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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1996

MARCH 3 THROUGH JUNE 18, 1997

FRANK D. WAGNER

REPORTER OF DECISIONS

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Erratum

503 U. S. 66, final line, to 67, first line: "87 Eng. 808, 816" should be "91 Eng. 19, 20".

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

LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.

OFFICERS OF THE COURT

JANET RENO, Attorney General.
WALTER DELLINGER, Acting Solicitor General.
WILLIAM K. SUTER, Clerk.
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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.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1996

UNITED STATES *v.* GONZALES ET AL.

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

No. 95–1605. Argued December 11, 1996—Decided March 3, 1997

All three respondents were convicted in New Mexico courts and sentenced to prison terms on state charges arising from the use of guns by two of them to hold up undercover officers during a drug sting operation. After they began to serve their state sentences, respondents were convicted on various drug and related federal charges connected to the sting operation, and of using firearms during those crimes in violation of 18 U. S. C. § 924(c). In ordering their imprisonment, the District Court directed that the portion of their federal sentences attributable to the drug convictions run concurrently with their state sentences, with the remaining 60-month sentences required by § 924(c) to run consecutively to both. Among other rulings, the Tenth Circuit vacated the firearms sentences on the ground that they should have run concurrently with the state prison terms. The court found § 924(c)'s language to be ambiguous, resorted to the legislative history, and held that a § 924(c) sentence may run concurrently with a previously imposed, already operational state sentence, but not with another federal sentence.

Held: Section § 924(c)'s plain language—*i. e.*, "the sentence . . . under this subsection [shall not] run concurrently with *any other term of imprisonment*" (emphasis added)—forbids a federal district court to direct that the section's mandatory 5-year firearms sentence run concurrently with any other prison term, whether state or federal. Read naturally, the section's word "any" has an expansive meaning that is not limited to federal sentences, and so must be interpreted as referring to all "term[s]

of imprisonment," including those imposed by state courts. Cf., *e. g.*, *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 358. Unlike the Tenth Circuit, this Court sees nothing remarkable (much less ambiguous) about Congress' decision, in drafting § 924(c), to prohibit concurrent sentences instead of simply mandating consecutive ones. Moreover, given the straightforward statutory command, there is no reason to resort to legislative history. *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254. Indeed, the legislative history excerpt relied upon by the Tenth Circuit only muddies the waters. Contrary to that court's interpretation, § 924(c)'s prohibition applies only to the section's mandatory firearms sentence, and does not limit a district court's normal authority under § 3584(a) to order that other federal sentences run concurrently with or consecutively to other state or federal prison terms. Pp. 4–11.

65 F. 3d 814, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 12. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 14.

Miguel A. Estrada argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben*.

Edward Bustamante, by appointment of the Court, 519 U. S. 804, argued the cause for respondents. With him on the brief were *Angela Arellanes*, by appointment of the Court, 519 U. S. 804, *Roberto Albertorio*, by appointment of the Court, 519 U. S. 962, and *Carter G. Phillips*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We are asked to decide whether a federal court may direct that a prison sentence under 18 U. S. C. § 924(c) run concurrently with a state-imposed sentence, even though § 924(c)

**Leah J. Prewitt*, *Jeffrey J. Pokorak*, *Placido G. Gomez*, and *Barbara Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

provides that a sentence imposed under that statute "shall [not] . . . run concurrently with any other term of imprisonment." We hold that it may not.

I

Respondents were arrested in a drug sting operation during which two of them pulled guns on undercover police officers. All three were convicted in New Mexico courts on charges arising from the holdup. The state courts sentenced them to prison terms ranging from 13 to 17 years. After they began to serve their state sentences, respondents were convicted in federal court of committing various drug offenses connected to the sting operation, and conspiring to do so, in violation of 21 U. S. C. §§ 841 and 846. They were also convicted of using firearms during and in relation to those drug trafficking crimes, in violation of 18 U. S. C. § 924(c). Respondents received sentences ranging from 120 to 147 months in prison, of which 60 months reflected the mandatory sentence required for their firearms convictions. Pursuant to § 924(c), the District Court ordered that the portion of respondents' federal sentences attributable to the drug convictions run concurrently with their state sentences, with the remaining 60 months due to the firearms offenses to run consecutively to both.

The Court of Appeals for the Tenth Circuit vacated respondents' sentences for the firearms violations, on the ground that the § 924(c) sentences should have run concurrently with the state prison terms. 65 F. 3d 814 (1995). (The court also vacated respondents' substantive drug convictions and dealt with various other sentencing issues not before us.) Although the Court of Appeals recognized that other Circuits had uniformly "held that § 924(c)'s plain language prohibits sentences imposed under that statute from running concurrently with state sentences," it nevertheless thought that "a literal reading of the statutory language would produce an absurd result." *Id.*, at 819. Feeling

obliged to "venture into the thicket of legislative history," *id.*, at 820 (citations and internal quotation marks omitted), the court found a line in a Senate Committee Report indicating that "'the mandatory sentence under the revised subsection 924(c) [should] be served prior to the start of the sentence for the underlying or any other offense,'" *ibid.* (quoting S. Rep. No. 98–225, pp. 313–314 (1983) (hereinafter S. Rep.)) (emphasis deleted). If this statement were applied literally, respondents would have to serve *first* their state sentences, *then* their 5-year federal firearms sentences, and *finally* the sentences for their narcotics convictions—even though the narcotics sentences normally would have run concurrently with the state sentences, since they all arose out of the same criminal activity. 65 F. 3d, at 821. To avoid this irrational result, the court held that "§ 924(c)'s mandatory five-year sentence may run concurrently with a previously imposed *state* sentence that a defendant *has already begun to serve.*" *Id.*, at 819.

We granted certiorari, 518 U. S. 1003, and now vacate and remand.

II

Our analysis begins, as always, with the statutory text. Section 924(c)(1) provides:

> "Whoever, during and in relation to any . . . drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . , be sentenced to imprisonment for five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with *any other term of imprisonment* including that imposed for the . . . drug trafficking crime in which the firearm was used or carried." 18 U. S. C. § 924(c)(1) (emphasis added).

The question we face is whether the phrase "any other term of imprisonment" "means what it says, or whether it should be limited to some subset" of prison sentences, *Maine* v. *Thiboutot*, 448 U. S. 1, 4 (1980)—namely, only federal sentences. Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all "term[s] of imprisonment," including those imposed by state courts. Cf. *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 358 (1994) (noting that statute referring to "any law enforcement officer" includes "federal, state, or local" officers); *Collector* v. *Hubbard*, 12 Wall. 1, 15 (1871) (stating "it is quite clear" that a statute prohibiting the filing of suit "in any court" "includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense"). There is no basis in the text for limiting § 924(c) to federal sentences.

In his dissenting opinion, JUSTICE STEVENS suggests that the word "any" as used in the first sentence of § 924(c) "unquestionably has the meaning 'any federal.'" *Post*, at 14. In that first sentence, however, Congress *explicitly* limited the scope of the phrase "any crime of violence or drug trafficking crime" to those "for which [a defendant] may be prosecuted in a court of the United States." Given that Congress expressly limited the phrase "any crime" to only federal crimes, we find it significant that no similar restriction modifies the phrase "any other term of imprisonment," which appears only two sentences later and is at issue in this case. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'").

The Court of Appeals also found ambiguity in Congress' decision, in drafting § 924(c), to prohibit concurrent sentences instead of simply mandating consecutive sentences. 65 F. 3d, at 820. Unlike the lower court, however, we see nothing remarkable (much less ambiguous) about Congress' choice of words. Because consecutive and concurrent sentences are exact opposites, Congress implicitly required one when it prohibited the other. This "ambiguity" is, in any event, beside the point because this phraseology has no bearing on whether Congress meant § 924(c) sentences to run consecutively only to other federal terms of imprisonment.

Given the straightforward statutory command, there is no reason to resort to legislative history. *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254 (1992). Indeed, far from clarifying the statute, the legislative history only muddies the waters. The excerpt from the Senate Report accompanying the 1984 amendment to § 924(c), relied upon by the Court of Appeals, reads:

> "[T]he Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense." S. Rep., at 313–314.

This snippet of legislative history injects into § 924(c) an entirely new idea—that a defendant must serve the 5-year prison term for his firearms conviction before any other sentences. This added requirement, however, is "in no way anchored in the text of the statute." *Shannon* v. *United States*, 512 U. S. 573, 583 (1994).

The Court of Appeals was troubled that this rule might lead to irrational results. Normally, a district court has authority to decide whether federal prison terms should run concurrently with or consecutively to other prison sentences. 18 U. S. C. § 3584(a) (vesting power in district court to run most prison terms either concurrently or consecutively); United States Sentencing Commission, Guidelines Manual

§ 5G1.3 (Nov. 1995) (USSG) (guiding court's discretion under § 3584(a)). If the prison terms for respondents' other federal sentences could not begin until after their § 924(c) terms were completed, however, the District Court would effectively be stripped of its statutory power to decide whether the sentences for the underlying narcotics offenses should run concurrently with respondents' state terms of imprisonment. 65 F. 3d, at 822. The court observed that such a rule could lead to dramatically higher sentences, particularly for the respondents in this case. Perez, for example, is already serving a 17-year state prison term for his role in the holdup. Normally, his 7.25-year federal sentence for narcotics possession would run concurrently with that state term under USSG § 5G1.3(b); his 5-year firearm sentence under § 924(c) would follow both, for a total of 22 years in prison. If he must serve his federal narcotics sentence *after* his 5-year firearms sentence, however, he would face a total of 29.25 years in prison. 65 F. 3d, at 821.

Seeking to avoid this conflict between § 924(c) (as reinterpreted in light of its legislative history) and § 3584(a), the Court of Appeals held that § 924(c) only prohibited running *federal* terms of imprisonment concurrently. *Ibid.* It also reasoned that such a narrow reading was necessary because "there is no way in which a later-sentencing federal court can cause the mandatory 5-year § 924(c) sentence to be served before a state sentence that is already being served." *Ibid.*

We see three flaws in this reasoning. First, the statutory texts of §§ 924(c) and 3584(a), unvarnished by legislative history, are entirely consistent. Section 924(c) specifies only that a court must not run a *firearms* sentence concurrently with other prison terms. It leaves plenty of room for a court to run *other* sentences—whether for state or federal offenses—concurrently with one another pursuant to § 3584(a) and USSG § 5G1.3. The statutes clash only if we engraft onto § 924(c) a requirement found only in a single

sentence buried in the legislative history: that the firearms sentence must run first. We therefore follow the text, rather than the legislative history, of § 924(c). By disregarding the suggestion that a district court must specify that a sentence for a firearms conviction be served before other sentences, we give full meaning to the texts of both §§ 924(c) and 3584(a). See *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96 (1820) (Marshall, C. J.) ("Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest").

Second, even if we ignored the plain language of § 924(c) and required courts to list the order in which a defendant must serve the sentences for different convictions, we would thereby create a rule that is superfluous in light of § 3584(c). That statute instructs the Bureau of Prisons to treat multiple terms of imprisonment, whether imposed concurrently or consecutively, "for administrative purposes as a single, aggregate term of imprisonment." *Ibid.* As a practical matter, then, it makes no difference whether a court specifies the sequence in which each portion of an aggregate sentence must be served. We will not impose on sentencing courts new duties that, in view of other statutory commands, will be effectively meaningless.

Third, the Court of Appeals' solution—to allow § 924(c) prison terms to run concurrently with state sentences—does not eliminate any anomaly that arises when a firearms sentence must run "first." Although it is clear that a prison term under § 924(c) cannot possibly run before an earlier imposed *state* prison term, the same holds true when a prisoner is already serving a *federal* sentence. See § 3585(a) (providing that a federal prison term commences when the defendant is received into custody or voluntarily arrives to begin serving the sentence). Because it is impossible to start a

§ 924(c) sentence before *any* prison term that the prisoner is already serving, whether imposed by a state or federal court, limiting the phrase "any other term of imprisonment" to state sentences does not get rid of the problem. Thus, we think that the Court of Appeals both invented the problem and devised the wrong solution.

JUSTICE BREYER questions, in dissent, whether Congress wanted to impose a § 924(c) sentence on a defendant who is already serving a prison term pursuant to a virtually identical state sentencing enhancement statute. *Post*, at 15. A federal court could not (for double jeopardy reasons) sentence a person to two consecutive federal prison terms for a single violation of a federal criminal statute, such as § 924(c). If Congress cannot impose two consecutive federal § 924(c) sentences, the dissent argues, it is unlikely that Congress would have wanted to stack a § 924(c) sentence onto a prison term under a virtually identical state firearms enhancement. *Ibid.*

As we have already observed, however, the straightforward language of § 924(c) leaves no room to speculate about congressional intent. See *supra*, at 4–5. The statute speaks of "any term of imprisonment" without limitation, and there is no intimation that Congress meant § 924(c) sentences to run consecutively only to certain types of prison terms. District courts have some discretion under the Sentencing Guidelines, of course, in cases where related offenses are prosecuted in multiple proceedings, to establish sentences "with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time . . . ." *Witte* v. *United States*, 515 U. S. 389, 404 (1995) (discussing USSG § 5G1.3). See *post*, at 14–15 (BREYER, J., dissenting). When Congress enacted § 924(c)'s consecutive-sentencing provision, however, it cabined the sentencing discretion of district courts in a single circumstance: When a defendant violates § 924(c), his sentencing en-

hancement under that statute must run consecutively to all other prison terms. Given this clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy.

Other language in § 924(c) reinforces our conclusion. In 1984, Congress amended § 924(c) so that its sentencing enhancement would apply regardless of whether the underlying felony statute "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Comprehensive Crime Control Act of 1984, Pub. L. 98–473, § 1005(a), 98 Stat. 2138–2139. Congress thus repudiated the result we reached in *Busic* v. *United States*, 446 U. S. 398 (1980), in which we held that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision," irrespective of whether the Government had actually sought an enhancement under that predicate statute. *Id.*, at 404; see also *Simpson* v. *United States*, 435 U. S. 6, 15 (1978) (holding that a federal court may not impose sentences under both § 924(c) and the weapon enhancement under the armed bank robbery statute, 18 U. S. C. § 2113, based on a single criminal transaction). Our holdings in these cases were based on our conclusion that the unamended text of § 924(c) left us with little "more than a guess" as to how Congress meant to mesh that statute with the sentencing enhancement provisions scattered throughout the federal criminal code. *Simpson*, *supra*, at 15; *Busic*, *supra*, at 405. The 1984 amendment, however, eliminated these ambiguities. At that point, Congress made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c). We therefore cannot agree with JUSTICE BREYER's contention that our interpretation of § 924(c) distinguishes between "those subject to undischarged state, and those subject to

undischarged federal, sentences." *Post*, at 16. Both sorts of defendants face sentences for their other convictions that run concurrently with or consecutively to each other according to normal sentencing principles, plus an enhancement under § 924(c). In short, in light of the 1984 amendment, we think that Congress has foreclosed the dissent's argument that § 924(c) covers only federal sentences.

Finally, we pause to comment on JUSTICE STEVENS' concern over how today's decision might affect other cases where "the state trial follows the federal trial and the state judge imposes a concurrent sentence" that might be viewed as inconsistent with § 924(c). *Post*, at 12. That, of course, was not the sequence in which the respondents were sentenced in this case, and so we have no occasion to decide whether a later sentencing state court is bound to order its sentence to run consecutively to the § 924(c) term of imprisonment. See *ibid.* All that is before us today is the authority of a later sentencing federal court to impose a consecutive sentence under § 924(c). We are hesitant to reach beyond the facts of this case to decide a question that is not squarely presented for our review.

III

In sum, we hold that the plain language of 18 U. S. C. § 924(c) forbids a federal district court to direct that a term of imprisonment under that statute run concurrently with any other term of imprisonment, whether state or federal. The statute does not, however, limit the court's authority to order that other federal sentences run concurrently with or consecutively to other prison terms—state or federal—under § 3584.

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

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

This case arose out of a criminal enterprise that violated both New Mexico law and federal law and gave rise to both state and federal prosecutions. It raises a narrow but important question concerning the scope of the prohibition against concurrent sentences contained in 18 U. S. C. § 924(c)(1). As the Government reads that provision, it prohibits the § 924(c) sentence from running concurrently with a state sentence that has already been imposed, but permits concurrent state and federal sentences when the federal prosecution precedes the state prosecution.[1] Thus, the length of the total term of imprisonment—including both the state sentence and the federal sentence—is determined, in part, by the happenstance of which case is tried first.

Read literally, however, the text of § 924(c)(1) would avoid this anomalous result. Because the text broadly prohibits the § 924(c) sentence from running "concurrently with any other term of imprisonment" regardless of whether that other term is imposed before or after the federal sentence, if the statute is read literally, it would require state judges to make any state term of imprisonment run consecutively to the § 924(c) sentence. Alternatively, if the state trial follows the federal trial and the state judge imposes a concurrent sentence (because she does not read § 924(c) as having any applicability to state sentences), the literal text would require the federal authorities to suspend the § 924(c) sentence until the state sentence has been served.

By relying so heavily on pure textual analysis, the Court's opinion would appear to dictate this result. Like the Government, however, I do not think the statute can reasonably be interpreted as containing any command to state sentencing judges or as requiring the suspension of any federal sentences when concurrent state sentences are later imposed.

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[1] Reply Brief for United States 10–11; Tr. of Oral Arg. 6–10.

Thus, common sense requires us to reject a purely literal reading of the text. The question that then arises is which is the better of two plausible nonliteral readings. Should the term "any other term of imprisonment" be narrowed by reading it to cover only "any other term of imprisonment *that has already been imposed*," as the Government argues, or "any other *federal* term of imprisonment," as respondents contend?

For three reasons, I think it more likely that Congress intended the latter interpretation. First, it borders on the irrational to assume that Congress would actually intend the severity of the defendant's punishment in a case of this kind to turn on the happenstance of whether the state or the federal prosecution was concluded first. Respondents' reading of the statute avoids that anomaly. Second, when § 924(c) was amended in 1970 to prohibit concurrent sentences, see Title II, Omnibus Crime Control Act of 1970, 84 Stat. 1889, this prohibition applied only to the federal sentence imposed for the underlying offense. When Congress amended the statute in 1984 to broaden the prohibition beyond the underlying offense, it said nothing about state sentences; if Congress had intended the amendment to apply to state as well as federal sentences, I think there would have been some mention of this important change in the legislative history.[2] Furthermore, the 1984 amendment was part of a general revision of sentencing laws that sought to achieve more uniformity and predictability in federal sentencing. See Sentencing Reform Act of 1984, 98 Stat. 1987, 18 U. S. C. § 3551 *et seq.* The anomaly that the Government's reading of § 924(c) authorizes is inconsistent with the basic uniformity theme of the 1984 legislation. Finally, the context

[2] "In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (REHNQUIST, J., dissenting).

in which the relevant language appears is concerned entirely with federal sentencing. Indeed, the word "any" as used earlier in the section unquestionably has the meaning "any federal."[3]

Given the Government's recognition of the fact that a completely literal reading of § 924(c)(1) is untenable, and the further fact that the Court offers nothing more than the dictionary definition of the word "any" to support its result, I think the wiser course is to interpret that word in the prohibition against concurrent sentences as having the same meaning as when the same word is first used in the statute.

Accordingly, I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

I believe that JUSTICE STEVENS is right. Section 924(c) concerns federal, not state, sentences. Hence Congress intended the words "other term of imprisonment" to refer to other federal, not other state, "terms." With respect to undischarged state sentences, therefore, 18 U. S. C. § 924(c) is permissive, not mandatory. That is, it permits the federal sentencing judge to make a § 924(c) sentence and an undischarged state sentence concurrent.

Quite often, it will make little difference that, in this state/federal circumstance, the consecutive/concurrent decision is permissive, not mandatory. That is because federal sentencing judges, understanding that § 924 requires consecutive sentencing where undischarged federal sentences are at issue, would normally treat undischarged state sentences the same way. They would make the § 924(c) sentence consecu-

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[3] In the first sentence of § 924(c)(1) the word "any" is expressly confined to federal prosecutions. When the word is used a second time to describe "any other provision of law," it is again quite obvious that it embraces only other provisions of federal law even though that limitation is implicit rather than explicit. Nowhere in § 924(c) is there any explicit reference to state law or state sentences.

tive to undischarged state sentences (even though § 924(c) would not force that result) in order to avoid treating similarly situated offenders differently. United States Sentencing Commission, Guidelines Manual § 5G1.3 (Nov. 1995). Ordinarily, the fact that the State, rather than the Federal Government, imposed an undischarged sentence is irrelevant in terms of any sentencing objective.

In at least one circumstance, however, federal sentencing judges would probably not treat an undischarged state sentence as if it were federal. That is where the undischarged state sentence is a sentence under a state statute that itself *simply mimics § 924(c)*. Such a situation cannot arise where the initial undischarged sentence is federal. Indeed, the Constitution would forbid any effort to apply § 924(c) twice to a single instance of gun possession. *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977). But a State might have its own version of § 924(c), and a federal § 924(c) offender could be subject to an undischarged term of imprisonment imposed under such a statute. To run a § 924(c) sentence consecutively in such an instance (even if constitutionally permissible, cf. *Abbate* v. *United States*, 359 U. S. 187 (1959); *Heath* v. *Alabama*, 474 U. S. 82 (1985)) would treat the state offender differently, and far more harshly, than any possible federal counterpart.

I am not inventing a purely hypothetical possibility. The State, in the very case before us, has punished respondents, in part, pursuant to a mandatory state sentence enhancement statute that has no counterpart in federal law but for § 924(c) itself, which the state statute, N. M. Stat. Ann. § 31–18–16(A) (Supp. 1994), very much resembles. But cf. *Witte* v. *United States*, 515 U. S. 389, 398–404 (1995). I understand that Congress wanted to guarantee that § 924(c)'s sentence would amount to an additional sentence. But I do not see why Congress would have wanted to pile Pelion on Ossa in this way, adding the § 924(c) sentence to another sentence that does the identical thing. Nor do I believe that

Congress would have intended potentially to create this kind of harsh distinction between those subject to undischarged state, and those subject to undischarged federal, sentences—a likely practical result of the majority's holding. See *id.*, at 404–406.

This reason, along with those that JUSTICE STEVENS has discussed, makes me think that Congress did intend § 924(c) to refer to federal sentences alone, and lead me to dissent in this close case.

Syllabus

WARNER-JENKINSON CO., INC. *v.* HILTON DAVIS CHEMICAL CO.

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

No. 95–728. Argued October 15, 1996—Decided March 3, 1997

Petitioner and respondent both manufacture dyes from which impurities must be removed. Respondent's "'746 patent," which issued in 1985, discloses an improved purification process involving the "ultrafiltration" of dye through a porous membrane at pH levels between 6.0 and 9.0. The inventors so limited their claim's pH element during patent prosecution after the patent examiner objected because of a perceived overlap with the earlier "Booth" patent, which disclosed an ultrafiltration process operating at a pH above 9.0. In 1986, petitioner developed its own ultrafiltration process, which operated at a pH level of 5.0. Respondent sued for infringement of the '746 patent, relying solely on the "doctrine of equivalents," under which a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is "equivalence" between the elements of the accused product or process and the claimed elements of the patented invention. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605, 609. Over petitioner's objections that this is an equitable doctrine and is to be applied by the court, the equivalence issue was included among those sent to the jury, which found, *inter alia*, that petitioner infringed upon the '746 patent. The District Court, among its rulings, entered a permanent injunction against petitioner. The en banc Federal Circuit affirmed, holding that the doctrine of equivalents continues to exist, that the question of equivalence is for the jury to decide, and that the jury had substantial evidence from which to conclude that petitioner's process was not substantially different from the process disclosed in the '746 patent.

Held:

1. The Court adheres to the doctrine of equivalents. Pp. 24–30.

(a) In *Graver Tank*, *supra*, at 609, the Court, *inter alia*, described some of the considerations that go into applying the doctrine, such as the patent's context, the prior art, and the particular circumstances of the case, including the purpose for which an ingredient is used in the patent, the qualities it has when combined with the other ingredients, the function it is intended to perform, and whether persons reasonably

skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was. Pp. 24–25.

(b) This Court rejects petitioner's primary argument, that the doctrine of equivalents, as set out in *Graver Tank* in 1950, is inconsistent with, and thus did not survive, particular aspects of Congress' 1952 revision of the Patent Act, 35 U. S. C. § 100 *et seq.* Petitioner's first three arguments in this regard—that the doctrine (1) is inconsistent with § 112's requirement that a patentee specifically "claim" the covered invention, (2) circumvents the patent reissue process under §§ 251–252, and (3) is inconsistent with the primacy of the Patent and Trademark Office (PTO) in setting a patent's scope—were made in *Graver Tank*, *supra*, at 613–615, and n. 3, in the context of the 1870 Patent Act, and failed to command a majority. The 1952 Act is not materially different from the 1870 Act with regard to these matters. Also unpersuasive is petitioner's fourth argument, that the doctrine of equivalents was implicitly rejected as a general matter by Congress' specific and limited inclusion of it in § 112, ¶ 6. This new provision was enacted as a targeted cure in response to *Halliburton Oil Well Cementing Co.* v. *Walker*, 329 U. S. 1, 8, and thereby to allow so-called "means" claims describing an element of an invention by the result accomplished or the function served. Moreover, the statutory reference to "equivalents" appears to be no more than a prophylactic against potential side effects of that cure, *i. e.*, an attempt to limit the application of the broad literal language of "means" claims to those means that are "equivalent" to the actual means shown in the patent specification. Pp. 25–28.

(c) The determination of equivalence should be applied as an objective inquiry on an element-by-element basis. The Court is concerned that the doctrine, as it has come to be broadly applied since *Graver Tank*, conflicts with the Court's numerous holdings that a patent may not be enlarged beyond the scope of its claims. The way to reconcile the two lines of authority is to apply the doctrine to each of the individual elements of a claim, rather than to the accused product or process as a whole. Doing so will preserve some meaning for each of a claim's elements, all of which are deemed material to defining the invention's scope. So long as the doctrine does not encroach beyond these limits, or beyond related limits discussed in the Court's opinion, *infra*, at 30–34, 39, n. 8, and 39–40, it will not vitiate the central functions of patent claims to define the invention and to notify the public of the patent's scope. Pp. 28–30.

(d) Petitioner is correct that *Graver Tank* did not supersede the well-established limitation on the doctrine of equivalents known as "prosecution history estoppel," whereby a surrender of subject matter during patent prosecution may preclude recapturing any part of that

subject matter, even if it is equivalent to the matter expressly claimed. But petitioner reaches too far in arguing that any such surrender establishes a bright line beyond which no equivalents may be claimed, and that the reason for an amendment during patent prosecution is therefore irrelevant to any subsequent estoppel. There are a variety of reasons why the PTO may request a change in claim language, and if the patent holder demonstrates that an amendment had a purpose unrelated to patentability, a court must consider that purpose in order to decide whether an estoppel is precluded. Where the patent holder is unable to establish such a purpose, the court should presume that the purpose behind the required amendment is such that prosecution history estoppel would apply. Here, it is undisputed that the upper limit of 9.0 pH was added to the '746 patent in order to distinguish the Booth patent, but the record before this Court does not reveal the reason for adding the lower 6.0 pH limit. It is therefore impossible to tell whether the latter reason could properly avoid an estoppel. Pp. 30–34.

(e) The Court rejects petitioner's argument that *Graver Tank* requires judicial exploration of the intent of the alleged infringer or a case's other equities before allowing application of the doctrine of equivalents. Although *Graver Tank* certainly leaves room for the inclusion of intent-based elements in the doctrine, the Court does not read the case as requiring proof of intent. The better view, and the one consistent with *Graver Tank*'s predecessors, see, *e. g.*, *Winans* v. *Denmead*, 15 How. 330, 343, and the objective approach to infringement, is that intent plays no role in the doctrine's application. Pp. 34–36.

(f) The Court also rejects petitioner's proposal that in order to minimize conflict with the notice function of patent claims, the doctrine of equivalents should be limited to equivalents that are disclosed within the patent itself. Insofar as the question under the doctrine is whether an accused element is equivalent to a claimed element, the proper time for evaluating equivalency—and knowledge of interchangeability between elements—is at the time of infringement, not at the time the patent was issued. P. 37.

(g) The Court declines to consider whether application of the doctrine of equivalents is a task for the judge or for the jury, since resolution of that question is not necessary to answer the question here presented. Pp. 37–39.

(h) In the Court's view, the particular linguistic framework used to determine "equivalence," whether the so-called "triple identity" test or the "insubstantial differences" test, is less important than whether the test is probative of the essential inquiry: Does the accused product or process contain elements identical or equivalent to each claimed element of the patented invention? Different linguistic frameworks

may be more suitable to different cases, depending on their particular facts. The Court leaves it to the Federal Circuit's sound judgment in this area of its special expertise to refine the formulation of the test for equivalence in the orderly course of case-by-case determinations. Pp. 39–40.

2. Because the Federal Circuit did not consider all of the requirements of the doctrine of equivalents as described by the Court in this case, particularly as related to prosecution history estoppel and the preservation of some meaning for each element in a claim, further proceedings are necessary. Pp. 40–41.

62 F. 3d 1512, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 41.

Richard G. Taranto argued the cause for petitioner. With him on the briefs were *H. Bartow Farr III* and *J. Robert Chambers.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae.* With him on the brief were *Solicitor General Days*, *Assistant Attorney General Bingaman*, *Cornelia T. L. Pillard*, *Nancy J. Linck*, and *Albin F. Drost.*

David E. Schmit argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for Gateway Technologies, Inc., by *Richard Grant Lyon;* for GHZ Equipment Co. by *Ronald D. Maines* and *Richard G. Wilkins;* for the Information Technology Industry Council et al. by *Joel M. Freed*, *Jerrold J. Ganzfried*, *John F. Cooney*, and *William D. Coston;* for the Intellectual Property Owners by *Carter G. Phillips*, *Mark E. Haddad*, and *Joseph R. Guerra;* for MCI Telecommunications Corp. by *Paul M. Smith* and *Nory Miller;* for Micron Separations, Inc., by *Steven M. Bauer* and *John J. Cotter;* and for Seagate Technology, Inc., et al. by *Carrie L. Walthour*, *Karl A. Limbach*, *Deborah Bailey-Wells*, and *Edward P. Heller III.*

Briefs of *amici curiae* urging affirmance were filed for the Biotechnology Industry Organization by *Charles E. Ludlam;* for Chiron Corp. by *Donald S. Chisum;* for the Dallas-Fort Worth Intellectual Property Law Association by *Lawrence J. Bassuk;* for Litton Systems, Inc., by *Laurence*

JUSTICE THOMAS delivered the opinion of the Court.

Nearly 50 years ago, this Court in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605 (1950), set out the modern contours of what is known in patent law as the "doctrine of equivalents." Under this doctrine, a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is "equivalence" between the elements of the accused product or process and the claimed elements of the patented invention. *Id.*, at 609. Petitioner, which was found to have infringed upon respondent's patent under the doctrine of equivalents, invites us to speak the death of that doctrine. We decline that invitation. The significant disagreement within the Court of Appeals for the Federal Circuit concerning the application of *Graver Tank* suggests, however, that the doctrine is not free from confusion. We therefore will endeavor to clarify the proper scope of the doctrine.

I

The essential facts of this case are few. Petitioner Warner-Jenkinson Co. and respondent Hilton Davis Chemical Co. manufacture dyes. Impurities in those dyes must be removed. Hilton Davis holds United States Patent No. 4,560,746 ('746 patent), which discloses an improved purification process involving "ultrafiltration." The '746 process filters impure dye through a porous membrane at certain

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H. Tribe and *Jonathan S. Massey;* and for the Ohio State Bar Association by *Eugene P. Whetzel* and *Albert L. Bell.*

Briefs of *amici curiae* were filed for the American Automobile Manufacturers Association by *D. Dennis Allegretti*, *Phillip D. Brady*, and *Andrew D. Koblenz;* for the American Intellectual Property Law Association by *Robert J. Baechtold*, *Stevan J. Bosses*, *Nicholas M. Cannella*, *Charles L. Gholz*, and *Roger W. Parkhurst;* for the Chemical Manufacturers Association by *Robert A. Armitage* and *Michael P. Walls;* and for the Licensing Executive Society (U. S. A. and Canada), Inc., by *Gayle Parker* and *James W. Gould.*

pressures and pH levels,[1] resulting in a high purity dye product.

The '746 patent issued in 1985. As relevant to this case, the patent claims as its invention an improvement in the ultrafiltration process as follows:

> "In a process for the purification of a dye . . . the improvement which comprises: subjecting an aqueous solution . . . to ultrafiltration through a membrane having a nominal pore diameter of 5–15 Angstroms under a hydrostatic pressure of approximately 200 to 400 p.s.i.g., *at a pH from approximately 6.0 to 9.0*, to thereby cause separation of said impurities from said dye . . . ." App. 36–37 (emphasis added).

The inventors added the phrase "at a pH from approximately 6.0 to 9.0" during patent prosecution. At a minimum, this phrase was added to distinguish a previous patent (the "Booth" patent) that disclosed an ultrafiltration process operating at a pH above 9.0. The parties disagree as to why the low-end pH limit of 6.0 was included as part of the claim.[2]

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[1] The pH, or power (exponent) of Hydrogen, of a solution is a measure of its acidity or alkalinity. A pH of 7.0 is neutral; a pH below 7.0 is acidic; and a pH above 7.0 is alkaline. Although measurement of pH is on a logarithmic scale, with each whole number difference representing a tenfold difference in acidity, the practical significance of any such difference will often depend on the context. Pure water, for example, has a neutral pH of 7.0, whereas carbonated water has an acidic pH of 3.0, and concentrated hydrochloric acid has a pH approaching 0.0. On the other end of the scale, milk of magnesia has a pH of 10.0, whereas household ammonia has a pH of 11.9. 21 Encyclopedia Americana 844 (Int'l ed. 1990).

[2] Petitioner contends that the lower limit was added because below a pH of 6.0 the patented process created "foaming" problems in the plant and because the process was not shown to work below that pH level. Brief for Petitioner 4, n. 5, 37, n. 28. Respondent counters that the process was successfully tested to pH levels as low as 2.2 with no effect on the process because of foaming, but offers no particular explanation as to why the lower level of 6.0 pH was selected. Brief for Respondent 34, n. 34.

In 1986, Warner-Jenkinson developed an ultrafiltration process that operated with membrane pore diameters assumed to be 5–15 Angstroms, at pressures of 200 to nearly 500 p. s. i. g., and at a pH of 5.0. Warner-Jenkinson did not learn of the '746 patent until after it had begun commercial use of its ultrafiltration process. Hilton Davis eventually learned of Warner-Jenkinson's use of ultrafiltration and, in 1991, sued Warner-Jenkinson for patent infringement.

As trial approached, Hilton Davis conceded that there was no literal infringement, and relied solely on the doctrine of equivalents. Over Warner-Jenkinson's objection that the doctrine of equivalents was an equitable doctrine to be applied by the court, the issue of equivalence was included among those sent to the jury. The jury found that the '746 patent was not invalid and that Warner-Jenkinson infringed upon the patent under the doctrine of equivalents. The jury also found, however, that Warner-Jenkinson had not intentionally infringed, and therefore awarded only 20% of the damages sought by Hilton Davis. The District Court denied Warner-Jenkinson's post-trial motions, and entered a permanent injunction prohibiting Warner-Jenkinson from practicing ultrafiltration below 500 p. s. i. g. and below 9.01 pH. A fractured en banc Court of Appeals for the Federal Circuit affirmed. 62 F. 3d 1512 (1995).

The majority below held that the doctrine of equivalents continues to exist and that its touchstone is whether substantial differences exist between the accused process and the patented process. *Id.*, at 1521–1522. The court also held that the question of equivalence is for the jury to decide and that the jury in this case had substantial evidence from which it could conclude that the Warner-Jenkinson process was not substantially different from the ultrafiltration process disclosed in the '746 patent. *Id.*, at 1525.

There were three separate dissents, commanding a total of 5 of 12 judges. Four of the five dissenting judges viewed the doctrine of equivalents as allowing an improper expan-

sion of claim scope, contrary to this Court's numerous holdings that it is the claim that defines the invention and gives notice to the public of the limits of the patent monopoly. *Id.*, at 1537–1538 (opinion of Plager, J.). The fifth dissenter, the late Judge Nies, was able to reconcile the prohibition against enlarging the scope of claims and the doctrine of equivalents by applying the doctrine to each element of a claim, rather than to the accused product or process "overall." *Id.*, at 1574. As she explained it: "The 'scope' is not enlarged if courts do not go beyond the substitution of equivalent elements." *Ibid.* All of the dissenters, however, would have found that a much narrowed doctrine of equivalents may be applied in whole or in part by the court. *Id.*, at 1540–1542 (opinion of Plager, J.); *id.*, at 1579 (opinion of Nies, J.).

We granted certiorari, 516 U. S. 1145 (1996), and now reverse and remand.

II

In *Graver Tank* we considered the application of the doctrine of equivalents to an accused chemical composition for use in welding that differed from the patented welding material by the substitution of one chemical element. 339 U. S., at 610. The substituted element did not fall within the literal terms of the patent claim, but the Court nonetheless found that the "question which thus emerges is whether the substitution [of one element for the other] . . . is a change of such substance as to make the doctrine of equivalents inapplicable; or conversely, whether under the circumstances the change was so insubstantial that the trial court's invocation of the doctrine of equivalents was justified." *Ibid.* The Court also described some of the considerations that go into applying the doctrine of equivalents:

> "What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is

> not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. In determining equivalents, things equal to the same thing may not be equal to each other and, by the same token, things for most purposes different may sometimes be equivalents. Consideration must be given to the purpose for which an ingredient is used in a patent, the qualities it has when combined with the other ingredients, and the function which it is intended to perform. An important factor is whether persons reasonably skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was." *Id.*, at 609.

Considering those factors, the Court viewed the difference between the chemical element claimed in the patent and the substitute element to be "colorable only," and concluded that the trial court's judgment of infringement under the doctrine of equivalents was proper. *Id.*, at 612.

A

Petitioner's primary argument in this Court is that the doctrine of equivalents, as set out in *Graver Tank* in 1950, did not survive the 1952 revision of the Patent Act, 35 U. S. C. § 100 *et seq.*, because it is inconsistent with several aspects of that Act. In particular, petitioner argues: (1) The doctrine of equivalents is inconsistent with the statutory requirement that a patentee specifically "claim" the invention covered by a patent, § 112; (2) the doctrine circumvents the patent reissue process—designed to correct mistakes in drafting or the like—and avoids the express limitations on that process, §§ 251–252; (3) the doctrine is inconsistent with the primacy of the Patent and Trademark Office (PTO) in setting the scope of a patent through the patent prosecution process; and (4) the doctrine was implicitly rejected as a general matter by Congress' specific and limited inclusion of the doctrine

in one section regarding "means" claiming, § 112, ¶ 6. All but one of these arguments were made in *Graver Tank* in the context of the 1870 Patent Act, and failed to command a majority.[3]

The 1952 Patent Act is not materially different from the 1870 Act with regard to claiming, reissue, and the role of the PTO. Compare, *e. g.*, 35 U. S. C. § 112 ("The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention") with the Consolidated Patent Act of 1870, ch. 230, § 26, 16 Stat. 198, 201 (the applicant "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery"). Such minor differences as exist between those provisions in the 1870 and the 1952 Acts have no bearing on the result reached in *Graver Tank*, and thus provide no basis for our overruling it. In the context of infringement, we have already held that pre-1952 precedent survived the passage of the 1952 Act. See *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336, 342 (1961) (new section defining infringement "left intact the entire

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[3] *Graver Tank* was decided over a vigorous dissent. In that dissent, Justice Black raised the first three of petitioner's four arguments against the doctrine of equivalents. See 339 U. S., at 613–614 (doctrine inconsistent with statutory requirement to "distinctly claim" the invention); *id.*, at 614–615 (patent reissue process available to correct mistakes); *id.*, at 615, n. 3 (duty lies with the Patent Office to examine claims and to conform them to the scope of the invention; inventors may appeal Patent Office determinations if they disagree with result).

Indeed, petitioner's first argument was not new even in 1950. Nearly 100 years before *Graver Tank*, this Court approved of the doctrine of equivalents in *Winans* v. *Denmead*, 15 How. 330 (1854). The dissent in *Winans* unsuccessfully argued that the majority result was inconsistent with the requirement in the 1836 Patent Act that the applicant "particularly 'specify and point' out what he claims as his invention," and that the patent protected nothing more. *Id.*, at 347 (opinion of Campbell, J.).

body of case law on direct infringement"). We see no reason to reach a different result here.[4]

Petitioner's fourth argument for an implied congressional negation of the doctrine of equivalents turns on the reference to "equivalents" in the "means" claiming provision of the 1952 Act. Section 112, ¶ 6, a provision not contained in the 1870 Act, states:

> "An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification *and equivalents thereof.*" (Emphasis added.)

Thus, under this new provision, an applicant can describe an element of his invention by the result accomplished or the function served, rather than describing the item or element to be used (*e. g.*, "a means of connecting Part A to Part B," rather than "a two-penny nail"). Congress enacted § 112, ¶ 6, in response to *Halliburton Oil Well Cementing Co.* v. *Walker*, 329 U. S. 1 (1946), which rejected claims that "do not describe the invention but use 'conveniently functional language at the exact point of novelty.'" *Id.*, at 8 (citation

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[4] Petitioner argues that the evolution in patent practice from "central" claiming (describing the core principles of the invention) to "peripheral" claiming (describing the outer boundaries of the invention) requires that we treat *Graver Tank* as an aberration and abandon the doctrine of equivalents. Brief for Petitioner 43–45. We disagree. The suggested change in claiming practice predates *Graver Tank*, is not of statutory origin, and seems merely to reflect narrower inventions in more crowded arts. Also, judicial recognition of so-called "pioneer" patents suggests that the abandonment of "central" claiming may be overstated. That a claim describing a limited improvement in a crowded field will have a limited range of permissible equivalents does not negate the availability of the doctrine *vel non*.

omitted). See *In re Donaldson Co.*, 16 F. 3d 1189, 1194 (CA Fed. 1994) (Congress enacted predecessor of § 112, ¶ 6, in response to *Halliburton*); *In re Fuetterer*, 319 F. 2d 259, 264, n. 11 (CCPA 1963) (same); see also 2 D. Chisum, Patents § 8.04[2], pp. 63–64 (1996) (discussing 1954 commentary of then-Chief Patent Examiner P. J. Federico). Section 112, ¶ 6, now expressly allows so-called "means" claims, with the proviso that application of the broad literal language of such claims must be limited to only those means that are "equivalen[t]" to the actual means shown in the patent specification. This is an application of the doctrine of equivalents in a restrictive role, narrowing the application of broad literal claim elements. We recognized this type of role for the doctrine of equivalents in *Graver Tank* itself. 339 U. S., at 608–609. The added provision, however, is silent on the doctrine of equivalents as applied where there is no literal infringement.

Because § 112, ¶ 6, was enacted as a targeted cure to a specific problem, and because the reference in that provision to "equivalents" appears to be no more than a prophylactic against potential side effects of that cure, such limited congressional action should not be overread for negative implications. Congress in 1952 could easily have responded to *Graver Tank* as it did to the *Halliburton* decision. But it did not. Absent something more compelling than the dubious negative inference offered by petitioner, the lengthy history of the doctrine of equivalents strongly supports adherence to our refusal in *Graver Tank* to find that the Patent Act conflicts with that doctrine. Congress can legislate the doctrine of equivalents out of existence any time it chooses. The various policy arguments now made by both sides are thus best addressed to Congress, not this Court.

B

We do, however, share the concern of the dissenters below that the doctrine of equivalents, as it has come to be applied since *Graver Tank*, has taken on a life of its own, unbounded

by the patent claims. There can be no denying that the doctrine of equivalents, when applied broadly, conflicts with the definitional and public-notice functions of the statutory claiming requirement. Judge Nies identified one means of avoiding this conflict:

> "[A] distinction can be drawn that is not too esoteric between substitution of an equivalent for a component *in* an invention and enlarging the metes and bounds of the invention *beyond* what is claimed.
>
> . . . . .
>
> "Where a claim to an invention is expressed as a combination of elements, as here, 'equivalents' in the sobriquet 'Doctrine of Equivalents' refers to the equivalency of an *element* or *part* of the invention with one that is substituted in the accused product or process.
>
> . . . . .
>
> "This view that the accused device or process must be more than 'equivalent' *overall* reconciles the Supreme Court's position on infringement by equivalents with its concurrent statements that 'the courts have no right to enlarge a patent beyond the scope of its claims as allowed by the Patent Office.' [Citations omitted.] The 'scope' is not enlarged if courts do not go beyond the substitution of equivalent elements." 62 F. 3d, at 1573–1574 (dissenting opinion) (emphasis in original).

We concur with this apt reconciliation of our two lines of precedent. Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole. It is important to ensure that the application of the doctrine, even as to an individual element, is not allowed such broad play as to effectively eliminate that element in its entirety. So long as the doctrine of equivalents does not encroach beyond the limits just described, or beyond related

limits to be discussed *infra* this page and 31–34, 39, n. 8, and 39–40, we are confident that the doctrine will not vitiate the central functions of the patent claims themselves.

III

Understandably reluctant to assume this Court would overrule *Graver Tank*, petitioner has offered alternative arguments in favor of a more restricted doctrine of equivalents than it feels was applied in this case. We address each in turn.

A

Petitioner first argues that *Graver Tank* never purported to supersede a well-established limit on nonliteral infringement, known variously as "prosecution history estoppel" and "file wrapper estoppel." See *Bayer Aktiengesellschaft* v. *Duphar Int'l Research B. V.*, 738 F. 2d 1237, 1238 (CA Fed. 1984). According to petitioner, any surrender of subject matter during patent prosecution, regardless of the reason for such surrender, precludes recapturing any part of that subject matter, even if it is equivalent to the matter expressly claimed. Because, during patent prosecution, respondent limited the pH element of its claim to pH levels between 6.0 and 9.0, petitioner would have those limits form bright lines beyond which no equivalents may be claimed. Any inquiry into the reasons for a surrender, petitioner claims, would undermine the public's right to clear notice of the scope of the patent as embodied in the patent file.

We can readily agree with petitioner that *Graver Tank* did not dispose of prosecution history estoppel as a legal limitation on the doctrine of equivalents. But petitioner reaches too far in arguing that the reason for an amendment during patent prosecution is irrelevant to any subsequent estoppel. In each of our cases cited by petitioner and by the dissent below, prosecution history estoppel was tied to amendments made to avoid the prior art, or otherwise to address a specific concern—such as obviousness—that arguably would have

rendered the claimed subject matter unpatentable. Thus, in *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126 (1942), Chief Justice Stone distinguished inclusion of a limiting phrase in an original patent claim from the "very different" situation in which "the applicant, in order to meet objections in the Patent Office, *based on references to the prior art*, adopted the phrase as a substitute for the broader one" previously used. *Id.*, at 136 (emphasis added). Similarly, in *Keystone Driller Co.* v. *Northwest Engineering Corp.*, 294 U. S. 42 (1935), estoppel was applied where the initial claims were "rejected on the prior art," *id.*, at 48, n. 6, and where the allegedly infringing equivalent element was outside of the revised claims and within the prior art that formed the basis for the rejection of the earlier claims, *id.*, at 48.[5]

It is telling that in each case this Court probed the reasoning behind the Patent Office's insistence upon a change in the claims. In each instance, a change was demanded because the claim as otherwise written was viewed as not describing a patentable invention at all—typically because what it described was encompassed within the prior art. But, as the United States informs us, there are a variety of other reasons why the PTO may request a change in claim language. Brief for United States as *Amicus Curiae* 22–23

[5] See also *Smith* v. *Magic City Kennel Club, Inc.*, 282 U. S. 784, 788 (1931) (estoppel applied to amended claim where the original "claim was rejected on the prior patent to" another); *Computing Scale Co. of America* v. *Automatic Scale Co.*, 204 U. S. 609, 618–620 (1907) (initial claims rejected based on lack of invention over prior patents); *Hubbell* v. *United States*, 179 U. S. 77, 83 (1900) (patentee estopped from excluding a claim element where element was added to overcome objections based on lack of novelty over prior patents); *Sutter* v. *Robinson*, 119 U. S. 530, 541 (1886) (estoppel applied where, during patent prosecution, the applicant "was expressly required to state that [the device's] structural plan was old and not of his invention"); cf. *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 33 (1966) (noting, in a validity determination, that "claims that have been narrowed in order to obtain the issuance of a patent by distinguishing the prior art cannot be sustained to cover that which was previously by limitation eliminated from the patent").

(counsel for the PTO also appearing on the brief). And if the PTO has been requesting changes in claim language without the intent to limit equivalents or, indeed, with the expectation that language it required would in many cases allow for a range of equivalents, we should be extremely reluctant to upset the basic assumptions of the PTO without substantial reason for doing so. Our prior cases have consistently applied prosecution history estoppel only where claims have been amended for a limited set of reasons, and we see no substantial cause for requiring a more rigid rule invoking an estoppel regardless of the reasons for a change.[6]

In this case, the patent examiner objected to the patent claim due to a perceived overlap with the Booth patent, which revealed an ultrafiltration process operating at a pH above 9.0. In response to this objection, the phrase "at a pH from approximately 6.0 to 9.0" was added to the claim. While it is undisputed that the upper limit of 9.0 was added in order to distinguish the Booth patent, the reason for adding the lower limit of 6.0 is unclear. The lower limit certainly did not serve to distinguish the Booth patent, which said nothing about pH levels below 6.0. Thus, while a lower limit of 6.0, by its mere inclusion, became a material *element* of the claim, that did not necessarily preclude the application of the doctrine of equivalents as to that element. See *Hubbell* v. *United States*, 179 U. S. 77, 82 (1900) ("'[A]ll [specified elements] must be regarded as material,'" though it remains an open "'question whether an omitted part is supplied by an equivalent device or instrumentality'" (citation omitted)).

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[6] That petitioner's rule might provide a brighter line for determining whether a patentee is estopped under certain circumstances is not a sufficient reason for adopting such a rule. This is especially true where, as here, the PTO may have relied upon a flexible rule of estoppel when deciding whether to ask for a change in the first place. To change so substantially the rules of the game now could very well subvert the various balances the PTO sought to strike when issuing the numerous patents which have not yet expired and which would be affected by our decision.

Where the reason for the change was not related to avoiding the prior art, the change may introduce a new element, but it does not necessarily preclude infringement by equivalents of that element.[7]

We are left with the problem, however, of what to do in a case like the one at bar, where the record seems not to reveal the reason for including the lower pH limit of 6.0. In our view, holding that certain reasons for a claim amendment may avoid the application of prosecution history estoppel is not tantamount to holding that the *absence* of a reason for an amendment may similarly avoid such an estoppel. Mindful that claims do indeed serve both a definitional and a notice function, we think the better rule is to place the burden on the patent holder to establish the reason for an amendment required during patent prosecution. The court then would decide whether that reason is sufficient to overcome prosecution history estoppel as a bar to application of the doctrine of equivalents to the element added by that amendment. Where no explanation is established, however, the court should presume that the patent applicant had a substantial reason related to patentability for including the limiting element added by amendment. In those circumstances, prosecution history estoppel would bar the application of the doctrine of equivalents as to that element. The presumption we have described, one subject to rebuttal if an appropriate reason for a required amendment is established, gives proper deference to the role of claims in defining an invention and providing public notice, and to the primacy of

[7] We do not suggest that, where a change is made to overcome an objection based on the prior art, a court is free to review the correctness of that objection when deciding whether to apply prosecution history estoppel. As petitioner rightly notes, such concerns are properly addressed on direct appeal from the denial of a patent, and will not be revisited in an infringement action. *Smith* v. *Magic City Kennel Club, Inc.*, *supra*, at 789–790. What *is* permissible for a court to explore is the reason (right or wrong) for the objection and the manner in which the amendment addressed and avoided the objection.

the PTO in ensuring that the claims allowed cover only subject matter that is properly patentable in a proffered patent application. Applied in this fashion, prosecution history estoppel places reasonable limits on the doctrine of equivalents, and further insulates the doctrine from any feared conflict with the Patent Act.

Because respondent has not proffered in this Court a reason for the addition of a lower pH limit, it is impossible to tell whether the reason for that addition could properly avoid an estoppel. Whether a reason in fact exists, but simply was not adequately developed, we cannot say. On remand, the Federal Circuit can consider whether reasons for that portion of the amendment were offered or not and whether further opportunity to establish such reasons would be proper.

B

Petitioner next argues that even if *Graver Tank* remains good law, the case held only that the absence of substantial differences was a *necessary* element for infringement under the doctrine of equivalents, not that it was *sufficient* for such a result. Brief for Petitioner 32. Relying on *Graver Tank*'s references to the problem of an "unscrupulous copyist" and "piracy," 339 U. S., at 607, petitioner would require judicial exploration of the equities of a case before allowing application of the doctrine of equivalents. To be sure, *Graver Tank* refers to the prevention of copying and piracy when describing the benefits of the doctrine of equivalents. That the doctrine produces such benefits, however, does not mean that its application is limited only to cases where those particular benefits are obtained.

Elsewhere in *Graver Tank* the doctrine is described in more neutral terms. And the history of the doctrine as relied upon by *Graver Tank* reflects a basis for the doctrine not so limited as petitioner would have it. In *Winans* v. *Denmead*, 15 How. 330, 343 (1854), we described the doctrine

of equivalents as growing out of a legally implied term in each patent claim that "the claim extends to the thing patented, however its form or proportions may be varied." Under that view, application of the doctrine of equivalents involves determining whether a particular accused product or process infringes upon the patent claim, where the claim takes the form—half express, half implied—of "X and its equivalents."

Machine Co. v. *Murphy*, 97 U. S. 120, 125 (1878), on which *Graver Tank* also relied, offers a similarly intent-neutral view of the doctrine of equivalents:

> "[T]he substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape."

If the essential predicate of the doctrine of equivalents is the notion of identity between a patented invention and its equivalent, there is no basis for treating an infringing equivalent any differently from a device that infringes the express terms of the patent. Application of the doctrine of equivalents, therefore, is akin to determining literal infringement, and neither requires proof of intent.

Petitioner also points to *Graver Tank*'s seeming reliance on the absence of independent experimentation by the alleged infringer as supporting an equitable defense to the doctrine of equivalents. The Federal Circuit explained this factor by suggesting that an alleged infringer's behavior, be it copying, designing around a patent, or independent experimentation, indirectly reflects the substantiality of the differences between the patented invention and the accused device or process. According to the Federal Circuit, a person aiming to copy or aiming to avoid a patent is imagined to be at

least marginally skilled at copying or avoidance, and thus intentional copying raises an inference—rebuttable by proof of independent development—of having only insubstantial differences, and intentionally designing around a patent claim raises an inference of substantial differences. This explanation leaves much to be desired. At a minimum, one wonders how ever to distinguish between the intentional copyist making minor changes to lower the risk of legal action and the incremental innovator designing around the claims, yet seeking to capture as much as is permissible of the patented advance.

But another explanation is available that does not require a divergence from generally objective principles of patent infringement. In both instances in *Graver Tank* where we referred to independent research or experiments, we were discussing the known interchangeability between the chemical compound claimed in the patent and the compound substituted by the alleged infringer. The need for independent experimentation thus could reflect knowledge—or lack thereof—of interchangeability possessed by one presumably skilled in the art. The known interchangeability of substitutes for an element of a patent is one of the express objective factors noted by *Graver Tank* as bearing upon whether the accused device is substantially the same as the patented invention. Independent experimentation by the alleged infringer would not always reflect upon the objective question whether a person skilled in the art would have known of the interchangeability between two elements, but in many cases it would likely be probative of such knowledge.

Although *Graver Tank* certainly leaves room for petitioner's suggested inclusion of intent-based elements in the doctrine of equivalents, we do not read it as requiring them. The better view, and the one consistent with *Graver Tank*'s predecessors and the objective approach to infringement, is that intent plays no role in the application of the doctrine of equivalents.

C

Finally, petitioner proposes that in order to minimize conflict with the notice function of patent claims, the doctrine of equivalents should be limited to equivalents that are disclosed within the patent itself. A milder version of this argument, which found favor with the dissenters below, is that the doctrine should be limited to equivalents that were known at the time the patent was issued, and should not extend to after-arising equivalents.

As we have noted, *supra,* at 36, with regard to the objective nature of the doctrine, a skilled practitioner's knowledge of the interchangeability between claimed and accused elements is not relevant for its own sake, but rather for what it tells the factfinder about the similarities or differences between those elements. Much as the perspective of the hypothetical "reasonable person" gives content to concepts such as "negligent" behavior, the perspective of a skilled practitioner provides content to, and limits on, the concept of "equivalence." Insofar as the question under the doctrine of equivalents is whether an accused element is equivalent to a claimed element, the proper time for evaluating equivalency—and thus knowledge of interchangeability between elements—is at the time of infringement, not at the time the patent was issued. And rejecting the milder version of petitioner's argument necessarily rejects the more severe proposition that equivalents must not only be known, but must also be actually disclosed in the patent in order for such equivalents to infringe upon the patent.

IV

The various opinions below, respondents, and *amici* devote considerable attention to whether application of the doctrine of equivalents is a task for the judge or for the jury. However, despite petitioner's argument below that the doctrine should be applied by the judge, in this Court petitioner makes only passing reference to this issue. See Brief for

Petitioner 22, n. 15 ("If this Court were to hold in *Markman* v. *Westview Instruments, Inc.*, No. 95–26 (argued Jan. 8, 1996), that judges rather than juries are to construe patent claims, so as to provide a uniform definition of the scope of the legally protected monopoly, it would seem at cross-purposes to say that juries may nonetheless expand the claims by resort to a broad notion of 'equivalents' "); Reply Brief for Petitioner 20 (whether judge or jury should apply the doctrine of equivalents depends on how the Court views the nature of the inquiry under the doctrine of equivalents).

Petitioner's comments go more to the alleged inconsistency between the doctrine of equivalents and the claiming requirement than to the role of the jury in applying the doctrine as properly understood. Because resolution of whether, or how much of, the application of the doctrine of equivalents can be resolved by the court is not necessary for us to answer the question presented, we decline to take it up. The Federal Circuit held that it was for the jury to decide whether the accused process was equivalent to the claimed process. There was ample support in our prior cases for that holding. See, *e. g.*, *Machine Co.* v. *Murphy*, 97 U. S., at 125 ("[I]n determining the question of infringement, the court or jury, as the case may be, . . . are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result"); *Winans* v. *Denmead*, 15 How., at 344 ("[It] is a question for the jury" whether the accused device was "the same in kind, and effected by the employment of [the patentee's] mode of operation in substance"). Nothing in our recent decision in *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370 (1996), necessitates a different result than that reached by the Federal Circuit. Indeed, *Markman* cites with considerable favor, when discussing the role of judge

and jury, the seminal *Winans* decision. 517 U. S., at 384–385. Whether, if the issue were squarely presented to us, we would reach a different conclusion than did the Federal Circuit is not a question we need decide today.[8]

V

All that remains is to address the debate regarding the linguistic framework under which "equivalence" is determined. Both the parties and the Federal Circuit spend considerable time arguing whether the so-called "triple identity" test—focusing on the *function* served by a particular claim element, the *way* that element serves that function, and the *result* thus obtained by that element—is a suitable method for determining equivalence, or whether an "insubstantial differences" approach is better. There seems to be substantial agreement that, while the triple identity test may be suitable for analyzing mechanical devices, it often

[8] With regard to the concern over unreviewability due to black-box jury verdicts, we offer only guidance, not a specific mandate. Where the evidence is such that no reasonable jury could determine two elements to be equivalent, district courts are obliged to grant partial or complete summary judgment. See Fed. Rule Civ. Proc. 56; *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 322–323 (1986). If there has been a reluctance to do so by some courts due to unfamiliarity with the subject matter, we are confident that the Federal Circuit can remedy the problem. Of course, the various legal limitations on the application of the doctrine of equivalents are to be determined by the court, either on a pretrial motion for partial summary judgment or on a motion for judgment as a matter of law at the close of the evidence and after the jury verdict. Fed. Rule Civ. Proc. 56; Fed. Rule Civ. Proc. 50. Thus, under the particular facts of a case, if prosecution history estoppel would apply or if a theory of equivalence would entirely vitiate a particular claim element, partial or complete judgment should be rendered by the court, as there would be no further *material* issue for the jury to resolve. Finally, in cases that reach the jury, a special verdict and/or interrogatories on each claim element could be very useful in facilitating review, uniformity, and possibly postverdict judgments as a matter of law. See Fed. Rules Civ. Proc. 49 and 50. We leave it to the Federal Circuit how best to implement procedural improvements to promote certainty, consistency, and reviewability to this area of the law.

provides a poor framework for analyzing other products or processes. On the other hand, the insubstantial differences test offers little additional guidance as to what might render any given difference "insubstantial."

In our view, the particular linguistic framework used is less important than whether the test is probative of the essential inquiry: Does the accused product or process contain elements identical or equivalent to each claimed element of the patented invention? Different linguistic frameworks may be more suitable to different cases, depending on their particular facts. A focus on individual elements and a special vigilance against allowing the concept of equivalence to eliminate completely any such elements should reduce considerably the imprecision of whatever language is used. An analysis of the role played by each element in the context of the specific patent claim will thus inform the inquiry as to whether a substitute element matches the function, way, and result of the claimed element, or whether the substitute element plays a role substantially different from the claimed element. With these limiting principles as a backdrop, we see no purpose in going further and micromanaging the Federal Circuit's particular word choice for analyzing equivalence. We expect that the Federal Circuit will refine the formulation of the test for equivalence in the orderly course of case-by-case determinations, and we leave such refinement to that court's sound judgment in this area of its special expertise.

VI

Today we adhere to the doctrine of equivalents. The determination of equivalence should be applied as an objective inquiry on an element-by-element basis. Prosecution history estoppel continues to be available as a defense to infringement, but if the patent holder demonstrates that an amendment required during prosecution had a purpose unrelated to patentability, a court must consider that purpose in

order to decide whether an estoppel is precluded. Where the patent holder is unable to establish such a purpose, a court should presume that the purpose behind the required amendment is such that prosecution history estoppel would apply. Because the Court of Appeals for the Federal Circuit did not consider all of the requirements as described by us today, particularly as related to prosecution history estoppel and the preservation of some meaning for each element in a claim, we reverse its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court and write separately to add a cautionary note on the rebuttable presumption the Court announces regarding prosecution history estoppel. I address in particular the application of the presumption in this case and others in which patent prosecution has already been completed. The new presumption, if applied woodenly, might in some instances unfairly discount the expectations of a patentee who had no notice at the time of patent prosecution that such a presumption would apply. Such a patentee would have had little incentive to insist that the reasons for all modifications be memorialized in the file wrapper as they were made. Years after the fact, the patentee may find it difficult to establish an evidentiary basis that would overcome the new presumption. The Court's opinion is sensitive to this problem, noting that "the PTO may have relied upon a flexible rule of estoppel when deciding whether to ask for a change" during patent prosecution. *Ante*, at 32, n. 6.

Because respondent has not presented to this Court any explanation for the addition of the lower pH limit, I concur in the decision to remand the matter to the Federal Circuit.

On remand, that court can determine—bearing in mind the prior absence of clear rules of the game—whether suitable reasons for including the lower pH limit were earlier offered or, if not, whether they can now be established.

Syllabus

ARIZONANS FOR OFFICIAL ENGLISH ET AL. *v.* ARIZONA ET AL.

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

No. 95–974. Argued December 4, 1996—Decided March 3, 1997

Maria-Kelly F. Yniguez, an Arizona state employee at the time, sued the State and its Governor, Attorney General, and Director of the Department of Administration under 42 U. S. C. §1983, alleging that State Constitution Article XXVIII—key provisions of which declare English "the official language of the State," require the State to "act in English and in no other language," and authorize state residents and businesses "to bring [state-court] suit[s] to enforce th[e] Article"—violated, *inter alia*, the Free Speech Clause of the First Amendment. Yniguez used both English and Spanish in her work and feared that Article XXVIII, if read broadly, would require her to face discharge or other discipline if she did not refrain from speaking Spanish while serving the State. She requested injunctive and declaratory relief, counsel fees, and "all other relief that the Court deems just and proper." During the early phases of the suit, the State Attorney General released an opinion expressing his view that Article XXVIII is constitutional in that, although it requires the expression of "official acts" in English, it allows government employees to use other languages to facilitate the delivery of governmental services. The Federal District Court heard testimony and, among its rulings, determined that only the Governor, in her official capacity, was a proper defendant. The court, at the same time, dismissed the State because of its Eleventh Amendment immunity, the State Attorney General because he had no authority to enforce Article XXVIII against state employees, and the Director because there was no showing that she had undertaken or threatened any action adverse to Yniguez; rejected the Attorney General's interpretation of the Article on the ground that it conflicted with the measure's plain language; declared the Article fatally overbroad after reading it to impose a sweeping ban on the use of any language other than English by all of Arizona officialdom; and declined to allow the Arizona courts the initial opportunity to determine the scope of Article XXVIII. Following the Governor's announcement that she would not appeal, the District Court denied the State Attorney General's request to certify the pivotal state-law question—the Article's correct construction—to the Arizona Supreme Court. The District Court also denied the State Attorney Gen-

eral's motion to intervene on behalf of the State, under 28 U. S. C. § 2403(b), to contest on appeal the court's holding that the Article is unconstitutional. In addition, the court denied the motion of newcomers Arizonans for Official English Committee (AOE) and its Chairman Park, sponsors of the ballot initiative that became Article XXVIII, to intervene to support the Article's constitutionality. The day after AOE, Park, and the State Attorney General filed their notices of appeal, Yniguez resigned from state employment to accept a job in the private sector. The Ninth Circuit then concluded that AOE and Park met standing requirements under Article III of the Federal Constitution and could proceed as party appellants, and that the Attorney General, having successfully obtained dismissal below, could not reenter as a party, but could present an argument, pursuant to § 2403(b), regarding the constitutionality of Article XXVIII. Thereafter, the State Attorney General informed the Ninth Circuit of Yniguez's resignation and suggested that, for lack of a viable plaintiff, the case was moot. The court disagreed, holding that a plea for nominal damages could be read into the complaint's "all other relief" clause to save the case. The en banc Ninth Circuit ultimately affirmed the District Court's ruling that Article XXVIII was unconstitutional, and announced that Yniguez was entitled to nominal damages from the State. Finding the Article's "plain language" dispositive, and noting that the State Attorney General had never conceded that the Article would be unconstitutional if construed as Yniguez asserted it should be, the Court of Appeals also rejected the Attorney General's limiting construction of the Article and declined to certify the matter to the State Supreme Court. Finally, the Ninth Circuit acknowledged a state-court challenge to Article XXVIII's constitutionality, *Ruiz* v. *State,* but found that litigation no cause to stay the federal proceedings.

Held: Because the case was moot and should not have been retained for adjudication on the merits, the Court vacates the Ninth Circuit's judgment and remands the case with directions that the action be dismissed by the District Court. This Court expresses no view on the correct interpretation of Article XXVIII or on the measure's constitutionality. Pp. 64–80.

(a) Grave doubts exist as to the standing of petitioners AOE and Park to pursue appellate review under Article III's case-or-controversy requirement. Standing to defend on appeal in the place of an original defendant demands that the litigant possess "a direct stake in the outcome." *Diamond* v. *Charles,* 476 U. S. 54, 62. Petitioners' primary argument—that, as initiative proponents, they have a quasi-legislative

interest in defending the measure they successfully sponsored—is dubious because they are not elected state legislators, authorized by state law to represent the State's interests, see *Karcher* v. *May*, 484 U. S. 72, 82. Furthermore, this Court has never identified initiative proponents as Article-III-qualified defenders. Cf. *Don't Bankrupt Washington Committee* v. *Continental Ill. Nat. Bank & Trust Co. of Chicago*, 460 U. S. 1077. Their assertion of representational or associational standing is also problematic, absent the concrete injury that would confer standing upon AOE members in their own right, see, *e. g.*, *Food and Commercial Workers* v. *Brown Group, Inc.*, 517 U. S. 544, 551–553, and absent anything in Article XXVIII's state-court citizen-suit provision that could support standing for Arizona residents in general, or AOE in particular, to defend the Article's constitutionality in federal court. Nevertheless, this Court need not definitively resolve the standing of AOE and Park to proceed as they did, but assumes such standing *arguendo* in order to analyze the question of mootness occasioned by originating plaintiff Yniguez's departure from state employment. See, *e. g.*, *Burke* v. *Barnes*, 479 U. S. 361, 363, 364, n. Pp. 64–67.

(b) Because Yniguez no longer satisfies the case-or-controversy requirement, this case is moot. To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *E. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401. Although Yniguez had a viable claim at the outset of this litigation, her resignation from public sector employment to pursue work in the private sector, where her speech was not governed by Article XXVIII, mooted the case stated in her complaint. Cf. *Boyle* v. *Landry*, 401 U. S. 77, 78, 80–81. Contrary to the Ninth Circuit's ruling, her implied plea for nominal damages, which the Ninth Circuit approved as against the State of Arizona, could not revive the case, as § 1983 actions do not lie against a State, *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 71; Arizona was permitted to participate in the appeal only as an intervenor, through its Attorney General, not as a party subject to an obligation to pay damages; and the State's cooperation with Yniguez in waiving Eleventh Amendment immunity did not recreate a live case or controversy fit for federal-court adjudication, cf., *e. g.*, *United States* v. *Johnson*, 319 U. S. 302, 304. Pp. 67–71.

(c) When a civil case becomes moot pending appellate adjudication, the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39. This Court is not disarmed from that course by the State Attorney General's failure to petition for certiorari. The Court has an obligation to inquire not only into its own

authority to decide the questions presented, but to consider also the authority of the lower courts to proceed, even though the parties are prepared to concede it. *E. g., Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541. Because the Ninth Circuit refused to stop the adjudication when it learned of the mooting event—Yniguez's departure from public employment—its unwarranted en banc judgment must be set aside. Nor is the District Court's judgment saved by its entry before the occurrence of the mooting event or by the Governor's refusal to appeal from it. AOE and Park had an arguable basis for seeking appellate review; moreover, the State Attorney General's renewed certification plea and his motion to intervene in this litigation demonstrate that he was pursuing his § 2403(b) right to defend Article XXVIII's constitutionality when the mooting event occurred. His disclosure of that event to the Ninth Circuit warranted a mootness disposition, which would have stopped his § 2403(b) endeavor and justified vacation of the District Court's judgment. The extraordinary course of this litigation and the federalism concern next considered lead to the conclusion that vacatur down the line is the equitable solution. Pp. 71–75.

(d) Taking into account the novelty of the question of Article XXVIII's meaning, its potential importance to the conduct of Arizona's business, the State Attorney General's views on the subject, and the at-least-partial agreement with those views by the Article's sponsors, more respectful consideration should have been given to the Attorney General's requests to seek, through certification, an authoritative construction of the Article from the State Supreme Court. When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of the question whether conflict is avoidable. Federal courts are not well equipped to rule on a state statute's constitutionality without a controlling interpretation of the statute's meaning and effect by the state courts. See, *e. g., Poe* v. *Ullman*, 367 U. S. 497, 526 (Harlan, J., dissenting). Certification saves time, energy, and resources and helps build a cooperative judicial federalism. See, *e. g., Lehman Brothers* v. *Schein*, 416 U. S. 386, 391. Contrary to the Ninth Circuit's suggestion, this Court's decisions do not require as a condition precedent to certification a concession by the Attorney General that Article XXVIII would be unconstitutional if construed as Yniguez contended it should be. Moreover, that court improperly blended abstention with certification when it found that "unique circumstances," rather than simply a novel or unsettled state-law question, are necessary before federal courts may employ certification. The Arizona Supreme Court has before it, in *Ruiz* v. *State*, the question: What does Article XXVIII mean? Once that court has spoken, adjudication of any remaining federal constitu-

tional question may be "greatly simplifie[d]." See *Bellotti* v. *Baird*, 428 U. S. 132, 151. Pp. 75–80.

69 F. 3d 920, vacated and remanded.

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

Barnaby W. Zall argued the cause and filed briefs for petitioners.

Robert J. Pohlman argued the cause for respondents. With him on the brief for respondent Yniguez was *Brian A. Luscher*. *Stephen G. Montoya*, *Albert M. Flores*, and *George Robles Vice III* filed a brief for respondents Arizonans Against Constitutional Tampering et al. *Grant Woods*, Attorney General, *Rebecca White Berch*, First Assistant Attorney General, *C. Tim Delaney*, Solicitor General, *Paula S. Bickett*, Assistant Attorney General, and *Carter G. Phillips* filed briefs for respondents State of Arizona et al.*

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*Briefs of *amici curiae* urging reversal were filed for the FLA–187 Committee et al. by *Stanley W. Sokolowski;* for the Pacific Legal Foundation by *Sharon L. Browne;* for U. S. English, Inc., by *Leonard J. Henzke, Jr.;* for the Washington Legal Foundation et al. by *Richard K. Willard*, *Bennett Evan Cooper*, *Daniel J. Popeo*, *Richard A. Samp*, and *Don Stenberg;* and for Thurston Greene, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of New Mexico by *Tom Udall*, Attorney General, *Manuel Tijerina*, Deputy Attorney General, and *Gerald T. E. Gonzalez*, *Tannis L. Fox*, *Laura Fashing*, *Elizabeth A. Glenn*, and *William S. Keller*, Assistant Attorneys General; for the American Civil Liberties Union et al. by *Edward M. Chen*, *Steven R. Shapiro*, *Marjorie Heins*, and *Robert L. Rusky;* for the Hawaii Civil Rights Commission et al. by *John H. Ishihara*, *Carl C. Christensen*, and *Eric K. Yamamoto;* for Human Rights Watch by *Allan Blumstein* and *Kenneth Roth;* for the Linguistic Society of America et al. by *Peter M. Tiersma;* for the Mexican American Legal Defense and Educational Fund by *E. Richard Larson;* for the National Council of La Raza et al. by *Joseph N. Onek*, *William D. Wallace*, and *Javier M. Guzman;* for the Navajo Nation by *Thomas W. Christie;* for the Puerto Rican Legal Defense and Education Fund et al. by *Kenneth Kimerling*, *Karen K. Narasaki*, and *Richard Albores;* and for Representative Nydia M. Velazquez et al. by *Walter A. Smith, Jr.*, and *Audrey J. Anderson*.

Acting Solicitor General Dellinger, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney Gen-*

JUSTICE GINSBURG delivered the opinion of the Court.

Federal courts lack competence to rule definitively on the meaning of state legislation, see, *e. g.*, *Reetz* v. *Bozanich*, 397 U. S. 82, 86–87 (1970), nor may they adjudicate challenges to state measures absent a showing of actual impact on the challenger, see, *e. g.*, *Golden* v. *Zwickler*, 394 U. S. 103, 110 (1969). The Ninth Circuit, in the case at hand, lost sight of these limitations. The initiating plaintiff, Maria-Kelly F. Yniguez, sought federal-court resolution of a novel question: the compatibility with the Federal Constitution of a 1988 amendment to Arizona's Constitution declaring English "the official language of the State of Arizona"—"the language of . . . all government functions and actions." Ariz. Const., Art. XXVIII, §§ 1(1), 1(2). Participants in the federal litigation, proceeding without benefit of the views of the Arizona Supreme Court, expressed diverse opinions on the meaning of the amendment.

Yniguez commenced and maintained her suit as an individual, not as a class representative. A state employee at the time she filed her complaint, Yniguez voluntarily left the State's employ in 1990 and did not allege she would seek to return to a public post. Her departure for a position in the private sector made her claim for prospective relief moot. Nevertheless, the Ninth Circuit held that a plea for nominal damages could be read into Yniguez's complaint to save the case, and therefore pressed on to an ultimate decision. A three-judge panel of the Court of Appeals declared Article XXVIII unconstitutional in 1994, and a divided en banc court, in 1995, adhered to the panel's position.

The Ninth Circuit had no warrant to proceed as it did. The case had lost the essential elements of a justiciable controversy and should not have been retained for adjudication on the merits by the Court of Appeals. We therefore

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eral Preston, *Irving L. Gornstein*, and *Anthony J. Steinmeyer* filed a brief for the United States as *amicus curiae*.

vacate the Ninth Circuit's judgment, and remand the case to that court with directions that the action be dismissed by the District Court. We express no view on the correct interpretation of Article XXVIII or on the measure's constitutionality.

I

A 1988 Arizona ballot initiative established English as the official language of the State. Passed on November 8, 1988, by a margin of one percentage point,[1] the measure became effective on December 5 as Arizona State Constitution Article XXVIII. Among key provisions, the Article declares that, with specified exceptions, the State "shall act in English and in no other language." Ariz. Const., Art. XXVIII, § 3(1)(a). The enumerated exceptions concern compliance with federal laws, participation in certain educational programs, protection of the rights of criminal defendants and crime victims, and protection of public health or safety. *Id.*, § 3(2). In a final provision, Article XXVIII grants standing to any person residing or doing business in the State "to bring suit to enforce th[e] Article" in state court, under such "reasonable limitations" as "[t]he Legislature may enact." *Id.*, § 4.[2]

Federal-court litigation challenging the constitutionality of Article XXVIII commenced two days after the ballot initiative passed. On November 10, 1988, Maria-Kelly F. Yniguez, then an insurance claims manager in the Arizona Department of Administration's Risk Management Division, sued the State of Arizona in the United States District Court for the District of Arizona. Yniguez invoked 42 U. S. C.

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[1] The measure, opposed by the Governor as "sadly misdirected," App. 38, drew the affirmative votes of 50.5% of Arizonans casting ballots in the election, see *Yniguez* v. *Arizonans for Official English*, 69 F. 3d 920, 924 (CA9 1995).

[2] Article XXVIII, titled "English as the Official Language," is set out in full in an appendix to this opinion.

§ 1983 as the basis for her suit.[3] Soon after the lawsuit commenced, Yniguez added as defendants, in their individual and official capacities, Arizona Governor Rose Mofford, Arizona Attorney General Robert K. Corbin, and the Director of Arizona's Department of Administration, Catherine Eden. Yniguez brought suit as an individual and never sought designation as a class representative.

Fluent in English and Spanish, Yniguez was engaged primarily in handling medical malpractice claims against the State. In her daily service to the public, she spoke English to persons who spoke only that language, Spanish to persons who spoke only that language, and a combination of English and Spanish to persons able to communicate in both languages. Record, Doc. No. 62, ¶¶ 8, 13 (Statement of Stipulated Facts, filed Feb. 9, 1989). Yniguez feared that Article XXVIII's instruction to "act in English," § 3(1)(a), if read broadly, would govern her job performance "every time she [did] something." See Record, Doc. No. 62, ¶ 10. She believed she would lose her job or face other sanctions if she did not immediately refrain from speaking Spanish while serving the State. See App. 58, ¶ 19 (Second Amended Complaint). Yniguez asserted that Article XXVIII violated the First and Fourteenth Amendments to the United States Constitution and Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d. She requested injunctive and declaratory relief, counsel fees, and "all other relief that the

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[3] Derived from § 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U. S. C. § 1983 provides in relevant part:

"*Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Court deems just and proper under the circumstances." App. 60.

All defendants named in Yniguez's complaint moved to dismiss all claims asserted against them.[4] The State of Arizona asserted immunity from suit under the Eleventh Amendment. The individual defendants asserted the absence of a case or controversy because "none of [them] ha[d] threatened [Yniguez] concerning her use of Spanish in the performance of her job duties [or had] ever told her not to use Spanish [at work]." Record, Doc. No. 30, p. 1. The defendants further urged that novel state-law questions concerning the meaning and application of Article XXVIII should be tendered first to the state courts. See *id.*, at 2.[5]

Trial on the merits of Yniguez's complaint, the parties agreed, would be combined with the hearing on her motion for a preliminary injunction.[6] Before the trial occurred, the State Attorney General, on January 24, 1989, released an opinion, No. I89–009, construing Article XXVIII and explaining why he found the measure constitutional. App. 61–76.

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[4] Under Arizona law, the State Attorney General represents the State in federal court. See Ariz. Rev. Stat. Ann. § 41–193(A)(3) (1992). Throughout these proceedings, the State and all state officials have been represented by the State Attorney General, or law department members under his supervision. See § 41–192(A).

[5] Arizona law permits the State's highest court to "answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court . . . if there are involved in any proceedings before the certifying court questions of [Arizona law] which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the intermediate appellate courts of this state." Ariz. Rev. Stat. Ann. § 12–1861 (1994).

[6] The District Court, on December 8, 1988, had denied Yniguez's application for a temporary restraining order, finding no "imminent danger of the imposition of sanctions" against her. Record, Doc. No. 23, p. 1.

In Opinion No. I89–009, the Attorney General said it was his obligation to read Article XXVIII "as a whole," in line "with the other portions of the Arizona Constitution" and "with the United States Constitution and federal laws." App. 61. While Article XXVIII requires the performance of "official acts of government" in English, it was the Attorney General's view that government employees remained free to use other languages "to facilitate the delivery of governmental services." *Id.*, at 62. Construction of the word "act," as used in Article XXVIII, to mean more than an "official ac[t] of government," the Attorney General asserted, "would raise serious questions" of compatibility with federal and state equal protection guarantees and federal civil rights legislation. *Id.*, at 65–66.[7]

On February 9, 1989, two weeks after release of the Attorney General's opinion, the parties filed a statement of stipulated facts, which reported Governor Mofford's opposition to the ballot initiative, her intention nevertheless "to comply with Article XXVIII," and her expectation that "State service employees [would] comply" with the measure. See Record, Doc. No. 62, ¶¶ 35, 36, 39. The stipulation confirmed the view of all parties that "[t]he efficient operation [and administration] of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English where the citizens are not proficient in English." *Id.*, ¶¶ 16, 17. In particular, the parties recognized that "Yniguez'[s] use of a language other

[7] Specifically addressing "[t]he handling of customer inquiries or complaints involving state or local government services," the Attorney General elaborated:

"All official documents that are governmental acts must be in English, but translation services and accommodating communications are permissible, and may be required if reasonably necessary to the fair and effective delivery of services, or required by specific federal regulation. Communications between elected and other governmental employees with the public at large may be in a language other than English on the same principles." App. 74.

than English in the course of her performing government business contributes to the efficient operation . . . and . . . administration of the State." *Id.*, ¶ 15. The stipulation referred to the Attorney General's January 24, 1989, opinion, *id.*, ¶ 46, and further recounted that since the passage of Article XXVIII, "none of [Yniguez's] supervisors ha[d] ever told her to change or cease her prior use of Spanish in the performance of her duties," *id.*, ¶ 48.[8]

The District Court heard testimony on two days in February and April 1989, and disposed of the case in an opinion and judgment filed February 6, 1990. *Yniguez* v. *Mofford*, 730 F. Supp. 309. Prior to that final decision, the court had dismissed the State of Arizona as a defendant, accepting the State's plea of Eleventh Amendment immunity. See *id.*, at 311. Yniguez's second amended complaint, filed February 23, 1989, accordingly named as defendants only the Governor, the Attorney General, and the Director of the Department of Administration. See App. 55.[9]

The District Court determined first that, among the named defendants, only the Governor, in her official capacity, was a proper party. The Attorney General, the District Court found, had no authority under Arizona law to enforce provisions like Article XXVIII against state employees. 730 F. Supp., at 311–312. The Director and the Governor,

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[8] Supplementing their pleas to dismiss for want of a case or controversy, the defendants urged that Attorney General Opinion No. I89–009 "puts to rest any claim that [Yniguez] will be penalized by the State for using Spanish in her work." Record, Doc. No. 51, p. 4, n. 1.

[9] The second amended complaint added another plaintiff, Arizona State Senator Jaime Gutierrez. Senator Gutierrez alleged that Article XXVIII interfered with his rights to communicate freely with persons, including residents of his Senate district, who spoke languages other than English. App. 58–59. The District Court dismissed Gutierrez's claim on the ground that the defendants, all executive branch officials, lacked authority to take enforcement action against elected legislative branch officials. *Yniguez* v. *Mofford*, 730 F. Supp. 309, 311 (Ariz. 1990). Gutierrez is no longer a participant in these proceedings.

on the other hand, did have authority to enforce state laws and rules against state service employees. *Id.*, at 311. But nothing in the record, the District Court said, showed that the Director had undertaken or threatened to undertake any action adverse to Yniguez. *Id.*, at 313. That left Governor Mofford.

The Attorney General "ha[d] formally interpreted Article XXVIII as not imposing any restrictions on Yniguez's continued use of Spanish during the course of her official duties," *id.*, at 312, and indeed all three named defendants—Mofford as well as Corbin and Eden, see *supra*, at 50—"ha[d] stated on the record that Yniguez may continue to speak Spanish without fear of official retribution." 730 F. Supp., at 312. Governor Mofford therefore reiterated that Yniguez faced no actual or threatened injury attributable to any Arizona executive branch officer, and hence presented no genuine case or controversy. See *ibid.* But the District Court singled out the stipulations that "Governor Mofford intends to comply with Article XXVIII," and "expects State service employees to comply with Article XXVIII." Record, Doc. No. 62, ¶¶ 35, 36; see 730 F. Supp., at 312. If Yniguez proved right and the Governor wrong about the breadth of Article XXVIII, the District Court concluded, then Yniguez would be vulnerable to the Governor's pledge to enforce compliance with the Article. See *ibid.*

Proceeding to the merits, the District Court found Article XXVIII fatally overbroad. The measure, as the District Court read it, was not merely a direction that all official acts be in English, as the Attorney General's opinion maintained; instead, according to the District Court, Article XXVIII imposed a sweeping ban on the use of any language other than English by all of Arizona officialdom, with only limited exceptions. *Id.*, at 314. The District Court adverted to the Attorney General's confining construction, but found it unpersuasive. Opinion No. I89–009, the District Court observed, is "merely . . . advisory," not binding on any

court. 730 F. Supp., at 315. "More importantly," the District Court concluded, "the Attorney General's interpretation . . . is simply at odds with Article XXVIII's plain language." *Ibid.*

The view that Article XXVIII's text left no room for a moderate and restrained interpretation led the District Court to decline "to allow the Arizona courts the initial opportunity to determine the scope of Article XXVIII." *Id.*, at 316. The District Court ultimately dismissed all parties save Yniguez and Governor Mofford in her official capacity, then declared Article XXVIII unconstitutional as violative of the First and Fourteenth Amendments, but denied Yniguez's request for an injunction because "she ha[d] not established an enforcement threat sufficient to warrant [such] relief." *Id.*, at 316–317.

Postjudgment motions followed, sparked by Governor Mofford's announcement that she would not pursue an appeal. See App. 98. The Attorney General renewed his request to certify the pivotal state-law question—the correct construction of Article XXVIII—to the Arizona Supreme Court. See Record, Doc. No. 82. He also moved to intervene on behalf of the State, pursuant to 28 U. S. C. § 2403(b),[10] in order to contest on appeal the District Court's declaration that a provision of Arizona's Constitution violated the Federal Constitution. Record, Doc. Nos. 92, 93.

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[10] Title 28 U. S. C. § 2403(b) provides:

"In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

Two newcomers also appeared in the District Court after judgment: the Arizonans for Official English Committee (AOE) and Robert D. Park, Chairman of AOE. Invoking Rule 24 of the Federal Rules of Civil Procedure, AOE and Park moved to intervene as defendants in order to urge on appeal the constitutionality of Article XXVIII. App. 94–102. AOE, an unincorporated association, was principal sponsor of the ballot initiative that became Article XXVIII. AOE and Park alleged in support of their intervention motion the interest of AOE members in enforcement of Article XXVIII and Governor Mofford's unwillingness to defend the measure on appeal. Responding to the AOE/Park motion, Governor Mofford confirmed that she did not wish to appeal, but would have no objection to the Attorney General's intervention to pursue an appeal as the State's representative, or to the pursuit of an appeal by any other party. See Record, Doc. No. 94.

Yniguez expressed reservations about proceeding further. "She ha[d] won [her] suit against her employer" and had "obtained her relief," her counsel noted. Record, Doc. No. 114, p. 18 (Tr. of Proceeding on Motion to Intervene and Motion to Alter or Amend Judgment, Mar. 26, 1990). If the litigation "goes forward," Yniguez's counsel told the District Court, "I guess we do, too," but, counsel added, it might be in Yniguez's "best interest . . . if we stopped it right here." *Ibid.* The District Court agreed.

In an opinion filed April 3, 1990, the District Court denied all three postjudgment motions. *Yniguez* v. *Mofford*, 130 F. R. D. 410. Certification was inappropriate, the District Court ruled, in light of the court's prior rejection of the Attorney General's narrow reading of Article XXVIII. See *id.*, at 412. As to the Attorney General's intervention application, the District Court observed that § 2403(b) addresses only actions "'to which the State or any agency, officer, or employee thereof is not a party.'" See *id.*, at 413 (quoting § 2403(b)). Yniguez's action did not fit the § 2403(b) de-

scription, the District Court said, because the State and its officers were the very defendants—the sole defendants—Yniguez's complaint named. Governor Mofford remained a party throughout the District Court proceedings. If the State lost the opportunity to defend the constitutionality of Article XXVIII on appeal, the District Court reasoned, it was "only because Governor Mofford determine[d] that the state's sovereign interests would be best served by foregoing an appeal." *Ibid.*

Turning to the AOE/Park intervention motion, the District Court observed first that the movants had failed to file a pleading "setting forth the[ir] claim or defense," as required by Rule 24(c). *Ibid.* But that deficiency was not critical, the District Court said. *Ibid.* The insurmountable hurdle was Article III standing. The labor and resources AOE spent to promote the ballot initiative did not suffice to establish standing to sue or defend in a federal tribunal, the District Court held. *Id.*, at 414–415. Nor did Park or any other AOE member qualify for party status, the District Court ruled, for the interests of voters who favored the initiative were too general to meet traditional standing criteria. *Id.*, at 415.

In addition, the District Court was satisfied that AOE and Park could not tenably assert practical impairment of their interests stemming from the precedential force of the decision. As nonparticipants in the federal litigation, they would face no issue preclusion. And a lower federal-court judgment is not binding on state courts, the District Court noted. Thus, AOE and Park would not be precluded by the federal declaration from pursuing "any future state court proceeding [based on] Article XXVIII." *Id.*, at 415–416.

II

The Ninth Circuit viewed the matter of standing to appeal differently. In an opinion released July 19, 1991, *Yniguez* v. *Arizona*, 939 F. 2d 727, the Court of Appeals reached these

conclusions: AOE and Park met Article III requirements and could proceed as appellants; Arizona's Attorney General, however, having successfully moved in the District Court for his dismissal as a defendant, could not reenter as a party, but would be permitted to present argument regarding the constitutionality of Article XXVIII. *Id.*, at 738–740. The Ninth Circuit reported it would retain jurisdiction over the District Court's decision on the merits, *id.*, at 740, but did not then address the question whether Article XXVIII's meaning should be certified for definitive resolution by the Arizona Supreme Court.

Concerning AOE's standing, the Court of Appeals reasoned that the Arizona Legislature would have standing to defend the constitutionality of a state statute; by analogy, the Ninth Circuit maintained, AOE, as principal sponsor of the ballot initiative, qualified to defend Article XXVIII on appeal. *Id.*, at 732–733; see also *id.*, at 734, n. 5 ("[W]e hold that AOE has standing in the same way that a legislature might."). AOE Chairman Park also had standing to appeal, according to the Ninth Circuit, because Yniguez "could have had a reasonable expectation that Park (and possibly AOE as well) would bring an enforcement action against her" under §4 of Article XXVIII, which authorizes any person residing in Arizona to sue in state court to enforce the Article. *Id.*, at 734, and n. 5.[11]

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[11] In a remarkable passage, the Ninth Circuit addressed Yniguez's argument, opposing intervention by AOE and Park, that the District Court's judgment was no impediment to any state-court proceeding AOE and Park might wish to bring, because that judgment is not a binding precedent on Arizona's judiciary. See 939 F. 2d, at 735–736. The Court of Appeals questioned the wisdom of the view expressed "in the academic literature," "by some state courts," and by "several individual justices" that state courts are "coordinate and coequal with the lower federal courts on matters of federal law." *Id.*, at 736 (footnote omitted). The Ninth Circuit acknowledged "there may be valid reasons not to bind the state courts to a decision of a single federal district judge—which is not even binding on the same judge in a subsequent action." *Id.*, at 736–737. However, the appellate panel added, those reasons "are inapplicable to

Having allowed AOE and Park to serve as appellants, the Court of Appeals held Arizona's Attorney General "judicial[ly] estoppe[d]" from again appearing as a party. *Id.*, at 738–739; see also *id.*, at 740 ("[H]aving asked the district court to dismiss him as a party, [the Attorney General] cannot now become one again.").[12] With Governor Mofford choosing not to seek Court of Appeals review, the appeal became one to which neither "[the] State [n]or any agency, officer, or employee thereof [was] a party," the Ninth Circuit observed, so the State's Attorney General could appear pursuant to 28 U. S. C. § 2403(b). See 939 F. 2d, at 739.[13] But, the Ninth Circuit added, § 2403(b) "confers only a *limited* right," a right pendent to the AOE/Park appeal, "to make an argument on the question of [Article XXVIII's] constitutionality." *Id.*, at 739–740.

Prior to the Ninth Circuit's July 1991 opinion, indeed the very day after AOE, Park, and the Arizona Attorney General filed their notices of appeal, a development of prime importance occurred. On April 10, 1990, Yniguez resigned from state employment in order to accept another job. Her resig-

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decisions of the federal courts of appeals." *Id.*, at 737. But cf. *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 617 (1989) ("state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law"); *Lockhart* v. *Fretwell*, 506 U. S. 364, 375–376 (1993) (THOMAS, J., concurring) (Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law).

[12] Because the Court of Appeals found AOE and Park to be proper appellants, that court did not "address the question whether the Attorney General would have standing to appeal under Article III if no other party were willing and able to appeal." 939 F. 2d, at 738. The Court of Appeals assumed, however, that "whenever the constitutionality of a provision of state law is called into question, the state government will have a sufficient interest [to satisfy] Article III." *Id.*, at 733, n. 4. Cf. *Maine* v. *Taylor*, 477 U. S. 131, 137 (1986) (intervening State had standing to appeal from judgment holding state law unconstitutional); *Diamond* v. *Charles*, 476 U. S. 54, 62 (1986) ("a State has standing to defend the constitutionality of its statute").

[13] The full text of 28 U. S. C. § 2403(b) is set out *supra*, at 55, n. 10.

nation apparently became effective on April 25, 1990. Arizona's Attorney General so informed the Ninth Circuit in September 1991, "suggest[ing] that this case may lack a viable plaintiff and, hence, may be moot." Suggestion of Mootness in Nos. 90–15546 and 90–15581 (CA9), Affidavit and Exh. A.

One year later, on September 16, 1992, the Ninth Circuit rejected the mootness suggestion. *Yniguez* v. *Arizona*, 975 F. 2d 646. The court's ruling adopted in large part Yniguez's argument opposing a mootness disposition. See App. 194–204 (Appellee Yniguez's Response Regarding Mootness Considerations). "[T]he plaintiff may no longer be affected by the English only provision," the Court of Appeals acknowledged. 975 F. 2d, at 647. Nevertheless, the court continued, "[her] constitutional claims may entitle her to an award of nominal damages." *Ibid.* Her complaint did "not expressly request nominal damages," the Ninth Circuit noted, but "it did request 'all other relief that the Court deems just and proper under the circumstances.'" *Id.*, at 647, n. 1; see *supra*, at 50–51. Thus, the Court of Appeals reasoned, one could regard the District Court's judgment as including an "implicit denial" of nominal damages. 975 F. 2d, at 647, n. 2.

To permit Yniguez and AOE to clarify their positions, the Ninth Circuit determined to return the case to the District Court. There, with the Ninth Circuit's permission, AOE's Chairman Park could file a notice of appeal from the District Court's judgment, following up the Circuit's decision 14 months earlier allowing AOE and Park to intervene. *Id.*, at 647.[14] And next, Yniguez could cross-appeal to place before

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[14] In their original notice of appeal, filed April 9, 1990, AOE and Park targeted the District Court's denial of their motion to intervene. See App. 150–151. Once granted intervention, their original notice indicated, they would be positioned to file an appeal from the judgment declaring Article XXVIII unconstitutional. See *id.*, at 150.

the Ninth Circuit, explicitly, the issue of nominal damages. *Id.*, at 647, and n. 2.[15]

In line with the Ninth Circuit's instructions, the case file was returned to the District Court on November 5, 1992; AOE and Park filed their second notice of appeal on December 3, App. 206–208, and Yniguez cross-appealed on December 15, App. 209.[16] The Ninth Circuit heard argument on the merits on May 3, 1994. After argument, on June 21, 1994, the Ninth Circuit allowed Arizonans Against Constitutional Tampering (AACT) and Thomas Espinosa, Chairman of AACT, to intervene as plaintiffs-appellees. App. 14; *Yniguez* v. *Arizona*, 42 F. 3d 1217, 1223–1224 (1994) (amended Jan. 17, 1995). AACT was the principal opponent of the ballot initiative that became Article XXVIII. *Id.*, at 1224. In permitting this late intervention, the Court of Appeals noted that "it d[id] not rely on [AACT's] standing as a party." *Ibid.* The standing of the preargument participants, in the Ninth Circuit's view, sufficed to support a determination on the merits. See *ibid.*

In December 1994, the Ninth Circuit panel that had superintended the case since 1990 affirmed the judgment declaring Article XXVIII unconstitutional and remanded the case, directing the District Court to award Yniguez nominal dam-

[15] The Ninth Circuit made two further suggestions in the event that Yniguez failed to seek nominal damages: A new plaintiff "whose claim against the operation of the English only provision is not moot" might intervene; or Yniguez herself might have standing to remain a suitor if she could show that others had refrained from challenging the English-only provision in reliance on her suit. See 975 F. 2d, at 647–648. No state employee later intervened to substitute for Yniguez, nor did Yniguez endeavor to show that others had not sued because they had relied on her suit.

[16] On March 16, 1993, the District Court awarded Yniguez nearly $100,000 in attorney's fees. Record, Doc. No. 127. Governor Mofford and the State filed a notice of appeal from that award on April 8, 1993. Record, Doc. No. 128. Because the Ninth Circuit ultimately affirmed the District Court's judgment on the merits, the appeals court did not reach the state defendants' appeal from the award of fees. 69 F. 3d, at 924, n. 2, 927.

ages. 42 F. 3d 1217 (amended Jan. 17, 1995). Despite the Court of Appeals' July 1991 denial of party status to Arizona, the Ninth Circuit apparently viewed the State as the defendant responsible for any damages, for it noted: "The State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of nominal damages." *Id.*, at 1243. The Ninth Circuit agreed to rehear the case en banc, 53 F. 3d 1084 (1995), and in October 1995, by a 6-to-5 vote, the en banc court reinstated the panel opinion with minor alterations. 69 F. 3d 920.

Adopting the District Court's construction of Article XXVIII, the en banc court read the provision to prohibit

> "'the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties, save to the extent that they may be allowed to use a foreign language by the limited exceptions contained in § 3(2) of Article XXVIII.'" 69 F. 3d, at 928 (quoting 730 F. Supp., at 314).

Because the court found the "plain language" dispositive, 69 F. 3d, at 929, it rejected the State Attorney General's limiting construction and declined to certify the matter to the Arizona Supreme Court, *id.*, at 929–931. As an additional reason for its refusal to grant the Attorney General's request for certification, the en banc court stated: "The Attorney General . . . never conceded that [Article XXVIII] would be unconstitutional if construed as Yniguez asserts it properly should be." *Id.*, at 931, and n. 14.[17] The Ninth Circuit also pointed to a state-court challenge to the constitutionality of

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[17] The Court of Appeals contrasted *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383 (1988), in which this Court certified to the Virginia Supreme Court questions concerning the proper interpretation of a state statute. In *American Booksellers*, the Ninth Circuit noted, "the State Attorney General *conceded* [the statute] would be unconstitutional if construed as the plaintiffs contended it should be." 69 F. 3d, at 930.

Article XXVIII, *Ruiz* v. *State,* No. CV92–19603 (Sup. Ct. Maricopa County, Jan. 24, 1994). In *Ruiz*, the Ninth Circuit observed, the state court of first instance "dispos[ed] of [the] First Amendment challenge in three paragraphs" and "d[id] nothing to narrow [the provision]." 69 F. 3d, at 931.[18]

After construing Article XXVIII as sweeping in scope, the en banc Court of Appeals condemned the provision as manifestly overbroad, trenching untenably on speech rights of Arizona officials and public employees. See *id.*, at 931–948. For prevailing in the § 1983 action, the court ultimately announced, Yniguez was "entitled to nominal damages." *Id.*, at 949. On remand, the District Court followed the en banc Court of Appeals' order and, on November 3, 1995, awarded Yniguez $1 in damages. App. 211.

AOE and Park petitioned this Court for a writ of certiorari to the Ninth Circuit.[19] They raised two questions: (1) Does Article XXVIII violate the Free Speech Clause of the First

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[18] The *Ruiz* case included among its several plaintiffs four elected officials and five state employees. After defeat in the court of first instance, the *Ruiz* plaintiffs prevailed in the Arizona Court of Appeals. *Ruiz* v. *Symington,* No. 1 CA–CV 94–0235, 1996 WL 309512 (Ariz. App., June 11, 1996). That court noted, with evident concern, that "the Ninth Circuit refused to abstain and certify the question of Article [XXVIII]'s proper interpretation to the Arizona Supreme Court, although the issue was pending in our state court system." *Id.*, at *4. "Comity," the Arizona intermediate appellate court observed, "typically applies when a federal court finds that deference to a state court, on an issue of state law, is proper." *Ibid.* Nevertheless, in the interest of uniformity and to discourage forum shopping, the Arizona appeals court decided to defer to the federal litigation, forgoing independent analysis. *Ibid.* The Arizona Supreme Court granted review in *Ruiz* in November 1996, and stayed proceedings pending our decision in this case. App. to Supplemental Brief for Petitioners 1.

[19] The State did not oppose the petition and, in its Appearance Form, filed in this Court on January 10, 1996, noted that "if the Court grants the Petition and reverses the lower court's decision . . . Arizona will seek reversal of award of attorney's fees against the State." See *supra*, at 61, n. 16.

Amendment by "declaring English the official language of the State and requiring English to be used to perform official acts"?; (2) Do public employees have "a Free Speech right to disregard the [State's] official language" and perform official actions in a language other than English? This Court granted the petition and requested the parties to brief as threshold matters (1) the standing of AOE and Park to proceed in this action as defending parties, and (2) Yniguez's continuing satisfaction of the case-or-controversy requirement. 517 U. S. 1102 (1996).

III

Article III, § 2, of the Constitution confines federal courts to the decision of "Cases" or "Controversies." Standing to sue or defend is an aspect of the case-or-controversy requirement. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 663–664 (1993) (standing to sue); *Diamond* v. *Charles*, 476 U. S. 54, 56 (1986) (standing to defend on appeal). To qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent.'" *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (quoting *Whitmore* v. *Arkansas*, 495 U. S. 149, 155 (1990)). An interest shared generally with the public at large in the proper application of the Constitution and laws will not do. See *Defenders of Wildlife*, 504 U. S., at 573–576. Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess "a direct stake in the outcome." *Diamond*, 476 U. S., at 62 (quoting *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972) (internal quotation marks omitted)).

The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance. *Diamond*, 476 U. S., at 62. The decision to seek review "is not to be placed in the

hands of 'concerned bystanders,'" persons who would seize it "as a 'vehicle for the vindication of value interests.'" *Ibid.* (citation omitted). An intervenor cannot step into the shoes of the original party unless the intervenor independently "fulfills the requirements of Article III." *Id.*, at 68.

In granting the petition for a writ of certiorari in this case, we called for briefing on the question whether AOE and Park have standing, consonant with Article III of the Federal Constitution, to defend in federal court the constitutionality of Arizona Constitution Article XXVIII. Petitioners argue primarily that, as initiative proponents, they have a quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored. AOE and Park stress the funds and effort they expended to achieve adoption of Article XXVIII. We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests. See *Karcher* v. *May*, 484 U. S. 72, 82 (1987).[20] AOE and its members, however, are not elected representatives, and we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State. Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated. Cf. *Don't Bankrupt Washington Committee* v. *Continental Ill. Nat. Bank & Trust Co. of Chicago*, 460 U. S. 1077 (1983) (summarily dismissing, for lack of standing, appeal by an initiative proponent from a decision holding the initiative unconstitutional).

AOE also asserts representational or associational standing. An association has standing to sue or defend in such

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[20] Cf. *INS* v. *Chadha*, 462 U. S. 919, 930, n. 5, 939–940 (1983) (Immigration and Naturalization Service appealed Court of Appeals ruling to this Court but declined to defend constitutionality of one-House veto provision; Court held Congress a proper party to defend measure's validity where both Houses, by resolution, had authorized intervention in the lawsuit).

capacity, however, only if its members would have standing in their own right. See *Food and Commercial Workers* v. *Brown Group, Inc.*, 517 U. S. 544, 551–553 (1996); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977). The requisite concrete injury to AOE members is not apparent. As nonparties in the District Court, AOE's members were not bound by the judgment for Yniguez. That judgment had slim precedential effect, see *supra*, at 58–59, n. 11,[21] and it left AOE entirely free to invoke Article XXVIII, § 4, the citizen suit provision, in state court, where AOE could pursue whatever relief state law authorized. Nor do we discern anything flowing from Article XXVIII's citizen suit provision—which authorizes suits to enforce Article XXVIII in state court—that could support standing for Arizona residents in general, or AOE in particular, to defend the Article's constitutionality in federal court.

We thus have grave doubts whether AOE and Park have standing under Article III to pursue appellate review. Nevertheless, we need not definitively resolve the issue. Rather, we will follow a path we have taken before and inquire, as a primary matter, whether originating plaintiff Yniguez still has a case to pursue. See *Burke* v. *Barnes*, 479 U. S. 361, 363, 364, n. (1987) (leaving unresolved question of congressional standing because Court determined case was moot). For purposes of that inquiry, we will assume, *arguendo*, that AOE and Park had standing to place this case before an appellate tribunal. See *id.*, at 366 (STEVENS, J., dissenting) (Court properly assumed standing, even though that matter raised a serious question, in order to analyze mootness issue). We may resolve the question whether

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[21] As the District Court observed, the *stare decisis* effect of that court's ruling was distinctly limited. The judgment was "not binding on the Arizona state courts [and did] not foreclose any rights of [AOE] or Park in any future state-court proceeding arising out of Article XXVIII." *Yniguez* v. *Mofford*, 130 F. R. D. 410, 416 (D. Ariz. 1990).

there remains a live case or controversy with respect to Yniguez's claim without first determining whether AOE or Park has standing to appeal because the former question, like the latter, goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case. Cf. *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 20–22 (1994).

IV

To qualify as a case fit for federal-court adjudication, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975) (quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974)) (internal quotation marks omitted). As a state employee subject to Article XXVIII, Yniguez had a viable claim at the outset of the litigation in late 1988. We need not consider whether her case lost vitality in January 1989 when the Attorney General released Opinion No. I89–009. That opinion construed Article XXVIII to require the expression of "official acts" in English, but to leave government employees free to use other languages "if reasonably necessary to the fair and effective delivery of services" to the public. See App. 71, 74; *supra*, at 52–53, 54; see also *Marston's Inc.* v. *Roman Catholic Church of Phoenix*, 132 Ariz. 90, 94, 644 P. 2d 244, 248 (1982) ("Attorney General opinions are advisory only and are not binding on the court. . . . This does not mean, however, that citizens may not rely in good faith on Attorney General opinions until the courts have spoken."). Yniguez left her state job in April 1990 to take up employment in the private sector, where her speech was not governed by Article XXVIII. At that point, it became plain that she lacked a still vital claim for prospective relief. Cf. *Boyle* v. *Landry*, 401 U. S. 77, 78, 80–81 (1971) (prospective relief denied where plaintiffs failed to show challenged measures adversely affected any plaintiff's primary conduct).

The Attorney General suggested mootness,[22] but Yniguez resisted, and the Ninth Circuit adopted her proposed method of saving the case. See *supra*, at 60–61.[23] It was not dispositive, the court said, that Yniguez "may no longer be affected by the English only provision," 975 F. 2d, at 647, for Yniguez had raised in response to the mootness suggestion "[t]he possibility that [she] may seek nominal damages," *ibid.;* see App. 197–200 (Appellee Yniguez's Response Regarding Mootness Considerations). At that stage of the litigation, however, Yniguez's plea for nominal damages was not the possibility the Ninth Circuit imagined.

Yniguez's complaint rested on 42 U. S. C. § 1983. See *supra*, at 49–50, and n. 3. Although Governor Mofford in her official capacity was the sole defendant against whom the

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[22] Mootness has been described as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 397 (1980) (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973)).

[23] Yniguez's counsel did not inform the Court of Appeals of Yniguez's departure from government employment, a departure effective April 25, 1990, the day before the appeal was docketed. See App. 7. It was not until September 1991 that the State's Attorney General notified the Ninth Circuit of the plaintiff's changed circumstances. See *id.*, at 187. Yniguez's counsel offered a laconic explanation for this lapse: First, "legal research disclosed that this case was not moot"; second, counsel for the State of Arizona knew of the resignation and "agreed this appeal should proceed." App. 196, n. 2 (Appellee Yniguez's Response Regarding Mootness Considerations). The explanation was unsatisfactory. It is the duty of counsel to bring to the federal tribunal's attention, "*without delay,*" facts that may raise a question of mootness. See *Board of License Comm'rs of Tiverton* v. *Pastore*, 469 U. S. 238, 240 (1985) *(per curiam)*. Nor is a change in circumstances bearing on the vitality of a case a matter opposing counsel may withhold from a federal court based on counsels' agreement that the case should proceed to judgment and not be treated as moot. See *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920); R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 721–722 (7th ed. 1993).

District Court's February 1990 declaratory judgment ran, see *supra*, at 55, the Ninth Circuit held the State answerable for the nominal damages Yniguez requested on appeal. See 69 F. 3d, at 948–949 (declaring Yniguez "entitled to nominal damages for prevailing in an action under 42 U. S. C. § 1983" and noting that "[t]he State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of nominal damages"). We have held, however, that § 1983 actions do not lie against a State. *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 71 (1989). Thus, the claim for relief the Ninth Circuit found sufficient to overcome mootness was nonexistent. The barrier was not, as the Ninth Circuit supposed, Eleventh Amendment immunity, which the State could waive. The stopper was that § 1983 creates no remedy against a State.[24]

Furthermore, under the Ninth Circuit's ruling on intervention, the State of Arizona was permitted to participate in the appeal, but not as a party. 939 F. 3d, at 738–740. The Court of Appeals never revised that ruling. To recapitulate,

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[24] State officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983. See *Will* v. *Michigan Dept. of State Police*, 491 U. S., at 71, and n. 10. State officers are subject to § 1983 liability for damages in their personal capacities, however, even when the conduct in question relates to their official duties. *Hafer* v. *Melo*, 502 U. S. 21, 25–31 (1991). At no point after the nominal damages solution to mootness surfaced in this case did the Ninth Circuit identify Governor Mofford as a party whose conduct could be the predicate for retrospective relief. That is hardly surprising, for Mofford never participated in any effort to enforce Article XXVIII against Yniguez. Moreover, she opposed the ballot initiative that became Article XXVIII, see *supra*, at 49, n. 1, associated herself with the Attorney General's restrained interpretation of the provision, see *supra*, at 52–53, and was unwilling to appeal from the District Court's judgment declaring the Article unconstitutional, see *supra*, at 56. In this Court, Yniguez raised the possibility of Governor Mofford's individual liability under the doctrine of *Ex parte Young*, 209 U. S. 123 (1908). See Brief for Respondent Yniguez 21–22. That doctrine, however, permits only prospective relief, not retrospective monetary awards. See *Edelman* v. *Jordan*, 415 U. S. 651, 664 (1974).

in July 1991, two months prior to the Attorney General's suggestion of mootness, the Court of Appeals rejected the Attorney General's plea for party status, as representative of the State. *Ibid.* The Ninth Circuit accorded the Attorney General the "right [under 28 U. S. C. § 2403(b)] to argue the constitutionality of Article XXVIII . . . contingent upon AOE and Park's bringing the appeal." *Id.*, at 740; see *supra*, at 59. But see *Maine* v. *Taylor*, 477 U. S. 131, 136–137 (1986) (State's § 2403(b) right to urge on appeal the constitutionality of its laws is not contingent on participation of other appellants). AOE and Park, however, were the sole participants recognized by the Ninth Circuit as defendants-appellants. The Attorney General "ha[d] asked the district court to dismiss him as a party," the Court of Appeals noted, hence he "cannot now become one again." 939 F. 2d, at 740. While we do not rule on the propriety of the Ninth Circuit's exclusion of the State as a party, we note this lapse in that court's accounting for its decision: The Ninth Circuit did not explain how it arrived at the conclusion that an intervenor the court had designated a nonparty could be subject, nevertheless, to an obligation to pay damages.

True, Yniguez and the Attorney General took the steps the Ninth Circuit prescribed: Yniguez filed a cross-appeal notice, see *supra*, at 61; the Attorney General waived the State's right to assert the Eleventh Amendment as a defense to an award of nominal damages, see 69 F. 3d, at 948–949. But the earlier, emphatic Court of Appeals ruling remained in place: The State's intervention, although proper under § 2403(b), the Ninth Circuit maintained, gave Arizona no status as a party in the lawsuit. See 939 F. 2d, at 738–740.[25]

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[25] Section 2403(b) by its terms subjects an intervenor "to all liabilities of a party as to *court costs*" required "for a proper presentation of the facts and law relating to the question of constitutionality." 28 U. S. C. § 2403(b) (emphasis added). It does not subject an intervenor to liability for damages available against a party defendant.

In advancing cooperation between Yniguez and the Attorney General regarding the request for and agreement to pay nominal damages, the Ninth Circuit did not home in on the federal courts' lack of authority to act in friendly or feigned proceedings. Cf. *United States* v. *Johnson*, 319 U. S. 302, 304 (1943) *(per curiam)* (absent "a genuine adversary issue between . . . parties," federal court "may not safely proceed to judgment"). It should have been clear to the Court of Appeals that a claim for nominal damages, extracted late in the day from Yniguez's general prayer for relief and asserted solely to avoid otherwise certain mootness, bore close inspection. Cf. *Fox* v. *Board of Trustees of State Univ. of N. Y.*, 42 F. 3d 135, 141–142 (CA2 1994) (rejecting claim for nominal damages proffered to save case from mootness years after litigation began where defendants could have asserted qualified immunity had plaintiffs' complaint specifically requested monetary relief). On such inspection, the Ninth Circuit might have perceived that Yniguez's plea for nominal damages could not genuinely revive the case.[26]

When a civil case becomes moot pending appellate adjudication, "[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). Vacatur "clears the path for future relitigation" by eliminating a judgment the loser was stopped from opposing on direct review. *Id.*, at 40. Vacatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties—or,

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[26] Endeavoring to meet the live case requirement, petitioners AOE and Park posited in this Court several "controversies remaining between the parties." Reply Brief for Petitioners 18–19. Tellingly, none of the asserted controversies involved Yniguez, sole plaintiff and prevailing party in the District Court. See *ibid.* (describing AOE and Park as adverse to intervenor Arizonans Against Constitution Tampering (AACT), see *supra*, at 61, AACT as adverse to the State, AOE and Park as adverse to the State).

relevant here, the "unilateral action of the party who prevailed in the lower court." *U. S. Bancorp Mortgage Co.*, 513 U. S., at 23; cf. *id.*, at 29 ("mootness by reason of settlement [ordinarily] does not justify vacatur of a judgment under review").

As just explained, Yniguez's changed circumstances—her resignation from public sector employment to pursue work in the private sector—mooted the case stated in her complaint.[27] We turn next to the effect of that development on the judgments below. Yniguez urges that vacatur ought not occur here. She maintains that the State acquiesced in the Ninth Circuit's judgment and that, in any event, the District Court judgment should not be upset because it was entered before the mooting event occurred and was not properly appealed. See Brief for Respondent Yniguez 23–25.

Concerning the Ninth Circuit's judgment, Yniguez argues that the State's Attorney General effectively acquiesced in that court's dispositions when he did not petition for this Court's review. See *id.*, at 24–25; Brief for United States as *Amicus Curiae* 10–11, and n. 4 (citing *Diamond* v. *Charles*, 476 U. S. 54 (1986)).[28] We do not agree that this Court is disarmed in the manner suggested.

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[27] It bears repetition that Yniguez did not sue on behalf of a class. See *supra*, at 50; cf. *Preiser* v. *Newkirk*, 422 U. S. 395, 404 (1975) (Marshall, J., concurring) (mootness determination unavoidable where plaintiff-respondent's case lost vitality and action was not filed on behalf of a class); *Sosna* v. *Iowa*, 419 U. S. 393, 397–403 (1975) (recognizing class action exception to mootness doctrine).

[28] Designated a respondent in this Court, the State was not required or specifically invited to file a brief answering the AOE/Park petition. In his appearance form, filed January 10, 1996, Arizona's Attorney General made this much plain: The State—aligned with petitioners AOE and Park in that Arizona defended Article XXVIII's constitutionality—did not oppose certiorari; in the event Yniguez did not prevail here, Arizona would seek to recoup the attorney's fees the District Court had ordered the State to pay her. See *supra*, at 61, n. 16.

We have taken up the case for consideration on the petition for certiorari filed by AOE and Park. Even if we were to rule definitively that AOE and Park lack standing, we would have an obligation essentially to search the pleadings on core matters of federal-court adjudicatory authority—to inquire not only into this Court's authority to decide the questions petitioners present, but to consider, also, the authority of the lower courts to proceed. As explained in *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534 (1986):

> "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). See *Juidice* v. *Vail*, 430 U. S. 327, 331–332 (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *United States* v. *Corrick*, 298 U. S. 435, 440 (1936) (footnotes omitted)." *Id.*, at 541 (brackets in original).

See also *Iron Arrow Honor Soc.* v. *Heckler*, 464 U. S. 67, 72–73 (1983) *(per curiam)* (vacating judgment below where Court of Appeals had ruled on the merits although case had become moot). In short, we have authority to "make such disposition of the whole case as justice may require." *U. S. Bancorp Mortgage Co.*, 513 U. S., at 21 (citation and internal quotation marks omitted). Because the Ninth Circuit refused to stop the adjudication when Yniguez's departure from public employment came to its attention, we set aside the unwarranted en banc Court of Appeals judgment.

As to the District Court's judgment, Yniguez stresses that the date of the mooting event—her resignation from state employment effective April 25, 1990—was some 2½ months after the February 6, 1990, decision she seeks to preserve. Governor Mofford was the sole defendant bound by the District Court judgment, and Mofford declined to appeal. Therefore, Yniguez contends, the District Court's judgment should remain untouched.

But AOE and Park had an arguable basis for seeking appellate review, and the Attorney General promptly made known his independent interest in defending Article XXVIII against the total demolition declared by the District Court. First, the Attorney General repeated his plea for certification of Article XXVIII to the Arizona Supreme Court. See Record, Doc. No. 82. And if that plea failed, he asked, in his motion to intervene, "to be joined as a defendant so that he may participate in all post-judgment proceedings." Record, Doc. No. 93, p. 2. Although denied party status, the Attorney General had, at a minimum, a right secured by Congress, a right to present argument on appeal "on the question of constitutionality." See 28 U. S. C. § 2403(b). He was in the process of pursuing that right when the mooting event occurred.

We have already recounted the course of proceedings thereafter. First, Yniguez did not tell the Court of Appeals that she had left the State's employ. See *supra*, at 68, n. 23. When that fact was disclosed to the court by the Attorney General, a dismissal for mootness was suggested, and rejected. A mootness disposition at that point was in order, we have just explained. Such a dismissal would have stopped in midstream the Attorney General's endeavor, premised on § 2403(b), to defend the State's law against a declaration of unconstitutionality, and so would have warranted a path-clearing vacatur decree.

The State urges that its current plea for vacatur is compelling in view of the extraordinary course of this litigation.

See Brief for Respondents State of Arizona et al. 34 ("It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment."). We agree. The "exceptional circumstances" that abound in this case, see *U. S. Bancorp Mortgage Co.*, 513 U. S., at 29, and the federalism concern we next consider, lead us to conclude that vacatur down the line is the equitable solution.

V

In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?[29] When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question. See, *e. g.*, *Poe* v. *Ullman*, 367 U. S. 497, 526 (1961) (Harlan, J., dissenting) ("[N]ormally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts."); *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 573–574 (1947); Shapiro, Jurisdiction and Discretion, 60 N. Y. U. L. Rev. 543, 580–585 (1985).

Arizona's Attorney General, in addition to releasing his own opinion on the meaning of Article XXVIII, see *supra*, at 52, asked both the District Court and the Court of Appeals to pause before proceeding to judgment; specifically, he asked both federal courts to seek, through the State's certification process, an authoritative construction of the new measure from the Arizona Supreme Court. See *supra*, at 51, and n. 5, 55, 62–63, and nn. 17, 18.

Certification today covers territory once dominated by a deferral device called "*Pullman* abstention," after the gen-

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[29] The phrasing is borrowed from Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657 (1959).

erative case, *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496 (1941). Designed to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues, the *Pullman* mechanism remitted parties to the state courts for adjudication of the unsettled state-law issues. If settlement of the state-law question did not prove dispositive of the case, the parties could return to the federal court for decision of the federal issues. Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court. See generally 17A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§ 4242, 4243 (2d ed. 1988 and Supp. 1996).

Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response. See Note, Federal Courts—Certification Before Facial Invalidation: A Return to Federalism, 12 W. New Eng. L. Rev. 217 (1990). Most States have adopted certification procedures. See generally 17A Wright, Miller, & Cooper, *supra*, § 4248. Arizona's statute, set out *supra*, at 51, n. 5, permits the State's highest court to consider questions certified to it by federal district courts, as well as courts of appeals and this Court.

Both lower federal courts in this case refused to invite the aid of the Arizona Supreme Court because they found the language of Article XXVIII "plain," and the Attorney General's limiting construction unpersuasive. See 730 F. Supp., at 315–316; 69 F. 3d, at 928–931.[30] Furthermore, the Ninth

[30] But cf. *Huggins* v. *Isenbarger*, 798 F. 2d 203, 207–210 (CA7 1986) (Easterbrook, J., concurring) (reasoned opinion of State Attorney General should be accorded respectful consideration; federal courts should hesitate

Circuit suggested as a proper price for certification a concession by the Attorney General that Article XXVIII "would be unconstitutional if construed as [plaintiff Yniguez] contended it should be." *Id.*, at 930; see *id.*, at 931, and n. 14. Finally, the Ninth Circuit acknowledged the pendency of a case similar to Yniguez's in the Arizona court system, but found that litigation no cause for a stay of the federal-court proceedings. See *id.*, at 931; *supra*, at 62–63, and n. 18 (describing the *Ruiz* litigation).

A more cautious approach was in order. Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save "time, energy, and resources and hel[p] build a cooperative judicial federalism." *Lehman Brothers* v. *Schein*, 416 U. S. 386, 391 (1974); see also *Bellotti* v. *Baird*, 428 U. S. 132, 148 (1976) (to warrant district court certification, "[i]t is sufficient that the statute is susceptible of . . . an interpretation [that] would avoid or substantially modify the federal constitutional challenge to the statute"). It is true, as the Ninth Circuit observed, 69 F. 3d, at 930, that in our decision certifying questions in *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383 (1988), we noted the State's concession that the statute there challenged would be unconstitutional if construed as plaintiffs contended it should be, *id.*, at 393–396. But neither in that case nor in any other did we declare such a concession a condition precedent to certification.

The District Court and the Court of Appeals ruled out certification primarily because they believed Article XXVIII was not fairly subject to a limiting construction. See 730 F. Supp., at 316 (citing *Houston* v. *Hill*, 482 U. S. 451, 467 (1987)); 69 F. 3d, at 930. The assurance with which the lower courts reached that judgment is all the more puzzling

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to conclude that "[a State's] Executive Branch does not understand state law").

in view of the position the initiative sponsors advanced before this Court on the meaning of Article XXVIII.

At oral argument on December 4, 1996, counsel for petitioners AOE and Park informed the Court that, in petitioners' view, the Attorney General's reading of the Article was "the correct interpretation." Tr. of Oral Arg. 6; see *id.*, at 5 (in response to the Court's inquiry, counsel for petitioners stated: "[W]e agree with the Attorney General's opinion as to [the] construction of Article XXVIII on [constitutional] grounds."). The Ninth Circuit found AOE's "explanations as to the initiative's scope . . . confused and self-contradictory," 69 F. 3d, at 928, n. 12, and we agree that AOE wavered in its statements of position, see, *e. g.*, Brief for Petitioners 15 (AOE may "protect its political and statutory rights against the State and government employees"), 32–39 (Article XXVIII regulates Yniguez's "language on the job"), 44 ("AOE might . . . sue the State for limiting Art. XXVIII"). Nevertheless, the Court of Appeals understood that the ballot initiative proponents themselves at least "partially endorsed the Attorney General's reading." 69 F. 3d, at 928, n. 12. Given the novelty of the question and its potential importance to the conduct of Arizona's business, plus the views of the Attorney General and those of Article XXVIII's sponsors, the certification requests merited more respectful consideration than they received in the proceedings below.

Federal courts, when confronting a challenge to the constitutionality of a federal statute, follow a "cardinal principle": They "will first ascertain whether a construction . . . is fairly possible" that will contain the statute within constitutional bounds. See *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring); *Ellis* v. *Railway Clerks*, 466 U. S. 435, 444 (1984); *Califano* v. *Yamasaki*, 442 U. S. 682, 692–693 (1979); *Rescue Army*, 331 U. S., at 568–569. State courts, when interpreting state statutes, are similarly equipped to apply that cardinal principle. See *Knoell* v. *Cerkvenik-*

Anderson Travel, Inc., 185 Ariz. 546, 548, 917 P. 2d 689, 691 (1996) (citing *Ashwander*).

Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court. See *Rescue Army*, 331 U. S., at 573–574. "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 510 (1985) (O'Connor, J., concurring).

Blending abstention with certification, the Ninth Circuit found "no unique circumstances in this case militating in favor of certification." 69 F. 3d, at 931. Novel, unsettled questions of state law, however, not "unique circumstances," are necessary before federal courts may avail themselves of state certification procedures.[31] Those procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions. See *supra*, at 76. Taking advantage of certification made available by a State may "greatly simplif[y]" an ultimate adjudication in federal court. See *Bellotti*, 428 U. S., at 151.

The course of Yniguez's case was complex. The complexity might have been avoided had the District Court, more than eight years ago, accepted the certification suggestion made by Arizona's Attorney General. The Arizona Supreme Court was not asked by the District Court or the Court of Appeals to say what Article XXVIII means. But the State's highest court has that very question before it in

[31] Arizona itself requires no "unique circumstances." It permits certification to the State's highest court of matters "which may be determinative of the cause," and as to which "no controlling precedent" is apparent to the certifying court. Ariz. Rev. Stat. Ann. § 12–1861 (1994).

Ruiz v. *Symington*, see *supra*, at 62–63, and n. 18, the case the Ninth Circuit considered no cause for federal-court hesitation. In *Ruiz*, which has been stayed pending our decision in this case, see *supra*, at 63, n. 18, the Arizona Supreme Court may now rule definitively on the proper construction of Article XXVIII. Once that court has spoken, adjudication of any remaining federal constitutional question may indeed become greatly simplified.

* * *

For the reasons stated, the judgment of the Court of Appeals is vacated, and the case is remanded to that court with directions that the action be dismissed by the District Court.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

§ 1. English as the official language; applicability

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to:

(i) the legislative, executive and judicial branches of government[,]

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and policies[,]

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

§2. Requiring this state to preserve, protect and enhance English

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

§3. Prohibiting this state from using or requiring the use of languages other than English; exceptions

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as a part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

§ 4. Enforcement; standing

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

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ADAMS ET AL. *v.* ROBERTSON ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 95–1873. Argued January 14, 1997—Decided March 3, 1997

Respondent Robertson filed a class action in Alabama, alleging that respondent Liberty National Life Insurance Company had fraudulently encouraged its customers to exchange existing health insurance policies for new ones with less coverage. The trial court made him class representative and certified the class under the Alabama Rules of Civil Procedure, which do not give class members the right to opt out of a class. It then approved a settlement that precluded class members from individually suing Liberty National for fraud based on its exchange program. Petitioners, who had objected to the settlement in the trial court, appealed, and the State Supreme Court affirmed in an opinion addressing only state-law issues. Certiorari was granted on the question whether the certification and settlement violated the Fourteenth Amendment's Due Process Clause because class members could not opt out of the class or settlement.

Held: Since petitioners have failed to establish that they properly presented the due process issue to the Alabama Supreme Court, this Court will not reach the question presented, and the writ is dismissed as improvidently granted. With rare exceptions, *Yee* v. *Escondido*, 503 U. S. 519, 533, this Court will not consider a petitioner's federal claim that was not addressed by, or properly presented to, the state court rendering the decision. The Alabama Supreme Court did not expressly address the claim raised here, and petitioners have not shown that it was properly presented to that court. When the highest state court is silent on the federal question before this Court, it is assumed that the issue was not properly presented; the aggrieved party bears the burden of defeating this assumption, *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 550, by demonstrating that the state court had a fair opportunity to address the issue, *Webb* v. *Webb*, 451 U. S. 493, 501. Petitioners have not met this burden. They have not demonstrated that they complied with the applicable state rules for raising their federal claim before the State Supreme Court, see, *e. g.*, *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 77–78, explained why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim, see, *e. g.*, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262–265, or shown that their claim was presented with fair precision and in due time, see, *e. g.*, *New York*

Syllabus

ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 67. Even assuming that the rule that a claim be addressed or properly presented in state court is purely prudential, the circumstances here justify no exception. An interest in penalizing respondents for failing to raise a timely objection to petitioners' failure to comply with the rule does not outweigh the interest of comity the rule serves or the value to this Court of a fully developed record upon which to base its decisions.

Certiorari dismissed as improvidently granted. Reported below: 676 So. 2d 1265.

Norman E. Waldrop, Jr., argued the cause for petitioners. With him on the briefs were *Stephen C. Olen*, *George M. Walker*, *M. Kathleen Miller*, *J. Gusty Yearout*, *M. Clay Ragsdale IV*, *John D. Richardson*, *David F. Daniell*, and *Roderick P. Stout*.

John G. Roberts, Jr., argued the cause and filed a brief for respondent Liberty National Life Insurance Company. With him on the brief were *David G. Leitch*, *Gregory G. Garre*, *Michael R. Pennington*, *James W. Gewin*, and *Edgar M. Elliott III*. *Paul M. Smith*, *Donald B. Verrilli, Jr.*, *Jere L. Beasley*, *Frank M. Wilson*, *James A. Main*, and *Walter R. Byars* filed a brief for respondent Charlie Frank Robertson.*

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*Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Howard F. Twiggs;* and for Trial Lawyers for Public Justice, P. C., by *Leslie A. Brueckner* and *Arthur H. Bryant*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama by *Jeff Sessions*, Attorney General, and *William H. Pryor, Jr.*, Deputy Attorney General; for the American Council of Life Insurance by *Evan M. Tager* and *Phillip E. Stano;* for Continental Casualty Company et al. by *Herbert M. Wachtell*, *Meir Feder*, *Paul J. Bschorr*, *Stephen M. Snyder*, *Kelly C. Wooster*, *Elihu Inselbuch*, *Peter Van N. Lockwood*, *Joseph F. Rice*, *Joseph B. Cox, Jr.*, *Rodney L. Eshelman*, *Donald T. Ramsey*, *Stuart Philip Ross*, *Sean M. Hanifan*, *Merril Hirsh*, *Steven Kazan*, and *Harry F. Wartnick;* for Exxon Corporation by *Charles W. Bender* and *John F. Daum;* and for the National Association of Manufacturers et al. by *Alfred W. Cortese, Jr.*, *Kathleen L. Blaner*, *James C. Wilson*, *Jan S. Amundson*, *Quentin Riegel*, and *D. Dudley Oldham*.

A brief of *amici curiae* was filed for the State of New York et al. by *Dennis C. Vacco*, Attorney General of New York, *Barbara Gott Billet*,

PER CURIAM.

We granted a petition for certiorari to the Supreme Court of Alabama to decide whether the Alabama courts' approval of the class action and the settlement agreement in this case, without affording all class members the right to exclude themselves from the class or the agreement, violated the Due Process Clause of the Fourteenth Amendment. The Alabama Supreme Court did not address this federal issue, and it is now apparent that petitioners have failed to establish that they properly presented the issue to that court. We therefore dismiss the writ as improvidently granted.

I

In 1992, respondent Charlie Frank Robertson filed a class-action suit in an Alabama trial court, alleging that Liberty National Life Insurance Company had fraudulently encouraged its customers to exchange existing health insurance policies for new policies that, according to Robertson, provided less coverage for cancer treatment. The trial court appointed Robertson as class representative and certified the

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Solicitor General, and *Shirley F. Sarna*, *Nancy A. Spiegel*, and *Joy Feigenbaum*, Assistant Attorneys General, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Elliot Burg*, Assistant Attorney General, *Winston Bryant*, Attorney General of Arkansas, *Daniel E. Lungren*, Attorney General of California, *Richard Blumenthal*, Attorney General of Connecticut, *Robert A. Butterworth*, Attorney General of Florida, *Alan G. Lance*, Attorney General of Idaho, *James E. Ryan*, Attorney General of Illinois, *Tom Miller*, Attorney General of Iowa, *Carla J. Stovall*, Attorney General of Kansas, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *Frankie Sue Del Papa*, Attorney General of Nevada, *Jeffrey R. Howard*, Attorney General of New Hampshire, *Michael F. Easley*, Attorney General of North Carolina, *Heidi Heitkamp*, Attorney General of North Dakota, *W. A. Drew Edmondson*, Attorney General of Oklahoma, *Thomas W. Corbett, Jr.*, Attorney General of Pennsylvania, *Charles W. Burson*, Attorney General of Tennessee, and *Charles F. C. Ruff*, Corporation Counsel of the District of Columbia.

class pursuant to provisions of the Alabama Rules of Civil Procedure that do not give class members the right to exclude themselves from a class. See 676 So. 2d 1265, 1268, 1270 (Ala. 1995); App. 90. The trial court then approved a settlement agreement that precluded class members from individually suing Liberty National for fraud based on its insurance policy exchange program. See 676 So. 2d, at 1270–1271; App. 158–159.

Petitioners, who had objected to the settlement in the trial court, appealed. The Alabama Supreme Court affirmed in an opinion addressing only state-law issues, see 676 So. 2d, at 1270–1274, and petitioners sought a writ of certiorari. We granted certiorari, 518 U. S. 1056 (1996), on the question whether the certification and settlement of this class-action suit (which petitioners characterize as primarily involving claims for monetary relief) violated the Due Process Clause of the Fourteenth Amendment because the class members were not afforded the right to opt out of the class or the settlement.

II

With "very rare exceptions," *Yee* v. *Escondido*, 503 U. S. 519, 533 (1992), we have adhered to the rule in reviewing state-court judgments under 28 U. S. C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review. See *Heath* v. *Alabama*, 474 U. S. 82, 87 (1985); *Illinois* v. *Gates*, 462 U. S. 213, 217–219 (1983); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940). As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. See Reply Brief for Petitioners 2–3, n. 1.

Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of*

Directors of Rotary Int'l v. *Rotary Club of Duarte*, 481 U. S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb* v. *Webb*, 451 U. S. 493, 501 (1981). We have described in different ways how a petitioner may satisfy this requirement. See *Street* v. *New York*, 394 U. S. 576, 583–585 (1969). In some cases, we have focused on the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'" *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 77–78 (1988) (quoting *Webb*, *supra*, at 501), see, *e. g.*, *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 181, n. 3 (1983); *Beck* v. *Washington*, 369 U. S. 541, 549–554 (1962), or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment, see, *e. g.*, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262–265 (1982). In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time," *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 85, n. 9 (1980). See generally 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4022, pp. 322–339 (1996).

But however we phrase our requirements, petitioners here have failed to satisfy them. Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal due process claim before the Alabama Supreme Court,[1] or to explain why the failure to

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[1] Respondents have argued that because petitioners failed to list their federal claim in the "statement of issues" section of their appellate brief in accordance with Alabama Rule of Appellate Procedure 28(a)(3), the Alabama Supreme Court would have properly disregarded the claim even if petitioners had presented it below. See Brief for Respondent Liberty

comply with those rules would not be an adequate and independent ground for the state court to disregard that claim.

Neither have petitioners satisfied us that they presented their federal claim with "fair precision and in due time." They argue that they raised their federal due process claim in their initial brief before the Alabama Supreme Court, and point to two pages of that brief discussing *Brown* v. *Ticor*, 982 F. 2d 386 (CA9 1992), cert. dism'd as improvidently granted, 511 U. S. 117 (1994). Although *Ticor* is relevant to the federal claim they present here, see 982 F. 2d, at 392, they mentioned the case below in the context of an entirely different argument that the right to a jury trial under § 11 of the Alabama Constitution gives a plaintiff the right to opt out of a class-action settlement agreement. The discussion of "a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim." *Board of Directors of Rotary Int'l*, *supra*, at 550, n. 9.

Equally unavailing is petitioners' reliance on three other pages of their Alabama Supreme Court brief. Although that portion begins with a heading asserting that "[m]inimum due process requires that Class Members be given the right to opt out or exclude themselves from the class," see Brief for Appellants in Nos. 1931603 et al. (Sup. Ct. Ala.), p. 23, the discussion under that heading addresses only whether members of the class who were not Alabama residents had been afforded due process under *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985). We therefore think that a court may fairly have read this section as arguing, as had the petitioner in *Shutts*, *id.*, at 802, that the state court lacked personal jurisdiction over out-of-state class members, not the different and broader question of whether, if a state

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National Life Insurance Company 4, n. 2 (citing Ala. Rule App. Proc. 28(a)(3)), and *Eady* v. *Stewart Dredging & Construction Co., Inc.*, 463 So. 2d 156, 157 (Ala. 1985); Brief for Respondent Robertson 16, n. 12 (citing *Eady*). Petitioners have not even responded to that argument.

court has jurisdiction over the plaintiffs, due process requires that all class members have the right to opt out of the class and settlement agreement.

Nor are petitioners helped by the fact that respondents addressed the federal due process issue raised here in *their* briefs as appellees in the Alabama Supreme Court.[2] Petitioners failed to address respondents' federal due process arguments in their reply brief in the State Supreme Court and, instead, described "[t]he pivotal issue in this case" as the right to a jury trial under the Alabama Constitution. Reply Brief for Appellants in Nos. 1931603 et al. (Sup. Ct. Ala.), pp. 1–5. In these circumstances, it would have been perfectly reasonable for a state court to conclude that the broader federal claim was not before it.[3]

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[2] Respondent Robertson listed among issues presented for review: "Whether an opt-out provision is required by the due process [clause] and/or trial by jury guarantees of the U. S. and Alabama Constitutions." Brief for Appellee Robertson in Nos. 1931603 et al. (Sup. Ct. Ala.), p. 11.

[3] Petitioners also direct our attention to 80 pages of the Joint Appendix containing papers filed in the trial court, see Reply Brief for Petitioners 2–3, n. 1 (referring to App. 93–126, 190–245). This general citation fails to comply with our requirement that petitioners provide us with "*specific* reference to the places in the record where the matter appears," see this Court's Rule 14.1(g)(i) (emphasis added). Moreover, the passing invocations of "due process" we found therein, see App. 196, 209, 226–227, fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution, see Ala. Const., § 13 (1901), and thus they did not meet our minimal requirement that it must be clear that a *federal* claim was presented, *Webb* v. *Webb*, 451 U. S. 493, 496–497, 501 (1981); see *Bowe* v. *Scott*, 233 U. S. 658, 664–665 (1914).

Petitioners also note that they raised their federal due process claim in their petition for rehearing before the Alabama Supreme Court. While the claim presented there closely resembles the one they ask us to review, see Appellants' Application for Rehearing and Brief in Support of Application for Rehearing in Nos. 1931603 et al. (Sup. Ct. Ala.), pp. 7–12, we have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question, see *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S.

III

Petitioners having thus failed to carry their burden of showing that the claim they raise here was properly presented to the Alabama Supreme Court, we will not reach the question presented. We need not decide in this case whether our requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential, see *Yee*, 503 U. S., at 533; *Bankers Life & Casualty Co.*, 486 U. S., at 79; *Gates*, 462 U. S., at 217–219, because even treating the rule as purely prudential, the circumstances here justify no exception.

The rule serves an important interest of comity. *Bankers Life & Casualty Co.*, *supra*, at 79. As we have explained, "it would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. *Webb*, 451 U. S., at 500 (citations and internal quotation marks omitted). Thus, the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. *Gates*, *supra*, at 221–222. Here, the Alabama Supreme Court has an undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing class-action settlements satisfy the requirements of due process, and whether to exercise its power to amend those rules to avoid potential constitutional challenges, see Ala. Const., § 6.11; 1971 Ala. Acts No. 1311.

Our traditional standard also reflects "practical considerations" relating to this Court's capacity to decide issues. *Bankers Life & Casualty Co.*, *supra*, at 79. Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues

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537, 549–550 (1987); *Hanson* v. *Denckla*, 357 U. S. 235, 244, n. 4 (1958); *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 128 (1945).

on state-law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record. See *Webb*, *supra*, at 500. Here, even if the state court's construction of its class-action rules would not obviate the due process challenge, it would undoubtedly aid our understanding of those rules as a predicate to our assessment of their constitutional adequacy. And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

The only unusual consideration weighing in favor of reaching the question presented is that respondents failed to raise a timely objection to our granting the petition for certiorari, on the ground that the question presented in that petition had not been properly raised or addressed.[4] This Court's Rule 15.2 "admonishe[s counsel] that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement" "of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Without minimizing this obligation,[5] however, we find no interest here in penalizing

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[4] Respondent Robertson failed to raise the objection in his brief in opposition to the certiorari petition; respondent Liberty National waived its right to submit a brief in opposition.

[5] Respondents' obligation to object under Rule 15.2 was not diminished by the fact that their objection may have been based on this Court's jurisdiction, see *supra*, at 90, and thus nonwaivable. Even if, contrary to the assumption underlying our discussion in the main text, the requirement that claims be raised in or addressed by the state court is jurisdictional and cannot be waived, counsel are obliged to this Court (not to mention their clients) to raise such threshold issues in their briefs in opposition.

Nor is respondents' failure to object in accordance with Rule 15.2 excused by petitioners' failure to comply with this Court's Rule 14.1(g)(i), which requires a petitioner seeking review of a state-court judgment to specify, among other things, "when the federal questions sought to be reviewed were raised" in the state court system and "the method or manner of raising them and the way in which they were passed on by those courts, . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of

the failure of counsel to comply with Rule 15.2 that overrides the interest of comity or the value to this Court of a fully developed factual and legal record upon which to base decisions.[6]

Accordingly, we dismiss the writ of certiorari as improvidently granted.

It is so ordered.

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certiorari." The obligations under Rules 14.1 and 15.2 are complementary, but independent of each other.

[6] We note, of course, that we dismissed a writ of certiorari regarding a similar question three Terms ago in *Ticor Title Ins. Co.* v. *Brown*, 511 U. S. 117 (1994) *(per curiam)*. Our continuing interest in an issue, however, does not affect the application of our Rules, because we recognize that by "adher[ing] scrupulously to the customary limitations on our discretion" regardless of the significance of the underlying issue, "we 'promote respect . . . for the Court's adjudicatory process.' " *Illinois* v. *Gates*, 462 U. S. 213, 224 (1983) (quoting *Mapp* v. *Ohio*, 367 U. S. 643, 677 (1961) (Harlan, J., dissenting)).

Syllabus

COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF HUBERT, DECEASED, C & S SOVRAN TRUST CO. (GEORGIA) N. A., CO-EXECUTOR

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

No. 95–1402. Argued November 12, 1996—Decided March 18, 1997

The executors of decedent Hubert's substantial estate filed a federal estate tax return about a year after his death. Subsequently, petitioner Commissioner of Internal Revenue issued a notice of deficiency, claiming underreporting of federal estate tax liability caused by the estate's asserted entitlement to marital and charitable deductions. While the estate's redetermination petition was pending in the Tax Court, interested parties settled much of the litigation surrounding the estate that had begun after Hubert's death. The agreement divided the estate's residue principal, assumed to be worth $26 million on the date of death, about equally between marital trusts and a charitable trust. It also provided that the estate would pay its administration expenses either from the principal or the income of the assets that would comprise the residue and the corpus of the trusts, preserving the executors' discretion to apportion such expenses. The estate paid about $500,000 of its nearly $2 million of administration expenses from principal and the rest from income. It then recalculated its tax liability, reducing the marital and charitable deductions by the amount of principal, but not the amount of income, used to pay the expenses. The Commissioner concluded that using income for expenses required a dollar-for-dollar reduction of the deductions. The Tax Court disagreed, finding that no reduction was required by reason of the executors' power, or the exercise of their power, to pay administration expenses from income. The Court of Appeals affirmed.

Held: The judgment is affirmed.

63 F. 3d 1083, affirmed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE GINSBURG, concluded that a taxpayer does not have to reduce the estate tax deduction for marital or charitable bequests by the amount of the administration expenses that were paid from income generated during administration by assets allocated to those bequests. Pp. 99–111.

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(a) Hubert's executors used the standard date-of-death valuation to determine the value of property included in the gross estate for estate tax purposes. The parties agree that, for purposes of the question presented, the charitable, 26 U. S. C. § 2055, and marital, § 2056, deduction statutes should be read to require the same answer, notwithstanding differences in their language. Since the marital deduction statute and regulation speak in more specific terms on this question than the charitable deduction statute, this plurality concentrates on the marital provisions, but the holding here applies to both deductions. Pp. 99–100.

(b) The marital deduction statute allows deduction for qualifying property only to the extent of the property's "value." So when the executors use date-of-death valuation for gross estate purposes, the deduction's value will be limited by that value. Marital deduction "value" is "net value," determined by the same principles as if the bequest were a gift to the spouse, 26 CFR § 20.2056(b)–4(a), *i. e.*, present value as of the controlling valuation date, § 25.2523(a)–1(e); see also §§ 20.2056(b)–4(d), 20.2055–2(f)(1). Although the question presented is not controlled by these provisions' exact terms, it is natural to apply the present-value principle here. Thus, assuming it were necessary for valuation purposes to take into account that income, this would be done by subtracting from the value of the bequest, computed as if the income were not subject to administration expense charges, the present value (as of the controlling valuation date) of the income expected to be used to pay administration expenses. Cf. *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. There is no dispute the entire interests transferred in trust here qualify for the marital and charitable deductions; the question before the Court is one of valuation. Pp. 100–104.

(c) Only material limitations on the right to receive income are taken into account when valuing the property interest passing to the surviving spouse. 26 CFR § 20.2056(b)–4(a). A provision requiring or allowing administration expenses to be paid from income "may" be deemed a "material limitation" on the spouse's right to income. For example, where the amount of the corpus, and the expected income from it, are small, the amount of the estate's anticipated administration expenses chargeable to income may be material as compared with the anticipated income used to determine the assets' date-of-death value. Whether a limitation is material will also depend in part on the nature of the spouse's interest in the assets generating income. An obligation to pay administration expenses from income is more likely to be material where the value of the trust to the spouse is derived solely from income, but is less likely to be material where, as here, the marital property is valued as being equivalent to a transfer of the fee. Pp. 104–107.

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(d) The Tax Court found that, on the facts presented, the trustee's discretion to pay administration expenses out of income was not a material limitation on the right to receive income. There is no reason to reverse for the Tax Court's failure to specify the facts it considered relevant to the materiality inquiry. The anticipated expenses could have been thought immaterial in light of the income the trust corpus could have been expected to generate. P. 107.

(e) This approach to the valuation question is consistent with the language of 26 U. S. C. § 2056(b), as interpreted in *United States* v. *Stapf*, 375 U. S. 118, 126, in which the Court held that the marital deduction should not exceed the "net economic interest received by the surviving spouse." There is no basis here for the Commissioner's argument that the reduction she seeks is necessary to avoid a "double deduction" for administration expenses in violation of 26 U. S. C. § 642(g). Moreover, assuming that the marital deduction statute's legislative history would have relevance here, it does not support the Commissioner's position. Pp. 109–111.

JUSTICE O'CONNOR, joined by JUSTICE SOUTER and JUSTICE THOMAS, concluded that the relevant sources point to a test of quantitative materiality to determine whether allocation of administrative expenses to postmortem income reduces marital and charitable deductions, and that test is not met by the unusual factual record in this case. Pp. 111–122.

(a) Neither the Tax Code itself nor its legislative history supplies guidance on the question whether allocation of administrative expenses to postmortem income reduces the marital deduction always, sometimes, or not at all. However, the Commissioner's regulations and revenue rulings can be relied on to decide this issue. Title 26 CFR § 20.2056(b)–4(a) directs the reader to ask whether the executor's right to allocate administrative expenses to the marital bequest's postmortem income is a "material limitation" upon the spouse's "right to income from the property," such that "account must be taken of its effect." Because the executor's power is undeniably a "limitation" on the spouse's right to income, the case hinges on whether that limitation is "material." In Revenue Ruling 93–48, the Commissioner ruled that § 20.2056(b)–4(a)'s marital deduction is not "ordinarily" reduced when an executor allocates interest payments on deferred federal estate taxes to the spousal bequest's postmortem income. Such interest and the administrative expenses at issue here are so similar that they should be treated the same under § 20.2056(b)–4(a). The Commissioner's treatment of interest in the Revenue Ruling also indicates that some, but not all, financial obligations will reduce the marital deduction. Thus, by virtue of the Rul-

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ing, the Commissioner has created a quantitative materiality rule for § 20.2056(b)–4(a). This rule is consistent with the example set forth in § 20.2056(b)–4(a), and the Commissioner's expressed preference for such a construction is entitled to deference. Pp. 112–120.

(b) The proper measure of materiality has yet to be decided by the Commissioner. In the absence of guidance from the Commissioner, the Tax Court's approach is as consistent with the Code as any other test, and provides no basis for reversal. Here, the Commissioner's litigation strategy effectively pre-empted the Tax Court from finding the $1.5 million diminution in postmortem income material under a quantitative materiality test, for she argued that *any* diversion of postmortem income was material and never presented any evidence or argued that this diminution was quantitatively material. Her failure to offer proof of materiality left the Tax Court with little choice but to reach its carefully crafted conclusion that the amount was not quantitatively material on the facts before it. Pp. 120–122.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and STEVENS and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in which SOUTER and THOMAS, JJ., joined, *post,* p. 111. SCALIA, J., filed a dissenting opinion, in which BREYER, J., joined, *post,* p. 122. BREYER, J., filed a dissenting opinion, *post,* p. 138.

Kent L. Jones argued the cause for petitioner. With him on the briefs were *Solicitor General Days*, *Acting Solicitor General Dellinger*, *Assistant Attorney General Argrett*, *Deputy Solicitor General Wallace*, *Jonathan S. Cohen*, and *Joan I. Oppenheimer.*

David D. Aughtry argued the cause for respondent. With him on the brief was *Shelley Cashion.**

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*Briefs of *amici curiae* urging affirmance were filed for the American College of Trust and Estate Counsel by *Edward F. Koren* and *Alvin J. Golden;* for the American Council on Education et al. by *Matthew J. Zinn* and *Carol A. Rhees;* for the Baptist Foundation of Texas et al. by *Terry L. Simmons, pro se;* and for the Tax Section of The Florida Bar by *Jerald David August* and *James J. Freeland.*

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE GINSBURG join.

In consequence of life's two certainties a decedent's estate faced federal estate tax deficiencies, giving rise to this case. The issue is whether the amount of the estate tax deduction for marital or charitable bequests must be reduced to the extent administration expenses were paid from income generated during administration by assets allocated to those bequests.

I

The estate of Otis C. Hubert was substantial, valued at more than $30 million when he died. Considerable probate and civil litigation ensued soon after his death. The parties to the various proceedings included his wife and children; his nephew; one of the estate's coexecutors, Citizens and Southern Trust Company (Georgia), N. A., the predecessor of respondent C & S Sovran Trust Company (Georgia), N. A.; the district attorney for Cobb County, Georgia, on behalf of certain charitable beneficiaries; and the Georgia State Revenue Commission. Hubert had made various wills and codicils, and the legal disputes for the most part concerned the distribution of estate assets; but they were not confined to this. In addition to will contests alleging fraud and undue influence, there were satellite civil suits including claims of slander and abuse of process. The principal proceedings were in the Probate and the Superior Courts of Cobb County, Georgia.

The estate attracted the attention of petitioner, the Commissioner of Internal Revenue. The executors filed the federal estate tax return in 1987, about a year after Hubert died. In 1990, the Commissioner issued a notice of deficiency, claiming underreporting of federal estate tax liability by some $14 million. The Commissioner's major challenge then was to the estate's claimed entitlement to two deduc-

tions. One was the marital deduction, under 68A Stat. 392, as amended, 26 U. S. C. § 2056, for qualifying property passing from a decedent to the surviving spouse. The other was the charitable deduction, under § 2055, for qualifying property passing from a decedent to a charity. The Commissioner's notice of deficiency asserted, for reasons not relevant here, that the property passing to Hubert's surviving wife and to charity did not qualify for the marital and charitable deductions. The estate petitioned the United States Tax Court for a redetermination of the deficiency.

Within days of the estate's petition in the Tax Court, much of the other litigation surrounding the estate settled. The settlement agreement divided the estate's residue principal between a marital and a charitable share, which we can assume for purposes of our discussion were worth a total of $26 million on the day Hubert died. The settlement agreement divided the $26 million principal about half to trusts for the surviving spouse and half to a trust for the charities. The Commissioner stipulated that the nature of the trusts did not prevent them from qualifying for the marital and charitable deductions. The stipulation streamlined the Tax Court litigation but did not resolve it.

The settlement agreement provided that the estate would pay its administration expenses either from the principal or from the income of the assets that would comprise the residue and the corpus of the trusts, preserving the discretion Hubert's most recent will had given his executors to apportion administration expenses. The apportionment provisions of the agreement and the will were consistent for all relevant purposes with the law of Georgia, the State where the decedent resided. The estate's administration expenses, including attorney's fees, were on the order of $2 million. The estate paid about $500,000 in expenses from principal and the rest from income.

The estate recalculated its estate tax liability based on the settlement agreement and the payments from principal.

The estate did not include in its marital and charitable deductions the amount of residue principal used to pay administration expenses. The parties here have agreed throughout that the marital or charitable deductions could not include those amounts. The estate, however, did not reduce its marital or charitable deductions by the amount of the income used to pay the balance of the administration expenses. The Commissioner disagreed and contended that use of income for this purpose required a dollar-for-dollar reduction of the amounts of the marital and charitable deductions.

In a reviewed opinion, the Tax Court, with two judges concurring in part and dissenting in part, rejected the Commissioner's position. 101 T. C. 314 (1993). The court noted it had resolved the same issue against the Commissioner in *Estate of Street* v. *Commissioner*, 56 TCM 774, 57 TCM 2851 (1988), ¶ 88,553 P–H Memo TC. The Court of Appeals for the Sixth Circuit had reversed this aspect of *Estate of Street*, see 974 F. 2d 723, 727–729 (1992), but in the instant case the Tax Court adhered to its view and said, given all the circumstances here, no reduction was required by reason of the executors' power, or the exercise of their power, to pay administration expenses from income. The Court of Appeals for the Eleventh Circuit affirmed the Tax Court, adopting the latter's opinion and noting the resulting conflict with the Sixth Circuit's decision in *Street* and with the Court of Appeals for the Federal Circuit's decision in *Burke* v. *United States*, 994 F. 2d 1576, cert. denied, 510 U. S. 990 (1993). See 63 F. 3d 1083, 1084–1085 (CA11 1995). We granted certiorari, 517 U. S. 1166 (1996), and, in agreement with the Tax Court and the Court of Appeals for the Eleventh Circuit, we now affirm the judgment.

II

A necessary first step in calculating the taxable estate for federal estate tax purposes is to determine the property in-

cluded in the gross estate, and its value. Though an alternative valuation date is authorized, the executors of the Hubert estate used the standard date-of-death valuation. See 26 U. S. C. §§ 2031(a), 2051. A later step is to compute any claimed charitable or marital deductions. See §§ 2055 (charitable), 2056 (marital). Our inquiry here involves the relationship between valuation principles and those computations. The language of the charitable and marital deduction sections differs. For instance, § 2056 requires consideration, in valuing a marital bequest, of obligations or encumbrances the decedent imposes on the bequest, "in the same manner as if the amount of a gift to such spouse of such interest were being determined." § 2056(b)(4). Section 2055 has no similar language. Treasury Reg. § 20.2056(b)–4(a), 26 CFR § 20.2056(b)–4(a) (1996), moreover, has amplified aspects of the marital deduction statute, as we discuss. There is no similar regulation for the charitable deduction statute. These differences notwithstanding, the Commissioner and respondent agree that, for purposes of the question presented, the two deduction statutes should be read to require the same answer. We adopt this approach. For the issue we decide, the marital deduction statute and regulation speak in more specific terms than the charitable deduction statute, so we concentrate on the marital provisions. Our holding in the case applies to both deductions.

We begin with the language of the marital deduction statute. It allows an estate to deduct for federal estate tax purposes "an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 26 U. S. C. § 2056(a).

The statute allows deduction for qualifying property only to the extent of the property's "value." So when the executors value the property for gross estate purposes as of the date of death, the value of the marital deduction will be lim-

ited by its date-of-death value. This is directed by the statutory language capping the deduction at "the value of any interest . . . included in determining the value of the gross estate." It is made explicit by Treas. Reg. § 20.2056(b)–4(a), which says "value, for the purpose of the marital deduction . . . is to be determined as of the date of the decedent's death [unless the estate uses the alternative valuation date]."

Section 20.2056(b)–4(a) provides that "value" for marital deduction purposes is "net value," determined by applying "the same principles . . . as if the amount of a gift to the spouse were being determined." Section 25.2523(a)–1, entitled "Gift to spouse; in general," includes a subsection (e), entitled "Valuation," which parallels § 20.2056(b)–4(d); see also § 20.2055–2(f)(1). Section 25.2523(a)–1(e) provides:

> "If the income from property is made payable to the donor or another individual for life or for a term of years, with remainder to the donor's spouse . . . the marital deduction is computed . . . with respect to the present value of the remainder, determined under [26 U. S. C. §]7520. The present value of the remainder (that is, its value as of the date of gift) is to be determined in accordance with the rules stated in § 25.2512–5 or, for certain prior periods, § 25.2512–5A."

Section 7520, in turn, refers to present-value tables located in regulation § 20.2031–7. The question presented here, involving date-of-death valuation of property or a principal amount, some of the income from which may be used to pay administration expenses, is not controlled by the exact terms of these provisions. For that reason, we do not attempt to force it into their detailed mold. It is natural, however, to apply the present-value principle to the question at hand, as we are directed to do by § 20.2056(b)–4(a). In other words, assuming it were necessary for valuation purposes to take into account that income, see *infra,* at 106–107 (discussing materiality), this would be done by subtracting from the

value of the bequest, computed as if the income were not subject to administration expense charges, the present value (as of the controlling valuation date) of the income expected to be used to pay administration expenses.

Our application of the present-value principle to the issue here is further supported by Justice Holmes' explanation of valuation theory in his opinion for the Court in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151 (1929). The decedent there bequeathed the residue of his estate in trust to charity, subject to a particular life interest in his wife. After holding that the charitable bequest qualified for the charitable deduction under the law as it stood in 1929, the Court considered how to value the bequest. The Government argued the value should be reduced to reflect the wife's probable life expectancy as of the date the decedent died. The estate argued for a smaller reduction than the Government, because by the time of the litigation it was known that the wife had, in fact, lived for only six months after the decedent died. Justice Holmes wrote:

> "The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. . . . [Value] depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. . . . Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done. . . . Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act." *Id.*, at 155.

So the charitable deduction had to be valued based on the wife's probable life expectancy as of the date of death rather than the known fact that she died only six months after her husband.

It is suggested that § 20.2056(b)–4(a)'s direction to value the marital deduction as a spousal gift refers to a gift tax qualification regulation, § 25.2523(e)–1(f), and a Revenue Ruling interpreting it, Rev. Rul. 69–56, 1969–1 Cum. Bull. 224. *Post*, at 116 (O'CONNOR, J., concurring in judgment). The suggestion misunderstands the regulations and the Revenue Ruling. Section 20.2056(b)–4(a) concerns how to determine the "value, for the purpose of the marital deduction, of any deductible interest." Before determining an interest's value under § 20.2056(b)–4(a), one must decide the extent to which the interest qualifies as deductible.

There is a structural problem with interpreting § 20.2056(b)–4(a) as directing reference to § 25.2523(e)–1(f) for valuation purposes. Qualification and valuation are different steps. Section 25.2523(e)–1(f) prescribes conditions under which an interest transferred in trust qualifies for a marital deduction under the gift tax. It tracks the language of § 20.2056(b)–5(f), which prescribes the same conditions for determining whether an interest transferred in trust qualifies for a marital deduction under the estate tax. Any interest to which § 25.2523(e)–1(f) would apply, were its principles understood to be incorporated into § 20.2056(b)–4(a), would, of necessity, already have been analyzed under the same principles at the earlier, qualification stage of the estate-tax marital-deduction inquiry under § 20.2056(b)–5(f). So under the suggested interpretation, whether or not an interest passed the qualification test, there would never be a need to value it. If it failed, there would be nothing to value; if it passed, its value would never be reduced at the valuation stage. The qualification step of the estate-tax marital-deduction inquiry would render the valuation step superfluous.

We do not think the Commissioner adopted this view of the regulations in Revenue Ruling 69–56. The Revenue Ruling held that a trustee's power to:

> "charge to income or principal, executor's or trustee's commissions, legal and accounting fees, custodian fees, and similar administration expenses . . . [does] not result
>
> . . . . .
>
> "[does] in the disallowance or diminution of the marital deduction for estate and gift tax purposes unless the execution of such directions would or the exercise of such powers could, cause the spouse to have less than substantially full beneficial enjoyment of the particular interest transferred." Rev. Rul. 69–56, 1969–1 Cum. Bull. 224.

The Revenue Ruling cites for this proposition §§ 20.2056(b)–5(f)(1) and 25.2523(e)–1(f)(1), parts of the estate and gift tax qualification regulations discussed above. The qualification regulations provide that an interest may qualify as deductible only in part. Where that happens, the deduction need not be disallowed but it must be diminished. See, *e. g.*, § 20.2056(b)–5(b); § 25.2523(e)–1(b); see also 26 U. S. C. §§ 2056(b)(5), 2523(e). It is in this qualification context that the Revenue Ruling speaks of "diminution" of the marital deduction. There is no dispute the entire interests transferred in trust here qualify for the estate tax marital and charitable deductions, respectively. The question before us is one of valuation. Sections 25.2523(e)–1(f) and 20.2056(b)–5(f) and Revenue Ruling 69–56 do not bear on our inquiry.

The parties here agree that the marital and charitable deductions had to be reduced by the amount of marital and charitable residue principal used to pay administration expenses. The Commissioner contends that the estate must reduce its marital and charitable deductions by the amount of administration expenses paid not only from principal but also, and in all events, from income and by a dollar-for-dollar amount. The Commissioner cites the controlling regulation in support of her position. The regulation says:

> "The value, for the purpose of the marital deduction, of any deductible interest which passed from the decedent to his surviving spouse is to be determined as of the date of the decedent's death [unless the estate uses the alternative valuation date]. The marital deduction may be taken only with respect to the net value of any deductible interest which passed from the decedent to his surviving spouse, the same principles being applicable as if the amount of a gift to the spouse were being determined. In determining the value of the interest in property passing to the spouse account must be taken of the effect of any material limitations upon her right to income from the property. An example of a case in which this rule may be applied is a bequest of property in trust for the benefit of the decedent's spouse but the income from the property from the date of the decedent's death until distribution of the property to the trustee is to be used to pay expenses incurred in the administration of the estate." 26 CFR §20.2056(b)–4(a) (1996).

The regulation does not help the Commissioner. It says a limitation providing that income "is to be used" throughout the administration period to pay administration expenses "may" be material in a given case and, if it is, account must be taken of it for valuation purposes as if it were a gift to the spouse, as we have discussed, see *supra,* at 101–102. The Tax Court was quite accurate in its description of the regulation when it said:

> "That section is merely a valuation provision which requires material limitations on the right to receive income to be taken into account when valuing the property interest passing to the surviving spouse. The fact that income from property is to be used to pay expenses during the administration of the estate is not necessarily

> a material limitation on the right to receive income that would have a significant effect on the date-of-death value of the property of the estate." 101 T. C., at 324–325.

There is no indication in the case before us that the executor's power to charge administration expenses to income is equivalent to an express postponement of the spouse's right to income beyond a reasonable period of administration. Cf. 26 CFR § 20.2056(b)–5(f)(9) (1996) (requiring valuation of express postponements of the spouse's right to income beyond a reasonable period of administration). By contrast, we have no difficulty conceiving of situations where a provision requiring or allowing administration expenses to be paid from income could be deemed a "material limitation" on the spouse's right to income. Suppose the decedent's other bequests account for most of the estate's property or that most of its assets are nonincome producing, so that the corpus of the surviving spouse's bequest, and the income she could expect to receive from it, would be quite small. In these circumstances, the amount of the estate's anticipated administration expenses chargeable to income may be material as compared with the anticipated income used to determine the assets' date-of-death value. If so, a provision requiring or allowing administration expenses to be charged to income would be a material limitation on the spouse's right to income, reducing the marital bequest's date-of-death value and the allowable marital deduction.

Whether a limitation is "material" will also depend in part on the nature of the spouse's interest in the assets generating income. This analysis finds strong support in the text of § 20.2056(b)–4(a). The regulation gives an example of where a limitation on the right to income "may" be material—bequests "in trust" for the benefit of a decedent's spouse. The example suggests a significant difference between a bequest of income and an outright gift of the fee interest in the income-producing property. A fee in the

same interest will almost always be worth much more. Where the value of the trust to the beneficiaries is derived solely from income, an obligation to pay administration expenses from that income is more likely to be "material." In the case of a specific bequest of income, for example, valued only for its future income stream, a diversion of that income would be more significant. The marital property in this case, however, comprising trusts involving either a general power of appointment (the GPA trust) or an irrevocable election (the QTIP trust), was valued as being equivalent to a transfer of the fee. See Brief for Petitioner 8–9, n. 1 ("[T]he corpus of both trusts is includable in the estate of the surviving spouse"). As a result, the limitation on the right to income here is less likely to be material. The inquiry into the value of the estate's anticipated administration expenses should be just as administrable, if not more so, than valuing property interests like going-concern businesses, see, *e. g.*, § 20.2031–3, involving much greater complexity and uncertainty.

The Tax Court concluded here: "On the facts before us, we find that the trustee's discretion to pay administration expenses out of income is not a material limitation on the right to receive income." 101 T. C., at 325. The Tax Court did not specify the facts it considered relevant to the materiality inquiry. As we have explained, however, the Commissioner does not contend the estate failed to give adequate consideration to expected future administration expenses as of the date of death in determining the amount of the marital deduction. We have no basis to reverse for the Tax Court's failure to elaborate. Here, given the size and complexity of the estate, one might have expected it to incur substantial litigation costs. But the anticipated expenses could nonetheless have been thought immaterial in light of the income the trust corpus could have been expected to generate.

The major disagreement in principle between the Tax Court majority and dissenters involved the distinction be-

tween expected and actual income and expenses. Judge Halpern's opinion, joined by Judge Beghe, explained:

> "I believe the majority is undone by its view that income earned on estate property is not included in the gross estate. Once it is accepted that income earned on estate property (as anticipated at the appropriate valuation date) *is* included in the gross estate, the next question is whether, but for the use of such income to pay administration expenses, it would be received by the surviving spouse or charitable beneficiary. If the answer is yes, then it follows easily that, when such income is used for administration expenses, rather than received by the surviving spouse or charitable beneficiary, the value of the interest passing from the decedent to the surviving spouse or charitable beneficiary is decreased." *Id.*, at 342–343 (opinion concurring in part and dissenting in part).

The Tax Court dissenters recognized that only anticipated, not actual, income is included in the gross estate, as the gross estate is based on date-of-death value. See also *id.*, at 342, n. 5 (opinion of Halpern, J.) ("It is true, of course, that income actually earned on . . . property [included in valuing the gross estate] during the period of estate administration is not included in the gross estate. The gross estate, however, does include the discounted value of post mortem income expected to be earned during estate administration" (emphasis deleted)). The dissenters failed to recognize that following their own logic, as a general rule, assuming compliance with § 20.2056(b)–4(a)'s limitation to relevant facts on the controlling valuation date, only anticipated administration expenses payable from income, not the actual ones, affect the date-of-death value of the marital or charitable bequests. The dissenters were, in a sense, a step closer to § 25.2523(a)–1(e)'s present-value approach than the Commissioner, for they would have required the estate to reduce the marital or char-

itable deduction by only the discounted value of the actual administration expenses, whereas the Commissioner insists on a dollar-for-dollar reduction. The dissenters' wait-and-see approach to the valuation inquiry, however, is still at odds with the valuation inquiry required by the regulations: What is the net value of the marital or charitable bequest on the controlling valuation date, determined as if it were a gift to the spouse?

The Commissioner directs us to the language of § 2056(b)(4), which says:

> "In determining . . . the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—
>
> . . . . .
>
> "(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined."

We interpreted this language in *United States* v. *Stapf*, 375 U. S. 118 (1963). The husband's will there gave property to his wife, conditioned on her relinquishing other property she owned to the couple's children. We held that the husband's estate was entitled to a marital deduction only to the extent the value of the property the husband gave his wife exceeded the value of the property she relinquished to receive it. The marital deduction, we explained, should not exceed the "net economic interest received by the surviving spouse." *Id.*, at 126. The statutory language, as we interpreted it in *Stapf*, is consistent with our analysis here. Where the will requires or allows the estate to pay administration expenses from income that would otherwise go to the surviving spouse, our analysis requires that the marital

deduction reflect the date-of-death value of the expected future administration expenses chargeable to income if they are material as compared with the date-of-death value of the expected future income. Using this approach to valuation, the estate will arrive at the "net economic interest received by the surviving spouse." *Ibid.*

For the first time at oral argument, the Commissioner suggested that the reduction she seeks is necessary to avoid a "double deduction" in violation of 26 U. S. C. § 642(g). Under § 642(g), an estate may take an estate tax deduction for administration expenses under § 2053(a)(2), or it may take them, if deductible, off its taxable income, but it may not do both. The so-called double deduction argument is rhetorical, not statutory. As our colleagues in dissent recognize, "nothing in § 642(g) *compels* the conclusion that the marital (or charitable) deduction must be reduced whenever an estate elects to deduct expenses from income." *Post,* at 137 (SCALIA, J., dissenting) (emphasis in original). The Commissioner nevertheless suggests that, unless we reduce the estate's marital deduction by the amount of administration expenses paid from income and deducted on its income tax, the estate will receive a deduction for them on its income tax as well as a deduction for them on its estate tax in the form of inflated marital and charitable deductions. See Tr. of Oral Arg. 12, 15. The marital and charitable estate tax deductions do not include income, however. When income is used, consistent with state law and the will, to pay administration expenses, this does not require that the estate tax deductions be diminished. The deductions include asset values determined with reference to expected income, but under our analysis the values must also be reduced to reflect material expected administration expense charges to which that income may be subjected. As noted above, the Commissioner has not contended the estate's marital and charitable deductions fail to reflect such expected payments. So

there is no basis for the double deduction argument. Our analysis is consistent with the design of the statute.

The Commissioner also invites our attention to the legislative history of the marital deduction statute. Assuming for the sake of argument it would have relevance here, it does not support her position. The Senate Report accompanying the statute says:

> "The interest passing to the surviving spouse from the decedent is only such interest as the decedent can give. If the decedent by his will leaves the residue of his estate to the surviving spouse and she pays, or if the estate income is used to pay, claims against the estate so as to increase the residue, such increase in the residue is acquired by purchase and not by bequest. Accordingly, the value of any additional part of the residue passing to the surviving spouse cannot be included in the amount of the marital deduction." S. Rep. No. 1013, 80th Cong., 2d Sess., pt. 2, p. 6 (1948).

The Report supports our analysis. It underscores that valuation for marital deduction purposes occurs on the date of death.

The Commissioner's position is inconsistent with the controlling regulations. The Tax Court and the Court of Appeals were correct in finding for the taxpayer on these facts, and we affirm the judgment.

It is so ordered.

Justice O'Connor, with whom Justice Souter and Justice Thomas join, concurring in the judgment.

"Logic and taxation are not always the best of friends." *Sonneborn Brothers* v. *Cureton*, 262 U. S. 506, 522 (1923) (McReynolds, J., concurring). In cases like the one before us today, they can be complete strangers. That our tax laws can at times be in such disarray is a discomforting thought. I can understand why the plurality attempts to extrapolate

a generalized estate tax valuation theory from one regulation and then to apply that theory to resolve this case, perhaps with the hope of making sense out of the applicable law. But where the applicability—not to mention the validity—of that theory is far from clear, the temptation to make order out of chaos at any cost should be resisted, especially when the question presented can be resolved—albeit imperfectly—by reference to more directly applicable sources. While JUSTICE SCALIA, JUSTICE BREYER, and I agree on this point, we disagree on the result ultimately dictated by these sources. I therefore write separately to explain why in my view the plurality's result, though not its reasoning, is correct.

I

When a citizen or resident of the United States dies, the Federal Government imposes a tax on "all [of his] property, real or personal, tangible or intangible, wherever situated." 26 U. S. C. §§ 2001(a), 2031(a). Specifically excluded from taxation, however, is certain property devised to the decedent's spouse or to charity. Such testamentary gifts may qualify for the marital deduction, § 2056(a), or the charitable deduction, § 2055(a). If they do, they are removed from the decedent's "gross estate" and exempted from the estate tax. § 2051. Calculating the estate tax, however, takes time, as does marshaling the decedent's property and distributing it to the ultimate beneficiaries. During this process, the assets in the estate often earn income and the estate itself incurs administrative expenses. To deal with this eventuality, the Tax Code permits an estate administrator to choose between allocating these expenses to the assets in the estate at the time of death (the estate principal), or to the postmortem income earned by those assets. § 642(g). Everyone agrees that when these expenses are charged against a portion of the estate's principal devised to the spouse or charity, that portion of the principal is diverted from the spouse or charity and the marital and charitable deductions are accord-

ingly "reduced" by the actual amount of expenses incurred. See *ante*, at 104 (plurality opinion); *post*, at 123 (SCALIA, J., dissenting); Brief for Petitioner 19; Brief for Respondent 6. The question presented here is what becomes of these deductions when the estate chooses the second option under § 642(g) and allocates administrative expenses to the postmortem income generated by the property in the spousal or charitable devise.

The Tax Code itself supplies no guidance. Accord, *post*, at 127 (SCALIA, J., dissenting). The statute most relevant to this case, 26 U. S. C. § 2056(b)(4)(B), provides:

> "[W]here [any interest in property otherwise qualifying for the marital deduction] is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined."

Although an executor's power to burden the postmortem income of the marital bequest with the estate's administrative expenses is arguably an "encumbrance" or an "obligation imposed by the decedent with respect to the passing of such interest," the statute itself says only that the "encumbrance or obligation shall be taken into account." It does not explain how this should be done, however. In my view, it is not possible to tell from § 2056(b)(4)(B) whether allocation of administrative expenses to postmortem income reduces the marital deduction always, sometimes, or not at all.

Nor does the Code's legislative history give shape to its otherwise ambiguous language. The discussion in the Senate Report of § 2056(b)(4)(B)'s predecessor statute reads:

> "The interest passing to the surviving spouse from the decedent is only such interest as the decedent can give. If the decedent by his will leaves the residue of his es-

> tate to the surviving spouse and she pays, or *if the estate income is used to pay, claims against the estate so as to increase the residue, such increase in the residue is acquired by purchase and not by bequest. Accordingly, the value of any such additional part of the residue passing to the surviving spouse cannot be included in the amount of the marital deduction.*" S. Rep. No. 1013, 80th Cong., 2d Sess., pt. 2, p. 6 (1948) (emphasis added).

This italicized passage might be helpful if it explicitly referred to "administrative expenses" instead of "claims against the estate." But it is not at all clear from the Senate Report whether the latter term includes the former: The Report nowhere defines the term "claims against the estate," and the immediately preceding paragraph discusses §2056(b)(4)(B)'s language with reference to mortgages. *Ibid.* Because mortgages differ from administrative expenses in many ways (*e. g.*, mortgages pre-exist the decedent's death and are fixed in amount at that time), there is a reasonable argument that administrative expenses are not "claims against the estate." In sum, the Code's legislative history is not illuminating.

II

All that remains in this statutory vacuum are the Commissioner's regulations and Revenue Rulings, and it is on these sources that I would decide this issue. The key regulation is 26 CFR §20.2056(b)–4(a) (1996):

> "The value, for the purpose of the marital deduction, of any deductible interest which passed from the decedent to his surviving spouse is to be determined as of the date of the decedent's death . . . . The marital deduction may be taken only with respect to the net value of any deductible interest which passed from the decedent to his surviving spouse, the same principles being applica-

> ble as if the amount of a gift to the spouse were being determined. In determining the value of the interest in property passing to the spouse account must be taken of the effect of any material limitations upon her right to income from the property."

The text of the regulation leaves no doubt that only the "net value" of the spousal gift may be deducted. Moreover, there is little doubt that, in assessing this "net value," one should examine how the spousal devise would have been treated if it were instead an *inter vivos* gift. See 26 U. S. C. § 2056(b)(4)(A) (also referring to treatment of gifts).

The plurality latches onto 26 CFR § 25.2523(a)–1(e) (1996), and to the statutes and regulations to which it refers. *Ante*, at 101–102 (referring to 26 U. S. C. § 7520; 26 CFR § 20.2031–7 (1996)). In the plurality's view, these regulations define how to "tak[e] [account] of the effect of any material limitations upon [a spouse's] right to income from the property." 26 CFR § 20.2056(b)–4(a) (1996). The plurality frankly admits that these regulations do not speak directly to the antecedent inquiry—when an executor's right to allocate administrative expenses to income constitutes a "material limitation." *Ante*, at 106. The plurality nevertheless believes that these regulations bear *indirectly* on this inquiry by implying an underlying estate tax valuation theory that, in the plurality's view, dovetails nicely with our decision in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151 (1929). *Ante*, at 102. It is on the basis of this valuation theory that the plurality is able to conclude that the Tax Court's analysis was wrong because that analysis did not, consistent with the plurality's theory, focus solely on *anticipated* administrative expenses and *anticipated* income. *Ante*, at 107–109. But, as Justice Scalia points out, the plurality's valuation theory is not universally applicable and, in fact, conflicts with the Commissioner's treatment of some other expenses. See 26 CFR § 20.2056(b)–4(c) (1996); *post*, at 133–136. Because § 25.2523(a)–1(e) and its accompanying provisions do no more

than suggest an estate tax valuation theory that itself has questionable value in this context, these provisions do not in my view provide any meaningful guidance in this case.

The Tax Court, on the other hand, zeroed in on 26 CFR §§ 25.2523(e)–1(f)(3) and (4) (1996), the gift tax regulations which, read together, provide that a trustee's power to allocate the "trustees' commissions . . . and other charges" to the trust's income will not disqualify the trust from the gift tax spousal deduction as long as the donee spouse receives "substantial beneficial enjoyment" of the trust property. 101 T. C. 314, 325 (1993); see also 26 CFR § 20.2056(b)–5(f) (1996) (tracking language of § 25.2523(e)–1(f)). The Commissioner interpreted this language in Revenue Ruling 69–56, and held that a trustee's power to

> "charge to income or principal, executor's or trustee's commissions, legal and accounting fees, custodian fees, and similar administration expenses . . .
>
> . . . . . .
>
> "[does] not result in the disallowance or *diminution of the marital deduction for estate* and gift *tax purposes* unless the execution of such directions would or the exercise of such powers could, cause the spouse to have less than substantially full beneficial enjoyment of the particular interest transferred." Rev. Rul. 69–56, 1969–1 Cum. Bull. 224 (emphasis added).

Both the plurality and JUSTICE SCALIA argue that these gift regulations and rulings are inapposite because they address how the power to allocate expenses affects a trust's *qualification* for the marital deduction, and not how it affects the trust's *value*. *Ante*, at 103–104; *post*, at 125–126, 131–132. They further contend that the "material limitation" language in 26 CFR § 20.2056(b)–4(a) (1996) would be rendered superfluous if a "material limitation" on the spouse's right to receive income existed only when that spouse lacked "substantial beneficial enjoyment" of the income. 101 T. C.,

at 325–326 (adopting this argument). Under this reading, there could be no such thing as a trust that qualified for the marital deduction but imposed a material limitation on the right to income because any trust failing the "substantial beneficial enjoyment" test would not qualify for the deduction at all. *Ante*, at 103; *post*, at 132. These are potent criticisms. But no matter how poorly drafted or ill conceived the Revenue Ruling might be, the fact remains that the Commissioner issued it and its plain language is hard to ignore. In the end, the conclusion one draws regarding how the marital and charitable trusts would be treated if they were *inter vivos* gifts depends on whether one takes the Commissioner at her word: If one does, the gift tax provisions, Revenue Ruling 69–56 in particular, favor respondent's position; if one does not, one is left with no guidance at all. Neither result is wholly satisfying.

Fortunately, § 20.2056(b)–4(a) further directs the reader to consider a second method of determining the amount of the marital deduction:

> "In determining the value of the interest in property passing to the spouse account must be taken of the effect of any material limitations upon her right to income from the property."

From this we ask whether the executor's right to allocate administrative expenses to the postmortem income of the marital bequest is a material limitation upon the spouse's "right to income from the property," such that "account must be taken of the effect." Because the executor's power is undeniably a "limitation" on the spouse's right to income, the case hinges on whether that limitation is "material." Accord, *post*, at 128 (Scalia, J., dissenting) ("The beginning of analysis . . . is to determine what, in the context of § 20.2056(b)–4(a), the word 'material' means").

We can quibble over which definition of "material"—"substantial" or "relevant"—precedes the other in the dictionary,

see *ibid.;* American Heritage Dictionary 772 (2d ed. 1985) ("substantial" precedes "relevant"), but this debate is beside the point. The Commissioner has already interpreted the language in § 20.2056(b)–4(a). In Revenue Ruling 93–48, the Commissioner ruled that the marital deduction is not "ordinarily" reduced when an executor allocates interest payments on deferred federal estate taxes to the postmortem income of the spousal bequest. Rev. Rul. 93–48, 1993–2 Cum. Bull. 271 ("[T]he value of a residuary charitable [or marital] bequest is [not] reduced by the amount of [interest] expenses payable from the income of the residuary property"). JUSTICE SCALIA contends that Revenue Ruling 93–48 should be disregarded because it was promulgated by the Commissioner only after her attempts to prevail on the contrary position in federal court repeatedly failed. *Post,* at 129–130. To be sure, the Commissioner may not have whole-heartedly embraced Revenue Ruling 93–48, but the Ruling nevertheless issued and we may not totally ignore the plain language of a regulation or ruling because the entity promulgating it did not *really* want to have to adopt it. See *Connecticut Nat. Bank* v. *Germain,* 503 U. S. 249, 253–254 (1992) ("We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *West Virginia Univ. Hospitals, Inc.* v. *Casey,* 499 U. S. 83, 98 (1991) (rejecting argument that "the congressional purpose in enacting [a statute] must prevail over the ordinary meaning of statutory terms").

It is, as an initial matter, difficult to reconcile the Commissioner's treatment of interest under Revenue Ruling 93–48 with her position in this case. For all intents and purposes, interest accruing on estate taxes is functionally indistinguishable from the administrative expenses at issue here. By definition, neither of these expenses can exist prior to the decedent's death; before that time, there is no estate to administer and no estate tax liability to defer. Yet both

types of expenses are inevitable once the estate is open because it is virtually impossible to close an estate in a day so as to avoid the deferral of estate tax payments or the incursion of some administration expenses. Although both can theoretically be avoided if an executor donates his time or pays up front what he estimates the estate tax to be, this will not often occur. Both types of expenses are, moreover, of uncertain amount on the date of death. Because these two types of expenses are so similar in relevant ways, in my view they should be treated the same under § 20.2056(b)–4(a) and Ruling 93–48, despite the Commissioner's limitation on the applicability of Revenue Ruling 93–48 to interest on deferred estate taxes.

But more important, the Commissioner's treatment of interest on deferred estate taxes in Revenue Ruling 93–48 indicates her rejection of the notion that *every* financial burden on a marital bequest's postmortem income is a material limitation warranting a reduction in the marital deduction. That the Ruling purports to apply not only to *income* but also to *principal*, and may therefore deviate from the accepted rule regarding payment of expenses from principal, see *supra*, at 112–113, does not undercut the relevance of the Ruling's implications as to *income*. *Post*, at 130 (Scalia, J., dissenting). Thus, some financial burdens on the spouse's right to postmortem income will reduce the marital deduction; others will not. The line between the two does not, as Justice Scalia contends, depend upon the relevance of the limitation on the spouse's right to income to the value of the marital bequest, *post*, at 128–129, since interest on deferred estate taxes surely reduces, and is therefore relevant to, "the value of what passes," *post*, at 128 (emphasis deleted). By virtue of Revenue Ruling 93–48, the Commissioner has instead created a quantitative rule for § 20.2056(b)–4(a). That a limitation affects the marital deduction only upon reaching a certain quantum of substantiality is not a concept alien to the law of taxation; such rules are quite common.

See, *e. g.*, Rev. Rul. 75–298, 1975–2 Cum. Bull. 290 (exempting from income tax the income of qualifying banks owned by foreign governments, as long as their participation in domestic commercial activity is *de minimis*); Rev. Rul. 90–60, 1990–2 Cum. Bull. 3 (establishing *de minimis* rule so that taxpayers who give up less than 33.3% of their partnership interest need not post a bond to enable them to defer payment of credit recapture taxes for low-income housing).

The Commissioner's quantitative materiality rule is consistent with the example set forth in 26 CFR §20.2056(b)–4(a) (1996):

> "An example of a case in which [the material limitation] rule may be applied is a bequest of property in trust for the benefit of the decedent's spouse but the income from the property from the date of the decedent's death until distribution of the property to the trustee is to be used to pay expenses incurred in the administration of the estate."

Even assuming that JUSTICE SCALIA is correct that the word "may" connotes "possibility rather than permissibility," *post*, at 131, the example still does not specify whether it applies when all the income, some of the income, or any of the income "from the property . . . is to be used to pay expenses incurred in the administration of the estate." Any of these constructions of the example's language is plausible, and the Commissioner's expressed preference for the second one is worthy of deference. *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 476 (1979).

That said, the proper measure of materiality has yet to be decided by the Commissioner. The Tax Court below compared the actual amount spent on administration expenses to its estimate of the income to be generated by the marital bequest during the spouse's lifetime. 101 T. C., at 325. One *amicus* suggests a comparison of the discounted present value of the projected income stream from the marital be-

quest when the actual administrative expenses are allocated to income with the projected income stream when the expenses are allocated to principal. App. to Brief for American College of Trust and Estate Counsel as *Amicus Curiae* 1–2. The plurality, drawing upon its valuation theory, *supra*, at 115, looks to whether the "date-of-death value of the expected future administration expenses chargeable to income . . . [is] material as compared with the date-of-death value of the expected future income." *Ante*, at 110. None of these tests specifies with any particularity when the threshold of materiality is crossed. Cf. 26 U. S. C. § 2503(b) (setting $10,000 annual minimum before gift tax liability attaches). The proliferation of possible tests only underscores the need for the Commissioner's guidance. In its absence, the Tax Court's approach is as consistent with the Code as any of the others, and provides no basis for reversal.

I share Justice Scalia's reluctance to find a $1.5 million diminution in postmortem income immaterial under any standard. *Post*, at 128–129. Were this Court considering the question of quantitative materiality in the first instance, I would be hard pressed not to find this amount "material" given the size of Mr. Hubert's estate. But the Tax Court in this case was effectively pre-empted from making such a finding by the Commissioner's litigation strategy. It appears from the record that the Commissioner elected to marshal all her resources behind the proposition that *any* diversion of postmortem income was material, and never presented any evidence or argued that $1.5 million was quantitatively material. See App. 58 (Stipulation of Agreed Issues) (setting forth Commissioner's argument); Brief for Respondent 47. Because she bore the burden of proving materiality (since her challenge to administrative expenses was omitted from the original notice of deficiency), Tax Court Rule 142(a), her failure of proof left the Tax Court with little choice but to reach its carefully crafted conclusion that $1.5 million was not quantitatively material on "the

facts before [it]." 101 T. C., at 325. I would resist the temptation to correct the seemingly counterintuitive result in this case by protecting the Commissioner from her own litigation strategy, especially when she continues to adhere to that strategy and does not, even now, ask us to reconsider the Tax Court's finding on this issue.

This complex case has spawned four separate opinions from this Court. The question presented is simple and its answer should have been equally straightforward. Yet we are confronted with a maze of regulations and rulings that lead at times in opposite directions. There is no reason why this labyrinth should exist, especially when the Commissioner is empowered to promulgate new regulations and make the answer clear. Indeed, nothing prevents the Commissioner from announcing by regulation the very position she advances in this litigation. Until that time, however, the relevant sources point to a test of quantitative materiality, one that is not met by the unusual factual record in this case. I would, accordingly, affirm the judgment of the Tax Court.

JUSTICE SCALIA, with whom JUSTICE BREYER joins, dissenting.

The statute and regulation most applicable to the question presented in this case are discussed in today's opinion almost as an afterthought. Instead of relying on the text of 26 U. S. C. § 2056(b)(4)(B) and its interpretive Treasury Regulation, 26 CFR § 20.2056(b)–4(a) (1996), the plurality hinges its analysis on general principles of valuation which it mistakenly believes to inhere in the estate tax. It thereby creates a tax boondoggle never contemplated by Congress, and announces a test of deductibility virtually impossible for taxpayers and the Internal Revenue Service to apply. In my view, § 2056(b)(4)(B) and § 20.2056(b)–4(a) provide a straightforward disposition, namely, that the marital (and charitable) deductions must be reduced whenever income from property

comprising the residuary bequest to the spouse (or charity) is used to satisfy administration expenses. I therefore respectfully dissent.

I

Section 2056 of the Internal Revenue Code provides for a deduction from gross estate for marital bequests.[1] The Code places two limitations on the marital deduction which are relevant to this case. First, as would be expected, the marital deduction is limited to "an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 26 U. S. C. § 2056(a). Thus, as the plurality correctly recognizes, and as both parties agree, if any portion of marital bequest principal is used to pay estate administration expenses, then the marital deduction must be reduced commensurately. Second, and more to the point, "where such interest or property [bequeathed to the spouse] is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined." § 2056(b)(4)(B). Section 2056(b)(4)(B) controls this case and leads to the conclusion that the marital deduction must be reduced when estate income which would otherwise pass to the spouse is used to pay administration expenses of the estate.

A

As the plurality implicitly recognizes, Mrs. Hubert's interest in the estate was burdened with the obligation of paying

[1] This case involves both the marital and the charitable deductions. I agree with the plurality's determination that the provisions governing the two should be read *in pari materia*, *ante*, at 100, and, like the plurality, I focus my attention on the marital deduction.

administration expenses. The settlement agreement resolving the will contest, like Mr. Hubert's most recent will, provided that the estate's administration expenses would be paid from the residuary trusts, with the discretion given to the executor to apportion expenses between the income and principal of the residue. The marital bequest, which makes up some 52% of the residue, was thus plainly burdened with the obligation of paying 52% of the administration expenses of the estate. (The charitable bequest accounted for the remaining 48% of the residue.)

Our task under §2056(b)(4)(B) is to determine how this obligation would affect the value of the marital bequest were the bequest an *inter vivos* gift. This seemingly rudimentary question proves difficult to answer. Both parties point to various provisions of the Internal Revenue Code and the Treasury Regulations, but these concern the quite different question whether a gift *qualifies* for the gift tax marital deduction; none discusses how the actual payment of administration expenses from income will affect the *value* of the gift tax marital deduction. See, *e. g.*, Treas. Reg. §§25.2523(e)–1(f)(3) and (4), 26 CFR §§25.2523(e)–1(f)(3) and (4) (1996) (inclusion of the power to a trustee to allocate expenses of a trust between income and corpus will not *disqualify* the gift from the marital deduction so long as the spouse maintains substantial beneficial enjoyment of the income). The plurality seeks to derive some support from §25.2523(a)–1(e), see *ante*, at 101–102, though it must acknowledge that "[t]he question presented here . . . is not controlled by the exact terms of [that regulation or the provisions to which it refers]," *ante*, at 101. Even going beyond its "exact terms," however, the regulation has no relevance. Like its counterparts in the estate tax provisions, see §§20.2031–1(b), 20.2031–7, it simply provides instruction on how to value the *assets* comprising the gift. It says nothing about how to take account of administration expenses. Indeed, the gross estate does not include anticipated adminis-

tration expenses. As I discuss below, *infra*, at 134–135, the estate tax provisions provide for a deduction from the gross estate for administration expenses actually incurred. See 26 U. S. C. § 2053(a)(2) and 26 CFR § 20.2053–3(a) (1996). Were expected administration expenses taken into account in valuing the assets of the gross estate, as the plurality incorrectly suggests, then the estate tax deduction for actual administration expenses would in effect be a second deduction for the same charge.

Respondent's strongest argument is based on Rev. Rul. 69–56, 1969–1 Cum. Bull. 224, which held that inclusion in a marital trust of the power to charge administration expenses to either income or principal does not run afoul of that provision of the regulations which requires, in order for a life-estate trust to *qualify* for the gift and estate tax marital deductions, that the settlor intend the spouse to enjoy "substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trust accord to a person who is unqualifiedly designated as the life beneficiary of a trust." 26 CFR §§ 2523(e)–1(f)(1), 2056(b)–5(f)(1) (1996). Although the Revenue Ruling was an interpretation of qualification regulations, it also purported to "h[o]ld" that inclusion of the "power" to allocate expenses between income and principal "does not result in the disallowance *or diminution* of the marital deduction," Rev. Rul. 69–56, 1969–1 Cum. Bull. 224, 225 (emphasis added). I agree with the Commissioner that this Revenue Ruling is inapposite because it deals with the effect of the mere *existence* of the power to allocate expenses against income; it speaks not at all to the question of how the actual *exercise* of that power will affect the valuation of the estate tax marital deduction. If the Ruling is construed to mean that *exercise* of the power does not reduce the marital deduction, then actually using principal to pay the expenses should not reduce the marital deduction, a result which everyone agrees is incorrect, see, *e. g.*, *ante*, at 104 (plurality opinion);

ante, at 112–113 (O'CONNOR, J., concurring in judgment); *supra*, at 123, and which plainly conflicts with § 2056(a). It seems to me obvious that the Commissioner was simply not addressing the issue before us today when she issued Revenue Ruling 69–56, a conclusion confirmed by the fact that the Commissioner's longstanding view—which antedates Revenue Ruling 69–56—is that use of marital bequest income to pay administration expenses requires that the marital deduction be reduced, see, *e. g.*, Brief for Government Appellee in *Ballantine* v. *Tomlinson*, No. 18,736 (CA5 1961), p. 18; Brief for Government Appellee in *Alston* v. *United States*, No. 21,402 (CA5 1965), p. 15.

B

The Commissioner contends that Treas. Reg. § 20.2056 (b)–4(a), 26 CFR § 2056(b)–4(a) (1996), which interprets § 2056(b)–(4)(B), mandates the conclusion that payment of administration expenses from marital bequest income reduces the marital deduction. Section 20.2056(b)–4(a) provides:

> "The value, for the purpose of the marital deduction, of any deductible interest which passed from the decedent to his surviving spouse is to be determined as of the date of the decedent's death, [unless the executor elects the alternate valuation date]. The marital deduction may be taken only with respect to the net value of any deductible interest which passed from the decedent to his surviving spouse, the same principles being applicable as if the amount of a gift to the spouse were being determined. In determining the value of the interest in property passing to the spouse account must be taken of the effect of any *material* limitations upon her right to income from the property. An example of a case in which this rule may be applied is a bequest of property in trust for the benefit of the decedent's spouse but the income from the property from the date of decedent's death until distribution of the property to the trustee is

> to be used to pay expenses incurred in the administration of the estate." (Emphasis added.)

This text was issued pursuant to explicit authority given the Secretary of the Treasury to promulgate the rules and regulations necessary to enforce the Internal Revenue Code. See 26 U. S. C. § 7805(a). As this Court has repeatedly acknowledged, judicial deference to the Secretary's handiwork "helps guarantee that the rules will be written by 'masters of the subject.'" *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 477 (1979), quoting *United States* v. *Moore*, 95 U. S. 760, 763 (1878). Thus, when a provision of the Internal Revenue Code is ambiguous, as § 2056(b)(4)(B) plainly is, this Court has consistently deferred to the Treasury Department's interpretive regulations so long as they "'"implement the congressional mandate in some reasonable manner."'" *National Muffler Dealers Assn., Inc., supra*, at 476, quoting *United States* v. *Cartwright*, 411 U. S. 546, 550 (1973), in turn quoting *United States* v. *Correll*, 389 U. S. 299, 307 (1967). See also *Cottage Savings Assn.* v. *Commissioner*, 499 U. S. 554, 560–561 (1991).

As the courts below recognized, the crucial term of the regulation for present purposes is "material limitations." Curiously enough, however, neither the Commissioner nor respondent comes forward with a definition of this term, the former simply contending that "it is the burden of paying administration expenses *itself* that constitutes the 'material' limitation," Brief for Petitioner 31, and the latter simply contending that that burden is for various reasons not substantial enough to qualify. Today's plurality opinion also takes the latter approach, never defining the term but displaying by its examples that "material" must mean "relatively substantial." If, it says, a spouse's bequest represents a small portion of the overall estate and could be expected to generate little income, the estate's anticipated administration expenses "'may' be material" when compared to the antici-

pated income. *Ante*, at 106. But, it says, the mere fact that an estate incurs (or as I discuss below, under the plurality's approach, expects to incur) "substantial litigation costs" is insufficient to make a limitation material. *Ante*, at 107.

The beginning of analysis, it seems to me, is to determine what, in the context of § 20.2056(b)–4(a), the word "material" means. In common parlance, the word sometimes bears the meaning evidently assumed by respondent: "substantial," or "serious," or "important." See 1 The New Shorter Oxford English Dictionary 1714 (1993) (def. 3); Webster's New International Dictionary 1514 (2d ed. 1950) (def. 2a). It would surely bear that meaning in a regulation that referred to a "material diminution of the value of the spouse's estate." Relatively small diminutions would not count. But where, as here, the regulation refers to "material limitations upon [the spouse's] right to receive income," it seems to me that the more expansive meaning of "material" is naturally suggested—the meaning that lawyers use when they move that testimony be excluded as "immaterial": Not "insubstantial" or "unimportant," but "*irrelevant*" or "*inconsequential.*" See American Heritage Dictionary 1109 (3d ed. 1992) (def. 4: defining "material" as "[b]eing both relevant and consequential," and listing "relevant" as a synonym). In the context of § 20.2056(b)–4(a), which deals, as its first sentence recites, with "[t]he *value*, for the purpose of the marital deduction, of any deductible interest which passed from the decedent to his surviving spouse" (emphasis added), a "*material* limitation" is a limitation that is relevant or consequential *to the value* of what passes. Many limitations are not—for example, a requirement that the spouse not spend the income for five years, or that the spouse be present at the reading of the will, or that the spouse reconcile with an alienated relative.

That this is the more natural reading of the provision is amply demonstrated by the consequences of the alternative reading, which would leave it to the taxpayer, the Commissioner, and ultimately the courts, to guess whether a particu-

lar decrease in value is "material" enough to qualify—without any hint as to what might be a "ballpark" figure, or indeed any hint as to whether there is such a thing as "absolute materiality" (the $2 million at issue here, for instance), or whether it is all relative to the size of the estate. One should not needlessly impute such a confusing meaning to a regulation which readily bears another interpretation that is more precise. Moreover, the Commissioner's interpretation of her own regulation, so long as it is consistent with the text, is entitled to considerable deference, see *National Muffler Dealers Assn., Inc., supra,* at 488–489; *Cottage Savings Assn., supra,* at 560–561.

The concurrence contends that the other (more unnatural) reading of "material" must be adopted—and that no deference is to be accorded the Commissioner's longstanding approach of reducing the marital deduction for *any* payment of administrative expenses out of marital-bequest income—because of a recent Revenue Ruling in which the Commissioner acquiesced in lower court holdings that the marital deduction is not reduced by the payment from the marital bequest of interest on deferred estate taxes. *Ante,* at 118–120 (discussing Rev. Rul. 93–48). The concurrence asserts that interest accruing on estate taxes "is functionally indistinguishable" from administrative expenses, so that Revenue Ruling 93–48 "created a quantitative rule" shielding some financial burdens from affecting the calculation of the marital deduction. *Ante,* at 118, 119. I think not. The Commissioner issued Revenue Ruling 93–48 only after her contention, that § 20.2056(b)–4(a) required the marital deduction to be reduced by payment of estate tax interest from the marital bequest, was repeatedly rejected by the Tax Court and the Courts of Appeals. See, *e. g., Estate of Street* v. *Commissioner,* 974 F. 2d 723 (CA6 1992); *Estate of Whittle* v. *Commissioner,* 994 F. 2d 379 (CA7 1993); *Estate of Richardson* v. *Commissioner,* 89 T. C. 1193 (1987). Rather than continuing to expend resources in litigation that seemed likely

to bring little or no income to the Treasury, the Commissioner chose, in Revenue Ruling 93–48, to "adopt the result" of then-recent court decisions regarding interest on taxes. It is impossible to think that this suggested her view on the proper treatment of administrative expenses had changed. Indeed, the Ruling itself expressly indicates continued adherence to the Commissioner's longstanding position by reaffirming Revenue Ruling 73–98, which held that the charitable deduction must be reduced by the amount of charitable bequest income and principal consumed to pay administrative expenses, modifying it only insofar as it applies to payment of interest on taxes. Moreover, the Courts of Appeals whose results the Commissioner adopted *themselves distinguished* administrative expenses. In *Estate of Street*, for example, the court reasoned that while administrative expenses accrue at death interest on taxes accrues after death, and noted that the example in Treas. Reg. § 2056(b)–4(a) specifically required a reduction of the marital deduction for payment of administrative expenses, but was silent as to interest on taxes. 974 F. 2d, at 727, 729. While the concurrence may be correct that the distinctions advanced by the Courts of Appeals are not wholly persuasive (the Commissioner herself argued that to no avail), I hardly think they are so irrational that it was arbitrary or capricious for the Commissioner to maintain her longstanding prior position on administrative expenses once Revenue Ruling 93–48 was issued; and it is utterly impossible to think that Revenue Ruling 93–48 was, or was understood to be, an indication that the Commissioner had *changed* her prior position on administrative expenses. That eliminates the only two grounds on which Revenue Ruling 93–48 could be relevant.

The concurrence's reading of Revenue Ruling 93–48 suffers from an additional flaw. Revenue Ruling 93–48 is not limited to payment from marital bequest *income*, but rather extends to payment from marital bequest *principal* as well. Thus, under the concurrence's view of that Ruling, even sub-

stantial administrative expenses paid out of marital bequest principal may not require a reduction of the marital deduction. This result is, of course, inconsistent with the statute, see 26 U. S. C. §2056(a), and with what appears to be (as I noted earlier, *supra*, at 125–126) the concurrence's view, *ante*, at 112–113.

Respondent asserts that some inquiry into "substantiality" is necessarily implied by the fact that the last sentence of the regulation describes an income-to-pay-administration-expenses limitation as "[a]n example of a case in which this rule [of taking account of material limitations] *may* be applied," 26 CFR §20.2056(b)–4(a) (1996) (emphasis added). The word "may" implies, the argument goes, that in some circumstances under those same facts the rule would *not* be applied—namely (the argument posits), when the administration expenses are not "substantial." But the latter is not the only explanation for the "may." Assuming it connotes possibility rather than permissibility (as in, "My boss said that I may go to New York"), the contingency referred to could simply be the contingency that there be some income which is used to pay administration expenses.

The Tax Court (in analysis adopted verbatim by the Eleventh Circuit and seemingly adopted by the concurrence, *ante*, at 120–121) took yet a third approach to "material limitation," which I must pause to consider. The Tax Court relied on 26 CFR §25.2523(e)–1(f)(3) (1996), which, it stated, provides that so long as the spouse has substantial beneficial enjoyment of the income of a trust, the bequest will not be disqualified from the marital gift deduction by virtue of a provision allowing the trustee to allocate expenses to income, and the spouse will be deemed to have received all the income from the trust. The Tax Court concluded: "If Mrs. Hubert is treated as having received all of the income from the trust, there can be no material limitation on her right to receive income." 101 T. C. 314, 325–326 (1993). This reasoning fails for a number of reasons. First, §25.2523(e)–

1(f)(3) is a *qualification* provision; it does not purport to instruct on how to value the bequest. Second, and more fundamentally, the Tax Court's approach renders the "material limitation" phrase in § 20.2056(b)–4(a) superfluous. Under that view, a limitation is material only if it deprives the spouse of substantial beneficial enjoyment of the income. However, if the spouse does not have substantial beneficial enjoyment of the income, the trust does not qualify for the marital deduction and whether the limitation is material is irrelevant. That "material limitation" is not synonymous with "substantial beneficial enjoyment" is further suggested by the regulations governing the qualification of trusts for the marital estate tax deduction, which are virtually identical to the gift tax provisions relied upon by the Tax Court. See 26 CFR § 20.2056(b)–5(f) (1996). Section 20.2056(b)–5(f)(9) provides that a spouse will not be deemed to lack substantial beneficial enjoyment of the income merely because the spouse is not entitled to the income from the estate assets for the period reasonably required for administration of the estate. However, that section expressly provides: "As to the *valuation* of the property interest passing to the spouse in trust where the right to income is expressly postponed, see *§ 20.2056(b)–4*." *Ibid.* (emphasis added).

C

My understanding of § 20.2056(b)–4(a) is the only approach consistent with the statutory requirement that the marital deduction be limited to the value of property which passes to the spouse. See 26 U. S. C. § 2056(a). As the plurality and the concurrence acknowledge, one component of an asset's value is its discounted future income. See, *e. g.*, *Maass* v. *Higgins*, 312 U. S. 443, 448 (1941); 26 CFR § 20.2031–1(b) (1996). (This explains why postmortem income earned by the estate is not added to the date-of-death value in computing the gross estate: projected income was already included in the date-of-death value.) The plurality

and the concurrence also properly acknowledge that if residuary principal is used to pay administration expenses, then the marital deduction must be reduced commensurately because the property does not pass to the spouse. See *ante*, at 104 (plurality opinion); *ante*, at 112–113 (O'CONNOR, J., concurring in judgment); 26 U. S. C. § 2056(a). The plurality and the concurrence decline, however, to follow this reasoning to its logical conclusion. Since the future stream of income is one part of the value of the assets at the date of death, use of the income to pay administration expenses (which were not included in calculating the assets' values) in effect reduces the value of the interest that passes to the spouse. As succinctly explained by a respected tax commentator:

> "Beneficiaries are compensated for the delay in receiving possession by giving them the right to the income that is earned during administration. . . . [I]t is only the combination of the two rights—that to the income and that to possess the property in the future—that gives the beneficiary rights at death that are equal to value of the property at death. If the beneficiary does not get the income, what the beneficiary gets is less than the deathtime value of the property." Davenport, A *Street* Through *Hubert*'s Fog, 73 Tax Notes 1107, 1110 (1996).

If the beneficiary does not receive the income generated by the marital bequest principal, she in effect receives at the date of death less than the value of the property in the estate, in much the same way as she receives less than the value of the property in the estate when principal is used to pay expenses.

II

Besides giving the word "material" the erroneous meaning of something in excess of "substantial," the plurality's opinion adopts a unique methodology for determining materiality. Consistent with its apparent view that the estate tax provisions prohibit examination of any events following the

date of death, the plurality concludes that whether a limitation is material, and the extent of any reduction in the marital deduction, are determined solely on the basis of the information available at the date of death—a position espoused by neither litigant, none of the *amici*, and none of the courts to have considered this issue since it arose some 35 years ago. The plurality appears to have been misled by its view that the estate tax demands symmetry: Since only anticipated income is included in the gross estate, only anticipated administration expenses can reduce the marital deduction. See *ante*, at 102, 106–109. The provisions of the estate tax clearly reject such a notion of symmetry and do not sharply discriminate between date-of-death and postmortem events insofar as the allowance of deductions for claims against and obligations of the estate are concerned. In this very case, for example, in calculating the taxable estate the executors deducted $506,989 of actual administration expenses pursuant to 26 U. S. C. § 2053(a)(2). App. to Pet. for Cert. 3a. The regulations governing such deductions provide that "[t]he amounts deductible . . . as 'administration expenses' . . . are limited to such expenses as are *actually and necessarily*, incurred in the administration of the decedent's estate," 26 CFR § 20.2053–3(a) (1996) (emphasis added), and expressly prohibit taking a deduction "upon the basis of a vague or uncertain estimate," § 20.2053–1(b)(3). Since such common administration expenses as litigation costs will be impossible to ascertain with any exactitude as of the date of death, the plurality's approach flatly contradicts the provisions of these regulations.[2]

The marital deduction itself is calculated on the basis of actual, rather than anticipated, expenditures from the marital bequest. The regulations governing 26 U. S. C. § 2056(b)

[2] The plurality's reference to *Ithaca Trust Co.* v. *United States*, 279 U. S. 151 (1929), is unhelpful. That case holds that date-of-death valuation is applicable to bequeathed assets, not that it is applicable to claims and obligations that are to be satisfied out of those assets.

(4)(A), the provision requiring the marital deduction to be reduced to take account of the effect of estate and inheritance taxes, make it clear that the *actual* amounts of those taxes control. See 26 CFR §20.2056(b)–4(c) (1996). (With respect to the charitable deduction, the requirement that actual amounts be used is apparent on the face of the statute itself, see 26 U. S. C. §2055(c).) Moreover, the language of §2056(b)(4)(A) is quite similar to the language of the regulation at issue here, §20.2056(b)–4(a), suggesting that the latter, like the former, should be interpreted to require consideration of *actual*, rather than merely expected, administration expenses. Compare 26 U. S. C. §2056(b)(4)(A) ("[T]here shall be taken into account the *effect* which the tax imposed by section 2001, or any estate [tax], has on the *net* value to the surviving spouse of such interest" (emphasis added)) with 26 CFR §20.2056(b)–4(a) (1996) ("The marital deduction may be taken only with respect to the *net* value of any deductible interest which passed from the decedent to his surviving spouse . . . . In determining the value of the interest in property passing to the spouse account must be taken of *the effect of* any material limitations upon [the spouse's] right to income" (emphasis added)).

In short, the plurality's general theory concerning valuation is contradicted by provisions of both the Code and regulations. It is also plagued by a number of practical problems. Most prominently, the plurality's rule is simply unadministrable. It requires the Internal Revenue Service and courts to engage in a peculiar, *nunc pro tunc*, three-stage investigation into what would have been believed on the date of death of the decedent. This highly speculative inquiry begins, I presume, with an examination of the various possible administration expenditures multiplied by the likelihood that they would actually come into being (for example, estimating the chances that a will contest would develop). Next, one must calculate the expected future income from the bequest. Finally, one must determine if,

in light of the expected income, the anticipated expenses are such that a willing buyer would deem them to be a "material [*i. e.*, substantial] limitation" on the right to receive income.

Just how a court, presiding over a tax controversy many years after the decedent's death, is supposed to blind itself to later developed facts, and gauge the expected administration expenses and anticipated income just as they would have been gauged on the date of death, is a mystery to me. In most cases, it is nearly impossible to estimate administration expenses as of the date of death; much less is it feasible to reconstruct such an estimation five or six years later. The plurality's test creates tremendous uncertainty and will undoubtedly produce extensive litigation. We should be very reluctant to attribute to the Code or the Secretary's regulations the intention to require this sort of inherently difficult inquiry, especially when the key regulation is best read to require that account be taken of *actual* expenses.

The plurality's test also leads to rather peculiar results. One example should suffice: Assume a decedent leaves his entire $30 million estate in trust to his wife and that as of the date of death a hypothetical buyer estimates that the estate will generate administration expenses on the order of $5 million because the decedent's estranged son has publicly stated that he is going to wage a fight over the will. Further, assume that the will provides that either income or principal may be used to satisfy the estate's expenses. Finally, assume that a week after the decedent's death, mother and son put aside their differences and that the money passes to the spouse almost immediately with virtually no administration expenses. Under the plurality's test, since "only anticipated administration expenses payable from income, not the actual ones, affect the date-of-death value of the marital or charitable bequests," *ante,* at 108, the marital deduction will be limited to approximately $25 million, and, despite generating almost no income and having very few adminis-

tration expenses, the estate will be required to pay an estate tax on some $5 million even though the entire estate passed to the spouse. The plurality's test creates taxable estates where none exist. The proper result under § 2056(b)(4)(B) and § 20.2056(b)–4(a) is that the marital deduction is $30 million and the estate pays no estate tax.

I have one final concern with the plurality's approach: It effectively permits an estate to obtain a double deduction from tax for administration expenses, a tax windfall which Congress could never have intended. Title 26 U. S. C. § 642(g) provides that administration expenses, which are allowed as a deduction in computing the taxable estate of a decedent, see § 2053, may be deducted from income (provided they fall within an income tax deduction) if the estate files a statement with the Commissioner stating that such amounts have not been taken as deductions from the gross estate. Here, respondent elected to deduct some $1.5 million of its administration expenses on its fiduciary income tax returns and was prohibited from taking these expenses as a deduction from the gross estate. Notwithstanding § 642(g), however, the plurality's holding effectively permits respondent to deduct the $1.5 million of administration expenses on the estate tax return under the guise of a marital or charitable deduction. Of course, the estate could have avoided the estate tax by electing to deduct its administration expenses on its estate tax return, but then it would have had no income tax deduction; Congress gave estates a choice, not a road map to a double deduction. I recognize that nothing in § 642(g) *compels* the conclusion that the marital (or charitable) deduction must be reduced whenever an estate elects to deduct expenses from income. However, by enacting § 642 to prohibit a double deduction, Congress seemingly anticipated that if an estate elected to deduct administration expenses against income, its potential estate tax liability would increase commensurately. The plurality's holding today defeats this expectation.

III

The plurality today virtually ignores the controlling authority and instead decides this case based on a novel vision of the estate tax system. Because 26 CFR § 20.2056(b)–4(a) (1996), which is a reasonable interpretation of 26 U. S. C. § 2056(b)(4)(B), squarely controls this case and requires that the marital (and charitable) deductions be reduced whenever marital (or charitable) bequest income is used to pay administration expenses, I would reverse the judgment of the Eleventh Circuit. There is some dispute as to how exactly to calculate the reduction in the marital and charitable deductions. The dissenting judges in the Tax Court, on the one hand, contended that the marital and charitable deductions should be reduced by the date-of-death value of an annuity charged against the residuary interest that would be sufficient to pay the actual administration expenses charged to income. See 101 T. C., at 348–349 (Beghe, J., dissenting). The Commissioner, on the other hand, contends that the marital and charitable deductions must be reduced on a dollar-for-dollar basis, reasoning that this is the same way that all claims and obligations of the estate are treated. Since this dispute was not adequately briefed by the parties, nor passed upon by the Eleventh Circuit or the majority of judges in the Tax Court, I would remand the case to allow the lower courts to consider this issue in the first instance.

JUSTICE BREYER, dissenting.

I join JUSTICE SCALIA's dissent. This case turns on whether a payment of administration expenses out of income generated by estate assets constitutes a "material limitation" on the right to receive income from those assets. 26 CFR § 20.2056(b)–4(a) (1996). The Commissioner has long, and consistently, argued that such a payment does reduce the value of the marital deduction. See, *e. g.*, *Ballantine* v. *Tomlinson*, 293 F. 2d 311 (CA5 1961); *Alston* v. *United States*, 349 F. 2d 87 (CA5 1965); *Estate of Street* v. *Commis-*

sioner, 974 F. 2d 723 (CA6 1992); *Estate of Roney*, 33 T. C. 801 (1960), aff'd *per curiam*, 294 F. 2d 774 (CA5 1961); Reply Brief for Petitioner 15. JUSTICE SCALIA explains why the Commissioner's interpretation is consistent with the regulation's language and the statute it interprets. I add a brief explanation as to why I believe that it is consistent with basic statutory and regulatory tax law objectives as well.

The regulation, which speaks of the "net value" of what passes to the spouse, requires a realistic valuation of the interest left to the spouse as of the date of the decedent's death. Assume, for example, that a decedent leaves his entire estate to his wife in trust, with the proviso that the administrator pay 25% of the income earned by the estate assets during the period of administration to the decedent's son. Assume that the period of administration lasts several years and that the estate generates several million dollars in income during that time. On these assumptions, the son will have received an important asset (included in the estate's date-of-death value) that the surviving spouse did not receive, namely, the right to a portion of the estate's income over a period of several years. Were estate tax law to fail to take account of this fact (that the son, not the wife, received that asset), it would permit a valuable asset (the right to that income) to pass to the son without estate tax. But estate tax law does seem realistically to appraise the "net value" of what passes to the wife in such circumstances. See 26 CFR §§ 20.2056(b)–5(f)(9), 20.2056(b)–4(a) (1996); 4 A. Casner, Estate Planning § 13.11, pp. 138–139, and § 13.14.6, n. 18 (5th ed. 1988); cf. *Estate of Friedberg*, 63 TCM 3080 (1992), ¶ 92,310 P–H Memo TC (delay in payment of a specific bequest to a surviving spouse reduces its marital deduction value). And that being so, why would it not take account of the similar limitation on the right to income at issue here? The fact that the administrator uses estate income to pay administration expenses, rather than to make a bequest to the son, makes no difference from a marital deduction

perspective, for, as the regulations state, the marital deduction focuses upon the "net value" of the "interest which passed from the decedent to his surviving spouse." 26 CFR § 20.2056(b)–4(a) (1996); see *United States* v. *Stapf*, 375 U. S. 118, 125 (1963).

The Commissioner's position also treats economic equals as equal. The time when the administrator writes the relevant checks, and not the account to which he debits them, determines economic impact. Thus $100,000 in administration expenses incurred by a $1 million estate open for one year, paid by check on the year's last day will (assuming 10% simple interest and assuming away here-irrelevant complexities) leave $1 million for the spouse at year's end, whether the administrator pays the expenses out of estate principal or from income. On these same assumptions, a commitment to pay, say, $100,000 in administration expenses out of income will reduce the value of principal by an amount identical to the reduction in value that would flow from a commitment to pay a similar amount out of principal. This economic similarity argues for similar estate tax treatment.

I recognize that the statute permits estates to deduct administration and certain other expenses either from the estate tax or from the estate's income tax. 26 U. S. C. § 642(g); cf. *ante*, at 112–113 (O'CONNOR, J., concurring in judgment). But I do not read that statute as allowing a spouse to escape payment both of the estate tax (through a greater marital deduction) and also of income tax (through the deduction of the administration expenses from income). One can easily read the provision's language as simply granting the estate the advantage of whichever of the two tax rates is the more favorable, while continuing to require the estate to pay at least one of the two potential taxes. To read the "election" provision in this way makes of it a less dramatic departure from a Tax Code that otherwise sees what passes to heirs not as the full value of what the testator left, but, rather, as

that value minus a set of permitted deductions. 26 U. S. C. § 2053(a) (specifying deductions).

Although respondent argues that the Commissioner's interpretation will sometimes produce an unjustified "shrinking" of the marital deduction, I do not see how that is so. I concede that unfairness could occur were the Commissioner to readjust the marital deduction *every time* the administrator deducted from the estate's income tax *every* expense necessary to produce that income. But regulations guard against her doing so. Those regulations distinguish between (a) "expenditures . . . essential to the proper settlement of the estate," and (b) expenses "incurred for the individual benefit of the heirs, legatees, or devisees." 26 CFR § 20.2053–3(a) (1996). The former are "administration expenses"; the latter are not. Deducting expenses in the latter category from the estate's income tax should not affect the marital deduction; and, as long as that is so, the Commissioner's interpretation will simply permit estates to use their administration expense deductions to the best tax advantage. It will not lead to a marital deduction that to the spouse's overall disadvantage somehow shrinks, or disappears.

The Commissioner's insistence upon reducing the date-of-death value of the trust dollar for dollar poses a more serious problem. Payment of $100,000 in administration expenses from future income should reduce the date-of-death value of assets left to a wife in trust not by $100,000, but by $100,000 discounted to reflect the fact that the $100,000 will be paid in the future, earning interest in the meantime. (Assuming a 10% interest rate and payment one year after death, the reduction in value would be about $91,000, not $100,000.) Nonetheless, the Commissioner's practice of reducing the marital deduction dollar for dollar might reflect the simplifying assumption that discount calculations do not make a sufficiently large difference sufficiently often to warrant the administrative burden of authorizing them. Or it might reflect

the fact that when administration expenses are taken as a deduction against the estate tax, their value is not discounted. Were the Commissioner to defend the dollar-for-dollar position in some such way, her approach might prove reasonable. And this Court will defer to longstanding interpretations of the Code and Treasury Regulations, see *supra*, at 138–139, that reasonably "implement the congressional mandate." *United States* v. *Correll*, 389 U. S. 299, 307 (1967); see *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 488 (1979). Regardless, I would not decide this matter now, for it has not been argued to us.

Finally, although I agree with much that JUSTICE O'CONNOR has written, I cannot agree that the amount at issue—almost $1.5 million of administration expenses deducted from income—is insignificant hence immaterial; and I can find no concession to that effect in the courts below.

For these reasons and those set forth by JUSTICE SCALIA, I would reverse the Court of Appeals.

Syllabus

YOUNG ET AL. *v.* HARPER

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

No. 95–1598. Argued December 9, 1996—Decided March 18, 1997

Oklahoma's Preparole Conditional Supervision Program (preparole or Program) took effect whenever the state prisons became overcrowded and authorized the conditional release of prisoners before their sentences expired. The Pardon and Parole Board (Board) determined who could participate in it, and an inmate could be placed on preparole after serving 15% of his sentence. An inmate was eligible for parole only after one-third of his sentence had elapsed, and the Governor, based on the Board's recommendation, decided to grant parole. Program participants and parolees were released subject to similar constraints. Upon reviewing respondent's criminal record and prison conduct, the Board simultaneously recommended him for parole and released him under the Program. At that time, he had served 15 years of a life sentence. After he spent five apparently uneventful months outside the penitentiary, the Governor denied him parole, whereupon he was ordered to, and did, report back to prison. Despite his claim that his summary reincarceration deprived him of liberty without due process in violation of the Fourteenth Amendment, he was denied habeas relief by, successively, the state trial court, the Oklahoma Court of Criminal Appeals, and the Federal District Court. The Tenth Circuit reversed, holding that preparole was sufficiently like parole that a Program participant was entitled to the procedural protections set forth in *Morrissey* v. *Brewer*, 408 U. S. 471.

Held: The Program, as it existed when respondent was released, was equivalent to parole as understood in *Morrissey*. *Morrissey*'s description of the "nature of the interest of the parolee in his continued liberty" could just as easily have applied to respondent while he was on preparole. In compliance with state procedures, he was released from prison before the expiration of his sentence. See 408 U. S., at 477. He kept his own residence; he sought, obtained, and maintained a job; and he lived a life generally free of the incidents of imprisonment. See *id.*, at 481–482. Although he was not permitted to use alcohol, to incur other than educational debt, or to travel outside the county without permission, and he was required to report regularly to a parole officer, similar limits on a parolee's liberty did not in *Morrissey* render such liberty beyond procedural protection. *Id.*, at 478. Some of the factors as-

serted by petitioners to differentiate the Program from parole under *Meachum* v. *Fano*, 427 U. S. 215, 228—that preparole had the purpose of reducing prison overcrowding, and that a preparolee continued to serve his sentence and receive earned credits, remained within the custody of the Department of Corrections, and was aware that he could have been transferred to a higher security level if the Governor denied parole—do not, in fact, appear to distinguish the two programs at all. Other differences identified by petitioners—that participation in the Program was ordered by the Board, while the Governor conferred parole; that escaped preparolees could be prosecuted as though they had escaped from prison, while escaped parolees were subject only to parole revocation, and that a preparolee could not leave Oklahoma under any circumstances, while a parolee could leave the State with his parole officer's permission—serve only to set preparole apart from the specific terms of parole as it existed in Oklahoma, but not from the more general class of parole identified in *Morrissey*. The Program appears to have differed from parole in name alone. Pp. 147–153.

64 F. 3d 563, affirmed.

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

Sandra D. Howard, Assistant Attorney General of Oklahoma, argued the cause for petitioners. With her on the briefs were *W. A. Drew Edmondson*, Attorney General, and *Jennifer B. Miller*, Assistant Attorney General.

Margaret Winter, by appointment of the Court, 518 U. S. 1015, argued the cause for respondent. With her on the brief were *Marjorie Rifkin*, *Elizabeth Alexander*, *Micheal Salem*, and *Steven R. Shapiro*.*

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the narrow question whether a program employed by the State of Oklahoma to reduce the overcrowd-

*A brief of *amici curiae* urging reversal was filed for the State of Nevada et al. by *Frankie Sue Del Papa*, Attorney General of Nevada, and *Anne Cathcart*, Senior Deputy Attorney General, joined by the Attorneys General for their respective States as follows: *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Joseph P. Mazurek* of Montana, and *Dennis C. Vacco* of New York.

ing of its prisons was sufficiently like parole that a person in the program was entitled to the procedural protections set forth in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), before he could be removed from it. We hold that the program, as it appears to have been structured at the time respondent was placed on it, differed from parole in name alone, and affirm the decision of the Court of Appeals for the Tenth Circuit.

I

As pertinent to this case, Oklahoma operated two programs under which inmates were conditionally released from prison before the expiration of their sentences. One was parole, the other was the Preparole Conditional Supervision Program (preparole or Program). The Program was in effect whenever the population of the prison system exceeded 95% of its capacity. Okla. Stat., Tit. 57, § 365(A) (Supp. 1990). An inmate could be placed on preparole after serving 15% of his sentence, § 365(A)(2), and he was eligible for parole when one-third of his sentence had elapsed, § 332.7(A). The Pardon and Parole Board (Board) had a role in the placement of both parolees and preparolees. The Board itself determined who could participate in the Program, while the Governor, based on the Board's recommendation, decided whether a prisoner would be paroled. As we describe further in Part II, *infra*, participants in the Program were released subject to constraints similar to those imposed on parolees.

In October 1990, after reviewing respondent Ernest Eugene Harper's criminal record and conduct while incarcerated, the Pardon and Parole Board simultaneously recommended him for parole and released him under the Program. At that time, respondent had served 15 years of a life sentence for two murders. Before his release, respondent underwent orientation, during which he reviewed the "Rules and Conditions of Pre-Parole Conditional Supervision," see App. 7, and after which he executed a document

indicating that he "underst[ood] that being classified to community level depend[ed] upon [his] compliance with each of these expectations," *id.*, at 6. He spent five apparently uneventful months outside the penitentiary. Nonetheless, the Governor of Oklahoma denied respondent parole. On March 14, 1991, respondent was telephoned by his parole officer, informed of the Governor's decision, and told to report back to prison, which he did later that day.

Respondent filed a petition for a writ of habeas corpus in state court complaining that his summary return to prison had deprived him of liberty without due process. The state trial court denied relief and the Oklahoma Court of Criminal Appeals affirmed. 852 P. 2d 164 (1993). The Court of Criminal Appeals concluded that respondent's removal from the Program impinged only upon an interest in his "degree of confinement," an interest to which the procedural protections set out in *Morrissey* did not attach. 852 P. 2d, at 165. The court found "[d]ispositive of the issue" the fact that respondent "was not granted parole by the Governor of Oklahoma." *Ibid.* The court noted that the Board had adopted a procedure under which preparolees subsequently denied parole remained on the Program, and had their cases reviewed within 90 days of the denial for a determination whether they should continue on preparole. According to the court, "such a procedure gives an inmate sufficient notice when he is placed in the program that he may be removed from it when the governor exercises his discretion and declines to grant parole." *Ibid.*

Respondent fared no better in District Court on his petition for relief under 28 U. S. C. § 2254. But the Tenth Circuit reversed. 64 F. 3d 563 (1995). It determined that preparole "more closely resembles parole or probation than even the more permissive forms of institutional confinement" and that "[d]ue process therefore mandates that program participants receive at least the procedural protections described in *Morrissey.*" *Id.*, at 566–567. Petitioners sought certio-

rari on the limited question whether preparole "is more similar to parole or minimum security imprisonment; and, thus, whether continued participation in such program is protected by the Due Process Clause of the Fourteenth Amendment." Pet. for Cert. i. We granted certiorari, 517 U. S. 1219 (1996), and, because we find that preparole as it existed at the time of respondent's release was equivalent to parole as understood in *Morrissey*, we affirm.[1]

II

"The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey*, 408 U. S., at 477. In *Morrissey*, we described the "nature of the interest of the parolee in his continued liberty":

> "[H]e can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. . . . The parolee has relied on at

[1] Respondent contends that the petition for certiorari was filed out of time, and that we are thus without jurisdiction. We disagree. A timely filed petition for rehearing will toll the running of the 90-day period for filing a petition for certiorari until disposition of the rehearing petition. *Missouri* v. *Jenkins*, 495 U. S. 33, 46 (1990). The petition for certiorari was filed within 90 days of the denial of rehearing. Although the petition for rehearing was filed two days late, the Tenth Circuit granted petitioners "leave to file a late petition for rehearing and suggestion for rehearing en banc," as it had authority to do. See Fed. Rule App. Proc. 40(a). Moreover, after granting petitioners leave to file the petition for rehearing, the Tenth Circuit treated it as timely and no mandate issued until after the petition was denied. See Fed. Rule App. Proc. 41(a). In these circumstances, we are satisfied that both the petition for rehearing and the subsequent petition for certiorari were timely filed.

> least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." *Id.*, at 482.

This passage could just as easily have applied to respondent while he was on preparole. In compliance with state procedures, he was released from prison before the expiration of his sentence. He kept his own residence; he sought, obtained, and maintained a job; and he lived a life generally free of the incidents of imprisonment. To be sure, respondent's liberty was not unlimited. He was not permitted to use alcohol, to incur other than educational debt, or to travel outside the county without permission. App. 7–8. And he was required to report regularly to a parole officer. *Id.*, at 7. The liberty of a parolee is similarly limited, but that did not in *Morrissey,* 408 U. S., at 478, render such liberty beyond procedural protection.

Petitioners do not ask us to revisit *Morrissey;* they merely dispute that preparole falls within its compass. Our inquiry, they argue, should be controlled instead by *Meachum* v. *Fano,* 427 U. S. 215 (1976). There, we determined that the interest of a prisoner in avoiding an intrastate prison transfer was "too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all." *Id.*, at 228; see also *Sandin* v. *Conner,* 515 U. S. 472, 487 (1995). Petitioners contend that reincarceration of a preparolee was nothing more than a "transfe[r] to a higher degree of confinement" or a "classification to a more supervised prison environment," Brief for Petitioners 18, which, like transfers within the prison setting, involved no liberty interest.

In support of their argument that preparole was merely a lower security classification and not parole, petitioners identify several aspects of the Program said to render it different from parole. Some of these do not, in fact, appear to distinguish the two programs. Others serve only to set preparole

apart from the specific terms of parole as it existed in Oklahoma, but not from the more general class of parole identified in *Morrissey*. None of the differences—real or imagined—supports a view of the Program as having been anything other than parole as described in *Morrissey*.

We first take up the phantom differences. We are told at the outset that the purposes of preparole and parole were different. Preparole was intended "to reduce prison overcrowding," while parole was designed "to help reintegrate the inmate into society." Reply Brief for Petitioners 10. This alleged difference is less than it seems. Parole could also be employed to reduce prison overcrowding, see Okla. Stat., Tit. 57, §332.7(B) (Supp. 1990). And the Program's requirement that its participants work or attend school belies the notion that preparole was concerned only with moving bodies outside of teeming prison yards. In fact, in their brief below, petitioners described the Program as one in which the Department of Corrections "places eligible inmates into a community for the purpose of reintegration into society." Brief for Appellees in No. 95–5026 (CA10), p. 7, n. 2.

We are also told that "an inmate on the Program continues to serve his sentence and receives earned credits . . . , whereas a parolee is not serving his sentence and, if parole is revoked, the parolee is not entitled to deduct from his sentence time spent on parole." Reply Brief for Petitioners 11. Our review of the statute in effect when respondent was released, however, reveals that a parolee was "entitled to a deduction from his sentence for all time during which he has been or may be on parole" and that, even when parole was revoked, the Board had the discretion to credit time spent on parole against the sentence. Okla. Stat., Tit. 57, §350 (Supp. 1990).

Petitioners next argue that preparolees, unlike parolees, remained within the custody of the Department of Corrections. This is said to be evidenced by respondent's having

had to report to his parole officer weekly and to provide the officer with a weekly itinerary. Reply Brief for Petitioners 13. We are at a loss to explain why respondent's regular visits to his parole officer rendered him more "in custody" than a parolee, who was required to make similar visits. See App. to Brief for Respondent 28a. Likewise, the provision that preparolees "be subject to disciplinary proceedings as established by the Department of Corrections" in the event that they "violate any rule or condition during the period of community supervision," Okla. Stat., Tit. 57, § 365(E) (Supp. 1990), did not distinguish their "custodial" status from that of parolees, who were also subject to the department's custody in the event of a parole violation. See Reply Brief for Petitioners 13.

Petitioners, for their final nonexistent distinction, argue that, because a preparolee "is aware that he may be transferred to a higher security level if the Governor, through his discretionary power, denies parole," he does not enjoy the same liberty interest as a parolee. Brief for Petitioners 20. Preparole, contend petitioners, was thus akin to a furlough program, in which liberty was not conditioned on the participant's behavior but on extrinsic events. By this reasoning, respondent would have lacked the "implicit promise" that his liberty would continue so long as he complied with the conditions of his release, *Morrissey*, 408 U. S., at 482. Respondent concedes the reasoning of petitioners' argument as it relates to furloughs, but challenges the premise that his participation in the Program was conditioned on the Governor's decision regarding parole.

In support of their assertion that a preparolee knew that a denial of parole could result in reincarceration, petitioners rely—as they have throughout this litigation—on a procedure promulgated in August 1991, nearly five months *after* respondent was returned to prison. See Pardon and Parole Board Procedure No. 004–011 (1991), App. to Pet. for Cert.

56a.[2] The Court of Criminal Appeals also relied on this provision, but because it was not in effect when respondent was released, it has little relevance to this case.

Nor have we been presented with any other evidence to substantiate this asserted limitation on respondent's release. The closest petitioners come is to direct us to the orientation form reviewed with respondent upon his release. Item 9 of that orientation form says: "Reviewed options available in the event of parole denial." App. 5. Mindful of Procedure No. 004–011, as amended after respondent was reincarcerated, it is *possible* to read this item as indicating that respondent was told his participation in the Program could be terminated if parole were denied. But the mere possibility of respondent's having been so informed is insufficient to overcome his showing of the facially complete, written "Rules and Conditions of Pre-Parole Conditional Supervision," App. 7–9, which said nothing about the effect of a parole denial.

Counsel for the State also claims that at the time respondent was participating in the Program, preparolees were always reincarcerated if the Governor denied them parole. Tr. of Oral Arg. 8. In the absence of evidence to this effect—and the State points to none—this assertion is insufficient to rebut the seemingly complete rules and conditions of respondent's release. On the record before us, therefore, the premise of petitioners' argument—that respondent's continued participation was conditioned on extrinsic events—is illusory, and the analogy to furlough inapposite.[3]

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[2] The version of Procedure No. 004–011 in effect when respondent was placed on the Program was silent as to a parole denial's effect. See App. to Pet. for Cert. 43a–52a. The procedure was amended again in 1994, and now provides that "[i]nmates denied parole by the Governor while on [preparole] will remain on the program, unless returned to higher security by due process." App. to Brief for Respondent 38a.

[3] Equally illusory is the argument, which petitioners made for the first time in this Court, that the Board had authority to reimprison a preparolee for any reason or for no reason. The written rules and conditions

Petitioners do identify some actual differences between preparole and Oklahoma's version of parole, but these do no better at convincing us that preparole was different from parole as we understood it in *Morrissey*. As petitioners point out, participation in the Program was ordered by the Board, while the Governor conferred parole. In this regard, preparole was different from parole in Oklahoma; but it was no different from parole as we described it in *Morrissey*. See 408 U. S., at 477–478. In addition, preparolees who "escape[d]" from the Program could be prosecuted as though they had escaped from prison, see Okla. Stat., Tit. 57, § 365(F) (Supp. 1990), while it appears that parolees who "escaped" from parole were subject not to further prosecution, but to revocation of parole, see Reply Brief for Petitioners 11. That the punishment for failure to abide by one of the conditions of his liberty was potentially greater for a preparolee than for a parolee did not itself diminish that liberty. Petitioners also note that a preparolee could not leave Oklahoma under any circumstances, App. 7, while a parolee could leave Oklahoma with his parole officer's permission, App. to Brief for Respondent 27a. This minor difference in a released prisoner's ability to travel did not, we think, alter the fundamentally parole-like nature of the Program.[4]

III

We conclude that the Program, as it existed when respondent was released, was a kind of parole as we understood pa-

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of respondent's release identify no such absolute discretion, and petitioners point to nothing to support their contention.

[4] A comparison of the conditions of preparole of which respondent was informed, App. 7–9, and those of which a roughly contemporary parolee would have been informed, App. to Brief for Respondent 27a–30a, reveals that—except for the travel and "escape" provisions—the two sets of conditions were essentially identical.

role in *Morrissey*.[5] The judgment of the Tenth Circuit is therefore affirmed.

It is so ordered.

[5] The Program appears to be different now. We have no occasion to pass on whether the State's amendments to the Program, adopted since respondent was reincarcerated, render the liberty interest of a present-day preparolee different in kind from that of a parolee.

Syllabus

BENNETT ET AL. *v.* SPEAR ET AL.

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

No. 95–813. Argued November 13, 1996—Decided March 19, 1997

The Endangered Species Act of 1973 (ESA) requires the Secretary of the Interior to specify animal species that are "threatened" or "endangered" and designate their "critical habitat," 16 U. S. C. § 1533, and requires federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize a listed species or adversely modify its critical habitat, § 1536(a)(2). If an agency determines that a proposed action may adversely affect such a species, it must formally consult with the Fish and Wildlife Service, which must provide it with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat. § 1536(b)(3)(A). If the Service concludes that such action will result in jeopardy or adverse habitat modification, § 1536(a)(2), the Biological Opinion must outline any "reasonable and prudent alternatives" that the Service believes will avoid that consequence, § 1536(b)(3)(A). If the Biological Opinion concludes that no jeopardy or adverse habitat modification will result, or if it offers reasonable and prudent alternatives, the Service must issue a written statement (known as the Incidental Take Statement) specifying the terms and conditions under which an agency may take the species. § 1536(b)(4). After the Bureau of Reclamation notified the Service that the operation of the Klamath Irrigation Project might affect two endangered species of fish, the Service issued a Biological Opinion, concluding that the proposed long-term operation of the project was likely to jeopardize the species and identifying as a reasonable and prudent alternative the maintenance of minimum water levels on certain reservoirs. The Bureau notified the Service that it would operate the project in compliance with the Biological Opinion. Petitioners, irrigation districts receiving project water and operators of ranches in those districts, filed this action against respondents, the Service's director and regional directors and the Secretary, claiming that the jeopardy determination and imposition of minimum water levels violated § 1536, and constituted an implicit critical habitat determination for the species in violation of § 1533(b)(2)'s requirement that the designation's economic impact be considered. They also claimed that the actions violated the Administrative Procedure Act (APA), which prohibits agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law. 5 U. S. C. § 706(2)(A). The District Court dismissed the complaint, concluding that petitioners lacked standing because they asserted "recreational, aesthetic, and commercial interests" that did not fall within the zone of interests sought to be protected by the ESA. The Court of Appeals affirmed, holding that the "zone of interests" test—which requires that a plaintiff's grievance arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit—limits the class of persons who may obtain judicial review not only under the APA, but also under the ESA's citizen-suit provision, 16 U. S. C. § 1540(g); and that only plaintiffs alleging an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA.

Held: Petitioners have standing to seek judicial review of the Biological Opinion. Pp. 161–179.

(a) The Court of Appeals erred in concluding that petitioners lacked standing under the zone-of-interests test to bring their claims under the ESA's citizen-suit provision. The test is a prudential standing requirement of general application, see, *e. g.*, *Allen* v. *Wright*, 468 U. S. 737, 751, that applies unless expressly negated by Congress. By providing that "any person may commence a civil suit," § 1540(g)(1) negates the test. The quoted phrase is an authorization of remarkable breadth when compared with the language Congress ordinarily uses. The Court's readiness to take the term "any person" at face value is greatly augmented by the interrelated considerations that the legislation's overall subject matter is the environment and that § 1540(g)'s obvious purpose is to encourage enforcement by so-called "private attorneys general." See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 210–211. The "any person" formulation applies to all § 1540(g) causes of action, including actions against the Secretary asserting overenforcement of § 1533; there is no textual basis for saying that the formulation's expansion of standing requirements applies to environmentalists alone. Pp. 161–166.

(b) Three alternative grounds advanced by the Government—(1) that petitioners fail to meet Article III standing requirements; (2) that § 1540(g) does not authorize judicial review of the types of claims petitioners advanced; and (3) that judicial review is unavailable under the APA—do not support affirmance. Petitioners' complaint alleges an injury in fact that is fairly traceable to the Biological Opinion and redressable by a favorable judicial ruling and, thus, meets Article III standing requirements at this stage of the litigation. Their § 1533 claim is clearly reviewable under § 1540(g)(1)(C), which authorizes suit against the Secretary for an alleged failure to perform any nondiscretionary act or duty

Syllabus

under § 1533. Their § 1536 claims are obviously not reviewable under subsection (C), however. Nor are they reviewable under subsection (A), which authorizes injunctive actions against any person "who is alleged to be in violation" of the ESA or its regulations. Viewed in the context of the entire statute, subsection (A)'s reference to any ESA "violation" cannot be interpreted to include the Secretary's maladministration of the Act. The § 1536 claims are nonetheless reviewable under the APA. The ESA does not preclude such review, and the claim that petitioners will suffer economic harm because of an erroneous jeopardy determination is plainly within the zone of interests protected by § 1536, the statutory provision whose violation forms the basis for the complaint, see *Lujan* v. *National Wildlife Federation*, 497 U. S. 871. In addition, the Biological Opinion constitutes final agency action for APA purposes. It marks the consummation of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113. It is also an action from which "legal consequences will flow," *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 71, because the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the Bureau is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions. *Franklin* v. *Massachusetts*, 505 U. S. 788, and *Dalton* v. *Specter*, 511 U. S. 462, distinguished. Pp. 166–179.

63 F. 3d 915, reversed and remanded.

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

Gregory K. Wilkinson argued the cause for petitioners. With him on the briefs was *William F. Schroeder.*

Deputy Solicitor General Kneedler argued the cause for respondents. With him on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Schiffer*, *Malcolm L. Stewart*, *Anne S. Almy*, *Robert L. Klarquist*, and *Evelyn S. Ying.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, *Charles W. Getz IV*, Assistant Attorney General, and *Linus Masouredis*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Margery S. Bronster* of

JUSTICE SCALIA delivered the opinion of the Court.

This is a challenge to a biological opinion issued by the Fish and Wildlife Service in accordance with the Endangered Species Act of 1973 (ESA), 87 Stat. 884, as amended, 16 U. S. C. § 1531 *et seq.*, concerning the operation of the Klamath Irrigation Project by the Bureau of Reclamation, and the project's impact on two varieties of endangered fish. The question for decision is whether the petitioners, who have competing economic and other interests in Klamath Project water, have standing to seek judicial review of the biological opinion under the citizen-suit provision of the ESA, § 1540(g)(1), and the Administrative Procedure Act (APA), 80 Stat. 392, as amended, 5 U. S. C. § 701 *et seq.*

I

The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are "threatened" or "endangered" under specified criteria, and

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Hawaii, *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Betty D. Montgomery* of Ohio, *Jan Graham* of Utah, and *Darrell V. McGraw, Jr.*, of West Virginia; for the State of Texas by *Dan Morales*, Attorney General, *Jorge Vega*, First Assistant Attorney General, and *Javier P. Guajardo* and *Sam Goodhope*, Special Assistant Attorneys General; for the American Farm Bureau Federation et al. by *Timothy S. Bishop*, *Michael F. Rosenblum*, *John J. Rademacher*, *Richard L. Krause*, and *Nancy N. McDonough;* for the American Forest & Paper Association et al. by *Steven P. Quarles*, *Clifton S. Elgarten*, *Thomas R. Lundquist*, and *William R. Murray;* for the American Homeowners Foundation et al. by *Nancie G. Marzulla;* for the Association of California Water Agencies et al. by *Thomas W. Birmingham*, *Clifford W. Schulz*, *Janet K. Goldsmith*, and *William T. Chisum;* for the National Association of Home Builders of the United States et al. by *Glen Franklin Koontz*, *Thomas C. Jackson*, and *Nick Cammarota;* for the Nationwide Public Projects Coalition et al. by *Lawrence R. Liebesman* and *Kenneth S. Kamlet;* for the Pacific Legal Foundation et al. by *Robin L. Rivett* and *M. Reed Hopper;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Craig S. Harrison.*

to designate their "critical habitat." 16 U. S. C. § 1533. The ESA further requires each federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." § 1536(a)(2). If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service, as delegate of the Secretary, *ibid.;* 50 CFR § 402.14 (1995), after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat, 16 U. S. C. § 1536(b)(3)(A). If the Service concludes that the proposed action will "jeopardize the continued existence of any [listed] species or threatened species or result in the destruction or adverse modification of [critical habitat]," § 1536(a)(2), the Biological Opinion must outline any "reasonable and prudent alternatives" that the Service believes will avoid that consequence, § 1536(b)(3)(A). Additionally, if the Biological Opinion concludes that the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Service must provide the agency with a written statement (known as the Incidental Take Statement) specifying the "impact of such incidental taking on the species," any "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact," and setting forth "the terms and conditions . . . that must be complied with by the Federal agency . . . to implement [those measures]." § 1536(b)(4).

The Klamath Project, one of the oldest federal reclamation schemes, is a series of lakes, rivers, dams, and irrigation canals in northern California and southern Oregon. The project was undertaken by the Secretary of the Interior

pursuant to the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U. S. C. § 371 *et seq.*, and the Act of Feb. 9, 1905, 33 Stat. 714, and is administered by the Bureau of Reclamation, which is under the Secretary's jurisdiction. In 1992, the Bureau notified the Service that operation of the project might affect the Lost River Sucker *(Deltistes luxatus)* and Shortnose Sucker *(Chasmistes brevirostris)*, species of fish that were listed as endangered in 1988, see 53 Fed. Reg. 27130–27133 (1988). After formal consultation with the Bureau in accordance with 50 CFR § 402.14 (1995), the Service issued a Biological Opinion which concluded that the "'long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers.'" App. to Pet. for Cert. 3. The Biological Opinion identified "reasonable and prudent alternatives" the Service believed would avoid jeopardy, which included the maintenance of minimum water levels on Clear Lake and Gerber reservoirs. The Bureau later notified the Service that it intended to operate the project in compliance with the Biological Opinion.

Petitioners, two Oregon irrigation districts that receive Klamath Project water and the operators of two ranches within those districts, filed the present action against the director and regional director of the Service and the Secretary of the Interior. Neither the Bureau nor any of its officials is named as defendant. The complaint asserts that the Bureau "has been following essentially the same procedures for storing and releasing water from Clear Lake and Gerber reservoirs throughout the twentieth century," *id.*, at 36; that "[t]here is no scientifically or commercially available evidence indicating that the populations of endangered suckers in Clear Lake and Gerber reservoirs have declined, are declining, or will decline as a result" of the Bureau's operation of the Klamath Project, *id.*, at 37; that "[t]here is no commercially or scientifically available evidence indicating that the restrictions on lake levels imposed in the Biological Opinion

will have any beneficial effect on the . . . populations of suckers in Clear Lake and Gerber reservoirs," *id.*, at 39; and that the Bureau nonetheless "will abide by the restrictions imposed by the Biological Opinion," *id.*, at 32.

Petitioners' complaint included three claims for relief that are relevant here. The first and second claims allege that the Service's jeopardy determination with respect to Clear Lake and Gerber reservoirs, and the ensuing imposition of minimum water levels, violated § 7 of the ESA, 16 U. S. C. § 1536. The third claim is that the imposition of minimum water elevations constituted an implicit determination of critical habitat for the suckers, which violated § 4 of the ESA, 16 U. S. C. § 1533(b)(2), because it failed to take into consideration the designation's economic impact.[1] Each of the claims also states that the relevant action violated the APA's prohibition of agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A).

The complaint asserts that petitioners' use of the reservoirs and related waterways for "recreational, aesthetic and commercial purposes, as well as for their primary sources of irrigation water," will be "irreparably damaged" by the actions complained of, App. to Pet. for Cert. 34, and that the restrictions on water delivery "recommended" by the Biological Opinion "adversely affect plaintiffs by substantially reducing the quantity of available irrigation water," *id.*, at 40. In essence, petitioners claim a competing interest in the water the Biological Opinion declares necessary for the preservation of the suckers.

The District Court dismissed the complaint for lack of jurisdiction. It concluded that petitioners did not have

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[1] Petitioners also raised a fourth claim: that the *de facto* designation of critical habitat violated the National Environmental Policy Act of 1969, 83 Stat. 853, as amended, 42 U. S. C. § 4332(2)(C), because it was not preceded by preparation of an environmental assessment. The Court of Appeals' dismissal of that claim has not been challenged.

standing because their "recreational, aesthetic, and commercial interests . . . do not fall within the zone of interests sought to be protected by ESA." *Id.*, at 28. The Court of Appeals for the Ninth Circuit affirmed. *Bennett* v. *Plenert*, 63 F. 3d 915 (1995). It held that the "zone of interests" test limits the class of persons who may obtain judicial review not only under the APA, but also under the citizen-suit provision of the ESA, 16 U. S. C. § 1540(g), and that "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA," 63 F. 3d, at 919 (emphasis in original). We granted certiorari. 517 U. S. 1102 (1996).

In this Court, petitioners raise two questions: first, whether the prudential standing rule known as the "zone of interests" test applies to claims brought under the citizen-suit provision of the ESA; and second, if so, whether petitioners have standing under that test notwithstanding that the interests they seek to vindicate are economic rather than environmental. In this Court, the Government has made no effort to defend the reasoning of the Court of Appeals. Instead, it advances three alternative grounds for affirmance: (1) that petitioners fail to meet the standing requirements imposed by Article III of the Constitution; (2) that the ESA's citizen-suit provision does not authorize judicial review of the types of claims advanced by petitioners; and (3) that judicial review is unavailable under the APA because the Biological Opinion does not constitute final agency action.

II

We first turn to the question the Court of Appeals found dispositive: whether petitioners lack standing by virtue of the zone-of-interests test. Although petitioners contend that their claims lie both under the ESA and the APA, we look first at the ESA because it may permit petitioners to recover their litigation costs, see 16 U. S. C. § 1540(g)(4), and because the APA by its terms independently authorizes re-

view only when "there is no other adequate remedy in a court," 5 U. S. C. § 704.

The question of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975) (citing *Barrows* v. *Jackson*, 346 U. S. 249 (1953)). To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 471–472 (1982). In addition to the immutable requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Id.*, at 474–475. Like their constitutional counterparts, these "judicially self-imposed limits on the exercise of federal jurisdiction," *Allen* v. *Wright*, 468 U. S. 737, 751 (1984), are "founded in concern about the proper—and properly limited—role of the courts in a democratic society," *Warth*, *supra*, at 498; but unlike their constitutional counterparts, they can be modified or abrogated by Congress, see 422 U. S., at 501. Numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. See *Allen*, *supra*, at 751; *Valley Forge*, *supra*, at 474–475.

The "zone of interests" formulation was first employed in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970). There, certain data processors sought to invalidate a ruling by the Comptroller of the Currency authorizing national banks to sell data processing

services on the ground that it violated, *inter alia*, § 4 of the Bank Service Corporation Act of 1962, 76 Stat. 1132, which prohibited bank service corporations from engaging in "any activity other than the performance of bank services for banks." The Court of Appeals had held that the banks' data-processing competitors were without standing to challenge the alleged violation of § 4. In reversing, we stated the applicable prudential standing requirement to be "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, *supra*, at 153. *Data Processing*, and its companion case, *Barlow* v. *Collins*, 397 U. S. 159 (1970), applied the zone-of-interests test to suits under the APA, but later cases have applied it also in suits not involving review of federal administrative action, see *Dennis* v. *Higgins*, 498 U. S. 439, 449 (1991); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 320–321, n. 3 (1977); see also Note, A Defense of the "Zone of Interests" Standing Test, 1983 Duke L. J. 447, 455–456, and nn. 40–49 (1983) (cataloging lower court decisions), and have specifically listed it among other prudential standing requirements of general application, see, *e. g.*, *Allen*, *supra*, at 751; *Valley Forge*, *supra*, at 474–475. We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the "'generous review provisions'" of the APA may not do so for other purposes, *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 400, n. 16 (1987) (quoting *Data Processing*, *supra*, at 156).

Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated. See *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345–348 (1984). Cf. *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 532–533, and n. 28

(1983). The first question in the present case is whether the ESA's citizen-suit provision, set forth in pertinent part in the margin,[2] negates the zone-of-interests test (or, perhaps more accurately, expands the zone of interests). We think it does. The first operative portion of the provision says that "any person may commence a civil suit"—an authorization of remarkable breadth when compared with the language Con-

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[2] "(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

"(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

. . . . .

"(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

"The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. . . .

"(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

"(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

"(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

"(iii) if the United States has commenced and is diligently prosecuting a criminal action . . . to redress a violation of any such provision or regulation.

. . . . .

"(3)(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

"(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 16 U. S. C. § 1540(g).

gress ordinarily uses. Even in some other environmental statutes, Congress has used more restrictive formulations, such as "[any person] having an interest which is or may be adversely affected," 33 U. S. C. § 1365(g) (Clean Water Act); see also 30 U. S. C. § 1270(a) (Surface Mining Control and Reclamation Act) (same); "[a]ny person suffering legal wrong," 15 U. S. C. § 797(b)(5) (Energy Supply and Environmental Coordination Act); or "any person having a valid legal interest which is or may be adversely affected . . . whenever such action constitutes a case or controversy," 42 U. S. C. § 9124(a) (Ocean Thermal Energy Conversion Act). And in contexts other than the environment, Congress has often been even more restrictive. In statutes concerning unfair trade practices and other commercial matters, for example, it has authorized suit only by "[a]ny person injured in his business or property," 7 U. S. C. § 2305(c); see also 15 U. S. C. § 72 (same), or only by "competitors, customers, or subsequent purchasers," § 298(b).

Our readiness to take the term "any person" at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general"—evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later. Given these factors, we think the conclusion of expanded standing follows *a fortiori* from our decision in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972), which held that standing was expanded to the full extent permitted under Article III by § 810(a) of the Civil Rights Act of 1968, 82 Stat. 85, 42 U. S. C. § 3610(a) (1986 ed.), that authorized

"[a]ny person who claims to have been injured by a discriminatory housing practice" to sue for violations of the Act. There also we relied on textual evidence of a statutory scheme to rely on private litigation to ensure compliance with the Act. See 409 U. S., at 210–211. The statutory language here is even clearer, and the subject of the legislation makes the intent to permit enforcement by everyman even more plausible.

It is true that the plaintiffs here are seeking to prevent application of environmental restrictions rather than to implement them. But the "any person" formulation applies to all the causes of action authorized by § 1540(g)—not only to actions against private violators of environmental restrictions, and not only to actions against the Secretary asserting underenforcment under § 1533, but also to actions against the Secretary asserting overenforcement under § 1533. As we shall discuss below, the citizen-suit provision does favor environmentalists in that it covers all private violations of the ESA but not all failures of the Secretary to meet his administrative responsibilities; but there is no textual basis for saying that its expansion of standing requirements applies to environmentalists alone. The Court of Appeals therefore erred in concluding that petitioners lacked standing under the zone-of-interests test to bring their claims under the ESA's citizen-suit provision.

III

The Government advances several alternative grounds upon which it contends we may affirm the dismissal of petitioners' suit. Because the District Court and the Court of Appeals found the zone-of-interests ground to be dispositive, these alternative grounds were not reached below. A respondent is entitled, however, to defend the judgment on any ground supported by the record, see *Ponte* v. *Real*, 471 U. S. 491, 500 (1985); *Matsushita Elec. Industrial Co.* v. *Epstein*, 516 U. S. 367, 379, n. 5 (1996). The asserted grounds were

raised below, and have been fully briefed and argued here; we deem it an appropriate exercise of our discretion to consider them now rather than leave them for disposition on remand.

A

The Government's first contention is that petitioners' complaint fails to satisfy the standing requirements imposed by the "case" or "controversy" provision of Article III. This "irreducible constitutional minimum" of standing requires: (1) that the plaintiff have suffered an "injury in fact"—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Defenders of Wildlife,* 504 U. S., at 560–561.

Petitioners allege, among other things, that they currently receive irrigation water from Clear Lake, that the Bureau "will abide by the restrictions imposed by the Biological Opinion," App. to Pet. for Cert. 32, and that "[t]he restrictions on lake levels imposed in the Biological Opinion adversely affect [petitioners] by substantially reducing the quantity of available irrigation water," *id.*, at 40. The Government contends, first, that these allegations fail to satisfy the "injury in fact" element of Article III standing because they demonstrate only a diminution in the *aggregate* amount of available water, and do not necessarily establish (absent information concerning the Bureau's water allocation practices) that *petitioners* will receive less water. This contention overlooks, however, the proposition that each element of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden

of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, *supra*, at 561. Thus, while a plaintiff must "set forth" by affidavit or other evidence "specific facts" to survive a motion for summary judgment, Fed. Rule Civ. Proc. 56(e), and must ultimately support any contested facts with evidence adduced at trial, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Defenders of Wildlife*, *supra*, at 561 (quoting *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 889 (1990)). Given petitioners' allegation that the amount of available water will be reduced and that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners will be injured—for example, the Bureau's distribution of the reduction pro rata among its customers. The complaint alleges the requisite injury in fact.

The Government also contests compliance with the second and third Article III standing requirements, contending that any injury suffered by petitioners is neither "fairly traceable" to the Service's Biological Opinion, nor "redressable" by a favorable judicial ruling, because the "action agency" (the Bureau) retains ultimate responsibility for determining whether and how a proposed action shall go forward. See 50 CFR § 402.15(a) (1995) ("Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion"). "If petitioners have suffered injury," the Government contends, "the proximate cause of their harm is an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to petitioners, not the biological opinion itself." Brief for Respondents 22. This wrongly equates injury "fairly traceable" to the defendant with injury as to

which the defendant's actions are the very last step in the chain of causation. While, as we have said, it does not suffice if the injury complained of is "'th[e] result [of] the *independent* action of some third party not before the court,'" *Defenders of Wildlife*, *supra*, at 560–561 (emphasis added) (quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 41–42 (1976)), that does not exclude injury produced by determinative or coercive effect upon the action of someone else.

By the Government's own account, while the Service's Biological Opinion theoretically serves an "advisory function," 51 Fed. Reg. 19928 (1986), in reality it has a powerful coercive effect on the action agency:

> "The statutory scheme . . . presupposes that the biological opinion will play a central role in the action agency's decisionmaking process, and that it will typically be based on an administrative record that is fully adequate for the action agency's decision insofar as ESA issues are concerned. . . . [A] federal agency that chooses to deviate from the recommendations contained in a biological opinion bears the burden of 'articulat[ing] in its administrative record its reasons for disagreeing with the conclusions of a biological opinion.' 51 Fed. Reg. 19,956 (1986). In the government's experience, action agencies very rarely choose to engage in conduct that the Service has concluded is likely to jeopardize the continued existence of a listed species." Brief for Respondents 20–21.

What this concession omits to say, moreover, is that the action agency must not only articulate its reasons for disagreement (which ordinarily requires species and habitat investigations that are not within the action agency's expertise), but that it runs a substantial risk if its (inexpert) reasons turn out to be wrong. A Biological Opinion of the sort rendered here alters the legal regime to which the action agency is subject. When it "offers reasonable and prudent alterna-

tives" to the proposed action, a Biological Opinion must include a so-called "Incidental Take Statement"—a written statement specifying, among other things, those "measures that the [Service] considers necessary or appropriate to minimize [the action's impact on the affected species]" and the "terms and conditions . . . that must be complied with by the Federal agency . . . to implement [such] measures." 16 U. S. C. § 1536(b)(4). Any taking that is in compliance with these terms and conditions "shall not be considered to be a prohibited taking of the species concerned." § 1536(*o*)(2). Thus, the Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action agency to "take" the endangered or threatened species so long as it respects the Service's "terms and conditions." The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for "any person" who knowingly "takes" an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment. See §§ 1540(a) and (b) (authorizing civil fines of up to $25,000 per violation and criminal penalties of up to $50,000 and imprisonment for one year); see also *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 708 (1995) (upholding interpretation of the term "take" to include significant habitat degradation).

The Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions. The Incidental Take Statement at issue in the present case begins by instructing the reader that any taking of a listed species is prohibited unless "such taking is in compliance with this incidental take statement," and warning that "[t]he measures described below are nondiscretionary, and must be taken by [the Bureau]." App. 92–93. Given all of this, and given petitioners' allegation that the Bureau had, until issuance of the Biological Opinion, operated the Klamath Project in the same manner throughout the 20th century, it is not

difficult to conclude that petitioners have met their burden—which is relatively modest at this stage of the litigation—of alleging that their injury is "fairly traceable" to the Service's Biological Opinion and that it will "likely" be redressed—*i. e.*, the Bureau will not impose such water level restrictions—if the Biological Opinion is set aside.

B

Next, the Government contends that the ESA's citizen-suit provision does not authorize judicial review of petitioners' claims. The relevant portions of that provision provide that

> "any person may commence a civil suit on his own behalf—
>
> "(A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or
>
> . . . . .
>
> "(C) against the Secretary [of Commerce or the Interior] where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." 16 U. S. C. § 1540(g)(1).

The Government argues that judicial review is not available under subsection (A) because the Secretary is not "in violation" of the ESA, and under subsection (C) because the Secretary has not failed to perform any nondiscretionary duty under § 1533.

1

Turning first to subsection (C): that it covers only violations of § 1533 is clear and unambiguous. Petitioners' first and second claims, which assert that the Secretary has violated § 1536, are obviously not reviewable under this provision. However, as described above, the third claim alleges

that the Biological Opinion implicitly determines critical habitat without complying with the mandate of § 1533(b)(2) that the Secretary "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." This claim does come within subsection (C).

The Government seeks to avoid this result by appealing to the limitation in subsection (C) that the duty sought to be enforced not be "discretionary with the Secretary." But the terms of § 1533(b)(2) are plainly those of obligation rather than discretion: "The Secretary *shall* designate critical habitat, and make revisions thereto, . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." (Emphasis added.) It is true that this is followed by the statement that, except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available." *Ibid.* It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94–95 (1943). Since it is the omission of these required procedures that petitioners complain of, their § 1533 claim is reviewable under § 1540(g)(1)(C).

2

Having concluded that petitioners' § 1536 claims are not reviewable under subsection (C), we are left with the ques-

tion whether they are reviewable under subsection (A), which authorizes injunctive actions against any person "who is alleged to be in violation" of the ESA or its implementing regulations. The Government contends that the Secretary's conduct in implementing or enforcing the ESA is not a "violation" of the ESA within the meaning of this provision. In its view, § 1540(g)(1)(A) is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties—both private entities and Government agencies—but is not an alternative avenue for judicial review of the Secretary's implementation of the statute. We agree.

The opposite contention is simply incompatible with the existence of § 1540(g)(1)(C), which expressly authorizes suit against the Secretary, but only to compel him to perform a nondiscretionary duty under § 1533. That provision would be superfluous—and, worse still, its careful limitation to § 1533 would be nullified—if § 1540(g)(1)(A) permitted suit against the Secretary for *any* "violation" of the ESA. It is the "'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *United States* v. *Menasche*, 348 U. S. 528, 538 (1955) (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937), and *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883)). Application of that principle here clearly requires us to conclude that the term "violation" does not include the Secretary's failure to perform his duties as administrator of the ESA.

Moreover, the ESA uses the term "violation" elsewhere in contexts in which it is most unlikely to refer to failure by the Secretary or other federal officers and employees to perform their duties in administering the ESA. Section 1540(a), for example, authorizes the Secretary to impose substantial civil penalties on "[a]ny person who knowingly violates . . . any provision of [the ESA]," and entrusts the Secretary with the power to "remi[t] or mitigat[e]" any such penalty. We know

of no precedent for applying such a provision against those who administer (as opposed to those who are regulated by) a substantive law. Nor do we think it likely that the statute meant to subject the Secretary and his officers and employees to criminal liability under § 1540(b), which makes it a crime for "[a]ny person [to] knowingly violat[e] any provision of [the ESA]," or that § 1540(e)(3), which authorizes law enforcement personnel to "make arrests without a warrant for any violation of [the ESA]," was intended to authorize warrantless arrest of the Secretary or his delegates for "knowingly" failing to use the best scientific data available.

Finally, interpreting the term "violation" to include any errors on the part of the Secretary in administering the ESA would effect a wholesale abrogation of the APA's "final agency action" requirement. Any procedural default, even one that had not yet resulted in a final disposition of the matter at issue, would form the basis for a lawsuit. We are loathe to produce such an extraordinary regime without the clearest of statutory direction, which is hardly present here.

Viewed in the context of the entire statute, § 1540(g)(1)(A)'s reference to any "violation" of the ESA cannot be interpreted to include the Secretary's maladministration of the ESA. Petitioners' claims are not subject to judicial review under § 1540(g)(1)(A).

IV

The foregoing analysis establishes that the principal statute invoked by petitioners, the ESA, does authorize review of their § 1533 claim, but does not support their claims based upon the Secretary's alleged failure to comply with § 1536. To complete our task, we must therefore inquire whether these § 1536 claims may nonetheless be brought under the Administrative Procedure Act, which authorizes a court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706.

A

No one contends (and it would not be maintainable) that the causes of action against the Secretary set forth in the ESA's citizen-suit provision are exclusive, supplanting those provided by the APA. The APA, by its terms, provides a right to judicial review of all "final agency action for which there is no other adequate remedy in a court," § 704, and applies universally "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law," § 701(a). Nothing in the ESA's citizen-suit provision expressly precludes review under the APA, nor do we detect anything in the statutory scheme suggesting a purpose to do so. And any contention that the relevant provision of 16 U. S. C. § 1536(a)(2) is discretionary would fly in the face of its text, which uses the imperative "shall."

In determining whether the petitioners have standing under the zone-of-interests test to bring their APA claims, we look not to the terms of the ESA's citizen-suit provision, but to the substantive provisions of the ESA, the alleged violations of which serve as the gravamen of the complaint. See *National Wildlife Federation*, 497 U. S., at 886. The classic formulation of the zone-of-interests test is set forth in *Data Processing*, 397 U. S., at 153: "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." The Court of Appeals concluded that this test was not met here, since petitioners are neither directly regulated by the ESA nor seek to vindicate its overarching purpose of species preservation. That conclusion was error.

Whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law

upon which the plaintiff relies. It is difficult to understand how the Ninth Circuit could have failed to see this from our cases. In *Data Processing* itself, for example, we did not require that the plaintiffs' suit vindicate the overall purpose of the Bank Service Corporation Act of 1962, but found it sufficient that their commercial interest was sought to be protected by the anticompetition limitation contained in § 4 of the Act—the specific provision which they alleged had been violated. See *Data Processing*, *supra,* at 155–156. As we said with the utmost clarity in *National Wildlife Federation,* "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected *by the statutory provision whose violation forms the legal basis for his complaint.*" 497 U. S., at 883 (emphasis added). See also *Air Courier Conference* v. *Postal Workers*, 498 U. S. 517, 523–524 (1991) (same).

In the claims that we have found not to be covered by the ESA's citizen-suit provision, petitioners allege a violation of § 7 of the ESA, 16 U. S. C. § 1536, which requires, *inter alia,* that each agency "use the best scientific and commercial data available," § 1536(a)(2). Petitioners contend that the available scientific and commercial data show that the continued operation of the Klamath Project will not have a detrimental impact on the endangered suckers, that the imposition of minimum lake levels is not necessary to protect the fish, and that by issuing a Biological Opinion which makes unsubstantiated findings to the contrary the defendants have acted arbitrarily and in violation of § 1536(a)(2). The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation

produced by agency officials zealously but unintelligently pursuing their environmental objectives. That economic consequences are an explicit concern of the ESA is evidenced by § 1536(h), which provides exemption from § 1536(a)(2)'s no-jeopardy mandate where there are no reasonable and prudent alternatives to the agency action and the benefits of the agency action clearly outweigh the benefits of any alternatives. We believe the "best scientific and commercial data" provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations. Petitioners' claim that they are victims of such a mistake is plainly within the zone of interests that the provision protects.

B

The Government contends that petitioners may not obtain judicial review under the APA on the theory that the Biological Opinion does not constitute "final agency action," 5 U. S. C. § 704, because it does not conclusively determine the manner in which Klamath Project water will be allocated:

> "Whatever the practical likelihood that the [Bureau] would adopt the reasonable and prudent alternatives (including the higher lake levels) identified by the Service, the Bureau was not legally obligated to do so. Even if the Bureau decided to adopt the higher lake levels, moreover, nothing in the biological opinion would constrain the [Bureau's] discretion as to how the available water should be allocated among potential users." Brief for Respondents 33.

This confuses the question whether the Secretary's action is final with the separate question whether petitioners' harm is "fairly traceable" to the Secretary's action (a question we have already resolved against the Government, see Part III–A, *supra*). As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must

mark the "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113 (1948)—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 71 (1970). It is uncontested that the first requirement is met here; and the second is met because, as we have discussed above, the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions. In this crucial respect the present case is different from the cases upon which the Government relies, *Franklin* v. *Massachusetts*, 505 U. S. 788 (1992), and *Dalton* v. *Specter*, 511 U. S. 462 (1994). In the former case, the agency action in question was the Secretary of Commerce's presentation to the President of a report tabulating the results of the decennial census; our holding that this did not constitute "final agency action" was premised on the observation that the report carried "no direct consequences" and served "more like a tentative recommendation than a final and binding determination." 505 U. S., at 798. And in the latter case, the agency action in question was submission to the President of base closure recommendations by the Secretary of Defense and the Defense Base Closure and Realignment Commission; our holding that this was not "final agency action" followed from the fact that the recommendations were in no way binding on the President, who had absolute discretion to accept or reject them. 511 U. S., at 469–471. Unlike the reports in *Franklin* and *Dalton*, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.

* * *

The Court of Appeals erred in affirming the District Court's dismissal of petitioners' claims for lack of jurisdiction. Petitioners' complaint alleges facts sufficient to meet the requirements of Article III standing, and none of their ESA claims is precluded by the zone-of-interests test. Petitioners' § 1533 claim is reviewable under the ESA's citizen-suit provision, and petitioners' remaining claims are reviewable under the APA.

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

TURNER BROADCASTING SYSTEM, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 95–992. Argued October 7, 1996—Decided March 31, 1997

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act) require cable television systems to dedicate some of their channels to local broadcast television stations. In *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 *(Turner)*, this Court held these so-called "must-carry" provisions to be subject to intermediate First Amendment scrutiny under *United States* v. *O'Brien*, 391 U. S. 367, 377, whereby a content-neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. However, because a plurality considered the record as then developed insufficient to determine whether the provisions would in fact alleviate real harms in a direct and material way and would not burden substantially more speech than necessary, the Court remanded the case. After 18 months of additional factfinding, the District Court granted summary judgment for the Government and other appellees, concluding that the expanded record contained substantial evidence supporting Congress' predictive judgment that the must-carry provisions further important governmental interests in preserving cable carriage of local broadcast stations, and that the provisions are narrowly tailored to promote those interests. This direct appeal followed.

Held: The judgment is affirmed.

910 F. Supp. 734, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to all but a portion of Part II–A–1, concluding that the must-carry provisions are consistent with the First Amendment:

1. The record as it now stands supports Congress' predictive judgment that the must-carry provisions further important governmental interests. Pp. 189–196, 208–213.

(a) This Court decided in *Turner*, 512 U. S., at 662, and now reaffirms, that must-carry was designed to serve three interrelated, important governmental interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread

dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the television programming market. Protecting noncable households from loss of regular broadcasting service due to competition from cable systems is important because 40 percent of American households still rely on over-the-air signals for television programming. See, *e. g.*, *id.*, at 663. Moreover, there is a corresponding governmental purpose of the highest order in ensuring public access to a multiplicity of information sources, *ibid.*, and the Government has an interest in eliminating restraints on fair competition even when the regulated parties are engaged in protected expressive activity, *ibid.* The parties' attempts to recast these interests in forms more readily proved—*i. e.*, the Government's claim that the loss of even a few broadcast stations is critically important and appellants' assertions that Congress' interest in preserving broadcasting is not implicated absent a showing that the entire industry would fail, and that its interest in assuring a multiplicity of information sources extends only as far as preserving a minimum amount of broadcast service—are inconsistent with Congress' stated interests in enacting must-carry. Pp. 189–194.

(b) Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, courts must accord deference to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest the traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy be infringed. See, *e. g.*, *Turner*, 512 U. S., at 665 (plurality opinion). The courts' sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. *Id.*, at 666. Pp. 195–196.

(c) The must-carry provisions serve important governmental interests "in a direct and effective way." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 800. Congress could reasonably conclude from the substantial body of evidence before it that attaining cable carriage would be of increasing importance to ensuring broadcasters' economic viability, and that, absent legislative action, the free local off-air broadcast system was endangered. Such evidence amply indicated that: a broadcast station's viability depends to a material extent on its ability to secure cable carriage and thereby to increase its audience size and revenues; broadcast stations had fallen into bankruptcy, curtailed their operations, and suffered serious reductions in operating revenues as a result of adverse carriage decisions by cable systems; stations without carriage encountered severe difficulties obtaining financing for operations; and the potentially adverse impact of losing carriage was increasing as the growth of "clustering"—*i. e.*, the acquisition of as many cable systems in a given

market as possible—gave multiple system operators centralized control over more local markets. The reasonableness of the congressional judgment is confirmed by evidence assembled on remand that clearly establishes the importance of cable to broadcast stations and suggests that expansion in the cable industry was harming broadcasting. Although the record also contains evidence to support a contrary conclusion, the question is not whether Congress was correct as an objective matter, but whether the legislative conclusion was reasonable and supported by substantial evidence. *Turner*, *supra*, at 665–666. Where, as here, that standard is satisfied, summary judgment is appropriate regardless of whether the evidence is in conflict. Cf., *e. g.*, *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 523. Pp. 208–213.

2. The must-carry provisions do not burden substantially more speech than is necessary to further the governmental interests they promote. See, *e. g.*, *Turner*, *supra*, at 662. Appellants say must-carry's burden is great, but significant evidence adduced on remand indicates the vast majority of cable operators have not been affected in a significant manner. This includes evidence that: such operators have satisfied their must-carry obligations 87 percent of the time using previously unused channel capacity; 94.5 percent of the cable systems nationwide have not had to drop any programming; the remaining 5.5 percent have had to drop an average of only 1.22 services from their programming; operators nationwide carry 99.8 percent of the programming they carried before must-carry; and broadcast stations gained carriage on only 5,880 cable channels as a result of must-carry. The burden imposed by must-carry is congruent to the benefits it affords because, as appellants concede, most of those 5,880 stations would be dropped in its absence. Must-carry therefore is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable. Cf., *e. g.*, *Ward*, *supra*, at 799, n. 7. The possibilities that must-carry will prohibit dropping a broadcaster even if the cable operator has no anticompetitive motives or if the broadcaster would survive without cable access are not so prevalent that they render must-carry substantially overbroad. This Court's precedents establish that it will not invalidate the preferred remedial scheme merely because some alternative solution is marginally less intrusive on a speaker's First Amendment interests. In any event, a careful examination of each of appellants' suggestions—a more limited set of must-carry obligations modeled on those earlier used by the Federal Communications Commission; use of so-called A/B switches, giving consumers a choice of both cable and broadcast signals; a leased-access regime requiring cable oper-

ators to set aside channels for both broadcasters and cable programmers to use at a regulated price; subsidies for broadcasters; and a system of antitrust enforcement or an administrative complaint procedure—reveals that none of them is an adequate alternative to must-carry for achieving the Government's aims. Because it has received only the most glancing attention from the District Court and the parties, prudence dictates that this Court not reach appellants' challenge to the Cable Act provision requiring carriage of low power stations in certain circumstances. Pp. 213–225.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE SOUTER, and by JUSTICE BREYER in part, concluded in Part II–A–1 that the expanded record contains substantial evidence to support Congress' conclusion that enactment of must-carry was justified by a real threat to local broadcasting's economic health. The harm Congress feared was that broadcast stations dropped or denied cable carriage would be at a serious risk of financial difficulty, see *Turner*, 512 U. S., at 667, and would deteriorate to a substantial degree or fail altogether, *id.*, at 666. The evidence before Congress, as supplemented on remand, indicated, *inter alia*, that: cable operators had considerable and growing market power over local video programming markets in 1992; the industry's expanding horizontal and vertical integration would give cable operators increasing ability and incentive to drop, or reposition to less-viewed channels, independent local broadcast stations, which competed with the operators for audiences and advertisers; significant numbers of local broadcasters had already been dropped; and, absent must-carry, additional stations would be deleted, repositioned, or not carried in an attempt to capture their local advertising revenues to offset waning cable subscription growth. The reasonableness of Congress' predictive judgment is also supported by additional evidence, developed on remand, indicating that the percentage of local broadcasters not carried on the typical cable system is increasing, and that the growth of cable systems' market power has proceeded apace, better enabling them to sell their own reach to potential advertisers, and to deny broadcast competitors access to all or substantially all the cable homes in a market area. Pp. 196–208.

JUSTICE BREYER, although agreeing that the statute satisfies the intermediate scrutiny standard set forth in *United States* v. *O'Brien*, 391 U. S. 367, 377, rested his conclusion not upon the principal opinion's analysis of the statute's efforts to promote fair competition, but rather upon its discussion of the statute's other two objectives. He therefore joined the opinion of the Court except insofar as Part II–A–1 relies on an anticompetitive rationale. Pp. 225–229.

Syllabus

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court, except as to a portion of Part II–A–1. REHNQUIST, C. J., and STEVENS and SOUTER, JJ., joined that opinion in full, and BREYER, J., joined except insofar as Part II–A–1 relied on an anticompetitive rationale. STEVENS, J., filed a concurring opinion, *post*, p. 225. BREYER, J., filed an opinion concurring in part, *post*, p. 225. O'CONNOR, J., filed a dissenting opinion, in which SCALIA, THOMAS, and GINSBURG, JJ., joined, *post*, p. 229.

H. Bartow Farr III argued the cause for appellants. With him on the briefs for appellant National Cable Television Association, Inc., were *Richard G. Taranto*, *Daniel L. Brenner*, *Neal M. Goldberg*, and *Diane B. Burstein*. *Bruce D. Sokler*, *Christopher A. Holt*, *Bertram W. Carp*, *Bruce D. Collins*, *Neal S. Grabell*, and *James H. Johnson* filed a brief for appellants Turner Broadcasting System, Inc., et al. *Albert G. Lauber, Jr.*, *Peter Van N. Lockwood*, *Judith A. McHale*, and *Diane L. Hofbauer* filed a brief for appellants Discovery Communications, Inc., et al. *Robert D. Joffe*, *Stuart W. Gold*, *Rowan D. Wilson*, *Brian Conboy*, and *Theodore Case Whitehouse* filed a brief for appellant Time Warner Entertainment Co.

Acting Solicitor General Dellinger argued the cause for appellees. With him on the briefs for the federal appellees were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Wallace*, *Paul R. Q. Wolfson*, *Douglas N. Letter*, *Bruce G. Forrest*, *William E. Kennard*, and *Christopher J. Wright*. *Bruce J. Ennis, Jr.*, argued the cause and filed a brief for appellees National Association of Broadcasters et al. With him on the brief were *Kit A. Pierson*, *Donald B. Verrilli, Jr.*, *Thomas J. Perrelli*, *Jack N. Goodman*, *Benjamin F. P. Ivins*, *Kathleen M. Sullivan*, and *James J. Popham*. *Carolyn F. Corwin*, *Mark H. Lynch*, *Marilyn Mohrman-Gillis*, and *Paula A. Jameson* filed a brief for appellees Association of America's Public Television Stations et al. *Andrew Jay Schwartzman*, *Gigi B. Sohn*, and *Elliot M. Mincberg* filed a brief for appellees Consumer Federation of America et al.

JUSTICE KENNEDY delivered the opinion of the Court, except as to a portion of Part II–A–1.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable television systems to dedicate some of their channels to local broadcast television stations. Earlier in this case, we held the so-called "must-carry" provisions to be content-neutral restrictions on speech, subject to intermediate First Amendment scrutiny under *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). A plurality of the Court considered the record as then developed insufficient to determine whether the provisions were narrowly tailored to further important governmental interests, and we remanded the case to the District Court for the District of Columbia for additional factfinding.

On appeal from the District Court's grant of summary judgment for appellees, the case now presents the two questions left open during the first appeal: First, whether the record as it now stands supports Congress' predictive judgment that the must-carry provisions further important governmental interests; and second, whether the provisions do not burden substantially more speech than necessary to further those interests. We answer both questions in the affirmative, and conclude the must-carry provisions are consistent with the First Amendment.

I

An outline of the Cable Act, Congress' purposes in adopting it, and the facts of the case are set out in detail in our first opinion, see *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994) *(Turner)*, and a more abbreviated summary will suffice here. Soon after Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), Pub. L. 102–385, 106 Stat. 1460, appellants brought suit against the United States and the Federal Communications Commission (FCC) (both referred to here as the Government) in the United States District Court for

the District of Columbia, challenging the constitutionality of the must-carry provisions under the First Amendment. The three-judge District Court, in a divided opinion, granted summary judgment for the Government and intervenor-defendants. A majority of the court sustained the must-carry provisions under the intermediate standard of scrutiny set forth in *United States* v. *O'Brien*, *supra*, concluding the must-carry provisions were content-neutral "industry-specific antitrust and fair trade" legislation narrowly tailored to preserve local broadcasting beset by monopoly power in most cable systems, growing concentration in the cable industry, and concomitant risks of programming decisions driven by anticompetitive policies. 819 F. Supp. 32, 40, 45–47 (1993).

On appeal, we agreed with the District Court that must-carry does not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed," 512 U. S., at 643, but is a content-neutral regulation designed "to prevent cable operators from exploiting their economic power to the detriment of broadcasters," and "to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content." *Id.*, at 649. We held that, under the intermediate level of scrutiny applicable to content-neutral regulations, must-carry would be sustained if it were shown to further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not " 'burden substantially more speech than is necessary to further' " those interests. *Id.*, at 662 (quoting *Ward* v. *Rock Against Racism*, 491 U. S. 781, 799 (1989)). Although we "ha[d] no difficulty concluding" the interests must-carry was designed to serve were important in the abstract, 512 U. S., at 663, a four-Justice plurality concluded genuine issues of material fact remained regarding whether "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry,"

and whether must-carry "'burden[s] substantially more speech than is necessary to further the government's legitimate interests.'" *Id.*, at 665 (quoting *Ward*, *supra*, at 799). JUSTICE STEVENS would have found the statute valid on the record then before us; he agreed to remand the case to ensure a judgment of the Court, and the case was returned to the District Court for further proceedings. 512 U. S., at 673–674 (opinion concurring in part and concurring in judgment); *id.*, at 667–668.

The District Court oversaw another 18 months of factual development on remand "yielding a record of tens of thousands of pages" of evidence, *Turner Broadcasting* v. *FCC*, 910 F. Supp. 734, 755 (1995), comprised of materials acquired during Congress' three years of pre-enactment hearings, see *Turner*, *supra*, at 632–634, as well as additional expert submissions, sworn declarations and testimony, and industry documents obtained on remand. Upon consideration of the expanded record, a divided panel of the District Court again granted summary judgment to appellees. 910 F. Supp., at 751. The majority determined "Congress drew reasonable inferences" from substantial evidence before it to conclude that "in the absence of must-carry rules, 'significant' numbers of broadcast stations would be refused carriage." *Id.*, at 742. The court found Congress drew on studies and anecdotal evidence indicating "cable operators had already dropped, refused to carry, or adversely repositioned significant numbers of local broadcasters," and suggesting that in the vast majority of cases the broadcasters were not restored to carriage in their prior position. *Ibid.* Noting evidence in the record before Congress and the testimony of experts on remand, *id.*, at 743, the court decided the noncarriage problem would grow worse without must-carry because cable operators had refrained from dropping broadcast stations during Congress' investigation and the pendency of this litigation, *id.*, at 742–743, and possessed increasing incentives to use their growing economic power to

capture broadcasters' advertising revenues and promote affiliated cable programmers, *ibid.* The court concluded "substantial evidence before Congress" supported the predictive judgment that a local broadcaster denied carriage "would suffer financial harm and possible ruin." *Id.*, at 743–744. It cited evidence that adverse carriage actions decrease broadcasters' revenues by reducing audience levels, *id.*, at 744–745, and evidence that the invalidation of the FCC's prior must-carry regulations had contributed to declining growth in the broadcast industry, *id.*, at 744, and n. 34.

The court held must-carry to be narrowly tailored to promote the Government's legitimate interests. It found the effects of must-carry on cable operators to be minimal, noting evidence that: most cable systems had not been required to add any broadcast stations since the rules were adopted; only 1.2 percent of all cable channels had been devoted to broadcast stations added because of must-carry; and the burden was likely to diminish as channel capacity expanded in the future. *Id.*, at 746–747. The court proceeded to consider a number of alternatives to must-carry that appellants had proposed, including: a leased-access regime, under which cable operators would be required to set aside channels for both broadcasters and cable programmers to use at a regulated price; use of so-called A/B switches, giving consumers a choice of both cable and broadcast signals; a more limited set of must-carry obligations modeled on those earlier used by the FCC; and subsidies for broadcasters. The court rejected each in turn, concluding that "even assuming that [the alternatives] would be less burdensome" on cable operators' First Amendment interests, they "are not in any respect as effective in achieving the government's [interests]." *Id.*, at 747. Judge Jackson would have preferred a trial to summary judgment, but concurred in the judgment of the court. *Id.*, at 751–754.

Judge Williams dissented. His review of the record, and particularly evidence concerning growth in the number of

broadcasters, industry advertising revenues, and per-station profits during the period without must-carry, led him to conclude the broadcast industry as a whole would not be " 'seriously jeopardized' " in the absence of must-carry. *Id.*, at 759–767. Judge Williams acknowledged the Government had a legitimate interest in preventing anticompetitive behavior, and accepted that cable operators have incentives to discriminate against broadcasters in favor of their own vertically integrated cable programming. *Id.*, at 772, 775, 779. He would have granted summary judgment for appellants nonetheless on the ground must-carry is not narrowly tailored. In his view, must-carry constitutes a significant (though "diminish[ing]," *id.*, at 782) burden on cable operators' and programmers' rights, *ibid.*, and the Cable Act's must-carry provisions suppress more speech than necessary because "less-restrictive" alternatives exist to accomplish the Government's legitimate objectives, *id.*, at 782–789.

This direct appeal followed. See 47 U. S. C. § 555(c)(1); 28 U. S. C. § 1253. We noted probable jurisdiction, 516 U. S. 1110 (1996), and we now affirm.

II

We begin where the plurality ended in *Turner*, applying the standards for intermediate scrutiny enunciated in *O'Brien*. A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. *O'Brien*, 391 U. S., at 377. As noted in *Turner*, must-carry was designed to serve "three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." 512 U. S., at 662. We decided then, and now reaffirm, that each of those is an important

governmental interest. We have been most explicit in holding that " 'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest." *Id.*, at 663 (quoting *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 714 (1984)). Forty percent of American households continue to rely on over-the-air signals for television programming. Despite the growing importance of cable television and alternative technologies, " 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.' " *Turner*, *supra*, at 663 (quoting *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 177 (1968)). We have identified a corresponding "governmental purpose of the highest order" in ensuring public access to "a multiplicity of information sources," 512 U. S., at 663. And it is undisputed the Government has an interest in "eliminating restraints on fair competition . . . , even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Id.*, at 664.

On remand, and again before this Court, both sides have advanced new interpretations of these interests in an attempt to recast them in forms "more readily proven." 910 F. Supp., at 759 (Williams, J., dissenting). The Government downplays the importance of showing a risk to the broadcast industry as a whole and suggests the loss of even a few broadcast stations "is a matter of critical importance." Tr. of Oral Arg. 23. Taking the opposite approach, appellants argue Congress' interest in preserving broadcasting is not implicated unless it is shown the industry as a whole would fail without must-carry, Brief for Appellant National Cable Television Association, Inc. 18–23 (NCTA Brief); Brief for Appellant Time Warner Entertainment Co., L. P. 8–10 (Time Warner Brief), and suggest Congress' legitimate interest in "assuring that the public has access to a multiplicity of information sources," *Turner*, *supra*, at 663, extends only as far

as preserving "a minimum amount of television broadcast service," Time Warner Brief 28; NCTA Brief 40; Reply Brief for Appellant NCTA 12.

These alternative formulations are inconsistent with Congress' stated interests in enacting must-carry. The congressional findings do not reflect concern that, absent must-carry, "a few voices," Tr. of Oral Arg. 23, would be lost from the television marketplace. In explicit factual findings, Congress expressed clear concern that the "marked shift in market share from broadcast television to cable television services," Cable Act § 2(a)(13), note following 47 U. S. C. § 521, resulting from increasing market penetration by cable services, as well as the expanding horizontal concentration and vertical integration of cable operators, combined to give cable systems the incentive and ability to delete, reposition, or decline carriage to local broadcasters in an attempt to favor affiliated cable programmers. §§ 2a(2)–(5), (15). Congress predicted that "absent the reimposition of [must-carry], additional local broadcast signals will be deleted, repositioned, or not carried," § 2(a)(15); see also § 2(a)(8)(D), with the end result that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized," § 2(a)(16).

At the same time, Congress was under no illusion that there would be a complete disappearance of broadcast television nationwide in the absence of must-carry. Congress recognized broadcast programming (and network programming in particular) "remains the most popular programming on cable systems," § 2(a)(19). Indeed, reflecting the popularity and strength of some broadcasters, Congress included in the Cable Act a provision permitting broadcasters to charge cable systems for carriage of the broadcasters' signals. See § 6, codified at 47 U. S. C. § 325. Congress was concerned not that broadcast television would disappear in its entirety without must-carry, but that without it, "significant numbers of broadcast stations will be refused carriage on cable sys-

tems," and those "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." 512 U. S., at 666. See, *e. g.*, H. R. Rep. No. 102–628, p. 51 (1992) (House Report) (the absence of must-carry "will result in a weakening of the over-the-air television industry and a reduction in competition"); *id.*, at 64 ("The Committee wishes to make clear that its concerns are not limited to a situation where stations are dropped wholesale by large numbers of cable systems"); S. Rep. No. 102–92, p. 62 (1991) (Senate Report) ("Without congressional action, . . . the role of local television broadcasting in our system of communications will steadily decline . . ."); see also Brief for Federal Appellees in *Turner Broadcasting System, Inc.* v. *FCC*, No. 93–44, p. 32, n. 22 (the question is not whether "the evidence shows that broadcast television is likely to be totally eliminated" but "whether the broadcast services available to viewers [without cable] are likely to be reduced to a significant extent, because of either loss of some stations altogether or curtailment of services by others").

Nor do the congressional findings support appellants' suggestion that legitimate legislative goals would be satisfied by the preservation of a rump broadcasting industry providing a minimum of broadcast service to Americans without cable. We have noted that "'it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."'" *Turner*, 512 U. S., at 663–664 (quoting *United States* v. *Midwest Video Corp.*, 406 U. S. 649, 668, n. 27 (1972) (plurality opinion), in turn quoting *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945)); see also *FCC* v. *WNCN Listeners Guild*, 450 U. S. 582, 594 (1981). "'[I]ncreasing the number of outlets for community self-expression'" represents a "'long-established regulatory goa[l] in the field of television broadcasting.'" *United States* v. *Midwest Video Corp.*, *supra*, at

667–668 (plurality opinion). Consistent with this objective, the Cable Act's findings reflect a concern that congressional action was necessary to prevent "a reduction in the number of media voices available to consumers." § 2(a)(4). Congress identified a specific interest in "ensuring [the] continuation" of "the local origination of [broadcast] programming," § 2(a)(10), an interest consistent with its larger purpose of promoting multiple types of media, § 2(a)(6), and found must-carry necessary "to serve the goals" of the original Communications Act of 1934 of "providing a fair, efficient, and equitable distribution of broadcast services," § 2(a)(9). In short, Congress enacted must-carry to "preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television." 512 U. S., at 652.

Although Congress set no definite number of broadcast stations sufficient for these purposes, the Cable Act's requirement that all cable operators with more than 12 channels set aside one-third of their channel capacity for local broadcasters, § 4, 47 U. S. C. § 534(b)(1)(B), refutes the notion that Congress contemplated preserving only a bare minimum of stations. Congress' evident interest in "preserv[ing] the existing structure," 512 U. S., at 652, of the broadcast industry discloses a purpose to prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households. To the extent the appellants question the substantiality of the Government's interest in preserving something more than a minimum number of stations in each community, their position is meritless. It is for Congress to decide how much local broadcast television should be preserved for noncable households, and the validity of its determination "'does not turn on a judge's agreement with the responsible decisionmaker concerning' . . . the degree to which [the Government's] interests should be promoted." *Ward*, 491 U. S., at 800 (quoting *United States* v.

Albertini, 472 U. S. 675, 689 (1985)); accord, *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 299 (1984) ("We do not believe . . . [that] *United States* v. *O'Brien* . . . endow[s] the judiciary with the competence to judge how much protection of park lands is wise").

The dissent proceeds on the assumption that must-carry is designed solely to be (and can only be justified as) a measure to protect broadcasters from cable operators' anticompetitive behavior. See *post*, at 251, 253, 258. Federal policy, however, has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S., at 714; *United States* v. *Midwest Video Corp.*, *supra*, at 665 (plurality opinion) (FCC regulations "were . . . avowedly designed to guard broadcast services from being undermined by unregulated [cable] growth"); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 223–224 (1943) (" 'While many of the network practices raise serious questions under the antitrust laws, . . . [i]t is not [the FCC's] function to apply the antitrust laws as such' " (quoting FCC Report on Chain Broadcasting Regulations (1941))). Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression. See *Turner*, *supra*, at 663; *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U. S. 775, 783 (1978) (referring to studies "showing the dominant role of television stations . . . as sources of local news and other information"). Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable.

A

On our earlier review, we were constrained by the state of the record to assessing the importance of the Government's asserted interests when "viewed in the abstract," *Turner*, 512 U. S., at 663. The expanded record now permits us to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way. *Id.*, at 663–664. We turn first to the harm or risk which prompted Congress to act. The Government's assertion that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry," *id.*, at 664–665, rests on two component propositions: First, "significant numbers of broadcast stations will be refused carriage on cable systems" absent must-carry, *id.*, at 666. Second, "the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Ibid.*

In reviewing the constitutionality of a statute, "courts must accord substantial deference to the predictive judgments of Congress." *Id.*, at 665. Our sole obligation is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.*, at 666. As noted in the first appeal, substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency. See *id.*, at 666–667; *id.*, at 670, n. 1 (STEVENS, J., concurring in part and concurring in judgment). We owe Congress' findings deference in part because the institution "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. *Turner*, *supra*, at 665–666 (plurality opinion) (quoting *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 331, n. 12 (1985)); *Ward*, *supra*, at 800; *Rostker* v. *Goldberg*, 453 U. S. 57, 83 (1981) (courts must perform "appropriately deferential examination of *Congress'* evaluation of th[e] evi-

dence"); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 103 (1973). This principle has special significance in cases, like this one, involving congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change. Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise. See *FCC* v. *National Citizens Comm. for Broadcasting, supra*, at 814 ("[C]omplete factual support in the record for the [FCC's] judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency' "); *United States* v. *Midwest Video Corp.*, 406 U. S., at 674 (it was "beyond the competence of the Court of Appeals itself to assess the relative risks and benefits" of FCC policy, so long as that policy was based on findings supported by evidence). This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

1

We have no difficulty in finding a substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions. We examine first the evidence before Congress and then the further evidence presented to the District Court on remand to supplement the congressional determination.

As to the evidence before Congress, there was specific support for its conclusion that cable operators had considerable and growing market power over local video programming markets. Cable served at least 60 percent of American households in 1992, see Cable Act § 2(a)(3), and evidence indicated cable market penetration was projected to grow beyond 70 percent. See Cable TV Consumer Protection Act of 1991: Hearing on S. 12 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 102d Cong., 1st Sess., 259 (1991) (statement of Edward O. Fritts) (App. 1253); see also Defendants' Joint Statement of Evidence Before Congress ¶¶ 9, 10 (JSCR) (App. 1252–1253). As Congress noted, § 2(a)(2), cable operators possess a local monopoly over cable households. Only one percent of communities are served by more than one cable system, JSCR ¶¶ 31–40 (App. 1262–1266). Even in communities with two or more cable systems, in the typical case each system has a local monopoly over its subscribers. See Comments of NAB before the FCC on MM Docket No. 85–349, ¶ 47 (Apr. 25, 1986) (App. 26). Cable operators thus exercise "control over most (if not all) of the television programming that is channeled into the subscriber's home [and] can thus silence the voice of competing speakers with a mere flick of the switch." *Turner*, 512 U. S., at 656.

Evidence indicated the structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems, or reposition them to a less-viewed channel. Horizontal concentration was increasing as a small number of multiple system operators (MSO's) acquired large numbers of cable systems nationwide. § 2(a)(4). The trend was accelerating, giving the MSO's increasing market power. In 1985, the 10 largest MSO's controlled cable systems serving slightly less than 42 percent of all cable subscribers; by 1989, the figure was nearly 54 percent. JSCR ¶ 77 (App. 1282); Competitive

Problems in the Cable Television Industry, Hearing before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary, 101st Cong., 1st Sess., 74 (1990) (Hearing on Competitive Problems in the Cable Television Industry) (statement of Gene Kimmelman and Dr. Mark N. Cooper).

Vertical integration in the industry also was increasing. As Congress was aware, many MSO's owned or had affiliation agreements with cable programmers. § 2(a)(5); Senate Report, at 24–29. Evidence indicated that before 1984 cable operators had equity interests in 38 percent of cable programming networks. In the late 1980's, 64 percent of new cable programmers were held in vertical ownership. JSCR ¶ 197 (App. 1332–1333). Congress concluded that "vertical integration gives cable operators the incentive and ability to favor their affiliated programming services," § 2(a)(5); Senate Report, at 25, a conclusion that even Judge Williams' dissent conceded to be reasonable. See 910 F. Supp., at 775. Extensive testimony indicated that cable operators would have an incentive to drop local broadcasters and to favor affiliated programmers. See, *e. g.,* Competitive Issues in the Cable Television Industry: Hearing before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary, 100th Cong., 2d Sess., 546 (1988) (Hearing on Competitive Issues) (statement of Milton Maltz); Cable Television Regulation: Hearings on H. R. 1303 and H. R. 2546 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102d Cong., 1st Sess., 869–870, 878–879 (1992) (Hearings on Cable Television Regulation) (statement of James B. Hedlund); *id.,* at 752 (statement of Edward O. Fritts); *id.,* at 699 (statement of Gene Kimmelman); Cable Television Regulation (Part 2): Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong., 2d Sess., 261 (1990) (Hearings on Cable Television Regulation (Part 2)) (state-

ment of Robert G. Picard) (App. 1339–1341); see also JSCR ¶¶ 168–170, 278–280 (App. 1320–1321, 1370–1371).

Though the dissent criticizes our reliance on evidence provided to Congress by parties that are private appellees here, *post,* at 237–238, that argument displays a lack of regard for Congress' factfinding function. It is the nature of the legislative process to consider the submissions of the parties most affected by legislation. Appellants, too, sent representatives before Congress to try to persuade them of their side of the debate. See, *e. g.*, Hearing on Competitive Problems in the Cable Television Industry, at 228–241 (statement of James P. Mooney, president and CEO of appellant NCTA); Hearings on Cable Television Regulation, at 575–582 (statement of Decker S. Anstrom, executive vice president of appellant NCTA); Cable TV Consumer Protection Act of 1991: Hearing on S. 12 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 102d Cong., 1st Sess., 173–180 (1991) (statement of Ted Turner, president of appellant Turner Broadcasting System). After hearing years of testimony, and reviewing volumes of documentary evidence and studies offered by both sides, Congress concluded that the cable industry posed a threat to broadcast television. The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process. Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress' findings and conclusions, including its findings and conclusions with respect to conflicting economic predictions. See *supra,* at 195–196. Furthermore, much of the testimony, though offered by interested parties, was supported by verifiable information and citation to independent sources. See, *e. g.*, Hearings on Cable Television Regulation, at 869–870, 878–879 (statement of James B. Hedlund); *id.*, at 705, 707–708, 712 (statement of Gene Kimmelman).

The reasonableness of Congress' conclusion was borne out by the evidence on remand, which also reflected cable industry favoritism for integrated programmers. See, *e. g.*, Record, Defendants' Additional Evidence, Vol. VII.H, Exh. 170, p. 1749 (DAE) (cable industry memo stating: "All [of an MSO's] systems must launch Starz [an integrated programmer] 2/94. Word from corporate: if you don't have free channels . . . make one free"); Third Declaration of Tom Meek ¶ 44 (Third Meek Declaration) (App. 2071–2072); see also Declaration of Roger G. Noll ¶¶ 18–22 (Noll Declaration) (App. 1009–1013); Declaration of James Dertouzos ¶ 6a (Dertouzos Declaration) (App. 959).

In addition, evidence before Congress, supplemented on remand, indicated that cable systems would have incentives to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advertisers. Independent local broadcasters tend to be the closest substitutes for cable programs, because their programming tends to be similar, see JSCR ¶¶ 269, 274, 276 (App. 1367, 1368–1370), and because both primarily target the same type of advertiser: those interested in cheaper (and more frequent) ad spots than are typically available on network affiliates. Second Declaration of Tom Meek ¶ 32 (Second Meek Declaration) (App. 1866); Reply Declaration of James N. Dertouzos ¶ 26 (App. 2023); Carriage of Television Broadcast Signals by Cable Television Systems, Reply Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission, p. 19 (Nov. 26, 1991) (Reply Comment of FTC) (App. 176). The ability of broadcast stations to compete for advertising is greatly increased by cable carriage, which increases viewership substantially. See Second Meek Declaration ¶ 34 (App. 1866–1867). With expanded viewership, broadcast presents a more competitive medium for television advertising. Empirical studies indicate that cable-carried broadcasters so enhance competition for advertising that even modest increases in the numbers of

broadcast stations carried on cable are correlated with significant decreases in advertising revenue to cable systems. Dertouzos Declaration ¶¶ 20, 25–28 (App. 966, 969–971); see also Reply Comment of FTC, at 18 (App. 175). Empirical evidence also indicates that demand for premium cable services (such as pay-per-view) is reduced when a cable system carries more independent broadcasters. Hearing on Competitive Problems in the Cable Television Industry, at 323 (statement of Michael O. Wirth). Thus, operators stand to benefit by dropping broadcast stations. Dertouzos Declaration ¶ 6b (App. 959).

Cable systems also have more systemic reasons for seeking to disadvantage broadcast stations: Simply stated, cable has little interest in assisting, through carriage, a competing medium of communication. As one cable-industry executive put it, "'our job is to promote cable television, not broadcast television.'" Hearing on Competitive Issues, at 658 (quoting Multichannel News, Channel Realignments: United Cable Eyes Plan to Bump Network Affils to Upper Channels, Nov. 3, 1986, p. 39); see also Hearing on Competitive Issues, at 661 ("'Shouldn't we give more . . . shelf space to cable? Why have people trained to view UHF?'") (vice president of operations at Comcast, an MSO, quoted in Multichannel News, Cable Operators begin to Shuffle Channel Lineups, Sept. 8, 1986, p. 38). The incentive to subscribe to cable is lower in markets with many over-the-air viewing options. See JSCR ¶ 275 (App. 1369); Dertouzos Declaration ¶¶ 27, 32 (App. 970, 972). Evidence adduced on remand indicated cable systems have little incentive to carry, and a significant incentive to drop, broadcast stations that will only be strengthened by access to the 60 percent of the television market that cable typically controls. Dertouzos Declaration ¶¶ 29, 35 (App. 971, 973); Noll Declaration ¶ 43 (App. 1029). Congress could therefore reasonably conclude that cable systems would drop broadcasters in favor of programmers—even unaffiliated ones—less likely to compete with them for

audience and advertisers. The cap on carriage of affiliates included in the Cable Act, 47 U. S. C. § 533(f)(1)(B); 47 CFR § 76.504 (1995), and relied on by the dissent, *post,* at 238, 252, is of limited utility in protecting broadcasters.

The dissent contends Congress could not reasonably conclude cable systems would engage in such predation because cable operators, whose primary source of revenue is subscriptions, would not risk dropping a widely viewed broadcast station in order to capture advertising revenues. *Post,* at 239. However, if viewers are faced with the choice of sacrificing a handful of broadcast stations to gain access to dozens of cable channels (plus network affiliates), it is likely they would still subscribe to cable even if they would prefer the dropped television stations to the cable programming that replaced them. Substantial evidence introduced on remand bears this out: With the exception of a handful of very popular broadcast stations (typically network affiliates), a cable system's choice between carrying a cable programmer or broadcast station has little or no effect on cable subscriptions, and subscribership thus typically does not bear on carriage decisions. Noll Declaration ¶ 29 (App. 1018–1019); Rebuttal Declaration of Roger G. Noll ¶ 20 (App. 1798); Reply Declaration of Roger G. Noll ¶¶ 3–4, and n. 3 (App. 2003–2004); see also Declaration of John R. Haring ¶ 37 (Haring Declaration) (App. 1106).

It was more than a theoretical possibility in 1992 that cable operators would take actions adverse to local broadcasters; indeed, significant numbers of broadcasters had already been dropped. The record before Congress contained extensive anecdotal evidence about scores of adverse carriage decisions against broadcast stations. See JSCR ¶¶ 291–467, 664 (App. 1376–1489, 1579). Congress considered an FCC-sponsored study detailing cable system carriage practices in the wake of decisions by the United States Court of Appeals for the District of Columbia Circuit striking down prior must-carry regulations. See *Quincy Cable TV, Inc.* v. *FCC,* 768 F. 2d

1434 (1985), cert. denied, 476 U. S. 1169 (1986); *Century Communications Corp.* v. *FCC*, 835 F. 2d 292 (1987), cert. denied, 486 U. S. 1032 (1988). It indicated that in 1988, 280 out of 912 responding broadcast stations had been dropped or denied carriage in 1,533 instances. App. 47. Even assuming that every station dropped or denied coverage responded to the survey, it would indicate that nearly a quarter (21 percent) of the approximately 1,356 broadcast stations then in existence, *id.*, at 40, had been denied carriage. The same study reported 869 of 4,303 reporting cable systems had denied carriage to 704 broadcast stations in 1,820 instances, *id.*, at 48, and 279 of those stations had qualified for carriage under the prior must-carry rules, *id.*, at 49. A contemporaneous study of public television stations indicated that in the vast majority of cases, dropped stations were not restored to the cable service. Record, CR Vol. I.Z, Exh. 140, pp. CR 15297–15298, 15306–15307.

Substantial evidence demonstrated that absent must-carry the already "serious," Senate Report, at 43, problem of noncarriage would grow worse because "additional local broadcast signals will be deleted, repositioned, or not carried," § 2(a)(15). The record included anecdotal evidence showing the cable industry was acting with restraint in dropping broadcast stations in an effort to discourage reregulation. See Hearings on Cable Television Regulation, at 900, n. 81 (statement of James B. Hedlund); Hearings on Cable Television Regulation (Part 2), at 242–243 (statement of James P. Mooney) (App. 1519); JSCR ¶¶ 524–534 (App. 1515–1519). There was also substantial evidence that advertising revenue would be of increasing importance to cable operators as subscribership growth began to flatten, providing a steady, increasing incentive to deny carriage to local broadcasters in an effort to capture their advertising revenue. *Id.*, ¶¶ 124–142, 154–166 (App. 1301–1308, 1313–1319). A contemporaneous FCC report noted that "[c]able operators' incentive to deny carriage . . . appears to be particularly great as against

local broadcasters." *Id.*, ¶ 155 (App. 1313). FCC Commissioner James Quello warned Congress that the carriage problems "occurring today are just the 'tip of the iceberg.' These activities come at a time when the cable industry is just beginning to recognize the importance of local advertising." Cable Television, Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 2d Sess., 322 (1988) (App. 1515). Quello continued: "As [cable] systems mature and penetration levels off, systems will turn increasingly to advertising for revenues. The incentive to deny carriage to local stations is a logical, rational and, without must carry, a legal business strategy." App. A to Testimony of James B. Hedlund before the Subcommittee on Telecommunications and Finance of the House Committee on Energy & Commerce 18 (1990) (statement of James H. Quello) (App. 1315). The FCC advised Congress the "diversity in broadcast television service . . . will be jeopardized if this situation continues unredressed." *In re Competition, Rate Regulation, and Provision of Cable Television Service*, 5 FCC Rcd 4962, 5040, ¶ 149 (1990).

Additional evidence developed on remand supports the reasonableness of Congress' predictive judgment. Approximately 11 percent of local broadcasters were not carried on the typical cable system in 1989. See Reply Comment of FTC, at 9–10 (App. 168–169). The figure had grown to even more significant proportions by 1992. According to one of appellants' own experts, between 19 and 31 percent of all local broadcast stations, including network affiliates, were not carried by the typical cable system. See Declaration of Stanley Besen, Exhs. C–2, C–3 (App. 907–908). Based on the same data, another expert concluded that 47 percent of local independent commercial stations, and 36 percent of noncommercial stations, were not carried by the typical cable system. The rate of noncarriage was even higher for new stations. Third Meek Declaration ¶ 4 (App. 2054). Appel-

lees introduced evidence drawn from an empirical study concluding the 1988 FCC survey substantially underestimated the actual number of drops (Declaration of Tom Meek ¶¶ 5, 25, 36 (Meek Declaration) (App. 619, 625, 626)), and the noncarriage problem grew steadily worse during the period without must-carry. By the time the Cable Act was passed, 1,261 broadcast stations had been dropped for at least one year, in a total of 7,945 incidents. *Id.*, ¶¶ 12, 15 (App. 621, 622).

The dissent cites evidence indicating that many dropped broadcasters were stations few viewers watch, *post*, at 242, and it suggests that must-carry thwarts noncable viewers' preferences, *ibid.* Undoubtedly, viewers without cable—the immediate, though not sole, beneficiaries of efforts to preserve broadcast television—would have a strong preference for carriage of any broadcast program over any cable program, for the simple reason that it helps to preserve a medium to which they have access. The methodological flaws in the cited evidence are of concern. See *post*, at 243. Even aside from that, the evidence overlooks that the broadcasters added by must-carry had ratings greater than or equal to the cable programs they replaced. Second Meek Declaration ¶ 23 (App. 1863) (ratings of broadcasters added by must-carry "are generally higher than that achieved . . . by their equivalent cable counterparts"); Meek Declaration ¶ 21, at 11–12 (Record, DAE Vol. II.A, Exh. 2); see also Hearings on Cable Television Regulation, at 880 (statement of James Hedlund) ("[I]n virtually every instance, the local [broadcast] stations shifted are more popular . . . than the cable program services that replace them"); JSCR ¶¶ 497–510 (App. 1505–1509) (stations dropped before must-carry generally more popular than cable services that replaced them). (Indeed, in the vast majority of cases, cable systems were able to fulfill their must-carry obligations using spare channels, and did not displace cable programmers. See Report to Counsel for National Cable Television Association Carriage of Must-

Carry TV Broadcast Stations, Table II–4 (Apr. 1995) (App. 678).) On average, even the lowest rated station added pursuant to must-carry had ratings better than or equal to at least nine basic cable program services carried on the system. Third Meek Declaration ¶ 20, and n. 5 (App. 2061). If cable systems refused to carry certain local broadcast stations because of their subscribers' preferences for the cable services carried in their place, one would expect that all cable programming services would have ratings exceeding those of broadcasters not carried. That is simply not the case.

The evidence on remand also indicated that the growth of cable systems' market power proceeded apace. The trend toward greater horizontal concentration continued, driven by "[e]nhanced growth prospects for advertising sales." Paul Kagan Assocs., Inc., Cable TV Advertising 1 (Sept. 30, 1994) (App. 301). By 1994, the 10 largest MSO's controlled 63 percent of cable systems, Notice of Inquiry, *In re Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 10 FCC Rcd 7805, 7819–7820, ¶ 79 (1995), a figure projected to have risen to 85 percent by the end of 1996. DAE Vol. VII.D, Exh. 80, at 1 (Turner Broadcasting memo); Noll Declaration ¶ 26 (App. 1017). MSO's began to gain control of as many cable systems in a given market as they could, in a trend known as "clustering." JSCR ¶¶ 150–153 (App. 1311–1313). Cable systems looked increasingly to advertising (and especially local advertising) for revenue growth, see, *e. g.*, Paul Kagan Associates, Inc., Cable TV Advertising 1 (July 28, 1993) (App. 251); 1 R. Bilotti, D. Hansen, & R. MacDonald, The Cable Television Industry 94–97 (Mar. 8, 1993) (DAE Vol. VII.K, Exh. 232, at 94–97) ("Local advertising revenue is an exceptional incremental revenue opportunity for the cable television industry"); Memo from Arts & Entertainment Network, dated Oct. 26, 1992, p. 2 (DAE Vol. VII.K, Exh. 235) (discussing "huge growth on the horizon" for spot adver-

tising revenue), and cable systems had increasing incentives to drop local broadcasters in favor of cable programmers (whether affiliated or not). See Noll Declaration ¶¶ 29–31 (App. 1018–1020). The vertical integration of the cable industry also continued, so by 1994, MSO's serving about 70 percent of the Nation's cable subscribers held equity interests in cable programmers. See *In re Implementation of Section 19 of Cable Television Protection and Competition Act of 1992, First Report*, 9 FCC Rcd 7442, 7526, ¶ 167, and nn. 455, 457 (1994); *id.*, App. G, Tables 9–10; Top 100 MSO's as of October 1, 1994 (DAE Vol. VII.K, Exh. 266); see also JSCR ¶¶ 199, 204 (App. 1334, 1336). The FTC study the dissent cites, *post*, at 242, takes a skeptical view of the potential for cable systems to engage in anticompetitive behavior, but concedes the risk of anticompetitive carriage denials is "most plausible" when "the cable system's franchise area is large relative to the local area served by the affected broadcast station," Reply Comment of FTC, at 20 (App. 177), and when "a system's penetration rate is both high and relatively unresponsive to the system's carriage decisions," *id.*, at 18 (App. 175). That describes "precisely what is happening" as large cable operators expand their control over individual markets through clustering. Second Meek Declaration ¶ 35 (App. 1867). As they do so, they are better able to sell their own reach to potential advertisers, and to limit the access of broadcast competitors by denying them access to all or substantially all the cable homes in the market area. *Ibid.*; accord, Noll Declaration ¶ 24 (App. 1015).

This is not a case in which we are called upon to give our best judgment as to the likely economic consequences of certain financial arrangements or business structures, or to assess competing economic theories and predictive judgments, as we would in a case arising, say, under the antitrust laws. "Statutes frequently require courts to make policy judgments. The Sherman Act, for example, requires courts to delve deeply into the theory of economic organization."

See *Holder* v. *Hall,* 512 U. S. 874, 966 (1994) (separate opinion of STEVENS, J.). The issue before us is whether, given conflicting views of the probable development of the television industry, Congress had substantial evidence for making the judgment that it did. We need not put our imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment.

2

The harm Congress feared was that stations dropped or denied carriage would be at a "serious risk of financial difficulty," 512 U. S., at 667, and would "deteriorate to a substantial degree or fail altogether," *id.*, at 666. Congress had before it substantial evidence to support its conclusion. Congress was advised the viability of a broadcast station depends to a material extent on its ability to secure cable carriage. JSCR ¶¶ 597–617, 667–670, 673 (App. 1544–1553, 1580–1581, 1582–1583). One broadcast industry executive explained it this way:

> "Simply put, a television station's audience size directly translates into revenue—large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat." Hearing on Competitive Issues, at 526–527 (statement of Gary Chapman) (App. 1600).

See also JSCR ¶¶ 589–591 (App. 1542–1543); *id.*, ¶¶ 625–633, 636, 638–640 (App. 1555–1563) (repositioning). Empirical research in the record before Congress confirmed the "'direct correlation [between] size in audience and station [ad-

vertising] revenues,'" *id.*, ¶ 591 (App. 1543), and that viewership was in turn heavily dependent on cable carriage, see *id.*, ¶¶ 589–596 (App. 1542–1544).

Considerable evidence, consisting of statements compiled from dozens of broadcasters who testified before Congress and the FCC, confirmed that broadcast stations had fallen into bankruptcy, see *id.*, ¶¶ 659, 661, 669, 671–672, 676, 681 (App. 1576, 1578, 1581–1582, 1584, 1587), curtailed their broadcast operations, see *id.*, ¶¶ 589, 692, 695, 697, 703–704 (App. 1542, 1591–1600), and suffered serious reductions in operating revenues as a result of adverse carriage decisions by cable systems, see *id.*, ¶¶ 618–620, 622–623 (App. 1553–1555). The record also reflected substantial evidence that stations without cable carriage encountered severe difficulties obtaining financing for operations, reflecting the financial markets' judgment that the prospects are poor for broadcasters unable to secure carriage. See, *e. g.*, *id.*, ¶¶ 302, 304, 581, 643–658 (App. 1382–1383, 1538–1539, 1564–1576); see also Declaration of David Schutz ¶¶ 6, 15–16, 18, 43 (App. 640–641, 644–646, 654); Noll Declaration ¶¶ 36–42 (App. 1024–1029); Haring Declaration ¶¶ 21–26 (App. 1099–1102); Second Meek Declaration ¶ 11 (App. 1858); Declaration of Jeffrey Rohlfs ¶ 6 (App. 1157–1158). Evidence before Congress suggested the potential adverse impact of losing carriage was increasing as the growth of clustering gave MSO's centralized control over more local markets. See JSCR ¶¶ 150–153 (App. 1311–1313). Congress thus had ample basis to conclude that attaining cable carriage would be of increasing importance to ensuring a station's viability. We hold Congress could conclude from the substantial body of evidence before it that "absent legislative action, the free local off-air broadcast system is endangered." Senate Report, at 42.

The evidence assembled on remand confirms the reasonableness of the congressional judgment. Documents produced on remand reflect that internal cable industry studies

> "clearly establis[h] the importance of cable television to broadcast television stations. Because viewership equates to ratings and in turn ratings equate to revenues, it is unlikely that broadcast stations could afford to be off the cable system's line-up for any extended period of time." Memorandum from F. Lopez to T. Baxter re: Adlink's Presentations on Retransmission Consent, dated June 14, 1993 (App. 2118).

Another study prepared by a large MSO in 1993 concluded that "[w]ith cable penetration now exceeding 70% in many markets, the ability of a broadcast television station to easily reach its audience through cable television is crucial." Exh. B to Haring Declaration, DAE Vol. II.A (App. 2147). The study acknowledged that even in a market with significantly below-average cable penetration, "[t]he loss of cable carriage could cause a significant decrease in a station's ratings and a resulting loss in advertising revenues." *Ibid.* (App. 2147). For an average market "the impact would be even greater." *Ibid.* (App. 2149). The study determined that for a popular station in a major television market, even modest reductions in carriage could result in sizeable reductions in revenue. A 5 percent reduction in cable viewers, for example, would result in a $1.48 million reduction in gross revenue for the station. (App. 2156.)

To be sure, the record also contains evidence to support a contrary conclusion. Appellants (and the dissent in the District Court) make much of the fact that the number of broadcast stations and their advertising revenue continued to grow during the period without must-carry, albeit at a diminished rate. Evidence introduced on remand indicated that only 31 broadcast stations actually went dark during the period without must-carry (one of which failed after a tornado destroyed its transmitter), and during the same period some 263 new stations signed on the air. Meek Declaration ¶¶ 76–77 (App. 627–628). New evidence appellants produced on remand indicates the average cable system volun-

tarily carried local broadcast stations accounting for about 97 percent of television ratings in noncable households. Declaration of Stanley Besen, Part III–D (App. 808). Appellants, as well as the dissent in the District Court, contend that in light of such evidence, it is clear "the must-carry law is not necessary to assure the economic viability of the broadcast system as a whole." NCTA Brief 18.

This assertion misapprehends the relevant inquiry. The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship. Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress. *Turner*, 512 U. S., at 665–666. In making that determination, we are not to "reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own." *Id.*, at 666. Rather, we are simply to determine if the standard is satisfied. If it is, summary judgment for defendants-appellees is appropriate regardless of whether the evidence is in conflict. We have noted in another context, involving less deferential review than is at issue here, that "'the possibility of drawing two inconsistent conclusions from the evidence does not prevent . . . [a] finding from being supported by substantial evidence.'" *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 523 (1981) (citation omitted) (quoting *Consolo* v. *Federal Maritime Comm'n*, 383 U. S. 607, 620 (1966)).

Although evidence of continuing growth in broadcast could have supported the opposite conclusion, a reasonable interpretation is that expansion in the cable industry was causing harm to broadcasting. Growth continued, but the rate of growth fell to a considerable extent during the period without must-carry (from 4.5 percent in 1986 to 1.7 percent by 1992), and appeared to be tapering off further. JSCR ¶¶ 577–584 (App. 1537–1540); Meek Declaration ¶¶ 74–82

(App. 626–631); 910 F. Supp., at 790, App. 2. At the same time, "in an almost unprecedented development," 5 FCC Rcd, at 5041, ¶¶ 153–154, stations began to fail in increasing numbers. Meek Declaration ¶ 78 (App. 628) ("[T]he number of stations going dark began to escalate" after 1988) (emphasis deleted); JSCR ¶¶ 659, 661, 669, 671–672, 676, 681 (App. 1576, 1581–1582, 1584, 1587). Broadcast advertising revenues declined in real terms by 11 percent between 1986 and 1991, during a period in which cable's real advertising revenues nearly doubled. See 910 F. Supp., at 790, App. 1. While these phenomena could be thought to stem from factors quite separate from the increasing market power of cable (for example, a recession in 1990–1992), it was for Congress to determine the better explanation. We are not at liberty to substitute our judgment for the reasonable conclusion of a legislative body. See *Turner*, *supra*, at 665–666. It is true the number of bankruptcies among local broadcasters was small; but Congress could forecast continuance of the "unprecedented" 5-year downward trend and conclude the station failures of 1985–1992 were, as Commissioner Quello warned, the tip of the iceberg. A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it. "An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly." *Turner*, *supra*, at 672 (STEVENS, J., concurring in part and concurring in judgment). As a Senate Committee noted in a Report on the Cable Act: "[W]e need not wait until widespread further harm has occurred to the system of local broadcasting or to competition in the video market before taking action to forestall such consequences. Congress is allowed to make a rational predication of the consequences of inaction and of the effects of regulation in furthering governmental interests." Senate Report, at 60.

Despite the considerable evidence before Congress and adduced on remand indicating that the significant numbers of

broadcast stations are at risk, the dissent believes yet more is required before Congress could act. It demands more information about which of the dropped broadcast stations still qualify for mandatory carriage, *post,* at 241; about the broadcast markets in which adverse decisions take place, *ibid.;* and about the features of the markets in which bankrupt broadcast stations were located prior to their demise, *post,* at 246. The level of detail in factfinding required by the dissent would be an improper burden for courts to impose on the Legislative Branch. That amount of detail is as unreasonable in the legislative context as it is constitutionally unwarranted. "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner, supra,* at 666 (plurality opinion).

We think it apparent must-carry serves the Government's interests "in a direct and effective way." *Ward,* 491 U. S., at 800. Must-carry ensures that a number of local broadcasters retain cable carriage, with the concomitant audience access and advertising revenues needed to support a multiplicity of stations. Appellants contend that even were this so, must-carry is broader than necessary to accomplish its goals. We turn to this question.

B

The second portion of the *O'Brien* inquiry concerns the fit between the asserted interests and the means chosen to advance them. Content-neutral regulations do not pose the same "inherent dangers to free expression," *Turner, supra,* at 661, that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution. See, *e. g., Ward, supra,* at 798–799, n. 6. Under intermediate scrutiny, the Government may employ the means of its choosing "'so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent

the regulation,'" and does not "'burden substantially more speech than is necessary to further'" that interest. *Turner*, 512 U. S., at 662 (quoting *Ward*, *supra*, at 799).

The must-carry provisions have the potential to interfere with protected speech in two ways. First, the provisions restrain cable operators' editorial discretion in creating programming packages by "reduc[ing] the number of channels over which [they] exercise unfettered control." *Turner*, 512 U. S., at 637. Second, the rules "render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Ibid.*

Appellants say the burden of must-carry is great, but the evidence adduced on remand indicates the actual effects are modest. Significant evidence indicates the vast majority of cable operators have not been affected in a significant manner by must-carry. Cable operators have been able to satisfy their must-carry obligations 87 percent of the time using previously unused channel capacity, Declaration of Harry Shooshan III, ¶ 14 (App. 692); 94.5 percent of the 11,628 cable systems nationwide have not had to drop any programming in order to fulfill their must-carry obligations; the remaining 5.5 percent have had to drop an average of only 1.22 services from their programming, *id.*, ¶ 15 (App. 692); and cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry, *id.*, ¶ 21 (App. 694–695). Appellees note that only 1.18 percent of the approximately 500,000 cable channels nationwide is devoted to channels added because of must-carry, see *id.*, ¶ 11(b) (App. 688–689); weighted for subscribership, the figure is 2.4 percent, 910 F. Supp., at 780 (Williams, J., dissenting). Appellees contend the burdens of must-carry will soon diminish as cable channel capacity increases, as is occurring nationwide. NAB Brief 45; see also 910 F. Supp., at 746–747.

We do not understand appellants to dispute in any fundamental way the accuracy of those figures, only their significance. See NCTA Brief 46; *id.*, at 44–49; Time Warner Brief

38–45; Turner Brief 33–42. They note national averages fail to account for greater crowding on certain (especially urban) cable systems, see Time Warner Brief 41, 43; Turner Brief 41, and contend that half of all cable systems, serving two-thirds of all cable subscribers, have no available capacity, NCTA Brief 45; Turner Brief 34; Time Warner Brief 42, n. 58. Appellants argue that the rate of growth in cable programming outstrips cable operators' creation of new channel space, that the rate of cable growth is lower than claimed, Turner Brief 39, and that must-carry infringes First Amendment rights now irrespective of future growth, Turner Brief 40; Reply Brief for Appellants Turner Broadcasting System, Inc., et al. 12–13. Finally, they say that regardless of the percentage of channels occupied, must-carry still represents "thousands of real and individual infringements of speech." Time Warner Brief 44.

While the parties' evidence is susceptible of varying interpretations, a few definite conclusions can be drawn about the burdens of must-carry. It is undisputed that broadcast stations gained carriage on 5,880 channels as a result of must-carry. While broadcast stations occupy another 30,006 cable channels nationwide, this carriage does not represent a significant First Amendment harm to either system operators or cable programmers because those stations were carried voluntarily before 1992, and even appellants represent, Tr. of Oral Arg. 6, that the vast majority of those channels would continue to be carried in the absence of any legal obligation to do so. See *Turner*, *supra*, at 673, n. 6 (STEVENS, J., concurring in part and concurring in judgment). The 5,880 channels occupied by added broadcasters represent the actual burden of the regulatory scheme. Appellants concede most of those stations would be dropped in the absence of must-carry, Tr. of Oral Arg. 6, so the figure approximates the benefits of must-carry as well.

Because the burden imposed by must-carry is congruent to the benefits it affords, we conclude must-carry is narrowly

tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable. Cf. *Ward*, 491 U. S., at 799, n. 7 ("[T]he essence of narrow tailoring" is "focus[ing] on the source of the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils"); *Community for Creative Non-Violence*, 468 U. S., at 297 ("None of [the regulation's] provisions appears unrelated to the ends that it was designed to serve"). Congress took steps to confine the breadth and burden of the regulatory scheme. For example, the more popular stations (which appellants concede would be carried anyway) will likely opt to be paid for cable carriage under the "retransmission consent" provision of the Cable Act; those stations will nonetheless be counted toward systems' must-carry obligations. Congress exempted systems of 12 or fewer channels, and limited the must-carry obligation of larger systems to one-third of capacity, 47 U. S. C. § 534(b)(1); see also §§ 535(b)(2)–(3); allowed cable operators discretion in choosing which competing and qualified signals would be carried, § 534(b)(2); and permitted operators to carry public stations on unused public, educational, and governmental channels in some circumstances, § 535(d).

Appellants say the must-carry provisions are overbroad because they require carriage in some instances when the Government's interests are not implicated: The must-carry rules prohibit a cable system operator from dropping a broadcaster "even if the operator has no anticompetitive motives, and even if the broadcaster that would have to be dropped . . . would survive without cable access." 512 U. S., at 683 (O'Connor, J., dissenting). See also NCTA Brief 25–26. We are not persuaded that either possibility is so prevalent that must-carry is substantially overbroad. As discussed *supra*, at 201–202, cable systems serving 70 percent of subscribers are vertically integrated with cable programmers, so anticompetitive motives may be implicated in a

majority of systems' decisions not to carry broadcasters. Some broadcasters will opt for must-carry although they would not suffer serious financial harm in its absence. See Time Warner Brief 35–36, and n. 49. Broadcasters with stronger finances tend, however, to be popular ones that ordinarily seek payment from cable systems for transmission, so their reliance on must-carry should be minimal. It appears, for example, that no more than a few hundred of the 500,000 cable channels nationwide are occupied by network affiliates opting for must-carry, see Time Warner Brief 35–36, and n. 49, a number insufficient to render must-carry "substantially broader than necessary to achieve the government's interest," *Ward, supra,* at 800. Even on the doubtful assumption that a narrower but still practicable must-carry rule could be drafted to exclude all instances in which the Government's interests are not implicated, our cases establish that content-neutral regulations are not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U. S., at 689; accord, *Ward*, *supra,* at 797; *Community for Creative Non-Violence*, *supra,* at 299.

Appellants posit a number of alternatives in an effort to demonstrate a less restrictive means to achieve the Government's aims. They ask us, in effect, to "sif[t] through all the available or imagined alternative means of regulating [cable television] in order to determine whether the [Government's] solution was 'the least intrusive means' of achieving the desired end," an approach we rejected in *Ward*, 491 U. S., at 797. This "'less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity'" of content-neutral regulations on speech. *Ibid.* (quoting *Regan* v. *Time, Inc.*, 468 U. S. 641, 657 (1984) (plurality opinion) (ellipses in original)). Our precedents establish that when evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the preferred remedial scheme because some alternative solution is marginally

less intrusive on a speaker's First Amendment interests. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U. S., at 800. See generally *ibid.* (holding regulation valid although Court of Appeals had identified less restrictive "alternative regulatory methods" of controlling volume at concerts); *Albertini*, *supra*, at 689 (upholding validity of order barring a person from a military base, although excluding barred person was not "essential" to preserving security and there were less speech-restrictive means of attaining that end); *Community for Creative Non-Violence*, *supra*, at 299 (overnight camping ban upheld although "there [were] less speech-restrictive alternatives" of satisfying interest in preserving park lands); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 815–817 (1984) (stating that although making exceptions to ban on posting signs on public property "would have had a less severe effect on expressive activity," they were not "constitutionally mandated"). It is well established a regulation's validity "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Albertini*, *supra*, at 689.

In any event, after careful examination of each of the alternatives suggested by appellants, we cannot conclude that any of them is an adequate alternative to must-carry for promoting the Government's legitimate interests. First among appellants' suggested alternatives is a proposal to revive a more limited set of must-carry rules, known as the "*Century* rules" after the 1987 court decision striking them down, see *Century Communications Corp.* v. *FCC*, 835 F. 2d 292 (CADC). Those rules included a minimum viewership standard for eligibility and limited the must-carry obligation

to 25 percent of channel capacity. The parties agree only 14 percent of broadcasters added to cable systems under the Cable Act would be eligible for carriage under the *Century* rules. See Turner Brief 45; Brief for Federal Appellees 45; NAB Brief 49; see also Declaration of Gregory Klein ¶¶ 21–25 (App. 1141–1143). The *Century* rules, for the most part, would require carriage of the same stations a system would carry without statutory compulsion. While we acknowledge appellants' criticism of any rationale that more is better, the scheme in question does not place limitless must-carry obligations on cable system operators. In the final analysis this alternative represents nothing more than appellants' "'[dis]agreement with the responsible decisionmaker concerning' . . . the degree to which [the Government's] interests should be promoted." *Ward*, *supra*, at 800 (quoting *Albertini*, *supra*, at 689); *Community for Creative Non-Violence*, 468 U. S., at 299. Congress legislated in the shadow of *Quincy Cable TV, Inc.* v. *FCC*, 768 F. 2d 1434 (CADC 1985), and *Century Communications*. Its deliberations reflect awareness of the must-carry rules at issue in those cases, Senate Report, at 39–41, 62; indeed, in drafting the must-carry provisions of the Cable Act, Congress made specific comparisons to the rules struck down in *Quincy*, *supra*. See House Report, at 65–66; Senate Report, at 61. The record reflects a deliberate congressional choice to adopt the present levels of protection, to which this Court must defer.

The second alternative appellants urge is the use of input selector or "A/B" switches, which, in combination with antennas, would permit viewers to switch between cable and broadcast input, allowing cable subscribers to watch broadcast programs not carried on cable. Congress examined the use of A/B switches as an alternative to must-carry and concluded it was "not an enduring or feasible method of distribution and . . . not in the public interest." § 2(a)(18). The data showed that: many households lacked adequate antennas to

receive broadcast signals, JSCR ¶¶ 724, 725, 768 (App. 1609–1610, 1634); A/B switches suffered from technical flaws, *id.*, ¶¶ 718, 721, 738–739, 751–755, 761 (App. 1606, 1608, 1617–1618, 1624–1626, 1630); viewers might be required to reset channel settings repeatedly in order to view both UHF and cable channels, House Report, at 54; and installation and use of the switch with other common video equipment (such as videocassette recorders) could be "cumbersome or impossible," Senate Report, at 45, and nn. 115–116; House Report, at 54, and nn. 60–61; see also JSCR ¶¶ 746, 750, 758–767 (App. 1622, 1623, 1629–1634). Even the cable industry trade association (one of appellants here) determined that "the A/B switch is not a workable solution to the carriage problem." Senate Report, at 45; House Report, at 54. The group's engineering committee likewise concluded the switches suffered from technical problems and that no solution "appear[ed] imminent." Joint Petition for Reconsideration in MM Docket No. 85–349, pp. 6–8 (Dec. 17, 1986) (App. 1606–1607); see also Senate Report, at 45, and n. 115; House Report, at 54, and n. 60; Must Carry, Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 100th Cong., 1st Sess., 80 (1989) (statement of Preston Padden) (App. 1608); Hearings on Cable Television Regulation, at 901, n. 84 (statement of James B. Hedlund) (App. 1608).

Congress also had before it "considerable evidence," including two empirical studies, that "it is rare for [cable subscribers] ever to switch to receive an over-the-air signal," Senate Report, at 45; House Report, at 54, and n. 62. A 1991 study demonstrated that even "after several years of a government mandated program of providing A–B switches [to] consumers and a simultaneous education program on their use," NAB, A–B Switch Availability and Use (Sept. 23, 1991) (App. 132), and after FCC-mandated technical improvements to the switch, App. 129, only 11.7 percent of all cable-connected television sets were attached to an antenna

and had an A/B switch, *id.*, at 131. Of the small number of households possessing the switch, an even smaller number (only 38 percent) had ever used it. *Ibid.* See House Report, at 54, and nn. 62–63. Congress' decision that use of A/B switches was not a real alternative to must-carry was a reasonable one based on substantial evidence of technical shortcomings and lack of consumer acceptance. The reasonableness of its judgment was confirmed by additional evidence on remand that A/B switches can create signal interference and add complexity to video systems, factors discouraging their use. See Declaration of Eldon Haakinson ¶¶ 45–54 (App. 602–609); Supplemental Declaration of Eldon Haakinson ¶¶ 8–10 (App. 2025–2026); Memorandum from W. Cicora to L. Yaeger et al., dated June 25, 1993, p. 5 (channels may have to be reset every time A/B switch is used) (App. 246).

Appellants also suggest a leased-access regime, under which both broadcasters and cable programmers would have equal access to cable channels at regulated rates. Turner Brief 46–47. Appellants do not specify what kind of regime they would propose, or how it would operate, making this alternative difficult to compare to the must-carry rules. Whatever virtues the proposal might otherwise have, it would reduce the number of cable channels under cable systems' control in the same manner as must-carry. Because this alternative is aimed solely at addressing the bottleneck control of cable operators, it would not be as effective in achieving Congress' further goal of ensuring that significant programming remains available for the 40 percent of American households without cable. Indeed, unless the number of channels set aside for local broadcast stations were to decrease (sacrificing Congress' interest in preserving a multiplicity of broadcasters), additional channels would have to be set aside for cable programmers, further reducing the channels under the systems' control. Furthermore, Congress was specific in noting that requiring payment for cable car-

riage was inimical to the interests it was pursuing, because of the burden it would impose on small broadcasters. See House Report, at 51; Senate Report, at 43, 45. Congress specifically prohibited such payments under the Cable Act. 47 U. S. C. §§ 534(b)(10), 535(i).

Appellants next suggest a system of subsidies for financially weak stations. Appellants have not proposed any particular subsidy scheme, so it is difficult to determine whether this option presents a feasible means of achieving the Government's interests, let alone one preferable to must-carry under the First Amendment. To begin with, a system of subsidies would serve a very different purpose than must-carry. Must-carry is intended not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households. Must-carry is simpler to administer and less likely to involve the Government in making content-based determinations about programming. The must-carry rules distinguish between categories of speakers based solely on the technology used to communicate. The rules acknowledge cable systems' expertise by according them discretion to determine which broadcasters to carry on reserved channels, and (within the Cable Act's strictures) allow them to choose broadcasters with a view to offering program choices appealing to local subscribers. Appellants' proposal would require the Government to develop other criteria for giving subsidies and to establish a potentially elaborate administrative structure to make subsidy determinations.

Appellants also suggest a system of antitrust enforcement or an administrative complaint procedure to protect broadcasters from cable operators' anticompetitive conduct. See Turner Brief 47–48. Congress could conclude, however, that the considerable expense and delay inherent in antitrust litigation, and the great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator, would make these remedies in-

adequate substitutes for guaranteed carriage. The record suggests independent broadcasters simply are not in a position to engage in complex antitrust litigation, which involves extensive discovery, significant motions practice, appeals, and the payment of high legal fees throughout. See JSCR ¶¶ 556–576 (App. 1528–1537); Meek Declaration ¶ 58 (Record, Defendants' Joint Submission of Expert Affidavits and Reports in Support of Motion for Summary Judgment, Vol. II.A, Exh. 2). An administrative complaint procedure, although less burdensome, would still require stations to incur considerable expense and delay before enforcing their rights. As it is, some public stations have been forced by limited resources to forgo pursuing administrative complaints under the Cable Act to obtain carriage. See Declaration of Carolyn Lewis ¶ 13 (App. 548–549); Declaration of John Beabout ¶ 11 (App. 526–527). Those problems would be compounded if instead of proving entitlement under must-carry, the station had to prove facts establishing an antitrust violation.

There is a final argument made by appellants that we do not reach. Appellant Time Warner Entertainment raises in its brief a separate First Amendment challenge to a subsection of the Cable Act, 47 U. S. C. § 534(c), that requires carriage on unfilled must-carry channels of low power broadcast stations if the FCC determines that the station's programming "would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license." § 534(h)(2)(B). We earlier reserved this question and invited the District Court to address it on remand. See *Turner*, 512 U. S., at 643–644, n. 6. Because this question has received "only the most glancing" attention, *ibid.*, from the District Court and the parties, we have no more information about "the operation of, and justifications for, the low-power broadcast provisions," *ibid.*, on which to base an informed determination than we did on the

earlier appeal. The District Court's primary opinion disposed of the question in a perfunctory discussion, 910 F. Supp., at 750–751; and the dissent explicitly declined to reach the question, *id.*, at 789. The issue has received even less attention from the parties. It was not addressed in the jurisdictional statement, the motions to affirm, or the appellants' oppositions to the motions to affirm. In over 400 pages of merits briefs, the parties devoted a total of four paragraphs (two of which were relegated to footnotes) to conclusory argumentation on this subject, largely concerning not the merits of the question but whether it was even properly before us. On this state of the record we have insufficient basis to make an informed judgment on this discrete issue. Even if the issue is "fairly included" in the broadly worded question presented, it is tangential to the main issue, and prudence dictates that we not decide this question based on such scant argumentation. See *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 588–589, n. 2 (1972); *Teamsters* v. *Denver Milk Producers, Inc.*, 334 U. S. 809 (1948) *(per curiam);* see also *Carducci* v. *Regan*, 714 F. 2d 171, 177 (CADC 1983) (Scalia, J.).

III

Judgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make. Those judgments "cannot be ignored or undervalued simply because [appellants] cas[t] [their] claims under the umbrella of the First Amendment." *Columbia Broadcasting* v. *Democratic National Committee*, 412 U. S., at 103. Appellants' challenges to must-carry reflect little more than disagreement over the level of protection broadcast stations are to be afforded and how protection is to be attained. We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination. Those requirements were met in this case, and in

these circumstances the First Amendment requires nothing more. The judgment of the District Court is affirmed.

It is so ordered.

JUSTICE STEVENS, concurring.

As JUSTICE KENNEDY clearly explains, the policy judgments made by Congress in the enactment of legislation that is intended to forestall the abuse of monopoly power are entitled to substantial deference. *Ante*, at 195–196, 224 and this page. That is true even when the attempt to protect an economic market imposes burdens on communication. Cf. *United States* v. *Radio Corp. of America*, 358 U. S. 334 (1959); *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 428, n. 12 (1990) (" 'This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association' " (quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 912 (1982))). If this statute regulated the content of speech rather than the structure of the market, our task would be quite different. See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 669, n. 2 (1994) (STEVENS, J., concurring in part and concurring in judgment). Cf. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 129 (1989); *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 843 (1978). Though I write to emphasize this important point, I fully concur in the Court's thorough opinion.

JUSTICE BREYER, concurring in part.

I join the opinion of the Court except insofar as Part II–A–1 relies on an anticompetitive rationale. I agree with the majority that the statute must be "sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Ante*, at 189 (citing *United States* v.

O'Brien, 391 U. S. 367, 377 (1968)). I also agree that the statute satisfies this standard. My conclusion rests, however, not upon the principal opinion's analysis of the statute's efforts to "promot[e] fair competition," see *post*, at 230–232, 237–240, but rather upon its discussion of the statute's other objectives, namely, "'(1) preserving the benefits of free, over-the-air local broadcast television,'" and "'(2) promoting the widespread dissemination of information from a multiplicity of sources,'" *ante*, at 189 (quoting *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 662 (1994) *(Turner)*). Whether or not the statute does or does not sensibly compensate for some significant market defect, it undoubtedly seeks to provide over-the-air viewers who *lack* cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate. I believe that this purpose—to assure the over-the-air public "access to a multiplicity of information sources," *id.*, at 663—provides sufficient basis for rejecting appellants' First Amendment claim.

I do not deny that the compulsory carriage that creates the "guarantee" extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. *Ante*, at 214; *post*, at 250. This "price" amounts to a "suppression of speech."

But there are important First Amendment interests on the other side as well. The statute's basic noneconomic purpose is to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public. *Ante*, at 190, 191–194. This purpose reflects what "has long been a basic tenet of national communications policy," namely, that "the

widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner*, *supra*, at 663 (quoting *United States* v. *Midwest Video Corp.*, 406 U. S. 649, 668, n. 27 (1972) (plurality opinion) (quoting *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945) (internal quotation marks omitted)); see also *FCC* v. *WNCN Listeners Guild*, 450 U. S. 582, 594 (1981). That policy, in turn, seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve. *Whitney* v. *California*, 274 U. S. 357, 375–376 (1927) (concurring opinion). See also *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Associated Press* v. *United States*, *supra*, at 20. Indeed, *Turner* rested in part upon the proposition that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." 512 U. S., at 663.

With important First Amendment interests on both sides of the equation, the key question becomes one of proper fit. That question, in my view, requires a reviewing court to determine both whether there are significantly less restrictive ways to achieve Congress' over-the-air programming objectives, and also to decide whether the statute, in its effort to achieve those objectives, strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 799–800 (1989); *ante*, at 217–218. The majority's opinion analyzes and evaluates those consequences, and I agree with its conclusions in respect to both of these matters. *Ante*, at 213–224.

In particular, I note (and agree) that a cable system, physically dependent upon the availability of space along city streets, at present (perhaps less in the future) typically faces little competition, that it therefore constitutes a kind of bot-

tleneck that controls the range of viewer choice (whether or not it uses any consequent economic power for economically predatory purposes), and that *some* degree—at least a limited degree—of governmental intervention and control through regulation can prove appropriate when justified under *O'Brien* (at least when not "content based"). *Ante*, at 197, 208–213; see also Defendants' Joint Statement of Evidence before Congress ¶¶ 12–21, 31–59 (App. 1254–1258, 1262–1274) (JSCR); Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(2), P. L. 102–385, 106 Stat. 1460. Cf. *Red Lion*, *supra*, at 377–378, 387–401; 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (1969) (Federal Communications Commission regulations upheld in *Red Lion*); *United Broadcasting Co.*, 10 F. C. C. 515 (1945); *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). I also agree that, without the statute, cable systems would likely carry significantly fewer over-the-air stations, *ante*, at 191, 202–205, that station revenues would therefore decline, *ante*, at 208–213, and that the quality of over-the-air programming on such stations would almost inevitably suffer, *e. g.*, JSCR ¶¶ 596, 704–706 (App. 1544, 1600–1601); Rebuttal Declaration of Roger G. Noll ¶¶ 5, 11, 34, 38 (App. 1790, 1793, 1804–1805, 1806). I agree further that the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers is limited and will diminish as typical cable system capacity grows over time.

Finally, I believe that Congress could reasonably conclude that the statute will help the typical over-the-air viewer (by maintaining an expanded range of choice) more than it will hurt the typical cable subscriber (by restricting cable slots otherwise available for preferred programming). The latter's cable choices are many and varied, and the range of choice is rapidly increasing. The former's over-the-air choice is more restricted; and, as cable becomes more popular, it may well become still more restricted insofar as the over-the-air market shrinks and thereby, by itself, becomes

less profitable. In these circumstances, I do not believe the First Amendment dictates a result that favors the cable viewers' interests.

These and other similar factors discussed by the majority lead me to agree that the statute survives "intermediate scrutiny," whether or not the statute is properly tailored to Congress' purely economic objectives.

Justice O'Connor, with whom Justice Scalia, Justice Thomas, and Justice Ginsburg join, dissenting.

In sustaining the must-carry provisions of the Cable Television Protection and Competition Act of 1992 (Cable Act), Pub. L. 102–385, §§ 4–5, 106 Stat. 1460, against a First Amendment challenge by cable system operators and cable programmers, the Court errs in two crucial respects. First, the Court disregards one of the principal defenses of the statute urged by appellees on remand: that it serves a substantial interest in preserving "diverse," "quality" programming that is "responsive" to the needs of the local community. The course of this litigation on remand and the proffered defense strongly reinforce my view that the Court adopted the wrong analytic framework in the prior phase of this case. See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 643–651 (1994) *(Turner); id.*, at 675–680 (O'Connor, J., concurring in part and dissenting in part). Second, the Court misapplies the "intermediate scrutiny" framework it adopts. Although we owe deference to Congress' predictive judgments and its evaluation of complex economic questions, we have an independent duty to identify with care the Government interests supporting the scheme, to inquire into the reasonableness of congressional findings regarding its necessity, and to examine the fit between its goals and its consequences. *Edenfield* v. *Fane*, 507 U. S. 761, 770–771 (1993); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 129 (1989); *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 496 (1986); *Landmark*

Communications, Inc. v. *Virginia*, 435 U. S. 829, 843 (1978). The Court fails to discharge its duty here.

I

I did not join those portions of the principal opinion in *Turner* holding that the must-carry provisions of the Cable Act are content neutral and therefore subject to intermediate First Amendment scrutiny. 512 U. S., at 643–651. The Court there referred to the "unusually detailed statutory findings" accompanying the Cable Act, in which Congress recognized the importance of preserving sources of local news, public affairs, and educational programming. *Id.*, at 646; see *id.*, at 632–634, 648. Nevertheless, the Court minimized the significance of these findings, suggesting that they merely reflected Congress' view of the "intrinsic value" of broadcast programming generally, rather than a congressional preference for programming with local, educational, or informational content. *Id.*, at 648.

In *Turner*, the Court drew upon Senate and House Reports to identify three "interests" that the must-carry provisions were designed to serve: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Id.*, at 662 (citing S. Rep. No. 102–92, p. 58 (1991); H. R. Rep. No. 102–628, p. 63 (1992)). The Court reiterates these interests here, *ante*, at 189–190, but neither the principal opinion nor the partial concurrence ever explains the relationship between them with any clarity.

Much of the principal opinion treats the must-carry provisions as a species of antitrust regulation enacted by Congress in response to a perceived threat that cable system operators would otherwise engage in various forms of anticompetitive conduct resulting in harm to broadcasters. *E. g.*, *ante*, at 191, 196–208. The Court recognizes that ap-

pellees cannot show an anticompetitive threat to broadcast television simply by demonstrating that "a few" broadcast stations would be forced off the air in the absence of must-carry. *Ante*, at 191; see Brief for Federal Appellees 14, 17, 18. No party has ever questioned that adverse carriage decisions by cable operators will threaten some broadcasters in some markets. The notion that Congress premised the must-carry provisions upon a far graver threat to the structure of the local broadcast system than the loss of "a few" stations runs through virtually every passage in the principal *Turner* opinion that discusses the Government interests the provisions were designed to serve. See, *e. g.*, 512 U. S., at 647 (recognizing substantiality of interest in "'protecting noncable households from loss of *regular television broadcasting service* due to competition from cable systems'" (quoting *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 714 (1984) (emphasis added))); 512 U. S., at 652 ("Congress sought to preserve the existing structure of the Nation's broadcast television medium, . . . and, in particular, to ensure that broadcast television *remains available* as a source of video programming for those without cable" (emphasis added)); *id.*, at 663 (recognizing interest in "maintaining the local broadcasting structure"); *id.*, at 664–665 (plurality opinion) (characterizing inquiry as whether Government "has adequately shown that the economic health of local broadcasting is in *genuine jeopardy*" (emphasis added)); *id.*, at 665 (noting Government's reliance on Congress' finding that "absent mandatory carriage rules, the continued *viability* of local broadcast television would be 'seriously jeopardized'" (quoting Cable Act, § 2(a)(16) (emphasis added))); *id.*, at 666 (recognizing Government's assertion that "the must-carry rules are necessary to protect the *viability* of broadcast television" (emphasis added)). Ostensibly adopting this framework, the Court now asks whether Congress could reasonably have thought the must-carry regime necessary to prevent a "*significant* reduction in the multiplicity of broad-

cast programming sources available to noncable households." *Ante*, at 193 (emphasis added).

I fully agree that promoting fair competition is a legitimate and substantial Government goal. But the Court nowhere examines whether the breadth of the must-carry provisions comports with a goal of preventing anticompetitive harms. Instead, in the course of its inquiry into whether the must-carry provisions are "narrowly tailored," the principal opinion simply assumes that most adverse carriage decisions are anticompetitively motivated, and that must-carry is therefore a measured response to a problem of anticompetitive behavior. *Ante*, at 216–217. We ordinarily do not substitute unstated and untested assumptions for our independent evaluation of the facts bearing upon an issue of constitutional law. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 636 (1980).

Perhaps because of the difficulty of defending the must-carry provisions as a measured response to anticompetitive behavior, the Court asserts an "independent" interest in preserving a "multiplicity" of broadcast programming sources. *Ante*, at 194; *ante*, at 226–227 (BREYER, J., concurring in part). In doing so, the Court posits existence of "conduct that threatens" the availability of broadcast television outlets, quite apart from anticompetitive conduct. *Ante*, at 194. We are left to wonder what precisely that conduct might be. Moreover, when separated from anticompetitive conduct, this interest in preserving a "multiplicity of broadcast programming sources" becomes poorly defined. Neither the principal opinion nor the partial concurrence offers any guidance on what might constitute a "significant reduction" in the availability of broadcast programming. The proper analysis, in my view, necessarily turns on the present *distribution* of broadcast stations among the local broadcast markets that make up the national broadcast "system." Whether cable poses a "significant" threat to a local broadcast market depends first on how many broadcast stations in

that market will, in the absence of must-carry, remain available to viewers in noncable households. It also depends on whether viewers actually watch the stations that are dropped or denied carriage. The Court provides some raw data on adverse carriage decisions, but it never connects those data to markets and viewership. Instead, the Court proceeds from the assumptions that adverse carriage decisions nationwide will affect broadcast markets in proportion to their size; and that all broadcast programming is watched by viewers. Neither assumption is logical or has any factual basis in the record.

Appellees bear the burden of demonstrating that the provisions of the Cable Act restricting expressive activity survive constitutional scrutiny. See *Turner*, *supra*, at 664. As discussed below, the must-carry provisions cannot be justified as a narrowly tailored means of addressing anticompetitive behavior. See *infra*, at 235–257; *ante*, at 225, 226, 227–228 (Breyer, J., concurring in part). As a result, the Court's inquiry into whether must-carry would prevent a "significant reduction in the multiplicity of broadcast programming sources" collapses into an analysis of an ill-defined and generalized interest in maintaining broadcast stations, wherever they might be threatened and whatever their viewership. Neither the principal opinion nor the partial concurrence ever explains what kind of conduct, apart from anticompetitive conduct, threatens the "multiplicity" of broadcast programming sources. Indeed, the only justification advanced by the parties for furthering this interest is heavily content based. It is undisputed that the broadcast stations protected by must-carry are the "marginal" stations within a given market, see *infra*, at 244; the record on remand reveals that any broader threat to the broadcast system was entirely mythical. Pressed to explain the importance of preserving noncable viewers' access to "vulnerable" broadcast stations, appellees emphasize that the must-carry rules are necessary to ensure that broadcast stations main-

tain "diverse," "quality" programming that is "responsive" to the needs of the local community. Brief for Federal Appellees 13, 30; see Brief for Appellees National Association of Broadcasters et al. 36–37 (NAB Brief); Tr. of Oral Arg. 29, 42; see also *ante*, at 226 (BREYER, J., concurring in part) (justifying must-carry as a means of preventing a decline in "quality and quantity of programming choice"). Must-carry is thus justified as a way of preserving viewers' access to a Spanish or Chinese language station or of preventing an independent station from adopting a home-shopping format. NAB Brief 28, 33; Brief for Federal Appellees 31; Tr. of Oral Arg. 32–33. Undoubtedly, such goals are reasonable and important, and the stations in question may well be worthwhile targets of Government subsidies. But appellees' characterization of must-carry as a means of protecting these stations, like the Court's explicit concern for promoting "'community self-expression'" and the "'local origination of broadcast programming,'" *ante*, at 192, 193 (brackets omitted), reveals a content-based preference for broadcast programming. This justification of the regulatory scheme is, in my view, wholly at odds with the *Turner* Court's premise that must-carry is a means of preserving "access to free television programming—*whatever its content*," 512 U. S., at 649 (emphasis added).

I do not read JUSTICE BREYER's opinion—which analyzes the must-carry rules in part as a "speech-enhancing" measure designed to ensure a "rich mix" of over-the-air programming, see *ante*, at 226, 227—to treat the content of over-the-air programming as irrelevant to whether the Government's interest in promoting it is an important one. The net result appears to be that five Justices of this Court *do not* view must-carry as a narrowly tailored means of serving a substantial governmental interest in preventing anticompetitive behavior; and that five Justices of this Court *do* see the significance of the content of over-the-air programming to the Government's and appellees' efforts to defend the law.

Under these circumstances, the must-carry provisions should be subject to strict scrutiny, which they surely fail.

II

The principal opinion goes to great lengths to avoid acknowledging that preferences for "quality," "diverse," and "responsive" local programming underlie the must-carry scheme, although the partial concurrence's reliance on such preferences is explicit. See *ante*, at 226 (opinion of BREYER, J.). I take the principal opinion at its word and evaluate the claim that the threat of anticompetitive behavior by cable operators supplies a content-neutral basis for sustaining the statute. It does not.

The *Turner* Court remanded the case for a determination whether the must-carry provisions satisfy intermediate scrutiny under *United States* v. *O'Brien*, 391 U. S. 367 (1968). Under that standard, appellees must demonstrate that the must-carry provisions (1) "furthe[r] an important or substantial government interest"; and (2) burden speech no more "than is essential to the furtherance of that interest." *Id.*, at 377; see also *Ward* v. *Rock Against Racism*, 491 U. S. 781, 799 (1989). The *Turner* plurality found that genuine issues of material fact remained as to both parts of the *O'Brien* analysis. On whether must-carry furthers a substantial governmental interest, the *Turner* Court remanded the case to test two essential and unproven propositions: "(1) that unless cable operators are compelled to carry broadcast stations, *significant numbers* of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either *deteriorate to a substantial degree or fail altogether.*" 512 U. S., at 666 (emphasis added). As for whether must-carry restricts no more speech than essential to further Congress' asserted purpose, the *Turner* plurality found evidence lacking on the extent of the burden that the must-carry provisions would place on cable operators and cable programmers. *Id.*, at 667–668.

The District Court resolved this case on cross-motions for summary judgment. As the Court recognizes, *ante*, at 211, the fact that the evidence before Congress might have been in conflict will not necessarily preclude summary judgment upholding the must-carry scheme. The question, rather, is what the undisputed facts show about the reasonableness of Congress' conclusions. We are not, however, at liberty to substitute speculation for evidence or to ignore factual disputes that call the reasonableness of Congress' findings into question. The evidence on remand demonstrates that appellants, not appellees, are entitled to summary judgment.

A

The principal opinion devotes substantial discussion to the structure of the cable industry, see *ante*, at 197, 206–207, a matter that was uncontroversial in *Turner*. See, *e. g.*, 512 U. S., at 627–628, 632–633, 639–640; *id.*, at 684 (O'CONNOR, J., concurring in part and dissenting in part). As of 1992, cable already served 60 percent of American households. I agree with the observation that Congress could reasonably predict an increase in cable penetration of the local video programming market. *Ante*, at 197. Local franchising requirements and the expense of constructing a cable system to serve a particular area make it possible for cable franchisees to exercise a monopoly over cable service. 512 U. S., at 633. Nor was it ever disputed that some cable system operators own large numbers of systems nationwide, or that some cable systems are affiliated with cable programmers. *Turner Broadcasting* v. *FCC*, 819 F. Supp. 32, 39–40 (DC 1993) (opinion of Jackson, J.); *id.*, at 57 (Williams, J., dissenting); Plaintiffs' Response to NAB's Statement of Material Facts ¶ 4 (Feb. 12, 1993) (App. in *Turner*, O. T. 1993, No. 93–44, p. 186); Plaintiff Time Warner's Statement of Material Facts as to Which There Is No Genuine Issue ¶¶ 5, 12 (App. in *Turner*, O. T. 1993, *supra*, at 198, 199).

What was not resolved in *Turner* was whether "reasonable inferences based on substantial evidence," 512 U. S., at 666 (plurality opinion), supported Congress' judgment that the must-carry provisions were necessary "to prevent cable operators from exploiting their economic power to the detriment of broadcasters," *id.*, at 649. Because I remain convinced that the statute is not a measured response to congressional concerns about monopoly power, see *infra*, at 249–256, in my view the principal opinion's discussion on this point is irrelevant. But even if it were relevant, it is incorrect.

1

The *Turner* plurality recognized that Congress' interest in curtailing anticompetitive behavior is substantial "in the abstract." 512 U. S., at 664. The principal opinion now concludes that substantial evidence supports the congressional judgment that cable operators have incentives to engage in significant anticompetitive behavior. It appears to accept two related arguments on this point: first, that vertically integrated cable operators prefer programming produced by their affiliated cable programming networks to broadcast programming, *ante*, at 198–199, 200; and second, that potential advertising revenues supply cable system operators, whether affiliated with programmers or not, with incentives to prefer cable programming to broadcast programming, *ante*, at 200–202.

To support the first proposition, the principal opinion states that "[e]xtensive testimony" before Congress showed that in fact operators do have incentives to favor vertically integrated programmers. *Ante*, at 198. This testimony, noteworthy as it may be, is primarily that of persons appearing before Congress on behalf of the private appellees in this case. Compare *ante*, at 198–199, with Competitive Issues in the Cable Television Industry: Hearing before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary, 100th Cong., 2d Sess.,

543 (1988) (Hearing on Competitive Issues) (statement of Milton Maltz, representative of Association of Independent Television Stations, Inc. (INTV), now appellee Association of Local Television Stations, Inc.) (Record, Defendants' Joint Submission of Congressional Record (CR) Vol. I.C, Exh. 8, p. CR 01882); Cable Television Regulation: Hearings on H. R. 1303 and H. R. 2546 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102d Cong., 1st Sess., 858 (1992) (statement of James B. Hedlund, president of INTV) (CR Vol. I.J, Exh. 18, at CR 07862); *id.*, at 752 (statement of Edward O. Fritts, president of appellee NAB) (CR Vol. I.J, Exh. 18, at CR 07756); *id.*, at 701 (statement of Gene Kimmelman, legislative director of appellee Consumer Federation of America) (CR Vol. I.J, Exh. 18, at CR 07706). It is appropriate to regard the testimony of interested persons with a degree of skepticism when our task is to engage in "'independent judgment of the facts bearing on an issue of constitutional law.'" *Turner*, *supra*, at 666 (plurality opinion) (quoting *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S., at 129). Moreover, even accepting as reasonable Congress' conclusion that cable operators have incentives to favor affiliated programmers, Congress has already limited the number of channels on a cable system that can be occupied by affiliated programmers. 47 U. S. C. § 533(f)(1)(B); 47 CFR § 76.504 (1995). Once a cable system operator reaches that cap, it can no longer bump a broadcaster in favor of an affiliated programmer. If Congress were concerned that broadcasters favored too many affiliated programmers, it could simply adjust the cap. Must-carry simply cannot be justified as a response to the allegedly "substantial" problem of vertical integration.

The second argument, that the quest for advertising revenue will supply cable operators with incentives to drop local broadcasters, takes two forms. First, some cable programmers offer blank slots within a program into which a cable operator can insert advertisements; appellees argue that

"[t]he opportunity to sell such advertising gives cable programmers an additional value to operators above broadcast stations . . . ." Brief for Federal Appellees 24. But that "additional value" arises only because the must-carry provisions *require* cable operators to carry broadcast signals without alteration. 47 U. S. C. § 534(b)(3). Judge Williams was correct in noting that the Government cannot have "a 'substantial interest' in remedying a competitive distortion that arises entirely out of a detail in its own purportedly remedial legislation." 910 F. Supp. 734, 777 (DC 1995) (dissenting opinion). Second, appellees claim that since cable operators compete directly with broadcasters for some advertising revenue, operators will profit if they can drive broadcasters out of the market and capture their advertising revenue. Even if the record before Congress included substantial evidence that "advertising revenue would be of increasing importance to cable operators as subscribership growth began to flatten," *ante*, at 203, it does not necessarily follow that Congress could reasonably find that the quest for advertising revenues supplies cable operators with incentives to engage in predatory behavior, or that must-carry is a reasonable response to such incentives. There is no dispute that a cable system depends primarily upon its subscriber base for revenue. A cable operator is therefore unlikely to drop a widely viewed station in order to capture advertising revenues—which, according to the figures of appellees' expert, account for between one and five percent of the total revenues of most large cable systems. Declaration of James N. Dertouzos ¶ 22 (App. 967). In doing so, it would risk losing subscribers. Nevertheless, appellees contend that cable operators will drop some broadcast stations in spite of, and not because of, viewer preferences. The principal opinion suggests that viewers are likely to subscribe to cable even though they prefer certain over-the-air programming to cable programming, because they would be willing to trade access to their preferred channel for access to dozens of cable

channels. *Ante,* at 202. Even assuming that, at the margin, advertising revenues would drive cable systems to drop some stations—invariably described as "vulnerable" or "smaller" independents, see NAB Brief 22; Brief for Federal Appellees 25, and n. 14—the strategy's success would depend upon the additional untested premise that the advertising revenues freed by dropping a broadcast station will flow to cable operators rather than to *other* broadcasters.

2

Under the standard articulated by the *Turner* plurality, the conclusion that must-carry serves a substantial governmental interest depends upon the "essential propositio[n]" that, without must-carry, "significant numbers of broadcast stations will be refused carriage on cable systems." 512 U. S., at 666. In analyzing whether this undefined standard is satisfied, the Court focuses almost exclusively on raw numbers of stations denied carriage or "repositioned"—that is, shifted out of their traditional channel positions.

The Court begins its discussion of evidence of adverse carriage decisions with the 1988 study sponsored by the Federal Communications Commission (FCC). *Ante,* at 202–203; see Cable System Broadcast Signal Carriage Survey, Staff Report by the Policy and Rules Division, Mass Media Bureau (Sept. 1, 1988) (App. 37). But in *Turner,* the plurality criticized this very study, noting that it did not indicate the timeframe within which carriage denials occurred or whether the stations were later restored to their positions. 512 U. S., at 667. As for the evidence in the record before Congress, these gaps persist; the Court relies on a study of *public* television stations to support the proposition that "in the vast majority of cases, dropped stations were not restored to the cable service." *Ante,* at 203.

In canvassing the additional evidence offered on remand, the Court focuses on the suggestion of one of appellees' experts that the 1988 FCC survey underestimated the number

of drops of broadcast stations in the non-must-carry era. The data do not indicate which of these stations would now qualify for mandatory carriage. Appellees' expert frames the relevant drop statistic as "subscriber instances"—that is, the number of drop instances multiplied by the number of cable subscribers affected. Declaration of Tom Meek ¶ 17 (Meek Declaration) (App. 623). Two-thirds of the "subscriber instances" of drops existing as of mid-1992 remained uncured as of mid-1994, fully 19 months after the present must-carry rules went into effect. Meek Declaration, Attachment C (Record, Defendants' Joint Submission of Expert Affidavits and Reports in Support of Motion for Summary Judgment, Vol. II.A, Exh. 2). The Court discounts the importance of whether dropped stations now qualify for mandatory carriage, on the ground that requiring any such showing places an "improper burden" on the Legislative Branch. *Ante*, at 213. It seems obvious, however, that if the must-carry rules will not reverse those adverse carriage decisions on which appellees rely to illustrate the Government "interest" supporting the rules, then a significant question remains as to whether the rules in fact serve the articulated interest. Without some further analysis, I do not see how the Court can, in the course of its independent scrutiny on a question of constitutional law, deem Congress' judgment "reasonable."

In any event, the larger problem with the Court's approach is that neither the FCC study nor the additional evidence on remand canvassed by the Court, *ante*, at 204–207, says anything about the broadcast markets in which adverse carriage decisions take place. The Court accepts Congress' stated concern about preserving the availability of a "multiplicity" of broadcast stations, but apparently thinks it sufficient to evaluate that concern in the abstract, without considering how much local service is already available in a given broadcast market. *Ante*, at 212–213; see also *ante*, at 226–227 (BREYER, J., concurring in part). I address this gap in the Court's discussion at greater length below, *infra*, at 247–250,

by examining the reasonableness of Congress' prediction that adverse carriage decisions will inflict severe harm on broadcast stations.

Nor can we evaluate whether must-carry is necessary to serve an interest in preserving broadcast stations without examining the value of the stations protected by the must-carry scheme to viewers in noncable households. By disregarding the distribution and viewership of stations not carried on cable, the Court upholds the must-carry provisions without addressing the interests of the over-the-air television viewers that Congress purportedly seeks to protect. See *Turner*, 512 U. S., at 647 (describing interest in "protecting *noncable* households from loss of regular television broadcasting service" (emphasis added; internal quotation marks omitted)); *id.*, at 652 (describing interest in ensuring that broadcast television remains available as a source of video programming *for those without cable*); *ante*, at 193 (describing interest in preventing "any significant reduction in the multiplicity of broadcast programming sources available to *noncable* households" (emphasis added)). The Court relies on analyses suggesting that, as of 1992, the typical independent commercial broadcaster was being denied carriage on cable systems serving 47 percent of subscribers in its local market, and the typical noncommercial station was denied carriage on cable systems serving 36 percent of subscribers in its local market. *Ante*, at 204. The *only* analysis in the record of the relationship between carriage and noncable viewership favors the appellants. A 1991 study by Federal Trade Commission staff concluded that most cable systems voluntarily carried broadcast stations with any reportable ratings in noncable households and that most instances of noncarriage involved "relatively remote (and duplicated) network stations, or local stations that few viewers watch." Carriage of Television Broadcast Signals by Cable Television Systems, Reply Comment of the Staff of the Bureau of Economics and the San Francisco Re-

gional Office of the Federal Trade Commission, p. 3 (Nov. 26, 1991) (App. 163); see also Declaration of Stanley M. Besen (Besen Declaration) (App. 808, 818); Second Declaration of Stanley M. Besen (App. 1812) (presenting data that (1) the typical cable subscriber was served by a cable system carrying local broadcast stations accounting for 97 percent of viewing in noncable households; and (2) the typical cable subscriber was served by a cable system carrying 90 percent of all local broadcast stations with any reportable ratings and 30 percent of all local broadcast stations with no reportable ratings).

Appellees claim there are various methodological flaws in each study, including appellants' expert's reliance on Nielsen data to measure viewership shares. A protective order entered by the District Court in this case prevents the parties from contesting the accuracy of such data. App. 321. But appellees—who bear the burden of proof in this case—offer no alternative measure of the viewership in noncable households of stations dropped or denied carriage. Instead, appellees and their experts repeatedly emphasize the importance of preserving "vulnerable" or "marginal" independent stations serving "relatively small" audiences. Brief for Federal Appellees 14, 17, 25, n. 14; NAB Brief 31; see also Deposition of James N. Dertouzos (App. 381) (describing broadcast stations affected by carriage denials as "[s]tations on the margin of cable operator decisionmaking now and in the future"); Deposition of Roger G. Noll (App. 446) (cable operators' advertising incentives will operate "at the margin" and affect "weaker stations, UHF independent stations"); *id.*, at 450 (stations dropped will be "[t]hose that have the lowest audience ratings combined with the absence of a specific target audience"); Deposition of Harry Shooshan III (App. 477) (must-carry has benefited "stations that were not as strong, that were marginal"); Reply Declaration of Roger G. Noll ¶ 19 (App. 2009) ("While frequently . . . the stations not carried by cable systems have low ratings, the point is

this: even the lowest rated commercial stations attract viewers, and the lowest rated noncommercial stations attract members"). The Court suggests that it is appropriate to disregard the low noncable viewership of stations denied carriage, because in some instances *cable* viewers preferred the dropped broadcast channels to the cable channels that replaced them. *Ante,* at 206. The viewership statistics in question, as well as their significance, are sharply disputed, but they are also irrelevant. The issue is whether the Government can demonstrate a substantial interest in forced carriage of certain *broadcast* stations, for the benefit of viewers who lack access to cable. That inquiry is not advanced by an analysis of relative *cable* household viewership of broadcast and cable programming. When appellees are pressed to explain the Government's "substantial interest" in preserving noncable viewers' access to "vulnerable" or "marginal" stations with "relatively small" audiences, it becomes evident that the interest has nothing to do with anticompetitive behavior, but has everything to do with content—preserving "quality" local programming that is "responsive" to community needs. Brief for Federal Appellees 13, 30. Indeed, JUSTICE BREYER expressly declines to accept the anticompetitive rationale for the must-carry rules embraced by the principal opinion, and instead explicitly relies on a need to preserve a "rich mix" of "quality" programming. *Ante,* at 226 (opinion concurring in part).

3

I turn now to the evidence of harm to broadcasters denied carriage or repositioned. The Court remanded for a determination whether broadcast stations denied carriage would be at "'serious risk of financial difficulty'" and would "'deteriorate to a substantial degree or fail altogether.'" *Ante,* at 208 (quoting *Turner,* 512 U. S., at 667, 666). The *Turner* plurality noted that there was no evidence that "local broadcast stations have fallen into bankruptcy, turned in their

broadcast licenses, curtailed their broadcast operations, or suffered a serious reduction in operating revenues" because of adverse carriage decisions. *Id.*, at 667. The record on remand does not permit the conclusion, at the summary judgment stage, that Congress could reasonably have predicted serious harm to a significant number of stations in the absence of must-carry.

The purported link between an adverse carriage decision and severe harm to a station depends on yet another untested premise. Even accepting the conclusion that a cable system operator has a monopoly over *cable* services to the home, *supra*, at 237, it does not necessarily follow that the operator also has a monopoly over all *video* services to cabled households. Cable subscribers using an input selector switch and an antenna can receive broadcast signals. Widespread use of such switches would completely eliminate any cable system "monopoly" over sources of video input. See 910 F. Supp., at 786 (Williams, J., dissenting). Growing use of direct-broadcast satellite television also tends to undercut the notion that cable operators have an inevitable monopoly over video services entering cable households. See, *e. g.*, Farhi, Dishing Out the Competition to Cable TV, Washington Post, Oct. 12, 1996, at H1, col. 3.

In the Cable Act, Congress rejected the wisdom of any "substantial societal investment" in developing input selector switch technology. § 2(a)(18). In defending this choice, the Court purports to identify "substantial evidence of technological shortcomings" that prevent widespread, efficient use of such devices. But nearly all of the "data" in question are drawn from sources predating the enactment of must-carry by roughly six years. Compare *ante*, at 219–220, with Defendants' Joint Statement of Evidence Before Congress ¶ 725 (JSCR) (citing ELRA Group, Inc., Outdoor Antennas, Reception of Local Television Signals and Cable Television i–ii (Jan. 28, 1986), App. H to NAB Testimony in Cable Legislation before the Subcommittee on Telecommunications and

Finance of the House Committee on Energy and Commerce, 101st Cong., 2d Sess. (May 16, 1990)) (CR Vol. I.L, Exh. 22, at CR 08828); JSCR ¶¶ 759–760 (App. 1629–1630) (citing Comments of INTV in MM Docket No. 85–349, at 73 (Jan. 29, 1986)) (CR Vol. I.BB, Exh. 162, at CR 15901–15902); JSCR ¶ 758 (App. 1628) (citing Comments of NAB in MM Docket No. 85–349, at 23–24 (Jan. 29, 1986)) (CR Vol. I.BB, Exh. 165, at CR 16183–16184); JSCR ¶¶ 718, 724, 751–752, 754–755, 761–762 (App. 1605–1607, 1609–1610, 1624–1627, 1630–1631) (citing Joint Petition for Reconsideration in MM Docket No. 85–349 (Dec. 17, 1986)) (CR Vol. I.DD, Exh. 183, at CR 16726–16839); JSCR ¶¶ 738–739, 764, 767 (App. 1617–1618, 1632–1634) (citing Petition for Reconsideration by Adelphia Communications Corp. et al. in MM Docket No. 85–349, at 27–32 (Jan. 12, 1987)) (CR Vol. I.DD, Exh. 184, at CR 16892–16897). The Court notes the importance of deferring to congressional judgments about the "interaction of industries undergoing rapid economic and technological change." *Ante*, at 196. But this principle does not require wholesale deference to judgments about rapidly changing technologies that are based on unquestionably outdated information.

The Court concludes that the evidence on remand meets the threshold of harm established in *Turner*. The Court begins with the "[c]onsiderable evidence" that broadcast stations denied carriage have fallen into bankruptcy. *Ante*, at 209. The analysis, however, does not focus on features of the market in which these stations were located or on the size of the audience they commanded. The "considerable evidence" relied on by the Court consists of repeated references to the bankruptcies of the same 23 commercial independent stations—apparently, new stations. See JSCR ¶¶ 659, 671–672, 676, 681 (App. 1576, 1581–1582, 1584, 1587); Hearing on Competitive Issues, at 548 (statement of Milton Maltz) (CR Vol. I.C, Exh. 8, at CR 01887). Because the must-carry provisions have never been justified as a means of *enhancing* broadcast television, I do not understand the

relevance of this evidence, or of the evidence concerning the difficulties encountered by *new* stations seeking financing. See *ante*, at 209 (citing JSCR ¶¶ 643–658 (App. 1564–1576)).

The Court also claims that the record on remand reflects "considerable evidence" of stations curtailing their broadcast operations or suffering reductions in operating revenues. *Ante*, at 209. Most of the anecdotal accounts of harm on which the Court relies are sharply disputed. Compare JSCR ¶¶ 618, 619, 622, 623, 692 (App. 1553–1555, 1591), with Time Warner Entertainment Company, L. P.'s Broadcast Station Rebuttal ¶ 8 (App. 2299) (ABC affiliate claiming harm from denial of carriage experienced $3.8 million net revenue increase between 1986 and 1992); *id.*, ¶ 111 (App. 2403) (Home Shopping Network affiliate did not report to Congress that it was harmed by cable operator conduct between 1986 and 1992); *id.*, ¶ 83 (App. 2372–2373) (station alleged to have lost half of its cable carriage in fact obtained carriage on systems serving 80 percent of total cable subscribers within area of dominant influence); *id.*, ¶ 94 (App. 2385) (station claiming harm from denial of carriage experienced a $1.13 million net revenue increase between 1986 and 1993); *id.*, ¶ 30 (App. 2318) (some systems on which station claimed anticompetitive carriage denials were precluded from carrying station due to signal strength and quality problems). Congress' reasonable conclusions are entitled to deference, and for that reason the fact that the evidence is in conflict will not necessarily preclude summary judgment in appellees' favor. Nevertheless, in the course of our independent review, we cannot ignore sharp conflicts in the record that call into question the reasonableness of Congress' findings.

Moreover, unlike other aspects of the record on remand, the station-specific accounts cited by the Court do permit an evaluation of trends in the various broadcast markets, or "areas of dominant influence," in which carriage denials allegedly caused harm. The Court does not conduct this sort

of analysis. Were it to do so, the Court would have to recognize that all but *one* of the commercial broadcast stations cited as claiming a curtailment in operations or a decline in revenue was broadcasting within an area of dominant influence that experienced net growth, or at least no net reduction, in the number of commercial broadcast stations operating during the non-must-carry era. See Besen Declaration, Exh. 11 (App. 861–869); cf. JSCR ¶ 618 (App. 1553) (station claiming harm within Cedar Rapids market, with four commercial broadcast stations in 1987 and five in 1992); *id.*, ¶ 620 (App. 1554) (station claiming harm within Tulsa market, with seven commercial broadcast stations in 1987 and 1992); *id.*, ¶ 623 (App. 1554) (station claiming harm within New York City market, with 14 commercial broadcast stations in 1987 and 1992); *id.*, ¶ 692 (App. 1591) (station claiming harm within Salt Lake City market, with five commercial broadcast stations in 1987 and eight in 1992); *id.*, ¶ 695 (App. 1593–1594) (station claiming harm within Honolulu market, with seven commercial broadcast stations in 1987 and nine in 1992); *id.*, ¶ 703 (App. 1599) (station claiming harm within Grand Rapids market, with seven commercial broadcast stations in 1987 and 1992). Indeed, in 499 of 504 areas of dominant influence nationwide, the number of commercial broadcast stations operating in 1992 equaled or exceeded the number operating in 1987. Besen Declaration, Exh. 11 (App. 861–869). Only two areas of dominant influence experienced a reduction in the number of noncommercial broadcast stations operating between 1987 and 1992. *Ibid.* (App. 871–880).

In sum, appellees are not entitled to summary judgment on whether Congress could conclude, based on reasonable inferences drawn from substantial evidence, that "'absent legislative action, the free local off-air broadcast system is endangered.'" *Ante*, at 209 (quoting S. Rep. No. 102–92, at 42). The Court acknowledges that the record contains much evidence of the health of the broadcast industry, including

evidence that 263 new broadcast stations signed on the air in the period without must-carry rules, evidence of growth in stations' advertising revenue, and evidence of voluntary carriage of broadcast stations accounting for virtually all measurable viewership in noncable households. *Ante,* at 210–211. But the Court dismisses such evidence, emphasizing that the question is not whether Congress correctly determined that must-carry is necessary to prevent significant financial hardship to a substantial number of stations, but whether "the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress." *Ante,* at 211. Even accepting the Court's articulation of the relevant standard, it is not properly applied here. The principal opinion disavows a need to closely scrutinize the logic of the regulatory scheme at issue on the ground that it "need not put [its] imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment." *Ante,* at 208. That approach trivializes the First Amendment issue at stake in this case. A highly dubious economic theory has been advanced as the "substantial interest" supporting a First Amendment burden on cable operators and cable programmers. In finding that must-carry serves a substantial interest, the principal opinion necessarily accepts that theory. The partial concurrence does not, but neither does it articulate what threat to the availability of a "multiplicity" of broadcast stations would exist in a perfectly competitive market.

B

I turn now to the second portion of the *O'Brien* inquiry, which concerns the fit between the Government's asserted interests and the means chosen to advance them. The Court observes that "broadcast stations gained carriage on 5,880 channels as a result of must-carry," and recognizes that this forced carriage imposes a burden on cable system operators and cable programmers. *Ante,* at 215. But the Court also concludes that the other 30,006 cable channels occupied

by broadcast stations are irrelevant to measuring the burden of the must-carry scheme. The must-carry rules prevent operators from dropping these broadcast stations should other more desirable cable programming become available, even though operators have carried these stations voluntarily in the past. The must-carry requirements thus burden an operator's First Amendment freedom to exercise unfettered control over a number of channels in its system, whether or not the operator's present choice is aligned with that of the Government.

Even assuming that the Court is correct that the 5,880 channels occupied by added broadcasters "represent the actual burden of the regulatory scheme," *ibid.*, the Court's leap to the conclusion that must-carry "is narrowly tailored to preserve a multiplicity of broadcast stations," *ante*, at 215–216, is nothing short of astounding. The Court's logic is circular. Surmising that most of the 5,880 channels added by the regulatory scheme would be dropped in its absence, the Court concludes that the figure also approximates the "benefit" of must-carry. Finding the scheme's burden "congruent" to the benefit it affords, the Court declares the statute narrowly tailored. The Court achieves this result, however, only by equating the *effect* of the statute—requiring cable operators to add 5,880 stations—with the governmental *interest* sought to be served. The Court's citation of *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), reveals the true nature of the interest at stake. The "evi[l] the Government seeks to eliminate," *id.*, at 799, n. 7, is not the failure of cable operators to carry *these 5,880 stations.* Rather, to read the first half of the principal opinion, the "evil" is *anticompetitive behavior* by cable operators. As a factual matter, we do not know whether these stations were not carried because of anticompetitive impulses. Positing the effect of a statute as the governmental interest "can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Simon & Schuster, Inc.* v. *Members of*

N. Y. State Crime Victims Bd., 502 U. S. 105, 120 (1991). Without a sense whether *most* adverse carriage decisions are anticompetitively motivated, it is improper to conclude that the statute is narrowly tailored simply because it prevents *some* adverse carriage decisions. See *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989) (scope of law must be "in proportion to the interest served") (internal quotation marks omitted).

In my view, the statute is not narrowly tailored to serve a substantial interest in preventing anticompetitive conduct. I do not understand JUSTICE BREYER to disagree with this conclusion. *Ante*, at 227 (examining fit between "speech-restricting and speech-enhancing consequences" of must-carry). Congress has commandeered up to one-third of each cable system's channel capacity for the benefit of local broadcasters, without any regard for whether doing so advances the statute's alleged goals. To the extent that Congress was concerned that anticompetitive impulses would lead vertically integrated operators to prefer those programmers in which the operators have an ownership stake, the Cable Act is overbroad, since it does not impose its requirements solely on such operators. An integrated cable operator cannot satisfy its must-carry obligations by allocating a channel to an unaffiliated cable programmer. And must-carry blocks an operator's access to up to one-third of the channels on the system, even if its affiliated programmer provides programming for only a single channel. The Court rejects this logic, finding the possibility that the must-carry regime would require reversal of a benign carriage decision not "so prevalent that must-carry is substantially overbroad." *Ante*, at 216. The principal opinion reasons that "cable systems serving 70 percent of subscribers are vertically integrated with cable programmers, *so anticompetitive motives may be implicated in a majority of systems' decisions not to carry broadcasters.*" *Ante*, at 216–217 (emphasis added). It is unclear whether the principal opinion means that anticompetitive

motives may be implicated in a majority of *decisions*, or in decisions by a majority of *systems*. In either case, the principal opinion's conclusion is wholly speculative. We do not know which of these vertically integrated systems are affiliated with one cable programmer and which are affiliated with five cable programmers. Moreover, Congress has placed limits upon the number of channels that can be used for affiliated programming. 47 U. S. C. § 533(f)(1)(B). The principal opinion does not suggest why these limits are inadequate or explain why, once a system reaches the limit, its remaining carriage decisions would also be anticompetitively motivated. Even if the channel limits are insufficient, the principal opinion does not explain why requiring carriage of *broadcast* stations on *one-third* of the system's channels is a measured response to the problem.

Finally, I note my disagreement with the Court's suggestion that the availability of less-speech-restrictive alternatives is never relevant to *O'Brien*'s narrow tailoring inquiry. *Ante*, at 217–218. The *Turner* Court remanded this case in part because a plurality concluded that "judicial findings concerning the availability and efficacy of constitutionally acceptable less restrictive means of achieving the Government's asserted interests" were lacking in the original record. 512 U. S., at 668 (internal quotation marks omitted). The Court's present position on this issue is puzzling.

Our cases suggest only that we have not interpreted the narrow tailoring inquiry to "require elimination of *all* less restrictive alternatives." *Fox*, *supra*, at 478. Put another way, we have refrained from imposing a *least*-restrictive-means requirement in cases involving intermediate First Amendment scrutiny. *Ward*, *supra*, at 798 (time, place, and manner restriction); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) (same); *Fox*, *supra*, at 478 (commercial speech). It is one thing to say that a regulation need not be the *least*-speech-restrictive means of serving an important governmental objective. It is quite another to

suggest, as I read the majority to do here, that the availability of less-speech-restrictive alternatives cannot establish or confirm that a regulation is substantially broader than necessary to achieve the Government's goals. While the validity of a Government regulation subject to intermediate First Amendment scrutiny does not turn on our "agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests," *United States* v. *Albertini*, 472 U. S. 675, 689 (1985), the availability of less intrusive approaches to a problem serves as a benchmark for assessing the reasonableness of the fit between Congress' articulated goals and the means chosen to pursue them, *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 490–491 (1995).

As shown *supra*, at 251–252 and this page, in this case it is plain without reference to any alternatives that the must-carry scheme is "substantially broader than necessary," *Ward*, 491 U. S., at 800, to serve the only governmental interest that the principal opinion fully explains—preventing unfair competition. If Congress truly sought to address anticompetitive behavior by cable system operators, it passed the wrong law. See *Turner*, *supra*, at 682 (O'CONNOR, J., concurring in part and dissenting in part) ("That some speech within a broad category causes harm . . . does not justify restricting the whole category"). Nevertheless, the availability of less restrictive alternatives—a leased access regime and subsidies—reinforces my conclusion that the must-carry provisions are overbroad.

Consider first appellants' proposed leased access scheme, under which a cable system operator would be required to make a specified proportion of the system's channels available to broadcasters and independent cable programmers alike at regulated rates. Leased access would directly address both vertical integration and predatory behavior, by placing broadcasters and cable programmers on a level playing field for access to cable. The principal opinion never ex-

plicitly identifies any threat to the availability of broadcast television to noncable households *other than* anticompetitive conduct, nor does JUSTICE BREYER's partial concurrence. Accordingly, to the extent that leased access would address problems of anticompetitive behavior, I fail to understand why it would not achieve the goal of "ensuring that significant programming remains available" for noncable households. *Ante,* at 221. The Court observes that a leased access regime would, like must-carry, "reduce the number of cable channels under cable systems' control in the same manner as must-carry." *Ibid.* No leased access scheme is currently before the Court, and I intimate no view on whether leased access, like must-carry, imposes unacceptable burdens on cable operators' free speech interests. It is important to note, however, that the Court's observation that a leased access scheme may, like must-carry, impose First Amendment burdens does not dispose of the narrow tailoring inquiry in this case. As noted, a leased access regime would respond directly to problems of vertical integration and problems of predatory behavior. Must-carry quite clearly does not respond to the problem of vertical integration. *Supra,* at 251–253. In addition, the must-carry scheme burdens the rights of cable programmers *and* cable operators; there is no suggestion here that leased access would burden cable *programmers* in the same way as must-carry does. In both of these respects, leased access is a more narrowly tailored guard against anticompetitive behavior. Finally, if, as the Court suggests, Congress were concerned that a leased access scheme would impose a burden on "small broadcasters" forced to pay for access, subsidies would eliminate the problem.

Subsidies would not, of course, eliminate anticompetitive behavior by cable system operators—a problem that Congress could address directly or through a leased-access scheme. Appellees defend the must-carry provisions, however, not only as a means of preventing anticompetitive

behavior, but also as a means of protecting "marginal" or "vulnerable" stations, even if they are *not* threatened by anticompetitive behavior. The principal opinion chooses not to acknowledge this interest explicitly, although JUSTICE BREYER does. Even if this interest were content neutral—which it is not—subsidies would address it directly. The Court adopts appellees' position that subsidies would serve a "very different purpose than must-carry. Must-carry is intended not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households." *Ante*, at 222; see Brief for Federal Appellees 47. To the extent that JUSTICE BREYER sees must-carry as a "speech-enhancing" measure designed to guarantee over-the-air broadcasters "extra dollars," *ante*, at 226, it is unclear why subsidies would not fully serve that interest. In any event, I take appellees' concern to be that subsidies, unlike must-carry, would save some broadcasters that would not survive even *with* cable carriage. There is a straightforward solution to this problem. If the Government is indeed worried that imprecision in allocation of subsidies would prop up stations that would not survive even with cable carriage, then it could tie subsidies to a percentage of stations' advertising revenues (or, for public stations, member contributions), determined by stations' access to viewers. For example, in a broadcast market where 50 percent of television-viewing households subscribe to cable, a broadcaster has access to all households without cable as well as to those households served by cable systems on which the broadcaster has secured carriage. If a broadcaster is carried on cable systems serving only 20 percent of cable households (*i. e.*, 10 percent of all television-viewing households in the broadcast market), the broadcaster has access to 60 percent of the television-viewing households. If the Government provided a subsidy to compensate for the loss in advertising revenue or member contributions that a station would sustain by virtue of its

failure to reach 40 percent of its potential audience, it could ensure that its allocation would do no more than protect those broadcasters that would survive with full access to television-viewing households. In sum, the alleged barrier to a precise allocation of subsidies is not insurmountable. The Court also suggests that a subsidy scheme would "involve the Government in making content-based determinations about programming." *Ante*, at 222. Even if that is so, it does not distinguish subsidies from the must-carry provisions. In light of the principal opinion's steadfast adherence to the position that a preference for "diverse" or local-content broadcasting is not a content-based preference, the argument is ironic indeed.

III

Finally, I note my disagreement with the Court's decision to sidestep a question reserved in *Turner*, see 512 U. S., at 643–644, n. 6; addressed by the District Court below, 910 F. Supp., at 750 (Sporkin, J.); fairly included within the question presented here; and argued by one of the appellants: whether the must-carry rules requiring carriage of low power stations, 47 U. S. C. § 534(c), survive constitutional scrutiny. A low power station qualifies for carriage only if the FCC determines that the station's programming "would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license." § 534(h)(2)(B). As the *Turner* Court noted, "this aspect of § 4 appears to single out certain low-power broadcasters for special benefits on the basis of content." 512 U. S., at 644, n. 6. Because I believe that the must-carry provisions fail even intermediate scrutiny, it is clear that they would fail scrutiny under a stricter content-based standard.

In declining to address the rules requiring carriage of low power stations, the Court appears to question whether the

issue was fairly included within the question presented or properly preserved by the parties. *Ante*, at 224. This position is somewhat perplexing. The Court in *Turner* apparently found the issue both fairly included within the strikingly similar question presented there, compare Brief for Federal Appellees in *Turner*, O. T. 1993, No. 93–44, p. I, with Brief for Federal Appellees I, and properly preserved despite the lack of specific argumentation devoted to this subsection of the challenged statute in the jurisdictional statement there, see Juris. Statement in *Turner*, O. T. 1993, No. 93–44, pp. 11–28. The Court's focus on the quantity of briefing devoted to the subject, *ante*, at 224, ignores the fact that there are two groups of appellants challenging the judgment below—cable operators and cable programmers—and that the issue is of more interest to the former than to the latter. It also seems to suggest that a party defending a judgment can defeat this Court's review of a question simply by ignoring its adversary's position on the merits.

In any event, the Court lets stand the District Court's seriously flawed legal reasoning on the point. The District Court concluded that the provisions "are very close to content-based legislation triggering strict scrutiny," but held that they do not "cross the line." 910 F. Supp., at 750. That conclusion appears to have been based on the fact that the low power provisions are *viewpoint* neutral. *Ibid.* Whether a provision is viewpoint neutral is irrelevant to the question whether it is also *content* neutral. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 430 (1992) (Stevens, J., concurring in judgment); *Turner*, *supra*, at 685 (Ginsburg, J., concurring in part and dissenting in part).

IV

In sustaining the must-carry provisions of the Cable Act, the Court ignores the main justification of the statute urged by appellees and subjects restrictions on expressive activity to an inappropriately lenient level of scrutiny. The principal

opinion then misapplies the analytic framework it chooses, exhibiting an extraordinary and unwarranted deference for congressional judgments, a profound fear of delving into complex economic matters, and a willingness to substitute untested assumptions for evidence. In light of gaps in logic and evidence, it is improper to conclude, at the summary judgment stage, that the must-carry scheme serves a significant governmental interest "in a direct and effective way." *Ward*, 491 U. S., at 800. Moreover, because the undisputed facts demonstrate that the must-carry scheme is plainly not narrowly tailored to serving the only governmental interest the principal opinion fully explains and embraces—preventing anticompetitive behavior—appellants are entitled to summary judgment in their favor.

JUSTICE BREYER disavows the principal opinion's position on anticompetitive behavior, and instead treats the must-carry rules as a "speech-enhancing" measure designed to ensure access to "quality" programming for noncable households. Neither the principal opinion nor the partial concurrence explains the nature of the alleged threat to the availability of a "multiplicity of broadcast programming sources," if that threat does not arise from cable operators' anticompetitive conduct. Such an approach makes it impossible to discern whether Congress was addressing a problem that is "real, not merely conjectural," and whether must-carry addresses the problem in a "direct and material way." *Turner*, *supra*, at 664 (plurality opinion).

I therefore respectfully dissent, and would reverse the judgment below.

Syllabus

UNITED STATES *v.* LANIER

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

No. 95–1717. Argued January 7, 1997—Decided March 31, 1997

Respondent Lanier was convicted under 18 U. S. C. § 242 of criminally violating the constitutional rights of five women by assaulting them sexually while he served as a state judge. The jury had been instructed, *inter alia*, that the Government had to prove as an element of the offense that Lanier had deprived the victims of their Fourteenth Amendment due process right to liberty, which included the right to be free from sexually motivated physical assaults and coerced sexual battery. The en banc Sixth Circuit set aside the convictions for lack of any notice to the public that § 242 covers simple or sexual assault crimes. Invoking general interpretive canons and *Screws* v. *United States*, 325 U. S. 91 (plurality opinion), the court held that § 242 criminal liability may be imposed only if the constitutional right said to have been violated is first identified in a decision of this Court, and only when the right has been held to apply in a factual situation "fundamentally similar" to the one at bar. The court regarded these combined requirements as substantially higher than the "clearly established" standard used to judge qualified immunity in civil cases under 42 U. S. C. § 1983.

Held: The Sixth Circuit employed the wrong standard for determining whether particular conduct falls within the range of criminal liability under § 242. Section 242's general language prohibiting "the deprivation of any rights . . . secured . . . by the Constitution" does not describe the specific conduct it forbids, but—like its companion conspiracy statute, 18 U. S. C. § 241—incorporates constitutional law by reference. Before criminal liability may be imposed for violation of any penal law, due process requires "fair warning . . . of what the law intends." *McBoyle* v. *United States*, 283 U. S. 25, 27. The touchstone is whether the statute, either standing alone or as construed by the courts, made it reasonably clear at the time of the charged conduct that the conduct was criminal. Section 242 was construed in light of this due process requirement in *Screws*, *supra*. The Sixth Circuit erred in adding as a gloss to this standard the requirement that a prior decision of this Court have declared the constitutional right at issue in a factual situation "fundamentally similar" to the one at bar. The *Screws* plurality referred in general terms to rights made specific by "decisions interpreting" the Constitution, see 325 U. S., at 104; no subsequent case has confined the

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universe of relevant decisions to the Court's opinions; and the Court has specifically referred to Court of Appeals decisions in defining the established scope of a constitutional right under § 241, see *Anderson* v. *United States*, 417 U. S. 211, 223–227, and in enquiring whether a right was "clearly established" when applying the qualified immunity rule under § 1983 and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, see, *e. g.*, *Mitchell* v. *Forsyth*, 472 U. S. 511, 533. Nor has this Court demanded precedents applying the right at issue to a "fundamentally similar" factual situation at the level of specificity meant by the Sixth Circuit. Rather, the Court has upheld convictions under § 241 or § 242 despite notable factual distinctions between prior cases and the later case, so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights. See, *e. g.*, *United States* v. *Guest*, 383 U. S. 745, 759, n. 17. The Sixth Circuit's view that due process under § 242 demands more than the "clearly established" qualified immunity test under § 1983 or *Bivens* is error. In effect that test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. As with official conduct under § 1983 or *Bivens*, liability may be imposed under § 242 if, but only if, in the light of pre-existing law the unlawfulness of the defendant's conduct is apparent. Pp. 264–272.

73 F. 3d 1380, vacated and remanded.

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

Deputy Solicitor General Waxman argued the cause for the United States. On the briefs were *Acting Solicitor General Dellinger*, *Assistant Attorney General Patrick*, *Deputy Solicitor General Bender*, *Paul R. Q. Wolfson*, *Jessica Dunsay Silver*, and *Thomas E. Chandler*.

Alfred H. Knight, by appointment of the Court, 519 U. S. 804, argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Marjorie Heins* and *Steven R. Shapiro;* for the NOW Legal Defense and Education Fund et al. by *Lynn Hecht Schafran* and *Martha F. Davis;* for the Southern Poverty Law Center et al. by *Mary-Christine Sungaila*, *Gregory R. Smith*, *J. Richard Cohen*, and *Brian Levin;* and for Vivian Forsythe-Archie et al. by *Catharine A. MacKinnon*.

JUSTICE SOUTER delivered the opinion of the Court.

Respondent David Lanier was convicted under 18 U. S. C. § 242 of criminally violating the constitutional rights of five women by assaulting them sexually while Lanier served as a state judge. The Sixth Circuit reversed his convictions on the ground that the constitutional right in issue had not previously been identified by this Court in a case with fundamentally similar facts. The question is whether this standard of notice is higher than the Constitution requires, and we hold that it is.

I

David Lanier was formerly the sole state Chancery Court judge for two rural counties in western Tennessee. The trial record, read most favorably to the jury's verdict, shows that from 1989 to 1991, while Lanier was in office, he sexually assaulted several women in his judicial chambers. The two most serious assaults were against a woman whose divorce proceedings had come before Lanier and whose daughter's custody remained subject to his jurisdiction. When the woman applied for a secretarial job at Lanier's courthouse, Lanier interviewed her and suggested that he might have to reexamine the daughter's custody. When the woman got up to leave, Lanier grabbed her, sexually assaulted her, and finally committed oral rape. A few weeks later, Lanier inveigled the woman into returning to the courthouse again to get information about another job opportunity, and again sexually assaulted and orally raped her. App. 44–67. On five other occasions Lanier sexually assaulted four other women: two of his secretaries, a Youth Services Officer of the juvenile court over which Lanier presided, and a local coordinator for a federal program who was in Lanier's chambers to discuss a matter affecting the same court. *Id.*, at 13–43, 67–109.

Ultimately, Lanier was charged with 11 violations of § 242, each count of the indictment alleging that, acting willfully and under color of Tennessee law, he had deprived the victim

of "rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilful sexual assault." *Id.*, at 5–12. Before trial, Lanier moved to dismiss the indictment on the ground that § 242 is void for vagueness. The District Court denied the motion.

The trial judge instructed the jury on the Government's burden to prove as an element of the offense that the defendant deprived the victim of rights secured or protected by the Constitution or laws of the United States:

> "Included in the liberty protected by the [Due Process Clause of the] Fourteenth Amendment is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion. Thus, this protected right of liberty provides that no person shall be subject to physical or bodily abuse without lawful justification by a state official acting or claiming to act under the color of the laws of any state of the United States when that official's conduct is so demeaning and harmful under all the circumstances as to shock one's consci[ence]. Freedom from such physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery. It is not, however, every unjustified touching or grabbing by a state official that constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's consci[ence]." *Id.*, at 186–187.

The jury returned verdicts of guilty on seven counts, and not guilty on three (one count having been dismissed at the close of the Government's evidence). It also found that the two oral rapes resulted in "bodily injury," for which Lanier was

subject to 10-year terms of imprisonment on each count, in addition to 1-year terms under the other five counts of conviction, see § 242. He was sentenced to consecutive maximum terms totaling 25 years.

A panel of the Court of Appeals for the Sixth Circuit affirmed the convictions and sentence, 33 F. 3d 639 (1994), but the full court vacated that decision and granted rehearing en banc, 43 F. 3d 1033 (1995). On rehearing, the court set aside Lanier's convictions for "lack of any notice to the public that this ambiguous criminal statute [*i. e.*, § 242] includes simple or sexual assault crimes within its coverage." 73 F. 3d 1380, 1384 (1996). Invoking general canons for interpreting criminal statutes, as well as this Court's plurality opinion in *Screws* v. *United States*, 325 U. S. 91 (1945), the Sixth Circuit held that criminal liability may be imposed under § 242 only if the constitutional right said to have been violated is first identified in a decision of this Court (not any other federal, or state, court), and only when the right has been held to apply in "a factual situation fundamentally similar to the one at bar." 73 F. 3d, at 1393. The Court of Appeals regarded these combined requirements as "substantially higher than the 'clearly established' standard used to judge qualified immunity" in civil cases under Rev. Stat. § 1979, 42 U. S. C. § 1983. 73 F. 3d, at 1393. Finding no decision of this Court applying a right to be free from unjustified assault or invasions of bodily integrity in a situation "fundamentally similar" to those charged, the Sixth Circuit reversed the judgment of conviction with instructions to dismiss the indictment. Two judges would not have dismissed the felony counts charging the oral rapes but concurred in dismissing the misdemeanor counts, while three members of the court dissented as to all dismissals.

We granted certiorari to review the standard for determining whether particular conduct falls within the range of criminal liability under § 242. 518 U. S. 1004 (1996). We now vacate and remand.

II

Section 242 is a Reconstruction Era civil rights statute making it criminal to act (1) "willfully" and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States.[1] 18 U. S. C. § 242; *Screws* v. *United States*, *supra*. The en banc decision of the Sixth Circuit dealt only with the last of these elements, and it is with that element alone that we are concerned here.[2]

The general language of § 242,[3] referring to "the deprivation of any rights, privileges, or immunities secured or pro-

[1] The present § 242 has its roots in portions of three Reconstruction Era Civil Rights Acts, whose substantive criminal provisions were consolidated in a single section in 1874. See 2 Cong. Rec. 827–828 (1874) (describing derivation of consolidated criminal civil rights law from §§ 1 and 2 of the Civil Rights Act of 1866, 14 Stat. 27; §§ 16 and 17 of the Civil Rights Act of 1870, 16 Stat. 144; and § 1 of the Civil Rights Act of 1871, 17 Stat. 13). Although those statutory forebears created criminal sanctions only for violations of some enumerated rights and privileges, the consolidated statute of 1874 expanded the law's scope to apply to deprivations of all constitutional rights, despite the "customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance." *United States* v. *Price*, 383 U. S. 787, 803 (1966). Since the 1874 recodification, Congress has revisited § 242 on several occasions, without contracting its substantive scope. See 35 Stat. 1092 (1909) (adding willfulness requirement); 82 Stat. 75 (1968) (enhancing penalties for some violations); 102 Stat. 4396 (1988) (same); 108 Stat. 1970, 2109, 2113, 2147 (1994) (same).

[2] Thus, we do not address the argument, pressed by respondent, that the actions for which he was convicted were not taken under color of law. The Sixth Circuit discussed that issue only in the original panel opinion, subsequently vacated, but did not reach the question in the en banc decision under review here. To the extent the issue remains open, we leave its consideration in the first instance to the Court of Appeals on remand.

[3] "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens," shall be subject to specified criminal penalties.

tected by the Constitution or laws of the United States," is matched by the breadth of its companion conspiracy statute, § 241,[4] which speaks of conspiracies to prevent "the free exercise or enjoyment of any right or privilege secured to [any person] by the Constitution or laws of the United States." Thus, in lieu of describing the specific conduct it forbids, each statute's general terms incorporate constitutional law by reference, see *United States* v. *Kozminski*, 487 U. S. 931, 941 (1988); *United States* v. *Price*, 383 U. S. 787, 797, 805 (1966), and many of the incorporated constitutional guarantees are, of course, themselves stated with some catholicity of phrasing. The result is that neither the statutes nor a good many of their constitutional referents delineate the range of forbidden conduct with particularity.

The right to due process enforced by § 242 and said to have been violated by Lanier presents a case in point, with the irony that a prosecution to enforce one application of its spacious protection of liberty can threaten the accused with deprivation of another: what Justice Holmes spoke of as "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931). "'The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Bouie* v. *City of Columbia*, 378 U. S. 347, 351 (1964) (quoting *United States* v. *Harriss*, 347 U. S. 612, 617 (1954)).[5]

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[4] Insofar as pertinent: "If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same," they shall be subject to specified criminal penalties.

[5] The fair warning requirement also reflects the deference due to the legislature, which possesses the power to define crimes and their punishment. See *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820); *United*

There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926); accord, *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). Second, as a sort of "junior version of the vagueness doctrine," H. Packer, The Limits of the Criminal Sanction 95 (1968), the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. See, *e. g.*, *Liparota* v. *United States*, 471 U. S. 419, 427 (1985); *United States* v. *Bass*, 404 U. S. 336, 347–348 (1971); *McBoyle*, *supra*, at 27. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, see, *e. g.*, *Bouie*, *supra*, at 357–359; *Kolender*, *supra*, at 355–356; *Lanzetta*, *supra*, at 455–457; Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 207 (1985), due 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, see, *e. g.*, *Marks* v. *United States*, 430 U. S. 188, 191–192 (1977); *Rabe* v. *Washington*, 405 U. S. 313 (1972) *(per curiam)*; *Bouie*, *supra*, at 353–354; cf. U. S. Const., Art. I, § 9, cl. 3; *id.*, § 10, cl. 1; *Bouie*, *supra*, at 353–354 (*Ex Post Facto*

States v. *Aguilar*, 515 U. S. 593, 600 (1995). See generally H. Packer, The Limits of the Criminal Sanction 79–96 (1968) (discussing "principle of legality," "that conduct may not be treated as criminal unless it has been so defined by [a competent] authority . . . before it has taken place," as implementing separation of powers, providing notice, and preventing abuses of official discretion) (quotation at 80); Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189 (1985).

Clauses bar legislatures from making substantive criminal offenses retroactive). In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

We applied this standard in *Screws* v. *United States*, 325 U. S. 91 (1945), which recognized that the expansive language of due process that provides a basis for judicial review is, when incorporated by reference into § 242, generally ill suited to the far different task of giving fair warning about the scope of criminal liability. The *Screws* plurality identified the affront to the warning requirement posed by employing § 242 to place "the accused . . . on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning." *Id.*, at 101. At the same time, the same Justices recognized that this constitutional difficulty does not arise when the accused is charged with violating a "right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Id.*, at 104. When broad constitutional requirements have been "made specific" by the text or settled interpretations, willful violators "certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. . . . [T]hey are not punished for violating an unknowable something." *Id.*, at 105. Accordingly, *Screws* limited the statute's coverage to rights fairly warned of, having been "made specific" by the time of the charged conduct. See also *Kozminski*, *supra*, at 941 (parallel construction of § 241).[6]

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[6] This process of "making specific" does not, as the Sixth Circuit believed, qualify *Screws* as "the only Supreme Court case in our legal history in which a majority of the Court seems [to have been] willing to create a common law crime." 73 F. 3d 1380, 1391 (1996). Federal crimes are defined by Congress, not the courts, *Kozminski*, 487 U. S., at 939; *United States* v. *Wiltberger*, *supra*, at 95, and *Screws* did not "create a common

The Sixth Circuit, in this case, added two glosses to the made-specific standard of fair warning. In its view, a generally phrased constitutional right has been made specific within the meaning of *Screws* only if a prior decision of this Court has declared the right, and then only when this Court has applied its ruling in a case with facts "fundamentally similar" to the case being prosecuted. 73 F. 3d, at 1393. None of the considerations advanced in this case, however, persuade us that either a decision of this Court or the extreme level of factual specificity envisioned by the Court of Appeals is necessary in every instance to give fair warning.

First, contrary to the Court of Appeals, see *ibid.*, we think it unsound to read *Screws* as reasoning that only this Court's decisions could provide the required warning. Although the *Screws* plurality gave two examples involving decisions of the Court, their opinion referred in general terms to rights made specific by "decisions interpreting" the Constitution, see 325 U. S., at 104 (plurality opinion), and no subsequent case has held that the universe of relevant interpretive decisions is confined to our opinions. While *United States* v. *Kozminski*, 487 U. S. 931 (1988), a case under § 241 for violat-

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law crime"; it narrowly construed a broadly worded Act of Congress, and the policies favoring strict construction of criminal statutes oblige us to carry out congressional intent as far as the Constitution will admit, see *Kozminski*, *supra*, at 939; *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974); *United States* v. *Morris*, 14 Pet. 464, 475 (1840). Nor is § 242's pedigree as an Act of Congress tainted by its birth at the hands of codifiers who arguably made substantive changes in the pre-existing law, see n. 1, *supra*, as the Sixth Circuit concluded from the statutory history, 73 F. 3d, at 1384–1387. The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language. See, *e. g.*, *United States* v. *Wells*, 519 U. S. 482, 496–497 (1997). Further, the Sixth Circuit's conclusion that Congress never intended § 242 to extend to "newly-created constitutional rights," 73 F. 3d, at 1387, is belied by the fact that Congress has increased the penalties for the section's violation several times since *Screws* was decided, without contracting its substantive scope, see n. 1, *supra*.

ing Thirteenth Amendment rights, did characterize our task as ascertaining the crime charged "by looking to the scope of the Thirteenth Amendment prohibition . . . specified in our prior decisions," *id.*, at 941, in at least one other case we have specifically referred to a decision of a Court of Appeals in defining the established scope of a constitutional right for purposes of § 241 liability, see *Anderson* v. *United States*, 417 U. S. 211, 223–227 (1974). It is also to the point, as we explain below, that in applying the rule of qualified immunity under 42 U. S. C. § 1983 and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), we have referred to decisions of the Courts of Appeals when enquiring whether a right was "clearly established." See *Mitchell* v. *Forsyth*, 472 U. S. 511, 533 (1985); *Davis* v. *Scherer*, 468 U. S. 183, 191–192 (1984); see also *id.*, at 203–205 (Brennan, J., concurring in part and dissenting in part); *Elder* v. *Holloway*, 510 U. S. 510, 516 (1994) (treating Court of Appeals decision as "relevant authority" that must be considered as part of qualified immunity enquiry). Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.

Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is "fundamentally similar" at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. See *United States* v. *Guest*, 383 U. S. 745, 759, n. 17 (1966) (prior cases established right of interstate travel,

but later case was the first to address the deprivation of this right by private persons); *United States* v. *Saylor*, 322 U. S. 385 (1944) (pre-*Screws;* prior cases established right to have legitimate vote counted, whereas later case involved dilution of legitimate votes through casting of fraudulent ballots); *United States* v. *Classic*, 313 U. S. 299, 321–324 (1941) (pre-*Screws;* prior cases established right to have vote counted in general election, whereas later case involved primary election); see also *Screws*, 325 U. S., at 106 (stating that *Classic* met the test being announced).

But even putting these examples aside, we think that the Sixth Circuit's "fundamentally similar" standard would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling. This danger flows from the Court of Appeals' stated view, 73 F. 3d, at 1393, that due process under § 242 demands more than the "clearly established" law required for a public officer to be held civilly liable for a constitutional violation under § 1983 or *Bivens*, see *Anderson* v. *Creighton*, 483 U. S. 635 (1987) (*Bivens* action); *Davis* v. *Scherer*, *supra* (§ 1983 action). This, we think, is error.

In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants "reasonably can anticipate when their conduct may give rise to liability," *id.*, at 195, by attaching liability only if "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson*, *supra*, at 640. So conceived, the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying § 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences

that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. See, *e. g.*, *Mitchell* v. *Forsyth*, *supra*, at 530–535, and n. 12. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful," *Anderson*, *supra*, at 640. As Judge Daughtrey noted in her dissenting opinion in this case: "'The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.'" 73 F. 3d, at 1410 (quoting *K. H. Through Murphy* v. *Morgan*, 914 F. 2d 846, 851 (CA7 1990)); see also *Colten* v. *Kentucky*, 407 U. S. 104, 110 (1972) (due process requirements are not "designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited"); *Williams* v. *United States*, 341 U. S. 97, 101 (1951) (holding that beating to obtain a confession plainly violates § 242). In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, "in the light of pre-existing law the un-

lawfulness [under the Constitution is] apparent," *Anderson*, *supra*, at 640. Where it is, the constitutional requirement of fair warning is satisfied.

Because the Court of Appeals used the wrong gauge in deciding whether prior judicial decisions gave fair warning that respondent's actions violated constitutional rights, we vacate the judgment and remand the case for application of the proper standard.[7]

It is so ordered.

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[7] We also leave consideration of other issues that may remain open to the Court of Appeals on remand. Several of the arguments tendered by respondent here are, however, plainly without merit and need not be left open. First, Lanier's contention that *Screws* excluded rights protected by the Due Process Clause of the Fourteenth Amendment from the ambit of § 242 is contradicted by the language of *Screws* itself as well as later cases. See *Screws* v. *United States*, 325 U. S. 91, 100, 106 (1945); *United States* v. *Price*, 383 U. S., at 789, and n. 2, 793 (§ 242 is enforcement legislation enacted under § 5 of the Fourteenth Amendment and encompasses violations of rights guaranteed under the Due Process Clause). Second, although *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189 (1989), generally limits the constitutional duty of officials to protect against assault by private parties to cases where the victim is in custody, *DeShaney* does not hold, as respondent maintains, that there is no constitutional right to be free from assault committed by state officials themselves outside of a custodial setting. Third, contrary to respondent's claim, *Graham* v. *Connor*, 490 U. S. 386, 394 (1989), does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

Syllabus

YOUNG ET AL. *v.* FORDICE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 95–2031. Argued January 6, 1997—Decided March 31, 1997

The National Voter Registration Act of 1993 (NVRA) requires States to provide simplified systems for registering to vote in *federal* elections, including a system for voter registration on a driver's license application. Beginning on January 1, 1995, Mississippi attempted to comply with the NVRA, attempting to replace its "Old System" of registration with a "Provisional Plan" that simplified registration procedures for both federal and state elections. The United States Attorney General precleared the Provisional Plan under § 5 of the Voting Rights Act of 1965 (VRA), which prohibits States with a specified history of voting discrimination from making changes in voting "practices or procedures" that have the purpose or effect of denying or abridging the right to vote on account of race or color. However, a week before the plan was precleared, the state legislature tabled legislation needed to make the changes effective for state elections. On February 10, 1995, the State abandoned the Provisional Plan in favor of a "New System," which uses the Provisional Plan for federal election registration only and the Old System for both state and federal election registration. The State made no further preclearance submissions. In this suit, appellants claim that the State and its officials violated § 5 by implementing changes in its registration system without preclearance. A three-judge District Court granted the State summary judgment, holding that the differences in the New System and Provisional Plan were attributable to the State's attempt to correct a misapplication of state law, and, thus, were not changes subject to preclearance; and that the State had precleared all the changes that the New System made in the Old when the Attorney General precleared the changes needed to implement the NVRA.

Held: Mississippi has not precleared, and must preclear, the "practices and procedures" that it sought to administer on and after February 10, 1995. Pp. 281–291.

(a) Several circumstances, taken together, lead to the conclusion that the Provisional Plan, although precleared by the Attorney General, was not "in force or effect" under § 5 and, hence, did not become part of the baseline against which to judge whether future change occurred. Those seeking to administer the plan did not intend to administer an

unlawful plan, and they abandoned the plan as soon as it became clear that the legislature would not pass the laws needed to make it lawful. Moreover, all these events took place within a few weeks: The plan was used for only 41 days and by only a third of the State's voter registration officials, and the State held no elections prior to its abandonment of the plan, nor were any elections imminent. Pp. 282–283.

(b) Nonetheless, the New System included changes that must be precleared because it contains "practices and procedures" that are significantly different from the Old System. Minor changes, as well as major, require preclearance. See *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 566–569. This is true even where, as here, the changes are made in an effort to comply with federal law, so long as those changes reflect policy choices made by state or local officials. *Id.*, at 565, n. 29. The NVRA does not preclude application of the VRA's requirements. Change invokes the preclearance process whether that change works in favor of, works against, or is neutral in its impact on minorities because the preclearance process is aimed at preserving the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change. Although the NVRA imposed mandates on the States, Mississippi's changes to the New System are discretionary and nonministerial, reflecting the exercise of policy choice and discretion by state officials. Thus, they are appropriate matters for § 5 preclearance review. Pp. 283–286.

(c) Mississippi's arguments in favor of its position that the Attorney General has already precleared its efforts to comply with the NVRA are rejected. Mississippi correctly argues that the decisions to adopt the NVRA federal registration system and to retain a prior state registration system, by themselves, are not changes for § 5 purposes. However, preclearance requires examination of the federal system's discretionary elements in a context that includes history, purpose, and practical effect. The argument on the merits is whether these changes could have the purpose and effect of denying or abridging the right to vote on account of race or color. Preclearance is necessary to evaluate this argument. Pp. 286–291.

Reversed and remanded.

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

Brenda Wright argued the cause for appellants. With her on the briefs were *Barbara R. Arnwine*, *Thomas J. Henderson*, *Samuel L. Walters*, *A. Spencer Gilbert III*, *Laughlin McDonald*, and *Neil Bradley*.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Patrick*, *Deputy Solicitor General Waxman*, and *Steven H. Rosenbaum.*

Robert E. Sanders, Assistant Attorney General of Mississippi, argued the cause for appellees. With him on the brief was *Mike Moore*, Attorney General.*

JUSTICE BREYER delivered the opinion of the Court.

The question before us is whether § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c (§ 5), requires preclearance of certain changes that Mississippi made in its voter registration procedures—changes that Mississippi made in order to comply with the National Voter Registration Act of 1993. We hold that § 5 does require preclearance.

I

A

The National Voter Registration Act

Congress enacted the National Voter Registration Act of 1993 (NVRA), 107 Stat. 77, 42 U. S. C. § 1973gg *et seq.*, to take effect for States like Mississippi on January 1, 1995. The NVRA requires States to provide simplified systems for registering to vote in *federal* elections, *i. e.*, elections for federal officials, such as the President, congressional Representatives, and United States Senators. The States must provide a system for voter registration by mail, § 1973gg–4, a system for voter registration at various state offices (including those that provide "public assistance" and those that provide services to people with disabilities), § 1973gg–5, and, particularly important, a system for voter registration on a driver's license application, § 1973gg–3. The NVRA speci-

**Juan Cartagena* filed a brief for the Community Service Society of New York et al. as *amici curiae* urging reversal.

fies various details about how these systems must work, including, for example, the type of information that States can require on a voter registration form. §§ 1973gg–3(c)(2), 1973gg–7(b). It also imposes requirements about just when, and how, States may remove people from the federal voter rolls. §§ 1973gg–6(a)(3), (4). The NVRA adds that it does not "supersede, restrict or limit the application of the Voting Rights Act of 1965," and that it does not "authoriz[e] or requir[e] conduct that is prohibited by the Voting Rights Act of 1965." § 1973gg–9(d).

The Voting Rights Act

Section 5 of the Voting Rights Act of 1965 (VRA), among other things, prohibits a State with a specified history of voting discrimination, such as Mississippi, from "enact[ing] or seek[ing] to administer any . . . practic[e], or procedure with respect to voting different from that in force or effect on November 1, 1964," unless and until the State obtains preclearance from the United States Attorney General (Attorney General) or the United States District Court for the District of Columbia. § 1973c. Preclearance is, in effect, a determination that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.* In the language of § 5 jurisprudence, this determination involves a determination that the change is not retrogressive. *Beer* v. *United States*, 425 U. S. 130, 141 (1976); 28 CFR § 51.54(a) (1996).

B

The case before us concerns three different Mississippi voting registration systems: The first system, which we shall call the "Old System," is that used by Mississippi before it tried to comply with the NVRA. The second system, the "Provisional Plan," is a system aimed at NVRA compliance, which Mississippi tried to implement for about six weeks between January 1, 1995, and February 10, 1995. The third

system, the "New System," is the system that Mississippi put into place after February 10, 1995, in a further effort to comply with the NVRA. We shall briefly explain the relevant features of each system.

The Old System. Before 1995, Mississippi administered a voting registration system, which, like the systems of most States, provided for a single registration that allowed the registrant to vote in both federal elections and state elections (*i. e.*, elections for state and local offices). Under Mississippi law, a citizen could register to vote either by appearing personally at a county or municipal clerk's office or at other locations (such as polling places) that the clerk or his deputy visited to register people to vote. Miss. Code Ann. §§23–15–35, 23–15–37, 23–15–39(6) (1990). Mississippi citizens could also register by obtaining a mail-in registration form available at driver's license agencies, public schools, and public libraries, among other places, and mailing it back to the clerk. Miss. Code Ann. §23–15–47(2)(a) (Supp. 1996). The law set forth various details, requiring, for example, that a mail-in application contain the name and address of the voter and that it be attested to by a witness, *ibid.* (although there is some dispute between the parties about whether an application could be rejected for failing to have the witness' signature). State law also allowed county registration officials to purge voters from the rolls if they had not voted in four years. Miss. Code Ann. §23–15–159 (1990).

The Provisional Plan. In late 1994, the Mississippi secretary of state, with the help of an NVRA implementation committee, prepared a series of voter registration changes designed to ensure compliance with the NVRA. The new voter registration application that was incorporated into the driver's license form, for example, did not require that the registrant repeat his or her address, nor did it require an attesting witness. The secretary of state provided information and instructions about those changes to voter registration officials and state agency personnel throughout the

State. The secretary of state and the implementing committee assumed—and recommended—that the Mississippi Legislature would change state law insofar as that law might prevent a valid registration under the NVRA's provisions from counting as a valid registration for a state or local election. And, on that assumption, at least one official in the secretary of state's office told state election officials to place the name of any new valid applicant under the NVRA on a list that would permit him or her to vote in state, as well as in federal, elections.

Using this Provisional Plan, at least some Mississippi officials registered as many as 4,000 voters between January 1, 1995, and February 10, 1995. On January 25, however, the state legislature tabled a bill that would have made NVRA registrations valid for all elections in Mississippi (by, for example, allowing applicants at driver's license and other agencies to register on the spot, without having to mail in the application themselves, App. 86, by eliminating the attesting witness signature on the mail-in application, compare *id.*, at 96, 101, with Miss. Code Ann. § 23–15–47(3) (Supp. 1996), and by eliminating the optional 4-year purge of nonvoting registrants, replacing it with other methods for maintaining up-to-date voter rolls, App. 87–92, 103). Because of the legislature's failure to change the Old System's requirements for state election registration, the state attorney general concluded that Provisional Plan registrations that did not meet Old System requirements would *not* work, under state law, as registration for state elections. State officials notified voter registration officials throughout the State; and they, in turn, were asked to help notify the 4,000 registrants that they were not registered to vote in state or local elections.

The New System. On February 10, 1995, Mississippi began to use what we shall call the New System. That system consists of the changes that its Provisional Plan set forth—but as applied only to registration for federal elections. Mississippi maintains the Old System as the only

method for registration for state elections, and as one set of methods to register for federal elections. See App. to Juris. Statement 21a. All other States, we are told, have modified their voter registration rules so that NVRA registration registers voters for both federal and state elections. Brief for United States as *Amicus Curiae* 4.

C

This case arises out of efforts by Mississippi to preclear, under §5 of the VRA, changes that it made to comply with the NVRA. In December 1994, Mississippi submitted to the United States Attorney General a list of NVRA-implementing changes that it then intended to make. That submission essentially described what we have called the Provisional Plan. The submission contained numerous administrative changes described in two booklets called The National Voter Registration Act, App. 26–43, and the Mississippi Agency Voter Registration Procedures Manual, *id.*, at 51–60. It also included the proposed state legislation necessary to make the Provisional Plan work for state elections as well. *Id.*, at 86–104. Mississippi requested preclearance. *Id.*, at 109–110. On February 1, 1995, the Department of Justice wrote to Mississippi that the Attorney General did "not interpose any objection to the specified changes"—thereby preclearing Mississippi's submitted changes. App. to Juris. Statement 17a.

As we pointed out above, however, on January 25, about one week before the Attorney General precleared the proposed changes, the state legislature had tabled the proposed legislation needed to make those changes effective for state elections. On February 10, 10 days after the Department precleared the proposed changes, Mississippi officials wrote to voter registration officials around the State, telling them that it "appears unlikely that the Legislature will" revive the tabled bill; that the Provisional Plan's registration would therefore not work for state elections; that they should

write—or help the secretary of state write—to tell those who had registered under that system that they were not registered to vote in state elections; that they should make certain future registrants understand that they would need to register separately to be eligible to vote in state, as well as federal, elections; and that they should develop a system for distinguishing between NVRA and other voters. *Id.*, at 20a–23a.

On February 16, about two weeks after the Department of Justice sent its preclearance letter, the Department wrote another letter to Mississippi, which made clear that the Department did not believe its earlier preclearance had precleared what it now saw as a new plan. The Department asked the State to submit what it called this new "dual registration and voter purge system" for preclearance. *Id.*, at 24a. The Department added:

> "In this regard, we note that while, on February 1, 1995, the Attorney General granted Section 5 preclearance to procedures instituted by the state to implement the NVRA, that submission did not seek preclearance for a dual registration and purge system and, indeed, we understand that the decision to institute such a system was not made until after February 1." *Id.*, at 24a–25a.

Mississippi, perhaps believing that the February 1 preclearance sufficed, made no further preclearance submissions.

D

On April 20, 1995, four private citizens (appellants) brought this lawsuit before a three-judge District Court. They claimed that Mississippi and its officials had implemented changes in its registration system without preclearance in violation of § 5. The United States, which is an *amicus curiae* here, brought a similar lawsuit, and the two actions were consolidated.

The three-judge District Court granted Mississippi's motion for summary judgment. It considered the plaintiffs'

basic claim, namely, that the differences between the *Provisional Plan* and the New System amounted to a change in the administration of Mississippi's voting registration practice, which change had not been precleared. The court rejected this argument on the ground that the Provisional Plan was a misapplication of state law, never ratified by the State. Since the differences between the New System and the Provisional Plan were attributable to the State's attempt to correct this misapplication of state law, the court held, those differences were not changes subject to preclearance.

The court also considered a different question, namely, whether the New System differed from the *Old System;* and whether Mississippi had precleared all the changes that the New System made in the Old. The court held that the Department had (on February 1) precleared the administrative changes needed to implement the NVRA. The court also held that Mississippi did not need to preclear its failure to pass a law that would have permitted NVRA registration to count for state, as well as for federal, elections, as the distinction between state and federal elections was due to the NVRA's own provisions, not to the State's changes in voting practices.

The private plaintiffs appealed, and we noted probable jurisdiction. 518 U. S. 1055 (1996). We now reverse.

II

Section 5 of the VRA requires Mississippi to preclear "any . . . practic[e] or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U. S. C. § 1973c. The statute's date of November 1, 1964, often, as here, is not directly relevant, for differences once precleared normally need not be cleared again. They become part of the baseline standard for purposes of determining whether a State has "enact[ed]" or is "seek[ing] to administer" a "practice or procedure" that is "different" enough itself to require preclearance. *Presley* v. *Etowah County*

Comm'n, 502 U. S. 491, 495 (1992) ("To determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted. Absent relevant intervening changes, the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison"). Regardless, none of the parties asks us to look further back in time than 1994, when the Old System was last in effect. The appellants ask us to consider whether Mississippi's New System amounts to a forbidden effort to implement unprecleared changes either (a) because the New System is "different from" the post-1994 Provisional Plan or (b) because it is "different from" the 1994 Old System. We shall consider each of these claims in turn.

A

First, the appellants and the Government argue that the Provisional Plan, because it was precleared by the Attorney General, became part of the baseline against which to judge whether a future change must be precleared. They add that the New System differs significantly from the Provisional Plan, particularly in its effect on registration for state elections. They conclude that Mississippi had to preclear the New System insofar as it differed from the Provisional Plan.

The District Court rejected this argument on the ground that the Provisional Plan practices and procedures never became part of Mississippi's voting-related practices or procedures, but instead simply amounted to a temporary misapplication of state law. We, too, believe that the Provisional Plan, in the statute's words, was never "in force or effect." 42 U. S. C. § 1973c.

The District Court rested its conclusion upon the fact that Mississippi did not change its state law so as to make the Provisional Plan's "unitary" registration system lawful and that neither the Governor nor the legislature nor the state attorney general ratified the Provisional Plan. The appel-

lants argue that the simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never "in force or effect." We agree. A State, after all, might maintain in effect for many years a plan that technically, or in one respect or another, violated some provision of state law. Cf. *Perkins* v. *Matthews*, 400 U. S. 379, 394–395 (1971) (deeming ward system "*in fact* 'in force or effect'" and requiring change from wards to at-large elections to be precleared even though ward system was illegal and at-large elections were required under state law (emphasis in original)); *City of Lockhart* v. *United States*, 460 U. S. 125, 132–133 (1983) (numbered-post election system was "in effect" although it may have been unauthorized by state law). But that is not the situation here.

In this case, those seeking to administer the Provisional Plan did not intend to administer an unlawful plan. They expected it to become lawful. They abandoned the Provisional Plan as soon as its unlawfulness became apparent, *i. e.*, as soon as it became clear that the legislature would not pass the laws needed to make it lawful. Moreover, all these events took place within the space of a few weeks. The plan was used to register voters for only 41 days, and only about a third of the State's voter registration officials had begun to use it. Further, the State held no elections prior to its abandonment of the Provisional Plan, nor were any elections imminent. These circumstances taken together lead us to conclude that the Provisional Plan was not "in force or effect"; hence it did not become part of the baseline against which we are to judge whether future change occurred.

B

We nonetheless agree with the appellants and the Government that the New System included changes that must be, but have not been, precleared. That is because the New System contains "practices and procedures" that are significantly "different from" the Old System—the system that was

in effect in 1994. And the State has not precleared those differences.

This Court has made clear that minor, as well as major, changes require preclearance. *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 566–569 (1969) (discussing minor changes, including a change from paper ballots to voting machines); *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166, 175–177 (1985) (election date relative to filing deadline); *Perkins*, *supra*, at 387 (location of polling places). See also 28 CFR § 51.12 (1996) (requiring preclearance of "[a]ny change affecting voting, even though it appears to be minor or indirect . . ."). This is true even where, as here, the changes are made in an effort to comply with federal law, so long as those changes reflect policy choices made by state or local officials. *Allen*, *supra*, at 565, n. 29 (requiring State to preclear changes made in an effort to comply with § 2 of the VRA, 42 U. S. C. § 1973); *McDaniel* v. *Sanchez*, 452 U. S. 130, 153 (1981) (requiring preclearance of voting changes submitted to a federal court because the VRA "requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable"); *Lopez* v. *Monterey County*, 519 U. S. 9, 22 (1996) (quoting *McDaniel* and emphasizing the need to preclear changes reflecting policy choices); *Hampton County Election Comm'n*, *supra*, at 179–180 (requiring preclearance of change in election date although change was made in an effort to comply with § 5). Moreover, the NVRA does not forbid application of the VRA's requirements. To the contrary, it says "[n]othing in this subchapter authorizes or requires conduct that is prohibited by the" VRA. 42 U. S. C. § 1973gg–9(d)(2). And it adds that "neither the rights and remedies established by this section nor any other provision of this subchapter shall supersede, restrict, or limit the application of the" VRA. § 1973gg–9(d)(1).

Nor does it matter for the preclearance requirement whether the change works in favor of, works against, or is neutral in its impact upon the ability of minorities to vote. See generally *City of Lockhart* v. *United States*, *supra* (requiring preclearance of a change but finding the change nonretrogressive). It is change that invokes the preclearance *process;* evaluation of that change concerns the *merits* of whether the change should in fact be precleared. See *Lopez*, *supra*, at 22–25; *Allen*, *supra*, at 555, n. 19, 558–559. That is so because preclearance is a process aimed at preserving the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change. See *McCain* v. *Lybrand*, 465 U. S. 236, 243–244 (1984) (Without § 5, even successful antidiscrimination lawsuits might "merely resul[t] in a change in methods of discrimination"); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 335 (1966) (same); *id.*, at 328 (explaining how the VRA could attack the problems of States going from one discriminatory system to another, by shifting "the advantage of time and inertia" to the potential victims of that discrimination).

In this case, the New System contains numerous examples of new, significantly different administrative practices—practices that are not purely ministerial, but reflect the exercise of policy choice and discretion by Mississippi officials. The system, for example, involves newly revised written materials containing significant, and significantly different, registration instructions; new reporting requirements for local elections officials; new and detailed instructions about what kind of assistance state agency personnel should offer potential NVRA registrants, which state agencies will be NVRA registration agencies, and how and in what form registration material is to be forwarded to those who maintain the voting rolls; and other similar matters. Insofar as they embody discretionary decisions that have a potential for discriminatory impact, they are appropriate matters for review under § 5's preclearance process.

In saying this, we recognize that the NVRA imposes certain mandates on States, describing those mandates in detail. The NVRA says, for example, that the state driver's license applications must also serve as voter registration applications and that a decision not to register will remain confidential. 42 U. S. C. §§ 1973gg–3(a)(1), (c)(2)(D)(ii). It says that States cannot force driver's license applications to submit the same information twice (on license applications and again on registration forms). § 1973gg–3(c)(2)(A). Nonetheless, implementation of the NVRA is not purely ministerial. The NVRA still leaves room for policy choice. The NVRA does not list, for example, all the other information the State may—or may not—provide or request. And a decision about that other information—say, whether or not to tell the applicant that registration counts only for federal elections—makes Mississippi's changes to the New System the kind of discretionary, nonministerial changes that call for federal VRA review. Hence, Mississippi must preclear those changes.

C

We shall consider Mississippi's two important arguments to the contrary.

1

The first set of arguments concerns the effect of the Attorney General's preclearance letter. Mississippi points out that the Department of Justice wrote to the State on February 1, 1995, that the Attorney General did "not interpose any objection" to its NVRA changes. App. to Juris. Statement 17a. Hence, says Mississippi, the Attorney General has already precleared its efforts to comply.

The submission that the Attorney General approved, however, assumed that Mississippi's administrative changes would permit NVRA registrants to vote in both state and federal elections. The submission included a pamphlet entitled The National Voter Registration Act, App. 26–43, which

set forth what Mississippi's submission letter called the State's "plan to administratively implement NVRA on January 1, 1995," *id.*, at 110. The submission included legislative changes; indeed, Mississippi enclosed in the packet the proposed legislation that would have made a single NVRA registration valid for both federal and state elections. *Id.*, at 86–104. The submission also included forms to be provided NVRA registrants, forms that, by their lack of specificity, probably would have led those voters—and the Attorney General—to believe that NVRA registration permitted them to vote in all elections. *Id.*, at 44–50. These forms—perfectly understandable on the "single registration" assumption—might well mislead if they cannot in fact be used to register for state elections. Cf. *City of Lockhart* v. *United States*, 460 U. S., at 131–132 (requiring city to submit "entire system" because "[t]he possible discriminatory purpose or effect of the [changes], admittedly subject to § 5, cannot be determined in isolation from the 'pre-existing' elements"). Furthermore, the submission included no instructions to voter registration officials about treating NVRA registrants differently from other voters and provided for no notice to NVRA registrants that they could not vote in state elections.

Mississippi replies that, as a matter of logic, one could read its submission, with its explicit indication that the state legislation was proposed, but not yet enacted, as a request for approval of the administrative changes *whether or not the state legislature passed the bill.* It tries to derive further support for its claim by pointing to Department of Justice regulations that say that the Attorney General will not preclear unenacted legislation. 28 CFR §§ 51.22, 51.35 (1996). As a matter of pure logic, Mississippi is correct. One could logically understand the preclearance in the way the State suggests. But still, that is not the *only* way to understand it. At a minimum, its submission was ambiguous as to whether (1) it sought approval on the assumption that the

state legislature would enact the bill, or (2) it sought approval whether or not the state legislature would enact the bill. Although there is one reference to the possibility of a "dual registration system" in the absence of legislation, App. 72, the submission simply did not specify what would happen if the legislature did not pass the bill, and it thereby created ambiguity about whether the practices and procedures described in the submission would be implemented regardless of what the legislature did. The VRA permits the Attorney General to resolve such ambiguities against the submitting State. *McCain*, 465 U. S., at 249, 255–257 (burden is on the State to submit a complete and unambiguous description of proposed changes); *Clark* v. *Roemer*, 500 U. S. 646, 658–659 (1991) (relying on "presumption that any ambiguity in the scope of the preclearance request must be construed against the [State]" (internal quotation marks and citations omitted)). See also 28 CFR §§ 51.26(d), 51.27(c) (1996) (requiring preclearance submissions to explain changes clearly and in detail). Hence, the Attorney General could read her approval of the submitted plan as an approval of a plan that rested on the assumption that the proposed changes would be valid for all elections, not a plan in which NVRA registration does not qualify the registrant to vote in state elections. We find nothing in the Attorney General's regulations that forces a contrary conclusion.

Mississippi adds that the Attorney General—if faced with an ambiguity—could have sought more information to clarify the situation, to determine what would happen if the legislature failed to pass the bill, for example. And the Attorney General could then have withheld her approval once she found out what would likely occur. Again, Mississippi is right as to what the Attorney General *might* have done. See § 51.37(a) (Attorney General may request more information about submissions). Indeed, the United States "acknowledge[s]" that with "the benefit of hindsight, . . . such a request might have been preferable" to preclearing the sub-

mission. Brief for United States as *Amicus Curiae* 27, n. 14. Still, the law does not *require* the Attorney General, in these circumstances, to obtain more information. *Clark*, *supra*, at 658–659 (The Attorney General is under no duty to investigate voting changes). See also *McCain*, *supra*, at 247 (Congress "'acknowledged and anticipated [the] inability of the Justice Department—given limited resources—to investigate independently all changes . . .'" (quoting *Perkins*, 400 U. S., at 392, n. 10)). And the issue, of course, is not whether she should or should not have issued a preclearance letter on February 1, 1995, but rather *what it was* that she precleared. Her failure to seek added information makes it more likely, not less likely, that she intended to preclear what she took to be the natural import of the earlier submission, namely, a proposal for a single state/federal registration system.

Finally, Mississippi argues that the Attorney General *in fact* knew, on February 1, 1995, when she issued the preclearance letter that the state legislature would not enact the proposed bill. And it adds that the Attorney General nonetheless approved the submission in order to have in place a precleared unitary system that would serve as a benchmark for measuring whether subsequent changes are retrogressive, thereby permitting the Attorney General to argue that § 5 prohibited as retrogressive the dual system which she knew would likely emerge because the legislation failed. In fact, the record is not clear about just what the Department of Justice did or did not know (*e. g.*, whether tabling the bill meant killing it; whether state election law definitely had to be changed). But in any event, the short answer to the argument is that Mississippi's description of the Department's motive, if true, would refute its claim that the Attorney General intended to preclear a dual system. Indeed, only two weeks after the February 1 preclearance, the Attorney General wrote to Mississippi stating explicitly her view that its submission had not sought "preclearance for a

dual registration and purge system." App. to Juris. Statement 25a. See *McCain*, *supra*, at 255–256 (relying on "such after-the-fact Justice Department statements . . . in determining whether a particular change was actually precleared").

Regardless, the law ordinarily permits the Attorney General to rest a decision to preclear or not to preclear upon the submission itself. *Clark*, *supra*, at 658–659; *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110, 136–138 (1978). Tying preclearance to a particular set of written documents themselves helps to avoid the kinds of arguments about meaning and intent that Mississippi raises here—arguments that, were they frequently to arise, could delay expeditious decisionmaking as to the many thousands of requests for clearance that the Department of Justice receives each year. See *Clark*, *supra*, at 658–659. In sum, we conclude that the Department of Justice, on February 1, did not preclear the New System.

2

Finally, Mississippi argues that the NVRA, because it specifically applies only to registration for federal elections, 42 U. S. C. § 1973gg–2(a), automatically authorizes it to maintain separate voting procedures; hence § 5 cannot be used to force it to implement the NVRA for all elections. If Mississippi means that the NVRA does not forbid two systems and that § 5 of the VRA does not categorically—*without more*—forbid a State to maintain a dual system, we agree. The decision to adopt the NVRA federal registration system is not, by itself, a change for the purposes of § 5, for the State has no choice but to do so. And of course, a State's retention of a prior system for state elections, by itself, is not a change. It is the discretionary elements of the new federal system that the State must preclear. The problem for Mississippi is that preclearance typically requires examination of discretionary changes in context—a context that includes history, purpose, and practical effect. See *City of Lockhart* v.

United States, 460 U. S., at 131 ("The possible discriminatory purpose or effect of the [changes], admittedly subject to § 5, cannot be determined in isolation from the 'pre-existing' elements of the council"). The appellants and the Government argue that *in context* and in light of their practical effects, the particular changes and the way in which Mississippi administers them *could* have the "purpose [or] effect of denying or abridging the right to vote on account of race or color . . . ." 42 U. S. C. § 1973c. We cannot say whether or not that is so, for that is an argument about the merits. The question here is "preclearance," and preclearance is necessary so that the appellants and the Government will have the opportunity to find out if it is true.

III

We hold that Mississippi has not precleared, and must preclear, the "practices and procedures" that it sought to administer on and after February 10, 1995. The decision of the District Court is reversed, and the case is remanded with instructions for the District Court to enter an order enjoining further use of Mississippi's unprecleared changes as appropriate. Any further questions about the remedy for Mississippi's use of an unprecleared plan are for the District Court to address in the first instance. *Clark*, 500 U. S., at 659–660.

It is so ordered.

Syllabus

LAMBERT, GALLATIN COUNTY ATTORNEY *v.* WICKLUND ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–858. Decided March 31, 1997

Montana's Parental Notice of Abortion Act permits a court to waive the requirement that one parent be notified before a minor has an abortion if, *inter alia*, notification is not in the minor's best interests. The Federal District Court declared the Act unconstitutional because the judicial bypass mechanism does not authorize waiver of the notice requirement whenever the abortion itself is in the minor's best interest. The Ninth Circuit affirmed, basing its conclusion entirely on its earlier decision that Nevada's identical bypass requirement was inconsistent with *Bellotti* v. *Baird*, 443 U. S. 622, and *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502.

Held: The Act's judicial bypass provision sufficiently protects a minor's right to an abortion. The Ninth Circuit's holding to the contrary is in direct conflict with this Court's precedents. The principal opinion in *Bellotti* explained the four criteria that a parental consent statute bypass provision must meet to be constitutional, and this Court explicitly held that the Ohio statute at issue in *Akron* met the second *Bellotti* requirement: that the minor be allowed to show that the desired abortion would be in her best interests. The Ohio statute was indistinguishable in any relevant way from the statute at issue here, and, thus, the Montana law also meets the second *Bellotti* requirement. *Akron*'s context, the Ohio statute's language, and *Akron*'s concurring opinion all make clear that requiring a minor to show that *parental notification is not* in her best interests is equivalent to requiring her to show that *abortion without notification is* in her best interests. Contrary to respondents' argument, the Montana statute does not draw a distinction between requiring a minor to show that parental notification is not in her best interests and requiring her to show that an abortion (without notification) is in her best interests, and respondents cite no Montana state-court decision suggesting that the statute permits a court to separate these questions.

Certiorari granted; 93 F. 3d 567, reversed.

PER CURIAM.

Before a minor has an abortion in Montana, one of her parents must be notified. A waiver, or "judicial bypass," of the notification requirement is allowed if the minor can convince a court that notification would not be in her best interests. The Court of Appeals for the Ninth Circuit struck down Montana's parental notification law as unconstitutional, holding that the judicial bypass did not sufficiently protect the right of minors to have an abortion. Because the Ninth Circuit's holding is in direct conflict with our precedents, we grant the petition for a writ of certiorari and reverse.

In 1995, Montana enacted the Parental Notice of Abortion Act. The Act prohibits a physician from performing an abortion on a minor unless the physician has notified one of the minor's parents or the minor's legal guardian 48 hours in advance. Mont. Code Ann. § 50–20–204 (1995).[1] However, an "unemancipated" minor[2] may petition the state youth court to waive the notification requirement, pursuant to the statute's "judicial bypass" provision. § 50–20–212 (quoted in full in an appendix to this opinion). The provision gives the minor a right to court-appointed counsel, and guarantees expeditious handling of the minor's petition (since the petition is automatically granted if the youth court fails to rule on

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[1] Section 50–20–204 provides in relevant part: "A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physician's intention to perform the abortion. . . . If actual notice is not possible after a reasonable effort, the physician or the physician's agent shall give alternate notice as provided in 50–20–205." Section 50–20–205 provides for notice by certified mail. The notice requirement does not apply if "a medical emergency exists and there is insufficient time to provide notice." § 50–20–208(1).

[2] "'Emancipated minor' means a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court . . . ." § 50–20–203(3).

the petition within 48 hours from the time it is filed). §§ 50–20–212(2)(a), (3). The minor's identity remains anonymous, and the proceedings and related documents are kept confidential. § 50–20–212(3).

If the court finds by clear and convincing evidence that *any* of the following three conditions are met, it must grant the petition and waive the notice requirement: (i) the minor is "sufficiently mature to decide whether to have an abortion"; (ii) "there is evidence of a pattern of physical, sexual, or emotional abuse" of the minor by one of her parents, a guardian, or a custodian; or (iii) "the *notification* of a parent or guardian is not in the best interests of the [minor]." §§ 50–20–212(4), (5) (emphasis added). It is this third condition which is at issue here.

Before the Act's effective date, respondents—several physicians who perform abortions, and other medical personnel—filed a complaint seeking a declaration that the Act was unconstitutional and an order enjoining its enforcement. The District Court for the District of Montana, addressing only one of respondents' arguments, held that the Act was unconstitutional because the third condition set out above was too narrow. According to the District Court, our precedents require that judicial bypass mechanisms authorize waiver of the notice requirement whenever "the *abortion* would be in [the minor's] best interests," not just when "*notification* would not be in the minor's best interests." App. to Pet. for Cert. 17a (emphasis in original) (citing *Bellotti* v. *Baird*, 443 U. S. 622, 640–642 (1979) (plurality opinion)). Three days before the Act was to go into effect, the District Court enjoined its enforcement.

The Court of Appeals affirmed, stating that it was bound by its prior decision in *Glick* v. *McKay*, 937 F. 2d 434 (CA9 1991). See *Wicklund* v. *Salvagni*, 93 F. 3d 567, 571–572 (CA9 1996). *Glick* struck down Nevada's parental notification statute which, like Montana's statute here, allowed a minor to bypass the notification requirement if a court deter-

mined that the *notification* would not be in the minor's best interests. The court's conclusion was based on its analysis of our decisions in *Bellotti* v. *Baird*, *supra*, and *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502 (1990).

In *Bellotti*, we struck down a statute requiring a minor to obtain the *consent* of both parents before having an abortion, subject to a judicial bypass provision, because the judicial bypass provision was too restrictive, unconstitutionally burdening a minor's right to an abortion. 443 U. S., at 647 (plurality opinion); *id.*, at 655–656 (STEVENS, J., concurring in judgment). The Court's principal opinion explained that a constitutional parental consent statute must contain a bypass provision that meets four criteria: (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (iii) ensure the minor's anonymity; and (iv) provide for expeditious bypass procedures. *Id.*, at 643–644 (plurality opinion). See also *Akron*, 497 U. S., at 511–513 (restating the four requirements).

In *Akron*, we upheld a statute requiring a minor to *notify* one parent before having an abortion, subject to a judicial bypass provision. We declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional. *Id.*, at 510. Instead, we held that this bypass provision satisfied the four *Bellotti* criteria required for bypass provisions in parental *consent* statutes, and that *a fortiori* it satisfied any criteria that might be required for bypass provisions in parental notification statutes. Critically for the case now before us, the judicial bypass provision we examined in *Akron* was substantively indistinguishable from both the Montana judicial bypass provision at issue here and the Nevada provision at issue in *Glick*. See 497 U. S., at 508 (summarizing Ohio Rev. Code Ann. § 2151.85 (1995)). The judicial bypass provision in *Akron* al-

lowed a court to waive the notification requirement if it determined by clear and convincing evidence "that *notice* is not in [the minor's] best interests" (not that *an abortion* is in her best interests). 497 U. S., at 508 (emphasis added) (citing § 2151.85(A)(4)). And we explicitly held that this provision satisfied the second *Bellotti* requirement, that "the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, 'the desired abortion would be in her best interests.'" 497 U. S., at 511 (quoting *Bellotti*, *supra*, at 644).

Despite the fact that *Akron* involved a parental notification statute, and *Bellotti* involved a parental consent statute;[3] despite the fact that *Akron* involved a statute virtually identical to the Nevada statute at issue in *Glick;* and despite the fact that *Akron* explicitly held that the statute met all of the *Bellotti* requirements, the Ninth Circuit in *Glick* struck down Nevada's parental notification statute as inconsistent with *Bellotti:*

> "Rather than requiring the reviewing court to consider the minor's 'best interests' generally, the Nevada statute requires the consideration of "best interests" only with respect to the possible consequences of parental notification. The best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision. Furthermore, in *Bellotti*, the court expressly stated, '[i]f, *all things considered*, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement.' *Bellotti*, 443 U. S. at 648 (emphasis added). Therefore, the Nevada statute impermissibly narrows

[3] See *Bellotti*, 443 U. S., at 654, n. 1 (STEVENS, J., concurring in judgment) ("[T]his case [does not] determin[e] the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto").

> the *Bellotti* 'best interests' criterion, and is unconstitutional." 937 F. 2d, at 439.

Based entirely on *Glick*, the Ninth Circuit in this case affirmed the District Court's ruling that the Montana statute is unconstitutional, since the statute allows waiver of the notification requirement only if the youth court determines that notification—not the abortion itself—is not in the minor's best interests. 93 F. 3d, at 572.

As should be evident from the foregoing, this decision simply cannot be squared with our decision in *Akron*. The Ohio parental notification statute at issue there was indistinguishable in any relevant way from the Montana statute at issue here. Both allow for judicial bypass if the minor shows that parental *notification* is not in her best interests. We asked in *Akron* whether this met the *Bellotti* requirement that the minor be allowed to show that "the desired abortion would be in her best interests." We explicitly held that it did. 497 U. S., at 511. Thus, the Montana statute meets this requirement, too. In concluding otherwise, the Ninth Circuit was mistaken.

Respondents (as did the Ninth Circuit in *Glick*) place great emphasis on our statement in *Akron*, that "[t]he statute requires the juvenile court to authorize the minor's consent where the court determines that *the abortion* is in the minor's best interest." 497 U. S., at 511 (emphasis added) (citing Ohio Rev. Code Ann. §2151.85(C)(2) (Supp. 1988)). But since we had clearly stated that the statute actually required such authorization only when the court determined that *notification* would not be in the minor's best interests, it is wrong to take our statement to imply that the statute said otherwise. Rather, underlying our statement was an assumption that a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best in-

terests, as the context of the opinion, the statutory language, and the concurring opinion all make clear.[4]

Respondents, echoing the Ninth Circuit in *Glick*, claim that there is a constitutionally significant distinction between requiring a minor to show that parental notification is not in her best interests, and requiring a minor to show that an abortion (without such notification) is in her best interests. See Brief in Opposition 12–13; 937 F. 2d, at 438–439. But the Montana statute draws no such distinction, and respondents cite no Montana state-court decision suggesting that the statute permits a court to separate the question whether parental notification is not in a minor's best interest from an inquiry into whether abortion (without notification) is in the minor's best interest. As with the Ohio statute in *Akron*, the challenge to the Montana statute here is a facial one. Under these circumstances, the Ninth Circuit was incorrect to assume that Montana's statute "narrow[ed]" the *Bellotti* test, 937 F. 2d, at 439, as interpreted in *Akron*.

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[4] See 497 U. S., at 517 ("if she can demonstrate that her maturity or best interests favor abortion without notifying one of her parents"); *id.*, at 522 (STEVENS, J., concurring in part and concurring in judgment) ("Although it need not take the form of a judicial bypass, the State must provide an adequate mechanism for cases in which the minor is mature or *notice* would not be in her best interests" (emphasis added)); Ohio Rev. Code Ann. §2151.85(C)(2) (1994) ("[I]f the court finds, by clear and convincing evidence, . . . that the notification of the parents, guardian, or custodian of the [minor] otherwise is not in the best interest of [the minor], the court shall issue an order authorizing the [minor] to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian"). See also *Hodgson* v. *Minnesota*, 497 U. S. 417, 497 (1990) (KENNEDY, J., concurring in judgment in part and dissenting in part) (interpreting Minnesota judicial bypass procedure which requires minor to show that "an *abortion* . . . *without notification* of her parents, guardian, or conservator *would be* in her best interests," Minn. Stat. §144.343(6) (1988) (emphasis added), as authorizing exemption from strictures of parental notification scheme in "those cases in which . . . *notification of the minor's parents is not* in the minor's best interests" (emphasis added)).

Because the reasons given by the District Court and the Ninth Circuit for striking down the Act are inconsistent with our precedents, we grant the petition for a writ of certiorari and reverse the judgment of the Ninth Circuit.

It is so ordered.

APPENDIX TO PER CURIAM OPINION

Mont. Code Ann. § 50–20–212 (1995):

"(1) The requirements and procedures under this section are available to minors and incompetent persons whether or not they are residents of this state.

"(2) (a) The minor or incompetent person may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf. The petition must include a statement that the petitioner is pregnant and is not emancipated. The court may appoint a guardian ad litem for the petitioner. A guardian ad litem is required to maintain the confidentiality of the proceedings. The youth court shall advise the petitioner of the right to court-appointed counsel and shall provide the petitioner with counsel upon request.

"(b) If the petition filed under subsection (2)(a) alleges abuse as a basis for waiver of notice, the youth court shall treat the petition as a report under 41–3–202. The provisions of Title 41, chapter 3, part 2, apply to an investigation conducted pursuant to this subsection.

"(3) Proceedings under this section are confidential and must ensure the anonymity of the petitioner. All proceedings under this section must be sealed. The petitioner may file the petition using a pseudonym or using the petitioner's initials. All documents related to the petition are confidential and are not available to the public. The proceedings on the petition must be given preference over other pending

matters to the extent necessary to ensure that the court reaches a prompt decision. The court shall issue written findings of fact and conclusions of law and rule within 48 hours of the time that the petition is filed unless the time is extended at the request of the petitioner. If the court fails to rule within 48 hours and the time is not extended, the petition is granted and the notice requirement is waived.

"(4) If the court finds by clear and convincing evidence that the petitioner is sufficiently mature to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the notification of a parent or guardian.

"(5) The court shall issue an order authorizing the petitioner to consent to an abortion without the notification of a parent or guardian if the court finds, by clear and convincing evidence, that:

"(a) there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian; or

"(b) the notification of a parent or guardian is not in the best interests of the petitioner.

"(6) If the court does not make a finding specified in subsection (4) or (5), the court shall dismiss the petition.

"(7) A court that conducts proceedings under this section shall issue written and specific findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence, findings, and conclusions be maintained.

"(8) The supreme court may adopt rules providing an expedited confidential appeal by a petitioner if the youth court denies a petition. An order authorizing an abortion without notice is not subject to appeal.

"(9) Filing fees may not be required of a pregnant minor who petitions a court for a waiver of parental notification or appeals a denial of a petition."

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

We assumed in *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502 (1990) *(Akron II)*, that a young woman's demonstration that an abortion would be in her best interest was sufficient to meet the requirements of the Ohio statute's judicial bypass provision. In my view, that case requires us to make the same assumption here. Whether that is a necessary showing is a question we need not reach.

In *Akron II*, we upheld a statute authorizing a judicial bypass of a parental notice requirement on the understanding that Ohio Rev. Code Ann. § 2151.85(C)(2) (1995) required the juvenile court to authorize the procedure whenever it determined that "the abortion is in the minor's best interest," 497 U. S., at 511. Given the fact that the relevant text of the Montana statute at issue in this case, Mont. Code Ann. § 50–20–212(5)(b) (1995), is essentially identical to the Ohio provision, coupled with the fact that the Montana Attorney General has advised us that "the best interests standard in § 50–20–212(5)(b) [is] either identical to or substantively indistinguishable from the best interests" provision construed in *Akron II*, Pet. for Cert. 7, it is surely appropriate to assume that the Montana provision also requires the court to authorize the minor's consent whenever the abortion is in her best interests. So understood, the Montana statute is plainly constitutional under our ruling in *Akron II*. Because the Court of Appeals erroneously construed the statute in a manner that caused that court to hold the statute unconstitutional, I agree with the majority that the judgment below should be reversed.*

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*Our reading of the statute in *Akron II* appropriately recognized that the two inquiries at issue here—whether an abortion is in a young woman's best interest, and whether notifying a minor's parents of her desire to obtain an abortion is in her best interest—are sometimes linked. For example, if a judge finds after careful assessment of all the circumstances

While a showing that an abortion is in a young woman's best interest is therefore sufficient to satisfy the Montana judicial bypass provision as we understood an analogous statute in *Akron II*, I do not think the Court need address whether the Montana statute can be properly understood to make such a demonstration a necessary requirement. My colleagues suggest that the statute requires a minor "to show that abortion without notification is in her best interests," *ante*, at 297–298 (emphasis deleted). To the extent this language indicates that a young woman must demonstrate *both* that abortion is in her best interest *and* that notification is not, I think that question is best left for another day. I note, however, that the plain language of the statute makes passably clear that a showing that notification is not in the minor's best interest is alone sufficient. See Mont. Code Ann. § 50–20–212(5)(b) (1995) ("The court shall issue an order authorizing the petitioner to consent to an abortion without the notification of a parent . . . if the court finds, by clear and convincing evidence, that . . . the notification of a parent . . . is not in the best interests of the petitioner").

Although I therefore do not agree with all of the Court's reasoning, I concur in the majority's view that the judgment of the Court of Appeals must be reversed.

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that the abortion a young woman seeks would be in her best interest, and determines that notifying her parents is both opposed by the young woman and would likely cause her to be deterred from pursuing the treatment decision that would serve her best, then parental notification is assuredly not in her best interest. Under such circumstances, the proper course for the trial judge would be to permit the abortion without notification.

Per Curiam

IN RE VEY

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 96–8005. Decided April 14, 1997

Pro se petitioner seeks leave to proceed *in forma pauperis* and requests this Court to issue a writ of habeas corpus vacating her 13-year-old convictions. In the past 6½ years, she has filed 11 petitions for certiorari, 12 petitions for extraordinary relief, and 2 applications for bail, all of which have been denied. While her first 14 motions to proceed *in forma pauperis* were granted, she has since been denied leave to proceed *in forma pauperis* five times under this Court's Rule 39.8.

Held: Petitioner's motion to proceed *in forma pauperis* is denied. For the reasons discussed in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 *(per curiam)*, she is barred from filing any further petitions for extraordinary writs unless she first pays the docketing fee and submits her petition in compliance with Rule 33.

Motion denied.

PER CURIAM.

Pro se petitioner Eileen Vey seeks leave to proceed *in forma pauperis* and requests this Court to issue a writ of habeas corpus vacating her 13-year-old convictions.

This is not Vey's first filing in this Court. In the past 6½ years, she has filed 11 petitions for certiorari, 12 petitions for extraordinary relief, and 2 applications for bail. All of these have been denied. For the first 14 of those submissions, we granted her motions to proceed *in forma pauperis.* Since then, we have five times denied her leave to proceed *in forma pauperis* under this Court's Rule 39.8.*

We again deny petitioner's motion to proceed *in forma pauperis.* Her various allegations are supported by nothing other than her own conclusory statements that they are true.

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*Rule 39.8 provides: "If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny a motion for leave to proceed *in forma pauperis.*"

Petitioner is allowed until May 5, 1997, within which to pay the docketing fees required by Rule 38 and to submit her petition in compliance with Rule 33.1. In light of her history of frivolous, repetitive filings, we direct the Clerk of the Court not to accept any further petitions for extraordinary writs from petitioner unless she first pays the docketing fee required by Rule 38 and submits her petition in compliance with Rule 33.

We enter the order barring future *in forma pauperis* filings for the reasons discussed in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

It is so ordered.

JUSTICE STEVENS, dissenting.

For reasons previously stated, see *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited, I respectfully dissent.

Syllabus

CHANDLER ET AL. *v.* MILLER, GOVERNOR OF GEORGIA, ET AL.

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

No. 96–126. Argued January 14, 1997—Decided April 15, 1997

A Georgia statute requires candidates for designated state offices to certify that they have taken a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the test result was negative. Petitioners, Libertarian Party nominees for state offices subject to the statute's requirements, filed this action in the District Court about one month before the deadline for submission of the certificates. Naming as defendants the Governor and two officials involved in the statute's administration, petitioners asserted, *inter alia*, that the drug tests violated their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution. The District Court denied petitioners' motion for a preliminary injunction and later entered final judgment for respondents. Relying on this Court's precedents sustaining drug-testing programs for student athletes, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 650, 665–666, Customs Service employees, *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 659, and railway employees, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 608–613, the Eleventh Circuit affirmed. The court accepted as settled law that the tests were searches, but reasoned that, as was true of the drug-testing programs at issue in *Skinner* and *Von Raab*, the statute served "special needs," interests other than the ordinary needs of law enforcement. Balancing the individual's privacy expectations against the State's interest in the drug-testing program, the court held the statute, as applied to petitioners, not inconsistent with the Fourth and Fourteenth Amendments.

Held: Georgia's requirement that candidates for state office pass a drug test does not fit within the closely guarded category of constitutionally permissible suspicionless searches. Pp. 313–323.

(a) It is uncontested that Georgia's drug-testing requirement, imposed by law and enforced by state officials, effects a search within the meaning of the Fourth and Fourteenth Amendments. The pivotal question here is whether the searches are reasonable. To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. See *Vernonia*, 515 U. S., at 652–653. But particularized exceptions to the main rule are sometimes

warranted based on "special needs, beyond the normal need for law enforcement." See *Skinner*, 489 U. S., at 619. When such "special needs" are alleged, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. See *Von Raab*, 489 U. S., at 665–666. In evaluating Georgia's ballot-access, drug-testing statute—a measure plainly not tied to individualized suspicion—the Eleventh Circuit sought to balance the competing interests in line with this Court's precedents most immediately in point: *Skinner*, *Von Raab*, and *Vernonia*. Pp. 313–317.

(b) These precedents remain the guides for assessing the validity of the Georgia statute despite respondents' invitation to apply a framework extraordinarily deferential to state measures setting conditions of candidacy for state office. No precedent suggests that a State's sovereign power to establish qualifications for state offices diminishes the constraints on state action imposed by the Fourth Amendment. Pp. 317–318.

(c) Georgia's testing method is relatively noninvasive; therefore, if the "special need" showing had been made, the State could not be faulted for excessive intrusion. However, Georgia has failed to show a special need that is substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. Respondents contend that unlawful drug use is incompatible with holding high state office because such drug use draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule. The statute was not enacted, as respondents concede, in response to any fear or suspicion of drug use by state officials. A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, see *Von Raab*, 489 U. S., at 673–675, would shore up an assertion of special need for a suspicionless general search program, see *Skinner*, 489 U. S., at 606–608; *Vernonia*, 515 U. S., at 662–663. In contrast to the effective testing regimes upheld in *Skinner*, *Von Raab*, and *Vernonia*, Georgia's certification requirement is not well designed to identify candidates who violate antidrug laws and is not a credible means to deter illicit drug users from seeking state office. The test date is selected by the candidate, and thus all but the prohibitively addicted could abstain for a pretest period sufficient to avoid detection. Respondents' reliance on this Court's decision in *Von Raab*, which sustained a drug-

testing program for Customs Service officers prior to promotion or transfer to certain high-risk positions, despite the absence of any documented drug abuse problem among Service employees, 489 U. S., at 660, is misplaced. Hardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context. Drug interdiction had become the agency's primary enforcement mission. The covered posts directly involved drug interdiction or otherwise required Customs officers to carry firearms, the employees would have access to vast sources of valuable contraband, and officers had been targets of and some had succumbed to bribery by drug smugglers. Moreover, it was not feasible to subject the Customs Service employees to the kind of day-to-day scrutiny that is the norm in more traditional office environments. In telling contrast, the day-to-day conduct of candidates for public office attracts attention notably beyond the norm in ordinary work environments. What is left, after close review of Georgia's scheme, is that the State seeks to display its commitment to the struggle against drug abuse. But Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed is symbolic, not "special." The Fourth Amendment shields society from state action that diminishes personal privacy for a symbol's sake. Pp. 318–322.

(d) The Court expresses no opinion on medical examinations designed to provide certification of a candidate's general health or on financial disclosure requirements, and it does not speak to drug testing in the private sector, a domain unguarded by Fourth Amendment constraints. P. 323.

73 F. 3d 1543, reversed.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 323.

Walker L. Chandler, petitioner, argued the cause and filed a brief *pro se*. With him on the briefs for petitioners was *Robert E. Turner*.

Patricia Guilday, Assistant Attorney General of Georgia, argued the cause for respondents. With her on the brief were *Michael J. Bowers*, Attorney General, *Michael E.*

Hobbs, Deputy Attorney General, and *Dennis D. Dunn*, Senior Assistant Attorney General.*

JUSTICE GINSBURG delivered the opinion of the Court.

The Fourth Amendment requires government to respect "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion. Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in "certain limited circumstances." See *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 668 (1989). These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 545–550, 566–567 (1976), or at a sobriety checkpoint, *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 447, 455 (1990), and administrative inspections in "closely regulated" businesses, *New York* v. *Burger*, 482 U. S. 691, 703–704 (1987).

Georgia requires candidates for designated state offices to certify that they have taken a drug test and that the test result was negative. Ga. Code Ann. § 21–2–140 (1993) (hereinafter § 21–2–140). We confront in this case the question whether that requirement ranks among the limited circumstances in which suspicionless searches are warranted. Relying on this Court's precedents sustaining drug-testing

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**Stephen H. Sachs*, *Steven R. Shapiro*, *Gerald R. Weber*, *Arthur B. Spitzer*, and *Barbara E. Bergman* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Richard K. Willard, *Daniel J. Popeo*, and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance.

Acting Solicitor General Dellinger, *Assistant Attorney General Hunger*, *Deputy Solicitor General Waxman*, *James A. Feldman*, *Leonard Schaitman*, and *Edward Himmelfarb* filed a brief for the United States as *amicus curiae*.

programs for student athletes, customs employees, and railway employees, see *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 650, 665–666 (1995) (random drug testing of students who participate in interscholastic sports); *Von Raab*, 489 U. S., at 659 (drug tests for United States Customs Service employees who seek transfer or promotion to certain positions); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 608–613 (1989) (drug and alcohol tests for railway employees involved in train accidents and for those who violate particular safety rules), the United States Court of Appeals for the Eleventh Circuit judged Georgia's law constitutional. We reverse that judgment. Georgia's requirement that candidates for state office pass a drug test, we hold, does not fit within the closely guarded category of constitutionally permissible suspicionless searches.

I

The prescription at issue, approved by the Georgia Legislature in 1990, orders that "[e]ach candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs." § 21–2–140(b). Georgia was the first, and apparently remains the only, State to condition candidacy for state office on a drug test.

Under the Georgia statute, to qualify for a place on the ballot, a candidate must present a certificate from a state-approved laboratory, in a form approved by the Secretary of State, reporting that the candidate submitted to a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the results were negative. § 21–2–140(c). The statute lists as "[i]llegal drug[s]": marijuana, cocaine, opiates, amphetamines, and phencyclidines. § 21–2–140(a)(3). The designated state offices are: "the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance,

Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission." § 21–2–140(a)(4).

Candidate drug tests are to be administered in a manner consistent with the United States Department of Health and Human Services Guidelines, 53 Fed. Reg. 11979–11989 (1988), or other professionally valid procedures approved by Georgia's Commissioner of Human Resources. See § 21–2–140(a)(2). A candidate may provide the test specimen at a laboratory approved by the State, or at the office of the candidate's personal physician, see App. 4–5 (Joint Statement of Undisputed Facts). Once a urine sample is obtained, an approved laboratory determines whether any of the five specified illegal drugs are present, *id.*, at 5; § 21–2–140(c), and prepares a certificate reporting the test results to the candidate.

Petitioners were Libertarian Party nominees in 1994 for state offices subject to the requirements of § 21–2–140. The Party nominated Walker L. Chandler for the office of Lieutenant Governor, Sharon T. Harris for the office of Commissioner of Agriculture, and James D. Walker for the office of member of the General Assembly. In May 1994, about one month before the deadline for submission of the certificates required by § 21–2–140, petitioners Chandler, Harris, and Walker filed this action in the United States District Court for the Northern District of Georgia. They asserted, *inter alia,* that the drug tests required by § 21–2–140 violated their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution. Naming as defendants Governor Zell D. Miller and two other state officials involved in the administration of § 21–2–140, petitioners requested declaratory and injunctive relief barring enforcement of the statute.

In June 1994, the District Court denied petitioners' motion for a preliminary injunction. Stressing the importance of the state offices sought and the relative unintrusiveness of the testing procedure, the court found it unlikely that petitioners would prevail on the merits of their claims. App. to Pet. for Cert. 5B. Petitioners apparently submitted to the drug tests, obtained the certificates required by § 21–2–140, and appeared on the ballot. See Tr. of Oral Arg. 5. After the 1994 election, the parties jointly moved for the entry of final judgment on stipulated facts. In January 1995, the District Court entered final judgment for respondents.

A divided Eleventh Circuit panel affirmed. 73 F. 3d 1543 (1996). It is settled law, the court accepted, that the drug tests required by the statute rank as searches. But, as was true of the drug-testing programs at issue in *Skinner* and *Von Raab*, the court reasoned, § 21–2–140 serves "special needs," interests other than the ordinary needs of law enforcement. The court therefore endeavored to " 'balance the individual's privacy expectations against the Government's interests to determine whether it [was] impractical to require a warrant or some level of individualized suspicion in the particular context.' " 73 F. 3d, at 1545 (quoting *Von Raab*, 489 U. S., at 665–666).

Examining the state interests involved, the court acknowledged the absence of any record of drug abuse by elected officials in Georgia. Nonetheless, the court observed, "[t]he people of Georgia place in the trust of their elected officials . . . their liberty, their safety, their economic well-being, [and] ultimate responsibility for law enforcement." 73 F. 3d, at 1546. Consequently, "those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use." *Ibid.* The court further noted that "[t]he nature of high public office in itself demands the highest levels of honesty, clear-sightedness, and clear-thinking." *Ibid.* Re-

citing responsibilities of the offices petitioners sought, the Court of Appeals perceived those "positions [as] particularly susceptible to the 'risks of bribery and blackmail against which the Government is entitled to guard.'" *Ibid.* (quoting *Von Raab*, 489 U. S., at 674).

Turning to petitioners' privacy interests, the Eleventh Circuit emphasized that the tests could be conducted in the office of the candidate's private physician, making the "intrusion here . . . even less than that approved in *Von Raab*." 73 F. 3d, at 1547. The court also noted the statute's reference to federally approved drug-testing guidelines. *Ibid.* The drug test itself would reveal only the presence or absence of indicia of the use of particular drugs, and not any other information about the health of the candidate. Furthermore, the candidate would control release of the test results: Should the candidate test positive, he or she could forfeit the opportunity to run for office, and in that event, nothing would be divulged to law enforcement officials. *Ibid.* Another consideration, the court said, is the reality that "candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position." *Ibid.* Concluding that the State's interests outweighed the privacy intrusion caused by the required certification, the court held the statute, as applied to petitioners, not inconsistent with the Fourth and Fourteenth Amendments. *Ibid.*[1]

Judge Barkett dissented. In her view, a balance of the State's and candidates' interests was not appropriate, for the State had failed to establish a special governmental need for the regime. "There is nothing so special or immediate about the generalized governmental interests involved here," she observed, "as to warrant suspension of the Fourth

[1] The court also rejected equal protection and free speech pleas made by petitioners. 73 F. 3d, at 1547–1549. We hold § 21–2–140 incompatible with the Fourth and Fourteenth Amendments, and do not reach petitioners' further pleas.

Amendment's requirement of individualized suspicion for searches and seizures." *Id.*, at 1551.

We granted the petition for certiorari, 518 U. S. 1057 (1996), and now reverse.[2]

II

We begin our discussion of this case with an uncontested point: Georgia's drug-testing requirement, imposed by law and enforced by state officials, effects a search within the meaning of the Fourth and Fourteenth Amendments. See *Skinner*, 489 U. S., at 617; Tr. of Oral Arg. 36; Brief for United States as *Amicus Curiae* 10 (collection and testing of urine to meet Georgia's certification statute "constitutes a search subject to the demands of the Fourth Amendment" (internal quotation marks omitted)). As explained in *Skinner*, government-ordered "collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." 489 U. S., at 617. Because "these intrusions [are] searches under the Fourth Amendment," *ibid.*, we focus on the question: Are the searches reasonable?

To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. See *Vernonia*, 515 U. S., at 652–653. But particularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." *Skinner*, 489 U. S., at 619 (internal

[2] The United States, as *amicus curiae* in support of respondents, suggests that this case may have become moot because there is no continuing controversy regarding the now-completed 1994 election, and petitioners, who did not sue on behalf of a class, failed to assert in the courts below that they intended to run for a covered state office in a future election. See Brief for United States as *Amicus Curiae* 9–10, n. 4. We reject the suggestion of mootness. Petitioner Chandler represented, as an officer of this Court, that he plans to run again, and counsel for the State does not contest that representation. See Tr. of Oral Arg. 4–6, 27; see also 28 U. S. C. § 1653 (defective allegations of jurisdiction curable by amendment at trial or in appellate stages).

quotation marks omitted). When such "special needs"—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. See *Von Raab*, 489 U. S., at 665–666; see also *id.*, at 668. As *Skinner* stated: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." 489 U. S., at 624.

In evaluating Georgia's ballot-access, drug-testing statute—a measure plainly not tied to individualized suspicion—the Eleventh Circuit sought to " 'balance the individual's privacy expectations against the [State's] interests,' " 73 F. 3d, at 1545 (quoting *Von Raab*, 489 U. S., at 665), in line with our precedents most immediately in point: *Skinner*, *Von Raab*, and *Vernonia*. We review those decisions before inspecting Georgia's law.

A

Skinner concerned Federal Railroad Administration (FRA) regulations that required blood and urine tests of rail employees involved in train accidents; the regulations also authorized railroads to administer breath and urine tests to employees who violated certain safety rules. 489 U. S., at 608–612. The FRA adopted the drug-testing program in response to evidence of drug and alcohol abuse by some railroad employees, the obvious safety hazards posed by such abuse, and the documented link between drug- and alcohol-impaired employees and the incidence of train accidents. *Id.*, at 607–608. Recognizing that the urinalysis tests, most conspicuously, raised evident privacy concerns, the Court noted two offsetting considerations: First, the regulations reduced the intrusiveness of the collection process, *id.*, at 626;

and, more important, railway employees, "by reason of their participation in an industry that is regulated pervasively to ensure safety," had diminished expectations of privacy, *id.*, at 627.

"[S]urpassing safety interests," the Court concluded, warranted the FRA testing program. *Id.*, at 634. The drug tests could deter illegal drug use by railroad employees, workers positioned to "cause great human loss before any signs of impairment become noticeable to supervisors." *Id.*, at 628. The program also helped railroads to obtain invaluable information about the causes of major train accidents. See *id.*, at 630. Testing without a showing of individualized suspicion was essential, the Court explained, if these vital interests were to be served. See *id.*, at 628. Employees could not forecast the timing of an accident or a safety violation, events that would trigger testing. The employee's inability to avoid detection simply by staying drug free at a prescribed test time significantly enhanced the deterrent effect of the program. See *ibid.* Furthermore, imposing an individualized suspicion requirement for a drug test in the chaotic aftermath of a train accident would seriously impede an employer's ability to discern the cause of the accident; indeed, waiting until suspect individuals could be identified "likely would result in the loss or deterioration of the evidence furnished by the tests." *Id.*, at 631.

In *Von Raab*, the Court sustained a United States Customs Service program that made drug tests a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm. 489 U. S., at 660–661, 667–677.[3] While the Service's regime was

[3] The Service's program also required tests for individuals promoted or transferred to positions in which they would handle "classified" material. 489 U. S., at 661. The Court agreed that the Government "ha[d] a compelling interest in protecting truly sensitive information." *Id.*, at 677. However, we did not rule on this aspect of the program, see *id.*, at 677–678,

not prompted by a demonstrated drug abuse problem, *id.*, at 660, it was developed for an agency with an "almost unique mission," *id.*, at 674, as the "first line of defense" against the smuggling of illicit drugs into the United States, *id.*, at 668. Work directly involving drug interdiction and posts that require the employee to carry a firearm pose grave safety threats to employees who hold those positions, and also expose them to large amounts of illegal narcotics and to persons engaged in crime; illicit drug users in such high-risk positions might be unsympathetic to the Service's mission, tempted by bribes, or even threatened with blackmail. See *id.*, at 668–671. The Court held that the Government had a "compelling" interest in assuring that employees placed in these positions would not include drug users. See *id.*, at 670–671. Individualized suspicion would not work in this setting, the Court determined, because it was "not feasible to subject [these] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Id.*, at 674.

Finally, in *Vernonia*, the Court sustained a random drug-testing program for high school students engaged in interscholastic athletic competitions. The program's context was critical, for a local government bears large "responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." 515 U. S., at 665. An "immediate crisis," *id.*, at 663, caused by "a sharp increase in drug use" in the school district, *id.*, at 648, sparked installation of the program. District Court findings established that student athletes were not only "among the drug users," they were "leaders of the drug culture." *Id.*, at 649. Our decision noted that "'students within the school environment have a lesser expectation of privacy than members of the population generally.'" *Id.*, at 657 (quoting *New Jersey* v.

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because the record did not clarify "whether the category defined by the [regulation] encompas[sed] only those Customs employees likely to gain access to sensitive information," *id.*, at 678.

T. L. O., 469 U. S. 325, 348 (1985) (Powell, J., concurring)). We emphasized the importance of deterring drug use by schoolchildren and the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field. See *Vernonia*, 515 U. S., at 662.

B

Respondents urge that the precedents just examined are not the sole guides for assessing the constitutional validity of the Georgia statute. The "special needs" analysis, they contend, must be viewed through a different lens because § 21–2–140 implicates Georgia's sovereign power, reserved to it under the Tenth Amendment, to establish qualifications for those who seek state office. Respondents rely on *Gregory* v. *Ashcroft*, 501 U. S. 452 (1991), which upheld against federal statutory and Equal Protection Clause challenges Missouri's mandatory retirement age of 70 for state judges. The Court found this age classification reasonable and not barred by the federal legislation. See *id.*, at 473. States, *Gregory* reaffirmed, enjoy wide latitude to establish conditions of candidacy for state office, but in setting such conditions, they may not disregard basic constitutional protections. See *id.*, at 463; *McDaniel* v. *Paty*, 435 U. S. 618 (1978) (invalidating state provision prohibiting members of clergy from serving as delegates to state constitutional convention); *Communist Party of Ind.* v. *Whitcomb*, 414 U. S. 441 (1974) (voiding loyalty oath as a condition of ballot access); *Bond* v. *Floyd*, 385 U. S. 116 (1966) (Georgia Legislature could not exclude elected representative on ground that his antiwar statements cast doubt on his ability to take an oath). We are aware of no precedent suggesting that a State's power to establish qualifications for state offices—any more than its sovereign power to prosecute crime—diminishes the constraints on state action imposed by the Fourth Amendment. We therefore reject respondents' invitation to apply in this case a framework extraordinarily deferential to state meas-

ures setting conditions of candidacy for state office. Our guides remain *Skinner*, *Von Raab*, and *Vernonia*.

Turning to those guides, we note, first, that the testing method the Georgia statute describes is relatively noninvasive; therefore, if the "special needs" showing had been made, the State could not be faulted for excessive intrusion. Georgia's statute invokes the drug-testing guidelines applicable to the federal programs upheld in *Skinner* and *Von Raab*. See Brief for United States as *Amicus Curiae* 20–21; *Von Raab*, 489 U. S., at 661–662, n. 1. The State permits a candidate to provide the urine specimen in the office of his or her private physician; and the results of the test are given first to the candidate, who controls further dissemination of the report. Because the State has effectively limited the invasiveness of the testing procedure, we concentrate on the core issue: Is the certification requirement warranted by a special need?

Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. See *supra*, at 313–317 and this page. Georgia has failed to show, in justification of § 21–2–140, a special need of that kind.

Respondents' defense of the statute rests primarily on the incompatibility of unlawful drug use with holding high state office. The statute is justified, respondents contend, because the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. Brief for Respondents 11–18. The statute, according to respondents, serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office. *Id.*, at 17–18. Notably lacking in respondents' pres-

entation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule.

Nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity. The statute was not enacted, as counsel for respondents readily acknowledged at oral argument, in response to any fear or suspicion of drug use by state officials:

> "QUESTION: Is there any indication anywhere in this record that Georgia has a particular problem here with State officeholders being drug abusers?
>
> "[COUNSEL FOR RESPONDENTS]: No, there is no such evidence, [and] to be frank, there is no such problem as we sit here today." Tr. of Oral Arg. 32.

See also *id.*, at 31 (counsel for respondents affirms absence of evidence that state officeholders in Georgia have drug problems). A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, see *Von Raab*, 489 U. S., at 673–675, would shore up an assertion of special need for a suspicionless general search program. Proof of unlawful drug use may help to clarify—and to substantiate—the precise hazards posed by such use. Thus, the evidence of drug and alcohol use by railway employees engaged in safety-sensitive tasks in *Skinner*, see 489 U. S., at 606–608, and the immediate crisis prompted by a sharp rise in students' use of unlawful drugs in *Vernonia*, see 515 U. S., at 662–663, bolstered the Government's and school officials' arguments that drug-testing programs were warranted and appropriate.

In contrast to the effective testing regimes upheld in *Skinner*, *Von Raab*, and *Vernonia*, Georgia's certification requirement is not well designed to identify candidates who violate antidrug laws. Nor is the scheme a credible means to deter illicit drug users from seeking election to state office. The test date—to be scheduled by the candidate anytime within

30 days prior to qualifying for a place on the ballot—is no secret. As counsel for respondents acknowledged at oral argument, users of illegal drugs, save for those prohibitively addicted, could abstain for a pretest period sufficient to avoid detection. See Tr. of Oral Arg. 44–46.[4] Even if we indulged respondents' argument that one purpose of § 21–2–140 might be to detect those unable so to abstain, see *id.*, at 46, respondents have not shown or argued that such persons are likely to be candidates for public office in Georgia. Moreover, respondents have offered no reason why ordinary law enforcement methods would not suffice to apprehend such addicted individuals, should they appear in the limelight of a public stage. Section 21–2–140, in short, is not needed and cannot work to ferret out lawbreakers, and respondents barely attempt to support the statute on that ground.

Respondents and the United States as *amicus curiae* rely most heavily on our decision in *Von Raab*, which sustained a drug-testing program for Customs Service officers prior to promotion or transfer to certain high-risk positions, despite the absence of any documented drug abuse problem among Service employees. 489 U. S., at 660; see Brief for Respondents 12–14; Brief for United States as *Amicus Curiae* 18; see also 73 F. 3d, at 1546. The posts in question in *Von Raab* directly involved drug interdiction or otherwise required the Service member to carry a firearm. See 489 U. S., at 670 ("Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."); *id.*, at 670–671 ("[T]he public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force.").

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[4] In *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989), the applicant for promotion or transfer could not know precisely when action would be taken on the application. In contrast, the potential candidate knows from the start the timing of all relevant events.

Hardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context. As the Customs Service reported in announcing the testing program: "Customs employees, more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use." *National Treasury Employees Union* v. *Von Raab*, 816 F. 2d 170, 173 (CA5 1987) (internal quotation marks omitted), aff'd in part, vacated in part, 489 U. S. 656 (1989). We stressed that "[d]rug interdiction ha[d] become the agency's primary enforcement mission," *id.*, at 660, and that the employees in question would have "access to vast sources of valuable contraband," *id.*, at 669. Furthermore, Customs officers "ha[d] been the targets of bribery by drug smugglers on numerous occasions," and several had succumbed to the temptation. *Ibid.*

Respondents overlook a telling difference between *Von Raab* and Georgia's candidate drug-testing program. In *Von Raab* it was "not feasible to subject employees [required to carry firearms or concerned with interdiction of controlled substances] and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Id.*, at 674. Candidates for public office, in contrast, are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments.

What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. The suspicionless tests, according to respondents, signify that candidates, if elected, will be fit to serve their constituents free from the influence of illegal drugs. But Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk,

safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not "special," as that term draws meaning from our case law.

In *Von Raab*, the Customs Service had defended its officer drug-testing program in part as a way to demonstrate the agency's commitment to enforcement of the law. See Brief for United States in *Treasury Employees* v. *Von Raab*, O. T. 1988, No. 86–1879, pp. 35–36. The *Von Raab* Court, however, did not rely on that justification. Indeed, if a need of the "set a good example" genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in *Skinner*, *Von Raab*, and *Vernonia* ranked as "special" wasted many words in entirely unnecessary, perhaps even misleading, elaborations.

In a pathmarking dissenting opinion, Justice Brandeis recognized the importance of teaching by example: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928). Justice Brandeis explained in *Olmstead* why the Government set a bad example when it introduced in a criminal proceeding evidence obtained through an unlawful Government wiretap:

> "[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.*, at 479.

However well meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action.

III

We note, finally, matters this opinion does not treat. Georgia's singular drug test for candidates is not part of a medical examination designed to provide certification of a candidate's general health, and we express no opinion on such examinations. Nor do we touch on financial disclosure requirements, which implicate different concerns and procedures. See, *e. g.*, *Barry* v. *City of New York*, 712 F. 2d 1554 (CA2 1983) (upholding city's financial disclosure law for elected and appointed officials, candidates for city office, and certain city employees); *Plante* v. *Gonzalez*, 575 F. 2d 1119 (CA5 1978) (upholding Florida's financial disclosure requirements for certain public officers, candidates, and employees). And we do not speak to drug testing in the private sector, a domain unguarded by Fourth Amendment constraints. See *United States* v. *Jacobsen*, 466 U. S. 109, 113 (1984).

We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports and at entrances to courts and other official buildings. See *Von Raab*, 489 U. S., at 674–676, and n. 3. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Eleventh Circuit is

Reversed.

CHIEF JUSTICE REHNQUIST, dissenting.

I fear that the novelty of this Georgia law has led the Court to distort Fourth Amendment doctrine in order to strike it down. The Court notes, impliedly turning up its nose, that "Georgia was the first, and apparently remains the only, State to condition candidacy for state office on a drug

test." *Ante,* at 309. But if we are to heed the oft-quoted words of Justice Brandeis in his dissent in *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (1932)—"[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"—novelty itself is not a vice. These novel experiments, of course, must comply with the United States Constitution; but their mere novelty should not be a strike against them.

Few would doubt that the use of illegal drugs and abuse of legal drugs is one of the major problems of our society. Cases before this Court involving drug use extend to numerous occupations—railway employees, *Skinner* v. *Railway Labor Executives' Assn.,* 489 U. S. 602 (1989), Border Patrol officers, *Treasury Employees* v. *Von Raab,* 489 U. S. 656 (1989), high school students, *Vernonia School Dist. 47J* v. *Acton,* 515 U. S. 646 (1995), and machine operators, *Paperworkers* v. *Misco, Inc.,* 484 U. S. 29 (1987). It would take a bolder person than I to say that such widespread drug usage could never extend to candidates for public office such as Governor of Georgia. The Court says that "[n]othing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity." *Ante,* at 319. But surely the State need not wait for a drug addict, or one inclined to use drugs illegally, to run for or actually become Governor before it installs a prophylactic mechanism. We held as much in *Von Raab:*

> "First, petitioners argue that the program is unjustified because it is not based on a belief that testing will reveal any drug use by covered employees. In pressing this argument, petitioners point out that the Service's testing scheme was not implemented in response to any perceived drug problem among Customs employees . . . .
>
> "Petitioners' first contention evinces an unduly narrow view of the context in which the Service's testing

> program was implemented. Petitioners do not dispute, nor can there be doubt, that drug abuse is one of the most serious problems confronting our society today. There is little reason to believe that American workplaces are immune from this pervasive social problem . . . ." 489 U. S., at 673–674.

The test under the Fourth Amendment, as these cases have held, is whether the search required by the Georgia statute is "reasonable." 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*, *supra*, at 620; *Von Raab*, *supra*, at 669. The "special needs" inquiry as delineated there has not required especially great "importan[ce]," *ante*, 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.

Under normal Fourth Amendment analysis, the individual's expectation of privacy is an important factor in the equation. But here, the Court perversely relies on the fact that a candidate for office *gives up* so much privacy—"[c]andidates for public office . . . are subject to relentless scrutiny—by their peers, the public, and the press," *ante*, at 321—as a reason for *sustaining* a Fourth Amendment claim. The Court says, in effect, that the kind of drug test for candidates required by the Georgia law is unnecessary, because the scrutiny to which they are already subjected by reason of their candidacy will enable people to detect any drug use on

their part. But this is a strange holding, indeed. One might just as easily say that the railroad employees in *Skinner*, or the Customs officials in *Von Raab*, would be subjected to the same sort of scrutiny from their fellow employees and their supervisors. But the clear teaching of those cases is that the government is not required to settle for that sort of a vague and uncanalized scrutiny; if in fact preventing persons who use illegal drugs from concealing that fact from the public is a legitimate government interest, these cases indicate that the government may require a drug test.

The privacy concerns ordinarily implicated by urinalysis drug testing are "negligible," *Vernonia*, *supra*, at 658, when the procedures used in collecting and analyzing the urine samples are set up "to reduce the intrusiveness" of the process, *Skinner*, *supra*, at 626. Under the Georgia law, the candidate may produce the test specimen at his own doctor's office, which must be one of the least intrusive types of urinalysis drug tests conceivable. But although the Court concedes this, it nonetheless manages to count this factor against the State, because with this kind of test the person tested will have advance notice of its being given, and will therefore be able to abstain from drug use during the necessary period of time. But one may be sure that if the test were random—and therefore apt to ensnare more users—the Court would then fault it for its intrusiveness. Cf. *Von Raab*, 489 U. S., at 676, and n. 4.

In *Von Raab*, we described as "compelling" the Government interest "in ensuring that many of these covered employees do not use drugs *even off duty*, for such use creates risks of bribery and blackmail against which the Government is entitled to guard." *Id.*, at 674 (emphasis added). The risks of bribery and blackmail for high-level officials of state government using illegal drugs would seem to be at least as significant as those for off-duty Customs officials. Even more important, however, is our treatment of the third class of tested employees in *Von Raab*, those who "handle[d] 'clas-

sified' materials." The Court relegates this discussion to a footnote, *ante*, at 315, n. 3, and all but dismisses it. Although the lack of factual development of the record in *Von Raab* prevented us from determining *who* "handle[d] 'classified' material," we did consider the *weight* of the proffered governmental interest:

> "We readily agree that the Government has a compelling interest in protecting truly sensitive information from those who, 'under compulsion of circumstances or for other reasons, . . . might compromise [such] information.' *Department of Navy* v. *Egan*, 484 U. S. 518, 528 (1988). . . . We also agree that employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program, especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test." 489 U. S., at 677.

Although petitioners might raise questions as to some of the other positions covered by the Georgia statute, there is no question that, at least for positions like Governor and Lieutenant Governor, identical concerns are implicated. In short, when measured through the correct lens of our precedents in this area, the Georgia urinalysis test is a "reasonable" search; it is only by distorting these precedents that the Court is able to reach the result it does.

Lest readers expect the holding of this case to be extended to any other case, the Court notes that the drug test here is not a part of a medical examination designed to provide certification of a candidate's general health. *Ante*, at 323. It is all but inconceivable that a case involving that sort of requirement could be decided differently than the present case; the same sort of urinalysis would be involved. The only possible basis for distinction is to say that the State has

a far greater interest in the candidate's "general health" than it does with respect to his propensity to use illegal drugs. But this is the sort of policy judgment that surely must be left to legislatures, rather than being announced from on high by the Federal Judiciary.

Nothing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the Members of this Court. I would affirm the judgment of the Court of Appeals.

Syllabus

BLESSING, DIRECTOR, ARIZONA DEPARTMENT OF ECONOMIC SECURITY *v.* FREESTONE ET AL.

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

No. 95–1441. Argued January 6, 1997—Decided April 21, 1997

Respondents, five Arizona mothers whose children are eligible for state child support services under Title IV–D of the Social Security Act, filed this 42 U. S. C. § 1983 suit against petitioner, the director of the state child support agency, claiming, among other things, that they properly applied for child support services; that, despite their good faith efforts to cooperate, the agency never took adequate steps to obtain child support payments for them; that these omissions were largely attributable to staff shortages and other structural defects in the State's program; and that these systemic failures violated their individual rights under Title IV–D to have all mandated services delivered in substantial compliance with the title and its implementing regulations. They requested broad relief, including a declaratory judgment that the Arizona program's operation violates Title IV–D provisions creating rights in them that are enforceable through a § 1983 action, and an injunction requiring the director to achieve substantial compliance with Title IV–D throughout all programmatic operations. The District Court granted summary judgment for petitioner, but the Ninth Circuit reversed. Without distinguishing among the numerous provisions of the complex Title IV–D program or the many rights those provisions might have created, the latter court held that respondents had an enforceable individual right to have the State achieve "substantial compliance" with Title IV–D. It also disagreed with the District Court's conclusion that Congress had foreclosed private Title IV–D enforcement actions by authorizing the Secretary of Health and Human Services (Secretary) to audit and cut off funds to States whose programs do not substantially comply with Title IV–D's requirements.

Held: Title IV–D does not give individuals a federal right to force a state agency to substantially comply with Title IV–D. Pp. 340–349.

(a) A plaintiff seeking § 1983 redress must assert the violation of a federal *right*, not merely of federal *law*. *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 106. Three principal factors determine whether a statutory provision creates a privately enforceable right: (1) whether the plaintiff is an intended beneficiary of the statute; (2) whether the plaintiff's asserted interests are not so vague and amor-

phous as to be beyond the competence of the judiciary to enforce; and (3) whether the statute imposes a binding obligation on the State. See, *e. g., Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 509. Even if a plaintiff demonstrates such a right, however, there is only a rebuttable presumption that it is enforceable under § 1983. Dismissal is proper if Congress specifically foreclosed a § 1983 remedy, *Smith* v. *Robinson*, 468 U. S. 992, 1005, n. 9, 1003, either expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual § 1983 enforcement, *Livadas* v. *Bradshaw*, 512 U. S. 107, 133. Pp. 340–341.

(b) Respondents have not established that Title IV–D gives them individually enforceable federal rights. In prior cases, the Court has been able to determine whether or not a statute created such rights because the plaintiffs articulated, and lower courts evaluated, well-defined claims. See, *e. g., Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 430. Here, respondents have not identified with particularity the rights they claim, and the Ninth Circuit has not engaged in the requisite methodical inquiry. That court erred in apparently holding that individuals have an enforceable right to "substantial compliance" with Title IV–D in all respects. The statutory "substantial compliance" requirement, see, *e. g.,* 42 U. S. C. § 609(a)(8) (1994 ed., Supp. II), does not give rise to individual rights; it was not intended to benefit individual children and custodial parents, but is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV–D program, allowing her to increase the frequency of audits and reduce the State's federal grant upon a finding of substantial noncompliance. The Court of Appeals also erred in taking a blanket approach to determining whether Title IV–D creates rights: It is readily apparent that many of the provisions of that multifaceted statutory scheme, including its "substantial compliance" standard and data processing, staffing, and organizational requirements, do not fit any of the traditional criteria for identifying statutory rights. Although this Court does not foreclose the possibility that some Title IV–D provisions give rise to individual rights, the Ninth Circuit did not separate out the particular rights it believed arise from the statutory scheme, the complaint is less than clear in this regard, and it is not certain whether respondents sought any relief more specific than a declaration that their "rights" were being violated and an injunction forcing petitioner to "substantially comply" with all of Title IV–D's provisions. This defect is best addressed by sending the case back for the District Court to construe the complaint in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting. Only by manageably breaking down the

complaint into specific allegations can the District Court proceed to determine whether any specific claim asserts an individual federal right. Pp. 341–346.

(c) Petitioner's argument that Title IV–D's remedial scheme is sufficiently comprehensive to demonstrate congressional intent to preclude § 1983 suits is rejected. Petitioner does not claim that any Title IV–D provision expressly curtails § 1983 actions, and she has failed to make the difficult showing that allowing such actions to go forward in these circumstances would be inconsistent with Congress' carefully tailored scheme. That scheme is far more limited than those at issue in *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, and *Smith* v. *Robinson*, 468 U. S. 992, the only cases in which the Court has found preclusion; in particular, Title IV–D contains no private remedy—either judicial or administrative—through which aggrieved persons can seek redress. The only way that Title IV–D assures that States live up to their child support plans is through the Secretary's oversight, but the Secretary's limited powers to audit and cut federal funding are not comprehensive enough to foreclose § 1983 liability. Pp. 346–348.

68 F. 3d 1141, vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 349.

C. Tim Delaney, Solicitor General of Arizona, argued the cause for petitioner. With him on the briefs were *Grant Woods*, Attorney General, *Carter G. Phillips*, *Richard D. Bernstein*, and *Adam D. Hirsh.*

Marsha S. Berzon argued the cause and filed a brief for respondents.

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *William Kanter*, and *Alfred Mollin.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *James E. Ryan*, Attorney General of Illinois, *Barbara A. Preiner*, Solicitor General, and *James C. O'Connell*, *Barbara L. Greenspan*, and *James C. Stevens*, Special Assistant Attorneys General, and *Charles F. C. Ruff*, Corporation Counsel of the District of Columbia, and

JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns a lawsuit brought by five mothers in Arizona whose children are eligible to receive child support services from the State pursuant to Title IV–D of the Social Security Act, as added, 88 Stat. 2351, and as amended, 42 U. S. C. §§ 651–669b (1994 ed. and Supp. II). These custodial parents sued the director of Arizona's child support agency

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by the Attorneys General for their respective jurisdictions as follows: *Jeff Sessions* of Alabama, *Bruce M. Botelho* of Alaska, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Pamela S. Carter* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Peter Verniero* of New Jersey, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Theodore R. Kulongoski* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Charles Molony Condon* of South Carolina, *Mark Barnett* of South Dakota, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, *James S. Gilmore III* of Virginia, *Christine O. Gregoire* of Washington, *William U. Hill* of Wyoming, *Malaetasi M. Togafau* of American Samoa, *Calvin E. Holloway, Sr.*, of Guam, and *Julio A. Brady* of the Virgin Islands; for the American Public Welfare Association et al. by *Diana L. Fogle;* for the Council of State Governments et al. by *Richard Ruda* and *Charles Rothfeld;* and for the National District Attorneys Association et al. by *John D. Krisor, Jr., John Kaye, Michael R. Capizi, John Ladenburg,* and *Michael McCormick.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Christopher A. Hansen, Steven R. Shapiro,* and *Erwin Chemerinsky;* for the Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School by *Gary H. Palm;* for the National Center for Youth Law et al. by *Leora Gershenzon, Martha Matthews,* and *Brian Paddock;* and for the National Women's Law Center et al. by *Regina G. Maloney, Nancy Duff Campbell, Elisabeth Hirschhorn Donahue,* and *Martha F. Davis.*

under Rev. Stat. § 1979, 42 U. S. C. § 1983, claiming that they had an enforceable individual right to have the State's program achieve "substantial compliance" with the requirements of Title IV–D. Without distinguishing among the numerous provisions of this complex program, the Court of Appeals for the Ninth Circuit held that respondents had such a right. We disagree that the statutory scheme can be analyzed so generally, and hold that Title IV–D does not give individuals a federal right to force a state agency to substantially comply with Title IV–D. Accordingly, we vacate and remand with instructions to remand to the District Court.

I

This controversy concerns an interlocking set of cooperative federal-state welfare programs. Arizona participates in the federal Aid to Families with Dependent Children (AFDC) program, which provides subsistence welfare benefits to needy families. Social Security Act, Title IV–A, 42 U. S. C. §§ 601–617. To qualify for federal AFDC funds, the State must certify that it will operate a child support enforcement program that conforms with the numerous requirements set forth in Title IV–D of the Social Security Act, 42 U. S. C. §§ 651–669b (1994 ed. and Supp. II),[1] and will do so pursuant to a detailed plan that has been approved by the Secretary of Health and Human Services (Secretary). § 602(a)(2); see also § 652(a)(3). The Federal Government underwrites roughly two-thirds of the cost of the State's child support efforts. § 655(a). But the State must do more than simply collect overdue support payments; it must also establish a comprehensive system to establish paternity,

[1] After the Court of Appeals rendered its decision, Congress amended Title IV–D in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, 110 Stat. 2105. Except where otherwise noted, we refer to the amended version of Title IV–D throughout this opinion.

locate absent parents, and help families obtain support orders. §§ 651, 654.

A State must provide these services free of charge to AFDC recipients and, when requested, for a nominal fee to children and custodial parents who are not receiving AFDC payments. §§ 651, 654(4). AFDC recipients must assign their child support rights to the State and fully cooperate with the State's efforts to establish paternity and obtain support payments. Although the State may keep most of the support payments that it collects on behalf of AFDC families in order to offset the costs of providing welfare benefits, until recently it only had to distribute the first $50 of each payment to the family. 42 U. S. C. § 657(b)(1). The amended version of Title IV–D replaces this $50 pass-through with more generous distributions to families once they leave welfare. 42 U. S. C. § 657(a)(2) (1994 ed., Supp. II). Non-AFDC recipients who request the State's aid are entitled to have all collected funds passed through. § 657(a)(3). In all cases, the State must distribute the family's share of collected support payments within two business days after receipt. § 654b(c)(1).

The structure of each State's Title IV–D agency, like the services it provides, must conform to federal guidelines. For example, States must create separate units to administer the plan, § 654(3), and to disburse collected funds, § 654(27), each of which must be staffed at levels set by the Secretary, 45 CFR § 303.20 (1995). If a State delegates its disbursement function to local governments, it must reward the most efficient local agencies with a share of federal incentive payments. 42 U. S. C. § 654(22). To maintain detailed records of all pending cases, as well as to generate the various reports required by federal authorities, States must set up computer systems that meet numerous federal specifications. § 654a. Finally, in addition to setting up this administrative framework, each participating

State must enact laws designed to streamline paternity and child support actions. §§ 654(20), 666.

To oversee this complex federal-state enterprise, Congress created the Office of Child Support Enforcement (OCSE) within the Department of Health and Human Services (HHS). This agency is charged with auditing the States' compliance with their federally approved plans. Audits must occur at least once every three years, or more often if a State's performance falls below certain standards. § 652(a)(4). If a State does not "substantially comply" with the requirements of Title IV–D, the Secretary is authorized to penalize the State by reducing its AFDC grant by up to five percent. § 609(a)(8). The Secretary has interpreted "substantial compliance" as: (a) full compliance with requirements that services be offered statewide and that certain recipients be notified monthly of the support collected, as well as with reporting, recordkeeping, and accounting rules; (b) 90 percent compliance with case opening and case closure criteria; and (c) 75 percent compliance with most remaining program requirements. 45 CFR § 305.20 (1995). The Secretary may suspend a penalty if the State implements an adequate corrective action plan, and if the program achieves "substantial compliance," she may rescind the penalty entirely. 42 U. S. C. § 609(c) (1994 ed., Supp. II).

II

Arizona's record of enforcing child support obligations is less than stellar, particularly compared with those of other States. In a 1992 report, Arizona's Auditor General chronicled many of the State's problems. In the 1989–1990 fiscal year, Arizona failed to collect enough child support payments and federal incentives to cover the administrative costs of its Title IV–D program—1 of only 10 States to fall below that target. Arizona Auditor General, A Performance Audit of the Arizona Department of Economic Security 2 (1992). The Auditor General also pointed out that the cost effectiveness

of Arizona's support enforcement efforts had been "minimal." For every dollar spent on enforcement, the State collected barely two dollars—almost half the nationwide average. *Ibid.* In 1992, nearly three-quarters of Arizona's 275,000 child support cases were still in the earliest stages of the enforcement process. In 42 percent of all cases, paternity had yet to be established. In a further 29 percent, the absent parent had been identified but his or her whereabouts were unknown. *Id.*, at 12. Overall, the Auditor General found that Arizona "obtains regular child support payments for fewer than five percent of the parents it serves." *Id.*, at 9.

Federal audits by OCSE have also identified shortcomings in Arizona's child support system. In several reviews of the State's performance from 1984 to 1989, the Secretary found that Arizona had not substantially complied with significant program requirements, and she repeatedly penalized the State one percent of its AFDC grant. The State developed a corrective action plan after each failed audit, which prompted the Secretary to suspend and—in every instance but one—waive the one-percent reduction in Arizona's AFDC funding.[2]

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[2] For the deficiencies in Arizona's child support enforcement system, see principally OCSE, Audit Division Report No. AZ–85–PR, Program Results Audit of the State of Arizona Child Support Enforcement Program, October 1, 1984–September 30, 1985 (June 25, 1987); OCSE, Audit Division Report No. AZ–86–PR/PM, Program Results/Performance Measurements Audit, State of Arizona, Child Support Enforcement Program, October 1, 1985–September 30, 1986 (June 9, 1989); OCSE, Audit Division Report No. AZ–90–AA, Comprehensive Annual Audit, State of Arizona (Sept. 30, 1991) (covering calendar year 1989). Arizona eventually achieved substantial compliance in each category found deficient in these audits, although not always in a timely manner. See, *e. g.*, Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Dept. of HHS, to Linda Moore-Cannon, Director, Arizona Dept. of Economic Security (Mar. 2, 1992) (reducing Arizona's AFDC funding by one percent for the period between July 1, 1988, and December 31, 1988, due to the State's failure to implement its Parent Locator Service in conformity with its corrective action plan).

Respondents are five Arizona mothers (some of whom receive AFDC benefits) whose children are eligible for Title IV–D child support services. They filed this lawsuit in the United States District Court for the District of Arizona against the Director of the Arizona Department of Economic Security, the state agency charged with providing child support services under Title IV–D. In a lengthy complaint, respondents claimed that they had properly applied for child support services but that, despite their good faith efforts to cooperate, the agency never took adequate steps to obtain child support payments from the fathers of their children. These omissions, respondents contended, were largely attributable to structural defects in the State's child support efforts: staff shortages, high caseloads, unmanageable backlogs, and deficiencies in the State's accounting methods and recordkeeping. App. 11, 14–16. Respondents sought to represent a class of all children and custodial parents residing in Arizona who are or will be entitled to Title IV–D services.

Respondents claimed that the State's systemic failures violated their federal rights under Title IV–D. Invoking 42 U. S. C. § 1983, they asked the District Court to grant them the following broad relief:

> "Enter a declaratory judgment determining that operation of the Arizona Title IV–D program violates controlling, substantive provisions of federal law creating rights in plaintiffs and the class enforceable through an action permitted by 42 U. S. C. § 1983.
>
> "Grant permanent (and as necessary and appropriate, interlocutory) injunctions prohibiting continued adherence to the aforesaid pattern and practices and requiring affirmative measures sufficient to achieve as well as sustain substantial compliance with federal law, throughout all programmatic operations at issue." App. 42.

The Director immediately moved to dismiss the complaint on several grounds, arguing primarily that Title IV–D cre-

ates no individual rights enforceable under § 1983. The District Court treated this motion as one for summary judgment and ruled in favor of the Director. Relying primarily on a decision of the Court of Appeals for the Sixth Circuit, *Carelli* v. *Howser*, 923 F. 2d 1208 (1991), the District Court held that Congress had foreclosed private actions to enforce Title IV–D by authorizing the Secretary to audit and cut off funds to States with programs that do not substantially comply with Title IV–D's requirements.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 68 F. 3d 1141 (1995). The majority identified the three principal factors this Court has used to determine whether a statute creates a privately enforceable right: whether the plaintiff is one of the "intended beneficiaries of the statute," whether the plaintiffs' asserted interests are not so "'vague and amorphous' as to be 'beyond the competence of the judiciary to enforce,'" and whether the statute imposes a binding obligation on the State. *Id.*, at 1147 (quoting *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 509 (1990)). Title IV–D, the Court of Appeals held, satisfied each of these criteria. First, "needy families with children" were the intended beneficiaries of Title IV–D. 68 F. 3d, at 1150. Second, the majority held that the "plaintiffs' asserted interest is not vague or amorphous, and it is sufficiently concrete to be judicially enforceable" because whether a State delivers the services required by Title IV–D "to the degree required by law is judicially ascertainable." *Id.*, at 1149–1150. Finally, the Court of Appeals stated that the statute imposes binding obligations because a State must satisfy each of the requirements spelled out in Title IV–D in order to receive AFDC funding. Although the majority acknowledged that the requirement that a State remain in "substantial compliance" with its plan might seem ambiguous when divorced from context, the majority believed that the "highly detailed requirements" of the statute and its imple-

menting regulations adequately notified the State of the extent of its duties. *Id.*, at 1148. Moreover, the Court of Appeals noted that "the statute . . . sets forth detailed criteria for measuring compliance with the statute," for example, generally requiring States to establish paternity in a given percentage of all cases. *Id.*, at 1149 (citing 42 U. S. C. § 652(g)). Accordingly, the Court of Appeals concluded that respondents could sue petitioner under § 1983 to bring Arizona's child support enforcement program into substantial compliance with federal law. 68 F. 3d, at 1150.

The Court of Appeals also disagreed with the District Court's conclusion that Congress had implicitly foreclosed an individual remedy under § 1983 for violations of Title IV–D. The majority noted that Title IV–D includes no provisions for judicial enforcement that might supplant the § 1983 remedy. *Id.*, at 1153. Instead, the law simply gave the Secretary administrative oversight powers that were virtually indiscernible from those we had found insufficient to displace § 1983 liability in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418 (1987). The majority expressed no opinion as to the appropriateness of either injunctive or declaratory relief, and left that question for the District Court to answer in the first instance. 68 F. 3d, at 1156.

Judge Kleinfeld dissented, arguing that Congress placed the power to enforce Title IV–D exclusively in the hands of the Secretary. He contended that the "'substantial compliance' standard does not 'unambiguously confer' enforceable rights on any individual." *Id.*, at 1157. At most, Title IV–D called upon States "to try pretty hard, and do a pretty good job, of enforcing child support, and come up with a plan to try harder if the Secretary thinks they have not been trying hard enough." *Ibid.*

We granted certiorari to resolve disagreement among the Courts of Appeals as to whether individuals may sue state

officials under § 1983 for violations of Title IV–D.[3] 517 U. S. 1186 (1996).

III

Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." We have held that this provision safeguards certain rights conferred by federal statutes. *Maine* v. *Thiboutot,* 448 U. S. 1 (1980). In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law. Golden State Transit Corp.* v. *Los Angeles,* 493 U. S. 103, 106 (1989). We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. *Wright,* 479 U. S., at 430. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that

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[3] Compare *Wehunt* v. *Ledbetter,* 875 F. 2d 1558 (CA11 1989) (holding that Title IV–D was not enacted for the especial benefit of AFDC families, and so it does not create enforceable rights under § 1983), cert. denied, 494 U. S. 1027 (1990), with *Carelli* v. *Howser,* 923 F. 2d 1208 (CA6 1991) (holding that Title IV–D creates rights that are enforceable under § 1983, but that the Secretary's oversight power forecloses a § 1983 remedy), with *Albiston* v. *Maine Comm'r of Human Servs.,* 7 F. 3d 258 (CA1 1993) (holding that AFDC recipients have an enforceable right to prompt disbursement of their child support payments under Title IV–D), and with *Howe* v. *Ellenbecker,* 8 F. 3d 1258 (CA8 1993) (holding that Title IV–D creates rights that are enforceable under § 1983), cert. denied, 511 U. S. 1005 (1994).

Petitioner makes two further arguments in her briefs on the merits. She first contends that the Eleventh Amendment strips federal courts of jurisdiction over a § 1983 cause of action against state officials to enforce Title IV–D. Next, she asks us to overrule *Maine* v. *Thiboutot,* 448 U. S. 1 (1980), where we held that § 1983 provides a remedy for violations of federal statutes. We decline to address these questions which were neither raised nor decided below, and were not presented in the petition for certiorari. This Court's Rule 14.1(a).

its enforcement would strain judicial competence. *Id.*, at 431–432. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. *Wilder*, *supra*, at 510–511; see also *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981) (discussing whether Congress created obligations giving rise to an implied cause of action).

Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress "specifically foreclosed a remedy under § 1983." *Smith* v. *Robinson*, 468 U. S. 992, 1005, n. 9 (1984). Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. *Livadas* v. *Bradshaw*, 512 U. S. 107, 133 (1994).

A

With these principles in mind, we turn first to the question whether respondents have established that Title IV–D gives them federal rights.

In their complaint, respondents argued that federal law granted them "individual rights to all mandated services delivered in substantial compliance with Title IV–D and its implementing regulations." App. 41. They sought a broad injunction requiring the Director of Arizona's child support agency to achieve "substantial compliance . . . throughout all programmatic operations." *Id.*, at 42. Attributing the deficiencies in the State's program primarily to staff shortages and other structural defects, respondents essentially invited the District Court to oversee every aspect of Arizona's Title IV–D program.

Without distinguishing among the numerous rights that might have been created by this federally funded welfare program, the Court of Appeals agreed in sweeping terms that "Title IV–D creates enforceable rights in families in need of Title IV–D services." 68 F. 3d, at 1150. The Court of Appeals did not specify exactly which "rights" it was purporting to recognize, but it apparently believed that federal law gave respondents the right to have the State substantially comply with Title IV–D in all respects. We disagree.

As an initial matter, the lower court's holding that Title IV–D "creates enforceable rights" paints with too broad a brush. It was incumbent upon respondents to identify with particularity the rights they claimed, since it is impossible to determine whether Title IV–D, as an undifferentiated whole, gives rise to undefined "rights." Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights. See, *e. g.*, *Golden State*, *supra*, at 106 (asking whether the "provision in question" was designed to benefit the plaintiff).

In prior cases, we have been able to determine whether or not a statute created a given right because the plaintiffs articulated, and lower courts evaluated, well-defined claims. In *Wright*, for example, we held that tenants of public housing projects had a right to have their utility costs included within a rental payment that did not exceed 30 percent of their income. We did not ask whether the federal housing legislation generally gave rise to rights; rather, we focused our analysis on a specific statutory provision limiting "rent" to 30 percent of a tenant's income. 479 U. S., at 430. Similarly, in *Wilder*, we held that health care providers had an enforceable right to reimbursement at "reasonable and adequate rates" as required by a particular provision in the Medicaid statute. 496 U. S., at 511–512. And in *Suter* v. *Artist M.*, 503 U. S. 347 (1992), where we held that Title

IV–E of the Social Security Act did not give the plaintiffs the right that they asserted, we again analyzed the claim in very specific terms: whether children had a right to have state authorities undertake "reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred." *Id.*, at 352 (footnote omitted). Finally, in *Livadas*, *supra*, at 134, we discerned in the structure of the National Labor Relations Act (NLRA) the very specific right of employees "to complete the collective-bargaining process and agree to an arbitration clause." See 512 U. S., at 133, n. 27 (explaining that whether a claim founded on the NLRA is cognizable under § 1983 may depend on whether the claim stems from abridgment of a "protected individual interest"). We did not simply ask whether the NLRA created unspecified "rights."

The Court of Appeals did not engage in such a methodical inquiry. As best we can tell, the Court of Appeals seemed to think that respondents had a right to require the Director of Arizona's child support agency to bring the State's program into substantial compliance with Title IV–D. But the requirement that a State operate its child support program in "substantial compliance" with Title IV–D was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV–D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied. A State substantially complies with Title IV–D when it provides most mandated services (such as enforcement of support obligations) in only 75 percent of the cases reviewed during the federal audit period. 45 CFR § 305.20(a)(3)(iii) (1995). States must aim to establish paternity in 90 percent of all eligible cases, but may satisfy considerably lower targets so long as their

efforts are steadily improving. 42 U. S. C. § 652(g). It is clear, then, that even when a State is in "substantial compliance" with Title IV–D, any individual plaintiff might still be among the 10 or 25 percent of persons whose needs ultimately go unmet. Moreover, even upon a finding of substantial noncompliance, the Secretary can merely reduce the State's AFDC grant by up to five percent; she cannot, by force of her own authority, command the State to take any particular action or to provide any services to certain individuals. In short, the substantial compliance standard is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent. As such, it does not give rise to individual rights.

The Court of Appeals erred not only in finding that individuals have an enforceable right to substantial compliance, but also in taking a blanket approach to determining whether Title IV–D creates rights. It is readily apparent that many other provisions of that multifaceted statutory scheme do not fit our traditional three criteria for identifying statutory rights. To begin with, many provisions, like the "substantial compliance" standard, are designed only to guide the State in structuring its systemwide efforts at enforcing support obligations. These provisions may ultimately benefit individuals who are eligible for Title IV–D services, but only indirectly. For example, Title IV–D lays out detailed requirements for the State's data processing system. Among other things, this system must sort information into standardized data elements specified by the Secretary; transmit information electronically to the State's AFDC system to monitor family eligibility for financial assistance; maintain the data necessary to meet federal reporting requirements; and provide for the electronic transfer of funds for purposes of income withholding and interstate collections. 42 U. S. C. § 654a (1994 ed., Supp. II); 45 CFR § 307.10 (1995). Obviously, these complex standards do not

give rise to individualized rights to computer services. They are simply intended to improve the overall efficiency of the States' child support enforcement scheme.

The same reasoning applies to the staffing levels of the state agency, which respondents seem to claim are inadequate. App. 11 (Complaint ¶ 39) (alleging that delays in case processing are attributable to "extraordinary staff shortages, inordinately high caseloads and unmanageable backlogs"). Title IV–D generally requires each participating State to establish a separate child support enforcement unit "which meets such staffing and organizational requirements as the Secretary may by regulation prescribe." 42 U. S. C. § 654(3). The regulations, in turn, simply provide that each level of the State's organization must have "sufficient staff" to fulfill specified functions. These mandates do not, however, give rise to federal rights. For one thing, the link between increased staffing and the services provided to any particular individual is far too tenuous to support the notion that Congress meant to give each and every Arizonan who is eligible for Title IV–D the right to have the State Department of Economic Security staffed at a "sufficient" level. Furthermore, neither the statute nor the regulation gives any guidance as to how large a staff would be "sufficient." Cf. *Suter*, 503 U. S., at 360 (finding requirement of "reasonable efforts" unenforceable where there was "[n]o further statutory guidance . . . as to how 'reasonable efforts' are to be measured"). Enforcement of such an undefined standard would certainly "strain judicial competence." *Livadas*, 512 U. S., at 132.

We do not foreclose the possibility that some provisions of Title IV–D give rise to individual rights. The lower court did not separate out the particular rights it believed arise from the statutory scheme, and we think the complaint is less than clear in this regard. For example, respondent Madrid alleged that the state agency managed to collect some support payments from her ex-husband but failed to pass

through the first $50 of each payment, to which she was purportedly entitled under the pre-1996 version of § 657(b)(1). App. 13 (Complaint ¶ 48). Although § 657 may give her a federal right to receive a specified portion of the money collected on her behalf by Arizona, she did not explicitly request such relief in the complaint.

In any event, it is not at all apparent that respondents sought any relief more specific than a declaration that their "rights" were being violated and an injunction forcing Arizona's child support agency to "substantially comply" with all of the provisions of Title IV–D. We think that this defect is best addressed by sending the case back for the District Court to construe the complaint in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting. Only by manageably breaking down the complaint into specific allegations can the District Court proceed to determine whether any specific claim asserts an individual federal right.

B

Because we leave open the possibility that Title IV–D may give rise to some individually enforceable rights, we pause to consider petitioner's final argument that no remand is warranted because the statute contains "a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" *Wilder*, 496 U. S., at 521 (quoting *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 20 (1981)). Because petitioner does not claim that any provision of Title IV–D expressly curtails § 1983 actions, she must make the difficult showing that allowing § 1983 actions to go forward in these circumstances "would be inconsistent with Congress' carefully tailored scheme." *Golden State*, 493 U. S., at 107 (citation and internal quotation marks omitted).

Only twice have we found a remedial scheme sufficiently comprehensive to supplant § 1983: in *Sea Clammers*, *supra*, and *Smith* v. *Robinson*, 468 U. S. 992 (1984). In *Sea Clammers*, we focused on the "unusually elaborate enforcement provisions" of the Federal Water Pollution Control Act, which placed at the disposal of the Environmental Protection Agency a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties. 453 U. S., at 13. We emphasized that several provisions of the Act authorized private persons to initiate enforcement actions. *Id.*, at 14, 20. We found it "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions." *Id.*, at 20. Likewise, in *Smith*, the review scheme in the Education of the Handicapped Act permitted aggrieved individuals to invoke "carefully tailored" local administrative procedures followed by federal judicial review. 468 U. S., at 1009. We reasoned that Congress could not possibly have wanted parents to skip these procedures and go straight to court by way of § 1983, since that would have "render[ed] superfluous most of the detailed procedural protections outlined in the statute." *Id.*, at 1011.

We have also stressed that a plaintiff's ability to invoke § 1983 cannot be defeated simply by "[t]he availability of administrative mechanisms to protect the plaintiff's interests." *Golden State*, *supra*, at 106. Thus, in *Wright*, we rejected the argument that the Secretary of Housing and Urban Development's "generalized powers" to audit local public housing authorities, to enforce annual contributions contracts, and to cut off federal funding demonstrated a congressional intention to prevent public housing tenants from using § 1983 to enforce their rights under the federal Housing Act. 479 U. S., at 428. We reached much the same conclusion in *Wilder*, where the Secretary of Health and Human Services

had power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law. 496 U. S., at 521. Even though in both cases these oversight powers were accompanied by limited state grievance procedures for individuals, we found that § 1983 was still available. *Wright*, *supra*, at 427–428; *Wilder*, *supra*, at 523.

The enforcement scheme that Congress created in Title IV–D is far more limited than those in *Sea Clammers* and *Smith*. Unlike the federal programs at issue in those cases, Title IV–D contains no private remedy—either judicial or administrative—through which aggrieved persons can seek redress. The only way that Title IV–D assures that States live up to their child support plans is through the Secretary's oversight. The Secretary can audit only for "substantial compliance" on a programmatic basis. Furthermore, up to 25 percent of eligible children and custodial parents can go without most of the services enumerated in Title IV–D before the Secretary can trim a State's AFDC grant. These limited powers to audit and cut federal funding closely resemble those powers at issue in *Wilder* and *Wright*. Although counsel for the Secretary suggested at oral argument that the Secretary "has the same right under a contract as any other party to seek specific performance," Tr. of Oral Arg. 49, this possibility was not developed in the briefs. Even assuming the Secretary's authority to sue for specific performance, Title IV–D's administrative enforcement arsenal would not compare to those in *Sea Clammers* and *Smith*, especially if, as the Government further contended, see Tr. of Oral Arg. 49–50, no private actor would have standing to force the Secretary to bring suit for specific performance. To the extent that Title IV–D may give rise to individual rights, therefore, we agree with the Court of Appeals that the Secretary's oversight powers are not comprehensive enough to close the door on § 1983 liability. 68 F. 3d, at 1151–1156.

IV

The judgment of the Court of Appeals is vacated, and the case is remanded with instructions to remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring.

I agree with the Court that under the test set forth in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423 (1987), and *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 509 (1990), 42 U. S. C. § 1983 does not permit individual beneficiaries of Title IV–D of the Social Security Act, as added, 88 Stat. 2351, and as amended, 42 U. S. C. §§ 651–669b (1994 ed., Supp. II), to bring suit challenging a State's failure to achieve "substantial compliance" with the requirements of Title IV–D. That conclusion makes it unnecessary to reach the question whether § 1983 *ever* authorizes the beneficiaries of a federal-state funding and spending agreement—such as Title IV–D—to bring suit.

As we explained in *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), such an agreement is "in the nature of a contract," *id.*, at 17: The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between the two others (C) is called a third-party beneficiary. Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it; that is to say, if, in the example given above, B broke his promise and did not provide services to C, the only person who could enforce the promise in court was the other party

to the contract, A. See 1 W. Story, A Treatise on the Law of Contracts 549–550 (4th ed. 1856). This appears to have been the law at the time § 1983 was enacted. See Brief for Council of State Governments et al. as *Amici Curiae* 10–11, and n. 6 (citing sources). If so, the ability of persons in respondents' situation to compel a State to make good on its promise to the Federal Government was not a "righ[t] . . . secured by the . . . laws" under § 1983. While it is of course true that newly enacted laws are automatically embraced within § 1983, it does not follow that the question of what rights those new laws (or, for that matter, old laws) *secure* is to be determined according to modern notions rather than according to the understanding of § 1983 when it was enacted. Allowing third-party beneficiaries of commitments to the Federal Government to sue is certainly a vast expansion.

It must be acknowledged that *Wright* and *Wilder* permitted beneficiaries of federal-state contracts to sue under § 1983, but the argument set forth above was not raised. I am not prepared without further consideration to reject the possibility that third-party-beneficiary suits simply do not lie. I join the Court's opinion because, in ruling against respondents under the *Wright/Wilder* test, it leaves that possibility open.

Syllabus

TIMMONS, ACTING DIRECTOR, RAMSEY COUNTY DEPARTMENT OF PROPERTY RECORDS AND REVENUE, ET AL. *v.* TWIN CITIES AREA NEW PARTY

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

No. 95–1608. Argued December 4, 1996—Decided April 28, 1997

Most States ban multiple-party, or "fusion," candidacies for elected office. Minnesota's laws prohibit an individual from appearing on the ballot as the candidate of more than one party. When respondent, a chapter of the national New Party, chose as its candidate for state representative an individual who was already the candidate of another political party, local election officials refused to accept the New Party's nominating petition. The party filed suit against petitioners, Minnesota election officials, contending that the State's antifusion laws violated its associational rights under the First and Fourteenth Amendments. The District Court granted petitioners summary judgment, but the Court of Appeals reversed, finding that the fusion ban was unconstitutional because it severely burdened the party's associational rights and was not narrowly tailored to advance Minnesota's valid interests in avoiding intraparty discord and party splintering, maintaining a stable political system, and avoiding voter confusion.

Held: Minnesota's fusion ban does not violate the First and Fourteenth Amendments. Pp. 356–370.

(a) While the First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas, *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 616, States may enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder, *Burdick* v. *Takushi*, 504 U. S. 428, 433. When deciding whether a state election law violates First and Fourteenth Amendment associational rights, this Court must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Id.*, at 434. Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. *Ibid.* No bright line separates permis-

sible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Storer* v. *Brown*, 415 U. S. 724, 730. Pp. 356–359.

(b) Minnesota's fusion ban does not severely burden the New Party's associational rights. The State's laws do not restrict the ability of the party and its members to endorse, support, or vote for anyone they like or directly limit the party's access to the ballot. The party's preferred candidate will still appear on the ballot, although as another party's candidate. The laws are also silent on parties' internal structure, governance, and policymaking. *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, and *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, distinguished. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the party's nominee and limit, slightly, the party's ability to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. However, ballots are designed primarily to elect candidates, not to serve as forums for political expression. See *Burdick*, *supra*, at 438. Pp. 359–363.

(c) Because Minnesota's fusion ban does not impose a severe burden on the New Party's rights, the State is required to show, not that the ban was narrowly tailored to serve compelling state interests, but that the State's asserted regulatory interests are "sufficiently weighty to justify the limitation" on the party's rights. *Norman* v. *Reed*, 502 U. S. 279, 288–289. Elaborate, empirical verification of weightiness is not required. See *Munro* v. *Socialist Workers Party*, 479 U. S. 189, 195–196. Here, the burden is justified by "correspondingly weighty" valid state interests in ballot integrity and political stability. States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials. *E. g.*, *Bullock* v. *Carter*, 405 U. S. 134, 145. Minnesota fears that a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases, transforming the ballot from a means of choosing candidates to a billboard for political advertising. It is also concerned that fusion might enable minor parties, by nominating a major party's candidate, to bootstrap their way to major-party status in the next election and circumvent the State's nominating-petition requirement for minor parties, which is designed to ensure that only bona fide minor and third parties are granted access to the ballot. The State's strong interest in the stability of its political systems, see, *e. g.*, *Eu*, *supra*, at 226, does not permit it to completely insulate the two-party system from minor parties' or independent candidates' competition and influence, *e. g.*, *Anderson* v. *Celebrezze*, 460 U. S. 780, 802, and is not a paternalistic license for States to protect political

parties from the consequences of their own internal disagreements, *e. g.*, *Eu*, *supra*, at 227. However, it does permit the State to enact reasonable election regulations that may, in practice, favor the traditional two-party system. Minnesota's fusion ban is far less burdensome than a California law, upheld in *Storer*, 415 U. S., at 728, that denied ballot positions to any independent candidate affiliated with a party at any time during the year preceding the primary election, and it is justified by similarly weighty state interests. The Court expresses no view on the party's policy-based arguments concerning the wisdom of fusion. Pp. 363–370.

73 F. 3d 196, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, and in Parts I and II of which SOUTER, J., joined, *post*, p. 370. SOUTER, J., filed a dissenting opinion, *post*, p. 382.

Richard S. Slowes, Assistant Solicitor General of Minnesota, argued the cause for petitioners. With him on the briefs were *Hubert H. Humphrey III*, Attorney General, and *Peter M. Ackerberg*, Assistant Attorney General.

Laurence H. Tribe argued the cause for respondent. With him on the brief were *Joel Rogers*, *Sarah E. Siskind*, *Cornish F. Hitchcock*, and *David C. Vladeck*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Most States prohibit multiple-party, or "fusion," candidacies for elected office.[1] The Minnesota laws challenged in

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Burt Neuborne*, *Steven R. Shapiro*, *Elliot M. Mincberg*, and *Lawrence S. Ottinger;* for the Conservative Party of New York et al. by *Rory O. Millson;* for the Reform Party et al. by *J. Gregory Taylor;* for the Republican National Committee by *Jan Witold Baran* and *Thomas J. Josefiak;* and for Twelve University Professors et al. by *David Halperin*.

[1] "Fusion," also called "cross-filing" or "multiple-party nomination," is "the electoral support of a single set of candidates by two or more parties." Argersinger, "A Place on the Ballot": Fusion Politics and Anti-

this case prohibit a candidate from appearing on the ballot as the candidate of more than one party. Minn. Stat. §§ 204B.06, subd. 1(b), and 204B.04, subd. 2 (1994). We hold that such a prohibition does not violate the First and Fourteenth Amendments to the United States Constitution.

Respondent is a chartered chapter of the national New Party. Petitioners are Minnesota election officials. In April 1994, Minnesota State Representative Andy Dawkins was running unopposed in the Minnesota Democratic-Farmer-Labor Party's (DFL) primary.[2] That same month, New Party members chose Dawkins as their candidate for the same office in the November 1994 general election. Neither Dawkins nor the DFL objected, and Dawkins signed the required affidavit of candidacy for the New Party. Minn. Stat. § 204B.06 (1994). Minnesota, however, prohibits fusion candidacies.[3] Because Dawkins had already filed as a candidate for the DFL's nomination, local election officials refused to accept the New Party's nominating petition.[4]

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fusion Laws, 85 Am. Hist. Rev. 287, 288 (1980); see also *Twin Cities Area New Party* v. *McKenna*, 73 F. 3d 196, 197–198 (CA8 1996) (Fusion is "the nomination by more than one political party of the same candidate for the same office in the same general election").

[2] The DFL is the product of a 1944 merger between Minnesota's Farmer-Labor Party and the Democratic Party, and is a "major party" under Minnesota law. Minn. Stat. § 200.02, subd. 7(a) (1994) (major parties are parties that have won five percent of a statewide vote and therefore participate in the state primary elections).

[3] State law provides: "No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition . . . ." § 204B.04, subd. 2. Minnesota law further requires that "[a]n affidavit of candidacy shall state the name of the office sought and shall state that the candidate: . . . (b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election." § 204B.06, subd. 1(b).

[4] Because the New Party is a "minor party" under Minnesota law, it does not hold a primary election but must instead file a nominating petition with the signatures of 500 eligible voters, or 10 percent of the total

The New Party filed suit in United States District Court, contending that Minnesota's antifusion laws violated the party's associational rights under the First and Fourteenth Amendments. The District Court granted summary judgment for the state defendants, concluding that Minnesota's fusion ban was "a valid and non-discriminatory regulation of the election process," and noting that "issues concerning the mechanics of choosing candidates . . . are, in large part, matters of policy best left to the deliberative bodies themselves." *Twin Cities Area New Party* v. *McKenna*, 863 F. Supp. 988, 994 (D. Minn. 1994).

The Court of Appeals reversed. *Twin Cities Area New Party* v. *McKenna*, 73 F. 3d 196, 198 (CA8 1996). First, the court determined that Minnesota's fusion ban "unquestionably" and "severe[ly]" burdened the New Party's "freedom to select a standard bearer who best represents the party's ideologies and preferences" and its right to "broaden the base of public participation in and support for [its] activities." *Ibid.* (citations and internal quotation marks omitted). The court then decided that Minnesota's absolute ban on multiple-party nominations was "broader than necessary to serve the State's asserted interests" in avoiding intraparty discord and party splintering, maintaining a stable political system, and avoiding voter confusion, and that the State's remaining concerns about multiple-party nomination were "simply unjustified in this case." *Id.*, at 199–200. The court noted, however, that the Court of Appeals for the Seventh Circuit had upheld Wisconsin's similar fusion ban in *Swamp* v. *Kennedy*, 950 F. 2d 383, 386 (1991) (fusion ban did not burden associational rights and, even if it did, the State's interests justified the burden), cert. denied, 505 U. S. 1204 (1992). Nonetheless, the court concluded that Minnesota's fusion-ban provisions, Minn. Stat. §§ 204B.06, subd. 1(b), and

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number of voters in the preceding state or county general election, whichever is less. §§ 204B.03, 204B.07–204B.08.

204B.04, subd. 2 (1994), were unconstitutional because they severely burdened the New Party's associational rights and were not narrowly tailored to advance Minnesota's valid interests. We granted certiorari, 517 U. S. 1219 (1996), and now reverse.

Fusion was a regular feature of Gilded Age American politics. Particularly in the West and Midwest, candidates of issue-oriented parties like the Grangers, Independents, Greenbackers, and Populists often succeeded through fusion with the Democrats, and vice versa. Republicans, for their part, sometimes arranged fusion candidacies in the South, as part of a general strategy of encouraging and exploiting divisions within the dominant Democratic Party. See generally Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws, 85 Am. Hist. Rev. 287, 288–290 (1980).

Fusion was common in part because political parties, rather than local or state governments, printed and distributed their own ballots. These ballots contained only the names of a particular party's candidates, and so a voter could drop his party's ticket in the ballot box without even knowing that his party's candidates were supported by other parties as well. But after the 1888 presidential election, which was widely regarded as having been plagued by fraud, many States moved to the "Australian ballot system." Under that system, an official ballot, containing the names of all the candidates legally nominated by all the parties, was printed at public expense and distributed by public officials at polling places. *Id.*, at 290–292; *Burdick* v. *Takushi*, 504 U. S. 428, 446–447 (1992) (KENNEDY, J., dissenting) (States' move to the Australian ballot system was a "progressive reform to reduce fraudulent election practices"). By 1896, use of the Australian ballot was widespread. During the same period, many States enacted other election-related reforms, including bans on fusion candidacies. See Argersinger, *supra*, at

288, 295–298. Minnesota banned fusion in 1901.[5] This trend has continued and, in this century, fusion has become the exception, not the rule. Today, multiple-party candidacies are permitted in just a few States,[6] and fusion plays a significant role only in New York.[7]

The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas. *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 616 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees"); *Norman* v. *Reed*, 502 U. S. 279, 288 (1992) ("constitutional right of citizens to create and develop new political parties . . . advances the constitutional interest of like-minded voters to gather in pursuit of common political ends"); *Tashjian* v. *Republican Party of Conn.*, 479

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[5] See Act of Apr. 13, 1901, ch. 312, 1902 Minn. Laws 524. The Minnesota Supreme Court struck down the ban in *In re Day*, 93 Minn. 178, 182, 102 N. W. 209, 211 (1904), because the title of the enacting bill did not reflect the bill's content. The ban was reenacted in 1905. 1905 Minn. Rev. Laws, ch. 6, § 176, pp. 27, 31. Minnesota enacted a revised election code, which includes the fusion-related provisions involved in this case, in 1981. Act of Apr. 14, 1981, ch. 29, Art. 4, § 6, 1981 Minn. Laws 73.

[6] Burnham Declaration, App. 15 ("Practice of [multiple-party nomination] in the 20th century has, of course, been much more limited. This owes chiefly to the fact that most state legislatures . . . outlawed the practice"); *McKenna*, 73 F. 3d, at 198 ("[M]ultiple party nomination is prohibited today, either directly or indirectly, in about forty states and the District of Columbia . . ."); S. Cobble & S. Siskind, Fusion: Multiple Party Nomination in the United States 8 (1993) (summarizing States' fusion laws).

[7] See N. Y. Elec. Law §§ 6–120, 6–146(1) (McKinney 1978 and Supp. 1996). Since 1936, when fusion was last relegalized in New York, several minor parties, including the Liberal, Conservative, American Labor, and Right to Life Parties, have been active and influential in New York politics. See Burnham Declaration, App. 15–16; Cobble & Siskind, *supra* n. 6, at 3–4.

U. S. 208, 214 (1986). As a result, political parties' government, structure, and activities enjoy constitutional protection. *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 230 (1989) (noting political party's "discretion in how to organize itself, conduct its affairs, and select its leaders"); *Tashjian*, *supra*, at 224 (Constitution protects a party's "determination . . . of the structure which best allows it to pursue its political goals").

On the other hand, it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder. *Burdick*, *supra*, at 433 ("'[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process'") (quoting *Storer* v. *Brown*, 415 U. S. 724, 730 (1974)); *Tashjian*, *supra*, at 217 (The Constitution grants States "broad power to prescribe the 'Time, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices").

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "'character and magnitude'" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Burdick*, *supra*, at 434 (quoting *Anderson* v. *Celebrezze*, 460 U. S. 780, 789 (1983)). Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'" *Burdick*, *supra*, at 434 (quoting *Anderson*, *supra*, at 788); *Norman*, *supra*, at 288–289 (requiring "corresponding interest sufficiently weighty

to justify the limitation"). No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Storer*, *supra*, at 730 ("[N]o litmus-paper test . . . separat[es] those restrictions that are valid from those that are invidious . . . . The rule is not self-executing and is no substitute for the hard judgments that must be made").

The New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. See, *e. g.*, *Cousins* v. *Wigoda*, 419 U. S. 477 (1975) (party, not State, has right to decide who will be State's delegates at party convention). That is, the New Party, and not someone else, has the right to select the New Party's "standard bearer." It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate. A particular candidate might be ineligible for office,[8] unwilling to serve, or, as here, another party's candidate. That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights. See *Burdick*, 504 U. S., at 440, n. 10 ("It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable"); *Anderson*, 460 U. S., at 792, n. 12 ("Although a disaffiliation provision may preclude . . . voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements"); *id.*, at 793, n. 15.

The New Party relies on *Eu* v. *San Francisco County Democratic Central Comm.*, *supra*, and *Tashjian* v. *Republican Party of Conn.*, *supra*. In *Eu*, we struck down Califor-

[8] See, *e. g.*, Minn. Stat. § 204B.06, subd. 1(c) (1994) (candidates must be 21 years of age or more upon assuming office and must have maintained residence in the district from which they seek election for 30 days before the general election).

nia election provisions that prohibited political parties from endorsing candidates in party primaries and regulated parties' internal affairs and structure. And in *Tashjian*, we held that Connecticut's closed-primary statute, which required voters in a party primary to be registered party members, interfered with a party's associational rights by limiting "the group of registered voters whom the Party may invite to participate in the basic function of selecting the Party's candidates." 479 U. S., at 215–216 (internal quotation marks and citations omitted). But while *Tashjian* and *Eu* involved regulation of political parties' internal affairs and core associational activities, Minnesota's fusion ban does not. The ban, which applies to major and minor parties alike, simply precludes one party's candidate from appearing on the ballot, as that party's candidate, if already nominated by another party. Respondent is free to try to convince Representative Dawkins to be the New Party's, not the DFL's, candidate. See *Swamp*, 950 F. 2d, at 385 ("[A] party may nominate any candidate that the party can convince to be *its* candidate"). Whether the party still wants to endorse a candidate who, because of the fusion ban, will not appear on the ballot as the party's candidate, is up to the party.

The Court of Appeals also held that Minnesota's laws "keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." *McKenna*, 73 F. 3d, at 199. The burden on the party was, the court held, severe because "[h]istory shows that minor parties have played a significant role in the electoral system where multiple party nomination is legal, but have no meaningful influence where multiple party nomination is banned." *Ibid.* In the view of the Court of Appeals, Minnesota's fusion ban forces members of the New Party to make a "no-win choice" between voting for "candidates with no realistic chance of winning, defect[ing] from their party and vot[ing] for a major party candidate who does, or declin[ing] to vote at all." *Ibid.*

But Minnesota has not directly precluded minor political parties from developing and organizing. Cf. *Norman*, 502 U. S., at 289 (statute "foreclose[d] the development of any political party lacking the resources to run a statewide campaign"). Nor has Minnesota excluded a particular group of citizens, or a political party, from participation in the election process. Cf. *Anderson*, *supra*, at 792–793 (filing deadline "places a particular burden on an identifiable segment of Ohio's independent-minded voters"); *Bullock* v. *Carter*, 405 U. S. 134 (1972) (striking down Texas statute requiring candidates to pay filing fees as a condition to having their names placed on primary-election ballots). The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen. Cf. *Eu*, 489 U. S., at 223 (California law curtailed right to "[f]ree discussion about candidates for public office"); *Colorado Republican Federal Campaign Comm'n*, 518 U. S., at 615 (restrictions on party's spending impair its ability to "engage in direct political advocacy").

The Court of Appeals emphasized its belief that, without fusion-based alliances, minor parties cannot thrive. This is a predictive judgment which is by no means self-evident.[9]

[9] Between the First and Second World Wars, for example, various radical, agrarian, and labor-oriented parties thrived, without fusion, in the Midwest. See generally R. Valelly, Radicalism in the States (1989). One of these parties, Minnesota's Farmer-Labor Party, displaced the Democratic Party as the Republicans' primary opponent in Minnesota during the 1930's. As one historian has noted: "The Minnesota Farmer-Labor Party elected its candidates to the governorship on four occasions, to the U. S. Senate in five elections, and to the U. S. House in twenty-five campaigns . . . . Never less than Minnesota's second strongest party, in 1936 Farmer-Laborites dominated state politics. . . . The Farmer-Labor Party was a success despite its independence of America's two dominant national parties and despite the sometimes bold anticapitalist rhetoric of its platforms." J. Haynes, Dubious Alliance 9 (1984). It appears that factionalism within the Farmer-Labor Party, the popular successes of New Deal programs and ideology, and the gradual movement of political power from the States to the National Government contributed to the party's de-

But, more importantly, the supposed benefits of fusion to minor parties do not require that Minnesota permit it. See *Tashjian*, *supra*, at 222 (refusing to weigh merits of closed and open primaries). Many features of our political system—*e. g.*, single-member districts, "first past the post" elections, and the high costs of campaigning—make it difficult for third parties to succeed in American politics. Burnham Declaration, App. 12–13. But the Constitution does not require States to permit fusion any more than it requires them to move to proportional-representation elections or public financing of campaigns. See *Mobile* v. *Bolden*, 446 U. S. 55, 75 (1980) (plurality opinion) ("Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law").

The New Party contends that the fusion ban burdens its "right . . . to communicate its choice of nominees on the ballot on terms equal to those offered other parties, and the right of the party's supporters and other voters to receive that information," and insists that communication on the ballot of a party's candidate choice is a "critical source of information for the great majority of voters . . . who . . . rely upon party 'labels' as a voting guide." Brief for Respondent 22–23.

It is true that Minnesota's fusion ban prevents the New Party from using the ballot to communicate to the public that it supports a particular candidate who is already another party's candidate. In addition, the ban shuts off one possible avenue a party might use to send a message to its preferred *candidate* because, with fusion, a candidate who wins an election on the basis of two parties' votes will likely know more—if the parties' votes are counted separately—about the particular wishes and ideals of his constituency. We are

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cline. See generally Haynes, *supra;* Valelly, *supra;* M. Gieske, Minnesota Farmer-Laborism: *The Third-Party Alternative* (1979). Eventually, a much-weakened Farmer-Labor Party merged with the Democrats, forming what is now Minnesota's Democratic-Farmer-Labor Party, in 1944. Valelly, *supra*, at 156.

unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression. See *Burdick*, 504 U. S., at 438; *id.*, at 445 (KENNEDY, J., dissenting). Like all parties in Minnesota, the New Party is able to use the ballot to communicate information about itself and its candidate to the voters, so long as that candidate is not already someone else's candidate. The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate. See *Anderson*, 460 U. S., at 788 ("[A]n election campaign is an effective platform for the expression of views on the issues of the day"); *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas").

In sum, Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the party's access to the ballot. They are silent on parties' internal structure, governance, and policymaking. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party. They also limit, slightly, the party's ability to send a message to the voters and to its preferred candidates. We conclude that the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights—though not trivial—are not severe.

The Court of Appeals determined that Minnesota's fusion ban imposed "severe" burdens on the New Party's associa-

tional rights, and so it required the State to show that the ban was narrowly tailored to serve compelling state interests. *McKenna*, 73 F. 3d, at 198. We disagree; given the burdens imposed, the bar is not so high. Instead, the State's asserted regulatory interests need only be "sufficiently weighty to justify the limitation" imposed on the party's rights. *Norman*, 502 U. S., at 288–289; *Burdick*, *supra*, at 434 (quoting *Anderson*, *supra*, at 788). Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications. See *Munro* v. *Socialist Workers Party*, 479 U. S. 189, 195–196 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights").

The Court of Appeals acknowledged Minnesota's interests in avoiding voter confusion and overcrowded ballots, preventing party splintering and disruptions of the two-party system, and being able to clearly identify the election winner. *McKenna*, *supra*, at 199–200. Similarly, the Seventh Circuit, in *Swamp*, noted Wisconsin's "compelling" interests in avoiding voter confusion, preserving the integrity of the election process, and maintaining a stable political system. 950 F. 2d, at 386; cf. *id.*, at 387–388 (Fairchild, J., concurring) (State has a compelling interest in "maintaining the distinct identity of parties"). Minnesota argues here that its fusion ban is justified by its interests in avoiding voter confusion, promoting candidate competition (by reserving limited ballot space for opposing candidates), preventing electoral distortions and ballot manipulations, and discouraging party splintering and "unrestrained factionalism." Brief for Petitioners 41–50.

States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials. *Bullock*, 405 U. S., at 145 (State may prevent "frivolous or fraudulent

candidacies") (citing *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971)); *Eu*, 489 U. S., at 231; *Norman*, *supra*, at 290 (States have an interest in preventing "misrepresentation"); *Rosario* v. *Rockefeller*, 410 U. S. 752, 761 (1973). Petitioners contend that a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases. For example, members of a major party could decide that a powerful way of "sending a message" via the ballot would be for various factions of that party to nominate the major party's candidate as the candidate for the newly formed "No New Taxes," "Conserve Our Environment," and "Stop Crime Now" parties. In response, an opposing major party would likely instruct its factions to nominate that party's candidate as the "Fiscal Responsibility," "Healthy Planet," and "Safe Streets" parties' candidate.

Whether or not the putative "fusion" candidates' names appeared on one or four ballot lines, such maneuvering would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising. The New Party responds to this concern, ironically enough, by insisting that the State could avoid such manipulation by adopting more demanding ballot-access standards rather than prohibiting multiple-party nomination. Brief for Respondent 38. However, as we stated above, because the burdens the fusion ban imposes on the party's associational rights are not severe, the State need not narrowly tailor the means it chooses to promote ballot integrity. The Constitution does not require that Minnesota compromise the policy choices embodied in its ballot-access requirements to accommodate the New Party's fusion strategy. See Minn. Stat. §204B.08, subd. 3 (1994) (signature requirements for nominating petitions); *Rosario*, *supra*, at 761–762 (New York's time limitation for enrollment in a political party was part of an overall scheme aimed at the preservation of the integrity of the State's electoral process).

Relatedly, petitioners urge that permitting fusion would undercut Minnesota's ballot-access regime by allowing minor parties to capitalize on the popularity of another party's candidate, rather than on their own appeal to the voters, in order to secure access to the ballot. Brief for Petitioners 45–46. That is, voters who might not sign a minor party's nominating petition based on the party's own views and candidates might do so if they viewed the minor party as just another way of nominating the same person nominated by one of the major parties. Thus, Minnesota fears that fusion would enable minor parties, by nominating a major party's candidate, to bootstrap their way to major-party status in the next election and circumvent the State's nominating-petition requirement for minor parties. See Minn. Stat. §§ 200.02, subd. 7 (defining "major party"), and 204D.13 (1994) (describing ballot order for major and other parties). The State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support. *Anderson*, 460 U. S., at 788, n. 9; *Storer*, 415 U. S., at 733, 746.

States also have a strong interest in the stability of their political systems.[10] *Eu*, *supra*, at 226; *Storer*, *supra*, at 736.

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[10] The dissents state that we may not consider "what appears to be the true basis for [our] holding—the interest in preserving the two-party system," *post*, at 377 (opinion of STEVENS, J.), because Minnesota did not defend this interest in its briefs and "expressly rejected" it at oral argument, *post*, at 378; see also *post*, at 382–383 (opinion of SOUTER, J.). In fact, at oral argument, the State contended that it has an interest in the stability of its political system and that, even if certain election-related regulations, such as those requiring single-member districts, tend to work to the advantage of the traditional two-party system, the "States do have a permissible choice . . . there, as long as they don't go so far as to close the door to minor part[ies]." Tr. of Oral Arg. 27; see also Brief for Petitioners 46–47 (discussing State's interest in avoiding "'splintered parties and unrestrained factionalism'") (quoting *Storer*, 415 U. S., at 736). We agree.

This interest does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence, *Anderson*, *supra*, at 802; *Williams* v. *Rhodes*, 393 U. S. 23 (1968), nor is it a paternalistic license for States to protect political parties from the consequences of their own internal disagreements. *Eu*, *supra*, at 227; *Tashjian*, 479 U. S., at 224. That said, the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system, see Burnham Declaration, App. 12 (American politics has been, for the most part, organized around two parties since the time of Andrew Jackson), and that temper the destabilizing effects of party splintering and excessive factionalism. The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system. See *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 107 (1990) (SCALIA, J., dissenting) ("The stabilizing effects of such a [two-party] system are obvious"); *Davis* v. *Bandemer*, 478 U. S. 109, 144–145 (1986) (O'CONNOR, J., concurring) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government"); *Branti* v. *Finkel*, 445 U. S. 507, 532 (1980) (Powell, J., dissenting) ("Broad-based political parties supply an essential coherence and flexibility to the American political scene"). And while an interest in securing the perceived benefits of a stable two-party system will not justify unreasonably exclusionary restrictions, see *Williams*, *supra*, at 31–32, States need not remove all of the many hurdles third parties face in the American political arena today.

In *Storer*, we upheld a California statute that denied ballot positions to independent candidates who had voted in the immediately preceding primary elections or had a registered party affiliation at any time during the year before the same

primary elections. 415 U. S., at 728.[11] After surveying the relevant case law, we "ha[d] no hesitation in sustaining" the party-disaffiliation provisions. *Id.*, at 733. We recognized that the provisions were part of a "general state policy aimed at maintaining the integrity of . . . the ballot," and noted that the provision did not discriminate against independent candidates. *Ibid.* We concluded that while a "State need not take the course California has, . . . California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist No. 10 (Madison). It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system." 415 U. S., at 736; see also *Lippitt* v. *Cipollone*, 404 U. S. 1032 (1972) (affirming, without opinion, district-court decision upholding statute banning party-primary candidacies of those who had voted in another party's primary within last four years).[12]

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[11] A similar provision applied to party candidates, and imposed a "flat disqualification upon any candidate seeking to run in a party primary if he has been 'registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.'" Another provision stated that "no person may file nomination papers for a party nomination and an independent nomination for the same office . . . ." *Storer*, 415 U. S., at 733.

[12] JUSTICE STEVENS insists that New York's experience with fusion politics undermines Minnesota's contention that its fusion ban promotes political stability. *Post*, at 376, n. 4, 381, n. 12 (dissenting opinion). California's experiment with cross-filing, on the other hand, provides some justification for Minnesota's concerns. In 1946, for example, Earl Warren was the nominee of both major parties, and was therefore able to run unopposed in California's general election. It appears to be widely accepted that California's cross-filing system stifled electoral competition and undermined the role of distinctive political parties. See B. Hyink, S. Brown, & D. Provost, Politics and Government in California 76 (12th ed. 1989) (California's cross-filing law "undermined party responsibility and cohesiveness"); D. Mazmanian, Third Parties in Presidential Elections 134 (1974) (cross-filing "diminish[ed] the role of political parties and

Our decision in *Burdick* v. *Takushi*, *supra*, is also relevant. There, we upheld Hawaii's ban on write-in voting against a claim that the ban unreasonably infringed on citizens' First and Fourteenth Amendment rights. In so holding, we rejected the petitioner's argument that the ban "deprive[d] him of the opportunity to cast a meaningful ballot," emphasizing that the function of elections is to elect candidates and that "we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activit[ies] at the polls." 504 U. S., at 437–438.

Minnesota's fusion ban is far less burdensome than the disaffiliation rule upheld in *Storer*, and is justified by similarly weighty state interests. By reading *Storer* as dealing only with "sore-loser candidates," JUSTICE STEVENS, in our view, fails to appreciate the case's teaching. *Post*, at 377 (dissenting opinion). Under the California disaffiliation statute at issue in *Storer*, *any* person affiliated with a party at any time during the year leading up to the primary election was absolutely precluded from appearing on the ballot as an independent or as the candidate of another party. Minnesota's fusion ban is not nearly so restrictive; the challenged provisions say nothing about the previous party affiliation of would-be candidates but only require that, in order to appear on the ballot, a candidate not be the nominee of more than one party. California's disaffiliation rule limited the field of candidates by thousands; Minnesota's precludes only a handful who freely choose to be so limited. It is also worth noting that while California's disaffiliation statute absolutely banned many candidacies, Minnesota's fusion ban only prohibits a candidate from being named twice.

We conclude that the burdens Minnesota's fusion ban imposes on the New Party's associational rights are justified by "correspondingly weighty" valid state interests in ballot

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work[ed] against the efforts of minority factions to gain recognition and a hearing in the electoral arena").

integrity and political stability.[13] In deciding that Minnesota's fusion ban does not unconstitutionally burden the New Party's First and Fourteenth Amendment rights, we express no views on the New Party's policy-based arguments concerning the wisdom of fusion. It may well be that, as support for new political parties increases, these arguments will carry the day in some States' legislatures. But the Constitution does not require Minnesota, and the approximately 40 other States that do not permit fusion, to allow it. The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, and with whom JUSTICE SOUTER joins as to Parts I and II, dissenting.

In Minnesota, the Twin Cities Area New Party (Party) is a recognized minor political party entitled by state law to have the names of its candidates for public office appear on the state ballots. In April 1994, Andy Dawkins was qualified to be a candidate for election to the Minnesota Legislature as the representative of House District 65A. With Dawkins' consent, the Party nominated him as its candidate for that office. In my opinion the Party and its members had a constitutional right to have their candidate's name appear on the ballot despite the fact that he was also the nominee of another party.

The Court's conclusion that the Minnesota statute prohibiting multiple-party candidacies is constitutional rests on three dubious premises: (1) that the statute imposes only a

[13] JUSTICE STEVENS rejects the argument that Minnesota's fusion ban serves its alleged paternalistic interest in "avoiding voter confusion." *Post*, at 374, 375–376 (dissenting opinion) ("[T]his concern is meritless and severely underestimates the intelligence of the typical voter"). Although this supposed interest was discussed below, 73 F. 3d, at 199–200, and in the parties' briefs before this Court, Brief for Petitioners 41–44; Brief for Respondent 34–39, it plays no part in our analysis today.

minor burden on the Party's right to choose and to support the candidate of its choice; (2) that the statute significantly serves the State's asserted interests in avoiding ballot manipulation and factionalism; and (3) that, in any event, the interest in preserving the two-party system justifies the imposition of the burden at issue in this case. I disagree with each of these premises.

I

The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office and to communicate the identity of their nominees to the voting public. Both the right to choose and the right to advise voters of that choice are entitled to the highest respect.

The Minnesota statutes place a significant burden on both of those rights. The Court's recital of burdens that the statute does not inflict on the Party, *ante*, at 363, does nothing to minimize the severity of the burdens that it does impose. The fact that the Party may nominate its second choice surely does not diminish the significance of a restriction that denies it the right to have the name of its first choice appear on the ballot. Nor does the point that it may use some of its limited resources to publicize the fact that its first choice is the nominee of some other party provide an adequate substitute for the message that is conveyed to every person who actually votes when a party's nominees appear on the ballot.

As to the first point, the State contends that the fusion ban in fact limits by only a few candidates the range of individuals a party may nominate, and that the burden is therefore quite small. But the *number* of candidates removed from the Party's reach cannot be the determinative factor. The ban leaves the Party free to nominate any eligible candidate except the particular "'standard bearer who best represents the party's ideologies and preferences.'" *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 224 (1989).

The Party could perhaps choose to expend its resources supporting a candidate who was not in fact the best representative of its members' views. But a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support.[1] Political parties "exist to advance their members' shared political beliefs," and "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 629 (1996) (KENNEDY, J., dissenting). See also *Anderson* v. *Celebrezze*, 460 U. S. 780, 821 (1983) (REHNQUIST, J., dissenting) ("Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election").

The State next argues that—instead of nominating a second-choice candidate—the Party could remove itself from

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[1] The burden on the Party's right to nominate its first-choice candidate, by limiting the Party's ability to convey through its nominee what the Party represents, risks impinging on another core element of any political party's associational rights—the right to "broaden the base of public participation in and support for its activities." *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 214 (1986). The Court of Appeals relied substantially on this right in concluding that the fusion ban impermissibly burdened the New Party, but its focus was somewhat different. See *Twin Cities Area New Party* v. *McKenna*, 73 F. 3d 196, 199 (CA8 1996). A fusion ban burdens the right of a minor party to broaden its base of support because of the political reality that the dominance of the major parties frequently makes a vote for a minor party or independent candidate a "wasted" vote. When minor parties can nominate a candidate also nominated by a major party, they are able to present their members with an opportunity to cast a vote for a candidate who will actually be elected. Although this aspect of a party's effort to broaden support is distinct from the ability to nominate the candidate who best represents the party's views, it is important to note that the party's right to broaden the base of its support is burdened in both ways by the fusion ban.

the ballot altogether, and publicly endorse the candidate of another party. But the right to be on the election ballot is precisely what separates a political party from any other interest group.[2] The Court relies on the fact that the Party remains free "to spread its message to all who will listen," *ante*, at 361, through forums other than the ballot. Given the limited resources available to most minor parties, and the less-than-universal interest in the messages of third parties, it is apparent that the Party's message will, in this manner, reach a much smaller audience than that composed of all voters who can read the ballot in the polling booth.

The majority rejects as unimportant the limits that the fusion ban may impose on the Party's ability to express its political views, *ante*, at 362–363, relying on our decision in *Burdick* v. *Takushi*, 504 U. S. 428, 445 (1992), in which we noted that "the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression." But in *Burdick* we concluded simply that an individual voter's interest in expressing his disapproval of the single candidate running for office in a particular election did not require the State to finance and provide a mechanism for tabulating write-in votes. Our conclusion that the ballot is not principally a forum for the individual expression of political sentiment through the casting of a vote does not justify the conclusion that the ballot serves no expressive purpose for the parties who place candidates on the ballot. Indeed, the long-recognized right to choose a "'standard bearer who best represents the party's ideologies and preferences,'" *Eu*, 489 U. S., at 224, is inescapably an expressive right. "To the extent that party labels

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[2] We have recognized that "[t]here is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 228, n. 18 (1989). Given this reality, I cannot agree with the majority's implicit equation of the right to endorse with the right to nominate.

provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 220 (1986).

In this case, and presumably in most cases, the burden of a statute of this kind is imposed upon the members of a minor party, but its potential impact is much broader. Popular candidates like Andy Dawkins sometimes receive nationwide recognition. Fiorello LaGuardia, Earl Warren, Ronald Reagan, and Franklin D. Roosevelt are names that come readily to mind as candidates whose reputations and political careers were enhanced because they appeared on election ballots as fusion candidates. See Note, Fusion and the Associational Rights of Minor Political Parties, 95 Colum. L. Rev. 683 (1995). A statute that denied a political party the right to nominate any of those individuals for high office simply because he had already been nominated by another party would, in my opinion, place an intolerable burden on political expression and association.

II

Minnesota argues that the statutory restriction on the Party's right to nominate the candidate of its choice is justified by the State's interests in avoiding voter confusion, preventing ballot clutter and manipulation, encouraging candidate competition, and minimizing intraparty factionalism. None of these rationales can support the fusion ban because the State has failed to explain how the ban actually serves the asserted interests.

I believe that the law significantly abridges First Amendment freedoms and that the State therefore must shoulder a correspondingly heavy burden of justification if the law is to survive judicial scrutiny. But even accepting the majority's view that the burdens imposed by the law are not weighty,

the State's asserted interests must at least bear some plausible relationship to the burdens it places on political parties. See *Anderson*, 460 U. S., at 789. Although the Court today suggests that the State does not have to support its asserted justifications for the fusion ban with evidence that they have any empirical validity, *ante*, at 364, we have previously required more than a bare assertion that some particular state interest is served by a burdensome election requirement. See, *e. g.*, *Eu*, 489 U. S., at 226 (rejecting California's argument that the State's endorsement ban protected political stability because the State "never adequately explain[ed] how banning parties from endorsing or opposing primary candidates advances that interest"); *Anderson*, 460 U. S., at 789 (evaluating a State's interests, we examine "the extent to which those interests make it necessary to burden the plaintiff's rights"); *Norman* v. *Reed*, 502 U. S. 279, 288–289 (1992) ("corresponding interest" must be "sufficiently weighty to justify the limitation").[3]

While the State describes some imaginative theoretical sources of voter confusion that could result from fusion candidacies, in my judgment the argument that the burden on First Amendment interests is justified by this concern is meritless and severely underestimates the intelligence of the

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[3] In any event, the parade of horribles that the majority appears to believe might visit Minnesota should fusion candidacies be allowed is fantastical, given the evidence from New York's experience with fusion. See Brief for Conservative Party of New York et al. as *Amici Curiae* 20–25. Thus, the evidence that actually is available diminishes, rather than strengthens, Minnesota's claims. The majority asserts, *ante*, at 368–369, n. 12, that California's cross-filing system, in place during the first half of this century, provides a compelling counterexample. But cross-filing, which "allowed candidates to file in the primary of any or all parties without specifying party affiliation," D. Mazmanian, Third Parties in Presidential Elections 132–133 (1974) (hereinafter Mazmanian), is simply not the same as fusion politics, and the problems suffered in California do not provide empirical support for Minnesota's position.

typical voter.[4] We have noted more than once that "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu*, 489 U. S., at 228; *Tashjian*, 479 U. S., at 221; *Anderson*, 460 U. S., at 798.

The State's concern about ballot manipulation, readily accepted by the majority, is similarly farfetched. The possibility that members of the major parties will begin to create dozens of minor parties with detailed, issue-oriented titles for the sole purpose of nominating candidates under those titles, see *ante*, at 365, is entirely hypothetical. The majority dismisses out-of-hand the Party's argument that the risk of this type of ballot manipulation and crowding is more easily averted by maintaining reasonably stringent requirements for the creation of minor parties. *Ibid.* In fact, though, the Party's point merely illustrates the idea that a State can place some kinds—but not every kind—of limitation on the abilities of small parties to thrive. If the State wants to make it more difficult for any group to achieve the legal status of being a political party, it can do so within reason and still not run up against the First Amendment. "The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Anderson*, 460 U. S., at 788–789, n. 9. See also *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971). But once the State has established a standard for achieving party status, forbidding an acknowledged party to put on the ballot its chosen candidate clearly frustrates core associational rights.[5]

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[4] See Brief for Petitioners 41–43; see also *ante*, at 365.

[5] A second "ballot manipulation" argument accepted by the majority is that minor parties will attempt to "capitalize on the popularity of another party's candidate, rather than on their own appeal to the voters, in order

The State argues that the fusion ban promotes political stability by preventing intraparty factionalism and party raiding. States do certainly have an interest in maintaining a stable political system. *Eu*, 489 U. S., at 226. But the State has not convincingly articulated how the fusion ban will prevent the factionalism it fears. Unlike the law at issue in *Storer* v. *Brown*, 415 U. S. 724 (1974), for example, this law would not prevent sore-loser candidates from defecting with a disaffected segment of a major party and running as an opposition candidate for a newly formed minor party. Nor does this law, like those aimed at requiring parties to show a modicum of support in order to secure a place on the election ballot, prevent the formation of numerous small parties. Indeed, the activity banned by Minnesota's law is the formation of coalitions, not the division and dissension of "splintered parties and unrestrained factionalism." *Id.*, at 736.

As for the State's argument that the fusion ban encourages candidate competition, this claim treats "candidates" as fungible goods, ignoring entirely each party's interest in nominating not just any candidate, but the candidate who best represents the party's views. Minnesota's fusion ban simply cannot be justified with reference to this or any of the above-mentioned rationales. I turn, therefore, to what appears to be the true basis for the Court's holding—the interest in preserving the two-party system.

III

Before addressing the merits of preserving the two-party system as a justification for Minnesota's fusion ban, I should note that, in my view, it is impermissible for the Court to consider this rationale. Minnesota did not argue in its

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to secure access to the ballot." *Ante*, at 366. What the majority appears unwilling to accept is that *Andy Dawkins was the Party's chosen candidate.* The Party was not trying to capitalize on his status as someone else's candidate, but to identify him as their own choice.

briefs that the preservation of the two-party system supported the fusion ban, and indeed, when pressed at oral argument on the matter, the State expressly rejected this rationale. Tr. of Oral Arg. 26. Our opinions have been explicit in their willingness to consider only the particular interests put forward by a State to support laws that impose any sort of burden on First Amendment rights. See *Anderson*, 460 U. S., at 789 (the Court will "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule"); *id.*, at 817 (REHNQUIST, J., dissenting) (state laws that burden First Amendment rights are upheld when they are "'tied to a particularized legitimate purpose'") (quoting *Rosario* v. *Rockefeller*, 410 U. S. 752, 762 (1973)); *Burdick*, 504 U. S., at 434.

Even if the State had put forward this interest to support its laws, it would not be sufficient to justify the fusion ban. In most States, perhaps in all, there are two and only two major political parties. It is not surprising, therefore, that most States have enacted election laws that impose burdens on the development and growth of third parties. The law at issue in this case is undeniably such a law. The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality.[6]

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[6] Indeed, "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson* v. *Celebrezze*, 460 U. S. 780, 793–794 (1983). I do not think it is irrelevant that when antifusion laws were passed by States all over the Nation in the latter part of the 1800's, these laws, characterized by the majority as "reforms," *ante*, at 356, were passed by "the parties in power in state legislatures . . . to squelch the threat posed by the opposition's combined voting force." *McKenna*, 73 F. 3d, at 198. See Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws, 85 Am. Hist. Rev. 287, 302–306 (1980). Although the State is not required now to justify its laws with exclusive reference to the original purpose behind their passage,

Our jurisprudence in this area reflects a certain tension: On the one hand, we have been clear that political stability is an important state interest and that incidental burdens on the formation of minor parties are reasonable to protect that interest, see *Storer*, 415 U. S., at 736; on the other, we have struck down state elections laws specifically because they give "the two old, established parties a decided advantage over any new parties struggling for existence," *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968).[7] Between these boundaries, we have acknowledged that there is "no litmus-paper test for separating those restrictions that are valid from those that are invidious . . . . The rule is not self-executing and is no substitute for the hard judgments that must be made." *Storer*, 415 U. S., at 730.

Nothing in the Constitution prohibits the States from maintaining single-member districts with winner-take-all voting arrangements. And these elements of an election system do make it significantly more difficult for third parties to thrive. But these laws are different in two respects from the fusion bans at issue here. First, the method by which they hamper third-party development is not one that impinges on the associational rights of those third parties; minor parties remain free to nominate candidates of their choice, and to rally support for those candidates. The small parties' relatively limited likelihood of ultimate success on election day does not deprive them of the right to try. Second, the establishment of single-member districts correlates

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Bolger v. *Youngs Drug Products Corp.*, 463 U. S. 60, 70–71 (1983), this history does provide some indication of the kind of burden the States themselves believed they were imposing on the smaller parties' effective association.

[7] In *Anderson*, the State argued that its interest in political stability justified the early filing deadline for Presidential candidates at issue in the case. We recognized that the "asserted interest in political stability amounts to a desire to protect existing political parties from competition," and rejected that interest. 460 U. S., at 801–802.

directly with the States' interests in political stability. Systems of proportional representation, for example, may tend toward factionalism and fragile coalitions that diminish legislative effectiveness. In the context of fusion candidacies, the risks to political stability are extremely attenuated.[8] Of course, the reason minor parties so ardently support fusion politics is because it allows the parties to build up a greater base of support, as potential minor party members realize that a vote for the smaller party candidate is not necessarily a "wasted" vote. Eventually, a minor party might gather sufficient strength that—were its members so inclined—it could successfully run a candidate not endorsed by any major party, and legislative coalition building will be made more difficult by the presence of third-party legislators. But the risks to political stability in that scenario are speculative at best.[9]

In some respects, the fusion candidacy is the best marriage of the virtues of the minor party challenge to entrenched viewpoints[10] and the political stability that the two-party

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[8] Even in a system that allows fusion, a candidate for election must assemble majority support, so the State's concern cannot logically be about risks to political stability in the particular election in which the fusion candidate is running.

[9] In fact, Minnesota's expressed concern that fusion candidacies would stifle political diversity because minor parties would not put additional names on the ballot seems directly contradictory to the majority's imposed interest in the stable two-party system. The tension between the Court's rationale for its decision and the State's actually articulated interests is one of the reasons I do not believe the Court can legitimately consider interests not relied on by the State, especially in a context where the burden imposed and the interest justifying it must have some relationship.

[10] "[A]s an outlet for frustration, often as a creative force and a sort of conscience, as an ideological governor to keep major parties from speeding off into an abyss of mindlessness, and even just as a technique for strengthening a group's bargaining position for the future, the minor party would have to be invented if it did not come into existence regularly enough." A. Bickel, Reform and Continuity 80 (1971); see also

system provides. The fusion candidacy does not threaten to divide the legislature and create significant risks of factionalism, which is the principal risk proponents of the two-party system point to. But it does provide a means by which voters with viewpoints not adequately represented by the platforms of the two major parties can indicate to a particular candidate that—in addition to his support for the major party views—he should be responsive to the views of the minor party whose support for him was demonstrated where political parties demonstrate support—on the ballot.

The strength of the two-party system—and of each of its major components—is the product of the power of the ideas, the traditions, the candidates, and the voters that constitute the parties.[11] It demeans the strength of the two-party system to assume that the major parties need to rely on laws that discriminate against independent voters and minor parties in order to preserve their positions of power.[12] Indeed,

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S. Rosenstone, R. Behr, & E. Lazarus, Third Parties in America: Citizen Response to Major Party Failure 4–9 (1984).

[11] The Court of Appeals recognized that fusion politics could have an important role in preserving this value when it struck down the fusion ban. "[R]ather than jeopardizing the integrity of the election system, consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics." *McKenna*, 73 F. 3d, at 199.

[12] The experience in New York with fusion politics provides considerable evidence that neither political stability nor the ultimate strength of the two major parties is truly risked by the existence of successful minor parties. More generally, "the presence of one or even two significant third parties has not led to a proliferation of parties, nor to the destruction of basic democratic institutions." Mazmanian 69; see also The Supreme Court, 1982 Term—Independent Candidates and Minority Parties, 97 Harv. L. Rev. 1, 162 (1983) ("American political stability does not depend on a two-party oligopoly. . . . [H]istorical experience in this country demonstrate[s] that minor parties and independent candidacies are compatible with long-term political stability. Moreover, there is no reason to believe that eliminating restrictions on political minorities would change the basic structure of the two-party system in this country").

it is a central theme of our jurisprudence that the entire electorate, which necessarily includes the members of the major parties, will benefit from robust competition in ideas and governmental policies that "'is at the core of our electoral process and of the First Amendment freedoms.'" *Anderson*, 460 U. S., at 802, quoting *Williams* v. *Rhodes*, 393 U. S., at 32.

In my opinion legislation that would otherwise be unconstitutional because it burdens First Amendment interests and discriminates against minor political parties cannot survive simply because it benefits the two major parties. Accordingly, I respectfully dissent.

JUSTICE SOUTER, dissenting.

I join Parts I and II of JUSTICE STEVENS's dissent, agreeing as I do that none of the concerns advanced by the State suffices to justify the burden of the challenged statutes on respondent's First Amendment interests. I also agree with JUSTICE STEVENS's view, set out in the first paragraph of Part III, that the State does not assert the interest in preserving "the traditional two-party system" upon which the majority repeatedly relies in upholding Minnesota's statutes, see, *e. g.*, *ante*, at 367 ("The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system"). Actually, Minnesota's statement of the "important regulatory concerns advanced by the State's ban on ballot fusion," Brief for Petitioners 40, contains no reference whatsoever to the "two-party system," nor even any explicit reference to "political stability" generally. See *id.*, at 40–50.

To be sure, the State does assert its intention to prevent "party splintering," *id.*, at 46–50, which may not be separable in the abstract from a desire to preserve political stabil-

ity.[1] But in fact the State has less comprehensive concerns; the primary dangers posed by what it calls "major-party splintering and factionalism," *id.*, at 47, are said to be those of "turn[ing] the general election ballot into a forum for venting intraparty squabbles," *ibid.*, and reducing elections to "a thinly disguised ballot-issue campaign," *id.*, at 49. Nowhere does the State even intimate that the splintering it wishes to avert might cause or hasten the demise of the two-party system. In these circumstances, neither the State's point about "splintering," nor its tentative reference to "political stability" at oral argument, n. 1, *infra*, may fairly be assimilated to the interest posited by the Court of preserving the "two-party system." Accordingly, because I agree with JUSTICE STEVENS, *ante*, at 378, that our election cases restrict our consideration to "the precise interests put forward by the State as justifications for the burden imposed by its rule," *Anderson* v. *Celebrezze*, 460 U. S. 780, 789 (1983),[2] I would judge the challenged statutes only on the interests the State has raised in their defense and would hold them unconstitutional.

I am, however, unwilling to go the further distance of considering and rejecting the majority's "preservation of the two-party system" rationale. For while Minnesota has made no such argument before us, I cannot discount the possibility of a forceful one. There is considerable consensus that party loyalty among American voters has declined significantly in the past four decades, see, *e. g.*, W. Crotty, American Parties in Decline 26–34 (2d ed. 1984); Jensen,

[1] Indeed, at oral argument, the State did hesitantly suggest that it "does have an interest, a generalized interest in preserving, in a sense, political stability . . . ." Tr. of Oral Arg. 26.

[2] See also *Edenfield* v. *Fane*, 507 U. S. 761, 768 (1993) (explaining that the midlevel scrutiny that applies in commercial speech cases, which is similar to what we apply here, "[u]nlike rational-basis review . . . does not permit us to supplant the precise interests put forward by the State with other suppositions").

The Last Party System: Decay of Consensus, 1932–1980, in The Evolution of American Electoral Systems 219–225, (P. Kleppner et al. eds. 1981), and that the overall influence of the parties in the political process has decreased considerably, see, *e. g.*, Cutler, Party Government Under the American Constitution, 134 U. Penn. L. Rev. 25 (1987); Sundquist, Party Decay and the Capacity to Govern, in The Future of American Political Parties: The Challenge of Governance 42–69 (J. Fleishman ed. 1982). In the wake of such studies, it may not be unreasonable to infer that the two-party system is in some jeopardy. See, *e. g.*, Lowi, N. Y. Times, Aug. 23, 1992, Magazine, p. 28 ("[H]istorians will undoubtably focus on 1992 as the beginning of the end of America's two-party system").

Surely the majority is right that States "have a strong interest in the stability of their political systems," *ante,* at 366, that is, in preserving a political system capable of governing effectively. If it could be shown that the disappearance of the two-party system would undermine that interest, and that permitting fusion candidacies poses a substantial threat to the two-party scheme, there might well be a sufficient predicate for recognizing the constitutionality of the state action presented by this case. Right now, however, no State has attempted even to make this argument, and I would therefore leave its consideration for another day.

Syllabus

RICHARDS *v.* WISCONSIN

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 96–5955. Argued March 24, 1997—Decided April 28, 1997

In *Wilson* v. *Arkansas*, 514 U. S. 927, this Court held that the Fourth Amendment incorporates the common-law requirement that police knock on a dwelling's door and announce their identity and purpose before attempting forcible entry, recognized that the flexible reasonableness requirement should not be read to mandate a rigid announcement rule that ignores countervailing law enforcement interests, *id.*, at 934, and left it to the lower courts to determine the circumstances under which an unannounced entry is reasonable. *Id.*, at 936. Officers in Madison, Wisconsin, obtained a warrant to search petitioner Richards' motel room for drugs and related paraphernalia, but the Magistrate refused to give advance authorization for a "no-knock" entry. The officer who knocked on Richards' door was dressed, and identified himself, as a maintenance man. Upon opening the door, Richards also saw a uniformed officer and quickly closed the door. The officers kicked down the door, caught Richards trying to escape, and found cash and cocaine in the bathroom. In denying Richards' motion to suppress the evidence on the ground that the officers did not knock and announce their presence before forcing entry, the trial court found that they could gather from Richards' strange behavior that he might try to destroy evidence or escape and that the drugs' disposable nature further justified their decision not to knock and announce. The State Supreme Court affirmed, concluding that *Wilson* did not preclude the court's pre-*Wilson* *per se* rule that police officers are *never* required to knock and announce when executing a search warrant in a felony drug investigation because of the special circumstances of today's drug culture.

Held:

1. The Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for felony drug investigations. While the requirement can give way under circumstances presenting a threat of physical violence or where officers believe that evidence would be destroyed if advance notice were given, 514 U. S., at 936, the fact that felony drug investigations may frequently present such circumstances cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Creating exceptions to the requirement based on the culture surrounding a general category of criminal behavior presents at

Syllabus

least two serious concerns. First, the exception contains considerable overgeneralization that would impermissibly insulate from judicial review cases in which a drug investigation does not pose special risks. Second, creating an exception in one category can, relatively easily, be applied to others. If a *per se* exception were allowed for each criminal activity category that included a considerable risk of danger to officers or destruction of evidence, the knock-and-announce requirement would be meaningless. The court confronted with the question in each case has a duty to determine whether the facts and circumstances of the particular entry justified dispensing with the requirement. A "no-knock" entry is justified when the police have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime. This standard strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. Cf. *Maryland* v. *Buie*, 494 U. S. 325, 337. Pp. 391–395.

2. Because the evidence in this case establishes that the decision not to knock and announce was a reasonable one under the circumstances, the officers' entry into the motel room did not violate the Fourth Amendment. That the Magistrate had originally refused to issue a no-knock warrant means only that at the time the warrant was requested there was insufficient evidence for a no-knock entry. However, the officers' decision to enter the room must be evaluated as of the time of entry. Pp. 395–396.

201 Wis. 2d 845, 549 N. W. 2d 218, affirmed.

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

David R. Karpe, by appointment of the Court, 519 U. S. 1106, argued the cause for petitioner. With him on the briefs were *John Wesley Hall, Jr.*, *Henry R. Schultz*, and *Jack E. Schairer*.

James E. Doyle, Attorney General of Wisconsin, argued the cause for respondent. With him on the brief was *Stephen W. Kleinmaier*, Assistant Attorney General.

Miguel A. Estrada argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Acting Solicitor General Dellinger*, *Acting Assistant Attorney*

General Richard, Deputy Solicitor General Dreeben, James A. Feldman, and *Deborah Watson.**

JUSTICE STEVENS delivered the opinion of the Court.

In *Wilson* v. *Arkansas,* 514 U. S. 927 (1995), we held that the Fourth Amendment incorporates the common-law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. At the same time, we recognized that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.,* at 934, and left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment," *id.,* at 936.

In this case, the Wisconsin Supreme Court concluded that police officers are *never* required to knock and announce their presence when executing a search warrant in a felony

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**Tracey Maclin, Steven R. Shapiro,* and *Lisa B. Kemler* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Betty D. Montgomery,* Attorney General of Ohio, *Jeffrey S. Sutton,* State Solicitor, *Simon B. Karas,* and *Diane R. Richards,* and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Winston Bryant* of Arkansas, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Gus F. Diaz* of Guam, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Carla J. Stovall* of Kansas, *A. B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran* of Maryland, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Thomas J. Miller* of Iowa, *Frankie Sue Del Papa* of Nevada, *Steven M. Houran* of New Hampshire, *Peter Verniero* of New Jersey, *Tom Udall* of New Mexico, *Jose Fuentes Agostini* of Puerto Rico, *Jeffrey B. Pine* of Rhode Island, *Charles Molony Condon* of South Carolina, *Mark W. Barnett* of South Dakota, *Jan Graham* of Utah, and *James Gilmore III* of Virginia; and for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau, Wayne W. Schmidt, James P. Manak, Richard M. Weintraub,* and *Bernard J. Farber.*

drug investigation. In so doing, it reaffirmed a pre-*Wilson* holding and concluded that *Wilson* did not preclude this *per se* rule. We disagree with the court's conclusion that the Fourth Amendment permits a blanket exception to the knock-and-announce requirement for this entire category of criminal activity. But because the evidence presented to support the officers' actions in this case establishes that the decision not to knock and announce was a reasonable one under the circumstances, we affirm the judgment of the Wisconsin court.

I

On December 31, 1991, police officers in Madison, Wisconsin, obtained a warrant to search Steiney Richards' motel room for drugs and related paraphernalia. The search warrant was the culmination of an investigation that had uncovered substantial evidence that Richards was one of several individuals dealing drugs out of hotel rooms in Madison. The police requested a warrant that would have given advance authorization for a "no-knock" entry into the motel room, but the Magistrate explicitly deleted those portions of the warrant. App. 7, 9.

The officers arrived at the motel room at 3:40 a.m. Officer Pharo, dressed as a maintenance man, led the team. With him were several plainclothes officers and at least one man in uniform. Officer Pharo knocked on Richards' door and, responding to the query from inside the room, stated that he was a maintenance man. With the chain still on the door, Richards cracked it open. Although there is some dispute as to what occurred next, Richards acknowledges that when he opened the door he saw the man in uniform standing behind Officer Pharo. Brief for Petitioner 6. He quickly slammed the door closed and, after waiting two or three seconds, the officers began kicking and ramming the door to gain entry to the locked room. At trial, the officers testified that they identified themselves as police while they were kicking the door in. App. 40. When they finally did break

into the room, the officers caught Richards trying to escape through the window. They also found cash and cocaine hidden in plastic bags above the bathroom ceiling tiles.

Richards sought to have the evidence from his motel room suppressed on the ground that the officers had failed to knock and announce their presence prior to forcing entry into the room. The trial court denied the motion, concluding that the officers could gather from Richards' strange behavior when they first sought entry that he knew they were police officers and that he might try to destroy evidence or to escape. *Id.*, at 54. The judge emphasized that the easily disposable nature of the drugs the police were searching for further justified their decision to identify themselves as they crossed the threshold instead of announcing their presence before seeking entry. *Id.*, at 55. Richards appealed the decision to the Wisconsin Supreme Court and that court affirmed. 201 Wis. 2d 845, 549 N. W. 2d 218 (1996).

The Wisconsin Supreme Court did not delve into the events underlying Richards' arrest in any detail, but accepted the following facts: "[O]n December 31, 1991, police executed a search warrant for the motel room of the defendant seeking evidence of the felonious crime of Possession with Intent to Deliver a Controlled Substance in violation of Wis. Stat. § 161.41(1m) (1991–92). They did not knock and announce prior to their entry. Drugs were seized." *Id.*, at 849, 549 N. W. 2d, at 220.

Assuming these facts, the court proceeded to consider whether our decision in *Wilson* required the court to abandon its decision in *State* v. *Stevens*, 181 Wis. 2d 410, 511 N. W. 2d 591 (1994), cert. denied, 515 U. S. 1102 (1995), which held that "when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs, they necessarily have reasonable cause to believe exigent circumstances exist" to justify a no-knock entry. 201 Wis. 2d, at 852, 549 N. W. 2d, at 221. The court concluded

that nothing in *Wilson*'s acknowledgment that the knock-and-announce rule was an element of the Fourth Amendment "reasonableness" requirement would prohibit application of a *per se* exception to that rule in a category of cases. 201 Wis. 2d, at 854–855, 549 N. W. 2d, at 220.

In reaching this conclusion, the Wisconsin court found it reasonable—after considering criminal conduct surveys, newspaper articles, and other judicial opinions—to assume that all felony drug crimes will involve "an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police." *Id.*, at 847–848, 549 N. W. 2d, at 219. Notwithstanding its acknowledgment that in "some cases, police officers will undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce," *id.*, at 863, 549 N. W. 2d, at 225, the court concluded that exigent circumstances justifying a no-knock entry are always present in felony drug cases. Further, the court reasoned that the violation of privacy that occurs when officers who have a search warrant forcibly enter a residence without first announcing their presence is minimal, given that the residents would ultimately be without authority to refuse the police entry. The principal intrusion on individual privacy interests in such a situation, the court concluded, comes from the issuance of the search warrant, not the manner in which it is executed. *Id.*, at 864–865, 549 N. W. 2d, at 226. Accordingly, the court determined that police in Wisconsin do not need specific information about dangerousness, or the possible destruction of drugs in a particular case, in order to dispense with the knock-and-announce requirement in felony drug cases.[1]

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[1] Several other state courts—in cases that predate our decision in *Wilson*—have adopted similar rules, concluding that simple probable cause to search a home for narcotics always allows the police to forgo the knock-and-announce requirement. See, *e. g.*, *People* v. *Lujan*, 484 P. 2d 1238, 1241 (Colo. 1971) (en banc); *Henson* v. *State*, 236 Md. 519, 523–524, 204 A.

Justice Abrahamson concurred in the judgment because, in her view, the facts found by the trial judge justified a no-knock entry. *Id.*, at 866–868, 549 N. W. 2d, at 227. Specifically, she noted that Richards' actions in slamming the door when he saw the uniformed man standing behind Officer Pharo indicated that he already knew that the people knocking on his door were police officers. Under these circumstances, any further announcement of their presence would have been a useless gesture. *Id.*, at 868–869, n. 3, 549 N. W. 2d, at 228, n. 3. While agreeing with the outcome, Justice Abrahamson took issue with her colleagues' affirmation of the blanket exception to the knock-and-announce requirement in drug felony cases. She observed that the constitutional reasonableness of a search has generally been a matter left to the court, rather than to the officers who conducted the search, and she objected to the creation of a blanket rule that insulated searches in a particular category of crime from the neutral oversight of a reviewing judge. *Id.*, at 868–875, 549 N. W. 2d, at 228–230.

II

We recognized in *Wilson* that the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." 514 U. S., at 936. It is indisputable that felony drug investigations may frequently involve both of these circumstances.[2] The question we must

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2d 516, 519–520 (1964); *State* v. *Loucks*, 209 N. W. 2d 772, 777–778 (N. D. 1973). Cf. *People* v. *De Lago*, 16 N. Y. 2d 289, 292, 213 N. E. 2d 659, 661 (1965) (similar rule for searches related to gambling operations), cert. denied, 383 U. S. 963 (1966).

[2] This Court has encountered before the links between drugs and violence, see, *e. g.*, *Michigan* v. *Summers*, 452 U. S. 692, 702 (1981), and the likelihood that drug dealers will attempt to dispose of drugs before police seize them, see, *e. g.*, *Ker* v. *California*, 374 U. S. 23, 28, n. 3 (1963).

resolve is whether this fact justifies dispensing with case-by-case evaluation of the manner in which a search was executed.[3]

The Wisconsin court explained its blanket exception as necessitated by the special circumstances of today's drug culture, 201 Wis. 2d, at 863–866, 549 N. W. 2d, at 226–227, and the State asserted at oral argument that the blanket exception was reasonable in "felony drug cases because of the convergence in a violent and dangerous form of commerce of weapons and the destruction of drugs." Tr. of Oral Arg. 26. But creating exceptions to the knock-and-announce rule based on the "culture" surrounding a general category of criminal behavior presents at least two serious concerns.[4]

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[3] Although our decision in *Wilson* did not address this issue directly, it is instructive that in that case—which involved a felony drug investigation—we remanded to the state court for further factual development to determine whether the no-knock entry was reasonable under the circumstances of the case. Two *amicus* briefs in *Wilson* suggested that we adopt just the sort of *per se* rule the Wisconsin court propounded here. Brief for Americans for Effective Law Enforcement, Inc., et al. as *Amici Curiae* 10–11, Brief for Wayne County, Michigan, as *Amicus Curiae* 39–46, in *Wilson* v. *Arkansas,* O. T. 1994, No. 5707. Although the respondent did not argue for a categorical rule, the petitioner, in her reply brief, did address the arguments put forward by the *amicus* briefs, Reply Brief for Petitioner in *Wilson* v. *Arkansas,* O. T. 1994, No. 5707, p. 11, and *amici* supporting the petitioner also presented arguments against a categorical rule. Brief for American Civil Liberties Union et al. as *Amici Curiae* in *Wilson* v. *Arkansas,* O. T. 1994, No. 5707, p. 29, n. 44. Thus, while the prospect of a categorical rule was one to which we were alerted in *Wilson,* we did not choose to adopt such a rule at that time.

[4] It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Minnesota* v. *Dickerson,* 508 U. S. 366, 380 (1993) (SCALIA, J., concurring).

First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry.[5] Wisconsin's blanket rule impermissibly insulates these cases from judicial review.

A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the

[5] The State asserts that the intrusion on individual interests effectuated by a no-knock entry is minimal because the execution of the warrant itself constitutes the primary intrusion on individual privacy and that the individual privacy interest cannot outweigh the generalized governmental interest in effective and safe law enforcement. Brief for Respondent 21–24. See also Brief for United States as *Amicus Curiae* 16 ("occupants' privacy interest is necessarily limited to the brief interval between the officers' announcement and their entry"). While it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. As we observed in *Wilson* v. *Arkansas*, 514 U. S. 927, 930–932 (1995), the common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.

Additionally, when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry. The State pointed out at oral argument that, in Wisconsin, most search warrants are executed during the late night and early morning hours. Tr. of Oral Arg. 24. The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

reasons for creating an exception in one category can, relatively easily, be applied to others. Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a *per se* exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.

Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. Cf. *Maryland* v. *Buie*, 494 U. S. 325, 337 (1990) (allowing a protective sweep of a house during an arrest where the officers have "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene"); *Terry* v. *Ohio*, 392 U. S. 1, 30 (1968) (requiring a reasonable and articulable suspicion of danger to justify a patdown search). This showing is not high, but the police

should be required to make it whenever the reasonableness of a no-knock entry is challenged.

III

Although we reject the Wisconsin court's blanket exception to the knock-and-announce requirement, we conclude that the officers' no-knock entry into Richards' motel room did not violate the Fourth Amendment. We agree with the trial court, and with Justice Abrahamson, that the circumstances in this case show that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so.[6]

The judge who heard testimony at Richards' suppression hearing concluded that it was reasonable for the officers executing the warrant to believe that Richards knew, after opening the door to his motel room the first time, that the men seeking entry to his room were the police. App. 54. Once the officers reasonably believed that Richards knew who they were, the court concluded, it was reasonable for them to force entry immediately given the disposable nature of the drugs. *Id.*, at 55.

In arguing that the officers' entry was unreasonable, Richards places great emphasis on the fact that the Magistrate who signed the search warrant for his motel room deleted the portions of the proposed warrant that would have given the officers permission to execute a no-knock entry. But this fact does not alter the reasonableness of the officers' decision, which must be evaluated as of the time they entered the motel room. At the time the officers obtained the warrant, they did not have evidence sufficient, in the judgment of the Magistrate, to justify a no-knock warrant. Of course,

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[6] We note that the attorneys general of 26 States, the Commonwealth of Puerto Rico, and the Territory of Guam filed an *amicus* brief taking the position that the officers' decision was reasonable under the specific facts of this case, but rejecting Wisconsin's *per se* rule. See Brief for Ohio et al. as *Amici Curiae.*

the Magistrate could not have anticipated in every particular the circumstances that would confront the officers when they arrived at Richards' motel room.[7] These actual circumstances—petitioner's apparent recognition of the officers combined with the easily disposable nature of the drugs—justified the officers' ultimate decision to enter without first announcing their presence and authority.

Accordingly, although we reject the blanket exception to the knock-and-announce requirement for felony drug investigations, the judgment of the Wisconsin Supreme Court is affirmed.

It is so ordered.

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[7] A number of States give magistrate judges the authority to issue "no-knock" warrants if the officers demonstrate ahead of time a reasonable suspicion that entry without prior announcement will be appropriate in a particular context. See, *e. g.*, 725 Ill. Comp. Stat., ch. 725, § 5/108–8 (1992); Neb. Rev. Stat. § 29–411 (1995); Okla. Stat., Tit. 22, § 1228 (Supp. 1997); S. D. Codified Laws § 23A–35–9 (1988); Utah Code Ann. § 77–23–210 (1995). But see *State* v. *Arce*, 83 Ore. App. 185, 730 P. 2d 1260 (1986) (magistrate has no authority to abrogate knock-and-announce requirement); *State* v. *Bamber*, 630 So. 2d 1048 (Fla. 1994) (same).

The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time. But, as the facts of this case demonstrate, a magistrate's decision not to authorize a no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed.

Syllabus

BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA *v.* BROWN ET AL.

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

No. 95–1100. Argued November 5, 1996—Decided April 28, 1997

Jill Brown (hereinafter respondent) brought this 42 U. S. C. § 1983 damages action against petitioner county, alleging, among other things, that its Deputy Burns had arrested her with excessive force, and that it was liable for her injuries because its Sheriff Moore had hired Burns without adequately reviewing his background. Burns had pleaded guilty to various driving infractions and other misdemeanors, including assault and battery. Moore, whom the county stipulated was its Sheriff's Department policymaker, testified that he had obtained Burns' driving and criminal records, but had not closely reviewed either before hiring Burns. The District Court denied the county's motions for judgment as a matter of law, which asserted that a policymaker's single hiring decision could not give rise to § 1983 municipal liability. Respondent prevailed following a jury trial, and the Fifth Circuit affirmed, holding that the county was properly found liable based on Moore's decision to hire Burns.

Held: The county is not liable for Sheriff Moore's isolated decision to hire Burns without adequate screening, because respondent has not demonstrated that the decision reflected a conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally protected right. Pp. 402–416.

(a) A municipality may not be held liable under § 1983 solely because it employs a tortfeasor, see, *e. g.*, *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 692. Instead, the plaintiff must identify a municipal "policy" or "custom" that caused the injury. See, *e. g.*, *Pembaur* v. *Cincinnati*, 475 U. S. 469, 480–481. Contrary to respondent's contention, a "policy" giving rise to liability cannot be established merely by identifying a policymaker's conduct that is properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. See *Monell*, *supra*, at 694. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. Pp. 402–404.

Syllabus

(b) Respondent's claim that a policymaker's single facially lawful hiring decision can trigger municipal liability presents difficult problems of proof. This Court has recognized a § 1983 cause of action based on a single decision attributable to a municipality only where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation. See, *e. g.*, *Pembaur*, *supra*, at 481. In relying heavily on *Pembaur*, respondent blurs the distinction between § 1983 cases that present no difficult fault and causation questions and those that do. Claims such as the present, which do not involve an allegation that the municipal action itself violated federal law or directed or authorized the deprivation of federal rights, require application of rigorous culpability and causation standards in order to ensure that the municipality is not held liable solely for its employees' actions. In *Canton* v. *Harris*, 489 U. S. 378, for example, the Court held that a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action—there, an allegedly inadequate training *program*—has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was not simply negligent, but was taken with "deliberate indifference" as to its known or obvious consequences. *Id.*, at 388. Respondent's reliance on *Canton* for an analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open the possibility that municipal liability could be triggered by evidence of a single violation of federal rights, accompanied by a showing that the municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, *id.*, at 390, and n. 10, the *Canton* Court simply hypothesized that, in this narrow range of circumstances, the violation may be a highly predictable consequence of the failure to train and thereby justify a finding of "deliberate indifference" by policymakers. Predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult. Only where adequate scrutiny of the applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference." Neither the District Court nor the Court of Appeals directly tested whether Burns' background made his use of excessive force in making an arrest a plainly obvious consequence of the hiring decision. Pp. 404–412.

(c) Even assuming without deciding that proof of a single instance of inadequate screening could ever trigger municipal liability, Moore's failure to scrutinize Burns' record cannot constitute "deliberate indiffer-

ence" to respondent's federally protected right to be free from the use of excessive force. To test the link between Moore's action and respondent's injury, it must be asked whether a full review of Burns' record reveals that Moore should have concluded that Burns' use of excessive force would be a plainly obvious consequence of his decision to hire Burns. Respondent's showing on this point was inadequate because the primary infractions on which she relies to prove Burns' propensity for violence arose from a single college fight. A full review of Burns' record might well have led Moore to conclude that Burns was an extremely poor deputy candidate, but he would not necessarily have reached that decision *because* Burns' use of excessive force would have been a plainly obvious consequence of the decision to hire him. The District Court therefore erred in submitting the inadequate screening theory to the jury. Pp. 412–415.

67 F. 3d 1174, vacated and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, and Thomas, JJ., joined. Souter, J., filed a dissenting opinion, in which Stevens and Breyer, JJ., joined, *post,* p. 416. Breyer, J., filed a dissenting opinion, in which Stevens and Ginsburg, JJ., joined, *post,* p. 430.

Wallace B. Jefferson argued the cause for petitioner. With him on the briefs was *Sharon E. Callaway.*

Bryan J. Serr argued the cause for respondent Brown. With him on the brief were *J. Kermit Hill* and *Duke Walker.**

Justice O'Connor delivered the opinion of the Court.

Respondent Jill Brown brought a claim for damages against petitioner Bryan County under Rev. Stat. § 1979, 42 U. S. C. § 1983. She alleged that a county police officer used

*Briefs of *amici curiae* urging reversal were filed for the City of New York by *Paul A. Crotty, Leonard J. Koerner,* and *John Hogrogian;* for the National Association of Counties et al. by *Richard Ruda, James I. Crowley,* and *Donald B. Ayer;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Ogden N. Lewis, James D. Liss, Vincent T. Chang, Michele S. Warman, and *Martha Davis* filed a brief for the NOW Legal Defense and Education Fund et al. as *amici curiae* urging affirmance.

excessive force in arresting her, and that the county itself was liable for her injuries based on its sheriff's hiring and training decisions. She prevailed on her claims against the county following a jury trial, and the Court of Appeals for the Fifth Circuit affirmed the judgment against the county on the basis of the hiring claim alone. 67 F. 3d 1174 (1995). We granted certiorari. We conclude that the Court of Appeals' decision cannot be squared with our recognition that, in enacting § 1983, Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the "moving force" behind the plaintiff's deprivation of federal rights. *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978).

I

In the early morning hours of May 12, 1991, Jill Brown (hereinafter respondent) and her husband were driving from Grayson County, Texas, to their home in Bryan County, Oklahoma. After crossing into Oklahoma, they approached a police checkpoint. Mr. Brown, who was driving, decided to avoid the checkpoint and return to Texas. After seeing the Browns' truck turn away from the checkpoint, Bryan County Deputy Sheriff Robert Morrison and Reserve Deputy Stacy Burns pursued the vehicle. Although the parties' versions of events differ, at trial both deputies claimed that their patrol car reached speeds in excess of 100 miles per hour. Mr. Brown testified that he was unaware of the deputies' attempts to overtake him. The chase finally ended four miles south of the police checkpoint.

After he got out of the squad car, Deputy Sheriff Morrison pointed his gun toward the Browns' vehicle and ordered the Browns to raise their hands. Reserve Deputy Burns, who was unarmed, rounded the corner of the vehicle on the passenger's side. Burns twice ordered respondent from the vehicle. When she did not exit, he used an "arm bar" technique, grabbing respondent's arm at the wrist and elbow,

pulling her from the vehicle, and spinning her to the ground. Respondent's knees were severely injured, and she later underwent corrective surgery. Ultimately, she may need knee replacements.

Respondent sought compensation for her injuries under 42 U. S. C. § 1983 and state law from Burns, Bryan County Sheriff B. J. Moore, and the county itself. Respondent claimed, among other things, that Bryan County was liable for Burns' alleged use of excessive force based on Sheriff Moore's decision to hire Burns, the son of his nephew. Specifically, respondent claimed that Sheriff Moore had failed to adequately review Burns' background. Burns had a record of driving infractions and had pleaded guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness. Oklahoma law does not preclude the hiring of an individual who has committed a misdemeanor to serve as a peace officer. See Okla. Stat., Tit. 70, § 3311(D)(2)(a) (1991) (requiring that the hiring agency certify that the prospective officer's records do not reflect a felony conviction). At trial, Sheriff Moore testified that he had obtained Burns' driving record and a report on Burns from the National Crime Information Center, but had not closely reviewed either. Sheriff Moore authorized Burns to make arrests, but not to carry a weapon or to operate a patrol car.

In a ruling not at issue here, the District Court dismissed respondent's § 1983 claim against Sheriff Moore prior to trial. App. 28. Counsel for Bryan County stipulated that Sheriff Moore "was the policy maker for Bryan County regarding the Sheriff's Department." *Id.*, at 30. At the close of respondent's case and again at the close of all of the evidence, Bryan County moved for judgment as a matter of law. As to respondent's claim that Sheriff Moore's decision to hire Burns triggered municipal liability, the county argued that a single hiring decision by a municipal policymaker could not give rise to municipal liability under § 1983. *Id.*, at 59–60.

The District Court denied the county's motions. The court also overruled the county's objections to jury instructions on the § 1983 claim against the county. *Id.*, at 125–126, 132.

To resolve respondent's claims, the jury was asked to answer several interrogatories. The jury concluded that Stacy Burns had arrested respondent without probable cause and had used excessive force, and therefore found him liable for respondent's injuries. It also found that the "hiring policy" and the "training policy" of Bryan County "in the case of Stacy Burns as instituted by its policymaker, B. J. Moore," were each "so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff." *Id.*, at 135. The District Court entered judgment for respondent on the issue of Bryan County's § 1983 liability. The county appealed on several grounds, and the Court of Appeals for the Fifth Circuit affirmed. 67 F. 3d 1174 (1995). The court held, among other things, that Bryan County was properly found liable under § 1983 based on Sheriff Moore's decision to hire Burns. *Id.*, at 1185. The court addressed only those points that it thought merited review; it did not address the jury's determination of county liability based on inadequate training of Burns, *id.*, at 1178, nor do we. We granted certiorari, 517 U. S. 1154 (1996), to decide whether the county was properly held liable for respondent's injuries based on Sheriff Moore's single decision to hire Burns. We now reverse.

II

Title 42 U. S. C. § 1983 provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-

> jured in an action at law, suit in equity, or other proper proceeding for redress."

We held in *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S., at 689, that municipalities and other local governmental bodies are "persons" within the meaning of § 1983. We also recognized that a municipality may not be held liable under § 1983 solely because it employs a tortfeasor. Our conclusion rested partly on the language of § 1983 itself. In light of the statute's imposition of liability on one who "subjects [a person], or causes [that person] to be subjected," to a deprivation of federal rights, we concluded that it "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.*, at 692. Our conclusion also rested upon the statute's legislative history. As stated in *Pembaur* v. *Cincinnati*, 475 U. S. 469, 479 (1986), "while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*" (citing *Monell*, *supra*, at 665–683). We have consistently refused to hold municipalities liable under a theory of *respondeat superior*. See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 818 (1985) (plurality opinion); *id.*, at 828 (opinion of Brennan, J.); *Pembaur*, *supra*, at 478–479; *St. Louis* v. *Praprotnik*, 485 U. S. 112, 122 (1988) (plurality opinion); *id.*, at 137 (opinion of Brennan, J.); *Canton* v. *Harris*, 489 U. S. 378, 392 (1989).

Instead, in *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal "policy" or "custom" that caused the plaintiff's injury. See *Monell*, *supra*, at 694; *Pembaur*, *supra*, at 480–481; *Canton*, *supra*, at 389. Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts

may fairly be said to be those of the municipality. *Monell*, *supra*, at 694. Similarly, an act performed pursuant to a "custom" that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. 436 U. S., at 690–691 (citing *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 167–168 (1970)).

The parties join issue on whether, under *Monell* and subsequent cases, a single hiring decision by a county sheriff can be a "policy" that triggers municipal liability. Relying on our decision in *Pembaur*, respondent claims that a single act by a decisionmaker with final authority in the relevant area constitutes a "policy" attributable to the municipality itself. So long as a § 1983 plaintiff identifies a decision properly attributable to the municipality, respondent argues, there is no risk of imposing *respondeat superior* liability. Whether that decision was intended to govern only the situation at hand or to serve as a rule to be applied over time is immaterial. Rather, under respondent's theory, identification of an act of a proper municipal decisionmaker is all that is required to ensure that the municipality is held liable only for its own conduct. The Court of Appeals accepted respondent's approach.

As our § 1983 municipal liability jurisprudence illustrates, however, it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightfor-

ward. Section 1983 itself "contains no state-of-mind requirement independent of that necessary to state a violation" of the underlying federal right. *Daniels* v. *Williams*, 474 U. S. 327, 330 (1986). In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation. Accordingly, proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.

Sheriff Moore's hiring decision was itself legal, and Sheriff Moore did not authorize Burns to use excessive force. Respondent's claim, rather, is that a single facially lawful hiring decision can launch a series of events that ultimately cause a violation of federal rights. Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee. See *Canton*, *supra*, at 391–392; *Tuttle*, *supra*, at 824 (plurality opinion). See also *Springfield* v. *Kibbe*, 480 U. S. 257, 270–271 (1987) *(per curiam)* (dissent from dismissal of writ as improvidently granted).

In relying heavily on *Pembaur*, respondent blurs the distinction between § 1983 cases that present no difficult questions of fault and causation and those that do. To the extent that we have recognized a cause of action under § 1983 based on a single decision attributable to a municipality, we have done so only where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation. For example, *Owen* v. *Independence*, 445 U. S. 622 (1980), and *Newport* v.

Fact Concerts, Inc., 453 U. S. 247 (1981), involved formal decisions of municipal legislative bodies. In *Owen*, the city council allegedly censured and discharged an employee without a hearing. 445 U. S., at 627–629, 633, and n. 13. In *Fact Concerts*, the city council canceled a license permitting a concert following a dispute over the performance's content. 453 U. S., at 252. Neither decision reflected implementation of a generally applicable rule. But we did not question that each decision, duly promulgated by city lawmakers, could trigger municipal liability if the decision itself were found to be unconstitutional. Because fault and causation were obvious in each case, proof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff's constitutional injury.

Similarly, *Pembaur* v. *Cincinnati* concerned a decision by a county prosecutor, acting as the county's final decisionmaker, 475 U. S., at 485, to direct county deputies to forcibly enter petitioner's place of business to serve *capiases* upon third parties. Relying on *Owen* and *Newport*, we concluded that a final decisionmaker's adoption of a course of action "tailored to a particular situation and not intended to control decisions in later situations" may, in some circumstances, give rise to municipal liability under § 1983. 475 U. S., at 481. In *Pembaur*, it was not disputed that the prosecutor had specifically directed the action resulting in the deprivation of petitioner's rights. The conclusion that the decision was that of a final municipal decisionmaker and was therefore properly attributable to the municipality established municipal liability. No questions of fault or causation arose.

Claims not involving an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights, present much more difficult problems of proof. That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the

employee acted culpably. We recognized these difficulties in *Canton* v. *Harris*, where we considered a claim that inadequate training of shift supervisors at a city jail led to a deprivation of a detainee's constitutional rights. We held that, quite apart from the state of mind required to establish the underlying constitutional violation—in that case, a violation of due process, 489 U. S., at 388–389, n. 8—a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. *Id.*, at 388. A showing of simple or even heightened negligence will not suffice.

We concluded in *Canton* that an "inadequate training" claim could be the basis for § 1983 liability in "limited circumstances." *Id.*, at 387. We spoke, however, of a deficient training "program," necessarily intended to apply over time to multiple employees. *Id.*, at 390. Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the "deliberate indifference"—necessary to trigger municipal liability. *Id.*, at 390, n. 10 ("It could . . . be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need"); *id.*, at 397 (O'Connor, J., concurring in part and dissenting in part) ("[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations . . ."). In addition, the existence of a pattern of

tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the "moving force" behind the plaintiff's injury. See *id.*, at 390–391.

Before trial, counsel for Bryan County stipulated that Sheriff Moore "was the policy maker for Bryan County regarding the Sheriff's Department." App. 30. Indeed, the county sought to avoid liability by claiming that its Board of Commissioners participated in no policy decisions regarding the conduct and operation of the office of the Bryan County Sheriff. *Id.*, at 32. Accepting the county's representations below, then, this case presents no difficult questions concerning whether Sheriff Moore has final authority to act for the municipality in hiring matters. Cf. *Jett* v. *Dallas Independent School Dist.*, 491 U. S. 701 (1989); *St. Louis* v. *Praprotnik*, 485 U. S. 112 (1988). Respondent does not claim that she can identify any pattern of injuries linked to Sheriff Moore's hiring practices. Indeed, respondent does not contend that Sheriff Moore's hiring practices are generally defective. The only evidence on this point at trial suggested that Sheriff Moore had adequately screened the backgrounds of all prior deputies he hired. App. 106–110. Respondent instead seeks to trace liability to what can only be described as a deviation from Sheriff Moore's ordinary hiring practices. Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high. Because the decision necessarily governs a single case, there can be no notice to the municipal decisionmaker, based on previous violations of federally protected rights, that his approach is inadequate. Nor will it be readily apparent that the municipality's action caused the injury in question, because the plaintiff can point to no other incident tending to make it more likely that the

plaintiff's own injury flows from the municipality's action, rather than from some other intervening cause.

In *Canton*, we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability. 489 U. S., at 390, and n. 10 ("[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious . . . that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need"). Respondent purports to rely on *Canton*, arguing that Burns' use of excessive force was the plainly obvious consequence of Sheriff Moore's failure to screen Burns' record. In essence, respondent claims that this showing of "obviousness" would demonstrate both that Sheriff Moore acted with conscious disregard for the consequences of his action and that the Sheriff's action directly caused her injuries, and would thus substitute for the pattern of injuries ordinarily necessary to establish municipal culpability and causation.

The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right. The high degree

of predictability may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable.

Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a "but-for" sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.

In attempting to import the reasoning of *Canton* into the hiring context, respondent ignores the fact that predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties. As our decision in *Canton* makes clear, "deliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant's background is not "obvious" in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant's background would make a violation of rights more *likely* cannot alone

give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation. After all, a full screening of an applicant's background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant's background cannot be said to have consciously disregarded an obvious risk that the officer would subsequently inflict a particular constitutional injury.

We assume that a jury could properly find in this case that Sheriff Moore's assessment of Burns' background was inadequate. Sheriff Moore's own testimony indicated that he did not inquire into the underlying conduct or the disposition of any of the misdemeanor charges reflected on Burns' record before hiring him. But this showing of an instance of inadequate screening is not enough to establish "deliberate indifference." In layman's terms, inadequate screening of an applicant's record may reflect "indifference" to the applicant's background. For purposes of a legal inquiry into municipal liability under § 1983, however, that is not the *relevant* "indifference." A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

Neither the District Court nor the Court of Appeals directly tested the link between Burns' actual background and the risk that, if hired, he would use excessive force. The District Court instructed the jury on a theory analogous to that reserved in *Canton.* The court required respondent to prove that Sheriff Moore's inadequate screening of Burns' background was "so likely to result in *violations of constitu-*

tional rights" that the Sheriff could "reasonably [be] said to have been deliberately indifferent to the *constitutional needs* of the Plaintiff." App. 123 (emphasis added). The court also instructed the jury, without elaboration, that respondent was required to prove that the "inadequate hiring . . . policy directly caused the Plaintiff's injury." *Ibid.*

As discussed above, a finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong. What the District Court's instructions on culpability, and therefore the jury's finding of municipal liability, failed to capture is whether Burns' background made his use of excessive force in making an arrest a plainly obvious consequence of the hiring decision. The Court of Appeals' affirmance of the jury's finding of municipal liability depended on its view that the jury could have found that "inadequate screening of *a deputy* could likely result in the violation of *citizens' constitutional rights.*" 67 F. 3d, at 1185 (emphasis added). Beyond relying on a risk of violations of unspecified constitutional rights, the Court of Appeals also posited that Sheriff Moore's decision reflected indifference to "the public's welfare." *Id.*, at 1184.

Even assuming without deciding that proof of a single instance of inadequate screening could ever trigger municipal liability, the evidence in this case was insufficient to support a finding that, in hiring Burns, Sheriff Moore disregarded a known or obvious risk of injury. To test the link between Sheriff Moore's hiring decision and respondent's injury, we must ask whether a full review of Burns' record reveals that Sheriff Moore should have concluded that Burns' use of excessive force would be a plainly obvious consequence of the

hiring decision.[1] On this point, respondent's showing was inadequate. To be sure, Burns' record reflected various misdemeanor infractions. Respondent claims that the record demonstrated such a strong propensity for violence that Burns' application of excessive force was highly likely. The primary charges on which respondent relies, however, are those arising from a fight on a college campus where Burns was a student. In connection with this single incident, Burns was charged with assault and battery, resisting arrest, and public drunkenness.[2] In January 1990, when he pleaded

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[1] In suggesting that our decision complicates this Court's § 1983 municipal liability jurisprudence by altering the understanding of culpability, JUSTICE SOUTER and JUSTICE BREYER misunderstand our approach. *Post*, at 422; *post*, at 430, 433–434. We do not suggest that a plaintiff in an inadequate screening case must show a higher degree of culpability than the "deliberate indifference" required in *Canton* v. *Harris*, 489 U. S. 378 (1989); we need not do so, because, as discussed below, respondent has not made a showing of deliberate indifference here. See *infra* this page and 414. Furthermore, in assessing the risks of a decision to hire a particular individual, we draw no distinction between what is "so obvious" or "so likely to occur" and what is "plainly obvious." The difficulty with the lower courts' approach is that it fails to connect the background of the particular officer hired in this case to the particular constitutional violation the respondent suffered. *Supra*, at 412. Ensuring that lower courts link the background of the officer to the constitutional violation alleged does not complicate our municipal liability jurisprudence with degrees of "obviousness," but seeks to ensure that a plaintiff in an inadequate screening case establishes a policymaker's deliberate indifference—that is, conscious disregard for the known and obvious consequences of his actions.

[2] JUSTICE SOUTER implies that Burns' record reflected assault and battery charges arising from more than one incident. *Post*, at 428. There has never been a serious dispute that a single misdemeanor assault and battery conviction arose out of a single campus fight. Nor did petitioner's expert testify that the record reflected any assault charge without a disposition, see 9 Record 535–536, although JUSTICE SOUTER appears to suggest otherwise, *post*, at 428–429, n. 6.

In fact, respondent's own expert witness testified that Burns' record reflected a single assault conviction. 7 Record 318; see also *id.*, at 320. Petitioner has repeatedly so claimed. See, *e. g.*, Suggestion for Rehearing En Banc in No. 93–5376 (CA5), p. 12 ("Burns had one misdemeanor assault

guilty to those charges, Burns also pleaded guilty to various driving-related offenses, including nine moving violations and a charge of driving with a suspended license. In addition, Burns had previously pleaded guilty to being in actual physical control of a vehicle while intoxicated.

The fact that Burns had pleaded guilty to traffic offenses and other misdemeanors may well have made him an extremely poor candidate for reserve deputy. Had Sheriff Moore fully reviewed Burns' record, he might have come to precisely that conclusion. But unless he would necessarily have reached that decision *because* Burns' use of excessive force would have been a plainly obvious consequence of the hiring decision, Sheriff Moore's inadequate scrutiny of Burns' record cannot constitute "deliberate indifference" to respondent's federally protected right to be free from a use of excessive force.

JUSTICE SOUTER's reading of the case is that the jury believed that Sheriff Moore in fact read Burns' entire record. *Post,* at 426–427. That is plausible, but it is also irrelevant. It is not sufficient for respondent to show that Sheriff Moore read Burns' record and therefore hired Burns with knowledge of his background. Such a decision may reflect indif-

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conviction stemming from a campus fight"); Pet. for Rehearing of Substituted Opinion in No. 93–5376 (CA5), p. 11 (same); 3 Record 927 (Brief in Support of Defendants' Motion for Judgment Notwithstanding the Verdict 10); Pet. for Cert. 16 ("Burns pled guilty to assault and battery" as a result of "one campus fight").

Respondent has not once contested this characterization. See, *e. g.,* 3 Record 961 (Brief in Support of Plaintiff's Response to Defendants' Motion for Judgment Notwithstanding the Jury Verdict 4); Brief for Appellee/Cross-Appellant Brown et al. in No. 93–5376 (CA5), pp. 3–4; Brief in Opposition 1. Indeed, since the characterization is reflected in the county's petition for certiorari, under this Court's Rule 15(2) respondent would have had an obligation in her brief in opposition to correct "any perceived misstatement" in the petition. She did not. Involvement in a single fraternity fracas does not demonstrate "a proclivity to violence against the person." *Post,* at 429, n. 6.

ference to Burns' *record*, but what is required is deliberate indifference to a plaintiff's constitutional right. That is, whether Sheriff Moore failed to examine Burns' record, partially examined it, or fully examined it, Sheriff Moore's hiring decision could not have been "deliberately indifferent" unless in light of that record Burns' use of excessive force would have been a plainly obvious consequence of the hiring decision. Because there was insufficient evidence on which a jury could base a finding that Sheriff Moore's decision to hire Burns reflected conscious disregard of an obvious risk that a use of excessive force would follow, the District Court erred in submitting respondent's inadequate screening claim to the jury.

III

Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause. In the broadest sense, every injury is traceable to a hiring decision. Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose. Cf. *Canton* v. *Harris*, 489 U. S., at 392. Bryan County is not liable for Sheriff Moore's isolated decision to hire Burns without adequate screening, because respondent has not demonstrated that his decision reflected a conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally pro-

tected right. We therefore vacate the judgment of the Court of Appeals and remand this case for further proceedings consistent with this opinion.

It is so ordered.

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

In *Pembaur* v. *Cincinnati*, 475 U. S. 469, 480 (1986), we held a municipality liable under 42 U. S. C. § 1983 for harm caused by the single act of a policymaking officer in a matter within his authority but not covered by a policy previously identified. The central question presented here is whether that rule applies to a single act that itself neither violates nor commands a violation of federal law. The answer is yes if the single act amounts to deliberate indifference to a substantial risk that a violation of federal law will result. With significant qualifications, the Court assumes so, too, in theory, but it raises such skeptical hurdles to reaching any such conclusion in practice that it virtually guarantees its disposition of this case: it holds as a matter of law that the sheriff's act could not be thought to reflect deliberate indifference to the risk that his subordinate would violate the Constitution by using excessive force. I respectfully dissent as much from the level of the Court's skepticism as from its reversal of the judgment.

I

Monell v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978), overruled *Monroe* v. *Pape*, 365 U. S. 167 (1961), insofar as *Monroe* had held § 1983 inapplicable to governments beneath the state level ("municipal," for short). *Monell*, *supra*, at 663. At the same time that we decided Congress meant municipalities to be persons subject to § 1983, however, we also concluded that municipal liability under the statute could not be based on the traditional theory of *respondeat superior*. 436 U. S., at 691. We said that for

purposes of § 1983 an act could not be attributed to a municipality merely because it was an act of a municipal agent performed in the course of exercising a power delegated to the municipality by local law, and we reasoned instead that "it is [only] when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*, at 694; see *Pembaur*, *supra*, at 480.

In assigning municipal liability under *Monell*, we accordingly distinguish an act of a municipal agent without independent authority to establish policy from the act of one authorized to set policy under local law, and we likewise distinguish the acts of lower level employees depending on whether they do or do not implement or manifest a policy set by those with the authority to set it. The act of the municipality is the act only of an authorized policymaker or of an employee following the policymaker's lead. "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur*, *supra*, at 479–480.

While this overview indicates that the policy requirement may be satisfied in more than one way, there are in fact three alternatives discernible in our prior cases. It is certainly met when the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy. *Monell* exemplified these circumstances, where city agencies had issued a rule requiring pregnant employees to take unpaid leaves of absence before any medical need arose. *Monell*, *supra*, at 660–661.

We have also held the policy requirement satisfied where no rule has been announced as "policy" but federal law has

been violated by an act of the policymaker itself. In this situation, the choice of policy and its implementation are one, and the first or only action will suffice to ground municipal liability simply because it is the very policymaker who is acting. See *Pembaur*, *supra*, at 480–481; cf. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 250–252 (1981) (implicitly assuming that a policymaker's single act can sustain § 1983 action); *Owen* v. *Independence*, 445 U. S. 622, 625–630 (1980) (same). It does not matter that the policymaker may have chosen "a course of action tailored [only] to a particular situation and not intended to control decisions in later situations," *Pembaur*, 475 U. S., at 481; if the decision to adopt that particular course of action is intentionally made by the authorized policymaker, "it surely represents an act of official government 'policy' " and "the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly," *ibid.*

We have, finally, identified a municipal policy in a third situation, even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the government "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymake[r] . . . can reasonably be said to have been deliberately indifferent to the need." *Canton* v. *Harris*, 489 U. S. 378, 390 (1989). Where, in the most obvious example, the policymaker sits on his hands after repeated, unlawful acts of subordinate officers and that failure "evidences a 'deliberate indifference' to the rights of [the municipality's] inhabitants," *id.*, at 389, the policymaker's toleration of the subordinates' behavior establishes a policy-in-practice just as readily attributable to the municipality as the one-act policy-in-practice described above. Such a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference. *Id.*, at 390, n. 10.

Deliberate indifference is thus treated, as it is elsewhere in the law,[1] as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes. Compare *Pembaur*, *supra*, at 483 (plurality opinion of Brennan, J.) ("deliberate choice" by policymaker), and *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 823 (1985) (plurality opinion of REHNQUIST, J.) ("'policy' generally implies a course of action consciously chosen"), with *Canton*, *supra*, at 389 ("Only where a municipality's failure to train its employees . . . evidences a 'deliberate indifference' to the rights of its inhabitants can . . . a shortcoming be . . . city 'policy or custom' . . . actionable under § 1983").

Under this prior law, Sheriff Moore's failure to screen out his 21-year-old great-nephew Burns on the basis of his criminal record, and the decision instead to authorize Burns to act as a deputy sheriff, constitutes a policy choice attributable to Bryan County under § 1983. There is no serious dispute that Sheriff Moore is the designated policymaker for implementing the sheriff's law enforcement powers and recruiting officers to exercise them, or that he "has final authority to act for the municipality in hiring matters." *Ante*, at 408. As the authorized policymaker, Sheriff Moore is the county

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[1] See, *e. g.*, American Law Institute, Model Penal Code § 2.02(2)(c) (1985) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct"); *J. I. Case Credit Corp.* v. *First Nat. Bank of Madison Cty.*, 991 F. 2d 1272, 1278 (CA7 1993) ("To consciously ignore or to deliberately close one's eyes to a manifest danger is recklessness, a mental state that the law commonly substitutes for intent or actual knowledge"). Cf. *Estelle* v. *Gamble*, 429 U. S. 97, 105–106 (1976) (deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment); *United States* v. *Giovannetti*, 919 F. 2d 1223, 1228 (CA7 1990) (a "deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires"); *United States* v. *Jewell*, 532 F. 2d 697, 700 (CA9), cert. denied, 426 U. S. 951 (1976) ("[D]eliberate ignorance and positive knowledge are equally culpable").

for purposes of § 1983 municipal liability arising from the sheriff's department's exercise of law enforcement authority. As I explain in greater detail below, it was open to the jury to find that the sheriff knew of the record of his nephew's violent propensity, but hired him in deliberate indifference to the risk that he would use excessive force on the job, as in fact he later did. That the sheriff's act did not itself command or require commission of a constitutional violation (like the order to perform an unlawful entry and search in *Pembaur*) is not dispositive under § 1983, for we have expressly rejected the contention that "only unconstitutional policies are actionable" under § 1983, *Canton*, *supra*, at 387, and have never suggested that liability under the statute is otherwise limited to policies that facially violate other federal law. The sheriff's policy choice creating a substantial risk of a constitutional violation therefore could subject the county to liability under existing precedent.[2]

II

At the level of theory, at least, the Court does not disagree, and it assumes for the sake of deciding the case that a single, facially neutral act of deliberate indifference by a policymaker could be a predicate to municipal liability if it led to an unconstitutional injury inflicted by subordinate officers. See *ante*, at 412. At the level of practice, however, the tenor of the Court's opinion is decidedly different: it suggests that

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[2] Given the sheriff's position as law enforcement policymaker, it is simply off the point to suggest, as the Court does, that there is some significance in either the fact that Sheriff Moore's failure to screen may have been a "deviation" from his ordinary hiring practices or that a pattern of injuries resulting from his past practices is absent. See *ante*, at 408. *Pembaur* made clear that a single act by a designated policymaker is sufficient to establish a municipal policy, see *Pembaur* v. *Cincinnati*, 475 U. S. 469, 480–481 (1986), and *Canton* explained, as the Court recognizes, see *ante*, at 409, that evidence of a single violation of federal rights can trigger municipal liability under § 1983, see *Canton* v. *Harris*, 489 U. S. 378, 390, n. 10 (1989). See Part II–B, *infra*.

the trial court insufficiently appreciated the specificity of the risk to which such indifference must be deliberate in order to be actionable; it expresses deep skepticism that such appreciation of risk could ever reasonably be attributed to the policymaker who has performed only a single unsatisfactory, but not facially unconstitutional, act; and it finds the record insufficient to make any such showing in this case. The Court is serially mistaken. This case presents no occasion to correct or refine the District Court's jury instructions on the degree of risk required for deliberate indifference; the Court's skepticism converts a newly demanding formulation of the standard of fault into a virtually categorical impossibility of showing it in a case like this; and the record in this case is perfectly sufficient to support the jury's verdict even on the Court's formulation of the high degree of risk that must be shown.

A

The Court is certainly correct in emphasizing the need to show more than mere negligence on the part of the policymaker, for at the least the element of deliberateness requires both subjective appreciation of a risk of unconstitutional harm, and a risk substantial enough to justify the heightened responsibility that deliberate indifference generally entails. The Court goes a step further, however, in requiring that the "particular" harmful consequence be "plainly obvious" to the policymaker, *ante,* at 411, a characterization of deliberate indifference adapted from dicta set forth in a footnote in *Canton,* see 489 U. S., at 390, n. 10. *Canton,* as mentioned above, held that a municipal policy giving rise to liability under § 1983 may be inferred even when the policymaker has failed to act affirmatively at all, so long as a need to control the agents of the government "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymake[r] . . . can reasonably be said to have been deliberately indifferent to the need." *Id.*, at 390. While we speculated in *Canton* that

"[i]t could . . . be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need," see *id.*, at 390, n. 10, we did not purport to be defining the fault of deliberate indifference universally as the failure to act in relation to a "plainly obvious consequence" of harm. Nor did we, in addressing the requisite risk that constitutional violations will occur, suggest that the deliberate indifference necessary to establish municipal liability must be, as the Court says today, indifference to the particular constitutional violation that in fact occurred.

The Court's formulation that deliberate indifference exists only when the risk of the subsequent, particular constitutional violation is a plainly obvious consequence of the hiring decision, see *ante*, at 411, while derived from *Canton*, is thus without doubt a new standard. See *post*, at 433–434 (BREYER, J., dissenting). As to the "particular" violation, the Court alters the understanding of deliberate indifference as set forth in *Canton*, where we spoke of constitutional violations generally.[3] As to "plainly obvious consequence," the Court's standard appears to be somewhat higher, for example, than the standard for "reckless" fault in the criminal law, where the requisite indifference to risk is defined as that which "consciously disregards a substantial and unjustifiable risk that the material element exists or will result . . . [and] involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." See American Law Institute, Model Penal Code § 2.02(2)(c) (1985).

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[3] The Court's embellishment on the deliberate indifference standard is, in any case, no help in resolving this case because there has never been any suggestion that Deputy Burns's criminal background, including charges of assault and battery, indicated that he would commit a constitutional violation different from the one he in fact committed.

That said, it is just possible that our prior understanding of the requisite degree of fault and the standard as the Court now states it may in practice turn out to amount to much the same thing, but I would have preferred an argument addressing the point before ruling on it. There was, however, no such argument here for the simple reason that petitioner never asked that deliberate indifference be defined to occur only when the particular constitutional injury was the plainly obvious consequence of the policymaker's act. Petitioner merely asked the District Court to instruct the jury to determine whether Sheriff Moore acted with "conscious indifference," see 2 Record 342, and made no objection to the District Court's charge that "Sheriff B. J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff if the need for closer scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B. J. Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff." 10 Record 800–801. If, as it appears, today's standard does raise the threshold of municipal liability, it does so quite independently of any issue posed or decided in the trial court.

B

The Court's skepticism that the modified standard of fault can ever be met in a single-act case of inadequate screening without a patently unconstitutional policy, *ante*, at 412–414, both reveals the true value of the assumption that in theory there might be municipal liability in such a case, and dictates the result of the Court's review of the record in the case before us. It is skepticism gone too far.

It is plain enough that a facially unconstitutional policy is likely to produce unconstitutional injury, see, *e. g.*, *Pembaur*, 475 U. S., at 480–481; *Monell*, 436 U. S., at 660–661, and obvious, too, that many facially neutral policy decisions evince

no such clear portents. Written standards for hiring law enforcement personnel might be silent on the significance of a prior criminal record without justifying much worry about employing axe murderers (who are unlikely to apply) or subjecting the public to attacks by someone with a 30-year-old assault conviction (who has probably grown up). But a policymaker need not mandate injury to be indifferent to its risk when obvious, and, because a particular hiring decision may raise a very high probability of harm down the line, it simply ignores the issue before us to lump together in one presumptively benign category every singular administrative act of a policymaker that does not expressly command or constitute unconstitutional behavior. Thus, a decision to give law enforcement authority to a scofflaw who had recently engaged in criminal violence presents a very different risk from hiring someone who once drove an overweight truck. While the decision to hire the violent scofflaw may not entail harm to others as unquestionably as an order to "go out and rough-up some suspects," it is a long way from neutral in the risk it creates.

While the Court should rightly be skeptical about predicating municipal or individual liability merely on a failure to adopt a crime-free personnel policy or on a particular decision to hire a guilty trucker, why does it extend that valid skepticism to the quite unsound point of doubting liability for hiring the violent scofflaw? The Court says it fears that the latter sort of case raises a danger of liability without fault, *ante*, at 408. But if the Court means fault generally (as distinct from the blame imputed on classic *respondeat superior* doctrine), it need only recall that whether a particular violent scofflaw is violent enough or scoffing enough to implicate deliberate indifference will depend on applying the highly demanding standard the Court announces: plainly obvious consequence of particular injury. It is the high threshold of deliberate indifference that will ensure that municipalities be held liable only for considered acts with

substantial risks. That standard will distinguish single-act cases with only a mild portent of injury from single-act cases with a plainly obvious portent, and from cases in which the harm is only the latest in a series of injuries known to have followed from the policymaker's action. The Court has fenced off the slippery slope.

A second stated reason of the skeptical majority is that, because municipal liability under *Monell* cannot rest on *respondeat superior*, *ante*, at 410, 415, "a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged," *ante*, at 410. But that is simply to say that the tortious act must be proximately caused by the policymaker. The policy requirement is the restriction that bars straightforward *respondeat superior* liability, and the need to "test the link" is merely the need to apply the law that defines what a cognizable link is. The restriction on imputed fault that saves municipalities from liability has no need of categorical immunization in single-act cases.

In short, the Court's skepticism is excessive in ignoring the fact that some acts of a policymaker present substantial risks of unconstitutional harm even though the acts are not unconstitutional *per se*. And the Court's purported justifications for its extreme skepticism are washed out by the very standards employed to limit liability.

C

For demonstrating the extreme degree of the Court's inhospitality to single-act municipal liability, this is a case on point, for even under the "plainly obvious consequence" rule the evidence here would support the verdict. There is no dispute that before the incident in question the sheriff ordered a copy of his nephew's criminal record. While the sheriff spoke euphemistically on the witness stand of a "driving record," the scope of the requested documentation included crimes beyond motor vehicle violations and the sher-

iff never denied that he knew this. He admitted that he read some of that record; he said he knew it was "long"; he said he was sure he had noticed charges of driving with a suspended license; and he said that he had taken the trouble to make an independent search for any outstanding warrant for Burns's arrest. As he put it, however, he somehow failed to "notice" charges of assault and battery or the list of offenses so long as to point either to contempt for law or to incapacity to obey it. Although the jury might have accepted the sheriff's disclaimer, no one who has read the transcript would assume that the jurors gave any credit to that testimony,[4] and it was open to them to find that the sheriff

[4] After Sheriff Moore testified that he knew Burns had been charged with driving while intoxicated, the following exchange with respondent's counsel took place:

"Q. And how did you obtain that information?

"A. I don't remember now how I got it.

"Q. Did you make an inquiry with the proper authorities in Oklahoma to get a copy of Mr. Burns' rap sheet?

"A. I run his driving record, yes.

"Q. All right. And you can get that rap sheet immediately, can't you?

"A. It don't take long.

"Q. All right. And did you not see on there where Mr. Burns had been arrested for assault and battery. Did you see that one on there?

"A. I never noticed it, no.

"Q. Did you notice on there he'd been arrested or charged with [Driving While License Suspended] on several occasions?

. . . . . .

"A. I'm sure I did.

"Q. All right. Did you notice on there that he'd been arrested and convicted for possession of false identification?

"A. No, I never noticed that.

"Q. Did you notice on there where he had been arrested for public drunk?

"A. He had a long record.

"Q. Did you notice on there where he had been arrested for resisting arrest?

"A. No, I didn't.

was simply lying under oath about his limited perusal. The Court of Appeals noted this possibility, see 67 F. 3d 1174, 1184 (CA5 1995), which is more likely than any other reading of the evidence. Law enforcement officers, after all, are not characteristically so devoid of curiosity as to lose interest part way through the criminal record of a subject of personal investigation.

If, as is likely, the jurors did disbelieve the sheriff and concluded he had read the whole record, they certainly could have eliminated any possibility that the sheriff's decision to

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"Q. Did you make any inquiries after you got that information to determine exactly what the disposition of those charges were?

"A. No, I didn't.

"Q. Did you not make any attempt to find out the status of Mr. Burns' criminal record at that time?

"A. As far as him having a criminal record, I don't believe he had a criminal record. It was just all driving and—most of it was, misdemeanors.

"Q. Well, did you make any attempts to determine whether or not Mr. Burns was on probation at the time you placed him out there?

"A. I didn't know he was on probation, no.

"Q. Did you make any effort to find out?

"A. I didn't have no idea he was on probation, no.

"Q. Well, you saw on his rap sheet where he had been charged with [Driving Under the Influence], didn't you?

"A. I had heard about that. I don't remember whether I had seen it on the rap sheet or not.

"Q. So you'd heard about it?

. . . . .

"A. I don't know remember whether I seen it on the rap sheet or heard about it.

"Q. All right. Well, whichever way you, it came to your attention, you didn't check to find out with the proper authorities as to what the disposition of that charge was, did you?

. . . . .

"A. I don't really know. I can't say.

"Q. Did you check to see if Mr. Burns had an arrest warrant out for him?

"A. We—I run him through [the National Crime Information Center] and there wasn't—didn't show no warrant, no." 9 Record 672–675.

employ his relative was an act of mere negligence or poor judgment. He did not even claim, for example, that he thought any assault must have been just a youthful peccadillo magnified out of proportion by the criminal charge, or that he had evaluated the assault as merely eccentric behavior in a young man of sound character, or that he was convinced that wild youth had given way to discretion. There being no such evidence of reasonable but mistaken judgment, the jury could readily have found that the sheriff knew his nephew's proven propensities, that he thought the thrust of the evidence was so damaging that he would lie to protect his reputation and the county treasury, and that he simply chose to put a family member on the payroll (the third relative, in fact[5]) disregarding the risk to the public.

At trial, petitioner's expert witness stated during cross-examination that Burns's rap sheet listed repeated traffic violations, including driving while intoxicated and driving with a suspended license, resisting arrest, and more than one charge of assault and battery. The witness further testified that Burns pleaded guilty to assault and battery and other charges 16 months before he was hired by Sheriff Moore.[6]

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[5] Burns is the son of Sheriff Moore's nephew and Burns's grandfather had been involved with the sheriff's department for 16 years. See 67 F. 3d 1174, 1184 (CA5 1995).

[6] The Court points out that Burns had only one conviction for assault and battery, that respondent has never claimed otherwise, and that her expert witness so testified. See *ante*, at 413–414, n. 2. This is entirely correct. But the issue here is not what might have been learned by thoroughly investigating Burns's behavior; the issue is the sufficiency of the evidence to support the jury's finding that the sheriff acted with deliberate indifference when he hired Burns. Specifically, assuming the jury found that the sheriff looked at Burns's criminal record, an assumption the Court acknowledges is "plausible," see *ante*, at 414, what does the evidence show that the sheriff learned from this examination? The criminal record was not itself introduced into evidence in written form, but it was, in relevant part, read to the jury by petitioner's expert witness Ken Barnes. According to Barnes's testimony, this criminal record's list of numerous charges included four references to assault and battery, two of which the witness

Respondent's expert witness testified that Burns's arrest record showed a "blatant disregard for the law and problems that may show themselves in abusing the public or using excessive force," 7 Record 316, and petitioner's own expert agreed that Burns's criminal history should have caused concern. When asked if he would have hired Burns, he replied that it was "doubtful." 9 Record 537. On this evidence, the jury could have found that the string of arrests and convictions revealed "that Burns had [such] a propensity for violence and a disregard for the law," see 67 F. 3d, at 1184, n. 20, that his subsequent resort to excessive force was the plainly obvious consequence of hiring him as a law enforcement officer authorized to employ force in performing his duties.

III

The county escapes from liability through the Court's untoward application of an enhanced fault standard to a record of inculpatory evidence showing a contempt for constitutional obligations as blatant as the nepotism that apparently occasioned it. The novelty of this escape shows something

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said were duplicative, though he conceded this was not necessarily so. See 9 Record 532–533. The upshot was that if the jury found that the sheriff looked at the written record, it could have found that he read four separate references to assault and battery charges. That is not to say that four assaults necessarily occurred, but only that the record refers four times to such charges before listing one conviction for assault and battery. Barnes also testified that the record does not contain a disposition for all the charges listed, and that a sheriff reviewing such a record should have investigated further to determine the disposition of such charges. See *id.*, at 536.

In my judgment, the evidence would have been sufficient (under the majority's test) if it had shown no more than one complaint and conviction for assault and battery, given the mixture of charges of resisting an officer, public drunkenness, and multiple traffic offenses over a 4-month period ending only 16 months before Burns was hired. The inference to be drawn would have been that a repeatedly lawless young man had shown a proclivity to violence against the person. But, as it turns out, the evidentiary record is ostensibly more damaging than that.

unsuspected (by me, at least) until today. Despite arguments that *Monell*'s policy requirement was an erroneous reading of § 1983, see *Oklahoma City* v. *Tuttle*, 471 U. S., at 834 (STEVENS, J., dissenting), I had not previously thought that there was sufficient reason to unsettle the precedent of *Monell*. Now it turns out, however, that *Monell* is hardly settled. That being so, JUSTICE BREYER's powerful call to reexamine § 1983 municipal liability afresh finds support in the Court's own readiness to rethink the matter.

I respectfully dissent.

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

In *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978), this Court said that municipalities cannot be held liable for constitutional torts under 42 U. S. C. § 1983 "on a *respondeat superior* theory," but they can be held liable "when execution of" a municipality's "policy or custom . . . inflicts the injury." 436 U. S., at 691, 694. That statement has produced a highly complex body of interpretive law. Today's decision exemplifies the law's complexity, for it distinguishes among a municipal action that "*itself* violates federal law," *ante*, at 404, an action that "intentionally deprive[s] a plaintiff of a federally protected right," *ante*, at 405, and one that "has caused an employee to do so," *ibid.* It then elaborates this Court's requirement that a consequence be "*so likely" to occur* that a policymaker could "*reasonably be said to have been deliberately indifferent*" with respect to it, *Canton* v. *Harris*, 489 U. S. 378, 390 (1989) (emphasis added), with an admonition that the unconstitutional consequence must be "plainly obvious," *ante*, at 411. The majority fears that a contrary view of prior precedent would undermine *Monell*'s basic distinction. That concern, however, rather than leading us to spin ever finer distinctions as we try to apply *Monell*'s basic distinction between liability that rests upon policy and liability that is vicarious, suggests

that we should reexamine the legal soundness of that basic distinction itself.

I believe that the legal prerequisites for reexamination of an interpretation of an important statute are present here. The soundness of the original principle is doubtful. The original principle has generated a body of interpretive law that is so complex that the law has become difficult to apply. Factual and legal changes have divorced the law from the distinction's apparent original purposes. And there may be only a handful of individuals or groups that have significantly relied upon perpetuation of the original distinction. If all this is so, later law has made the original distinction, not simply wrong, but obsolete and a potential source of confusion. Cf., *e. g.*, *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 47–49 (1977) (reexamining Sherman Act's interpretation set forth in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967)); *Hubbard* v. *United States*, 514 U. S. 695, 697–715 (1995) (reexamining interpretation of 18 U. S. C. § 1001 set forth in *United States* v. *Bramblett*, 348 U. S. 503 (1955)); *Monell*, *supra*, at 664–690, 695–701 (reexamining interpretation of 42 U. S. C. § 1983 set forth in *Monroe* v. *Pape*, 365 U. S. 167 (1961)). See also *United States* v. *Gaudin*, 515 U. S. 506, 521–522 (1995).

First, consider *Monell*'s original reasoning. The *Monell* "no vicarious liability" principle rested upon a historical analysis of § 1983 and upon § 1983's literal language—language that imposes liability upon (but only upon) any "person." JUSTICE STEVENS has clearly explained why neither of these rationales is sound. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 834–844 (1985) (dissenting opinion); *Pembaur* v. *Cincinnati*, 475 U. S. 469, 489–491 (1986) (opinion concurring in part and concurring in judgment). Essentially, the history on which *Monell* relied consists almost exclusively of the fact that the Congress that enacted § 1983 rejected an amendment (called the Sherman amendment) that would have made municipalities vicariously liable for the maraud-

ing acts of *private citizens*. *Monell*, *supra*, at 666–667, 694. Cf. *Jett* v. *Dallas Independent School Dist.*, 491 U. S. 701, 726–729 (1989) (plurality opinion). That fact, as JUSTICE STEVENS and others have pointed out, does not argue against vicarious liability for the act of municipal *employees*—particularly since municipalities, at the time, were vicariously liable for many of the acts of their employees. See *Tuttle*, *supra*, at 836, n. 8 (STEVENS, J., dissenting) (citing cases); *Pembaur*, *supra*, at 489–490 (STEVENS, J., concurring in part and concurring in judgment). See also, *e. g.*, Kramer & Sykes, Municipal Liability Under § 1983: A Legal and Economic Analysis, 1987 S. Ct. Rev. 249, 256–265; Mead, 42 U. S. C. § 1983 Municipal Liability: The *Monell* Sketch Becomes a Distorted Picture, 65 N. C. L. Rev. 517, 535–537 (1987). But see Welch & Hofmeister, *Praprotnik*, Municipal Policy and Policymakers: The Supreme Court's Constriction of Municipal Liability, 13 S. Ill. U. L. J. 857, 881 (1989) (adopting *Monell*'s reading of the legislative history).

Without supporting history, it is difficult to find § 1983's words "[e]very person" inconsistent with *respondeat superior* liability. In 1871 "bodies politic and corporate," such as municipalities, were "person[s]." See Act of Feb. 25, ch. 71, § 2, 16 Stat. 431 (repealed 1939); *Monell*, *supra*, at 688–689. Section 1983 requires that the "person" either "subjec[t]" or "caus[e]" a different person "to be subjected" to a "deprivation" of a right. As a purely linguistic matter, a municipality, which can act only through its employees, might be said to have "subject[ed]" a person or to have "cause[d]" that person to have been "subjected" to a loss of rights when a municipality's employee acts within the scope of his or her employment. See Restatement (Second) of Agency § 219 (1957); W. Landes & R. Posner, The Economic Structure of Tort Law 120–121 (1987). Federal courts on occasion have interpreted the word "person" or the equivalent in other statutes as authorizing forms of vicarious liability. See, *e. g.*, *American Telephone and Telegraph Co.* v. *Winback and*

Conserve Program, Inc., 42 F. 3d 1421, 1429–1434 (CA3 1994), cert. denied, 514 U. S. 1103 (1995) (Lanham Act); *American Soc. of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556 (1982) (Sherman Act); *United States* v. *A & P Trucking Co.*, 358 U. S. 121, 124–125 (1958) (criminal statute). See also *Tuttle*, *supra*, at 835 (STEVENS, J., dissenting).

Second, *Monell*'s basic effort to distinguish between vicarious liability and liability derived from "policy or custom" has produced a body of law that is neither readily understandable nor easy to apply. Today's case provides a good example. The District Court in this case told the jury it must find (1) Sheriff Moore's screening "*so likely* to result in violations of constitutional rights" that he could "*reasonably [be] said to have been deliberately indifferent* to the constitutional needs of the Plaintiff" and (2) that the "inadequate hiring . . . policy *directly caused* the Plaintiff's injury." App. 123a (emphasis added). This instruction comes close to repeating this Court's language in *Canton* v. *Harris*. In *Canton*, the Court said (of the city's failure to train officers in the use of deadly force):

> "[I]n light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy *so likely* to result in the violation of constitutional rights, that the policymakers of the city can *reasonably be said to have been deliberately indifferent* to the need." 489 U. S., at 390 (emphasis added).

The majority says that the District Court and the Court of Appeals did not look closely enough at the specific facts of this case. It also adds that the harm must be a "*plainly obvious consequence*" of the "decision to hire" Burns. *Ante*, at 411. But why elaborate *Canton*'s instruction in this way? The Court's verbal formulation is slightly different; and that being so, a lawyer or judge will ignore the Court's precise

words at his or her peril. Yet those words, while adding complexity, do not seem to reflect a difference that significantly helps one understand the difference between "vicarious" liability and "policy." Cf. *ante*, at 421–422 (SOUTER, J., dissenting). Even if the Court means only that the record evidence does not meet *Canton*'s standard, it will be difficult for juries, and for judges, to understand just why that is so. It will be difficult for them to apply today's elaboration of *Canton*—except perhaps in the limited context of police force hiring decisions that are followed by a recruit's unconstitutional conduct.

Consider some of the other distinctions that this Court has had to make as it has sought to distinguish liability based upon policymaking from liability that is "vicarious." It has proved necessary, for example, to distinguish further, between an exercise of *policymaking authority* and an exercise of *delegated discretionary policy-implementing authority.* See *St. Louis* v. *Praprotnik*, 485 U. S. 112, 126–127 (1988) (plurality opinion). Compare *Tuttle*, 471 U. S., at 817 (plurality opinion), with *Canton*, *supra*, at 389–390. Without some such distinction, "municipal liability [might] collaps[e] into *respondeat superior*," *ante*, at 410, for the law would treat similarly (and hold municipalities responsible for) both a police officer's decision about how much force to use when making a particular arrest and a police chief's decision about how much force to use when making a particular *kind* of arrest. But the distinction is not a clear one. It requires federal courts to explore state and municipal law that distributes different state powers among different local officials and local entities. *Praprotnik*, *supra*, at 125–126, 127–131 (plurality opinion); *Jett*, *supra*, at 737–738. That law is highly specialized; it may or may not say just where policymaking authority lies, and it can prove particularly difficult to apply in light of the Court's determination that a decision can be "policymaking" even though it applies only to a single instance. *Pembaur*, 475 U. S., at 481. See also

Praprotnik, supra, at 143 (Brennan, J., concurring in judgment); Schnapper, A *Monell* Update: Clarity, Conflict, and Complications, Practising Law Institute, Litigation and Administrative Practice Series, No. 381, Vol. 2, p. 36 (1989); Schuck, Municipal Liability Under Section 1983: Some Lessons From Tort Law and Organization Theory, 77 Geo. L. J. 1753, 1774–1779 (1989).

It is not surprising that results have sometimes proved inconsistent. Compare *ante,* at 408 (sheriff was final policymaker in hiring matters), with *Greensboro Professional Fire Fighters Assn., Local 3157* v. *Greensboro,* 64 F. 3d 962, 965–966 (CA4 1995) (fire chief was not policymaker with respect to hiring and firing), and *Harris* v. *Pagedale,* 821 F. 2d 499, 505–508 (CA8) (municipality was deliberately indifferent to charges of sexual assault), cert. denied, 484 U. S. 986 (1987), with *Wilson* v. *Chicago,* 6 F. 3d 1233, 1240–1241 (CA7 1993) (municipal policymaker was not deliberately indifferent to charges of abuse of pretrial detainees), cert. denied, 511 U. S. 1088 (1994). See also *Auriemma* v. *Rice,* 957 F. 2d 397, 400–401 (CA7 1992) (describing confusion in courts).

Nor does the location of "policymaking" authority pose the only conceptually difficult problem. Lower courts must also decide whether a failure to make policy was "deliberately indifferent," rather than "grossly negligent." *Canton, supra,* at 388, n. 7. And they must decide, for example, whether it matters that some such failure occurred in the officer-training, rather than the officer-hiring, process. *Ante,* at 409–410.

Given the basic *Monell* principle, these distinctions may be necessary, for without them, the Court cannot easily avoid a "municipal liability" that "collaps[es] into *respondeat superior.*" *Ante,* at 410. But a basic legal principle that requires so many such distinctions to maintain its legal life may not deserve such longevity. See Mead, 65 N. C. L. Rev., at 542 (describing the "confusion and uncertainty" in the lower courts "caused by the *Monell* Court's choice of the

policy or custom causation requirement"); Schuck, *supra*, at 1783 (noting the "extraordinary unpredictability of the 'official policy' test").

Finally, relevant legal and factual circumstances may have changed in a way that affects likely reliance upon *Monell*'s liability limitation. The legal complexity just described makes it difficult for municipalities to predict just when they will be held liable based upon "policy or custom." Moreover, their potential liability is, in a sense, greater than that of individuals, for they cannot assert the "qualified immunity" defenses that individuals may raise. *Owen* v. *Independence*, 445 U. S. 622 (1980). Further, many States have statutes that appear to, in effect, mimic *respondeat superior* by authorizing indemnification of employees found liable under § 1983 for actions within the scope of their employment. See, *e. g.*, Conn. Gen. Stat. § 7–465 (1997); Idaho Code § 6–903 (1990); Ill. Comp. Stat., ch. 745, § 10/2–302 (1994); Kan. Stat. Ann. § 75–6109 (1989); Minn. Stat. § 466.07 (1994); Mont. Code Ann. § 2–9–305 (1994); Nev. Rev. Stat. § 41.0349 (1989); N. H. Rev. Stat. Ann. § 29–A:2 (1988); N. D. Cent. Code § 32–12.1–04(4) (Supp. 1993); Okla. Stat., Tit. 51, § 162 (Supp. 1995); 42 Pa. Cons. Stat. § 8548 (1982); S. D. Codified Laws § 3–19–1 (1994); Utah Code Ann. § 63–30–36 (1993); W. Va. Code § 29–112A–11 (1992); Wis. Stat. § 895.46 (1993–1994). These statutes—valuable to government employees as well as to civil rights victims—can provide for payments from the government that are similar to those that would take place in the absence of *Monell*'s limitations. To the extent that they do so, municipal reliance upon the continuation of *Monell*'s "policy" limitation loses much of its significance.

Any statement about reliance, of course, must be tentative, as we have not heard argument on the matter. We do not know the pattern of indemnification: how often, and to what extent, States now indemnify their employees, and which of their employees they indemnify. I also realize that there may be other reasons, constitutional and otherwise, that I

have not discussed that argue strongly for reaffirmation of *Monell*'s holding. See, *e. g.*, Gerhardt, The *Monell* Legacy: Balancing Federalism Concerns and Municipal Accountability under Section 1983, 62 S. Cal. L. Rev. 539 (1989) (discussing federalism); Nahmod, Constitutional Accountability in Section 1983 Litigation, 68 Iowa L. Rev. 1, 24–25 (1982) (describing *Monell* as having the "proper approach to local government accountability under section 1983" and describing a fault-based interpretation of § 1983); Welch & Hofmeister, 13 S. Ill. U. L. J., at 883, n. 176 (discussing disadvantages of an "expansive view of municipal liability," including lack of insurance coverage).

Nonetheless, for the reasons I have set forth, I believe the case for reexamination is a strong one. Today's decision underscores this need. Consequently, I would ask for further argument that would focus upon the continued viability of *Monell*'s distinction between vicarious municipal liability and municipal liability based upon policy and custom.

Syllabus

STRATE, ASSOCIATE TRIBAL JUDGE, TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, ET AL. *v.* A–1 CONTRACTORS ET AL.

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

No. 95–1872. Argued January 7, 1997—Decided April 28, 1997

Vehicles driven by petitioner Fredericks and respondent Stockert collided on a portion of a North Dakota state highway that runs through the Fort Berthold Indian Reservation. The 6.59-mile stretch of highway within the reservation is open to the public, affords access to a federal water resource project, and is maintained by North Dakota under a federally granted right-of-way that lies on land held by the United States in trust for the Three Affiliated Tribes and their members. Neither driver is a member of the Tribes or an Indian, but Fredericks is the widow of a deceased tribal member and has five adult children who are also members. The truck driven by Stockert belonged to his employer, respondent A–1 Contractors, a non-Indian-owned enterprise with its principal place of business outside the reservation. At the time, A–1 was under a subcontract with LCM Corporation, a corporation wholly owned by the Tribes, to do landscaping within the reservation. The record does not show whether Stockert was engaged in subcontract work at the time of the accident. Fredericks filed a personal injury action in Tribal Court against Stockert and A–1, and Fredericks' adult children filed a loss-of-consortium claim in the same lawsuit. The Tribal Court ruled that it had jurisdiction over Fredericks' claim and therefore denied respondents' motion to dismiss, and the Northern Plains Intertribal Court of Appeals affirmed. Respondents then commenced this action in the Federal District Court against Fredericks, her adult children, the Tribal Court, and Tribal Judge Strate, seeking a declaratory judgment that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate Fredericks' claims; respondents also sought an injunction against further Tribal Court proceedings. Relying particularly on *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, and *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9, the District Court dismissed the action, determining that the Tribal Court had civil jurisdiction over Fredericks' complaint against respondents. The

en banc Eighth Circuit reversed, concluding that the controlling precedent was *Montana* v. *United States*, 450 U. S. 544, and that, under *Montana*, the Tribal Court lacked subject-matter jurisdiction over the dispute.

Held: When an accident occurs on a public highway maintained by the State pursuant to a federally granted right-of-way over Indian reservation land, a civil action against allegedly negligent nonmembers falls within state or federal regulatory and adjudicatory governance; absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highway, tribal courts may not exercise jurisdiction in such cases. This Court expresses no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation. Pp. 445–460.

(a) Absent express authorization by federal statute or treaty, tribal jurisdiction over nonmembers' conduct exists only in limited circumstances. In *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, the Court held that tribes lack criminal jurisdiction over non-Indians. Later, in *Montana* v. *United States*, the Court set forth the general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to exceptions relating to (1) the activities of nonmembers who enter consensual relationships with the tribe or its members and (2) nonmember conduct that threatens or directly affects the tribe's political integrity, economic security, health, or welfare. 450 U. S., at 564–567. Pp. 445–448.

(b) *Montana* controls this case. Contrary to petitioners' contention, *National Farmers* and *Iowa Mutual* do not establish a rule converse to *Montana*'s. Neither case establishes that tribes presumptively retain adjudicatory authority over claims against nonmembers arising from occurrences anywhere within a reservation. Rather, these cases prescribe a prudential, nonjurisdictional exhaustion rule requiring a federal court in which tribal-court jurisdiction is challenged to stay its hand, as a matter of comity, until after the tribal court has had an initial and full opportunity to determine its own jurisdiction. See 471 U. S., at 857; 480 U. S., at 20, n. 14; see also *id.*, at 16, n. 8. This exhaustion rule, as explained in *National Farmers*, 471 U. S., at 855–856, reflects the more extensive jurisdiction tribal courts have in civil cases than in criminal proceedings and the corresponding need to inspect relevant statutes, treaties, and other materials in order to determine tribal adjudicatory authority. *National Farmers'* exhaustion requirement does not conflict with *Montana*, in which the Court made plain that the general rule and exceptions there announced govern only in the absence of a delegation

of tribal authority by treaty or statute. See 450 U. S., at 557–563. Read in context, the Court's statement in *Iowa Mutual*, 480 U. S., at 18, that "[c]ivil jurisdiction over [the] activities [of non-Indians on reservation lands] presumptively lies in the tribal courts," addresses only situations in which tribes possess authority to regulate nonmembers' activities. As to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, absent congressional direction enlarging tribal-court jurisdiction. Pp. 448–453.

(c) It is unavailing to argue, as petitioners do, that *Montana* does not govern this case because the land underlying the accident scene is held in trust for the Three Affiliated Tribes and their members. Petitioners are correct that *Montana* and the cases following its instruction—*Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, and *South Dakota* v. *Bourland*, 508 U. S. 679—all involved alienated, non-Indian-owned reservation land. However, the right-of-way North Dakota acquired for its highway renders the 6.59-mile stretch here at issue equivalent, for nonmember governance purposes, to such alienated, non-Indian land. The right-of-way was granted to facilitate public access to a federal water resource project, forms part of the State's highway, and is open to the public. Traffic on the highway is subject to the State's control. The granting instrument details only one specific reservation to Indian landowners, the right to construct necessary crossings, and the Tribes expressly reserved no other right to exercise dominion or control over the right-of-way. Rather, they have consented to, and received payment for, the State's use of the stretch at issue, and so long as that stretch is maintained as part of the State's highway, they cannot assert a landowner's right to occupy and exclude. Pp. 454–456.

(d) Petitioners refer to no treaty or federal statute authorizing the Three Affiliated Tribes to entertain highway-accident tort suits of the kind Fredericks commenced against A–1 and Stockert. Nor have they shown that Fredericks' tribal-court action qualifies under either of the exceptions to *Montana*'s general rule. The tortious conduct alleged by Fredericks does not fit within the first exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," 450 U. S., at 565, particularly when measured against the conduct at issue in the cases cited by *Montana*, *id.*, at 565–566, as fitting within the exception, *Williams* v. *Lee*, 358 U. S. 217, 223; *Morris* v. *Hitchcock*, 194 U. S. 384; *Buster* v. *Wright*, 135 F. 947, 950; and *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 152–154. This dispute is distinctly nontribal in nature, arising between two non-Indians involved in a run-of-the-mill highway accident. Although

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A–1 was engaged in subcontract work on the reservation, and therefore had a "consensual relationship" with the Tribes, Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident. *Montana*'s second exception, concerning conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U. S., at 566, is also inapplicable. The cases cited by *Montana* as stating this exception each raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government. *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382, 386; *Williams*, 358 U. S., at 220; *Montana Catholic Missions* v. *Missoula County*, 200 U. S. 118, 128–129; and *Thomas* v. *Gay*, 169 U. S. 264, 273. Opening the Tribal Court for Fredericks' optional use is not necessary to protect tribal self-government; and requiring A–1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to the Tribes' political integrity, economic security, or health or welfare. Pp. 456–459.

76 F. 3d 930, affirmed.

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

Melody L. McCoy argued the cause for petitioners. With her on the brief was *Donald R. Wharton.*

Jonathan E. Nuechterlein argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, and *Edward J. Shawaker.*

Patrick J. Ward argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the Assiniboine and Sioux Tribes of the Fort Peck Reservation et al. by *Reid Peyton Chambers;* for the Northern Plains Tribal Judges Association by *B. J. Jones;* for the Shakopee Mdewakanton Sioux (Dakota) Community et al. by *Kurt V. BlueDog* and *Richard A. Duncan;* and for the Yavapai-Apache Nation et al. by *Susan M. Williams* and *Gwenellen P. Janov.*

Briefs of *amici curiae* urging affirmance were filed for the State of Montana et al. by *Joseph P. Mazurek*, Attorney General of Montana, *Clay R. Smith*, Solicitor, and *Harley R. Harris*, Assistant Attorney General, joined by the Attorneys General for their respective jurisdictions as fol-

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members. Specifically, we confront this question: When an accident occurs on a portion of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land, may tribal courts entertain a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?

Such cases, we hold, fall within state or federal regulatory and adjudicatory governance; tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question. We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.

I

In November 1990, petitioner Gisela Fredericks and respondent Lyle Stockert were involved in a traffic accident on a portion of a North Dakota state highway running through the Fort Berthold Indian Reservation. The highway strip crossing the reservation is a 6.59-mile stretch of road, open to the public, affording access to a federal water resource project. North Dakota maintains the road under a right-of-

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lows: *Grant Woods* of Arizona, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *Alan G. Lance* of Idaho, *Scott Harshbarger* of Massachusetts, *Mike Moore* of Mississippi, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, *Christine O. Gregoire* of Washington, *James E. Doyle* of Wisconsin, and *William U. Hill* of Wyoming; for Lake County, Montana, et al. by *Jon Metropoulos;* for the American Trucking Associations, Inc., et al. by *Michele Odorizzi, Andrew J. Pincus,* and *Daniel R. Barney;* and for the Council of State Governments et al. by *Richard Ruda* and *Charles F. Lettow.*

way granted by the United States to the State's Highway Department; the right-of-way lies on land held by the United States in trust for the Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) and their members.

The accident occurred when Fredericks' automobile collided with a gravel truck driven by Stockert and owned by respondent A–1 Contractors, Stockert's employer. A–1 Contractors, a non-Indian-owned enterprise with its principal place of business outside the reservation, was at the time under a subcontract with LCM Corporation, a corporation wholly owned by the Tribes, to do landscaping work related to the construction of a tribal community building. A–1 Contractors performed all work under the subcontract within the boundaries of the reservation.[1] The record does not show whether Stockert was engaged in subcontract work at the time of the accident. Neither Stockert nor Fredericks is a member of the Three Affiliated Tribes or an Indian. Fredericks, however, is the widow of a deceased member of the Tribes and has five adult children who are tribal members.[2]

Fredericks sustained serious injuries in the accident and was hospitalized for 24 days. In May 1991, she sued respondents A–1 Contractors and Stockert, as well as A–1 Contractors' insurer, in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Reservation. In the same lawsuit, Fredericks' five adult children filed a loss-of-consortium

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[1] Respondents state that the subcontract had forum-selection and choice-of-law provisions selecting Utah state courts and Utah law for dispute resolution. See Brief for Respondents 2. Petitioners do not contest this point, but the subcontract is not part of the record in this case.

[2] The Court of Appeals for the Eighth Circuit stated that petitioner Fredericks resides on the reservation. See 76 F. 3d 930, 932 (1996) (en banc). Respondents assert, however, that there is an unresolved factual dispute regarding Fredericks' residence at the time of the accident. See Brief for Respondents 1–2, n. 2; Brief in Opposition 3, n. 4. Under our disposition of the case, Fredericks' residence at the time of the accident is immaterial.

claim. Together, Fredericks and her children sought damages exceeding $13 million. App. 8–10.

Respondents and the insurer made a special appearance in the Tribal Court to contest that court's personal and subject-matter jurisdiction. The Tribal Court ruled that it had authority to adjudicate Gisela Fredericks' case, and therefore denied respondents' motion to dismiss the action. *Id.*, at 24–25.[3] Respondents appealed the Tribal Court's jurisdictional ruling to the Northern Plains Intertribal Court of Appeals, which affirmed. *Id.*, at 36. Thereafter, pursuant to the parties' stipulation, the Tribal Court dismissed the insurer from the suit. See *id.*, at 38–40.

Before Tribal Court proceedings resumed, respondents commenced this action in the United States District Court for the District of North Dakota. Naming as defendants Fredericks, her adult children, the Tribal Court, and Tribal Judge William Strate, respondents sought a declaratory judgment that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate Fredericks' claims. The respondents also sought an injunction against further proceedings in the Tribal Court. See *id.*, at 41–45.

Relying particularly on this Court's decisions in *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985), and *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9 (1987), the District Court determined that the Tribal Court had civil jurisdiction over Fredericks' complaint against A–1 Contractors and Stockert; accordingly, on cross-motions for summary judgment, the District Court dismissed the action. App. 54–67. On appeal, a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed. App. 68–90. The Eighth Circuit granted rehearing en banc and, in an 8-to-4 decision, reversed the District Court's judgment.

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[3] Satisfied that it could adjudicate Gisela Fredericks' claims, the Tribal Court declined to address her adult children's consortium claim, App. 25; thus, no ruling on that claim is here at issue.

76 F. 3d 930 (1996). The Court of Appeals concluded that our decision in *Montana* v. *United States*, 450 U. S. 544 (1981), was the controlling precedent, and that, under *Montana*, the Tribal Court lacked subject-matter jurisdiction over the dispute.[4]

We granted certiorari, 518 U. S. 1056 (1996), and now affirm.

II

Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances. In *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191 (1978), the Court held that Indian tribes lack criminal jurisdiction over non-Indians.[5] *Montana* v. *United States*, decided three years later, is the pathmarking case concerning tribal civil authority over nonmembers. *Montana* concerned the authority of the Crow Tribe to regulate hunting and fishing by non-Indians on lands within the Tribe's reservation owned in fee simple by non-Indians. The Court said in *Montana* that the restriction on tribal criminal jurisdiction recognized in *Oliphant* rested on principles that support a more "general proposition." 450 U. S., at 565. In the main, the Court explained, "the inherent sovereign powers of an Indian tribe"—those powers a tribe enjoys apart from express provision by treaty or statute—"do not extend to the activities

[4] Petitioner Fredericks has commenced a similar lawsuit in a North Dakota state court "to protect her rights against the running of the State's six-year statute of limitations." Reply Brief 6, n. 2. Respondents assert that they have answered the complaint and "are prepared to proceed in that forum." Brief for Respondents 8, n. 6. Respondents also note, without contradiction, that the state forum "is physically much closer by road to the accident scene . . . than [is] the tribal courthouse." *Ibid.*

[5] In *Duro* v. *Reina*, 495 U. S. 676, 684–685 (1990), we held that Indian tribes also lack criminal jurisdiction over nonmember Indians. Shortly after our decision in *Duro*, Congress provided for tribal criminal jurisdiction over nonmember Indians. See 25 U. S. C. § 1301(2).

of nonmembers of the tribe." *Ibid.* The *Montana* opinion added, however, that in certain circumstances, even where Congress has not expressly authorized it, tribal civil jurisdiction may encompass nonmembers:

> "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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 dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to 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 565–566 (citations and footnote omitted).

The term "non-Indian fee lands," as used in this passage and throughout the *Montana* opinion, refers to reservation land acquired in fee simple by non-Indian owners. See *id.*, at 548.

Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare. The *Montana* Court recognized that the Crow Tribe retained power to limit or forbid hunting or fishing by nonmembers on land still owned by or held in trust for the Tribe. *Id.*, at 557. The Court held, however, that the Tribe lacked authority to regulate hunting and fishing by non-Indians on land within the Tribe's

reservation owned in fee simple by non-Indians. *Id.*, at 564–567.[6]

Petitioners and the United States as *amicus curiae* urge that *Montana* does not control this case. They maintain that the guiding precedents are *National Farmers* and *Iowa Mutual*, and that those decisions establish a rule converse to *Montana*'s. Whatever *Montana* may instruct regarding *regulatory* authority, they insist, tribal courts retain *adjudicatory* authority in disputes over occurrences inside a reservation, even when the episode-in-suit involves nonmembers, unless a treaty or federal statute directs otherwise. Petitioners, further supported by the United States, argue, alternately, that *Montana* does not cover lands owned by, or held

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[6] *Montana*'s statement of the governing law figured prominently in *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408 (1989), and in *South Dakota* v. *Bourland*, 508 U. S. 679 (1993). The Court held in *Brendale*, 6 to 3, that the Yakima Indian Nation lacked authority to zone nonmembers' land within an area of the Tribe's reservation open to the general public; almost half the land in the area was owned in fee by nonmembers. The Court also held, 5 to 4, that the Tribe retained authority to zone fee land in an area of the reservation closed to the general public. No opinion garnered a majority. Justice White, writing for four Members of the Court, concluded that, under *Montana*, the Tribe lacked authority to zone fee land in both the open and closed areas of the reservation. 492 U. S., at 422–432. Justice Stevens, writing for two Justices, concluded that the Tribe retained zoning authority over nonmember land only in the closed area. *Id.*, at 443–444. Justice Blackmun, writing for three Justices, concluded that, under *Montana*'s second exception, the Tribe retained authority to zone fee land in both the open and the closed areas. *Id.*, at 456–459.

In *Bourland*, the Court considered whether the Cheyenne River Sioux Tribe could regulate hunting and fishing by non-Indians in an area within the Tribe's reservation, but acquired by the United States for the operation of a dam and a reservoir. We determined, dominantly, that no treaty or statute reserved to the Tribe regulatory authority over the area, see 508 U. S., at 697, and we left for resolution on remand the question whether either *Montana* exception applied, see 508 U. S., at 695–696; see also 39 F. 3d 868, 869–870 (CA8 1994) (decision of divided panel on remand that neither *Montana* exception justified regulation by the Tribe).

in trust for, a tribe or its members. *Montana* holds sway, petitioners say, only with respect to alienated reservation land owned in fee simple by non-Indians. We address these arguments in turn.

A

We begin with petitioners' contention that *National Farmers* and *Iowa Mutual* broadly confirm tribal-court civil jurisdiction over claims against nonmembers arising from occurrences on any land within a reservation. We read our precedent differently. *National Farmers* and *Iowa Mutual*, we conclude, are not at odds with, and do not displace, *Montana*. Both decisions describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases. Accord, *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 427, n. 10 (1989) (opinion of White, J.).

National Farmers involved a federal-court challenge to a tribal court's jurisdiction over a personal injury action initiated on behalf of a Crow Indian minor against a Montana school district. The accident-in-suit occurred when the minor was struck by a motorcycle in an elementary school parking lot. The school occupied land owned by the State within the Crow Indian Reservation. See 471 U. S., at 847. The school district and its insurer sought a federal-court injunction to stop proceedings in the Crow Tribal Court. See *id.*, at 848. The District Court granted the injunction, but the Court of Appeals reversed, concluding that federal courts lacked subject-matter jurisdiction to entertain such a case. See *id.*, at 848–849.

We reversed the Court of Appeals' judgment and held that federal courts have authority to determine, as a matter "arising under" federal law, see 28 U. S. C. § 1331, whether a tribal court has exceeded the limits of its jurisdiction. See 471 U. S., at 852–853. We further held, however, that the fed-

eral suit was premature. Ordinarily, we explained, a federal court should stay its hand "until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Id.*, at 857. Finding no cause for immediate federal-court intervention,[7] we remanded the case, leaving initially to the District Court the question "[w]hether the federal action should be dismissed, or merely held in abeyance pending . . . further Tribal Court proceedings." *Ibid.*

Petitioners underscore the principal reason we gave in *National Farmers* for the exhaustion requirement there stated. Tribal-court jurisdiction over non-Indians in criminal cases is categorically restricted under *Oliphant*, we observed, while in civil matters "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U. S., at 855–856 (footnote omitted).

The Court's recognition in *National Farmers* that tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings, and of the need to inspect relevant statutes, treaties, and other materials, does not limit *Montana*'s instruction. As the Court made plain in *Montana*, the general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute. In *Montana* itself, the Court examined the treaties and legislation relied upon by the Tribe and explained

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[7] The Court indicated in *National Farmers* that exhaustion is not an unyielding requirement:

"We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." 471 U. S., at 856, n. 21 (citation omitted).

why those measures did not aid the Tribe's case. See 450 U. S., at 557–563. Only after and in light of that examination did the Court address the Tribe's assertion of "inherent sovereignty," and formulate, in response to that assertion, *Montana*'s general rule and exceptions to it. In sum, we do not extract from *National Farmers* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts "to explain to the parties the precise basis for accepting [or rejecting] jurisdiction." 471 U. S., at 857.

Iowa Mutual involved an accident in which a member of the Blackfeet Indian Tribe was injured while driving a cattle truck within the boundaries of the reservation. 480 U. S., at 11. The injured member was employed by a Montana corporation that operated a ranch on reservation land owned by Blackfeet Indians residing on the reservation. See *ibid.* The driver and his wife, also a Tribe member, sued in the Blackfeet Tribal Court, naming several defendants: the Montana corporation that employed the driver; the individual owners of the ranch; the insurer of the ranch; and an independent insurance adjuster representing the insurer. See *ibid.* Over the objection of the insurer and the insurance adjuster—both companies not owned by members of the Tribe—the Tribal Court determined that it had jurisdiction to adjudicate the case. See *id.*, at 12.

Thereafter, the insurer commenced a federal-court action against the driver, his wife, the Montana corporation, and the ranch owners. See *ibid.* Invoking federal jurisdiction based on the parties' diverse citizenship, see 28 U. S. C. § 1332, the insurer alleged that it had no duty to defend or indemnify the Montana corporation or the ranch owners because the injuries asserted by the driver and his wife fell outside the coverage of the applicable insurance policies. See 480 U. S., at 12–13. The Federal District Court dismissed the insurer's action for lack of subject-matter jurisdiction, and the Court of Appeals affirmed. See *id.*, at 13–14.

We reversed. Holding that the District Court had diversity-of-citizenship jurisdiction over the insurer's complaint, we remanded, as in *National Farmers*, for a determination whether "the federal action should be stayed pending further Tribal Court proceedings or dismissed." 480 U. S., at 20, n. 14. The Court recognized in *Iowa Mutual* that the exhaustion rule stated in *National Farmers* was "prudential," not jurisdictional. 480 U. S., at 20, n. 14; see also *id.*, at 16, n. 8 (stating that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite"). Respect for tribal self-government made it appropriate "to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Id.*, at 16 (quoting *National Farmers*, 471 U. S., at 857). That respect, the Court reasoned, was equally in order whether federal-court jurisdiction rested on § 1331 (federal question) or on § 1332 (diversity of citizenship). 480 U. S., at 17–18. Elaborating on the point, the Court stated:

> "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana* v. *United States*, 450 U. S. 544, 565–566 (1981); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 152–153 (1980); *Fisher* v. *District Court [of Sixteenth Judicial Dist. of Mont.]*, 424 U. S. [382,] 387–389 [(1976)]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. . . . In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion." *Id.*, at 18.

Petitioners and the United States fasten upon the Court's statement that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts." Read in context, however, this language scarcely supports the view that the

Montana rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants.

The statement stressed by petitioners and the United States was made in refutation of the argument that "Congress intended the diversity statute to limit the jurisdiction of the tribal courts." 480 U. S., at 18. The statement is preceded by three informative citations. The first citation points to the passage in *Montana* in which the Court advanced "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, with two prime exceptions, *id.*, at 565–566. The case cited second is *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980), a decision the *Montana* Court listed as illustrative of the first *Montana* exception, applicable to "nonmembers who enter consensual relationships with the tribe or its members," 450 U. S., at 565–566; the Court in *Colville* acknowledged inherent tribal authority to tax "non-Indians entering the reservation to engage in economic activity," 447 U. S., at 153. The third case noted in conjunction with the *Iowa Mutual* statement is *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382 (1976) *(per curiam)*, a decision the *Montana* Court cited in support of the second *Montana* exception, covering on-reservation activity of nonmembers bearing directly "on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 566. The Court held in *Fisher* that a tribal court had exclusive jurisdiction over an adoption proceeding when all parties were members of the tribe and resided on its reservation. See 424 U. S., at 383, 389. State-court jurisdiction over such matters, the Court said, "plainly would interfere with the powers of self-government conferred upon the . . . Tribe and exercised through the Tribal Court." *Id.*, at 387. The Court observed in *Fisher* that state courts may not exercise jurisdiction over disputes arising out of

on-reservation conduct—even over matters involving non-Indians—if doing so would "'infring[e] on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.*, at 386 (citation omitted).

In light of the citation of *Montana, Colville,* and *Fisher*, the *Iowa Mutual* statement emphasized by petitioners does not limit the *Montana* rule. In keeping with the precedent to which *Iowa Mutual* refers, the statement stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, "[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts." 480 U. S., at 18.

Recognizing that our precedent has been variously interpreted, we reiterate that *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement, a "prudential rule," see *Iowa Mutual*, 480 U. S., at 20, n. 14, based on comity, see *id.*, at 16, n. 8. These decisions do not expand or stand apart from *Montana*'s instruction on "the inherent sovereign powers of an Indian tribe." 450 U. S., at 565. While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of "inherent sovereignty." *Id.*, at 563. Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." *Id.*, at 565. As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. 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." *Ibid.*

B

We consider next the argument that *Montana* does not govern this case because the land underlying the scene of the accident is held in trust for the Three Affiliated Tribes and their members. Petitioners and the United States point out that in *Montana*, as in later cases following *Montana*'s instruction—*Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408 (1989), and *South Dakota* v. *Bourland*, 508 U. S. 679 (1993), described *supra*, at 447, n. 6—the challenged tribal authority related to nonmember activity on alienated, non-Indian reservation land. We "can readily agree," in accord with *Montana*, 450 U. S., at 557, that tribes retain considerable control over nonmember conduct on tribal land.[8] On the particular matter before us, however, we agree with respondents: The right-of-way North Dakota acquired for the State's highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes,[9] to alienated, non-Indian land.

Congress authorized grants of rights-of-way over Indian lands in 1948 legislation. Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, 25 U. S. C. §§ 323–328. A grant over land belonging to a tribe requires "consent of the proper tribal officials," § 324,

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[8] Petitioners note in this regard the Court's unqualified recognition in *Montana* that "the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." 450 U. S., at 557. The question addressed was "the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." *Ibid.;* see Brief for Petitioners 15–16.

[9] For contextual treatment of rights-of-way over Indian land, compare 18 U. S. C. § 1151 (defining "Indian country" in criminal law chapter generally to include "rights-of-way running through [a] reservation") with §§ 1154(c) and 1156 (term "Indian country," as used in sections on dispensation and possession of intoxicants, "does not include . . . rights-of-way through Indian reservations").

and the payment of just compensation, § 325.[10] The grant involved in this case was made, pursuant to the federal statute, in 1970. Its purpose was to facilitate public access to Lake Sakakawea, a federal water resource project under the control of the Army Corps of Engineers.

In the granting instrument, the United States conveyed to North Dakota "an easement for a right-of-way for the realignment and improvement of North Dakota State Highway No. 8 over, across and upon [specified] lands." App. to Brief for Respondents 1. The grant provides that the State's "easement is subject to any valid existing right or adverse claim and is without limitation as to tenure, so long as said easement shall be actually used for the purpose . . . specified." *Id.*, at 3. The granting instrument details only one specific reservation to Indian landowners:

> "The right is reserved to the Indian land owners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupan[cy] of the premises affected by the right-of-way; such crossings to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any damage to the right-of-way, which may be occasioned by such crossings." *Id.*, at 3–4.

Apart from this specification, the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right-of-way.

Forming part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's

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[10] Rights-of-way granted over lands of individual Indians also require payment of compensation, 25 U. S. C. § 325, and ordinarily require consent of the individual owners, see § 324 (describing circumstances in which rights-of-way may be granted without the consent of owners).

control.[11] The Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway. They have retained no gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude. Cf. *Bourland*, 508 U. S., at 689 (regarding reservation land acquired by the United States for operation of a dam and a reservoir, Tribe's loss of "right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others"). We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case.

III

Petitioners and the United States refer to no treaty or statute authorizing the Three Affiliated Tribes to entertain highway-accident tort suits of the kind Fredericks commenced against A–1 Contractors and Stockert. Rather, petitioners and the United States ground their defense of tribal-court jurisdiction exclusively on the concept of retained or inherent sovereignty. *Montana*, we have explained, is the controlling decision for this case. To prevail here, petitioners must show that Fredericks' tribal-court action against nonmembers qualifies under one of *Montana*'s two exceptions.

The first exception to the *Montana* rule covers "activities of nonmembers who enter consensual relationships with the

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[11] We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law. Cf. *State* v. *Schmuck*, 121 Wash. 2d 373, 390, 850 P. 2d 1332, 1341 (en banc) (recognizing that a limited tribal power "to stop and detain alleged offenders in no way confers an *unlimited* authority to regulate the right of the public to travel on the Reservation's roads"), cert. denied, 510 U. S. 931 (1993).

tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U. S., at 565. The tortious conduct alleged in Fredericks' complaint does not fit that description. The dispute, as the Court of Appeals said, is "distinctly non-tribal in nature." 76 F. 3d, at 940. It "arose between two non-Indians involved in [a] run-of-the-mill [highway] accident." *Ibid.* Although A–1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribes, "Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident." *Ibid.*

Montana's list of cases fitting within the first exception, see 450 U. S., at 565–566, indicates the type of activities the Court had in mind: *Williams* v. *Lee*, 358 U. S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris* v. *Hitchcock*, 194 U. S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster* v. *Wright*, 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U. S., at 152–154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status"). Measured against these cases, the Fredericks-Stockert highway accident presents no "consensual relationship" of the qualifying kind.

The second exception to *Montana*'s general rule concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 566. Undoubtedly, those

who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule. Again, cases cited in *Montana* indicate the character of the tribal interest the Court envisioned.

The Court's statement of *Montana*'s second exceptional category is followed by citation of four cases, *ibid.;* each of those cases raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government. In two of the cases, the Court held that a State's exercise of authority would so intrude, and in two, the Court saw no impermissible intrusion.

The Court referred first to the decision recognizing the exclusive competence of a tribal court over an adoption proceeding when all parties belonged to the Tribe and resided on its reservation. See *Fisher*, 424 U. S., at 386; *supra*, at 452–453. Next, the Court listed a decision holding a tribal court exclusively competent to adjudicate a claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store. See *Williams*, 358 U. S., at 220 ("[A]bsent governing Acts of Congress, the question [of state-court jurisdiction over on-reservation conduct] has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."). Thereafter, the Court referred to two decisions dealing with objections to a county or territorial government's imposition of a property tax on non-Indian-owned livestock that grazed on reservation land; in neither case did the Court find a significant tribal interest at stake. See *Montana Catholic Missions* v. *Missoula County*, 200 U. S. 118, 128–129 (1906) ("the Indians' interest in this kind of property [livestock], situated on their reservations, was not sufficient to exempt such property, when owned by private individuals, from [state or territorial] taxation"); *Thomas* v. *Gay*, 169 U. S. 264, 273 (1898) ("[terri-

torial] tax put upon the cattle of [non-Indian] lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians").

Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." 450 U. S., at 564. Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U. S., at 220. The *Montana* rule, therefore, and not its exceptions, applies to this case.

Gisela Fredericks may pursue her case against A–1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota's highway.[12] Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A–1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court[13] is not crucial to "the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes]." *Montana*, 450 U. S., at 566.[14]

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[12] See *supra*, at 445, n. 4.

[13] Within the federal system, when nonresidents are the sole defendants in a suit filed in state court, the defendants ordinarily may remove the case to federal court. See 28 U. S. C. § 1441.

[14] When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. See *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 854 (1985). Therefore, when tribal-court juris-

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For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is

Affirmed.

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diction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, see *supra,* at 449–450, must give way, for it would serve no purpose other than delay. Cf. *National Farmers,* 471 U. S., at 856, n. 21; *supra,* at 449, n. 7.

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JOHNSON *v.* UNITED STATES

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

No. 96–203. Argued February 25, 1997—Decided May 12, 1997

Petitioner Johnson testified before a federal grand jury, investigating, *inter alia*, the disposition of proceeds from her boyfriend's alleged drug trafficking, that she had obtained tens of thousands of dollars to improve her home from a box of cash given her late mother by one Talcott. Subsequently, she was charged with violating 18 U. S. C. § 1623, which proscribes "knowingly mak[ing] any false material declaration" under oath before a grand jury. At her trial, it was revealed that her boyfriend had negotiated the purchase of her home and had an interest in a corporation whose checks had been used to help pay for the property, and that Talcott had died several years before the time he allegedly gave her mother the money. Johnson did not object when, in accordance with then-extant Circuit precedent, the judge instructed the jury that materiality was a question for him to decide, and that he had determined that her statements were material. Johnson was convicted of perjury, but before her appeal, this Court ruled, in *United States* v. *Gaudin*, 515 U. S. 506, that the materiality of a false statement must be decided by a jury rather than a trial judge. On appeal, Johnson's claim that her conviction was invalid under *Gaudin* was reviewed by the Eleventh Circuit pursuant to Federal Rule of Criminal Procedure 52(b), which allows plain errors affecting substantial rights to be noticed even though no objection has been made. Following the analysis outlined in *United States* v. *Olano*, 507 U. S. 725, the court assumed, *arguendo*, that the District Court's failure to submit materiality to the jury constituted "error" that was "clear or obvious." However, it concluded that any such error did not affect "substantial rights" because its independent review of the record showed that there was "overwhelming" evidence of materiality and that no reasonable juror could conclude that Johnson's false statements about the money's source were not material to the grand jury's investigation.

Held: The trial court's action in this case was not "plain error" of the sort which an appellate court may notice under Rule 52(b).

(a) Since § 1623's text leaves no doubt that materiality is an element of perjury, *Gaudin* dictates that materiality in this case be decided by the jury, not the court. Johnson's failure to timely assert that right before the trial court ordinarily would result in forfeiture of the right

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pursuant to Rule 30. However, Rule 52(b) mitigates Rule 30 and, contrary to Johnson's argument, governs her direct appeal. The *Olano* test for applying Rule 52(b) requires that there be (1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Pp. 465–466.

(b) The first prong of *Olano* is satisfied here, as *Gaudin* must be applied to Johnson's case on direct review. See *Griffith* v. *Kentucky*, 479 U. S. 314, 328. The second prong is met as well. In a case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is sufficient that the error be plain at the time of appellate consideration. Even assuming that the third prong is also satisfied, a court must still determine whether the forfeited error meets the fourth prong before it may exercise its discretion to correct the error. In this case the fourth question must be answered in the negative. Materiality was essentially uncontroverted at trial and has remained so on appeal. Johnson has presented no plausible argument that her false statement under oath—lying about the source of the money she used to improve her home—was somehow not material to the grand jury investigation. It would be the reversal of her conviction, not the failure to notice the error, that would seriously affect the fairness, integrity, or public reputation of judicial proceedings. Pp. 466–470.

82 F. 3d 429, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, which was unanimous except insofar as SCALIA, J., did not join Parts II–B and II–C.

William J. Sheppard argued the cause for petitioner. With him on the briefs were *D. Gray Thomas* and *Elizabeth L. White.*

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Acting Solicitor General Dellinger*, *Acting Assistant Attorney General Keeney*, and *Jonathan E. Nuechterlein.**

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers by *Neal Goldfarb*, *Barbara Bergman*, and *Blair G. Brown;* and for David R. Knoll by *Stephen L. Braga.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.*

In this case the trial court itself decided the issue of materiality in a perjury prosecution, rather than submitting it to the jury as our decision in *United States* v. *Gaudin*, 515 U. S. 506 (1995), now requires. No objection was made by the petitioner, Joyce B. Johnson, and we hold that the court's action in this case was not "plain error" of the sort which an appellate court may notice under Federal Rule of Criminal Procedure 52(b).

In the late 1980's, a federal investigation into the cocaine and marijuana trafficking of Earl James Fields revealed that he and his partner had amassed some $10 million from their illicit activities. Following the money trail, federal authorities subpoenaed Johnson, Fields' long-time girlfriend, to testify before a federal grand jury. Johnson, who is the mother of a child by Fields, earned about $34,000 a year at the Florida Department of Health and Rehabilitative Services. She testified before the grand jury that she owned five pieces of real property, including her house. That house was purchased by Johnson in 1991 for $75,600, and in the next two years she added sufficient improvements to it that in 1993 it was appraised at $344,800. When asked the source of her home improvement funds, Johnson stated that she had put $80,000 to $120,000 into her house, all of which had come from a box of cash given her late mother by one Gerald Talcott in 1985 or 1986.

On the basis of this testimony, Johnson was indicted for perjury under 18 U. S. C. § 1623. At trial, it was revealed that Fields had negotiated the original purchase of Johnson's home and that Johnson had paid for the property with eight different cashier's checks, including two from a corporation in which Fields had an interest. It was also established that Gerald Talcott had died in April 1982, several years before

*JUSTICE SCALIA joins all but Parts II–B and II–C of this opinion.

the time Johnson claimed he had given her mother the box full of cash.

At the close of Johnson's trial, and in accordance with then-extant Circuit precedent, see, *e. g.*, *United States* v. *Molinares*, 700 F. 2d 647, 653 (CA11 1983), the District Judge instructed the jury that the element of materiality was a question for the judge to decide, and that he had determined that her statements were material. App. 72. Johnson did not object to this instruction. Indeed, when the prosecution had presented evidence concerning materiality during the trial, she had then objected, on the ground that materiality was a matter for the judge, and not the jury, to decide. *Id.*, at 61. The jury returned a verdict of guilty, and Johnson was sentenced to 30 months' imprisonment, three years' supervised release, and a $30,000 fine.

After Johnson was convicted, but before her appeal to the Court of Appeals, we decided *United States* v. *Gaudin*, *supra*, which held that the materiality of a false statement must be submitted to the jury rather than decided by the trial judge. On her appeal, Johnson argued that the trial judge's failure to submit materiality to the jury rendered her conviction invalid under *Gaudin*.

Because Johnson had failed to object to the trial judge's deciding materiality, the Court of Appeals for the Eleventh Circuit reviewed for plain error. Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> "PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Following our analysis in *United States* v. *Olano*, 507 U. S. 725 (1993), the Court of Appeals assumed, *arguendo*, that the District Court's failure to submit materiality to the jury constituted "error" that was "clear or obvious," but concluded nonetheless that any such error did not affect the "substantial rights" of the defendant. That conclusion was

based on the court's independent review of the record and determination that there was "overwhelming" evidence of materiality and that "[n]o reasonable juror could conclude that Johnson's false statements about the source of the money . . . were not material to the grand jury's investigation." App. to Pet. for Cert. 9a (judgt. order reported at 82 F. 3d 429 (CA11 1996)). Due to the conflict between this decision and the Ninth Circuit's en banc decision in *United States* v. *Keys*, 95 F. 3d 874 (1996), we granted certiorari. 519 U. S. 989 (1996). We now affirm.

I

Title 18 U. S. C. § 1623 proscribes "knowingly mak[ing] any false material declaration" under oath before a grand jury. Although we merely assumed in *Gaudin* that materiality is an element of making a false statement under 18 U. S. C. § 1001, and although we recently held that materiality is not an element of making a false statement to a federally insured bank under 18 U. S. C. § 1014, *United States* v. *Wells*, 519 U. S. 482 (1997), there is no doubt that materiality is an element of perjury under § 1623. The statutory text expressly requires that the false declaration be "material." *Gaudin* therefore dictates that materiality be decided by the jury, not the court.

Petitioner, however, did not object to the trial court's treatment of materiality. Rule 30 of the Federal Rules of Criminal Procedure provides: "No party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." This Rule is simply the embodiment of the "familiar" principle that a 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.'" *Olano*, *supra*, at 731 (quoting *Yakus* v. *United States*, 321 U. S. 414, 444 (1944)).

The Rule is mitigated, however, by Rule 52(b), which allows plain errors affecting substantial rights to be noticed even though there was no objection.

Petitioner argues that she need not fall within the "limited" and "circumscribed" strictures of *Olano*, because the error she complains of here is "structural," and so is outside Rule 52(b) altogether. But the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure. None of the cases discussing "structural error," upon which petitioner relies, were direct appeals from judgments of conviction in the federal system. Several came from state courts which had considered the claimed error under their own rules. See *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Arizona* v. *Fulminante*, 499 U. S. 279 (1991); *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993). Others came here by way of federal habeas challenges to state convictions. See *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984). None of them were subject to the provisions of Rule 52.

But it is that Rule which by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case. We cautioned against any unwarranted expansion of Rule 52(b) in *United States* v. *Young*, 470 U. S. 1 (1985), because it "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed,'" *id.*, at 15 (quoting *United States* v. *Frady*, 456 U. S. 152, 163 (1982)). Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make. See *Carlisle* v. *United States*, 517 U. S. 416, 425–426 (1996).

II

We therefore turn to apply here Rule 52(b) as outlined in *Olano*. Under that test, before an appellate court can cor-

rect an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." 507 U. S., at 732. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "'"seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."'" *Ibid.* (quoting *United States* v. *Young*, *supra*, at 15, in turn quoting *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936)).

A

There is no doubt that if petitioner's trial occurred today, the failure to submit materiality to the jury would be error under *Gaudin*. Under *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review . . . , with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.*, at 328. Because petitioner is still on direct review, *Griffith* requires that we apply *Gaudin* retroactively. Accordingly, under *Gaudin* there was "error," and the first prong of *Olano* is satisfied.

B

The second prong is more difficult. *Olano* explained that the word "plain" is "synonymous with 'clear' or, equivalently, 'obvious.'" 507 U. S., at 734. But *Olano* refrained from deciding *when* an error must be plain to be reviewable. "At a minimum," *Olano* concluded, the error must be plain "under current law." *Ibid.* In the case with which we are faced today, the error is certainly clear under "current law," but it was by no means clear at the time of trial.

The Government contends that for an error to be "plain," it must have been so both at the time of trial and at the time of appellate consideration. In this case, it says, petitioner should have objected to the court's deciding the issue of materiality, even though near-uniform precedent both from this

Court and from the Courts of Appeals held that course proper.[1] Petitioner, on the other hand, urges that such a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent. We agree with petitioner on this point, and hold that in a case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be "plain" at the time of appellate consideration. Here, at the time of trial it was settled that the issue of materiality was to be decided by the court, not the jury; by the time of appellate consideration, the law had changed, and it is now settled that materiality is an issue for the jury. The second part of the *Olano* test is therefore satisfied.

C

But even though the error be "plain," it must also "affec[t] substantial rights." It is at this point that petitioner's argument that the failure to submit an element of the offense to the jury is "structural error" becomes relevant. She contends in effect that if an error is so serious as to defy harmless-error analysis, it must also "affec[t] substantial rights." A "structural" error, we explained in *Arizona* v. *Fulminante*, is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," 499 U. S., at 310. We have found structural errors only in a very limited class of cases: See *Gideon*

[1] See *United States* v. *Corsino*, 812 F. 2d 26, 31, n. 3 (CA1 1987); *United States* v. *Bernard*, 384 F. 2d 915, 916 (CA2 1967); *United States* v. *Greber*, 760 F. 2d 68, 73 (CA3 1985); *Nilson Van & Storage Co.* v. *Marsh*, 755 F. 2d 362, 367 (CA4 1985); *United States* v. *Hausmann*, 711 F. 2d 615, 616–617 (CA5 1983); *United States* v. *Chandler*, 752 F. 2d 1148, 1150–1151 (CA6 1985); *United States* v. *Brantley*, 786 F. 2d 1322, 1327, and n. 2 (CA7 1986); *United States* v. *Hicks*, 619 F. 2d 752, 758 (CA8 1980); *United States* v. *Daily*, 921 F. 2d 994, 1004 (CA10 1990); *United States* v. *Lopez*, 728 F. 2d 1359, 1362, n. 4 (CA11 1984); *United States* v. *Hansen*, 772 F. 2d 940, 950 (CADC 1985).

v. *Wainwright*, 372 U. S. 335 (1963) (a total deprivation of the right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (lack of an impartial trial judge); *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (the right to self-representation at trial); *Waller* v. *Georgia*, 467 U. S. 39 (1984) (the right to a public trial); *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) (erroneous reasonable-doubt instruction to jury).

It is by no means clear that the error here fits within this limited class of cases. *Sullivan* v. *Louisiana*, the case most closely on point, held that the erroneous definition of "reasonable doubt" vitiated all of the jury's findings because one could only speculate what a properly charged jury might have done. *Id.*, at 280. The failure to submit materiality to the jury, as in this case, can just as easily be analogized to improperly instructing the jury on an element of the offense, *e. g.*, *Yates* v. *Evatt*, 500 U. S. 391 (1991); *Carella* v. *California*, 491 U. S. 263 (1989) *(per curiam)*; *Pope* v. *Illinois*, 481 U. S. 497 (1987); *Rose* v. *Clark*, 478 U. S. 570 (1986), an error which is subject to harmless-error analysis, as it can be to failing to give a proper reasonable-doubt instruction altogether. Cf. *California* v. *Roy*, 519 U. S. 2, 5 (1996) *(per curiam)* ("The specific error at issue here—an error in the instruction that defined the crime—is . . . as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission' ").

D

But we need not decide that question because, even assuming that the failure to submit materiality to the jury "affec[ted] substantial rights," it does not meet the final requirement of *Olano*. When the first three parts of *Olano* are satisfied, an appellate court must then determine whether the forfeited error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' " before

it may exercise its discretion to correct the error. *Olano*, 507 U. S., at 736 (quoting *Atkinson*, 297 U. S., at 160).

In this case that question must be answered in the negative. As the Court of Appeals noted, the evidence supporting materiality was "overwhelming." App. to Pet. for Cert. 9a. Materiality was essentially uncontroverted at trial[2] and has remained so on appeal. The grand jury here was investigating petitioner's long-time boyfriend's alleged cocaine and marijuana trafficking and the "disposition of money which was proceeds of this cocaine and [marijuana] distribution activity, including the possible concealment of such proceeds as investments in real estate." App. 5–6. Before the Eleventh Circuit and in her briefing before this Court, petitioner has presented no plausible argument that the false statement under oath for which she was convicted—lying about the source of the tens of thousands of dollars she used to improve her home—was somehow not material to the grand jury investigation.

On this record there is no basis for concluding that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Indeed, it would be the reversal of a conviction such as this which would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." R. Traynor, The Riddle of Harmless Error 50 (1970). No "miscarriage of justice" will result here if we do not notice the error, *Olano*, *supra*, at 736, and we decline to do so. The judgment of the Court of Appeals is therefore

Affirmed.

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[2] The Government represents—and petitioner has not disputed—that the sum total of petitioner's argument at trial concerning materiality consisted of the following conclusory sentence: "'I would argue that the element of materiality has been insufficiently proven and that the Court ought to grant a judgment of acquittal.'" Brief for United States 5 (quoting trial transcript); see also Reply Brief for Petitioner 4, n. 5.

Syllabus

RENO, ATTORNEY GENERAL *v.* BOSSIER PARISH SCHOOL BOARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 95–1455. Argued December 9, 1996—Decided May 12, 1997*

Appellee Bossier Parish School Board (Board) is subject to the preclearance requirements of § 5 of the Voting Rights Act of 1965 (Act) and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." Based on the 1990 census, the Board redrew its 12 single-member districts, adopting the redistricting plan that the Attorney General had recently precleared for use in elections of the parish's primary governing body (the Jury plan). In doing so, the Board rejected a plan proposed by the National Association for the Advancement of Colored People (NAACP), which would have created two majority-black districts. The Attorney General objected to preclearance, finding that the NAACP plan, which had not been available when the Jury plan was originally approved, demonstrated that black residents were sufficiently numerous and geographically compact to constitute a majority in two districts; that, compared with this alternative, the Board's plan unnecessarily limited the opportunity for minority voters to elect their candidates of choice and thereby diluted their voting strength in violation of § 2 of the Act; and that the Attorney General must withhold preclearance where necessary to prevent a clear § 2 violation. The Board then filed this action with the District Court, and appellant Price and others intervened as defendants. A three-judge panel granted the preclearance request, rejecting appellants' contention that a voting change's failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5 and their related argument that a court must still consider evidence of a § 2 violation as evidence of discriminatory purpose under § 5.

Held:

1. Preclearance under § 5 may not be denied solely on the basis that a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2. This Court has consistently understood § 5 and § 2 to com-

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*Together with No. 95–1508, *Price et al.* v. *Bossier Parish School Board et al.*, also on appeal from the same court.

bat different evils and, accordingly, to impose very different duties upon the States. See *Holder* v. *Hall*, 512 U. S. 874, 883 (plurality opinion). Section 5 freezes election procedures in a covered jurisdiction until that jurisdiction proves that its proposed changes do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race. See *Beer* v. *United States*, 425 U. S. 130, 140. It is designed to combat only those effects that are retrogressive. Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan, see *Holder*, *supra*, at 883 (plurality opinion), and necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. Section 2, on the other hand, applies in *all* jurisdictions and uses as its benchmark for comparison in vote dilution claims a hypothetical, undiluted plan. Making compliance with § 5 contingent upon compliance with § 2, as appellants urge, would, for all intents and purposes, replace the standards for § 5 with those for § 2, thus contradicting more than 20 years of precedent interpreting § 5. See, *e. g.*, *Beer*, *supra*. Appellants' contentions that their reading of § 5 is supported by the *Beer* decision, by the Attorney General's regulations, and by public policy considerations are rejected. Pp. 476–485.

2. Evidence showing that a jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to establish a jurisdiction's "intent to retrogress" under § 5, so there is no need to decide today whether such evidence is relevant to establish other types of discriminatory intent or whether § 5's purpose inquiry ever extends beyond the search for retrogressive intent. Because this Court cannot say with confidence that the District Court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, this aspect of that court's holding must be vacated. Pp. 486–490.

(a) Section 2 evidence may be "relevant" within the meaning of Federal Rule of Evidence 401, for the fact that a plan has a dilutive impact makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." This does not, of course, mean that evidence of a plan's dilutive impact is dispositive of the § 5 purpose inquiry. Indeed, if it were, § 2 would be effectively incorporated into § 5, a result this Court finds unsatisfactory. In conducting their inquiry into a jurisdiction's motivation in enacting voting changes, courts should look for guidance to *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, which sets forth a framework for examining discriminatory purpose. Pp. 486–489.

(b) This Court is unable to determine whether the District Court deemed irrelevant all evidence of the dilutive impact of the redistricting

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plan adopted by the Board. While some language in its opinion is consistent with today's holding that the existence of less dilutive options was at least relevant to the purpose inquiry, the District Court also appears to have endorsed the notion that dilutive impact evidence is irrelevant even to an inquiry into retrogressive intent. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction to remedy any remaining vestiges of a dual school system. Pp. 489–490.

907 F. Supp. 434, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined in full, and in which GINSBURG and BREYER, JJ., joined except insofar as Part III is inconsistent with the views expressed in the concurrence of BREYER, J. THOMAS, J., filed a concurring opinion, *post*, p. 490. BREYER, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 493. STEVENS, J., filed an opinion dissenting in part and concurring in part, in which SOUTER, J., joined, *post*, p. 497.

Assistant Attorney General Patrick argued the cause for appellant in No. 95–1455. With him on the briefs were *Acting Solicitor General Dellinger*, *Deputy Solicitor General Bender*, *Cornelia T. L. Pillard*, *David K. Flynn*, and *Steven H. Rosenbaum*. *John W. Borkowski* argued the cause for appellants in No. 95–1508. With him on the briefs were *Walter A. Smith, Jr.*, *Patricia A. Brannan*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Brenda Wright*, and *Samuel L. Walters*.

Michael A. Carvin argued the cause for appellee Bossier Parish School Board in both cases. With him on the brief were *David H. Thompson*, *James J. Thornton*, and *Michael P. McDonald*.†

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†*Laughlin McDonald*, *Neil Bradley*, *Steven R. Shapiro*, *Elaine R. Jones*, *Norman J. Chachkin*, and *Jacqueline Berrien* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Sharon L. Browne and *Deborah J. La Fetra* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging affirmance.

JUSTICE O'CONNOR delivered the opinion of the Court.

Today we clarify the relationship between § 2 and § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 439, as amended, 42 U. S. C. §§ 1973, 1973c. Specifically, we decide two questions: (i) whether preclearance must be denied under § 5 whenever a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2; and (ii) whether evidence that a new "standard, practice, or procedure" has a dilutive impact is always irrelevant to the inquiry whether the covered jurisdiction acted with "the purpose . . . of denying or abridging the right to vote on account of race or color" under § 5. We answer both in the negative.

I

Appellee Bossier Parish School Board (Board) is a jurisdiction subject to the preclearance requirements of § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c, and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." The Board has 12 members who are elected from single-member districts by majority vote to serve 4-year terms. When the 1990 census revealed wide population disparities among its districts, see App. to Juris. Statement 93a (Stipulations of Fact and Law ¶ 82), the Board decided to redraw the districts to equalize the population distribution.

During this process, the Board considered two redistricting plans. It considered, and initially rejected, the redistricting plan that had been recently adopted by the Bossier Parish Police Jury, the parish's primary governing body (the Jury plan), to govern its own elections. Just months before, the Attorney General had precleared the Jury plan, which also contained 12 districts. *Id.*, at 88a (Stipulations ¶ 68). None of the 12 districts in the Board's existing plan or in the Jury plan contained a majority of black residents. *Id.*, at

93a (Stipulations ¶ 82) (under 1990 population statistics in the Board's existing districts, the three districts with highest black concentrations contain 46.63%, 43.79%, and 30.13% black residents, respectively); *id.*, at 85a (Stipulations ¶ 59) (population statistics for the Jury plan, with none of the plan's 12 districts containing a black majority). Because the Board's adoption of the Jury plan would have maintained the status quo regarding the number of black-majority districts, the parties stipulated that the Jury plan was not "retrogressive." *Id.*, at 141a (Stipulations ¶ 252) ("The . . . plan is not retrogressive to minority voting strength compared to the existing benchmark plan . . ."). Appellant George Price, president of the local chapter of the National Association for the Advancement of Colored People (NAACP), presented the Board with a second option—a plan that created two districts each containing not only a majority of black residents, but a majority of voting-age black residents. *Id.*, at 98a (Stipulations ¶ 98). Over vocal opposition from local residents, black and white alike, the Board voted to adopt the Jury plan as its own, reasoning that the Jury plan would almost certainly be precleared again and that the NAACP plan would require the Board to split 46 electoral precincts.

But the Board's hopes for rapid preclearance were dashed when the Attorney General interposed a formal objection to the Board's plan on the basis of "new information" not available when the Justice Department had precleared the plan for the Police Jury—namely, the NAACP's plan, which demonstrated that "black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts." *Id.*, at 155a–156a (Attorney General's August 30, 1993, objection letter). The objection letter asserted that the Board's plan violated § 2 of the Act, 42 U. S. C. § 1973, because it "unnecessarily limit[ed] the opportunity for minority voters to elect their candidates of choice," App. to Juris. Statement, at 156a, as compared to the new alternative. Relying on 28 CFR § 51.55(b)(2) (1996), which

provides that the Attorney General shall withhold preclearance where "necessary to prevent a clear violation of amended Section 2 [42 U. S. C. § 1973]," the Attorney General concluded that the Board's redistricting plan warranted a denial of preclearance under § 5. App. to Juris. Statement 157a. The Attorney General declined to reconsider the decision. *Ibid.*

The Board then filed this action seeking preclearance under § 5 in the District Court for the District of Columbia. Appellant Price and others intervened as defendants. The three-judge panel granted the Board's request for preclearance, over the dissent of one judge. 907 F. Supp. 434, 437 (1995). The District Court squarely rejected the appellants' contention that a voting change's alleged failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5: "We hold, as has every court that has considered the question, that a political subdivision that does not violate either the 'effect' or the 'purpose' prong of section 5 cannot be denied preclearance because of an alleged section 2 violation." *Id.*, at 440–441. Given this holding, the District Court quite properly expressed no opinion on whether the Jury plan in fact violated § 2, and its refusal to reach out and decide the issue in dicta does not require us, as JUSTICE STEVENS insists, to "assume that the record discloses a 'clear violation' of § 2." See *post*, at 499 (opinion dissenting in part and concurring in part). That issue has yet to be decided by any court. The District Court did, however, reject appellants' related argument that a court "must still consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5." *Id.*, at 445. We noted probable jurisdiction on June 3, 1996. 517 U. S. 1232.

II

The Voting Rights Act of 1965 (Act), 42 U. S. C. § 1973 *et seq.*, was enacted by Congress in 1964 to "attac[k] the blight of voting discrimination" across the Nation. S. Rep. No. 97–

417, 2d Sess., p. 4 (1982); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966). Two of the weapons in the Federal Government's formidable arsenal are § 5 and § 2 of the Act. Although we have consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States, see *Holder* v. *Hall*, 512 U. S. 874, 883 (1994) (plurality opinion) (noting how the two sections "differ in structure, purpose, and application"), appellants nevertheless ask us to hold that a violation of § 2 is an independent reason to deny preclearance under § 5. Unlike JUSTICE STEVENS, *post*, at 502–503, and n. 5 (opinion dissenting in part and concurring in part), we entertain little doubt that the Department of Justice or other litigants would "routinely" attempt to avail themselves of this new reason for denying preclearance, so that recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject appellants' position.

Section 5, 42 U. S. C. § 1973c, was enacted as

> "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'" *Beer* v. *United States*, 425 U. S. 130, 140 (1976) (quoting H. R. Rep. No. 94–196, pp. 57–58 (1970)).

In light of this limited purpose, § 5 applies only to certain States and their political subdivisions. Such a covered ju-

risdiction may not implement any change in a voting "qualification, prerequisite, standard, practice, or procedure" unless it first obtains either administrative preclearance of that change from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 42 U. S. C. § 1973c. To obtain judicial preclearance, the jurisdiction bears the burden of proving that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.; City of Rome* v. *United States*, 446 U. S. 156, 183, n. 18 (1980) (covered jurisdiction bears burden of proof). Because § 5 focuses on "freez[ing] election procedures," a plan has an impermissible "effect" under § 5 only if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, *supra*, at 141.

Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. See *Holder*, *supra*, at 883 (plurality opinion) ("Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change"). It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. In *Beer*, for example, we concluded that the city of New Orleans' reapportionment of its council districts, which created one district with a majority of voting-age blacks where before there had been none, had no discriminatory "effect." 425 U. S., at 141–142 ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5"). Likewise, in *City of Lockhart* v. *United States*, 460 U. S. 125 (1983), we found that the city's new charter had no retrogressive "effect" even though it maintained

the city's prior practice of electing its council members at-large from numbered posts, and instituted a new practice of electing two of the city's four council members every year (instead of electing all the council members every two years). While each practice could "have a discriminatory effect under some circumstances," *id.*, at 135, the fact remained that "[s]ince the new plan did not *increase* the degree of discrimination against [the city's Mexican-American population], it was entitled to § 5 preclearance [because it was not retrogressive]," *id.*, at 134 (emphasis added).

Section 2, on the other hand, was designed as a means of eradicating voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups," S. Rep. No. 97–417, at 28. Under this broader mandate, § 2 bars *all* States and their political subdivisions from maintaining any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race or color." 42 U. S. C. § 1973(a). A voting practice is impermissibly dilutive within the meaning of § 2

> "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [members of a class defined by race or color] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b).

A plaintiff claiming vote dilution under § 2 must initially establish that: (i) "[the racial group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; (ii) the group is "politically cohesive"; and (iii) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

Thornburg v. *Gingles*, 478 U. S. 30, 50–51 (1986); *Growe* v. *Emison*, 507 U. S. 25, 40 (1993). The plaintiff must also demonstrate that the totality of the circumstances supports a finding that the voting scheme is dilutive. *Johnson* v. *De Grandy*, 512 U. S. 997, 1011 (1994); see *Gingles*, *supra*, at 44–45 (listing factors to be considered by a court in assessing the totality of the circumstances). Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an "undiluted" practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark "undiluted" voting practice. *Holder* v. *Hall*, 512 U. S., at 881 (plurality opinion); *id.*, at 950–951 (Blackmun, J., dissenting).

Appellants contend that preclearance must be denied under § 5 whenever a covered jurisdiction's redistricting plan violates § 2. The upshot of this position is to shift the focus of § 5 from nonretrogression to vote dilution, and to change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan.

But § 5, we have held, is designed to combat only those effects that are retrogressive. See *supra*, at 477–479. To adopt appellants' position, we would have to call into question more than 20 years of precedent interpreting § 5. See, *e. g.*, *Beer*, *supra; City of Lockhart*, *supra.* This we decline to do. Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect. See, *e. g.*, *Elkins* v. *United States*, 364 U. S. 206, 219 (1960) ("[A]s a practical matter it is never easy to prove a negative"). To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive "result" before it can implement that plan—even if the Attorney General bears the burden of proving that "result"—is to increase further the serious federalism costs already implicated by § 5. See *Miller* v. *Johnson*, 515 U. S. 900, 926 (1995) (noting the "federalism costs exacted by § 5 preclearance").

Appellants nevertheless contend that we should adopt their reading of § 5 because it is supported by our decision in *Beer*, by the Attorney General's regulations, and by considerations of public policy. In *Beer*, we held that § 5 prohibited only retrogressive effects and further observed that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U. S., at 141. Although there had been no allegation that the redistricting plan in *Beer* "so . . . discriminate[d] on the basis of race or color as to be unconstitutional," we cited in dicta a few cases to illustrate when a redistricting plan might be found to be constitutionally offensive. *Id.*, at 142, n. 14. Among them was our decision in *White* v. *Regester*, 412 U. S. 755 (1973), in which we sustained a vote dilution challenge, brought under the Equal Protection Clause, to the use of multimember election districts in two Texas counties. Appellants argue that "[b]ecause vote dilution standards under the Constitution and Section 2 were generally coextensive at the time *Beer* was decided, *Beer*'s discussion meant that practices that violated Section 2 would not be entitled to preclearance under Section 5." Brief for Federal Appellant 36–37.

Even assuming, *arguendo*, that appellants' argument had some support in 1976, it is no longer valid today because the applicable statutory and constitutional standards have changed. Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose. See *Mobile* v. *Bolden*, 446 U. S. 55, 62 (1980) (plurality opinion) ("Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"); *id.*, at 66 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection

Clause of the Fourteenth Amendment"); see also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component, see S. Rep. No. 97–417, at 2 ("Th[e 1982] amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2"). Because now the Constitution requires a showing of intent that § 2 does not, a violation of § 2 is no longer *a fortiori* a violation of the Constitution. Congress itself has acknowledged this fact. See *id.*, at 39 ("The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself").

JUSTICE STEVENS argues that the subsequent divergence of constitutional and statutory standards is of no moment because, in his view, we "did not [in *Beer*] purport to distinguish between challenges brought under the Constitution and those brought under the [Voting Rights] statute." *Post*, at 504 (opinion dissenting in part and concurring in part). Our citation to *White*, he posits, incorporated *White*'s standard into our exception for nonretrogressive apportionments that violate § 5, whether or not that standard continued to coincide with the constitutional standard. In essence, JUSTICE STEVENS reads *Beer* as creating an exception for nonretrogressive apportionments that so discriminate on the basis of race or color as to violate any federal law that happens to coincide with what would have amounted to a constitutional violation in 1976. But this reading flatly contradicts the plain language of the exception we recognized, which applies solely to apportionments that "so discriminat[e] on the basis of race or color as to violate *the Constitution.*" *Beer, supra*, at 141 (emphasis added). We cited *White*, not for itself, but because it embodied the current

constitutional standard for a violation of the Equal Protection Clause. See also 425 U. S., at 143, n. 14 (noting that New Orleans' plan did "not remotely approach a violation of the *constitutional* standards enunciated in" *White* and other cited cases (emphasis added)). When *White* ceased to represent the current understanding of the Constitution, a violation of its standard—even though that standard was later incorporated in § 2—no longer constituted grounds for denial of preclearance under *Beer*.

Appellants' next claim is that we must defer to the Attorney General's regulations interpreting the Act, one of which states:

> "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance." 28 CFR § 51.55(b)(2) (1996).

Although we normally accord the Attorney General's construction of the Act great deference, "we only do so if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 508 (1992). Given our longstanding interpretation of § 5, see *supra*, at 477–479, 480–482 and this page, which Congress has declined to alter by amending the language of § 5, *Arkansas Best Corp.* v. *Commissioner*, 485 U. S. 212, 222, n. 7 (1988) (placing some weight on Congress' failure to express disfavor with our 25-year interpretation of a tax statute), we believe Congress has made it sufficiently clear that a violation of § 2 is not grounds in and of itself for denying preclearance under § 5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments, S. Rep. No. 97–417, *supra*, at 12, n. 31, does not

change our view. With those amendments, Congress, among other things, renewed § 5 but did so without changing its applicable standard. We doubt that Congress would depart from the settled interpretation of § 5 and impose a demonstrably greater burden on the jurisdictions covered by § 5, see *supra*, at 480, by dropping a footnote in a Senate Report instead of amending the statute itself. See *Pierce* v. *Underwood*, 487 U. S. 552, 567 (1988) ("Quite obviously, reenacting precisely the same language would be a strange way to make a change"). See also *City of Lockhart* v. *United States*, 460 U. S. 125 (1983) (reaching its holding over Justice Marshall's dissent, which raised the argument now advanced by appellants regarding this passage in the Senate Report).

Nor does the portion of the House Report cited by JUSTICE STEVENS unambiguously call for the incorporation of § 2 into § 5. That portion of the Report states:

> "[M]any voting and election practices currently in effect are outside the scope of [§ 5] . . . because they were in existence before 1965. . . . Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i. e., litigation [under § 2] or preclearance [under § 5]." H. R. Rep. No. 97–227, p. 28 (1981).

The obvious thrust of this passage is to establish that pre-1965 discriminatory practices are not free from scrutiny under the Act just because they need not be precleared under § 5: Such practices might still violate § 2. But to say that pre-1965 practices can be reached solely by § 2 is not to say that all post-1965 changes that might violate § 2 may be reached by both § 2 *and § 5* or that "the substantive standards for § 2 and § 5 [are] the same," see *post*, at 506 (opinion dissenting in part and concurring in part). Our ultimate conclusion is also not undercut by statements found in the "post-enactment legislative record," see *post*, at 506, n. 9, given that "the views of a subsequent Congress form a hazardous

basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S. 304, 313 (1960). We therefore decline to give these sources controlling weight.

Appellants' final appeal is to notions of public policy. They assert that if the district court or Attorney General examined whether a covered jurisdiction's redistricting plan violates § 2 at the same time as ruling on preclearance under § 5, there would be no need for two separate actions and judicial resources would be conserved. Appellants are undoubtedly correct that adopting their interpretation of § 5 would serve judicial economy in those cases where a § 2 challenge follows a § 5 proceeding. But this does not always happen, and the burden on judicial resources might actually increase if appellants' position prevailed because § 2 litigation would effectively be incorporated into *every* § 5 proceeding.

Appellants lastly argue that preclearance is an equitable remedy, obtained through a declaratory judgment action in district court, see 42 U. S. C. § 1973c, or through the exercise of the Attorney General's discretion, see 28 CFR § 51.52(a) (1996). A finding that a redistricting plan violates § 2 of the Act, they contend, is an equitable "defense," on the basis of which a decisionmaker should, in the exercise of its equitable discretion, be free to deny preclearance. This argument, however, is an attempt to obtain through equity that which the law—*i. e.*, the settled interpretation of § 5—forbids. Because "it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law,'" *INS* v. *Pangilinan*, 486 U. S. 875, 883 (1988) (citing *Hedges* v. *Dixon County*, 150 U. S. 182, 192 (1893)), this argument must fail.

Of course, the Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction's newly enacted voting "qualification, prerequisite, standard, practice, or procedure" may violate that section. All we hold today is that preclearance under § 5 may not be denied on that basis alone.

III

Appellants next contend that evidence showing that a jurisdiction's redistricting plan dilutes the voting power of minorities is at least *relevant* in a § 5 proceeding because it tends to prove that the jurisdiction enacted its plan with a discriminatory "purpose." The District Court, reasoning that "[t]he line [between § 2 and § 5] cannot be blurred by allowing a defendant to do indirectly what it cannot do directly," 907 F. Supp., at 445, rejected this argument and held that it "will not permit section 2 evidence to prove discriminatory purpose under section 5," *ibid.* Because we hold that some of this "§ 2 evidence" may be relevant to establish a jurisdiction's "intent to retrogress" and cannot say with confidence that the District Court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, we vacate this aspect of the District Court's holding and remand. In light of this conclusion, we leave open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent. See *Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454, 465, n. 5 (1989) (declining to decide an issue that "is not necessary to our decision"). Reserving this question is particularly appropriate when, as in this suit, it was not squarely addressed by the decision below or in the parties' briefs on appeal. See Brief for Federal Appellant 23; Brief for Appellant Price et al. 31–33, 34–35; Brief for Appellee 42–43. But in doing so, we do not, contrary to JUSTICE STEVENS' view, see *post*, at 499 (opinion dissenting in part and concurring in part), necessarily assume that the Board enacted the Jury plan with some nonretrogressive, but nevertheless discriminatory, "purpose." The existence of such a purpose, and its relevance to § 5, are issues to be decided on remand.

Although § 5 warrants a denial of preclearance if a covered jurisdiction's voting change "ha[s] the purpose [or] . . . the effect of denying or abridging the right to vote on account

of race or color," 42 U. S. C. § 1973c, we have consistently interpreted this language in light of the purpose underlying § 5—"to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities." *Beer*, 425 U. S., at 141. Accordingly, we have adhered to the view that the only "effect" that violates § 5 is a retrogressive one. *Ibid.; City of Lockhart*, 460 U. S., at 134.

Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401. As we observed in *Arlington Heights*, 429 U. S., at 266, the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions. Thus, a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact. A jurisdiction that acts with an intent to dilute minority voting strength is more likely to act with an intent to worsen the position of minority voters—*i. e.*, an intent to retrogress—than a jurisdiction acting with no intent to dilute. The fact that a plan has a dilutive impact therefore makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance . . . is a liberal one," *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 587 (1993), and one we think is met here.

That evidence of a plan's dilutive impact may be relevant to the § 5 purpose inquiry does not, of course, mean that such evidence is dispositive of that inquiry. In fact, we have previously observed that a jurisdiction's single decision to choose a redistricting plan that has a dilutive impact does not, with-

out more, suffice to establish that the jurisdiction acted with a discriminatory purpose. *Shaw* v. *Hunt*, 517 U. S. 899, 914, n. 6 (1996) ("[W]e doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5"). This is true whether the jurisdiction chose the more dilutive plan because it better comported with its traditional districting principles, see *Miller* v. *Johnson*, 515 U. S., at 922 (rejecting argument that a jurisdiction's failure to adopt the plan with the greatest possible number of majority black districts establishes that it acted with a discriminatory purpose); *Shaw*, *supra*, at 912–913 (same), or if it chose the plan for no reason at all. Indeed, if a plan's dilutive impact were dispositive, we would effectively incorporate § 2 into § 5, which is a result we find unsatisfactory no matter how it is packaged. See Part II, *supra*.

As our discussion illustrates, assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights*, 429 U. S., at 266. In conducting this inquiry, courts should look to our decision in *Arlington Heights* for guidance. There, we set forth a framework for analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking. *Ibid.* In addition to serving as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause for over two decades, see, *e. g.*, *Shaw* v. *Reno*, 509 U. S. 630, 644 (1993) (citing *Arlington Heights* standard in context of Equal Protection Clause challenge to racial gerrymander of districts); *Rogers* v. *Lodge*, 458 U. S. 613, 618 (1982) (evaluating vote dilution claim under Equal Protection Clause using *Arlington Heights* test); *Mobile*, 446 U. S., at 70–74 (same), the *Arlington Heights* framework has also been used, at least in part, to evaluate purpose in our previous § 5 cases. See *Pleasant Grove* v. *United States*, 479 U. S. 462, 469–470 (1987) (considering city's history in rejecting annexation of

black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); see also *Busbee* v. *Smith*, 549 F. Supp. 494, 516–517 (DC 1982), summarily aff'd, 459 U. S. 1166 (1983) (referring to *Arlington Heights* test); *Port Arthur* v. *United States*, 517 F. Supp. 987, 1019, aff'd, 459 U. S. 159 (1982) (same).

The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.'" 429 U. S., at 266 (citing *Washington* v. *Davis*, 426 U. S. 229, 242 (1976)). In a § 5 case, "impact" might include a plan's retrogressive effect and, for the reasons discussed above, its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." 429 U. S., at 266–268.

We are unable to determine from the District Court's opinion in this action whether it deemed irrelevant all evidence of the dilutive impact of the redistricting plan adopted by the Board. At one point, the District Court correctly stated that "the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot *by itself* give rise to the inference of discriminatory intent." 907 F. Supp., at 450 (emphasis added). This passage implies that the District Court believed that the existence of less dilutive options was at least relevant to, though not dispositive of, its purpose inquiry. While this language is consistent with our holding today, see *supra*, at 486–488, the District Court also declared that "we will not permit section 2 evidence to prove discriminatory purpose under section 5," *supra*, at 486. With this statement, the District Court appears to endorse the notion that evidence

of dilutive impact is irrelevant even to an inquiry into retrogressive intent, a notion we reject. See *supra*, at 486–488.

The Board contends that the District Court actually "presumed that white majority districts had [a dilutive] effect," Brief for Appellee 35, and "cut directly to the dispositive question 'started' by the existence of [a dilutive] impact: did the Board have 'legitimate, nondiscriminatory motives' for adopting its plan[?]" *Id.*, at 33. Even if the Board were correct, the District Court gave no indication that it was assuming the plan's dilutive effect, and we hesitate to attribute to the District Court a rationale it might not have employed. Because we are not satisfied that the District Court considered evidence of the dilutive impact of the Board's redistricting plan, we vacate this aspect of the District Court's opinion. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction "to 'remedy any remaining vestiges of [a] dual [school] system,'" 907 F. Supp., at 449, n. 18.

* * *

The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

JUSTICE THOMAS, concurring.

Although I continue to adhere to the views I expressed in *Holder* v. *Hall*, 512 U. S. 874, 891 (1994) (opinion concurring in judgment), I join today's opinion because it is consistent with our vote dilution precedents. I fully anticipate, however, that as a result of today's holding, all of the problems we have experienced in §2 vote dilution cases will now be replicated and, indeed, exacerbated in the §5 retrogression inquiry.

I have trouble, for example, imagining a reapportionment change that could not be deemed "retrogressive" under our

vote dilution jurisprudence by a court inclined to find it so. We have held that a reapportionment plan that "enhances the position of racial minorities" by increasing the number of majority-minority districts does not "have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). But in so holding we studiously avoided addressing one of the necessary consequences of increasing majority-minority districts: Such action *necessarily decreases* the level of minority influence in surrounding districts, and to that extent "dilutes" the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole. See, *e. g.*, *Hays* v. *Louisiana*, 936 F. Supp. 360, 364, n. 17 (WD La. 1996) (three-judge court) (noting that plaintiffs' expert "argues convincingly that our plan, with its one black majority and three influence districts, empowers more black voters statewide than does" a plan with two black-majority districts and five "bleached" districts in which minority influence was reduced in order to create the second black-majority district); cf. *Johnson* v. *De Grandy*, 512 U. S. 997, 1007 (1994) (noting that dilution can occur by "fragmenting the minority voters among several districts . . . or by packing them into one or a small number of districts to minimize their influence in the districts next door").

Under our vote dilution jurisprudence, therefore, a court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts). A court could presumably even strike down a new reapportionment plan that did not significantly alter the status quo at all, on the theory that such a plan did not measure up to some hypothetical ideal. With such an indeterminate "rule," § 5 ceases to be primarily a prophylactic tool in the important war against discrimination in voting, and instead becomes the means whereby the Federal Government, and particularly the Department of Justice, usurps

the legitimate political judgments of the States. And such an empty "rule" inevitably forces the courts to make political judgments regarding which type of apportionment best serves supposed minority interests—judgments that the courts are ill equipped to make.

I can at least find some solace in the belief that today's opinion will force us to confront, with a renewed sense of urgency, this fundamental inconsistency that lies at the heart of our vote dilution jurisprudence.

Beyond my general objection to our vote dilution precedent, the one portion of the majority opinion with which I disagree is the majority's new suggestion that preclearance standards established by the Department of Justice are "normally" entitled to deference. See *ante*, at 483.* Section 5 sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U. S. C. § 1973c (generally requiring District Court preclearance, with a proviso that covered jurisdictions may *obtain* preclearance by the Attorney General in lieu of District Court preclearance, but providing no authority for the Attorney General to *preclude* judicial preclearance). Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

Moreover, given our own "longstanding interpretation of § 5," see *ante*, at 483, deference to the particular preclearance regulation addressed in this action would be inconsistent with another of the Attorney General's regulations, which provides: "In making determinations [under § 5] the Attorney General will be guided by the relevant decisions of the

*I do not address the separate question, not presented by this action, whether the Department's *interpretation* of the Voting Rights Act of 1965, as opposed to its articulation of standards applicable to its own preclearance determinations, is entitled to deference. The regulation at issue here only purports to be the latter.

Supreme Court of the United States and of other Federal courts." 28 CFR § 51.56 (1996). Thus, while I agree with the majority's decision not to defer to the Attorney General's standards, I would reach that result on different grounds.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, concurring in part and concurring in the judgment.

I join Parts I and II of the majority opinion, and Part III insofar as it is not inconsistent with this opinion. I write separately to express my disagreement with one aspect of the majority opinion. The majority says that we need not decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante*, at 486. In my view, we should decide the question, for otherwise the District Court will find it difficult to evaluate the evidence that we say it must consider. Cf. *post*, at 508 (STEVENS, J., dissenting in part and concurring in part). Moreover, the answer to the question is that the "purpose" inquiry does extend beyond the search for retrogressive intent. It includes the purpose of unconstitutionally diluting minority voting strength.

The language of § 5 itself forbids a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," where that change either (1) has the "purpose" or (2) will have the "effect" of "denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973c. These last few words reiterate in context the language of the Fifteenth Amendment itself: "The right of citizens . . . to vote shall not be denied or abridged . . . on account of race [or] color . . . ." This use of constitutional language indicates that one purpose forbidden by the statute is a purpose to act unconstitutionally. And a new plan enacted with the purpose of unconstitutionally diluting minority votes is an unconstitutional plan. *Mobile* v. *Bolden*, 446 U. S. 55, 62–63, 66 (1980) (plurality opinion); *ante*, at 481–482.

Of course, the constitutional language also applies to § 5's prohibition that rests upon "effects." The Court assumes, in its discussion of "effects," that the § 5 word "effects" does not now embody a *purely* constitutional test, whether or not it ever did so. See *ante*, at 478; *City of Rome* v. *United States*, 446 U. S. 156, 173, 177 (1980). And that fact, here, is beside the point. The separate argument about the meaning of the word "effect" concerns *how far beyond* the Constitution's requirements Congress intended that word to reach. The argument about "purpose" is simply whether Congress intended the word to reach *as far as* the Constitution itself, embodying those purposes that, in relevant context, the Constitution itself would forbid. I can find nothing in the Court's discussion that shows that Congress intended to restrict the meaning of the statutory word "purpose" short of what the Constitution itself requires. And the Court has previously expressly indicated that minority vote dilution is a harm that § 5 guards against. *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 569 (1969).

Consider a hypothetical example that will clarify the precise legal question here at issue. Suppose that a covered jurisdiction is choosing between two new voting plans, A and B. Neither plan is retrogressive. Plan A violates every traditional districting principle, but from the perspective of minority representation, it maintains the status quo, thereby meeting the "effects" test of § 5. See *ante*, at 478–479. Plan B is basically consistent with traditional districting principles and it also creates one or two new majority-minority districts (in a State where the number of such districts is significantly less than proportional to minority voting age population). Suppose further that the covered jurisdiction adopts Plan A. Without any other proposed evidence or justification, ordinary principles of logic and human experience suggest that the jurisdiction would likely have adopted Plan A with "the purpose . . . of denying or abridging the right to vote on account of race or color." § 1973c. It is reason-

able to assume that the Constitution would forbid the use of such a plan. See *Rogers* v. *Lodge*, 458 U. S. 613, 617 (1982) (Fourteenth Amendment covers vote dilution claims); *Mobile*, 446 U. S., at 66 (plurality opinion) (same). And compare *id.*, at 62–63 (intentional vote dilution may be illegal under the Fifteenth Amendment) and *Gomillion* v. *Lightfoot*, 364 U. S. 339, 346 (1960) (Fifteenth Amendment covers municipal boundaries drawn to exclude blacks), with *Mobile*, *supra*, at 84, n. 3 (STEVENS, J., concurring in judgment) (*Mobile* plurality said that Fifteenth Amendment does not reach vote dilution); *Voinovich* v. *Quilter*, 507 U. S. 146, 159 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims . . ."); *Shaw* v. *Reno*, 509 U. S. 630, 645 (1993) (endorsing the *Gomillion* concurrence's Fourteenth Amendment approach); and *Beer* v. *United States*, 425 U. S. 130, 142, n. 14 (1976). Then, to read § 5's "purpose" language to require approval of Plan A, even though the jurisdiction cannot provide a neutral explanation for its choice, would be both to read § 5 contrary to its plain language and also to believe that Congress would have wanted a § 5 court (or the Attorney General) to approve an unconstitutional plan adopted with an unconstitutional purpose.

In light of this example, it is not surprising that this Court has previously indicated that the purpose part of § 5 prohibits a plan adopted with the purpose of unconstitutionally diluting minority voting strength, whether or not the plan is retrogressive in its effect. In *Shaw* v. *Hunt*, 517 U. S. 899 (1996), for example, the Court doubted "that a showing of discriminatory effect under § 2, *alone*, could support a claim of discriminatory purpose under § 5." *Id.*, at 914, n. 6 (emphasis added). The word "alone" suggests that the evidence of a discriminatory effect there at issue—evidence of dilution—could be relevant to a discriminatory purpose claim. And if so, the more natural understanding of § 5 is that an unlawful purpose includes more than simply a purpose to

retrogress. Otherwise, dilution would either dispositively show an unlawful discriminatory effect (if retrogressive) or it would almost always be irrelevant (if not retrogressive). Either way, it would not normally have much to do with unlawful purpose. See also the discussions in *Richmond* v. *United States*, 422 U. S. 358, 378–379 (1975) (annexation plan did not have an impermissible dilutive effect but the Court remanded for a determination of whether there was an impermissible § 5 purpose); *Pleasant Grove* v. *United States*, 479 U. S. 462, 471–472, and n. 11 (1987) (purpose to minimize *future* black voting strength is impermissible under § 5); *Port Arthur* v. *United States*, 459 U. S. 159, 168 (1982) (a plan adopted for a discriminatory purpose is invalid under § 5 even if it "might otherwise be said to reflect the political strength of the minority community"); *post*, at 507–508 (STEVENS, J., dissenting in part and concurring in part).

Miller v. *Johnson*, 515 U. S. 900 (1995), also implicitly assumed that § 5's "purpose" stretched beyond the purely retrogressive. There, the Justice Department pointed out that Georgia made a choice between two redistricting plans, one of which (call it Plan A) had more majority-black districts than the other (call it Plan B). The Department argued that the fact that Georgia chose Plan B showed a forbidden § 5 discriminatory purpose. The Court rejected this argument, but the reason that the majority gave for that rejection is important. The Court pointed out that Plan B embodied traditional state districting principles. It reasoned that "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference" of an unlawful discriminatory purpose. *Id.*, at 924. If the only relevant "purpose" were a retrogressive purpose, this reasoning, with its reliance upon traditional districting principles, would have been beside the point. The Court would have concerned itself only with Georgia's intent to worsen the position of minorities, not with the reasons why Georgia could

have adopted one of two potentially ameliorative plans. Indeed, the Court indicated that an ameliorative plan *would* run afoul of the § 5 purpose test if it violated the Constitution. *Ibid.* See also *Shaw* v. *Hunt*, *supra*, at 912–913.

In sum, the Court today should make explicit an assumption implicit in its prior cases. Section 5 prohibits a covered State from making changes in its voting practices and procedures where those changes have the *unconstitutional* "purpose" of unconstitutionally diluting minority voting strength.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting in part and concurring in part.

In my view, a plan that clearly violates § 2 is not entitled to preclearance under § 5 of the Voting Rights Act of 1965. The majority's contrary view would allow the Attorney General of the United States to place her stamp of approval on a state action that is in clear violation of federal law. It would be astonishing if Congress had commanded her to do so. In fact, however, Congress issued no such command. Surely no such command can be found in the text of § 5 of the Voting Rights Act.[1] Moreover, a fair review of the text

[1] As originally enacted, § 5 provided:

"Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney Gen-

and the legislative history of the 1982 amendment to § 2 of that Act indicates that Congress intended the Attorney General to deny preclearance under § 5 whenever it was clear that a new voting practice was prohibited by § 2. This does not mean that she must make an independent inquiry into possible violations of § 2 whenever a request for preclearance is made. It simply means that, as her regulations provide, she must refuse preclearance when "necessary to prevent a clear violation of amended section 2." 28 CFR § 51.55(b)(2) (1996).

It is, of course, well settled that the Attorney General must refuse to preclear a new election procedure in a covered jurisdiction if it will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). A retrogressive effect or a retrogressive purpose is a sufficient basis for denying a preclearance request under § 5. Today, however, the Court holds that retrogression is the only kind of effect that will justify denial of preclearance under § 5, *ante*, at 476–485, and it assumes that "the § 5 purpose inquiry [never] extends beyond the search for retrogressive intent." *Ante*, at 486. While I agree that this action must be remanded even under the Court's miserly interpretation of § 5, I disagree with the Court's holding/assumption that § 5 is concerned only with retrogressive effects and purposes.

Before explaining my disagreement with the Court, I think it important to emphasize the three factual predicates that underlie our analysis of the issues. First, we assume

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eral and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 U. S. C. § 2284] and any appeal shall lie to the Supreme Court." 79 Stat. 439.

that the plan submitted by the Bossier Parish School Board (Board) was not "retrogressive" because it did not make matters any worse than they had been in the past. None of the 12 districts had ever had a black majority and a black person had never been elected to the Board. App. to Juris. Statement 67a. Second, because the majority in both the District Court and this Court found that even clear violations of § 2 must be precleared and thus found it unnecessary to discuss whether § 2 was violated in this action, we may assume that the record discloses a "clear violation" of § 2. This means that, in the language of § 2, it is perfectly clear that "the political processes leading to nomination or election [to positions on the Board] are not equally open to participation by members of [the African-American race] in that its members have less opportunity than other members of the electorate to . . . elect representatives of their choice." 42 U. S. C. § 1973(b).[2] Third, if the Court is correct in assuming that the purpose inquiry under § 5 may be limited to evidence of "retrogressive intent," it must also be willing to assume that the documents submitted in support of the request for preclearance clearly establish that the plan was adopted for the specific purpose of preventing African-Americans from obtaining representation on the Board. Indeed, for the purpose of analyzing the legal issues, we must assume that Judge Kessler, concurring in part and dissenting in part, accurately summarized the evidence when she wrote:

> "The evidence in this case demonstrates overwhelmingly that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory

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[2] Although the majority in the District Court refused to consider any of the evidence relevant to a § 2 violation, the parties' stipulations suggest that the plan violated § 2. For instance, the parties' stipulated that there had been a long history of discrimination against black voters in Bossier Parish, see App. to Juris. Statement 130a–140a; that voting in Bossier Parish was racially polarized, see *id.*, at 122a–127a; and that it was possible to draw two majority-black districts without violating traditional districting principles, see *id.*, at 76a, 82a–83a, 114a–115a.

> purpose. The adoption of the Police Jury plan bears heavily on the black community because it denies its members a reasonable opportunity to elect a candidate of their choice. The history of discrimination by the Bossier School System and the Parish itself demonstrates the Board's continued refusal to address the concerns of the black community in Bossier Parish. The sequence of events leading up to the adoption of the plan illustrate the Board's discriminatory purpose. The School Board's substantive departures from traditional districting principles is similarly probative of discriminatory motive. Three School Board members have acknowledged that the Board is hostile to black representation. Moreover, some of the purported rationales for the School Board's decision are flat-out untrue, and others are so glaringly inconsistent with the facts of the case that they are obviously pretexts." 907 F. Supp. 434, 463 (DC 1995).

If the purpose and the effect of the Board's plan were simply to maintain the discriminatory status quo as described by Judge Kessler, the plan would not have been retrogressive. But, as I discuss below, that is not a sufficient reason for concluding that it complied with § 5.

I

In the Voting Rights Act of 1965, Congress enacted a complex scheme of remedies for racial discrimination in voting. As originally enacted, § 2 of the Act was "an uncontroversial provision" that "simply restated" the prohibitions against such discrimination "already contained in the Fifteenth Amendment," *Mobile* v. *Bolden*, 446 U. S. 55, 61 (1980) (plurality opinion). Like the constitutional prohibitions against discriminatory districting practices that were invalidated in cases like *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and *White* v. *Regester*, 412 U. S. 755 (1973), § 2 was made applicable to every State and political subdivision in the country.

Section 5, on the other hand, was highly controversial because it imposed novel, extraordinary remedies in certain areas where discrimination had been most flagrant. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 334–335 (1966).[3] Jurisdictions like Bossier Parish in Louisiana are covered by § 5 because their history of discrimination against African-Americans was a matter of special concern to Congress. Because these jurisdictions had resorted to various strategies to avoid complying with court orders to remedy discrimination, "Congress had reason to suppose that [they] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.*, at 335. Thus Congress enacted § 5, not to maintain the discriminatory status quo, but to stay ahead of efforts by the most resistant jurisdictions to undermine the Act's purpose of "rid[ding] the country of racial discrimination." *Id.*, at 315 ("The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant").

In areas of the country lacking a history of pervasive discrimination, Congress presumed that voting practices were generally lawful. Accordingly, the burden of proving a violation of § 2 has always rested on the party challenging the voting practice. The situation is dramatically different in covered jurisdictions. In those jurisdictions, § 5 flatly prohibits the adoption of any new voting procedure unless the State or political subdivision institutes an action in the Federal District Court for the District of Columbia and obtains a declaratory judgment that the change will not have a discriminatory purpose or effect. See 42 U. S. C. § 1973c. The burden of proving compliance with the Act rests on the jurisdiction. A proviso to § 5 gives the Attorney General the authority to allow the new procedure to go into effect, but

[3] Section 4 of the Act sets forth the formula for identifying the jurisdictions in which such discrimination had occurred, see *South Carolina* v. *Katzenbach*, 383 U. S., at 317–318.

like the immigration statutes that give her broad discretion to waive deportation of undesirable aliens, it does not expressly impose any limit on her discretion to refuse preclearance. See *ibid.* The Attorney General's discretion is, however, cabined by regulations that are presumptively valid if they "are reasonable and do not conflict with the Voting Rights Act itself," *Georgia* v. *United States*, 411 U. S. 526, 536 (1973). Those regulations provide that preclearance will generally be granted if a proposed change "is free of discriminatory purpose and retrogressive effect"; they also provide, however, that in "those instances" in which the Attorney General concludes "that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2," preclearance shall be withheld.[4] There is no basis for the Court's speculation that litigants would so "'routinely,'" *ante*, at 477, employ this 10-year-old regulation as to "make compliance with § 5 contingent upon compliance with § 2," *ibid.* Nor do the regulations require the jurisdiction to assume the burden of proving the absence of vote

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[4] Title 28 CFR § 51.55 (1996) provides:

"Consistency with constitutional and statutory requirements.

"(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U. S. C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

"(b) *Section 2.* (1) Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change subsequently demonstrates that such action is appropriate.

"(2) In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance."

dilution, see *ante,* at 480. They merely preclude preclearance when "necessary to prevent a clear violation of . . . section 2." While the burden of disproving discriminatory purpose or retrogressive effect is on the submitting jurisdiction, if the Attorney General's conclusion that the change would clearly violate § 2 is challenged, the burden on that issue, as in any § 2 challenge, should rest on the Attorney General.[5]

The Court does not suggest that this regulation is inconsistent with the text of § 5. Nor would this be persuasive, since the language of § 5 forbids preclearance of any voting practice that would have "the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973c. Instead the Court rests its entire analysis on the flawed premise that our cases hold that a change, even if otherwise unlawful, cannot have an effect prohibited by § 5 unless that effect is retrogressive. The two cases on which the Court relies, *Beer* v. *United States,* 425 U. S. 130 (1976), and *City of Lockhart* v. *United States,* 460 U. S. 125 (1983), do hold (as the current regulations provide) that proof that a change is not retrogressive is normally sufficient to justify preclearance under § 5. In neither case, however, was the Court confronted with the question whether that showing would be sufficient if the proposed change was so discriminatory that it clearly violated some other federal law.

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[5] Thus, I agree with those courts that have found that the jurisdiction is not required to prove that its proposed change will not violate § 2 in order to receive preclearance. See *Arizona* v. *Reno,* 887 F. Supp. 318, 321 (DC 1995). Although several three-judge District Courts have concluded that § 2 standards should not be incorporated into § 5, none has held that preclearance should be granted when there is a clear violation of § 2; rather, they appear simply to have determined that a § 2 inquiry is not routinely required in a § 5 case. See, *e. g., Georgia* v. *Reno,* 881 F. Supp. 7, 12–14 (DC 1994); *New York* v. *United States,* 874 F. Supp. 394, 398–399 (DC 1994); cf. *Burton* v. *Sheheen,* 793 F. Supp. 1329, 1350 (SC 1992) (holding that although courts are not "obligated to completely graft" § 2 standards onto § 5, "[i]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of § 2").

In fact, in *Beer*—which held that a legislative reapportionment enhancing the position of African-American voters did not have a discriminatory effect—the Court stated that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U. S., at 141.[6] Thus, to the extent that the *Beer* Court addressed the question at all, it suggested that certain nonretrogressive changes that were nevertheless discriminatory should not be precleared.

The Court discounts the significance of the "unless" clause because it refers to a constitutional violation rather than a statutory violation. According to the Court's reading, the *Beer* dictum at most precludes preclearance of changes that violate the Constitution rather than changes that violate § 2. This argument is unpersuasive. As the majority notes, the *Beer* Court cites *White* v. *Regester*, 412 U. S., at 766, which found unconstitutional a reapportionment scheme that gave African-American residents "less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Because, in 1976, when *Beer* was decided, the § 2 standard was coextensive with the constitutional standard, *Beer* did not purport to distinguish between challenges brought under the Constitution and those brought under the statute. Rather *Beer*'s dictum suggests that any changes that violate the standard established in *White* v. *Regester* should not be precleared.[7]

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[6] In *Lockhart* the Court disavowed reliance on the ameliorative character of the change reviewed in *Beer*, see 460 U. S., at 134, n. 10. It left open the question whether Congress had altered the *Beer* standard when it amended § 2 in 1982, 460 U. S., at 133, n. 9, and said nothing about the possible significance of a violation of a constitutional or statutory prohibition against vote dilution.

[7] In response to this dissent, the majority contends that, at most, *Beer* v. *United States*, 425 U. S. 130 (1976), allows denial of preclearance for those changes that violate the Constitution. See *ante*, at 482–483. Thus, the majority apparently concedes that our "settled interpretation," *ante*,

As the Court recognizes, *ante,* at 481–482, the law has changed in two respects since the announcement of the *Beer* dictum. In 1980, in what was perceived by Congress to be a change in the standard applied in *White* v. *Regester,* a plurality of this Court concluded that discriminatory purpose is an essential element of a constitutional vote dilution challenge. See *Mobile* v. *Bolden,* 446 U. S., at 62. In reaction to that decision, in 1982 Congress amended § 2 by placing in the statute the language used in the *White* opinion to describe what is commonly known as the "results" standard for evaluating vote dilution challenges. See 96 Stat. 134 (now codified at 42 U. S. C. §§ 1973(a)–(b)); *Thornburg* v. *Gingles,* 478 U. S. 30, 35 (1986).[8] Thus Congress preserved, as a matter of statutory law, the very same standard that the Court had identified in *Beer* as an exception to the general rule requiring preclearance of nonretrogressive changes. Because in 1975 *Beer* required denial of preclearance for voting plans that violated the *White* standard, it follows that Congress, in preserving the *White* standard, intended also that the Attorney General should continue to refuse to preclear plans violating that standard.

That intent is confirmed by the legislative history of the 1982 Act. The Senate Report states:

> "Under the rule of *Beer* v. *United States,* 425 U. S. 130 (1976), a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' 425 U. S. at 141; *see also* 142 n. 14 (citing to the dilution cases from *Fortson* v. *Dorsey*[, 379 U. S. 433 (1965),] through *White* v. *Regester*). In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so

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at 484, of § 5 supports a denial of preclearance for at least some nonretrogressive changes.

[8] The amended version of § 2 tracks the language in *White* v. *Regester,* 412 U. S. 755, 766 (1973).

> discriminates as to violate section 2." S. Rep. No. 97–417, p. 12, n. 31 (1982).

The House Report conveys the same message in different language. It unequivocally states that whether a discriminatory practice or procedure was in existence before 1965 (and therefore only subject to attack under § 2) or is the product of a recent change (and therefore subject to preclearance under § 5) "affects only the mechanism that triggers relief." H. R. Rep. No. 97–227, p. 28 (1981). This statement plainly indicates that the Committee understood the substantive standards for § 2 and § 5 violations to be the same whenever a challenged practice in a covered jurisdiction represents a change subject to the dictates of § 5.[9] Thus, it is reasonable to assume that Congress, by endorsing the "unless" clause in *Beer,* contemplated the denial of preclearance for any change that clearly violates amended § 2. The majority, by belittling this legislative history, abrogates Con-

[9] The postenactment legislative record also supports the Attorney General's interpretation of § 5. In 1985, the Attorney General first proposed regulations requiring a denial of preclearance "based upon violation of Section 2 if there is clear and convincing evidence of such a violation." 50 Fed. Reg. 19122, 19131. Congress held oversight hearings in which several witnesses, including the Assistant Attorney General, Civil Rights Division, testified that clear violations of § 2 should not be precleared. See Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act, 99th Cong., 1st Sess., 47, 149, 151–152 (1985). Following these hearings, the House Judiciary Subcommittee on Civil and Constitutional Rights issued a Report in which it concluded "that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations." Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Voting Rights Act: Proposed Section 5 Regulations, 99th Cong., 2d Sess., Ser. No. 9, p. 5 (Comm. Print 1986). Although this history does not provide direct evidence of the enacting Congress' intent, it does constitute an informed expert opinion concerning the validity of the Attorney General's regulation.

gress' effort, in enacting the 1982 amendments, "to broaden the protection afforded by the Voting Rights Act." *Chisom* v. *Roemer*, 501 U. S. 380, 404 (1991).

Despite this strong evidence of Congress' intent, the majority holds that no deference to the Attorney General's regulation is warranted. The Court suggests that had Congress wished to alter "our longstanding interpretation" of § 5, Congress would have made this clear. *Ante*, at 483. But nothing in our "settled interpretation" of § 5, *ante*, at 484, is inconsistent with the Attorney General's reading of the statute. To the contrary, our precedent actually indicates that nonretrogressive plans that are otherwise discriminatory under *White* v. *Regester* should not be precleared. As neither the language nor the legislative history of § 5 can be said to conflict with the view that changes that clearly violate § 2 are not entitled to preclearance, there is no legitimate basis for refusing to defer to the Attorney General's regulation. See *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 508 (1992).

II

In Part III of its opinion the Court correctly concludes that this action must be remanded for further proceedings because the District Court erroneously refused to consider certain evidence that is arguably relevant to whether the Board has proved an absence of discriminatory purpose under § 5. Because the Court appears satisfied that the disputed evidence may be probative of an "'intent to retrogress,'" it concludes that it is unnecessary to decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante*, at 486. For two reasons, I think it most unwise to reverse on such a narrow ground.

First, I agree with JUSTICE BREYER, see *ante*, at 493, that there is simply no basis for imposing this limitation on the purpose inquiry. None of our cases have held that § 5's purpose test is limited to retrogressive intent. In *Pleasant*

Grove v. *United States*, 479 U. S. 462, 469–472 (1987), for instance, we found that the city had failed to prove that its annexation of certain white areas lacked a discriminatory purpose. Despite the fact that the annexation lacked a retrogressive effect, we found it was subject to § 5 preclearance. *Ibid.;* see also *id.*, at 474–475 (Powell, J., dissenting) (contending that the majority erred in holding that a discriminatory purpose could be found even though there was no intent "to have a retrogressive effect"). Furthermore, limiting the § 5 purpose inquiry to retrogressive intent is inconsistent with the basic purpose of the Act. Assume, for example, that the record unambiguously disclosed a long history of deliberate exclusion of African-Americans from participating in local elections, including a series of changes each of which was adopted for the specific purpose of maintaining the status quo. None of those changes would have been motivated by an "intent to regress," but each would have been motivated by a "discriminatory purpose" as that term is commonly understood. Given the long-settled understanding that § 5 of the Act was enacted to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *South Carolina* v. *Katzenbach*, 383 U. S., at 335, it is inconceivable that Congress intended to authorize preclearance of changes adopted for the sole purpose of perpetuating an existing pattern of discrimination.

Second, the Court's failure to make this point clear can only complicate the task of the District Court on remand. If that court takes the narrow approach suggested by the Court, another appeal will surely follow; if a majority ultimately agrees with my view of the issue, another remand will then be necessary. On the other hand, if the District Court does not limit its consideration to evidence of retrogressive intent, and if it therefore rules against the Board, appellees will bring the action back and the Court would then have to resolve the issue definitively.

In sum, both the interest in orderly procedure and the fact that a correct answer to the issue is pellucidly clear should be sufficient to persuade the Court to state definitively that § 5 preclearance should be denied if Judge Kessler's evaluation of the record is correct.

Accordingly, while I concur in the judgment insofar as it remands the action for further proceedings, I dissent from the decision insofar as it fails to authorize proceedings in accordance with the views set forth above.

Syllabus

INTER-MODAL RAIL EMPLOYEES ASSOCIATION ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL.

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

No. 96–491. Argued March 17, 1997—Decided May 12, 1997

As employees of respondent Santa Fe Terminal Services, Inc. (SFTS), a wholly owned subsidiary of respondent The Atchison, Topeka and Santa Fe Railway Co. (ATSF), the individual petitioners were entitled, among other things, to pension, health, and welfare benefits under SFTS-Teamsters Union collective bargaining agreements. The resulting benefit plans were subject to the Employee Retirement Income Security Act of 1974 (ERISA). Ultimately ATSF bid the work being done by petitioners to respondent In-Terminal Services (ITS) and terminated SFTS employees who declined to continue employment with ITS. The ITS-Teamsters pension and welfare benefit plans were less generous than the SFTS-Teamsters plans. Petitioners filed suit, alleging that the terminations violated § 510 of ERISA, which makes it unlawful to "discharge . . . a [plan] participant . . . for the purpose of interfering with the *attainment of any right* to which such participant may become entitled under *the plan*." (Emphasis added.) The District Court granted respondents' motion to dismiss. Concluding that § 510 only prohibits interference with the attainment of rights that are capable of "vesting," the Court of Appeals reinstated petitioners' claim for interference with *pension* benefits, but affirmed the dismissal of their claim for interference with *welfare* benefits, which do not vest.

Held: The Court of Appeals' holding that § 510 bars interference only with vested rights is contradicted by § 510's plain language, whose use of the word "plan" all but forecloses that position. ERISA defines "plan" to include an "employee welfare benefit plan," 29 U. S. C. § 1002(3), even though welfare plans are exempted from its stringent vesting requirements, see § 1051(1). Had Congress intended to confine § 510's protection to "vested" rights, it could have easily substituted "pension plan" for "plan" or "nonforfeitable right" for "any right." The flexibility an employer enjoys to unilaterally amend or eliminate its welfare benefit plan, see *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73, 78, does not justify a departure from § 510's plain language. Such flexibility helps employers avoid the complicated administration and increased cost of vested plans, and encourages them to offer more generous benefits at the outset, since they can reduce benefits should economic conditions

sour. Section 510 counterbalances this flexibility by requiring employers to follow a plan's formal amendment process, thus ensuring that employers do not "circumvent the provision of promised benefits." *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 143. Any tension that might exist between an employer's amendment power and a participant's § 510 rights is the product of a careful balance of competing interests, not the type of "absurd or glaringly unjust" result, *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Compensation Programs*, 519 U. S. 248, 261, that would warrant departure from § 510's plain language. On remand, the Court of Appeals should have the first opportunity to evaluate respondents' remaining arguments, including their argument that petitioners were eligible to receive welfare benefits under the SFTS-Teamsters plan at the time they were discharged and, thus, cannot state a § 510 claim. Pp. 514–517.

80 F. 3d 348, vacated and remanded.

O'Connor, J., delivered the opinion for a unanimous Court.

Richard E. Schwartz argued the cause for petitioners. With him on the briefs was *James E. Parrot.*

Cornelia T. L. Pillard argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Dellinger, Deputy Solicitor General Kneedler, J. Davitt McAteer, Allen H. Feldman,* and *Mark S. Flynn.*

James D. Holzhauer argued the cause for respondents. With him on the brief for respondents Atchison, Topeka & Santa Fe Railway Co. et al. was *Alan E. Untereiner. Patrick W. Jordan* and *Robin M. Schachter* filed a brief for respondent In-Terminal Services.*

Justice O'Connor delivered the opinion of the Court.

Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 895, makes it unlawful to

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**Mary Ellen Signorille, Melvin Radowitz,* and *Ronald Dean* filed a brief for the American Association of Retired Persons et al. as *amici curiae* urging reversal.

Robert N. Eccles, Karen M. Wahle, Jan S. Amundson, Quentin Riegel, Robert W. Blanchette, and *Kenneth P. Kolson* filed a brief for the Employers Group et al. as *amici curiae* urging affirmance.

"discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [of an employee benefit plan] for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U. S. C. § 1140. The Court of Appeals for the Ninth Circuit held that § 510 only prohibits interference with the attainment of rights that are capable of "vesting," as that term is defined in ERISA. We disagree.

I

The individual petitioners are former employees of respondent Santa Fe Terminal Services, Inc. (SFTS), a wholly owned subsidiary of respondent The Atchison, Topeka and Santa Fe Railway Co. (ATSF), which was responsible for transferring cargo between railcars and trucks at ATSF's Hobart Yard in Los Angeles, California. While petitioners were employed by SFTS, they were entitled to retirement benefits under the Railroad Retirement Act of 1974, 88 Stat. 1312, as amended, 45 U. S. C. § 231 *et seq.*, and to pension, health, and welfare benefits under collective bargaining agreements involving SFTS and the Teamsters Union. SFTS provided its workers with pension, health, and welfare benefits through employee benefit plans subject to ERISA's comprehensive regulations.

In January 1990, ATSF entered into a formal "Service Agreement" with SFTS to have SFTS do the same "intermodal" work it had done at the Hobart Yard for the previous 15 years without a contract. Seven weeks later, ATSF exercised its right to terminate the newly formed agreement and opened up the Hobart Yard work for competitive bidding. Respondent In-Terminal Services (ITS) was the successful bidder, and SFTS employees who declined to continue employment with ITS were terminated. ITS, unlike SFTS, was not obligated to make contributions to the Railroad Retirement Account under the Railroad Retirement Act. ITS also provided fewer pension and welfare benefits under its

collective bargaining agreement with the Teamsters Union than had SFTS. Workers who continued their employment with ITS "lost their Railroad Retirement Act benefits" and "suffered a substantial reduction in Teamsters benefits." 80 F. 3d 348, 350 (CA9 1996) *(per curiam)*.

Petitioners sued respondents SFTS, ATSF, and ITS in the United States District Court for the Central District of California, alleging that respondents had violated § 510 of ERISA by "discharg[ing]" petitioners "for the purpose of interfering with the attainment of . . . right[s] to which" they would have "become entitled" under the ERISA pension and welfare plans adopted pursuant to the SFTS-Teamsters collective bargaining agreement. See App. to Pet. for Cert. 29a, Complaint ¶ 33. Had SFTS remained their employer, petitioners contended, they would have been entitled to assert claims for benefits under the SFTS-Teamsters benefit plans, at least until the collective bargaining agreement that gave rise to those plans expired. The substitution of ITS for SFTS, however, precluded them from asserting those claims and relegated them to asserting claims under the less generous ITS-Teamsters benefit plans. According to petitioners, the substitution "interfer[ed] with the attainment" of their "right" to assert those claims and violated § 510. Respondents moved to dismiss these § 510 claims, and the District Court granted the motion.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 80 F. 3d 348 (1996). The court reinstated petitioners' claim under § 510 for interference with their *pension* benefits, concluding that § 510 "'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting.'" *Id.*, at 350–351 (quoting *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 143 (1990)). But the Court of Appeals affirmed the dismissal of petitioners' claim for interference with their *welfare* benefits. "Unlike pension benefits," the Court of Appeals observed, "welfare benefits do not vest." 80 F. 3d, at

351. As a result, the Court of Appeals noted, "employers remain free to unilaterally amend or eliminate [welfare] plans," and "employees have no present 'right' to future, anticipated welfare benefits.' " *Ibid.* (emphasis deleted; internal quotation marks omitted). Because the "existence of a present 'right' is [a] prerequisite to section 510 relief," the Court of Appeals concluded that § 510 did not state a cause of action for interference with welfare benefits. *Ibid.* We granted certiorari to resolve a conflict among the Courts of Appeals on this issue,* 519 U. S. 1003 (1996), and now vacate the decision below and remand.

II

The Court of Appeals' holding that § 510 bars interference only with vested rights is contradicted by the plain language of § 510. As noted above, that section makes it unlawful to "discharge . . . a [plan] participant or beneficiary . . . for the purpose of interfering with the *attainment of any right* to which such participant may become entitled under *the plan.*" 29 U. S. C. § 1140 (emphasis added). ERISA defines a "plan" to include both "an employee welfare benefit plan [and] an employee pension benefit plan," § 1002(3), and specifically exempts "employee welfare benefit plan[s]" from its stringent vesting requirements, see § 1051(1). Because a "plan" includes an "employee welfare benefit plan," and because welfare plans offer benefits that do not "vest" (at least insofar as ERISA is concerned), Congress' use of the word "plan" in § 510 all but forecloses the argument that § 510's interfer-

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*See *Shahid* v. *Ford Motor Co.*, 76 F. 3d 1404, 1411 (CA6 1996) (holding that § 510 draws no distinction between benefits that vest and those that do not); *Heath* v. *Varity Corp.*, 71 F. 3d 256, 258 (CA7 1995) (same); *Seaman* v. *Arvida Realty Sales*, 985 F. 2d 543, 546 (CA11) (same), cert. denied, 510 U. S. 916 (1993); see also *McGann* v. *H & H Music Co.*, 946 F. 2d 401, 408 (CA5 1991) (implying the same), cert. denied *sub nom. Greenburg* v. *H & H Music Co.*, 506 U. S. 981 (1992); *Andes* v. *Ford Motor Co.*, 70 F. 3d 1332, 1336 (CADC 1995) (implying the same).

ence clause applies only to "vested" rights. Had Congress intended to confine § 510's protection to "vested" rights, it could have easily substituted the term "pension plan," see 29 U. S. C. § 1002(2), for "plan," or the term "nonforfeitable" right, see § 1002(19), for "any right." But § 510 draws no distinction between those rights that "vest" under ERISA and those that do not.

The right that an employer or plan sponsor may enjoy in some circumstances to unilaterally amend or eliminate its welfare benefit plan does not, as the Court of Appeals apparently thought, justify a departure from § 510's plain language. It is true that ERISA itself "does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 732 (1985). Thus, unless an employer contractually cedes its freedom, see, *e. g.*, *Adcox* v. *Teledyne, Inc.*, 21 F. 3d 1381, 1389 (CA6), cert. denied, 513 U. S. 871 (1994), it is "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [its] welfare pla[n]." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73, 78 (1995).

The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that "requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans." S. Rep. No. 93–383, p. 51 (1973). Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, "they would err initially on the side of omission." *Heath* v. *Varity Corp.*, 71 F. 3d 256, 258 (CA7 1995). Section 510 counterbalances this flexibility by ensuring that employers do not "circumvent the provision of promised benefits." *Ingersoll-Rand Co.*, *supra*, at 143 (citing S. Rep. No. 93–127, pp. 35–36 (1973); H. R. Rep. No. 93–533, p. 17 (1973)). In short, "§ 510 helps to make promises credible." *Heath*, *supra*, at 258. An employer

may, of course, retain the unfettered right to alter its promises, but to do so it must follow the formal procedures set forth in the plan. See 29 U. S. C. § 1102(b)(3) (requiring plan to "provide a procedure for amending such plan"); *Schoonejongen*, *supra*, at 78 (observing that the "cognizable claim [under ERISA] is that the company did not [amend its welfare benefit plan] in a permissible manner"). Adherence to these formal procedures "increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve." *Schoonejongen*, *supra*, at 82. The formal amendment process would be undermined if § 510 did not apply because employers could "informally" amend their plans one participant at a time. Thus, the power to amend or abolish a welfare benefit plan does not include the power to "discharge, fine, suspend, expel, discipline, or discriminate against" the plan's participants and beneficiaries "for the purpose of interfering with [their] attainment of . . . right[s] . . . under the plan." To be sure, when an employer acts without this purpose, as could be the case when making fundamental business decisions, such actions are not barred by § 510. But in the case where an employer acts with a purpose that triggers the protection of § 510, any tension that might exist between an employer's power to amend the plan and a participant's rights under § 510 is the product of a careful balance of competing interests, and is most surely not the type of "absurd or glaringly unjust" result, *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Compensation Programs*, 519 U. S. 248, 261 (1997), that would warrant departure from the plain language of § 510.

Respondents argue that the Court of Appeals' decision must nevertheless be affirmed because § 510, when applied to benefits that do not "vest," only protects an employee's right to cross the "threshold of eligibility" for welfare benefits. See Brief for Respondent Atchison, Topeka & Santa Fe Railway Co. et al. 18. In other words, argue respondents,

an employee who is eligible to receive benefits under an ERISA welfare benefit plan has already "attain[ed]" her "right[s]" under the plan, so that any subsequent actions taken by an employer cannot, by definition, "interfer[e]" with the "attainment of . . . right[s]" under the plan. According to respondents, petitioners were eligible to receive welfare benefits under the SFTS-Teamsters plan at the time they were discharged, so they cannot state a claim under § 510. The Court of Appeals' approach precluded it from evaluating this argument, and others presented to us, and we see no reason not to allow it the first opportunity to consider these matters on remand.

We therefore vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

LAMBRIX *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

No. 96–5658. Argued January 15, 1997—Decided May 12, 1997

In the sentencing phase of the trial at which petitioner Lambrix was convicted on two counts of first-degree murder, the Florida state-court jury rendered an advisory verdict recommending death sentences on both counts. Finding numerous aggravating circumstances in connection with both murders, and no mitigating circumstances as to either, the trial court sentenced Lambrix to death on both counts. After his conviction and sentence were upheld on direct and collateral review by the Florida courts, he filed a habeas petition in the Federal District Court, which rejected all of his claims. While his appeal was pending before the Eleventh Circuit, this Court decided in *Espinosa* v. *Florida*, 505 U. S. 1079, that if the sentencing judge in a "weighing" State (*i. e.*, a State such as Florida that requires specified aggravating circumstances to be weighed against any mitigating circumstances at a capital trial's sentencing phase) is required to give deference to a jury's advisory sentencing recommendation, then neither the jury nor the judge is constitutionally permitted to weigh invalid aggravating circumstances. Since one of Lambrix's claims was that his sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravator, *Espinosa* had obvious relevance to his habeas petition. The Eleventh Circuit held its proceedings in abeyance to permit Lambrix to present his *Espinosa* claim to the Florida Supreme Court, which rejected the claim without considering its merits on the ground that the claim was procedurally barred. Without even acknowledging the procedural bar, the Eleventh Circuit denied relief, ruling that *Espinosa* announced a "new rule" which cannot be applied retroactively on federal habeas under *Teague* v. *Lane*, 489 U. S. 288.

Held:

1. Although the question whether a federal court should resolve a claim of procedural bar *before* considering a claim of *Teague* bar has not previously been presented, the Court's opinions—most particularly, *Coleman* v. *Thompson*, 501 U. S. 722—suggest that the procedural bar issue should ordinarily be considered first. The Court nonetheless chooses not to resolve this case on the procedural bar ground. Lambrix asserts several reasons why procedural bar does not apply, the validity

of which is more appropriately determined by the lower federal courts, which are more familiar with the procedural practices of the States in which they sit. Rather than prolong this litigation by a remand, the Court proceeds to decide the question presented. Pp. 522–525.

2. A prisoner whose conviction became final before *Espinosa* is foreclosed from relying on that decision in a federal habeas proceeding. Pp. 525–540.

(a) To apply *Teague*, a federal habeas court must: (1) determine the date on which the defendant's conviction became final; (2) survey the legal landscape as it existed on that date to determine whether a state court then considering the defendant's claim would have felt compelled by existing precedent to conclude that the rule the defendant seeks was constitutionally required; and (3) if not, consider whether the relief sought falls within one of two narrow exceptions to nonretroactivity. Pp. 525–527.

(b) A survey of the legal landscape as of the date that Lambrix's conviction became final shows that *Espinosa* was not dictated by then-existing precedent, but announced a "new rule" as defined in *Teague*. It is significant that *Espinosa*, *supra*, at 1082, cited only a single case in support of its central conclusion, *Baldwin* v. *Alabama*, 472 U. S. 372, 382, and introduced that lone citation with a "cf."—an introductory signal indicating authority that supports the point in dictum or by analogy. *Baldwin* states, on the page that *Espinosa* cites, 472 U. S., at 382, that the defendant's *Espinosa*-like argument "conceivably might have merit" in circumstances not present in that case. The decisions relied on most heavily by Lambrix—*Godfrey* v. *Georgia*, 446 U. S. 420; *Maynard* v. *Cartwright*, 486 U. S. 356; and *Clemons* v. *Mississippi*, 494 U. S. 738—do not dictate the result ultimately reached in *Espinosa*. Rather, a close examination of the Florida death penalty scheme, in light of cases such as *Proffitt* v. *Florida*, 428 U. S. 242, 253 (joint opinion); *id.*, at 260–261 (White, J., concurring in judgment); and *Spaziano* v. *Florida*, 468 U. S. 447, 451, 466, indicates that a reasonable jurist considering the matter at the time Lambrix's sentence became final could have reached a result different from *Espinosa*. That conclusion is confirmed by *Walton* v. *Arizona*, 497 U. S. 639, 653–654. The fact that *Espinosa* was handed down as a *per curiam* without oral argument is insignificant, since the decision followed by just three weeks *Sochor* v. *Florida*, 504 U. S. 527, in which the identical issue was fully briefed and argued, but could not be decided for jurisdictional reasons. Pp. 527–539.

(c) *Espinosa*'s new rule does not fall within either of the exceptions to this Court's nonretroactivity doctrine. The first exception plainly has no application, since *Espinosa* neither decriminalizes a class of conduct nor prohibits the imposition of capital punishment on a particular

class of persons. *E. g., Saffle* v. *Parks*, 494 U. S. 484, 494–495. Lambrix does not contend that the second exception—for watershed rules of criminal procedure implicating the criminal proceeding's fundamental fairness and accuracy—applies to *Espinosa* errors, and *Sawyer* v. *Smith*, 497 U. S. 227, 241–244, makes clear that it does not. Pp. 539–540.

72 F. 3d 1500, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 540. O'CONNOR, J., filed a dissenting opinion, *post*, p. 546.

Matthew C. Lawry, by appointment of the Court, 519 U. S. 1005, argued the cause for petitioner. With him on the briefs was *Mark Evan Olive*.

Carol M. Dittmar, Assistant Attorney General of Florida, argued the cause for respondent. With her on the brief was *Robert A. Butterworth*, Attorney General.*

JUSTICE SCALIA delivered the opinion of the Court.

We granted certiorari in this case to consider whether a prisoner whose conviction became final before our decision in *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) *(per curiam)*, is foreclosed from relying on that decision in a federal habeas corpus proceeding because it announced a "new rule" as defined in *Teague* v. *Lane*, 489 U. S. 288 (1989).

I

On February 5, 1983, Cary Michael Lambrix and his girlfriend, Frances Smith, met Clarence Moore and Aleisha Bryant at a local tavern. The two couples returned to Lambrix's trailer for dinner, where Lambrix killed Moore and Bryant in brutal fashion. Lambrix was convicted on two counts of first-degree murder. In the sentencing phase of trial, the jury rendered an advisory verdict recommending

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

that the trial court sentence Lambrix to death on both counts. The trial court, after finding five aggravating circumstances in connection with the murder of Moore, four aggravating circumstances in connection with the murder of Bryant, and no mitigating circumstances as to either murder, sentenced Lambrix to death on both counts. Lambrix's conviction and sentence were upheld on direct appeal by the Florida Supreme Court. *Lambrix* v. *State*, 494 So. 2d 1143 (1986).

After the Florida courts denied his repeated efforts to obtain collateral relief, *Lambrix* v. *Dugger*, 529 So. 2d 1110 (Fla. 1988); *Lambrix* v. *State*, 534 So. 2d 1151 (Fla. 1988); *Lambrix* v. *State*, 559 So. 2d 1137 (Fla. 1990), Lambrix filed a petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254 in the United States District Court for the Southern District of Florida; that court rejected all of his claims. While Lambrix's appeal was pending before the Court of Appeals for the Eleventh Circuit, this Court decided *Espinosa* v. *Florida*, *supra*, which held that if the sentencing judge in a "weighing" State (*i. e.*, a State that requires specified aggravating circumstances to be weighed against any mitigating circumstances at the sentencing phase of a capital trial) is required to give deference to a jury's advisory sentencing recommendation, then neither the jury nor the judge is constitutionally permitted to weigh invalid aggravating circumstances. Since Florida is such a State, and since one of Lambrix's claims was that his sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" (HAC) aggravator, *Espinosa* had obvious relevance to his habeas petition. Rather than address this issue in the first instance, however, the Eleventh Circuit held its proceedings in abeyance to permit Lambrix to present his *Espinosa* claim to the Florida state courts.

The Florida Supreme Court rejected Lambrix's *Espinosa* claim without considering its merits on the ground that the claim was procedurally barred. *Lambrix* v. *Singletary*, 641

So. 2d 847 (1994). That court explained that although Lambrix had properly preserved his *Espinosa* objection at trial by requesting a limiting instruction on the HAC aggravator, he had failed to raise the issue on direct appeal. 641 So. 2d, at 848. The Florida Supreme Court also rejected Lambrix's claim that the procedural bar should be excused because his appellate counsel was ineffective in failing to raise the forfeited issue, explaining that this claim was itself procedurally barred and was, in any event, meritless. *Id.*, at 848–849.

After the Florida Supreme Court entered judgment against Lambrix, the Eleventh Circuit adjudicated his habeas petition. Without even acknowledging the procedural bar—which was expressly raised and argued by the State—the Court of Appeals proceeded to address the *Espinosa* claim, and determined that *Espinosa* announced a new rule which cannot be applied retroactively on federal habeas under *Teague* v. *Lane*, *supra*. 72 F. 3d 1500, 1503 (1996). We granted certiorari. 519 U. S. 958 (1996).

II

Before turning to the question presented in this case, we pause to consider the State's contention that Lambrix's *Espinosa* claim is procedurally barred because he failed to contend that the jury was instructed with a vague HAC aggravator on his direct appeal to the Florida Supreme Court. According to the State, the Florida Supreme Court "has consistently required that an *Espinosa* issue must have been objected to at trial and pursued on direct appeal in order to be reviewed in postconviction proceedings." Brief for Respondent 30, citing *Chandler* v. *Dugger*, 634 So. 2d 1066, 1069 (Fla. 1994), *Jackson* v. *Dugger*, 633 So. 2d 1051, 1055 (Fla. 1993), and *Henderson* v. *Singletary*, 617 So. 2d 313 (Fla.), cert. denied, 507 U. S. 1047 (1993).

In *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court

rests on a state law ground that is independent of the federal question and adequate to support the judgment." See also *Harris* v. *Reed*, 489 U. S. 255, 262 (1989). We in fact lack jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory. *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945); see also *Sochor* v. *Florida*, 504 U. S. 527, 533–534, and n. (1992). The "independent and adequate state ground" doctrine is not technically jurisdictional when a federal court considers a state prisoner's petition for habeas corpus pursuant to 28 U. S. C. § 2254, since the federal court is not formally reviewing a judgment, but is determining whether the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." We have nonetheless held that the doctrine applies to bar consideration on federal habeas of federal claims that have been defaulted under state law. *Coleman*, *supra*, at 729–730, 750; see also *Wainwright* v. *Sykes*, 433 U. S. 72, 81, 82 (1977), discussing *Brown* v. *Allen*, 344 U. S. 443, 486–487 (1953), and *Ex parte Spencer*, 228 U. S. 652 (1913); *Harris*, *supra*, at 262.

Application of the "independent and adequate state ground" doctrine to federal habeas review is based upon equitable considerations of federalism and comity. It "ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Coleman*, 501 U. S., at 732. "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Ibid.* If the "independent and adequate state ground" doctrine were not applied, a federal district court or court of appeals would be able to review claims that this Court would have been unable to consider on direct review. See *id.*, at 730–731.

We have never had occasion to consider whether a federal court should resolve a State's contention that a petitioner's claim is procedurally barred *before* considering whether his claim is *Teague* barred. Our opinions, however—most particularly, *Coleman*—certainly suggest that the procedural-bar issue should ordinarily be considered first. It was speculated at oral argument that the Court of Appeals may have resolved the *Teague* issue without first considering procedural bar because our opinions have stated that the *Teague* retroactivity decision is to be made as a "threshold matter." *E. g., Penry* v. *Lynaugh*, 492 U. S. 302, 329 (1989); *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994). That simply means, however, that the *Teague* issue should be addressed "before considering the merits of [a] claim." 510 U. S., at 389. It does not mean that the *Teague* inquiry is antecedent to consideration of the general prerequisites for federal habeas corpus which are unrelated to the merits of the particular claim—such as the requirement that the petitioner be "in custody," see 28 U. S. C. § 2254(a), or that the state-court judgment not be based on an independent and adequate state ground. Constitutional issues are generally to be avoided, and as even a cursory review of this Court's new-rule cases reveals (including our discussion in Part IV, *infra*), the *Teague* inquiry requires a detailed analysis of federal constitutional law. See, *e. g., Sawyer* v. *Smith*, 497 U. S. 227, 233–241 (1990); *Penry*, *supra*, at 316–319; *Gilmore* v. *Taylor*, 508 U. S. 333, 339–344 (1993); *Saffle* v. *Parks*, 494 U. S. 484, 488–494 (1990).

We are somewhat puzzled that the Eleventh Circuit, after having held proceedings in abeyance while petitioner brought his claim in state court, did not so much as mention the Florida Supreme Court's determination that Lambrix's *Espinosa* claim was procedurally barred. The State of Florida raised that point before both the District Court and the Court of Appeals, going so far as to reiterate it in a postjudg-

ment Motion for Clarification and/or Modification of Opinion before the Court of Appeals, reprinted at App. 176. A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system. We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law. Cf. 28 U. S. C. § 2254(b)(2) (permitting a federal court to deny a habeas petition on the merits notwithstanding the applicant's failure to exhaust state remedies).

Despite our puzzlement at the Court of Appeals' failure to resolve this case on the basis of procedural bar, we hesitate to resolve it on that basis ourselves. Lambrix asserts several reasons why his claim is not procedurally barred, which seem to us insubstantial but may not be so; as we have repeatedly recognized, the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit, see, *e. g.*, *Rummel* v. *Estelle*, 445 U. S. 263, 267, n. 7 (1980); *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 153–154 (1979). Rather than prolong this litigation by a remand, we proceed to decide the case on the *Teague* grounds that the Court of Appeals used.

III

Florida employs a three-stage sentencing procedure. First, the jury weighs statutorily specified aggravating circumstances against any mitigating circumstances, and renders an "advisory sentence" of either life imprisonment or death. Fla. Stat. § 921.141(2) (Supp. 1992). Second, the trial court weighs the aggravating and mitigating circumstances, and enters a sentence of life imprisonment or death;

if the latter, its findings must be set forth in writing. § 921.141(3). The jury's advisory sentence is entitled to "great weight" in the trial court's determination, *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975), but the court has an independent obligation to determine the appropriate punishment, *Ross* v. *State*, 386 So. 2d 1191, 1197 (Fla. 1980). Third, the Florida Supreme Court automatically reviews all cases in which the defendant is sentenced to death. § 921.141(4).

Lambrix's jury, which was instructed on five aggravating circumstances, recommended that he be sentenced to death for each murder. The trial court found five aggravating circumstances as to Moore's murder and four as to Bryant's, including that each murder was "especially heinous and atrocious"; it found no mitigating circumstances as to either murder; it concluded that the aggravating circumstances outweighed the mitigating, and sentenced Lambrix to death on each count. App. 20–21. Although Lambrix failed to raise any claims concerning the sentencing procedure on direct appeal, the Florida Supreme Court agreed with the trial court's findings as to the aggravating circumstances. *Lambrix* v. *State*, 494 So. 2d, at 1148.

Lambrix contends that the jury's consideration of the HAC aggravator violated the Eighth Amendment because the jury instructions concerning this circumstance failed to provide sufficient guidance to limit the jury's discretion. Like the Eleventh Circuit, see 72 F. 3d, at 1503, we assume, *arguendo*, that this was so. Lambrix further contends (and this is at the heart of the present case) that the trial court's independent weighing did not cure this error. Prior to our opinion in *Espinosa* v. *Florida*, 505 U. S. 1079 (1992), the State had contended that Lambrix was not entitled to relief because the sentencing judge properly found and weighed a narrowed HAC aggravator. In *Espinosa*, however, we established the principle that if a "weighing" State requires the sentencing trial judge to give deference to a jury's advisory recommendation, neither the judge *nor the jury* is constitutionally per-

mitted to weigh invalid aggravating circumstances. Lambrix seeks the benefit of that principle; the State contends that it constitutes a new rule under *Teague* and thus cannot be relied on in a federal habeas corpus proceeding.[1]

In *Teague* we held that, in general, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U. S., at 310–311. To apply *Teague*, a federal court engages in a three-step process. First, it determines the date upon which the defendant's conviction became final. See *Caspari* v. *Bohlen*, 510 U. S., at 390. Second, it must "'[s]urve[y] the legal landscape as it then existed,' *Graham* v. *Collins*, [506 U. S. 461, 468 (1993)], and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution,' *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990)." *Ibid.* Finally, if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity. See *Gilmore* v. *Taylor*, 508 U. S., at 345.

IV

Lambrix's conviction became final on November 24, 1986, when his time for filing a petition for certiorari expired. Thus, our first and principal task is to survey the legal landscape as of that date, to determine whether the rule later announced in *Espinosa* was *dictated* by then-existing precedent—whether, that is, the unlawfulness of Lambrix's

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[1] Lambrix also contends that the trial court itself failed to apply a properly narrowed HAC aggravator. We decline to consider this contention because it is not fairly within the question presented, which asked only whether *Teague* v. *Lane*, 489 U. S. 288 (1989), bars relief based upon *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) *(per curiam)*, Pet. for Cert. i. See this Court's Rule 14.1(a).

conviction was apparent to all reasonable jurists. See, *e. g.*, *Graham* v. *Collins*, 506 U. S. 461, 477 (1993); *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990); *id.*, at 417–418 (Brennan, J., dissenting).

In *Espinosa*, we determined that the Florida capital jury is, in an important respect, a cosentencer with the judge. As we explained: "Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." 505 U. S., at 1082. We then concluded that the jury's consideration of a vague aggravator tainted the trial court's sentence because the trial court gave deference to the jury verdict (and thus *indirectly* weighed the vague aggravator) in the course of weighing the aggravating and mitigating circumstances. *Ibid.* We reasoned that this indirect weighing created the same risk of arbitrariness as the direct weighing of an invalid aggravating factor. *Ibid.*[2]

In our view, *Espinosa* was not dictated by precedent, but announced a new rule which cannot be used as the basis for federal habeas corpus relief. It is significant that *Espinosa* itself did not purport to rely upon any controlling precedent.[3]

[2] Our description of the holding of *Espinosa* in the preceding paragraph of text is so clear that we are at a loss to explain JUSTICE STEVENS's impression that we accord *Espinosa* the "novel interpretation" that "the constitutional error in the jury instruction will 'automatically render a defendant's sentence unconstitutional.'" *Post*, at 541 (dissenting opinion) (quoting *infra*, at 530). The sentence from which the phrase quoted by JUSTICE STEVENS is wrenched (so violently that the word "not" which precedes it is omitted) is not discussing the holding of *Espinosa;* indeed, it does not even *mention Espinosa;* nor does the entire paragraph or the previous or subsequent paragraphs.

[3] JUSTICE STEVENS maintains that this statement is proved wrong by *Espinosa*'s citation of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), and *Tedder* v. *State*, 322 So. 2d 908 (Fla. 1975). *Post*, at 541, n. 2. This is wordplay. While those two cases can be called "controlling authority" in the sense that the two propositions they established (that an instruction to the

The opinion cited only a single case, *Baldwin* v. *Alabama*, 472 U. S. 372, 382 (1985), in support of its central conclusion that indirect weighing of an invalid aggravator "creates the same potential for arbitrariness" as direct weighing of an invalid aggravator. *Espinosa*, 505 U. S., at 1082. And it introduced that lone citation with a "cf."—an introductory signal which shows authority that supports the point in dictum or by analogy, not one that "controls" or "dictates" the result.

Baldwin itself contains further evidence that *Espinosa* set forth a new rule. *Baldwin* considered the constitutionality of Alabama's death sentencing scheme, in which the jury was required to "fix the punishment at death" if it found the defendant guilty of an aggravated offense, whereupon the trial court would conduct a sentencing hearing at which it would determine a sentence of death or of life imprisonment. 472 U. S., at 376. The defendant contended that because the jury's mandatory sentence would have been unconstitutional standing alone, see *Woodson* v. *North Carolina*, 428 U. S. 280, 288–305 (1976) (plurality opinion), it was impermissible for the trial court to consider that verdict in determining its own sentence. We did not reach that contention because we concluded that under Alabama law the jury's verdict formed no part of the trial judge's sentencing calculus. *Id.*, at 382. We noted, however, on the page of the opinion that *Espinosa* cited, that the defendant's "argument *conceivably might have merit* if the judge actually were required to consider the jury's 'sentence' as a recommendation as to the sentence the jury believed would be appropriate, cf. *Proffitt* v. *Flor-*

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sentencing jury which fails to define the HAC aggravator violates the Eighth Amendment, and that the Florida sentencing judge must give great weight to the jury's recommendation) were among the "givens" from which any decision in *Espinosa* had to be derived, they assuredly were not "controlling authority" in the sense we obviously intend: that they compel the outcome in *Espinosa*. They do not answer the definitive question: whether the jury's advisory verdict taints the trial court's sentence, that is, whether indirect weighing of an invalid factor creates the same potential for arbitrariness as direct weighing.

ida, 428 U. S. 242 (1976), and if the judge were obligated to accord some deference to it." *Baldwin*, 472 U. S., at 382 (emphasis added); see also *id.*, at 386, n. 8 ("express[ing] no view" on the same point). This highly tentative expression, far from showing that *Baldwin* "dictate[s]" the result in *Espinosa*, see *Sawyer* v. *Smith*, 497 U. S., at 235, suggests just the opposite. Indeed, in *Baldwin* the Chief Justice, who believed that Alabama's scheme *did* contemplate that the trial judge would consider the jury's "sentence," nonetheless held the scheme constitutional. 472 U. S., at 392 (opinion concurring in judgment).

The Supreme Court decisions relied upon most heavily by petitioner are *Godfrey* v. *Georgia*, 446 U. S. 420 (1980); *Maynard* v. *Cartwright*, 486 U. S. 356 (1988); and *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). In *Godfrey*, we held that Georgia's "outrageously or wantonly vile, horrible and inhuman" aggravator was impermissibly vague, reasoning that there was nothing in the words "outrageously or wantonly vile, horrible and inhuman" "that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence," and concluded that these terms alone "gave the jury no guidance." 446 U. S., at 428–429 (plurality opinion). Similarly, in *Maynard* v. *Cartwright*, applied retroactively to February 1985 in *Stringer* v. *Black*, 503 U. S. 222 (1992), we held that Oklahoma's HAC aggravator, which is identically worded to Florida's HAC aggravator, was impermissibly vague because the statute gave no more guidance than the vague aggravator at issue in *Godfrey* and the sentencing jury was not given a limiting instruction. 486 U. S., at 363–364.

Although *Godfrey* and *Maynard* support the proposition that vague aggravators must be sufficiently narrowed to avoid arbitrary imposition of the death penalty, these cases, and others, demonstrate that the failure to instruct the sentencing jury properly with respect to the aggravator does not automatically render a defendant's sentence unconstitutional. We have repeatedly indicated that a sentencing

jury's consideration of a vague aggravator can be cured by appellate review. Thus, in *Godfrey* itself, we were less concerned about the failure to instruct the jury properly than we were about the Georgia Supreme Court's failure to narrow the facially vague aggravator on appeal. Had the Georgia Supreme Court applied a narrowing construction of the aggravator, we would have rejected the Eighth Amendment challenge to Godfrey's death sentence, notwithstanding the failure to instruct the jury on that narrowing construction. *Godfrey*, *supra*, at 431–432. Likewise in *Maynard*, we stressed that the vague HAC aggravator had not been sufficiently limited on appeal by the Oklahoma Court of Criminal Appeals "to cure the unfettered discretion of the jury." 486 U. S., at 364.

We reached a similar conclusion in *Clemons* v. *Mississippi*, applied retroactively to February 1985 in *Stringer*. *Clemons* considered the question whether the sentencer's weighing of a vague HAC aggravator rendered that sentence unconstitutional in a "weighing" State. The sentencing jury in *Clemons*, as in *Maynard*, was given a HAC instruction that was unconstitutionally vague. We held that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review." *Clemons*, *supra*, at 741, 745; see also *Stringer*, *supra*, at 230.

The principles of the above-described cases do not dictate the result we ultimately reached in *Espinosa*. Florida, unlike Oklahoma, see *Maynard*, *supra*, at 360, had given its facially vague HAC aggravator a limiting construction sufficient to satisfy the Constitution. See *Proffitt* v. *Florida*, 428 U. S., at 255–256 (joint opinion of Stewart, Powell, and STEVENS, JJ.); *id.*, at 260 (White, J., concurring in judgment). Thus, unlike the sentencing juries in *Clemons*, *Maynard*, and *Godfrey*, who were not instructed with a properly lim-

ited aggravator, the sentencing trial judge in *Espinosa* did find the HAC aggravator under a properly limited construction. See *Espinosa*, 505 U. S., at 1082, citing *Walton* v. *Arizona*, 497 U. S. 639, 653 (1990).[4] A close examination of the Florida death penalty scheme persuades us that a reasonable jurist considering Lambrix's sentence in 1986 could have reached a conclusion different from the one *Espinosa* announced in 1992. There were at least three different, but somewhat related, approaches that would have suggested a different outcome:

(1) *The mere cabining of the trial court's discretion would avoid arbitrary imposition of the death penalty, and thus avoid unconstitutionality.* In *Proffitt* v. *Florida*, *supra*, we upheld the Florida death penalty scheme against the contention that it resulted in arbitrary imposition of the death penalty, see *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976), because "trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life" and because the Florida Supreme

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[4] JUSTICE STEVENS's dissent says that "[g]iven that the judge's instruction to the jury failed to narrow the HAC aggravator, there is no reason to believe that [the trial judge] appropriately narrowed the [HAC] factor in his . . . deliberations." *Post*, at 545. Our cases establish that there is *always* a "reason to believe" that, which we consider fully adequate: "Trial judges are presumed to know the law and to apply it in making their decisions. If the [State] Supreme Court has narrowed the definition of the [HAC] aggravating circumstance, we presume that [state] trial judges are applying the narrower definition." *Walton* v. *Arizona*, 497 U. S., at 653. Without abandoning our precedent, the most JUSTICE STEVENS can argue is that the ordinary presumption is overcome by failure to instruct. The factual support for such an argument is questionable: Judges fail to instruct juries about rules of law they are aware of all the time. Moreover, if the argument were correct, the holding in *Espinosa* itself would have been unnecessary: We could have simply said there (as JUSTICE STEVENS would have us say here) that the failure to instruct on the narrowing construction displayed the judge's ignorance of the narrowing construction. Instead, of course, *Espinosa* cited the passage from *Walton* quoted above. *Espinosa*, 505 U. S., at 1082.

Court reviewed sentences for consistency. *Proffitt*, 428 U. S., at 253 (joint opinion of Stewart, Powell, and STEVENS, JJ.); *id.*, at 260–261 (opinion of White, J., joined by the Chief Justice and REHNQUIST, J.). (In *Proffitt* itself, incidentally, the jury had *not* been instructed on an appropriately narrowed HAC aggravator, see *Proffitt* v. *Wainwright*, 685 F. 2d 1227, 1264, n. 57 (CA11 1982), cert. denied, 464 U. S. 1002 (1983).) From what was said in *Proffitt* it would, as the en banc Eleventh Circuit noted, "sensibly follow that the judge's proper review of the sentence cures any risk of arbitrariness occasioned by the jury's consideration of an unconstitutionally vague aggravating circumstance." *Glock* v. *Singletary*, 65 F. 3d 878, 886 (1995), cert. denied, 519 U. S. 888 (1996). It could have been argued, of course, as JUSTICE STEVENS contends, see *post*, at 543 (dissenting opinion), that prior constitutional error by a sentencing-determining jury would make a difference, but both the conclusion and the premise of that argument were debatable: not only whether it *would* make a difference, but even (as the succeeding point demonstrates) whether there *was* any constitutional error by a sentencing-determining jury.

(2) *There was no error for the trial judge to cure, since under Florida law the trial court, not the jury, was the sentencer.* In *Espinosa* we concluded, in effect, that the jury was at least in part a cosentencer along with the trial court. That determination can fairly be traced to our opinion in *Sochor* v. *Florida*, 504 U. S. 527 (1992), decided just three weeks earlier, where we explained that under Florida law the trial court "is at least a constituent part of 'the sentencer,'" implying that the jury was that as well. *Id.*, at 535–536. That characterization is in considerable tension with our pre-1986 view. In *Proffitt*, for example, after considering *Tedder* v. *State*, 322 So. 2d 908 (Fla. 1975), on which *Espinosa* primarily relied, the Court determined that the trial court was *the sentencer*. *E. g.*, 428 U. S., at 249 (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[T]he *actual*

sentence is determined by the *trial judge*" (emphasis added)); *id.*, at 251 (the trial court is "[t]he sentencing authority in Florida"); *id.*, at 252 ("[T]he sentence is determined by the judge rather than by the jury"); *id.*, at 260 (White, J., concurring in judgment). We even distinguished the Florida scheme from the Georgia scheme on the ground that "in Florida the sentence is determined by the *trial judge* rather than by the jury." *Id.*, at 252 (joint opinion) (emphasis added). Some eight years later, just two years before petitioner's conviction became final, we continued to describe the judge as *the* sentencer. See *Spaziano* v. *Florida*, 468 U. S. 447 (1984); see also *Barclay* v. *Florida*, 463 U. S. 939, 952–954 (1983) (plurality opinion); *id.*, at 962 (STEVENS, J., concurring in judgment). (Although he now believes the jury is a co-sentencer, at the time Lambrix's conviction became final JUSTICE STEVENS had explained that "the sentencing authority [is] the jury in Georgia, the judge in Florida." *Ibid.*) It would not have been unreasonable to rely on what we had said in *Proffitt*, *Spaziano*, and *Barclay*—that the trial court was the sentencer—and to conclude that where the sentencer considered properly narrowed aggravators there was simply no error under *Godfrey* or *Maynard*. The Florida Supreme Court and the Eleventh Circuit held precisely that in 1989, see *Smalley* v. *State*, 546 So. 2d 720, 722; *Bertolotti* v. *Dugger*, 883 F. 2d 1503, 1526–1527, cert. denied, 497 U. S. 1032 (1990); and in 1985 the Eleventh Circuit foresaw the possibility of such a holding: "[*Spaziano*'s] reasoning calls into question whether any given error in such a merely 'advisory' proceeding should be considered to be of constitutional magnitude." *Proffitt* v. *Wainwright*, 756 F. 2d 1500, 1502.

(3) *The trial court's weighing of properly narrowed aggravators and mitigators was sufficiently independent of the jury to cure any error in the jury's consideration of a vague aggravator.* Although the Florida Supreme Court had interpreted its statute—which provided that the judge was the sentencer, Fla. Stat. § 921.141(3) (Supp. 1992), and that the

jury rendered merely an "advisory sentence," § 921.141(2)—as requiring the trial judge to give "great weight" to a jury's advisory recommendation, *Tedder* v. *State*, *supra*, that court nonetheless emphasized that the trial court must "independently weigh the evidence in aggravation and mitigation," and that "[u]nder no combination of circumstances can th[e] [jury's] recommendation usurp the judge's role by limiting his discretion." *Eutzy* v. *State*, 458 So. 2d 755, 759 (Fla. 1984), cert. denied, 471 U. S. 1045 (1985). In one case, the Florida Supreme Court vacated a sentence because the trial court had given "undue weight to the jury's recommendation of death and did not make an *independent* judgment of whether or not the death penalty should be imposed." *Ross* v. *State*, 386 So. 2d 1191, 1197 (1980) (emphasis added). In *Spaziano* v. *Florida*, *supra*, we acknowledged that the Florida trial court conducts "its own weighing of the aggravating and mitigating circumstances," *id.*, at 451, and that "[r]egardless of the jury's recommendation, the trial judge is required to conduct an *independent* review of the evidence and to make his own findings regarding aggravating and mitigating circumstances," *id.*, at 466 (emphasis added); see also *Proffitt*, 428 U. S., at 251.[5] Given these precedents, it was rea-

[5] JUSTICE STEVENS accuses us of "simply ignoring the reasoning in *Tedder*." *Post*, at 543 (dissenting opinion). We have of course not done so. See *supra*, at 526, 533–534 and this page. JUSTICE STEVENS, however, fails to discuss, or indeed even mention, the cases interpreting *Tedder* that contradict the dissent's view—cases in both this Court and the Florida Supreme Court repeatedly emphasizing the trial judge's obligation to make an *independent* assessment and weighing of the aggravating and mitigating circumstances. He relies, for example, upon the Florida Supreme Court's decision in *Riley* v. *Wainwright*, 517 So. 2d 656 (1987), see *post*, at 541, n. 3 (a decision rendered after Lambrix's conviction became final and hence not technically relevant). But subsequent to that case the Florida Supreme Court summarized its jurisprudence as follows: "Our case law contains many instances where a trial judge's override of a jury recommendation of life has been upheld. Notwithstanding the jury recommendation, whether it be for life imprisonment or death, the judge is required to make an *independent* determination, based on the

sonable to think that the trial court's review would at least constitute the sort of "reweighing" that would satisfy *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), see also *Stringer*, 503 U. S., at 237. In fact, given the view of some Members of this Court that appellate reweighing was inconsistent with the Eighth Amendment, see, *e. g.*, *Cabana* v. *Bullock*, 474 U. S. 376, 400–401, 404 (1986) (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.); *Clemons*, *supra*, at 769–772 (Blackmun, J., joined by Brennan, Marshall, and STEVENS, JJ., concurring in part and dissenting in part), it would have been reasonable to think that trial-court reweighing was preferable. As one Court of Appeals was prompted to note, "*Clemons*'s holding, which arguably points in the opposite direction from *Espinosa*, indicates that even in 1990 *Espinosa*'s result would not have been dictated by precedent." *Glock* v. *Singletary*, 65 F. 3d, at 887 (en banc).

That *Espinosa* announced a new rule is strongly confirmed by our decision in *Walton* v. *Arizona*, 497 U. S. 639 (1990). Although decided after petitioner's conviction became final, *Walton* is a particularly good proxy for what a reasonable jurist would have thought in 1986, given that the only relevant cases decided by this Court in the interim were *Maynard* and *Clemons*, the holdings of both of which, we later

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aggravating and mitigating factors. Moreover, this procedure has been previously upheld against constitutional challenge." *Grossman* v. *State*, 525 So. 2d 833, 840 (Fla. 1988) (emphasis added; citations omitted). "It is clear . . . that the prosecutor correctly stated the law in Florida: the judge is the sentencing authority and the jury's role is merely advisory." *Id.*, at 839. It is not our burden, of course, to establish that these statements in *Grossman*, or in the other cases we rely upon, were accurate; as we later determined, they were wrong and the dissent's (current) reading of *Tedder* is correct. But the question before us is whether a reasonable jurist could have disagreed with the dissent's interpretation of *Tedder* at the time of Lambrix's conviction. In treating as relevant to that question only that portion of precedent vindicated by later decisions, JUSTICE STEVENS "endues the jurist with prescience, not reasonableness." *Stringer* v. *Black*, 503 U. S. 222, 244 (1992) (SOUTER, J., dissenting).

held, were compelled by the law in 1985, see *Stringer*, *supra*. In *Walton*, we rejected a claim that Arizona's HAC aggravator failed sufficiently to channel the sentencer's discretion. Summarizing *Godfrey* and *Maynard*, we explained that "in neither case did the state appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition," and this, we said, "w[as] crucial to the conclusion we reached in *Maynard*." *Walton*, *supra*, at 653. This reasoning suggests that even following *Maynard*, a weighing-state death sentence would satisfy the Eighth Amendment so long as the vague aggravator was narrowed at some point in the process. Additionally, in the course of our opinion, we characterized *Clemons* as follows:

> "[E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined *or* the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty." *Walton*, *supra*, at 653–654 (emphasis added).

Our use of the disjunctive suggests that as late as 1990, if a Florida trial court determined that the defendant's conduct fell within the narrowed HAC aggravator, the sentence would satisfy the Eighth Amendment irrespective of whether the trial court reweighed the aggravating and mitigating factors.[6] The holdings in *Stringer*, *Maynard*, *Clem-*

[6] JUSTICE STEVENS is thus simply wrong in stating that we have confused appellate application of a limiting construction with a trial court's deference to a tainted jury recommendation, see *post*, at 545 (dissenting

ons, and *Godfrey* cannot be thought to suggest otherwise, because there was no indication in those cases that the state courts had found the facts of the crimes to fall within appropriately narrowed definitions of the aggravators. Before *Espinosa*, we had never invalidated a death sentence where a court found the challenged aggravator to be within the appellate court's narrowed definition of a facially vague aggravator.

Most of JUSTICE STEVENS's dissent is devoted to making a forceful case that *Espinosa* was a reasonable interpretation of prior law—perhaps even the most reasonable one. But the *Teague* inquiry—which is applied to Supreme Court decisions that are, one must hope, *usually* the most reasonable interpretation of prior law—requires more than that. It asks whether *Espinosa* was *dictated* by precedent—*i. e.*, whether *no other* interpretation was reasonable. We think it plain from the above that a jurist considering all the relevant material (and not, like JUSTICE STEVENS's dissent, considering only the material that favors the *Espinosa* result) could reasonably have reached a conclusion contrary to our holding in that case. Indeed, both before and after Lambrix's conviction became final, every court decision we are aware of did so. See, *e. g.*, *Smalley* v. *State*, 546 So. 2d, at 722; *Proffitt* v. *Wainwright*, 756 F. 2d, at 1502; *Bertolotti* v. *Dugger*, 883 F. 2d, at 1527; *Sanchez-Velasco* v. *State*, 570 So. 2d 908, 916 (Fla. 1990), cert. denied, 500 U. S. 929 (1991).

It has been suggested that *Espinosa* was not a new rule because our decision was handed down as a *per curiam* without oral argument. See, *e. g.*, *Glock* v. *Singletary*, 65 F. 3d, at 896, n. 11 (en banc) (Tjoflat, C. J., dissenting). Whatever

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opinion). *Walton* indicated that our precedents provided two distinct and permissible routes to satisfy the Eighth Amendment where the sentencer considered a vague aggravator: a court's finding of the aggravator under a proper limiting construction, *or* independent reweighing of the circumstances.

inference of established law a summary, *per curiam* disposition might normally carry is precluded by the peculiar circumstances surrounding the summary *per curiam* in *Espinosa*. Just three weeks prior to our issuance of *Espinosa*, we had decided a case that raised the identical issue, and in which that issue had been fully briefed and argued; we found ourselves without jurisdiction to decide the point, however, because the defendant had failed to preserve his objection in the state courts. See *Sochor* v. *Florida*, 504 U. S., at 533–534. It is obvious on the face of the matter that *Espinosa* was only in the most technical sense an "unargued" case: We used that case, which was pending on petition for certiorari when *Sochor* was decided, as the vehicle for resolving a fully argued point without consuming additional resources.

V

Since we have determined that *Espinosa* announced a new rule under *Teague*, there remains only the task of determining whether that new rule nonetheless falls within one of the two exceptions to our nonretroactivity doctrine. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, see *Teague*, 489 U. S., at 311, or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle* v. *Parks*, 494 U. S., at 494 (quoting *Penry* v. *Lynaugh*, 492 U. S., at 329, 330). Plainly, this exception has no application to this case. *Espinosa* "neither decriminalize[s] a class of conduct nor prohibit[s] the imposition of capital punishment on a particular class of persons." 494 U. S., at 495.

The second exception is for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Ibid.* (quoting *Teague*,

supra, at 311). Lambrix does not contend that this exception applies to *Espinosa* errors, and our opinion in *Sawyer* v. *Smith*, 497 U. S., at 241–244, makes it quite clear that that is so.

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For the reasons stated, the judgment of the Court of Appeals for the Eleventh Circuit is

Affirmed.

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

Two propositions of law supported our holding in *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) *(per curiam):* First, in a capital sentencing proceeding in a State where the sentencer weighs aggravating and mitigating circumstances, the Eighth Amendment is violated by a jury instruction that fails to define the "especially heinous, atrocious, or cruel" (HAC) aggravating circumstance. Second, in a Florida sentencing proceeding the trial court must give "'great weight'" to the jury's recommendation, whether it be for life or death. *Id.*, at 1082. For these reasons, we concluded in *Espinosa* that constitutional error that taints the jury's recommendation presumptively taints the judge's sentence as well. *Ibid.* The two propositions supporting the *Espinosa* holding were well established when that case was decided. The first proposition dates back to 1980 when we decided *Godfrey* v. *Georgia*, 446 U. S. 420, 428–429,[1] and the second was announced by the Florida Supreme Court in

[1] *Godfrey,* of course, held that Georgia's "outrageously or wantonly vile, horrible and inhuman" aggravating factor failed to adequately channel the jury's discretion. See 446 U. S., at 428–429. We found the "heinous, atrocious or cruel" aggravator unconstitutional in *Maynard* v. *Cartwright*, 486 U. S. 356, 359 (1988), and subsequently noted that application of *Godfrey* to the HAC instruction did not create a new rule. See *Stringer* v. *Black*, 503 U. S. 222, 228–229 (1992).

1975 in *Tedder* v. *State*, 322 So. 2d 908, 910.[2] Thus I agree with Chief Judge Tjoflat that our *per curiam* opinion in *Espinosa* amounted to "nothing more than an application of well-settled principles. . . . In declaring the Florida HAC instruction unconstitutional, the Court simply applied the law as announced initially in *Godfrey* and later reaffirmed in *Maynard* [v. *Cartwright*, 486 U. S. 356 (1988)]. The Court's conclusion—that the invalid instruction may have tainted the jury's death penalty recommendation and the trial judge's sentence—merely acknowledged what the Supreme Court of Florida has been holding for years." *Glock* v. *Singletary*, 65 F. 3d 878, 896 (CA11 1995) (dissenting opinion) (footnotes omitted).[3]

Today the Court reaches the conclusion that *Espinosa* announced a new rule by placing a novel interpretation on its holding. The majority apparently construes *Espinosa* as holding that the constitutional error in the jury instruction will "automatically render a defendant's sentence unconstitutional." *Ante*, at 530.[4] The Court suggests that our holdings in *Godfrey*, *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), and *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990)—that

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[2] These two "controlling precedents," both of which were cited in the *Espinosa* opinion, provided sufficient support for its holding. Thus the Court is simply mistaken when it asserts that "*Espinosa* itself did not purport to rely upon any controlling precedent." *Ante*, at 528.

[3] *Tedder*, of course, was not an isolated decision. In *Riley* v. *Wainwright*, 517 So. 2d 656 (Fla. 1987), the State Supreme Court put the point succinctly: "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." *Id.*, at 659. The *Riley* court relied on a pre-*Tedder* decision stating that the advisory opinion of the jury "is an integral part of the death sentencing process." 517 So. 2d, at 657 (citing *Lamadline* v. *State*, 303 So. 2d 17, 20 (Fla. 1974)).

[4] Responding to this dissent in n. 2, *ante*, at 528, the Court states that the clause I have quoted was not intended to describe the Court's understanding of the holding in *Espinosa*. If that be so, the relevance of this portion of the Court's opinion, including its reliance on *Godfrey* and *Maynard*, is opaque, at best.

an appellate court could cure a sentencing jury's weighing of an invalid aggravator—might have led a reasonable jurist down a road different from the one the Court followed in *Espinosa*.[5] But in holding that a trial judge's sentence may be infected by the jury's consideration of an invalid aggravating factor, *Espinosa* did not address the entirely separate question of whether the jury's error could be cured or considered harmless either at the trial or the appellate level. Indeed, in subsequent proceedings the Supreme Court of Florida did conclude that the error in Espinosa's case was harmless and upheld his sentence of death. See *Espinosa* v. *State*, 626 So. 2d 165, 167 (1993) (ruling that Espinosa's HAC instruction claim was procedurally barred because he had challenged the HAC factor rather than the instruction itself and, alternatively, that any error in the instruction was harmless beyond a reasonable doubt), cert. denied, 511 U. S. 1152 (1994), and affirmed Espinosa's sentence. Our decision in *Espinosa* did not create a new rule prohibiting trial courts from curing a jury's error, rather it held that "if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." 505 U. S., at 1082. This holding is a logical consequence of applying *Godfrey* to Florida's sentencing scheme.

In a sinuous, difficult to follow argument, the Court suggests that three hypothetical propositions of law somehow demonstrate that the narrow holding in *Espinosa* was not dictated by *Godfrey* and *Tedder*. First, the Court posits that a reasonable jurist might have believed that "[t]he mere cabining of the trial court's discretion" was alone enough to avoid constitutional error. *Ante*, at 532 (emphasis deleted).

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[5] The Court also relies heavily on a passage in our opinion in *Walton* v. *Arizona*, 497 U. S. 639 (1990), noting that a trial judge's failure to apply a narrowing construction to an invalid aggravator "'does not necessarily require that a state appellate court vacate a death sentence based on that factor.'" *Ante*, at 537.

A critical part of that "cabining," however, is Florida's requirement that a properly instructed jury must have an opportunity to recommend a life sentence, and that the judge must give great weight to that recommendation. The role of the jury is to provide one of the cabin's four walls. The fact that three walls remain standing hardly excuses an error that removed the wall represented by the jury's recommendation. At the time of petitioner's sentencing, the Florida Supreme Court recognized the jury's critical role, and, when error occurred before the jury, did not hesitate to remand for resentencing, even when the trial judge claimed to be unaffected by the error. For example in *Messer* v. *State*, 330 So. 2d 137, 142 (1976), the State Supreme Court remanded for resentencing when the trial court failed to allow the jury to consider certain mitigating evidence. The court rejected the argument that the trial court's subsequent weighing of the mitigating evidence cured the error: The Florida scheme, the court concluded, was one of "checks and balances in which the input of the jury serves as an integral part." *Ibid.* Our holding in *Proffitt* v. *Florida*, 428 U. S. 242, 255 (1976) (joint opinion), that Florida's sentencing scheme is not facially unconstitutional does not suggest otherwise. There, we determined that the State's sentencing procedure provided adequate safeguards against arbitrary imposition of the death sentence in part because of the procedures followed by the trial judge in fixing the sentence. Our focus was on the adequacy of the guidance provided by the sentencing scheme; accordingly, we had no need to extensively examine or discuss the judge's relationship to the jury or Florida Supreme Court decisions like *Tedder*.

Second, simply ignoring the reasoning in *Tedder*, the Court suggests that there was "no error for the trial judge to cure, since under Florida law the trial court, not the jury, was the sentencer." *Ante*, at 533 (emphasis deleted). It is, of course, true that the judge imposes the sentence after receiving the jury's recommendation. But this has never

meant that constitutional error in the proceedings before the jury is simply irrelevant. Cf. *Messer* v. *State*, *supra*. As then-JUSTICE REHNQUIST noted in 1983, it is well-settled Florida law that if the jury makes a recommendation of life imprisonment, "the trial judge may not impose a death sentence unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.' *Tedder* v. *State*, 322 So. 2d 908, 910 (1975)." *Barclay* v. *Florida*, 463 U. S. 939, 955–956 (plurality opinion).[6] Similarly, a trial judge should not disturb a jury recommendation of death "unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." See *LeDuc* v. *State*, 365 So. 2d 149, 151 (Fla. 1978), cert. denied, 444 U. S. 885 (1979). Given this, it is vacuous to argue that our prior references to the judge as the sentencer somehow imply that an error before the jury would not affect the ultimate sentence. It is equally vacuous to suggest that our conclusion in *Espinosa* "that the jury was at least in part a cosentencer" had its source in a case decided "just three weeks earlier," *ante*, at 533 (citing *Sochor* v. *Florida*, 504 U. S. 527 (1992)). In that earlier case, we cited *Tedder* after explaining that the jury was a constituent element of the sentencer "because the trial judge does not render wholly independent judgment, but must accord deference to the jury's recommendation." *Sochor*, 504 U. S., at 533.

Third, the Court suggests that the trial court's "weighing of properly narrowed aggravators and mitigators was sufficiently independent of the jury to cure any error in the jury's consideration of a vague aggravator." *Ante*, at 534 (em-

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[6] The Florida Supreme Court has applied *Tedder* in numerous cases to reverse a trial judge's override of a jury's life sentence. See, *e. g.*, *Wasko* v. *State*, 505 So. 2d 1314, 1318 (1987); *Goodwin* v. *State*, 405 So. 2d 170, 172 (1981); *Odom* v. *State*, 403 So. 2d 936, 942–943 (1981), cert. denied, 456 U. S. 925 (1982); *Neary* v. *State*, 384 So. 2d 881, 885–886 (1980); *Malloy* v. *State*, 382 So. 2d 1190, 1193 (1979).

phasis deleted). This suggestion is doubly flawed. Given that the judge's instruction to the jury failed to narrow the HAC aggravator, there is no reason to believe that he appropriately narrowed the factor in his own deliberations.[7] More importantly, even if he did apply a limiting definition, his sentencing decision was made without the benefit of an untainted recommendation from the jury, and, under Florida law, he could not have simply resentenced the petitioner without regard to the jury's tainted recommendation. Nor can one simply conclude that this error made no practical difference in petitioner's sentence. There is nothing in the record to suggest that had the jury recommended a life sentence, the judge would have found that "the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ," as *Tedder* requires.

Here, again, the Court finds that our statements in cases like *Walton* v. *Arizona*, 497 U. S. 639 (1990), that a state appellate court may affirm a death sentence resulting from an unconstitutionally broad aggravator by applying a limiting definition, suggest that *Espinosa* is a new rule. The majority's analysis confuses an appellate court's application of a limiting definition on appellate review with a trial judge's deference to a tainted jury recommendation. The judge in this case did not indicate that he was applying a limiting definition of the HAC factor, or that he was in some other way curing or discounting the error in the jury instruction. At the time of petitioner's sentencing, given *Godfrey* and *Tedder*, this rendered petitioner's death sentence constitutionally defective.

As a matter of logic and law there was nothing new about *Espinosa*'s holding that the jury plays a central role in Florida's capital sentencing scheme. Moreover, as statistics that

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[7] Nothing in the record indicates that the judge recognized that the jury instruction was erroneous, or that he sought to cure that error in his own weighing process. In finding that the HAC aggravator was present, the judge merely stated: "The facts speak for themselves." App. 20.

I have previously summarized demonstrate, it was equally clear as a matter of fact that "erroneous instructions to the jury at the sentencing phase of the trial may make the difference between life or death." *Sochor* v. *Florida*, 504 U. S., at 552.[8]

I respectfully dissent.

JUSTICE O'CONNOR, dissenting.

Although I agree with much of the reasoning set forth in Part II of the Court's opinion, I disagree with its disposition of the case. I would instead vacate the judgment of the Court of Appeals and remand the case so that the Court of Appeals might consider the procedural bar issue in the first instance.

The Court holds that, as a general practice, a federal habeas court should consider whether the relief a habeas petitioner requests is a "new rule" under *Teague* v. *Lane*, 489 U. S. 288 (1989), only after resolving the State's argument that his claim is procedurally barred. *Ante*, at 525. Usu-

[8] "As a matter of fact, the jury sentence is the sentence that is usually imposed by the Florida Supreme Court. The State has attached an appendix to its brief, see App. to Brief for Respondent A1–A70, setting forth data concerning 469 capital cases that were reviewed by the Florida Supreme Court between 1980 and 1991. In 341 of those cases (73%), the jury recommended the death penalty; in none of those cases did the trial judge impose a lesser sentence. In 91 cases (19%), the jury recommended a life sentence; in all but one of those cases, the trial judge overrode the jury's recommended life sentence and imposed a death sentence. In 69 of those overrides (77%), however, the Florida Supreme Court vacated the trial judge's sentence and either imposed a life sentence itself or remanded for a new sentencing hearing.

"Two conclusions are evident. First, when the jury recommends a death sentence, the trial judge will almost certainly impose that sentence. Second, when the jury recommends a life sentence, although overrides have been sustained occasionally, the Florida Supreme Court will normally uphold the jury rather than the judge. It is therefore clear that in practice, erroneous instructions to the jury at the sentencing phase of the trial may make the difference between life or death." *Sochor* v. *Florida*, 504 U. S., at 551–552 (footnote omitted).

ally, then, when a federal habeas court has before it contentions that a petitioner's claim is barred both on state procedural grounds and because the petitioner seeks to rely on a "new rule" under *Teague*, the court should consider the *Teague* question only after the procedural bar issue has been resolved in the petitioner's favor. As the Court recognizes, addressing the procedural bar issue first avoids unnecessary consideration of constitutional questions and accords fitting respect to the State's procedural rules, which are indispensable to the administration of its criminal justice system. *Ante*, at 524–525.

With this much of the Court's opinion I agree. Of course, there may be exceptions to the rule that the procedural bar issue should be resolved first. One case might be where the procedural bar question is excessively complicated, but the *Teague* issue can be easily resolved. The Court of Appeals here gave no reason for its failure to consider the Florida Supreme Court's determination that petitioner's claim based on *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) *(per curiam)*, was procedurally barred. Indeed, the Court of Appeals did not even discuss the state court's holding, let alone decide that resolution of the procedural bar issue would be inappropriate in this case. I see no reason to think resolution of the procedural bar question would be especially troublesome, nor do I see any other reason for the Court of Appeals' failure to give priority to the State's argument that an independent and adequate state ground barred petitioner's *Espinosa* claim.

Accordingly, I would remand the case to the Court of Appeals for it to resolve the procedural bar issue. As the Court points out, the Court of Appeals is better suited to evaluating matters of state procedure than are we. *Ante*, at 525. In my view, then, it is premature to address the State's contention that petitioner's *Espinosa* claim is barred on *Teague* grounds. Nevertheless, since the Court reaches the question, I wish to express my agreement with JUSTICE STEVENS' resolution of the *Teague* issue.

Syllabus

HARBOR TUG & BARGE CO. *v.* PAPAI ET UX.

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

No. 95–1621. Argued January 13, 1997—Decided May 12, 1997

Respondent Papai was injured while painting the housing structure of the tug *Pt. Barrow*. Petitioner Harbor Tug & Barge Co., the tug's operator, had hired him to do the work, which was expected to last one day and would not involve sailing with the vessel. Papai had been employed by Harbor Tug on 12 previous occasions in the 2½ months before his injury, receiving those jobs through the Inland Boatman's Union (IBU) hiring hall. He had been getting short-term jobs with various vessels through the hiring hall for about 2¼ years. Most of those were deckhand work, which Papai said involved manning the lines on- and off-board vessels while they dock or undock. Papai sued Harbor Tug, claiming, *inter alia*, negligence under the Jones Act, and his wife joined as a plaintiff, claiming loss of consortium. The District Court granted Harbor Tug summary judgment upon finding that Papai did not enjoy seaman status under the Jones Act, and it later confirmed that adjudication. The Ninth Circuit reversed and remanded for a trial of, among other things, Papai's seaman status and his corresponding Jones Act claim. Based on *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, the court described the relevant inquiry as not whether Papai had a permanent connection with the vessel but whether his relationship with a vessel or an identifiable group of vessels was substantial in duration and nature, and found that this required consideration of his employment's total circumstances. The court determined that a reasonable jury could conclude that Papai satisfied that test, for if the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, he should not be deprived of that status simply because the industry operates under a daily assignment, rather than a permanent employment, system.

Held:

1. Because the issue whether the record permits a reasonable jury to conclude that Papai is a Jones Act seaman is here resolved in the employer's favor, this Court does not reach the question whether an administrative ruling for an employee on his claim of Longshore and Harbor Workers' Compensation Act coverage bars his claim of seaman status in a Jones Act suit. P. 550.

Syllabus

2. This record would not permit a reasonable jury to conclude that Papai is a Jones Act seaman. Jones Act coverage is confined to seamen, those workers who face regular exposure to the perils of the sea. An important part of the test for determining who is a seaman is whether the injured worker has a substantial connection to a vessel or to a fleet of vessels, and the latter concept requires a requisite degree of common ownership or control. *Chandris*, 515 U. S., at 366. The requisite link is not established by the mere use of the same hiring hall which draws from the same pool of employees. The various vessels on which Papai worked through the IBU hiring hall in the 2¼ years before his injury were not linked by any common ownership or control. Considering prior employments with independent employers in making the seaman status inquiry would undermine "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act . . . before a particular work day begins," *id.*, at 363, and there would be no principled basis for limiting which prior employments are considered for determining seaman status. That the IBU Deckhands Agreement classified Papai as a deckhand does not give him claim to seaman status. Seaman status is based on his actual duties, *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 260, and Papai's duties during the employment in question included no seagoing activity. Nor is it reasonable to infer from his testimony that his 12 prior employments with Harbor Tug involved work of a seagoing nature that could qualify him for seaman status. Pp. 553–560.

67 F. 3d 203, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 560.

Eric Danoff argued the cause for petitioner. With him on the briefs was *Richard K. Willard.*

Thomas J. Boyle argued the cause and filed a brief for respondents.

David C. Frederick argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Dellinger*, *Deputy Solicitor*

General Kneedler, *J. Davitt McAteer*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Mark S. Flynn*.*

JUSTICE KENNEDY delivered the opinion of the Court.

Adjudication to determine whether a maritime employee is a seaman under the Jones Act, 46 U. S. C. App. § 688(a), or a maritime employee covered by the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (pt. 2) 1424, as amended, 33 U. S. C. § 901 *et seq.*, continues to be of concern in our system. The distinction between the two mutually exclusive categories can be difficult to implement, and many cases turn on their specific facts.

The Court of Appeals for the Ninth Circuit held in this case that there was a jury question as to whether an injured worker was a Jones Act seaman. Granting the employer's petition for a writ of certiorari, we brought two questions before us. The first is whether an administrative ruling in favor of the employee on his claim of coverage under the LHWCA bars his claim of seaman status in the Jones Act suit he wishes to pursue in district court. The second is whether this record would permit a reasonable jury to conclude the employee is a Jones Act seaman. We resolve the second question in the employer's favor and, as it is dispositive of the case, we do not reach the first.

On the question of seaman status, there is an issue of significance beyond the facts of this case. Our statement in an earlier case that a worker may establish seaman status based on the substantiality of his connection to "an identifiable group of . . . vessels" in navigation, see *Chandris, Inc.* v.

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*Briefs of *amici curiae* urging reversal were filed for Industrial Indemnity Co. et al. by *Roger A. Levy* and *J. Mark Foley;* and for the Shipbuilders Council of America et al. by *Charles T. Carroll, Jr.*, *F. Edwin Froelich*, *Franklin W. Losey*, and *Lloyd A. Schwartz.*

A brief of *amicus curiae* urging affirmance was filed for the United Brotherhood of Carpenters and Joiners of America by *John T. DeCarlo* and *John R. Hillsman.*

Latsis, 515 U. S. 347, 368 (1995), has been subject to differing interpretations, and we seek to provide clarification.

I

Respondent John Papai was painting the housing structure of the tug *Pt. Barrow* when a ladder he was on moved, he alleges, causing him to fall and injure his knee. App. 50. Petitioner Harbor Tug & Barge Co., the tug's operator, had hired Papai to do the painting work. *Id.*, at 44. A prime coat of paint had been applied and it was Papai's task to apply the finish coat. *Id.*, at 45. There was no vessel captain on board and Papai reported to the port captain, who had a dockside office. *Id.*, at 36–37. The employment was expected to begin and end the same day, *id.*, at 35, 48, and Papai was not going to sail with the vessel after he finished painting, *id.*, at 51. Papai had been employed by Harbor Tug on 12 previous occasions in the 2½ months before his injury.

Papai received his jobs with Harbor Tug through the Inland Boatman's Union (IBU) hiring hall. He had been getting jobs with various vessels through the hiring hall for about 2¼ years. All the jobs were short term. The longest lasted about 40 days and most were for 3 days or under. *Id.*, at 29, 34. In a deposition, Papai described the work as coming under three headings: maintenance, longshoring, and deckhand. *Id.*, at 30–32. Papai said maintenance work involved chipping rust and painting aboard docked vessels. *Id.*, at 30, 34–35. Longshoring work required helping to discharge vessels. *Id.*, at 31. Deckhand work involved manning the lines on- and off-board vessels while they docked or undocked. *Id.*, at 30. As for the assignments he obtained through the hiring hall over 2¼ years, most of them, says Papai, involved deckhand work. *Id.*, at 34.

After his alleged injury aboard the *Pt. Barrow*, Papai sued Harbor Tug in the United States District Court for the Northern District of California, claiming negligence under

the Jones Act and unseaworthiness under general maritime law, in addition to other causes of action. His wife joined as a plaintiff, claiming loss of consortium. Harbor Tug sought summary judgment on Papai's Jones Act and unseaworthiness claims, contending he was not a seaman and so could not prevail on either claim. The District Court granted Harbor Tug's motion and later denied Papai's motion for reconsideration. After our decisions in *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337 (1991), and *Southwest Marine, Inc.* v. *Gizoni*, 502 U. S. 81 (1991), the District Court granted a motion by Harbor Tug "to confirm" the earlier summary adjudication of Papai's nonseaman status. The District Court reasoned, under a test since superseded, see *Chandris*, *supra*, that Papai was not a seaman within the meaning of the Jones Act or the general maritime law, because "he did not have a 'more or less permanent connection' with the vessel on which he was injured nor did he perform substantial work on the vessel sufficient for seaman status." App. to Pet. for Cert. 27a.

The Court of Appeals for the Ninth Circuit reversed and remanded for a trial of Papai's seaman status and his corresponding Jones Act and unseaworthiness claims. Based on our decision in *Chandris*, the court described the relevant inquiry as "not whether plaintiff had a permanent connection with the vessel [but] whether plaintiff's relationship with a vessel (or a group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." 67 F. 3d 203, 206 (1995). A majority of the panel believed it would be reasonable for a jury to conclude the employee satisfied that test. In the majority's view, "[i]f the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system." *Ibid.* The majority also said the

"circumstance" that Papai had worked for Harbor Tug on 12 occasions during the 2½ months before his injury "may in itself provide a sufficient connection" to Harbor Tug's vessels to establish seaman status. *Ibid.*

Judge Poole dissented from the majority's holding that there was a triable issue as to Papai's seaman status. He recognized that *Chandris* held out the possibility of being a seaman without a substantial connection to a particular vessel in navigation, provided one nevertheless had the required connection to "'an identifiable group of such vessels.'" 67 F. 3d, at 209 (quoting 515 U. S., at 368). Judge Poole said, however, it would be a mistake to view *Chandris* as holding that, for seaman-status purposes, a "group may be identified simply as those vessels on which a sailor sails, not just those of a particular employer or controlling entity. . . . Th[e majority's holding] renders the 'identifiable group' or 'fleet' requirement a nullity." 67 F. 3d, at 209 (citation omitted). Judge Poole also noted that the majority's position conflicted with that of the Fifth Circuit (en banc) and of a Third Circuit panel. *Ibid.* (citing *Barrett* v. *Chevron, U. S. A., Inc.*, 781 F. 2d 1067 (CA5 1986) (en banc); *Reeves* v. *Mobile Dredging & Pumping Co.*, 26 F. 3d 1247 (CA3 1994)); see also *Johnson* v. *Continental Grain Co.*, 58 F. 3d 1232 (CA8 1995); but see *Fisher* v. *Nichols*, 81 F. 3d 319, 323 (CA2 1996) (rejecting common ownership or control requirement).

We granted certiorari, 518 U. S. 1055 (1996), and now reverse.

II

The LHWCA, a maritime workers' compensation scheme, excludes from its coverage "a master or member of a crew of any vessel," 33 U. S. C. § 902(3)(G). These masters and crewmembers are the seamen entitled to sue for damages under the Jones Act. *Chandris*, 515 U. S., at 355–358. In other words, the LHWCA and the Jones Act are "mutually exclusive." *Id.*, at 355–356.

Our recent cases explain the proper inquiry to determine seaman status. We need not restate that doctrinal development, see *id.*, at 355–368; *Wilander*, *supra*, at 341–354, to resolve Papai's claim. It suffices to cite *Chandris*, which held, in pertinent part:

> "[T]he essential requirements for seaman status are twofold. First, . . . an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission. . . .
>
> "Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." 515 U. S., at 368 (citations and internal quotation marks omitted).

The seaman inquiry is a mixed question of law and fact, and it often will be inappropriate to take the question from the jury. Nevertheless, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Wilander*, *supra*, at 356; see also *Chandris*, 515 U. S., at 368–369.

Harbor Tug does not dispute that it would be reasonable for a jury to conclude Papai's duties aboard the *Pt. Barrow* (or any other vessel he worked on through the IBU hiring hall) contributed to the function of the vessel or the accomplishment of its mission, satisfying *Chandris*' first standard. Nor does Harbor Tug dispute that a reasonable jury could conclude that the *Pt. Barrow* or other vessels Papai worked on were in navigation. The result, as will often be the case, is that seaman status turns on the part of *Chandris*' second standard which requires the employee to show "a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Id.*, at 368. We explained the rule as follows:

> "The fundamental purpose of th[e] substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Ibid.*

For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Papai argues, and the Court of Appeals majority held, that Papai meets *Chandris*' second test based on his employments with the various vessels he worked on through the IBU hiring hall in the 2¼ years before his injury, vessels owned, it appears, by three different employers not linked by any common ownership or control, App. 38. He also did longshoring work through the hiring hall, *id.*, at 31, and it appears this was for still other employers, *id.*, at 38. As noted above, Papai testified at his deposition that the majority of his work during this period was deckhand work. According to Papai, this satisfies *Chandris* because the group of vessels Papai worked on through the IBU hiring hall constitutes "an identifiable group of . . . vessels" to which he has a "substantial connection." 515 U. S., at 368.

The Court of Appeals for the Fifth Circuit was the first to hold that a worker could qualify as a seaman based on his connection to a group of vessels rather than a particular one. In *Braniff* v. *Jackson Ave.-Gretna Ferry, Inc.*, 280 F. 2d 523 (1960), the court held the employer was not entitled to summary judgment on the seaman-status question where an

employee's job was to perform maintenance work on the employer's fleet of ferry boats, often while the boats were running: "The usual thing, of course, is for a person to have a Jones Act seaman status in relation to a particular vessel. But there is nothing about this . . . concept to limit it mechanically to a single ship." *Id.*, at 528. There is "no insurmountable difficulty," the court explained, in finding seaman status based on the employee's relationship to "several specific vessels"—"an identifiable fleet"—as opposed to a single one. *Ibid.*

We, in turn, adverted to the group of vessels concept in *Chandris.* We described it as a rule "allow[ing] seaman status for those workers who had the requisite connection with an 'identifiable fleet' of vessels, a finite group of vessels under common ownership or control." 515 U. S., at 366. The majority in the Court of Appeals did not discuss our description of the group of vessels concept as requiring common ownership or control, nor did it discuss other Courts of Appeals cases applying the concept, see, *e. g.*, *Reeves* v. *Mobile Dredging & Pumping Co.*, 26 F. 3d, at 1258. The court pointed to this statement from *Chandris:* "[W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer." 515 U. S., at 371–372. It interpreted this to mean "it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period." 67 F. 3d, at 206. The court did not define what it meant by "the relevant time period." In any event, the context of our statement in *Chandris* makes clear our meaning, which is that the employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different "essential duties" from his previous ones. 515 U. S., at 371. In *Chandris,* the words "particular employer" give emphasis to the point that the inquiry into the nature

of the employee's duties for seaman-status purposes may concentrate on a narrower, not broader, period than the employee's entire course of employment with his current employer. There was no suggestion of a need to examine the nature of an employee's duties with prior employers. See also *id.*, at 367 ("Since *Barrett* [v. *Chevron, U. S. A., Inc.*, 781 F. 2d 1067 (CA5 1986) (en banc)], the Fifth Circuit consistently has analyzed the problem [of determining seaman status] in terms of the percentage of work performed on vessels for the employer in question"). The Court of Appeals majority interpreted the words "particular employer" outside the limited discussion in which we used them and, as a result, gave the phrase a meaning opposite from what the context requires.

The Court of Appeals stressed that various of Papai's employers had "join[ed] together to obtain a common labor pool on which they draw by means of a union hiring hall." 67 F. 3d, at 206; see also *id.*, at 206, n. 3 (suggesting that this case involves a "group of vessels [that] have collectively agreed to obtain employees" from a hiring hall). There is no evidence in the record that the contract Harbor Tug had with the IBU about employing deckhands (IBU Deckhands Agreement) was negotiated by a multiemployer bargaining group, and, even if it had been, that would not affect the result here. There was no showing that the group of vessels the court sought to identify were subject to unitary ownership or control in any aspect of their business or operation. So far as the record shows, each employer was free to hire, assign, and direct workers for whatever tasks and time period they each determined, limited, at most, by the IBU Deckhands Agreement. In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman-status determination, the question is whether the vessels are subject to common ownership or control. The requisite link is not established by the mere use of the same hiring hall which draws from the same pool of employees.

Considering prior employments with independent employers in making the seaman-status inquiry would undermine "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA) before a particular work day begins." *Chandris*, *supra*, at 363. There would be no principled basis for limiting which prior employments are considered for determining seaman status. The Court of Appeals spoke of a "relevant time period" but, as noted above, it did not define this term. Since the substantial connection standard is often, as here, the determinative element of the seaman inquiry, it must be given workable and practical confines. When the inquiry further turns on whether the employee has a substantial connection to an identifiable group of vessels, common ownership or control is essential for this purpose.

Papai contends his various employers through the hiring hall would have been able to predict his status as a seaman under the Jones Act based on the seagoing nature of some of the duties he could have been hired to perform consistent with his classification as a "qualified deckhand" under the IBU Deckhands Agreement. By the terms of the agreement, Papai was qualified as a "satisfactory helmsman and lookout," for example, and he could have been hired to serve a vessel while it was underway, in which case his duties would have included "conduct[ing] a check of the engine room status a minimum of two (2) times each watch . . . for vessel safety reasons." App. 77. In *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251 (1940), we rejected a claim to seaman status grounded on the employee's job title, which also happened to be "deckhand." "The question," we said, "concerns his actual duties." *Id.*, at 260. See also *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 268, n. 30 (1977) (reasoning that employee's membership in longshoremen's union was, in itself, irrelevant to whether employee

was covered by the LHWCA, as fact of union membership was unrelated to the purposes of the LHWCA's coverage provisions). The question is what connection the employee had in actual fact to vessel operations, not what a union agreement says. Papai was qualified under the IBU Deckhands Agreement to perform nonseagoing work in addition to the seagoing duties described above. His actual duty on the *Pt. Barrow* throughout the employment in question did not include any seagoing activity; he was hired for one day to paint the vessel at dockside and he was not going to sail with the vessel after he finished painting it. App. 44, 48, 51. This is not a case where the employee was hired to perform seagoing work during the employment in question, however brief, and we need not consider here the consequences of such an employment. The IBU Deckhands Agreement gives no reason to assume that any particular percentage of Papai's work would be of a seagoing nature, subjecting him to the perils of the sea. In these circumstances, the union agreement does not advance the accuracy of the seaman-status inquiry.

Papai argues he qualifies as a seaman if we consider his 12 prior employments with Harbor Tug over the 2½ months before his injury. Papai testified at his deposition that he worked aboard the *Pt. Barrow* on three or four occasions before the day he was injured, the most recent of which was more than a week earlier. *Id.*, at 35, 44. Each of these engagements involved only maintenance work while the tug was docked. *Id.*, at 34–35. The nature of Papai's connection to the *Pt. Barrow* was no more substantial for seaman-status purposes by virtue of these engagements than the one during which he was injured. Papai does not identify with specificity what he did for Harbor Tug the other eight or nine times he worked for the company in the 2½ months before his injury. The closest he comes is his deposition testimony that 70 percent of his work over the 2¼ years before his injury was deckhand work. *Id.*, at 34. Coupled with

the fact that none of Papai's work aboard the *Pt. Barrow* was of a seagoing nature, it would not be reasonable to infer from Papai's testimony that his recent engagements with Harbor Tug involved work of a seagoing nature. In any event, these discrete engagements were separate from the one in question, which was the sort of "transitory or sporadic" connection to a vessel or group of vessels that, as we explained in *Chandris,* does not qualify one for seaman status. 515 U. S., at 368.

Jones Act coverage is confined to seamen, those workers who face regular exposure to the perils of the sea. An important part of the test for determining who is a seaman is whether the injured worker seeking coverage has a substantial connection to a vessel or a fleet of vessels, and the latter concept requires a requisite degree of common ownership or control. The substantial connection test is important in distinguishing between sea- and land-based employment, for land-based employment is inconsistent with Jones Act coverage. This was the holding in *Chandris,* and we adhere to it here. The only connection a reasonable jury could identify among the vessels Papai worked aboard is that each hired some of its employees from the same union hiring hall from which Papai was hired. That is not sufficient to establish seaman status under the group of vessels concept. Papai had the burden at summary judgment to "set forth specific facts showing that there is a genuine issue for trial." Fed. Rule Civ. Proc. 56(e). He failed to meet it. The Court of Appeals erred in holding otherwise. Its judgment is reversed.

It is so ordered.

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

During the 2-year period immediately before his injury, respondent Papai worked as a maintenance man and a deckhand for various employers who hired out of the Inland Boat-

man's Union hiring hall. He testified that about 70 percent of his work was as a deckhand, and that "most of that work [was] done while the boats were moving on the water." App. 34. If all of that deckhand work had been performed for petitioner, there would be no doubt about Papai's status as a seaman.

Petitioner, however, did not maintain a permanent crew on any of its vessels. 67 F. 3d 203, 204 (CA9 1995). Instead, like other tugboat operators in the San Francisco Bay area, it obtained its deckhands on a job-by-job basis through the union hiring hall. Under these circumstances, I believe the Court of Appeals correctly concluded that Papai's status as a seaman should be tested by the character of his work for the group of vessel owners that used the same union agent to make selections from the same pool of employees.

In *Chandris, Inc.* v. *Latsis*, 515 U. S. 347 (1995), the Court rejected a "voyage test" of seaman status, concluding that an employee who was injured while performing his duties on a vessel on the high seas was not necessarily a Jones Act seaman. *Id.*, at 358–364. The Court instead adopted a status-based inquiry that looked at the nature and duration of the employee's relationship to a vessel—or an identifiable group of vessels—in navigation to determine whether that employee received Jones Act coverage. *Id.*, at 370–371. Today, the majority apparently concludes that an employee is not necessarily protected by the Jones Act even if he was injured aboard a vessel in navigation *and* his work over the preceding two years was primarily seaman's work. I believe this conclusion is unsupported by either the reasoning or the language in the *Chandris* opinion.

Chandris' status-based test requires a maritime worker to have a relationship that is substantial in duration and nature with a vessel, or an identifiable group of vessels, in navigation. See *id.*, at 376. Nothing in the Court's holding there intimated that the "identifiable group of vessels" need all be

owned by the same person.[1] Particularly in a labor market designed to allow employers to rely on temporary workers for a range of jobs, there is "no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer." *Id.*, at 371–372. As the Court of Appeals observed in this case: "If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system." 67 F. 3d, at 206.

The unfairness created by the Court's rule is evident. Let us assume that none of the tugboat operators in the bay area have permanent crews and that all of them obtain their deckhands on a more or less random basis through the same hiring hall. Further, assume that about 70 percent of the work performed by the employees thus obtained is seaman's work, while the remainder is shore-based maintenance work. A typical employee working for a typical employer in that pool would have the status of a seaman, and both the employees and the employers would be aware of this reality about their work environment. But under the Court's reasoning, even if over 70 percent of his randomly selected assignments during a 2-year period were seaman assignments, an injured worker would not be a seaman for Jones Act purposes if he happened to receive only a few assignments with the owner of the particular boat on which he was injured and those assignments were not seaman's work.

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[1] The majority puts great weight on *Chandris'* description of the Fifth Circuit's case law developing the fleet doctrine as "modif[ying] the test to allow seaman status for those workers who had the requisite connection with an 'identifiable fleet' of vessels, a finite group of vessels under common ownership or control." *Chandris,* 515 U. S., at 366. See *ante,* at 556. But that description of the lower court's case law did not form part of the *Chandris* holding, and it should not control the outcome here.

The majority tries to justify this conclusion with the argument that a rule acknowledging an employee's status as a seaman based on the work he does for a number of employers who hire out of the same hiring hall would create uncertainties for employers. *Ante*, at 558. The Court's concern is that an employer might not realize that an employee he had selected to chip paint on a docked boat had spent most of the past year as a deckhand on a neighboring vessel. This fear is exaggerated, since an employer who hires its workers out of a union hiring hall should be presumed to be familiar with the general character of their work. Moreover, surely the unfairness created by the majority's rule outweighs this concern.

Of course, in order to hold a particular employer liable, an employment relationship must have existed between the worker and the particular vessel owner at the time of the injury. *Chandris* teaches us, however, that the specific activity being performed at the time of the injury is not sufficient to establish the employee's status under the Jones Act. Rather, we must determine whether an employee has seaman status by looking at his work history. The character of that history in the market from which a vessel owner obtains all of its crews seems to me just as relevant as the assignments to the particular operator for whom work was being performed when the injury occurred.

Accordingly, I would affirm the judgment of the Court of Appeals.[2]

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[2] On the question the Court does not reach, I think the Court of Appeals correctly interpreted our opinion in *Southwest Marine, Inc.* v. *Gizoni*, 502 U. S. 81 (1991). See also G. Gilmore & C. Black, Law of Admiralty 435 (2d ed. 1975).

Syllabus

CAMPS NEWFOUND/OWATONNA, INC. *v.* TOWN OF HARRISON ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 94–1988. Argued October 9, 1996—Decided May 19, 1997

Petitioner, a Maine nonprofit corporation, operates a church camp for children, most of whom are not Maine residents. Petitioner is financed through camper tuition and other revenues. From 1989 to 1991, it paid over $20,000 per year in real estate and personal property taxes. A state statute provides a general exemption from those taxes for charitable institutions incorporated in Maine. With respect to institutions operated principally for the benefit of Maine nonresidents, however, a charity may only qualify for a more limited tax benefit, and then only if its weekly charge for services does not exceed $30 per person. Petitioner was ineligible for any exemption, because its campers were largely nonresidents and its weekly tuition was roughly $400 per camper. After respondent town of Harrison (Town) rejected its request for a refund of taxes already paid and a continuing exemption from future taxes, which was based principally on a claim that the tax exemption statute violated the Commerce Clause, petitioner filed suit and was awarded summary judgment by the Superior Court. The Maine Supreme Judicial Court reversed, holding that petitioner had not met its burden of persuasion that the statute is unconstitutional.

Held: An otherwise generally applicable state property tax violates the Commerce Clause if its exemption for property owned by charitable institutions excludes organizations operated principally for the benefit of nonresidents. Pp. 571–595.

(a) Because the Government lacked power to regulate interstate commerce during the Nation's first years, the States freely adopted measures fostering local interests without regard to possible prejudice to nonresidents, resulting in a "conflict of commercial regulations, destructive to the harmony of the States." *Gibbons* v. *Ogden*, 9 Wheat. 1, 224 (Johnson, J., concurring in judgment). Arguably, this was the cause of the Constitutional Convention. *Ibid.* The Commerce Clause not only granted Congress express authority to override restrictive and conflicting state commercial regulations, but also effected a curtailment of state power even absent congressional legislation. Pp. 571–572.

(b) The Court is unpersuaded by the Town's arguments that the dormant Commerce Clause is inapplicable here, either because campers are

not "articles of commerce," or more generally because interstate commerce is not implicated. The camp is unquestionably engaged in commerce, not only as a purchaser, see, *e. g., Katzenbach* v. *McClung*, 379 U. S. 294, 300–301, but also as a provider of goods and services akin to a hotel, see, *e. g., Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 244, 258. Although the latter case involved Congress' affirmative powers, its reasoning is applicable in the dormant Commerce Clause context. See, *e. g., Hughes* v. *Oklahoma*, 441 U. S. 322, 326, n. 2. The Town's further argument that the dormant Clause is inapplicable because a real estate tax is at issue is also rejected. Even assuming, as the Town argues, that Congress could not impose a national real estate tax, States are not free to levy such taxes in a manner that discriminates against interstate commerce. *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 596. Pp. 572–575.

(c) There is no question that if this statute targeted profit-making entities, it would violate the dormant Commerce Clause. The statute discriminates on its face against interstate commerce: It expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business. Such laws are virtually *per se* invalid. *E. g., Fulton Corp.* v. *Faulkner*, 516 U. S. 325, 331. Because the Town did not attempt to defend the statute by demonstrating that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, *e. g., Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 101, the Court does not address this question. See *Fulton Corp.*, 516 U. S., at 333–334. Pp. 575–583.

(d) The rule applicable to profit-making enterprises also applies to a discriminatory tax exemption for charitable and benevolent institutions. The dormant Commerce Clause's applicability to the nonprofit sector follows from this Court's decisions holding not-for-profit institutions subject to laws regulating commerce, *e. g., Associated Press* v. *NLRB*, 301 U. S. 103, 129, and to the federal antitrust laws, *e. g., National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 100, n. 22. The Court has already held that the dormant Clause applies to activities not intended to earn a profit, *Edwards* v. *California*, 314 U. S. 160, 172, n. 1, and there is no reason why an enterprise's nonprofit character should exclude it from the coverage of either the affirmative or the negative aspect of the Clause, see, *e. g., Hughes* v. *Oklahoma*, 441 U. S., at 326, n. 2. Whether operated on a for-profit or

nonprofit basis, camps such as petitioner's purchase goods and services in competitive markets, offer their facilities to a variety of patrons, and derive revenues from a variety of local and out-of-state sources. Any categorical distinction on the basis of profit is therefore wholly illusory. Pp. 583–588.

(e) The Town's arguments that the exemption statute should be viewed as either a legitimate discriminatory subsidy of those charities that focus on local concerns, see, *e. g., West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 199, or alternatively as a governmental "purchase" of charitable services falling within the narrow exception to the dormant Commerce Clause for States in their role as "market participants," see, *e. g., Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794; *Reeves, Inc.* v. *Stake*, 447 U. S. 429, are unpersuasive. Although tax exemptions and subsidies serve similar ends, they differ in important and relevant respects that preclude approval of the statute at issue. See, *e. g., West Lynn*, 512 U. S., at 269, 278 (SCALIA, J., concurring in judgment). As for the "market participant" argument, the Court has already rejected the Town's position in *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 277, and in any event respondents' open-ended exemption is not analogous to the industry-specific state actions approved in *Alexandria Scrap* and *Reeves*. Pp. 588–594.

(f) This case's facts, viewed in isolation, do not appear to pose any threat to the national economy's health. Nevertheless, history, including the history of commercial conflict that preceded the Constitutional Convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, has shown that even the smallest discrimination invites significant inroads on national solidarity. See *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523. P. 595.

655 A. 2d 876, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS and GINSBURG, JJ., joined, *post*, p. 595. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which REHNQUIST, C. J., joined as to Part I, *post*, p. 609.

William H. Dempsey argued the cause for petitioner. With him on the briefs were *Robert B. Wasserman*, *William H. Dale*, *Emily A. Bloch*, and *Sally J. Daggett*.

William L. Plouffe argued the cause and filed a brief for respondents.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether an otherwise generally applicable state property tax violates the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, because its exemption for property owned by charitable institutions excludes organizations operated principally for the benefit of nonresidents.

I

Petitioner is a Maine nonprofit corporation that operates a summer camp for the benefit of children of the Christian Science faith. The regimen at the camp includes supervised prayer, meditation, and church services designed to help the children grow spiritually and physically in accordance with the tenets of their religion. App. 40–41. About 95 percent of the campers are not residents of Maine. *Id.*, at 44.

The camp is located in the town of Harrison (Town); it occupies 180 acres on the shores of a lake about 40 miles northwest of Portland. Brief for Respondents 4, and n. 6. Petitioner's revenues include camper tuition averaging about $400 per week for each student, contributions from private donors, and income from a "modest endowment." App. 42, 51. In recent years, the camp has had an annual operating deficit of approximately $175,000. *Id.*, at 41. From 1989 to 1991, it paid over $20,000 in real estate and personal property taxes each year.[1] *Id.*, at 42–43.

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*Briefs of *amici curiae* urging reversal were filed for the American Council on Education et al. by *Sheldon Elliot Steinbach, Carter G. Phillips, Nathan C. Sheers,* and *Adam Yarmolinsky;* and for the Christian Legal Society et al. by *James C. Geoly, Kevin R. Gustafson,* and *Steven T. McFarland.*

[1] Most of petitioner's tax bill was for real estate taxes. See, *e. g.*, App. 43 (petitioner paid 1991 real estate taxes of $20,770.71 and personal property taxes of $994.70).

The Maine statute at issue, Me. Rev. Stat. Ann., Tit. 36, § 652(1)(A) (Supp. 1996), provides a general exemption from real estate and personal property taxes for "benevolent and charitable institutions incorporated" in the State. With respect to institutions that are "in fact conducted or operated principally for the benefit of persons who are not residents of Maine," however, a charity may only qualify for a more limited tax benefit, and then only if the weekly charge for services provided does not exceed $30 per person. § 652(1)(A)(1).[2] Because most of the campers come from out

[2] The statute provides:

"The following property of institutions and organizations is exempt from taxation:

"1. Property of institutions and organizations.

"A. The real estate and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State, and none of these may be deprived of the right of exemption by reason of the source from which its funds are derived or by reason of limitation in the classes of persons for whose benefit such funds are applied.

"(1) Any such institution that is in fact conducted or operated principally for the benefit of persons who are not residents of Maine is entitled to an exemption not to exceed $50,000 of current just value only when the total amount of any stipends or charges that it makes or takes during any tax year, as defined by section 502, for its services, benefits or advantages divided by the total number of persons receiving such services, benefits or advantages during the same tax year does not result in an average rate in excess of $30 per week when said weekly rate is computed by dividing the average yearly charge per person by the total number of weeks in a tax year during which such institution is in fact conducted or operated principally for the benefit of persons who are not residents of Maine. No such institution that is in fact conducted or operated principally for the benefit of persons who are not residents of Maine and makes charges that result in an average weekly rate per person, as computed under this subparagraph, in excess of $30 may be entitled to tax exemption. This subparagraph does not apply to institutions incorporated as nonprofit corporations for the sole purpose of conducting medical research.

"For the purposes of this paragraph, 'benevolent and charitable institutions' include, but are not limited to, nonprofit nursing homes and nonprofit

of State, petitioner could not qualify for a complete exemption.[3] And, since the weekly tuition was roughly $400, petitioner was ineligible for any charitable tax exemption at all.

In 1992 petitioner made a formal request to the Town for a refund of taxes paid from 1989 through 1991, and a continuing exemption from future property taxes, based principally on a claim that the tax exemption statute violated the Commerce Clause of the Federal Constitution.[4] The request was denied, and petitioner filed suit in the Superior Court against the Town and its tax assessors and collectors.[5] After the

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boarding homes and boarding care facilities licensed by the Department of Human Services pursuant to Title 22, chapter 1665 or its successor, nonprofit community mental health service facilities licensed by the Commissioner of Mental Health, Mental Retardation, and Substance Abuse Services, pursuant to Title 34–B, chapter 3 and nonprofit child care centers incorporated by this State as benevolent and charitable institutions. For the purposes of this paragraph, 'nonprofit' means a facility exempt from taxation under Section 501(c)(3) of the Code . . . ." Me. Rev. Stat. Ann., Tit. 36, § 652(1)(A) (Supp. 1996).

[3] The statute's language reserving the property tax exemption for those entities operated "principally for the benefit" of Maine residents is not without ambiguity. The parties are in agreement, however, that because petitioner's camp is attended almost entirely by out-of-staters, it would not qualify for the exemption under any reading of the language. See Brief for Petitioner 2; Brief for Respondents 2, n. 3; Tr. of Oral Arg. 36. The courts below appear to have presumed the same, and we of course accept their interpretation of state law.

[4] Petitioner also argued below that the Maine statute violated the Equal Protection Clauses of the United States and Maine Constitutions, and the Privileges and Immunities Clause, Art. IV, § 2, of the Federal Constitution. The Maine Supreme Judicial Court had already found the statute constitutional under an equal protection analysis in a prior decision, and adhered to its earlier view. See *Green Acre Baha'i Institute* v. *Eliot*, 159 Me. 395, 193 A. 2d 564 (1963); 655 A. 2d 876, 879–880 (1995). As for the privileges and immunities claim, the Supreme Judicial Court found petitioner's argument unavailing. *Id.*, at 880. These claims are not before us.

[5] The Superior Court referred to all of the original defendants as "Municipal Defendants" because the State of Maine intervened to defend the constitutionality of its statute. App. to Pet. for Cert. 9a. However, the

parties agreed on the relevant facts, they filed cross-motions for summary judgment. The Superior Court ruled for petitioner, explaining that under Maine's statute:

> "Denial of a tax exemption is explicitly and primarily triggered by engaging in a certain level of interstate commerce. This denial makes operation of the institutions serving non-residents more expensive. This increased cost results from an impermissible distinction between in-state and out-of-state consumers. *See Commonwealth Edison Co.*, 453 U. S., at 617–19. . . . Maine's charitable tax exemption is denied, not because there is a difference between the activities of charitable institutions serving residents and non-residents, but because of the residency of the people whom the institutions serve." App. to Pet. for Cert. 14a–15a (footnote omitted).

The Town, but not the State, appealed and the Maine Supreme Judicial Court reversed. 655 A. 2d 876 (1995). Noting that a Maine statute[6] characterized tax exemptions as "tax expenditures," it viewed the exemption for charitable institutions as the equivalent of a purchase of their services. *Id.*, at 878. Because the exemption statute "treats all Maine charities alike"—given the fact that "all have the opportunity to qualify for an exemption by choosing to dispense the majority of their charity locally"—it "regulates evenhandedly with only incidental effects on interstate commerce." *Id.*, at 879. In the absence of evidence that petitioner's camp "*competes* with other summer camps outside of or within Maine," or that the statute "impedes interstate travel" or that it "provides services that are necessary for interstate travel," the Court concluded that petitioner had

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State did not appeal the adverse decision of the Superior Court and, therefore, is not a respondent in this Court. We shall use the term "Town" to refer to the respondents collectively.

[6] Me. Rev. Stat. Ann., Tit. 36, § 196 (1990).

"not met its heavy burden of persuasion that the statute is unconstitutional." *Ibid.*

We granted certiorari. 516 U. S. 1157. For the reasons that follow, we now reverse.

II

During the first years of our history as an independent confederation, the National Government lacked the power to regulate commerce among the States. Because each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents, what Justice Johnson characterized as a "conflict of commercial regulations, destructive to the harmony of the States," ensued. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 224 (1824) (opinion concurring in judgment). In his view, this "was the immediate cause that led to the forming of a [constitutional] convention." *Ibid.* "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Id.*, at 231.[7]

We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power. "In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona ex rel.*

[7] See also *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 193, n. 9 (1994) (noting that "[t]he 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison"); *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 807, n. 16 (1976) (quoting W. Rutledge, A Declaration of Legal Faith 25–26 (1947)).

Sullivan, 325 U. S. 761 [(1945)]; *Morgan* v. *Virginia*, 328 U. S. 373 [(1946)]." *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946). Our decisions on this point reflect, "upon fullest consideration, the course of adjudication unbroken through the Nation's history." *Ibid.* See also *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 534–535 (1949). Although Congress unquestionably has the power to repudiate or substantially modify that course of adjudication,[8] it has not done so.

This case involves an issue that we have not previously addressed—the disparate real estate tax treatment of a nonprofit service provider based on the residence of the consumers that it serves. The Town argues that our dormant Commerce Clause jurisprudence is wholly inapplicable to this case, because interstate commerce is not implicated here and Congress has no power to enact a tax on real estate. We first reject these arguments, and then explain why we think our prior cases make it clear that if profit-making enterprises were at issue, Maine could not tax petitioner more heavily than other camp operators simply because its campers come principally from other States. We next address the novel question whether a different rule should apply to a discriminatory tax exemption for charitable and benevolent institutions. Finally, we reject the Town's argument that the exemption should either be viewed as a permissible subsidy or as a purchase of services by the State acting as a "market participant."

III

We are unpersuaded by the Town's argument that the dormant Commerce Clause is inapplicable here, either because campers are not "articles of commerce" or, more generally, because the camp's "product is delivered and 'consumed' entirely within Maine." Brief for Respondents

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[8] See *New York* v. *United States*, 505 U. S. 144, 171 (1992); *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 318 (1992); *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429–430, 434–435 (1946).

17–18. Even though petitioner's camp does not make a profit, it is unquestionably engaged in commerce, not only as a purchaser, see *Katzenbach* v. *McClung*, 379 U. S. 294, 300–301 (1964); *United States* v. *Lopez*, 514 U. S. 549, 558 (1995), but also as a provider of goods and services. It markets those services, together with an opportunity to enjoy the natural beauty of an inland lake in Maine, to campers who are attracted to its facility from all parts of the Nation. The record reflects that petitioner "advertises for campers in [out-of-state] periodicals . . . and sends its Executive Director annually on camper recruiting trips across the country." App. 49–50. Petitioner's efforts are quite successful; 95 percent of its campers come from out of State. The attendance of these campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of "commerce." *Edwards* v. *California*, 314 U. S. 160, 172 (1941); see also *Caminetti* v. *United States*, 242 U. S. 470, 491 (1917); *Hoke* v. *United States*, 227 U. S. 308, 320 (1913).

Summer camps are comparable to hotels that offer their guests goods and services that are consumed locally. In *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964), we recognized that interstate commerce is substantially affected by the activities of a hotel that "solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation." *Id.*, at 243. In that case, we held that commerce was substantially affected by private race discrimination that limited access to the hotel and thereby impeded interstate commerce in the form of travel. *Id.*, at 244, 258; see *Lopez*, 514 U. S., at 558–559. Official discrimination that limits the access of nonresidents to summer camps creates a similar impediment. Even when business activities are purely local, if "'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'" *Heart of Atlanta*, 379 U. S., at 258

(quoting *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460, 464 (1949)).

Although *Heart of Atlanta* involved Congress' affirmative Commerce Clause powers, its reasoning is applicable here. As we stated in *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979): "The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Id.*, at 326, n. 2. That case in turn rested upon our reasoning in *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978), in which we rejected a "two-tiered definition of commerce." *Id.*, at 622. "Just as Congress ha[d] power to regulate the interstate movement of [the] wastes" at issue in that case, so too we held were States "not free from constitutional scrutiny when they restrict that movement." *Id.*, at 622–623. See also *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 953 (1982).

The Town's arguments that the dormant Commerce Clause is inapplicable to petitioner because the campers are not "articles of commerce," or more generally that interstate commerce is not at issue here, are therefore unpersuasive. The services that petitioner provides to its principally out-of-state campers clearly have a substantial effect on commerce, as do state restrictions on making those services available to nonresidents. Cf. *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, 391 (1994).

The Town also argues that the dormant Commerce Clause is inapplicable because a real estate tax is at issue. We disagree. A tax on real estate, like any other tax, may impermissibly burden interstate commerce. We may assume as the Town argues (though the question is not before us) that Congress could not impose a national real estate tax. It does not follow that the States may impose real estate taxes in a manner that discriminates against interstate commerce. A State's "power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which

involves a discrimination against [interstate] commerce." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 596 (1923).

To allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate would destroy the barrier against protectionism that the Constitution provides. We noted in *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186 (1994), that "[t]he paradigmatic . . . law discriminating against interstate commerce is the protective [import] tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *Id.*, at 193. Such tariffs are "so patently unconstitutional that our cases reveal not a single attempt by a State to enact one." *Ibid.* Yet, were the Town's theory adopted, a State could create just such a tariff with ease. The State would need only to pass a statute imposing a special real estate tax on property used to store, process, or sell imported goods. By gearing the increased tax to the value of the imported goods at issue, the State could create the functional equivalent of an import tariff. As this example demonstrates, to accept the Town's theory would have radical and unacceptable results.

We therefore turn to the question whether our prior cases preclude a State from imposing a higher tax on a camp that serves principally nonresidents than on one that limits its services primarily to residents.

IV

There is no question that were this statute targeted at profit-making entities, it would violate the dormant Commerce Clause. "State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" *Fulton Corp.* v. *Faulkner*, 516 U. S. 325, 331 (1996) (quoting *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99 (1994)). It is not necessary to look beyond the text of this statute to determine that it

discriminates against interstate commerce. The Maine law expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out camps that serve mostly instaters for beneficial tax treatment, and penalizing those camps that do a principally interstate business. As a practical matter, the statute encourages affected entities to limit their out-of-state clientele, and penalizes the principally nonresident customers of businesses catering to a primarily interstate market.

If such a policy were implemented by a statutory prohibition against providing camp services to nonresidents, the statute would almost certainly be invalid. We have "consistently . . . held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 338 (1982). Our authorities on this point date to the early part of the century.[9] Petitioner's "product" is

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[9] In *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911), we held invalid under the Commerce Clause an Oklahoma statute that had the effect of preventing out-of-state consumers from purchasing Oklahoma natural gas. We ruled similarly in *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), that a West Virginia statute limiting out-of-state users' access to West Virginia gas to that not "required to meet the local needs for all purposes," *id.*, at 594, violated the Commerce Clause. We found those cases directly analogous in *New England Power*, ruling invalid a state law that reserved for state citizens domestically generated hydroelectric power. In *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978), we struck down a New Jersey statute prohibiting certain categories of out-of-state waste from flowing into the State's landfills, noting that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Id.*, at 627. And, in *Hughes* v. *Oklahoma*, 441 U. S., at 338, we ruled that a statute prohibiting the export of minnows for sale out of State violated the Commerce Clause. We held similarly in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 958 (1982), that a provision preventing the export of ground water to States not allowing reciprocal export rights was an impermissible barrier to com-

in part the natural beauty of Maine itself and, in addition, the special services that the camp provides. In this way, the Maine statute is like a law that burdens out-of-state access to domestically generated hydroelectric power, *New England Power*, or to local landfills, *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978). In those cases, as in this case, the burden fell on out-of-state access both to a natural resource and to related services provided by state residents.[10]

Avoiding this sort of "economic Balkanization," *Hughes* v. *Oklahoma*, 441 U. S., at 325, and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence. See *ibid.*; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 255 (1911) (expressing concern that "embargo may be retaliated by embargo, and commerce will be halted at state lines"). And, as we noted in *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 580 (1986): "Economic protectionism is not limited to attempts to convey advan-

merce. Insofar as *Sporhase* suggests certain narrow circumstances in which the reservation of natural resources for state citizens may be permissible, see *id.*, at 956–957, these concerns are not implicated here.

[10] We have long noted the applicability of our dormant Commerce Clause jurisprudence to service industries. See, *e. g.*, *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, 391 (1994) ("[T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it"); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. 353, 359 (1992) (noting that "arrangements between out-of-state generators of waste and the . . . operator of a waste disposal site" may be "viewed as 'sales' of garbage or 'purchases' of transportation and disposal services"); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 337 (1977) ("[N]o State may discriminatorily tax . . . the business operations performed in any other State"); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 42 (1980) (striking down state statute under dormant Commerce Clause that favored in-state over out-of-state entities in the investor services market). Given the substantial portion of the national economy now devoted to service industries, see Bureau of Census, Statistical Abstract of the United States 1995, p. 779 (Table 1288) (noting service industries constituted approximately 20 percent of gross domestic product in 1992), this is a natural development in our dormant Commerce Clause jurisprudence.

tages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States."[11] By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent.

Of course, this case does not involve a total prohibition. Rather, the statute provides a strong incentive for affected entities not to do business with nonresidents if they are able to so avoid the discriminatory tax. In this way, the statute is similar to the North Carolina "intangibles tax" that we struck down in *Fulton Corp.* v. *Faulkner*, 516 U. S., at 327. That case involved the constitutionality under the Commerce Clause of a state "regime that taxe[d] stock [held by in-state shareholders] only to the degree that its issuing corporation participates in interstate commerce." *Id.*, at 333. We held the statute facially discriminatory, in part because it tended "to discourage domestic corporations from plying their trades in interstate commerce." *Ibid.* Maine's statute has a like effect.

To the extent that affected Maine organizations are not deterred by the statute from doing a principally interstate business, it is clear that discriminatory burdens on interstate commerce imposed by regulation or taxation may also violate the Commerce Clause. We have held that special fees assessed on nonresidents directly by the State when they attempt to use local services impose an impermissible burden on interstate commerce. See, *e. g.*, *Chemical Waste Management, Inc.* v. *Hunt*, 504 U. S. 334, 342 (1992) (discriminatory tax imposed on disposal of out-of-state hazardous waste). That the tax discrimination comes in the form of a deprivation of a generally available tax benefit, rather than

[11] The Town argues that "the Commerce Clause protects out-of-state competitors but does not protect out-of state consumers." Brief for Respondents 16. As the discussion above indicates, our cases have rejected this view.

a specific penalty on the activity itself, is of no moment. Thus, in *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 274 (1988), the Court invalidated an Ohio statute that provided a tax credit for sales of ethanol produced in State, but not ethanol produced in certain other States; the law "deprive[d] certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appear[ed] to violate the cardinal requirement of nondiscrimination."[12] Given the fact that the burden of Maine's facially discriminatory tax scheme falls by design in a predictably disproportionate way on out-of-staters,[13] the pernicious effect on interstate commerce is

[12] See *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 268 (1984) (discriminatory excise tax exemption); *Maryland* v. *Louisiana*, 451 U. S. 725, 756 (1981) (tax scheme "unquestionably discriminates against interstate commerce . . . as the necessary result of various tax credits and exclusions"); *Westinghouse Elec. Corp.* v. *Tully*, 466 U. S. 388, 399–400, and n. 9 (1984) *(per curiam);* see also *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S., at 210 (SCALIA, J., concurring in judgment).

[13] Because the Maine tax is facially discriminatory, this case is unlike *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981). There, we held permissible under the Commerce Clause a generally applicable Montana severance tax on coal extracted from in-state mines. Appellants challenged the tax arguing, *inter alia*, that it discriminated against interstate commerce because 90 percent of the coal happened to be shipped to out-of-state users, and the tax burden was therefore borne principally by nonresidents. We rejected this claim, noting that "there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." *Id.*, at 619. We recognized that an approach to the dormant Commerce Clause requiring an assessment of the likely demand for a particular good by nonresidents and a State's ability to shift its tax burden out of State "would require complex factual inquiries about such issues as elasticity of demand for the product and alternative sources of supply," *id.*, at 619, n. 8, and declined to adopt such a difficult to police test. Here, in contrast, the tax scheme functions by design and on its face to burden out-of-state users disproportionately. Our analysis in *Commonwealth Edison* is therefore inapplicable.

CTS Corp. v. *Dynamics Corp. of America*, 481 U. S. 69 (1987), is also inapposite. In that case, we rejected the argument that a facially nondis-

the same as in our cases involving taxes targeting out-of-staters alone.

Unlike in *Chemical Waste*, we recognize that here the discriminatory burden is imposed on the out-of-state customer indirectly by means of a tax on the entity transacting business with the non-Maine customer. This distinction makes no analytic difference. As we noted in *West Lynn Creamery* discussing the general phenomenon of import tariffs: "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." 512 U. S., at 202 (citing cases). So too here, it matters little that it is the camp that is taxed rather than the campers. The record demonstrates that the economic incidence of the tax falls at least in part on the campers, the Town has not contested the point, and the courts below based their decision on this presumption. App. 49; 655 A. 2d, at 879; App. to Pet. for Cert. 14a, n. 2.[14]

With respect to those businesses—like petitioner's—that continue to engage in a primarily interstate trade, the Maine statute therefore functionally serves as an export tariff that targets out-of-state consumers by taxing the businesses that

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criminatory state law deterring hostile tender offers violated the dormant Commerce Clause because most such offers "are launched by offerors outside Indiana." *Id.*, at 88. We explained that "nothing *in the . . . Act* imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors." *Ibid.* (emphasis added). Here, the discrimination appears on the face of the Maine statute. *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978), is similarly distinguishable. See *id.*, at 126 ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce").

[14] We therefore have no need to consider these matters further. Cf. *Fulton Corp.* v. *Faulkner*, 516 U. S. 325, 341 (1996) (noting "complexity of economic incidence analysis").

principally serve them. As our cases make clear, this sort of discrimination is at the very core of activities forbidden by the dormant Commerce Clause. "'[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Chemical Waste*, 504 U. S., at 342 (quoting *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 642 (1984)); see *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S., at 193 (tariffs forbidden by the dormant Commerce Clause).

Ninety-five percent of petitioner's campers come from out of State. Insofar as Maine's discriminatory tax has increased tuition, that burden is felt almost entirely by out-of-staters, deterring them from enjoying the benefits of camping in Maine.[15] In sum, the Maine statute facially discriminates against interstate commerce, and is all but *per se* invalid. See, *e. g.*, *Oregon Waste*, 511 U. S., at 100–101.

We recognize that the Town might have attempted to defend the Maine law under the *per se* rule by demonstrating that it "'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.*, at 101 (quoting *New Energy Co.*, 486 U. S., at 278). In assessing respondents' arguments, we would have applied our "strictest scrutiny." *Hughes* v. *Oklahoma*, 441

[15] The Town argues that these effects are entirely speculative, because the record does not reflect any decision by a potential camper not to attend petitioner's camp as a result of the burden imposed. Brief for Respondents 16. The Supreme Judicial Court appears to have adopted similar reasoning. 655 A. 2d, at 879. This misconstrues the proper analysis. As we made clear most recently in *Fulton Corp.* v. *Faulkner*, 516 U. S., at 333, n. 3, there is no "'*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause." A particularized showing of the sort respondent seeks is not required. See *Associated Industries of Mo.* v. *Lohman*, 511 U. S. 641, 650 (1994) ("[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred"); *Maryland* v. *Louisiana*, 451 U. S., at 756; see also *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S., at 334, n. 13.

U. S., at 337. This is an extremely difficult burden, "so heavy that 'facial discrimination by itself may be a fatal defect.'" *Oregon Waste*, 511 U. S., at 101 (quoting *Hughes*, 441 U. S., at 337); see *Chemical Waste Management, Inc.* v. *Hunt*, 504 U. S., at 342 ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"). Perhaps realizing the weight of its burden, the Town has made no effort to defend the statute under the *per se* rule, and so we do not address this question. See *Fulton Corp.* v. *Faulkner*, 516 U. S., at 333–334.[16] We have no doubt that if petitioner's camp were

[16] JUSTICE SCALIA submits that we err by following our precedent in *Fulton* and declining to address an argument that the Town itself did not think worthy of pressing. *Post*, at 602–603. But even if there were reason to consider the State's compliance with the *per se* rule, the Town would not prevail. In the single case JUSTICE SCALIA points to in which we found the *per se* standard to have been met, *Maine* v. *Taylor*, 477 U. S. 131 (1986), the State had no "'reasonable nondiscriminatory alternatives,'" *Oregon Waste*, 511 U. S., at 101 (quoting *New Energy Co.*, 486 U. S., at 278), to the action it had taken. Absent a bar on the import of certain minnows, there was no way for Maine to protect its natural environment from the hazard of parasites and nonnative species that might have been accidentally introduced into the State's waters. *Taylor*, 477 U. S., at 141.

In contrast, here Maine has ample alternatives short of a facially discriminatory property tax exemption to achieve its apparent goal of subsidizing the attendance of the State's children at summer camp. Maine could, for example, achieve this end by offering direct financial support to parents of resident children. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). Though we have not had the occasion to address the issue, it might also be permissible for the State to subsidize Maine camps directly to the extent that they serve residents. See *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S., at 199, n. 15; *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 278 (1988) (noting that "[d]irect subsidization of domestic industry does not ordinarily run afoul" of the Commerce Clause); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S., at 816 (STEVENS, J., concurring).

While the Town does argue its case under the less exacting analysis set forth in, *e. g.*, *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), "this lesser scrutiny is only available 'where other [nondiscriminatory] legislative objectives are credibly advanced *and* there is *no* patent discrimination

a profit-making entity, the discriminatory tax exemption would be impermissible.

V

The unresolved question presented by this case is whether a different rule should apply to tax exemptions for charitable and benevolent institutions. Though we have never had cause to address the issue directly, the applicability of the dormant Commerce Clause to the nonprofit sector of the economy follows from our prior decisions.

Our cases have frequently applied laws regulating commerce to not-for-profit institutions. In *Associated Press* v. *NLRB*, 301 U. S. 103 (1937), for example, we held the National Labor Relations Act as applied to the Associated Press' (A. P.'s) newsgathering activities to be an enactment entirely within Congress' Commerce Clause power, despite the fact that the A. P. "does not sell news and does not operate for a profit." *Id.*, at 129. Noting that the A. P.'s activities "involve[d] the constant use of channels of interstate and foreign communication," we concluded that its operations "amount[ed] to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution." *Id.*,

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against interstate trade.'" *Chemical Waste*, 504 U. S., at 343, n. 5 (quoting *Philadelphia* v. *New Jersey*, 437 U. S., at 624 (emphasis added)). Because the Maine statute is facially discriminatory, the more deferential standard is inapplicable. Contrary to JUSTICE SCALIA's suggestion, this case is quite unlike *General Motors Corp.* v. *Tracy*, 519 U. S. 278 (1997). There, the Court premised its holding that the statute at issue was not facially discriminatory on the view that sellers of "bundled" and "unbundled" natural gas were principally competing in different markets. See *id.*, at 297–298, 300 ("dormant Commerce Clause protects markets and participants in markets, not taxpayers as such"). While it may be true that "[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are . . . similarly situated," *post*, at 601, there is no question that the statute at issue here is facially discriminatory because it disparately treats identically situated Maine nonprofit camps depending upon whether they favor in-state, as opposed to out-of-state, campers.

at 128. See also *Polish National Alliance of United States* v. *NLRB*, 322 U. S. 643 (1944).

We have similarly held that federal antitrust laws are applicable to the anticompetitive activities of nonprofit organizations. See *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 100, n. 22 (1984) (Sherman Act § 1 applies to nonprofits); *American Soc. of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556, 576 (1982) ("[I]t is beyond debate that nonprofit organizations can be held liable under the antitrust laws"); *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975). The nonprofit character of an enterprise does not place it beyond the purview of federal laws regulating commerce. See also *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672, 681, n. 11 (1980) (noting that in context of amendments to National Labor Relations Act "Congress appears to have agreed that nonprofit institutions 'affect commerce' under modern economic conditions").

We have already held that the dormant Commerce Clause is applicable to activities undertaken without the intention of earning a profit. In *Edwards* v. *California*, 314 U. S. 160 (1941), we addressed the constitutionality of a California statute prohibiting the transport into that State of indigent persons. We struck the statute down as a violation of the dormant Commerce Clause, reasoning that "the transportation of persons is 'commerce,'" and that the California statute was an "unconstitutional barrier to [that] interstate commerce." *Id.*, at 172–173. In determining whether the transportation of persons is "commerce," we noted that "[i]t is immaterial whether or not the transportation is commercial in character." *Id.*, at 172, n. 1.

We see no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause. See *Hughes*, 441 U. S., at 326, n. 2; *Philadelphia* v. *New Jersey*, 437 U. S., at 621–623 (rejecting "two-tiered definition of commerce"); *Sporhase*, 458 U. S., at 953; see also *supra*, at

572–574. There are a number of lines of commerce in which both for-profit and nonprofit entities participate. Some educational institutions, some hospitals, some child care facilities, some research organizations, and some museums generate significant earnings; and some are operated by not-for-profit corporations. See Hansmann, The Role of Nonprofit Enterprise, 89 Yale L. J. 835, 835, and n. 1, 865 (1980).

A nonprofit entity is ordinarily understood to differ from a for-profit corporation principally because it "is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees." *Id.*, at 838.[17] Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce. Summer camps may be operated as for-profit or nonprofit entities; nonprofits may depend—as here—in substantial part on fees charged for their services. Clotfelter, The Distributional Consequences of Nonprofit Activities, in Who Benefits from the Nonprofit Sector? 1, 6 (C. Clotfelter ed. 1992) (nonprofits in some sectors are "heavily dependent on fees by paying customers, with private payments accounting for at least half of total revenues"). Whether operated on a for-profit or nonprofit basis, they purchase goods and

[17] Maine's law governing nonprofits embraces this conception, see Me. Rev. Stat. Ann., Tit. 13–B, § 102(9) (1981), as does the tax exemption statute at issue here. The exemption applies to "benevolent and charitable institutions." Me. Rev. Stat. Ann., Tit. 36, § 652(1)(A) (Supp. 1996). To qualify, the entity must devote "[a]ll profits derived from [its] operation . . . and the proceeds from the sale of its property . . . exclusively to the purposes for which it is organized." § 652(1)(C)(3). "A director, trustee, officer or employee of an organization claiming exemption is not entitled to receive directly or indirectly any pecuniary profit from the operation of that organization, excepting reasonable compensation for services in effecting its purposes." § 652(1)(C)(2). The statute also expressly designates certain categories of entities (nonprofit nursing homes, boarding homes, community mental health service facilities, and child care centers) that qualify for tax exempt status under federal law, 26 U. S. C. § 501(c)(3), as falling within its ambit. See Me. Rev. Stat. Ann., Tit. 36, § 652(1)(A) (Supp. 1996) ("'[B]enevolent and charitable institutions' include, but are not limited to, [the specified entities]").

services in competitive markets, offer their facilities to a variety of patrons, and derive revenues from a variety of sources, some of which are local and some out of State.

For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.[18] See *Wickard* v. *Filburn*, 317 U. S. 111, 127–128 (1942); *Lopez*, 514 U. S., at 556, 559–560.

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[18] We are informed by *amici* that "the nonprofit sector spends over $389 billion each year in operating expenses—approximately seven percent of the gross national product." Brief for American Council on Education et al. as *Amici Curiae* 19. In recent years, nonprofits have employed approximately seven percent of the Nation's paid workers, roughly 9.3 million people in 1990. V. Hodgkinson, M. Weitzman, C. Toppe, & S. Noga, Nonprofit Almanac 1992–1993: Dimensions of the Independent Sector 29 (1992) (Table 1.5).

JUSTICE SCALIA wrongly suggests that Maine's law offers only a "narrow tax exemption," *post*, at 598, which he implies has no substantial effect on interstate commerce and serves only "to relieve the State of its burden of caring for its residents," *post*, at 596. This characterization is quite misleading. The statute expressly exempts from tax property used by such important nonprofit service industries as nursing homes and child care centers. See Me. Rev. Stat. Ann., Tit. 36, § 652(1)(A)(1) (Supp. 1996). Nonprofit participation in these sectors is substantial. Nationally, nonprofit nursing homes had estimated revenues of $18 billion in 1994. U. S. Bureau of the Census, Service Annual Survey: 1994 (1996) (Table 7.3). These entities compete with a sizeable for-profit nursing home sector, which had revenues of approximately $40 billion in 1994. *Id.*, at Table 7.1. Similarly, the $5 billion nonprofit market in child day care services competes with an $11 billion for-profit industry. *Id.*, at Tables 8.1, 8.3 (1994 data).

Nonprofit hospitals and health maintenance organizations also receive an exemption from Maine's property tax. See Me. Rev. Stat. Ann., Tit.

From the State's standpoint it may well be reasonable to use tax exemptions as a means of encouraging nonprofit institutions to favor local citizens, notwithstanding any possible adverse impact on the larger markets in which those in-

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36, §§ 652(1)(A), (K) (Supp. 1996). While operating as nonprofit entities, their activities are serious business. In *Maine Medical Center* v. *Lucci*, 317 A. 2d 1 (1974), the Supreme Judicial Court presumed that a "large hospital" employing 2,000 people qualified as a "benevolent and charitable institution" for purposes of the § 652(1)(A) exemption, and held that a newly constructed $3.3 million parking facility—which patients, visitors, and staff were charged a fee to use—was also exempt from the tax. Though the garage was being operated at an immediate loss, "projected estimates of income and expense indicated a possible recovery of the capital investment over a period of twenty years." *Id.*, at 2. Nonprofit hospitals had national revenues of roughly $305 billion in 1994, considerably more than the $34 billion in revenues collected by hospitals operated on a for-profit basis. U. S. Bureau of the Census, Service Annual Survey: 1994 (1996) (Tables 7.1, 7.3).

Maine law further permits qualifying nonprofits to rent out their property on a commercial basis at market rates in order to support other activities, so long as that use of the property is only incidental to their own purposes. See *Maine Medical Center*, 317 A. 2d, at 2 (citing with approval *Curtis* v. *Androscoggin Lodge, No. 24, Independent Order of Odd Fellows*, 99 Me. 356, 360, 59 A. 518, 520 (1904)); *State Young Men's Christian Assn.* v. *Winthrop*, 295 A. 2d 440, 442 (Me. 1972). Although Maine's tax exemption statute was amended in 1953 to specify that the property need not be occupied by the charity to qualify for the exemption, but may also be "used solely" for its own purposes, see *ibid.*, this extension did not alter the "well defined rul[e] of exemption" permitting "occasional or purely incidental" renting. *Green Acre Baha'i Institute*, 150 Me., at 354, 110 A. 2d, at 584; see also *Alpha Rho Zeta of Lambda Chi Alpha, Inc.* v. *Waterville*, 477 A. 2d 1131, 1141 (Me. 1984). But cf. *Nature Conservancy of the Pine Tree State, Inc.* v. *Bristol*, 385 A. 2d 39, 43 (Me. 1978) (holding that requirement that property be used "solely" for institution's own purposes prohibits tax exemption where grantor of property to charity maintains private rights of use). Maine's statute expressly contemplates that entities receiving the benefit of the tax exemption may well earn profits, though of course these must be plowed back into the enterprise or otherwise appropriately used. See Me. Rev. Stat. Ann., Tit. 36, § 652(1)(C)(3) (Supp. 1996).

stitutions participate. Indeed, if we view the issue solely from the State's perspective, it is equally reasonable to use discriminatory tax exemptions as a means of encouraging the growth of local trade. But as our cases clearly hold, such exemptions are impermissible. See, *e. g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 273 (1984). Protectionism, whether targeted at for-profit entities or serving, as here, to encourage nonprofits to keep their efforts close to home, is forbidden under the dormant Commerce Clause.[19] If there is need for a special exception for nonprofits, Congress not only has the power to create it,[20] but also is in a far better position than we to determine its dimensions.[21]

VI

Rather than urging us to create a categorical exception for nonprofit entities, the Town argues that Maine's exemption statute should be viewed as an expenditure of government money designed to lessen its social service burden and to foster the societal benefits provided by charitable organizations. So characterized, the Town submits that its tax exemption scheme is either a legitimate discriminatory subsidy

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[19] Contrary to JUSTICE SCALIA's suggestion, nothing in our holding today "prevent[s] a State from giving a tax break to charities that benefit the State's inhabitants." *Post*, at 595. The States are, of course, free to provide generally applicable nondiscriminatory tax exemptions without running afoul of the dormant Commerce Clause.

[20] See n. 8, *supra*.

[21] We must admit to some puzzlement as to the force of the argument underlying JUSTICE SCALIA's dissent. On the one hand, he suggests that a categorical exemption of nonprofit activities from dormant Commerce Clause scrutiny would be proper. *Post*, at 607–608. Yet at the same time, he makes a great effort to characterize *this* statute as being so narrow that, whatever the appropriate generally applicable rule, the dormant Commerce Clause ought not to apply here. *Post*, at 598. As we have explained, the argument in favor of a *categorical* exemption for nonprofits is unpersuasive, and we disagree with JUSTICE SCALIA's characterization of this statute's effects. Accordingly, we reject his position on either of these theories.

of only those charities that choose to focus their activities on local concerns, or alternatively a governmental "purchase" of charitable services falling within the narrow exception to the dormant Commerce Clause for States in their role as "market participants," see, *e. g.*, *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976); *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980). We find these arguments unpersuasive. Although tax exemptions and subsidies serve similar ends, they differ in important and relevant respects, and our cases have recognized these distinctions. As for the "market participant" argument, we have already rejected the Town's position in a prior case, and in any event respondents' open-ended exemption for charitable and benevolent institutions is not analogous to the industry-specific state actions that we reviewed in *Alexandria Scrap* and *Reeves*.

The Town argues that its discriminatory tax exemption is, in economic reality, no different from a discriminatory subsidy of those charities that cater principally to local needs. Noting our statement in *West Lynn Creamery* that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business," 512 U. S., at 199, the Town submits that since a discriminatory subsidy may be permissible, a discriminatory exemption must be, too. We have "never squarely confronted the constitutionality of subsidies," *id.*, at 199, n. 15, and we need not address these questions today. Assuming, *arguendo*, that the Town is correct that a direct subsidy benefiting only those nonprofits serving principally Maine residents would be permissible, our cases do not sanction a tax exemption serving similar ends.[22]

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[22] As the Supreme Judicial Court made clear, 655 A. 2d, at 878, under Maine law an exemption is categorized as a "tax expenditure." Me. Rev. Stat. Ann., Tit. 36, § 196 (1990). The Town's effort to argue that this state statutory categorization allows it to elide the federal constitutional distinction between tax exemptions and subsidies is unavailing. We recognized long ago that a tax exemption can be viewed as a form of government

In *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970), notwithstanding our assumption that a direct subsidy of religious activity would be invalid,[23] we held that New York's tax exemption for church property did not violate the Establishment Clause of the First Amendment.[24] That holding rested, in part, on the premise that there is a constitutionally significant difference between subsidies and tax exemptions.[25] We have expressly recognized that this distinction is also applicable to claims that certain state action designed to give residents an advantage in the marketplace is prohibited by the Commerce Clause.

In *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269 (1988), we found unconstitutional under the Commerce Clause an Ohio tax scheme that provided a sales tax credit for ethanol produced in State, or manufactured in another State to the extent that State gave similar tax advantages to ethanol produced in Ohio. We recognized that the party challenging the Ohio scheme was "eligible to receive a cash subsidy"

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spending. See *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 544 (1983). The distinction we have drawn for dormant Commerce Clause purposes does not turn on this point.

[23] We noted: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case." *Walz*, 397 U. S., at 675.

[24] We reasoned that "New York's statute [cannot be read] as attempting to establish religion; it . . . simply spar[es] the exercise of religion from the burden of property taxation levied on private profit institutions." *Id.*, at 673.

[25] "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'" *Id.*, at 675. As Justice Brennan noted: "Tax exemptions and general subsidies . . . are qualitatively different." *Id.*, at 690 (concurring opinion).

from its home State, and was therefore "the potential beneficiary of a scheme no less discriminatory than the one that it attacks, and no less effective in conferring a commercial advantage over out-of-state competitors." *Id.*, at 278. That was of no importance. We noted: "The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.* Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation . . . does." *Ibid.* (emphasis in original). See also *West Lynn,* 512 U. S., at 210 (SCALIA, J., concurring in judgment) (drawing similar distinction between forbidden generally applicable tax with discriminatory "exemption" and permissible "subsidy . . . funded from the State's general revenues"). This distinction is supported by scholarly commentary as well as precedent, and we see no reason to depart from it. See Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 377, 442–443 (1996); Hellerstein & Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 Cornell L. Rev. 789, 846–848 (1996).[26] The Town's claim that its discriminatory tax scheme should be viewed as a permissible subsidy is therefore unpersuasive.[27]

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[26] The distinction provides a sufficient response to the Town's argument that our ruling today would invalidate a State's subsidization of all or part of its residents' tuition at state-owned universities.

[27] JUSTICE SCALIA, *post,* at 605–606, and n. 4, would distinguish this line of authority by holding that it should not apply where a State is giving tax relief to charitable enterprises. As explained in Part V, *supra,* we see no categorical reason to treat for-profit and nonprofit entities differently under the dormant Commerce Clause. JUSTICE SCALIA's heavy reliance upon *Board of Ed. of Ky. Annual Conference of Methodist Episcopal Church* v. *Illinois,* 203 U. S. 553 (1906), is misplaced. In that case, a bequest to a Kentucky charitable corporation did not qualify for an exemp-

Finally, the Town argues that its discriminatory tax exemption scheme falls within the "market-participant" exception. As we explained in *New Energy Co.:* "That doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause." 486 U. S., at 277. See *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204, 208 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S., at 436–437; *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S., at 810.

In *Alexandria Scrap* we concluded that the State of Maryland had, in effect, entered the market for abandoned automobile hulks as a purchaser because it was using state funds to provide bounties for their removal from Maryland streets and junkyards. *Id.*, at 809–810. In *Reeves*, the State of South Dakota similarly participated in the market for cement as a seller of the output of the cement plant that it had owned and operated for many years. 447 U. S., at 431–432. And in *White*, the city of Boston had participated in the construction industry by funding certain projects. 460 U. S., at 205–206. These three cases stand for the proposition that, for purposes of analysis under the dormant Commerce Clause, a State acting in its proprietary capacity as a pur-

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tion from the Illinois inheritance tax because the corporate legatee was not incorporated in Illinois. In this case, the petitioner is a Maine corporation, and the validity of the portion of the Maine statute that denies the exemption to out-of-state corporations is not at issue. Moreover, unlike the situation in *Board of Ed. of Ky.*, in which none of the charitable activities of the legatee were performed in Illinois, all of the benefits of attending petitioner's camp in Maine are "bestowed within her borders." *Id.*, at 563. While the dictum that JUSTICE SCALIA quotes, *post*, at 606, is consistent with his analysis, it does not purport to address the applicability of the dormant Commerce Clause to charities in general, to resident charities, or to nonresident charities that provide benefits for both residents and nonresidents.

chaser or seller may "favor its own citizens over others." *Alexandria Scrap,* 426 U. S., at 810.

Maine's tax exemption statute cannot be characterized as a proprietary activity falling within the market-participant exception. In *New Energy Co.,* Ohio argued similarly that a discriminatory tax credit program fell within the exception. We noted that the tax program had "the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws." 486 U. S., at 277. "That," we explained, "does not transform it into a form of state participation in the free market." *Ibid.* "The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity." *Ibid.* As we indicated in *White:* "[I]n this kind of case there is 'a single inquiry: whether the challenged "program constituted direct state participation in the market."' " 460 U. S., at 208 (quoting *Reeves,* 447 U. S., at 436, n. 7). A tax exemption is not the sort of direct state involvement in the market that falls within the market-participation doctrine.

Even if we were prepared to expand the exception in the manner suggested by the Town, the Maine tax statute at issue here would be a poor candidate. Like the tax exemption upheld in *Walz*—which applied to libraries, art galleries, and hospitals as well as churches[28]—the exemption that has been denied to petitioner is available to a broad category of charitable and benevolent institutions.[29] For that reason, nothing short of a dramatic expansion of the "market-

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[28] See *Walz,* 397 U. S., at 666–667, and n. 1.

[29] See Me. Rev. Stat. Ann., Tit. 36, § 652(1)(A) (Supp. 1996) ("For the purposes of this paragraph, 'benevolent and charitable institutions' *include, but are not limited to,* nonprofit nursing homes and nonprofit boarding homes and boarding care facilities . . . , nonprofit community mental health service facilities . . . [,] and nonprofit child care centers") (emphasis added).

participant" exception would support its application to this case. *Alexandria Scrap* involved Maryland's entry into the market for automobile hulks, a discrete activity focused on a single industry. Similarly, South Dakota's participation in the market for cement was—in part because of its narrow scope—readily conceived as a proprietary action of the State. In contrast, Maine's tax exemption—which sweeps to cover broad swathes of the nonprofit sector—must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function. See *White*, 460 U. S., at 211, n. 7 (noting that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business"). The Town's version of the "market-participant" exception would swallow the rule against discriminatory tax schemes. Contrary to the Town's submission, the notion that whenever a State provides a discriminatory tax abatement it is "purchasing" some service in its proprietary capacity is not readily confined to the charitable context. A special tax concession for liquors indigenous to Hawaii, for example, might be conceived as a "purchase" of the jobs produced by local industry, or an investment in the unique local cultural value provided by these beverages. Cf. *Bacchus*, 468 U. S., at 270–271. Discriminatory schemes favoring local farmers might be seen as the "purchase" of agricultural services in order to ensure that the State's citizens will have a steady local supply of the product. Cf. *West Lynn*, 512 U. S., at 190 (striking down statute protecting in-state milk producers designed to "preserve . . . local industry," "thereby ensur[ing] a continuous and adequate supply of fresh milk for our market" (internal quotation marks omitted)). Our cases provide no support for the Town's radical effort to expand the market-participant doctrine.

VII

As was true in *Bacchus Imports, Ltd.* v. *Dias*, the facts of this particular case, viewed in isolation, do not appear to pose any threat to the health of the national economy. Nevertheless, history, including the history of commercial conflict that preceded the Constitutional Convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our Federal Union. As Justice Cardozo recognized, to countenance discrimination of the sort that Maine's statute represents would invite significant inroads on our "national solidarity":

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935).

The judgment of the Maine Supreme Judicial Court is reversed.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE GINSBURG join, dissenting.

The Court's negative Commerce Clause jurisprudence has drifted far from its moorings. Originally designed to create a national market for commercial activity, it is today invoked to prevent a State from giving a tax break to charities that benefit the State's inhabitants. In my view, Maine's tax exemption, which excuses from taxation only that property

used to relieve the State of its burden of caring for its residents, survives even our most demanding Commerce Clause scrutiny.

I

We have often said that the purpose of our negative Commerce Clause jurisprudence is to create a national market. As Justice Jackson once observed, the "vision of the Founders" was "that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 539 (1949). In our zeal to advance this policy, however, we must take care not to overstep our mandate, for the Commerce Clause was not intended "to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 443–444 (1960).

Our cases have struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States' police powers, each exercise of which no doubt has some effect on the commerce of the Nation. See *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 180–183 (1995). The rules that we currently use can be simply stated, if not simply applied: Where a state law facially discriminates against interstate commerce, we observe what has sometimes been referred to as a "virtually *per se* rule of invalidity;" where, on the other hand, a state law is nondiscriminatory, but nonetheless adversely affects interstate commerce, we employ a deferential "balancing test," under which the law will be sustained unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). See *Oregon*

Waste Systems, Inc. v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99 (1994).

While the "virtually *per se* rule of invalidity" entails application of the "strictest scrutiny," *Hughes* v. *Oklahoma*, 441 U. S. 322, 337 (1979), it does not necessarily result in the invalidation of facially discriminatory state legislation, see, *e. g.*, *Maine* v. *Taylor*, 477 U. S. 131 (1986) (upholding absolute ban on the importation of baitfish into Maine), for "what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so," *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 278 (1988). Thus, even a statute that erects an absolute barrier to the movement of goods across state lines will be upheld if "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism," *id.*, at 274, or to put a finer point on it, if the state law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," *id.*, at 278.

In addition to laws that employ suspect means as a necessary expedient to the advancement of legitimate state ends, we have also preserved from judicial invalidation laws that confer advantages upon the State's residents but do so without *regulating* interstate commerce. We have therefore excepted the State from scrutiny when it participates in markets rather than regulates them—by selling cement, for example, see *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980), or purchasing auto hulks, see *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976), or hiring contractors, see *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204 (1983). Likewise, we have said that direct subsidies to domestic industry do not run afoul of the Commerce Clause. See *New Energy Co.*, *supra*, at 278. In sum, we have declared that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in con-*

nection with the State's regulation of interstate commerce." *Ibid.* (emphasis in original).

II

In applying the foregoing principles to the case before us, it is of course important to understand the precise scope of the exemption created by Me. Rev. Stat. Ann., Tit. 36, § 652(1)(A) (Supp. 1996–1997). The Court's analysis suffers from the misapprehension that § 652(1)(A) "sweeps to cover broad swathes of the nonprofit sector," *ante,* at 594, including nonprofit corporations engaged in quintessentially commercial activities. That is not so. A review of Maine law demonstrates that the provision at issue here is a narrow tax exemption, designed merely to compensate or subsidize those organizations that contribute to the public fisc by dispensing public benefits the State might otherwise provide.

Although Maine allows nonprofit corporations to be organized "for any lawful purpose," Me. Rev. Stat. Ann., Tit. 13–B, § 201 (1981 and Supp. 1996–1997), the exemption supplied by § 652(1)(A) does not extend to all nonprofit organizations, but only to those "benevolent and charitable institutions," § 652(1)(A), which are "organized and conducted *exclusively* for benevolent and charitable purposes," § 652(1)(C)(1) (emphasis added), and only to those parcels of real property and items of personal property that are used "solely," § 652(1)(A), "to further the organization's charitable purposes," *Poland* v. *Poland Springs Health Institute, Inc.*, 649 A. 2d 1098, 1100 (Me. 1994). The Maine Supreme Judicial Court has defined the statutory term "benevolent and charitable institutions" to include only those nonprofits that dispense "charity," which is in turn defined to include only those acts which are

> "'for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them

> to establish themselves in life, or by erecting or maintaining public buildings or works *or otherwise lessening the burdens of government.*'" *Lewiston* v. *Marcotte Congregate Housing, Inc.*, 673 A. 2d 209, 211 (1996) (emphasis added).

Moreover, the Maine Supreme Judicial Court has further limited the § 652(1)(A) exemption by insisting that the party claiming its benefit "bring its claim unmistakably within the spirit and intent of the act creating the exemption," *ibid.* (internal quotation marks omitted), and by proclaiming that the spirit and intent of § 652(1)(A) is to compensate charitable organizations for their contribution to the public fisc. As the court has explained:

> "'[A]ny institution which by its charitable activities relieves the government of part of [its] burden is conferring a pecuniary benefit upon the body politic, and in receiving exemption from taxation it is merely being given a "*quid pro quo*" for its services in providing something which otherwise the government would have to provide.'" *Episcopal Camp Foundation, Inc.* v. *Hope*, 666 A. 2d 108, 110 (1995) (quoting *Young Men's Christian Assn. of Germantown* v. *Philadelphia*, 323 Pa. 401, 413, 187 A. 204, 210 (1936)).

Thus, § 652(1)(A) exemptions have been denied to organizations that do not provide substantial public benefits, as defined by reference to the state public policy. In one case, for example, an organization devoted to maintaining a wildlife sanctuary was denied exemption on the ground that the preserve's prohibition on deer hunting conflicted with state policy on game management, so that the preserve could not be deemed to provide a public benefit. See *Holbrook Island Sanctuary* v. *Brooksville*, 214 A. 2d 660 (Me. 1965). Even churches have been denied exemptions, see *Pentecostal Assembly of Bangor* v. *Maidlow*, 414 A. 2d 891, 893–894

(Me. 1980) ("religious purposes are not to be equated with benevolent and charitable purposes").

The Maine Supreme Judicial Court has adhered rigorously to the requirement that the exempt property be used "solely" for charitable purposes. Even when there is no question that the organization owning the property is devoted exclusively to charitable purposes, the entire exemption will be forfeited if even a small fraction of the property is not used in furtherance of those purposes. See *Lewiston*, *supra*, at 212–213 (denying exemption to a building 18 percent of which was leased at market rates); *Nature Conservancy of Pine Tree State, Inc.* v. *Bristol*, 385 A. 2d 39, 43 (1978) (denying exemption to a nature preserve on which the grantors had reserved rights-of-way).

That § 652(1)(A) serves to compensate private charities for helping to relieve the State of its burden of caring for its residents should not be obscured by the fact that this particular case involves a summer camp rather than a more traditional form of social service. The statute that the Court strikes down does not speak of "camps" at all, but rather lists as examples of "benevolent and charitable institutions" nonprofit nursing homes, boarding homes, community mental health service facilities, and child care centers, see § 652(1)(A). *Some* summer camps fall within the exemption under a 1933 decision of the Supreme Judicial Court which applied it to a *tuition-free* camp for *indigent* children, see *Camp Emoh Associates* v. *Inhabitants of Lyman*, 166 A. 59, 60, and under a recent 4-to-3 decision which relied heavily on the fact that the camp at issue provided "moral instruction" and training in "social living and civic responsibility," and was not only "nonprofit" but furnished its camping services *below cost*, see *Episcopal Camp Foundation*, *supra*, at 109, 111. What is at issue in this case is not whether a summer camp can properly be regarded as relieving the State of social costs, but rather whether, *assuming it can*, a distinction between charities serving mainly residents and

charities operated principally for the benefit of nonresidents is constitutional.[1]

III

I turn next to the validity of this focused tax exemption—applicable only to property used solely for charitable purposes by organizations devoted exclusively to charity—under the negative Commerce Clause principles discussed earlier. The Court readily concludes that, by limiting the class of eligible property to that which is used "principally for the benefit of persons who are Maine residents," the statute "facially discriminates" against interstate commerce. That seems to me not necessarily true. Disparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated. See *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298–299

[1] The Court protests that "there is no '*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause," *ante*, at 581, n. 15—as though that were the point of our emphasizing in this Part II the narrowness of the challenged limitation. It is not. Rather, the point is (1) that Maine's limitation focuses upon a particular state interest that is deserving of exemption from negative Commerce Clause invalidation, and (2) that acknowledging the principle of such an exemption (as developed in Part III below) will not place the "national market" in any peril. What the Court should have gleaned from our discussion, it did not: It persists in misdescribing the exemption we defend as "a categorical exemption of nonprofit activities from dormant Commerce Clause scrutiny." *Ante*, at 588, n. 21; see also *ante*, at 591–592, n. 27.

The Court also makes an attempt to contest on the merits the narrowness of the exemption, suggesting a massive effect upon interstate commerce by reciting the multi-billion-dollar annual revenues of nonprofit nursing homes, child care centers, hospitals, and health maintenance organizations. See *ante*, at 586–587, n. 18. But of course most of the services provided by those institutions are provided locally, to local beneficiaries. (In that regard the summer camp that is the subject of the present suit is most atypical.) The record does not show the number of nonprofit nursing homes, child care centers, hospitals, and HMO's in Maine that have been denied the charitable exemption because their property is not used "principally for the benefit of persons who are Maine residents"; but it would be a good bet that the number is zero.

(1997). And for purposes of entitlement to a tax subsidy from the State, it is certainly reasonable to think that property gratuitously devoted to relieving the State of some of its welfare burden is not similarly situated to property used "principally for the benefit of persons who are not residents of [the State]," § 652(1)(A). As we have seen, the theory underlying the exemption is that it is a *quid pro quo* for uncompensated expenditures that lessen the State's burden of providing assistance to its residents.

The Court seeks to establish "facial discrimination" by showing that the effect of treating disparate property disparately is to produce higher costs for those users of the property who come from out of State. But that could be regarded as an *indirect* effect upon interstate commerce produced by a tax scheme that is *not* facially discriminatory, which means that the proper mode of analysis would be the more lenient "balancing" standard discussed above. We follow precisely this mode of analysis in *Tracy*, upholding an Ohio law that provides preferential tax treatment to domestic public utilities. Such entities, we conclude, are not "similarly situated" to other fuel distributors; their insulation from out-of-state competition does not violate the negative Commerce Clause because it "serves important interests in health and safety." 519 U. S., at 306. The Court in *Tracy* paints a compelling image of people shivering in their homes in the dead of winter without the assured service that competition-sheltered public utilities provide. See *id.*, at 301–302, 306. No less important, however, is the availability of many of the benefits provided by Maine's private charities and facilitated not by total insulation from competition but by favorable tax treatment: care for the sick and dying, for example, or nursing services for the elderly.

Even if, however, the Maine statute displays "facial discrimination" against interstate commerce, that is not the end of the analysis. The most remarkable thing about today's judgment is that it is rendered without inquiry into whether the purposes of the tax exemption *justify* its favoritism.

Once having concluded that the statute is facially discriminatory, the Court rests. "[T]he Town," it asserts, "has made no effort to defend the statute under the *per se* rule." *Ante*, at 582. This seems to me a pointless technicality. The town of Harrison (Town) has asserted that the State's interest in encouraging private entities to shoulder part of its social-welfare burden validates this provision under the negative Commerce Clause. Whether it does so because the presence of that interest causes the resident-benefiting charities not to be "similarly situated" to the non-resident-benefiting charities, and hence *negates* "facial discrimination," or rather because the presence of that interest *justifies* "facial discrimination," is a question that is not only of no consequence but is also probably unanswerable. To strike down this statute because the Town's lawyers put the argument in one form rather than the other is truly senseless.[2]

If the Court were to proceed with that further analysis it would have to conclude, in my view, that this is one of those cases in which the "virtually *per se* rule of invalidity" does not apply. Facially discriminatory or not, the exemption is no more an artifice of economic protectionism than any state law which dispenses public assistance only to the State's residents.[3] Our cases have always recognized the legitimacy of

[2] I do not understand the Court's contention, *ante*, at 582, and n. 16, that *Fulton Corp.* v. *Faulkner*, 516 U. S. 325 (1996), provides precedent for such a course. In *Fulton*, the arguments left unaddressed had not been made in another form, but had not been made *at all*. There (unlike here) the State *conceded* facial discrimination, and relied exclusively on the compensatory tax defense, see *id.*, at 333, which the Court found had not been made out, see *id.*, at 344. That narrow defense could not possibly have been regarded as an invocation of broader policy justifications such as those asserted here.

[3] In a footnote responding to this dissent, the Court does briefly address whether the statute fails the "virtually *per se* rule of invalidity." It concludes that it does fail because "Maine has ample alternatives short of a facially discriminatory property tax exemption," such as offering direct cash subsidies to parents of resident children or to camps that serve residents. *Ante*, at 582, n. 16. These are *nonregulatory* alternatives (and hence immune from negative Commerce Clause attack), but they are not

limiting state-provided welfare benefits to bona fide residents. As JUSTICE STEVENS once wrote for a unanimous Court: "Neither the overnight visitor, the unfriendly agent of a hostile power, the resident diplomat, nor the illegal entrant, can advance even a colorable claim to a share in the bounty that a conscientious sovereign makes available to its own citizens." *Mathews* v. *Diaz*, 426 U. S. 67, 80 (1976). States have restricted public assistance to their own bona fide residents since colonial times, see, M. Ierley, With Charity For All, Welfare and Society, Ancient Times to the Present 41 (1984), and such self-interested behavior (or, put more benignly, application of the principle that charity begins at home) is inherent in the very structure of our federal system, cf. *Edgar* v. *MITE Corp.*, 457 U. S. 624, 644 (1982) ("[T]he State has no legitimate interest in protecting nonresident[s]"). We have therefore upheld against equal protection challenge continuing residency requirements for municipal employment, see *McCarthy* v. *Philadelphia Civil Serv. Comm'n*, 424 U. S. 645 (1976) *(per curiam)*, and bona fide

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nondiscriminatory alternatives, which is what the exception to the "virtually *per se* rule of invalidity" requires. See *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 101 (1994) (quoting *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 278 (1988)). Surely, for example, our decision in *Maine* v. *Taylor*, 477 U. S. 131 (1986), which upheld Maine's regulatory ban on the importation of baitfish, would not have come out the other way if it had been shown that a state *subsidy* of sales of in-state baitfish could have achieved the same goal—by making the out-of-state fish noncompetitive and thereby excluding them from the market even more effectively than a difficult-to-police ban on importation. Where regulatory discrimination against out-of-state interests is appropriate, the negative Commerce Clause is not designed to push a State into nonregulatory discrimination instead. It permits state regulatory action disfavoring out-of-staters where disfavoring them is indispensable to the achievement of an important and nonprotectionist state objective. As applied to the present case: It is obviously impossible for a State to distribute social welfare benefits only to its residents without discriminating against nonresidents.

residency requirements for free primary and secondary schooling, see *Martinez* v. *Bynum*, 461 U. S. 321 (1983).

If the negative Commerce Clause requires the invalidation of a law such as § 652(1)(A), as a logical matter it also requires invalidation of the laws involved in those cases. After all, the Court today relies not on any discrimination against out-of-state nonprofits, but on the supposed discrimination against nonresident would-be *recipients* of charity (the nonprofits' "customers"); surely those individuals are similarly discriminated against in the direct distribution of state benefits. The problem, of course, is not limited to municipal employment and free public schooling, but extends also to libraries, orphanages, homeless shelters, and refuges for battered women. One could hardly explain the constitutionality of a State's limiting its provision of these to its own residents on the theory that the State is a "market participant." These are traditional governmental functions, far removed from commercial activity and utterly unconnected to any genuine private market.

If, however, a State that provides social services directly *may* limit its largesse to its own residents, I see no reason why a State that chooses to provide some of its social services indirectly—by compensating or subsidizing private charitable providers—cannot be similarly restrictive.[4] In fact, we have already approved it. In *Board of Ed. of Ky. Annual Conference of Methodist Episcopal Church* v. *Illinois*, 203 U. S. 553 (1906), we upheld a state law providing an in-

[4] It is true, of course, that the legitimacy of a State's subsidizing domestic commercial enterprises out of general funds does not establish the legitimacy of a State's giving domestic commercial enterprises preferential tax treatment. See *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 210–212 (1994) (SCALIA, J., concurring in judgment). But there is no valid comparison between, on the one hand, the State's giving tax relief to an enterprise devoted to the making of profit and, on the other hand, the State's giving tax relief to an enterprise which, for the purpose at hand, has the same objective as the State itself (the expenditure of funds for social welfare).

heritance tax exemption to in-state charities but denying a similar exemption to out-of-state charities. We recognized that such exemptions are nothing but compensation to private organizations for their assistance in alleviating the State's burden of caring for its less fortunate residents, see *id.*, at 561. "[I]t cannot be said," we wrote, "that if a State exempts property bequeathed for charitable or educational purposes from taxation it is unreasonable or arbitrary to require the charity to be exercised or the education to be bestowed within her borders and for her people," *id.*, at 563.[5]

It is true that the opinion in *Board of Ed. of Ky.* addressed only the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment, and not the Commerce Clause. A Commerce Clause argument was unquestionably raised by the plaintiff in error, however, in both brief, see Brief for Plaintiff in Error, D. T. 1906, No. 103, pp. 30–38, and oral argument, see 203 U. S., at 555 (argument of counsel), and the Court could not have reached the disposition it did without rejecting it. "[T]he Court implicitly rejected [the] argumen[t] . . . by refusing to address [it]." *Clemons* v. *Mississippi*, 494 U. S. 738, 747–748, n. 3 (1990). The Commerce Clause objection went undiscussed, I think, because it was (as it is here) utterly contrived: The State's

[5] The Court attempts to distinguish *Board of Ed. of Ky.* on the ground that the statute upheld in that case treated charities differently based on whether they were incorporated within the State, rather than on whether they dispensed charity within the State, see *ante*, at 591–592, n. 27. That is quite impossible, inasmuch as we have *held* that out-of-state incorporation is *not* a constitutional basis for discriminating between charities. And in the case that announced that holding (invalidating the denial of a property tax exemption to a nonprofit corporation incorporated in another State), we distinguished *Board of Ed. of Ky.* on the ground that the statute at issue there withheld the exemption "by reason of the foreign corporation's failure or inability to benefit the State in the same measure as do domestic nonprofit corporations." *WHYY, Inc.* v. *Glassboro*, 393 U. S. 117, 120 (1968) *(per curiam)*. The Court's analysis contradicts both the holding of this case and its reading of *Board of Ed. of Ky.*—which is obviously the correct one.

legislated distinction between charity "bestowed within her borders and for her people" and charity bestowed elsewhere or for others did not implicate commerce at all, except to the indirect and permissible extent that innumerable state laws do.

Finally, even if Maine's property tax exemption for local charities constituted facial discrimination against out-of-state commerce, and even if its policy justification (unrelated to economic protectionism) were insufficient to survive our "virtually *per se* rule of invalidity," cf. *Maine* v. *Taylor*, 477 U. S. 131 (1986), there would remain the question whether we should not recognize an additional exception to the negative Commerce Clause, as we have in *Tracy*. As that case explains, just as a public health justification unrelated to economic protectionism may justify an overt discrimination against goods moving in interstate commerce, "so may health and safety considerations be weighed in the process of deciding the threshold question whether the conditions entailing application of the dormant Commerce Clause are present." 519 U. S., at 307. Today's opinion goes to great length to reject the Town's contention that Maine's property tax exemption does not fall squarely within either the "market participant" or "subsidy" exceptions to the negative Commerce Clause, but never stops to ask whether those exceptions are the only ones that may apply. As we explicitly acknowledge in *Tracy*—which effectively creates what might be called a "public utilities" exception to the negative Commerce Clause—the "subsidy" and "market participant" exceptions do not exhaust the realm of state actions that we should abstain from scrutinizing under the Commerce Clause. In my view, the provision by a State of free public schooling, public assistance, and other forms of social welfare to only (or principally) its own residents—whether it be accomplished directly or by providing tax exemptions, cash, or other property to private organizations that perform the work for the State—implicates none of the concerns underlying our

negative Commerce Clause jurisprudence. That is, I think, self-evidently true, despite the Court's effort to label the recipients of the State's philanthropy as "customers," or "clientele," see, *e. g.*, *ante*, at 576. Because § 652(1)(A) clearly serves these purposes and has nothing to do with economic protectionism, I believe that it is beyond scrutiny under the negative Commerce Clause.

* * *

As I have discussed, there are various routes by which the Court could validate the statute at issue here: on the ground that it does not constitute "facial discrimination" against interstate commerce and readily survives the *Pike* v. *Bruce Church* balancing test; on the ground that it does constitute "facial discrimination" but is supported by such traditional and important state interests that it survives scrutiny under the "virtually *per se* rule of invalidity"; or on the ground that there is a "domestic charity" exception (just as there is a "public utility" exception) to the negative Commerce Clause. Whichever route is selected, it seems to me that the *quid pro quo* exemption at issue here is such a reasonable exercise of the State's taxing power that it is not prohibited by the Commerce Clause in the absence of congressional action. We held as much in *Board of Ed. of Ky.* and should not overrule that decision.

The State of Maine may have special need for a charitable-exemption limitation of the sort at issue here: Its lands and lakes are attractive to various charities of more densely populated Eastern States, which would (if the limitation did not exist) compel the taxpayers of Maine to subsidize their generosity. But the principle involved in our disapproval of Maine's exemption limitation has broad application elsewhere. A State will be unable, for example, to exempt private schools that serve its citizens from state and local real estate taxes unless it exempts as well private schools attended predominantly or entirely by students from

out of State. A State that provides a tax exemption for real property used exclusively for the purpose of feeding the poor must provide an exemption for the facilities of an organization devoted exclusively to feeding the poor in another country. These results may well be in accord with the parable of the Good Samaritan, but they have nothing to do with the Commerce Clause.

I respectfully dissent.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

The tax at issue here is a tax on real estate, the quintessential asset that does not move in interstate commerce. Maine exempts from its otherwise generally applicable property tax, and thereby subsidizes, certain charitable organizations that provide the bulk of their charity to Maine's own residents. By invalidating Maine's tax assessment on the real property of charitable organizations primarily serving non-Maine residents, because of the tax's alleged *indirect* effect on interstate commerce, the majority has essentially created a "dormant" Necessary and Proper Clause to supplement the "dormant" Commerce Clause. This move works a significant, unwarranted, and, in my view, improvident expansion in our "dormant," or "negative," Commerce Clause jurisprudence.[1] For that reason, I join JUSTICE SCALIA's dissenting opinion.

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[1] Although the terms "dormant" and "negative" have often been used interchangeably to describe our jurisprudence in this area, I believe "negative" is the more appropriate term. See *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 200 (1995) (SCALIA, J., joined by THOMAS, J., concurring in judgment) ("[T]he 'negative Commerce Clause' . . . is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution"). There is, quite frankly, nothing "dormant" about our jurisprudence in this area. See Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L. J. 425, 425, n. 1 (1982).

I write separately, however, because I believe that the improper expansion undertaken today is possible only because our negative Commerce Clause jurisprudence, developed primarily to invalidate discriminatory state taxation of interstate commerce, was already both overbroad and unnecessary. It was overbroad because, unmoored from any constitutional text, it brought within the supervisory authority of the federal courts state action far afield from the discriminatory taxes it was primarily designed to check. It was unnecessary because the Constitution would seem to provide an *express* check on the States' power to levy certain discriminatory taxes on the commerce of other States—not in the judicially created negative Commerce Clause, but in the Art. I, § 10, Import-Export Clause, our decision in *Woodruff* v. *Parham*, 8 Wall. 123 (1869), notwithstanding. That the expansion effected by today's decision finds some support in the morass of our negative Commerce Clause case law only serves to highlight the need to abandon that failed jurisprudence and to consider restoring the original Import-Export Clause check on discriminatory state taxation to what appears to be its proper role. As I explain in Part III, the tax (and tax exemption) at issue in this case seems easily to survive Import-Export Clause scrutiny; I would therefore, in all likelihood, sustain Maine's tax under that Clause as well, were we to apply it instead of the judicially created negative Commerce Clause.

I

The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application. See, *e. g.*, *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 259–265 (1987) (SCALIA, J., dissenting); *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S. 888, 895–898 (1988) (SCALIA, J., concurring in judgment). In one fashion

or another, every Member of the current Court[2] and a goodly number of our predecessors[3] have at least recognized these problems, if not been troubled by them.[4] Because the

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[2] See, *e. g., C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, 401 (1994) (O'CONNOR, J., concurring in judgment) ("The scope of the dormant Commerce Clause is a judicial creation"); *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 309 (1992) (STEVENS, J., writing for a unanimous Court) (recognizing that the Commerce Clause "says nothing about the protection of interstate commerce in the absence of any action by Congress"); *Wyoming* v. *Oklahoma*, 502 U. S. 437, 461–462 (1992) (SCALIA, J., joined by REHNQUIST, C. J., and THOMAS, J., dissenting) (describing the "negative Commerce Clause" as "nontextual"); *Kassel* v. *Consolidated Freightways Corp. of Del.*, 450 U. S. 662, 706 (1981) (REHNQUIST, J., dissenting) ("[T]he jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused"); cf. *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 797, n. 12 (1995) (STEVENS, J., joined by KENNEDY, SOUTER, GINSBURG, and BREYER, JJ.) ("[T]he Constitution is clearly silent on the subject of state legislation that discriminates against interstate commerce").

[3] See, *e. g., Wardair Canada Inc.* v. *Florida Dept. of Revenue*, 477 U. S. 1, 17 (1986) (Burger, C. J., concurring in part and concurring in judgment) (referring to "the cloudy waters of this Court's 'dormant Commerce Clause' doctrine"); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 623 (1978) (Stewart, J.) ("The bounds of [the restraints imposed by the Commerce Clause itself, in the absence of federal legislation], appear nowhere in the words of the Commerce Clause"); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 457, 458 (1959) (Clark, J.) (referring to our negative Commerce Clause jurisprudence as a "tangled underbrush" and a "quagmire" (internal quotation marks omitted)); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 534–535 (1949) (Jackson, J.) (describing the negative Commerce Clause as filling in one of the "great silences of the Constitution"); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 189 (1940) (Black, J., joined by Frankfurter and Douglas, JJ., dissenting) (criticizing the negative Commerce Clause as arising out of "[s]pasmodic and unrelated instances of litigation [that] cannot afford an adequate basis for the creation of integrated national rules" that "Congress alone" is positioned to develop).

[4] Scholarly commentary, too, has been critical of our negative Commerce Clause jurisprudence. See D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 234 (1985) (describing the negative Commerce Clause as "arbitrary, conclusory, and irreconcilable with the constitutional text"); see also, *e. g.*, L. Tribe, American Constitu-

expansion effected by today's holding further undermines the delicate balance in what we have termed "Our Federalism," *Younger* v. *Harris*, 401 U. S. 37, 44 (1971), I think it worth revisiting the underlying justifications for our involvement in the negative aspects of the Commerce Clause, and the compelling arguments demonstrating why those justifications are illusory.

To cover its exercise of judicial power in an area for which there is no textual basis, the Court has historically offered two different theories in support of its negative Commerce Clause jurisprudence. The first theory posited was that the Commerce Clause itself constituted an *exclusive* grant of power to Congress. See, *e. g.*, *Passenger Cases*, 7 How. 283, 393–400 (1849).[5] The "exclusivity" rationale was likely wrong from the outset, however. See, *e. g.*, The Federalist No. 32, p. 154 (M. Beloff ed. 1987) (A. Hamilton) ("[N]otwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the states, to insert negative clauses prohibiting the exercise

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tional Law 439 (2d ed. 1988) ("The Supreme Court's approach to commerce clause issues . . . often appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles"); Redish & Nugent, "The Dormant Commerce Clause and the Constitutional Balance of Federalism," 1987 Duke L. J. 569, 573 ("[N]ot only is there no textual basis [for it], the dormant Commerce Clause actually contradicts, and therefore directly undermines, the Constitution's carefully established textual structure for allocating power between federal and state sovereigns"); B. Gavit, The Commerce Clause of the United States Constitution 22 (1932) (noting that the Court has set "no conscious standard" but has rather, "in an imperial way," decided whether each particular state action presented to it "was or was not an invalid regulation of interstate commerce").

[5] See also *Mayor of New York* v. *Miln*, 11 Pet. 102, 157–159 (1837) (Story, J., dissenting); *Groves* v. *Slaughter*, 15 Pet. 449, 504, 506–508 (1841) (McLean, J., concurring); *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1852) (adopting a partial-exclusivity rationale for dormant Commerce Clause cases).

of them by the states").[6] It was seriously questioned even in early cases. See *License Cases*, 5 How. 504, 583, 615, 618, 624 (1847) (four, and arguably five, of the seven participating Justices contending that the Commerce Clause was not exclusive). And, in any event, the Court has long since "repudiated" the notion that the Commerce Clause operates as an exclusive grant of power to Congress, and thereby forecloses state action respecting interstate commerce. *Freeman* v. *Hewit*, 329 U. S. 249, 259, 262 (1946) (Rutledge, J., concurring); see also, *e. g.*, *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 766–767 (1945) ("Ever since *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Wardens*, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it"); *James* v. *Watt*, 716 F. 2d 71, 73 (CA1 1983) (Breyer, J.) (noting that "the strong Madison/Marshall 'preemptive' view of the Interstate Commerce Clause is no longer the law of the land"), cert. denied, 467 U. S. 1209 (1984).[7]

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[6] See also F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 13 (1937) ("The conception that the mere grant of the commerce power to Congress dislodged state power finds no expression" in the records of the Philadelphia Convention nor the discussions preceding ratification); *id.*, at 17–19 (noting that Chief Justice Marshall's discussion of the "exclusiveness" doctrine in *Gibbons* v. *Ogden*, 9 Wheat. 1, 197–209 (1824), "was logically irrelevant to [his] holding," and adding: "It was an audacious doctrine, which, one may be sure, would hardly have been publicly avowed in support of the adoption of the Constitution. Indeed, *The Federalist* in effect denied it, by assuring that only express prohibitions in the Constitution limited the taxing power of the states" (citing The Federalist No. 32)).

[7] The majority's assertion that James Madison viewed what we have termed the "negative" aspect of the Commerce Clause as more significant than its positive aspects, see *ante*, at 571, n. 7, is based on a letter written by Madison more than 40 years after the Convention, see 3 The Records of the Federal Convention of 1787, p. 478 (M. Farrand ed. 1911) (hereinafter Farrand) (reprinting letter from James Madison to J. C. Cabell, Feb. 13,

Indeed, the Court's early view that the Commerce Clause, on its own, prohibited state impediments to interstate commerce such that "Congress cannot re-grant, or in any manner reconvey to the states that power," *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318 (1852), quickly proved untenable. Compare *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518 (1852) (holding that construction of the Wheeling Bridge impeded commerce in violation of the Commerce Clause), with *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 426 (1856) (upholding Federal Act that declared the Wheeling Bridge to be "[a] lawful structur[e]"); see also *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 701 (1883) ("It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce").[8] And, as this Court's definition of the scope of congressional authority under the positive Commerce Clause has expanded, the exclusivity rationale has moved from untenable to absurd.

The second theory offered to justify creation of a negative Commerce Clause is that Congress, by its silence, pre-empts state legislation. See *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 493 (1887) (asserting that congressional

1829). The majority's interpretation of the letter is anachronistic. There is nothing in the letter to suggest that Madison had in mind the "negative" Commerce Clause we have created which supposedly operates of its own force to allow *courts* to invalidate state laws that affect commerce. Rather, Madison's reference to the Clause as granting a "power" strongly suggests that he was merely asserting that the Convention designed the Clause more to enable "the General Government," namely, *Congress*, to *negate* state laws impeding commerce "rather than as a power to be used for the positive purposes of the General Government." *Ibid.*

[8] See also *ante*, at 572 ("Congress unquestionably has the power to repudiate or substantially modify th[e] course of [our negative Commerce Clause] adjudication"); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945) (Congress has "undoubted" power to "permit the states to regulate the commerce in a manner which would otherwise not be permissible").

silence evidences congressional intent that there be no state regulation of commerce). In other words, we presumed that congressional "inaction" was "equivalent to a declaration that inter-State commerce shall be free and untrammelled." *Welton* v. *Missouri*, 91 U. S. 275, 282 (1876). To the extent that the "pre-emption-by-silence" rationale ever made sense, it, too, has long since been rejected by this Court in virtually every analogous area of the law.

For example, ever since the watershed case of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), this Court has rejected the notion that it can create a federal common law to fill in great silences left by Congress, and thereby pre-empt state law. We have recognized that "a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress." *Milwaukee* v. *Illinois*, 451 U. S. 304, 313 (1981).[9]

The limited areas in which we have created federal common law typically involve either uniquely federal issues or the rights and responsibilities of the United States or its agents. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 641 (1981). But where a federal rule is not essential, or where state law already operates within a particular field, we have applied state law rather than opting to create federal common law. See *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 730 (1979) (rejecting "generalized

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[9] See also *Atherton* v. *FDIC*, 519 U. S. 213, 218 (1997) (rejecting the "judicial 'creation' of a special federal rule of decision" and noting that "'[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts" (citation omitted)); *O'Melveny & Myers* v. *FDIC*, 512 U. S. 79, 83 (1994) (rejecting, as "so plainly wrong," the contention that federal common law governs application of state causes of action brought by the Federal Deposit Insurance Corporation as receiver for a federally insured savings and loan); *Milwaukee*, 451 U. S., at 313, n. 7, 314 ("Federal common law is a 'necessary' expedient" resorted to only when the Court is "compelled to consider federal questions 'which cannot be answered from federal statutes alone'" (citations omitted)).

pleas for uniformity" as a basis for creating federal common law); see also *Atherton* v. *FDIC*, 519 U. S. 213, 225–226 (1997) (same).

Similarly, even where Congress *has* legislated in an area subject to its authority, our pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as pre-empting state law:

> "As is always the case in our pre-emption jurisprudence, where 'federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."'" *California Div. of Labor Standards Enforcement* v. *Dillingham Constr. N. A., Inc.*, 519 U. S. 316, 325 (1997) (citations omitted).

See also *Jones* v. *Rath Packing Co.*, 430 U. S. 519 (1977) (same); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947) (same).

To be sure, we have overcome our reluctance to pre-empt state law in two types of situations: (1) where a state law directly conflicts with a federal law; and (2) where Congress, through extensive legislation, can be said to have pre-empted the field. See *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 98 (1992). But those two forms of pre-emption provide little aid to defenders of the negative Commerce Clause. Conflict pre-emption only applies when there is a direct clash between an Act of Congress and a state statute, but the very premise of the negative Commerce Clause is the *absence* of congressional action.

Field pre-emption likewise is of little use in areas where Congress has failed to enter the field, and certainly does not support the general proposition of "pre-emption-by-silence" that is used to provide a veneer of legitimacy to our negative Commerce Clause forays. Furthermore, field pre-emption

is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted. Perhaps recognizing this problem, our recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it. See, *e. g., O'Melveny & Myers* v. *FDIC*, 512 U. S. 79, 85 (1994) ("Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law"). Even when an express pre-emption provision has been enacted by Congress, we have narrowly defined the area to be pre-empted. See, *e. g., Dillingham*, *supra*, at 324–325; *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 517 (1992).

In the analogous context of statutory construction, we have similarly refused to rely on congressional *inaction* to alter the proper construction of a pre-existing statute. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 180–185 (1994). And, even more troubling, the "pre-emption-by-silence" rationale virtually amounts to legislation by default, in apparent violation of the constitutional requirements of bicameralism and presentment. Cf. *INS* v. *Chadha*, 462 U. S. 919, 951–959 (1983). Thus, even were we wrongly to assume that congressional silence evidenced a desire to pre-empt some undefined category of state laws, and an intent to delegate such policy-laden categorization to the courts, treating unenacted congressional intent as if it were law would be constitutionally dubious.

In sum, neither of the Court's proffered theoretical justifications—exclusivity or pre-emption-by-silence—currently supports our negative Commerce Clause jurisprudence, if either ever did. Despite the collapse of its theoretical foundation, I suspect we have nonetheless adhered to the negative Commerce Clause because we believed it necessary to check state measures contrary to the perceived *spirit*, if not

the actual letter, of the Constitution. Thus, in one of our early uses of the negative Commerce Clause, we invalidated a state tax on the privilege of selling goods "which are not the growth, produce, or manufacture of the State." *Welton* v. *Missouri,* 91 U. S., at 278. And in *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878), we struck down a state tax on out-of-state goods sold at auction. See also, *e. g.*, *I. M. Darnell & Son Co.* v. *Memphis*, 208 U. S. 113 (1908); *Voight* v. *Wright*, 141 U. S. 62 (1891); *Walling* v. *Michigan*, 116 U. S. 446 (1886); *Webber* v. *Virginia*, 103 U. S. 344 (1881). To this day, we find discriminatory state taxes on out-of-state goods to be "virtually *per se* invalid" under our negative Commerce Clause. See, *e. g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186 (1994); *Associated Industries of Mo.* v. *Lohman*, 511 U. S. 641 (1994); *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269 (1988); *Maryland* v. *Louisiana*, 451 U. S. 725 (1981). Though each of these cases reached what intuitively seemed to be a desirable result—and in some cases arguably was the constitutionally *correct* result, as I describe below—the negative Commerce Clause rationale upon which they rested remains unsettling because of that rationale's lack of a textual basis.

Moreover, our negative Commerce Clause jurisprudence has taken us well beyond the invalidation of obviously discriminatory taxes on interstate commerce. We have used the Clause to make policy-laden judgments that we are ill equipped and arguably unauthorized to make. See *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 278–280 (1978) (recognizing that establishing a formula for apportioning taxes on multistate corporations would require "extensive judicial lawmaking" for which the courts are ill suited). In so doing, we have developed multifactor tests in order to assess the perceived "effect" any particular state tax or regulation has on interstate commerce. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977); see also *Quill Corp.* v. *North*

Dakota, 504 U. S. 298 (1992). And in an unabashedly legislative manner, we have balanced that "effect" against the perceived interests of the taxing or regulating State, as the very description of our "general rule" indicates:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron [Portland] Cement Co.* v. *Detroit*, 362 U. S. 440, 443 [(1960)]. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).

Any test that requires us to assess (1) whether a particular statute serves a "legitimate" local public interest; (2) whether the effects of the statute on interstate commerce are merely "incidental" or "clearly excessive in relation to the putative benefits"; (3) the "nature" of the local interest; and (4) whether there are alternative means of furthering the local interest that have a "lesser impact" on interstate commerce, and even then makes the question "one of degree," surely invites us, if not compels us, to function more as legislators than as judges. See *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S., at 897–898 (SCALIA, J., concurring in judgment) (urging abandonment of the *Pike* balancing test so as to "leave essentially legislative judgments to the Congress").

Moreover, our open-ended balancing tests in this area have allowed us to reach different results based merely "on differing assessments of the force of competing analogies." *Okla-*

homa Tax Comm'n v. *Jefferson Lines, Inc.*, 514 U. S. 175, 196, n. 7 (1995). The examples are almost too numerous to count, but there is perhaps none that more clearly makes the point than a comparison of our decisions in *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978), and its progeny, on the one hand, and *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888), and its progeny, on the other. In *Bowman*, we recognized that States can prohibit the importation of "cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption," *id.*, at 489, a view to which we have adhered for more than a century, see, *e. g.*, *Maine* v. *Taylor*, 477 U. S. 131 (1986); *Asbell* v. *Kansas*, 209 U. S. 251 (1908). In *Philadelphia*, however, we held that New Jersey could not prohibit the importation of "solid or liquid waste which originated or was collected outside the territorial limits of the State." 437 U. S., at 618 (internal quotation marks omitted). The cases were arguably distinguishable, but only on policy grounds and not on any distinction derived from the text of the Constitution itself.

Similarly, we have in some cases rejected attempts by a State to limit use of the State's own natural resources to that State's residents. See, *e. g.*, *Hughes* v. *Oklahoma*, 441 U. S. 322, 338 (1979). But in other cases, we have upheld just such preferential access. See, *e. g.*, *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 955–957 (1982); cf. *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U. S. 371 (1978). Again, the distinctions turned on often subtle policy judgments, not the text of the Constitution.

In my view, none of this policy-laden decisionmaking is proper. Rather, the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious state taxes on interstate commerce described above, see *supra*, at 618, and leaves to Congress the policy choices necessary for any further regulation of interstate commerce.

II

Article I, § 10, cl. 2, of the Constitution provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ." To the 20th-century reader, the Clause appears only to prohibit States from levying certain kinds of taxes on goods imported from or exported to *foreign* nations. But a strong argument can be made that for the Constitution's Framers and ratifiers—representatives of States which still viewed themselves as semi-independent sovereigns—the terms "imports" and "exports" encompassed not just trade with foreign nations, but trade with *other States* as well.

The late Professor William Crosskey, in a persuasive treatment of this subject nearly a half century ago, unearthed numerous founding-era examples in which the word "import" referred to goods produced in other States. See The True Meaning of the Imports and Exports Clause: Herein of "Interstate Trade Barriers," in 1787, 1 Politics and the Constitution in the History of the United States 295–323 (1953). Crosskey recounts, for example, that merchants frequently published advertisements in the local newspapers announcing recent shipments of such "imported" goods as "Philadelphia Flour," "Carolina Rice," and "Connecticut Beef." *Id.*, at 298.[10] Similarly, the word "export" was used to refer to

[10] See also Gazette of the State of Georgia, Oct. 11, 1787, p. 3, col. 3 ("Just imported . . . Superfine Philadelphia flour"); Newport [R. I.] Mercury, June 12, 1784, p. 4, col. 2 ("Just imported . . . Burlington [New Jersey] and Carolina, Pork, in Barrels"); *ibid.* ("Just imported . . . best Philadelphia Flour"); South Carolina Weekly Gazette, Sept. 13, 1783, p. 3, col. 2 ("Just imported, In the Sloop Rosana, . . . from Rhode-Island, . . . Potatoes, Apples, Onions by the bunch and bushel, Beats, Carrots, and good warranted Cheese"); Columbian Herald [Charleston, S. C.], Nov. 26, 1787, p. 4, col. 4 ("Just imported, From Philadelphia, . . . Dr. Martin's Celebrated Medicine for Cancers, Ulcers, Wens, Scurvies, Tetters, Ringworms, &c."); Newport Mercury, July 31, 1786, p. 2, col. 2 (complaining that "last year upwards of 700,000 bushels of corn were imported into [South Carolina] from North Carolina and Virginia"); Columbian Herald, Feb. 14, 1785, p. 2,

goods shipped both to other States and abroad. One writer, for example, urged his fellow Connecticut citizens to manufacture stockings in sufficient quantity not only for the supply of Connecticut "but for *exportation to other States*" as well. Letter from "A. C.," Massachusetts Centinel, Sept. 5, 1787, p. 1, col. 1, reprinted from New Haven Gazette (emphasis added). Another argued that Connecticut could enrich itself "[b]y making and refining *Cyder* for *exportation* with which we might supply the *Southern States*, as well as the large provinces of Quebec and Nova-Scotia." Connecticut Farmer, New-Haven Gazette, Oct. 6, 1785, p. 2, col. 3 (second and third emphases added).

More significantly, the early statute books are replete with examples of these commonplace 18th-century understandings of the terms "import" and "export." The Virginia cheese-duty Act of October 1786, for example, provided for a duty of "three pence a pound on all cheese . . . *imported* into this commonwealth." 12 Hening, Virginia Statutes at Large, ch. 29, § 2, p. 289 (emphasis added). As complaints published in New England newspapers indicate, that duty was imposed on cheese produced by the New England States. See Salem [Mass.] Mercury, Mar. 3, 1787, p. 2, col. 2. Moreover, the duty was but one of many imposed by Virginia, which had for some time, it seems, "imposed like duties upon the importation of New-England rum, Lynn [Mass.] Shoes, Cheese, Cordage, and a variety of other articles manufactured in the Eastern States." Independent Chronicle [Boston], Apr. 19, 1787, p. 3, col. 2; see 11 Hening, Virginia Statutes at Large, ch. 8, § 8, pp. 121–122 (Oct. 1782) (imposing a tonnage duty "on all vessels . . . from or to foreign parts, or from or to any of the United States," and an impost duty on goods "imported or brought into this commonwealth . . . from any port or place whatsoever").

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col. 4 (complaint about legislation pending in Georgia—later adopted—taxing "all goods imported into the back part of that state from South Carolina").

Maryland, for its part, taxed certain "articles exported out of" the State, including flour shipped to New England. 1784 Md. Laws, ch. 84, § 1; see also Letter from "A Citizen," Norwich [Conn.] Packet, Jan. 17, 1788, p. 1, col. 1 ("The New-England States have imported, for four years past, from the State of Maryland, upwards of twenty five thousand barrels of flour annually—on which they have been obliged to pay a duty for the liberty of exportation"). And, when it provided for the inspection of salted foods "exported and imported from and to the town of Baltimore," Maryland expressly included salted foods "brought or imported into the said town, from any part of this state, or any one of the United States, or from any foreign port whatever." 1786 Md. Laws, ch. 17, § 5.

In similar fashion, Connecticut adopted an excise tax that distinguished between "imported Chocolate," taxed at three pence per pound, and "Chocolate made within this State," taxed at one penny per pound. 1783 Conn. Acts and Laws 619. And in May 1784, Connecticut adopted an import duty that expressly applied to certain enumerated articles "imported or brought into this State, by Land or Water, from any of the United States of America." 1784 Conn. Acts and Laws 271.[11]

[11] Some commentators have argued that the phrase "imported or brought" suggests that Connecticut lawmakers intended to distinguish between foreign goods "imported" and other States' goods "brought" into the State. This supposed distinction between "imported" and "brought" is not consistent with the remainder of the statute, however. For example, the second paragraph of the Act uses the phrase "brought or imported into this State" when referring exclusively to items "that are not the Growth, Produce, or Manufacture of the United States." 1784 Conn. Acts and Laws 271. And conversely, "imported" is used alone in contexts where it plainly covers goods produced in other States. See, *e. g.*, *id.*, at 309 (setting duty for sugar, "whether the Produce or Manufacture of the United States, or not, imported into this State"); cf. 1786 Md. Laws, ch. 17, § 6 (setting standards for "all beef and pork barrels brought to, or imported into, Baltimore-town, from any part of this state"). The more plausible view, therefore, is that the words "brought" and "imported" are

In fact, when state legislators of the founding generation intended to limit the term "imports" only to goods of foreign origin, they were quite adept at so indicating. See *id.*, at 269 (provision regarding merchants "who shall import annually into [New London or New Haven] from Europe, Asia or Africa, Goods, Wares and Merchandise, the Growth, Produce or Manufacture of said Countries"); *id.*, at 270 (setting duties for "Goods imported into this State from any Foreign Port, Island or Plantation not within any of The United States"); 2 New York Laws, ch. 7, p. 12 (1886) (Act of Nov. 18, 1784, setting duties for certain "articles imported from Europe"). Thus, based on this common 18th-century usage of the words "import" and "export," and the lack of any textual indication that the Clause was intended to apply exclusively to foreign goods, it seems likely that those who drafted the Constitution sought, through the Import-Export Clause, to prohibit States from levying duties and imposts on goods imported from, or exported to, other States as well as foreign nations, and that those who ratified the Constitution would have so understood the Clause.

Our Civil War era decision in *Woodruff* v. *Parham*, 8 Wall. 123 (1869), of course, held that the Import-Export Clause applied only to foreign trade. None of the parties to these proceedings have challenged that holding, but given that the common 18th-century understanding of the words used in the Clause extended to interstate as well as foreign trade, it is

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largely redundant and, to the extent they refer to different activities, the distinction in the phrase is not between foreign goods "imported" into Connecticut, on the one hand, and other States' goods "brought" into Connecticut, on the other, but between goods of both kinds—domestic and foreign—commercially "imported" in quantity and those "brought" in limited quantities by individuals in their own baggage. Compare 1784 Conn. Acts and Laws, at 272 (using the phrase "imported or brought" when referring both to a ship's cargo and to the "Baggage of Passengers"), with *id.*, at 273 (using only the word "imported" when referring solely to the ship's cargo).

worth assessing the *Woodruff* Court's reasoning with an eye toward reconsidering that decision in an appropriate case.

The *Woodruff* Court began with a textual argument, contending that the power to levy "imposts" given to Congress in Art. I, § 8, cl. 1, applied only to foreign imports. Such a limited reading of the word "imposts" in that Clause was necessary, the Court claimed, because any other reading would be nonsensical: Goods "imported" by one State from another State, explained the Court, would be an "export" of the State where the goods were produced or grown, and the supposed power given to Congress in Art. I, § 8, to levy an "impost" on such "imports" would be prohibited by the Art. I, § 9, provision that "[n]o Tax or Duty shall be laid on Articles exported from any State." This apparent tension between § 8 and § 9 led the Court to believe that the word "imposts" in § 8 must be read as applying only to foreign imports in order to avoid a partial negation of the Art. I, § 8, power. The Court then extrapolated from this reading that the word "impost" in Art. I, § 10, similarly had the same limited application to foreign imports. As we have already seen, however, see *supra,* at 621–623, the word "import" derived its meaning from the jurisdiction into which goods were imported; consequently, it does not necessarily follow that the imports on which Congress was given the power to lay "imposts" in Art. I, § 8, were identical to the imports and exports on which the several States were prohibited from levying "Imposts or Duties" by Art. I, § 10.[12]

The *Woodruff* Court bolstered its textual argument with two further arguments, neither of which appear still to be

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[12] Even assuming that the word "impost" in the two Clauses applied to the same class of "imports," there is nothing nonsensical in reading "impost" in Art. I, § 8, as applicable to interstate as well as foreign trade. It is frequently the case that a broad grant of power in one Clause is restricted by another Clause. Moreover, a State could also import goods from a federal territory, and the congressional power to lay an impost on such (nonforeign) trade would not run afoul of the Art. I, § 9, prohibition.

valid, if ever they were: First, that in the history of the Constitution's formation and adoption, "the words imports and imposts were used with *exclusive* reference to articles imported from foreign countries," *id.*, at 133 (emphasis added), and second, the policy concern that goods imported from other States would be forever exempt from tax if the Clause were read to apply to interstate imports.

As to the first nontextual argument, the *Woodruff* Court was selective in its use of history, to say the least. It first asserted that, in Articles VI and IX of the Articles of Confederation, the words "imports, exports, and imposts are used with exclusive reference to foreign trade, because [those articles] have regard only to the treaty-making power of the federation." *Id.*, at 134. Even if the *Woodruff* Court's assertion was accurate as to Articles VI and IX, which is doubtful,[13] Article IV cannot be so read. That Article expressly permitted "duties" and "impositions" to be levied on property removed from one State to another, as long

[13] Article VI, § 3, merely provided that "[n]o State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled." 1 Stat. 5. And Article IX provided: "The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances, provided that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. . . ." 1 Stat. 6. As should be evident, neither Article requires a reading of "impost" as applicable exclusively to foreign imports. The better reading is that when the States levied imposts in their individual capacities, they could not interfere with treaties enacted by the States in their collective capacity. In fact, the two provisions, read together, suggest the existence of much broader classes of "imposts," "imports," and "exports," and that only the *subclass* of imposts interfering with foreign trade might be prohibited. The absence of this very qualifier in the later enacted Import-Export Clause creates a negative inference that the unqualified constitutional language covered more than did the limited prohibition in the Articles of Confederation.

as the property was not owned by "the United States, or either of them."[14]

The *Woodruff* Court next turned to the use of the words "duty" and "import" in the Continental Congress. The Court noted that the Continental Congress recommended that the States give it permission to levy a duty of five percent on all "foreign merchandise imported into the country," and that, though "imperfectly . . . preserved," the debates in the Congress "are full of the subject of the injustice done by the States who had good seaports, by duties levied in those ports on foreign goods designed for States who had no such ports." *Id.*, at 134.

There is, of course, no question that the ability of seaport States to tax the foreign imports of their neighbors was a source of discord between the States, and continued to be so through the Constitutional Convention itself. In order to support its contention, however, the *Woodruff* Court was obligated to show not merely that the words "duty," "impost," and "imports" were used in reference to foreign goods, but

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[14] Indeed, some New Englanders apparently believed that the Virginia duty on New England cheese, see *supra*, at 622, was contrary to Article IV's provision that "no imposition, duties or restriction, shall be laid by any State, on the property of the United States, or either of them." 1 Stat. 4. See Salem [Mass.] Mercury, Mar. 3, 1787. The general view of the Clause, however, and certainly the view of the several States that imposed duties on interstate trade, see *supra*, at 622–623, was that it applied only to goods actually owned by the States, not to goods grown or manufactured within them. See Salem [Mass.] Mercury, Mar. 3, 1787 ("[T]he proper construction of that part of the Articles of Confederation is, that no state in the union shall lay a tax on publick property imported therein—for, be it remembered, Congress were, at the time the Confederation was formed, exporters of almost every necessary for carrying on the war, & the clause alluded to was intended to prevent any individual state from laying a duty on those necessary supplies"); see also 12 Hening, Virginia Statutes at Large, ch. 40, § 3, pp. 304–305 (Oct. 1786) (distinguishing between articles "which are the property of the United States, or either of them," and articles "which shall be proved to be of the growth, produce or manufacture of the State from which they shall be imported").

that foreign goods were the *exclusive* reference. Contrary to the *Woodruff* Court's claim, the historical record does not appear to support such an exclusive use of the words.

The records of the Continental Congress contain numerous examples of the words "duty," "impost," and "import" being used with reference to interstate trade. In 1785, for example, in response to the increasing animosities between the States engendered by conflicting interstate trade regulations, an amendment to the Articles of Confederation was proposed that would have vested in the Continental Congress the power to lay "such imposts and duties upon imports and exports, as may be necessary for the purpose" of "regulating the trade of the States, as well with foreign Nations, *as with each other*." 28 Journals of the Continental Congress, Mar. 28, 1785, p. 201 (1933) (emphasis added). Two provisos within the proposed amendment further suggest that interstate imports and exports were very much within the purview of the amendment: First, "that the Citizens of the States shall in no instance be subjected to pay higher imposts and duties, than those imposed on the subjects of foreign powers"; and second, "that the Legislative power of the several States shall not be restrained from prohibiting the importation or exportation of any species of goods or commodities whatsoever." *Ibid.*

As early as 1779, the problems posed by *interstate* trade barriers had become acute enough to warrant a request by the Continental Congress urging the States "to repeal all laws or other restrictions laid on the inland trade between the said states." Resolution of Aug. 25, 1779, 14 Journals of the Continental Congress 986; *id.*, at 996 (adopting resolution). While this particular resolution does not use the words "duties" or "imports," it seems evident from a survey of the statutory "duties" being levied by some States on goods "imported" from other States, see *supra*, at 622–623, that the resolution was directed at just such duties on imports from other States.

Many of the States ignored the request, of course, and their "rival, conflicting and angry regulations" continued to be a source of conflict until the new Constitution went into effect. See Madison, Preface to Debates in the Convention of 1787 (Draft), *circa* 1836, in 3 Farrand 547; see also, *e. g.*, William Ellery to Samuel Dick, Aug. 2, 1784, in 7 Letters of Members of the Continental Congress 579 (E. Burnett ed. 1934) (hereinafter Burnett's Letters) (predicting that Rhode Island would not agree to the national impost requested by the Congress in 1781 "until the States shall have agreed not to lay any *duties* upon goods *imported* into them from any one of their Sister States; perhaps not then" (emphasis added)); William Samuel Johnson to Jonathan Sturges (draft), Jan. 26, 1785, in 8 Burnett's Letters 13 (noting that the Continental Congress was considering asking the States "to invest Congress with the Power of regulating their Trade as well with foreign Nations *as with each other*," a move which "might probably overturn the System [of "duties" on "imported" goods, see *supra*, at 623,] Conn[ecticu]t has adopt'd as relat[iv]e to N. Y. which it is said she will counteract by regulat[ion]s of her Assembly now convening" (emphasis in original)).

In fact, the animosity engendered by the various duties levied on imports from other States was one of the motivating factors leading to the Annapolis Convention of 1786. See T. Powell, Vagaries and Varieties in Constitutional Interpretation 182 (1956) ("When the Framers spoke in 1787, the states were substantially sovereign, and their exercises of sovereign powers in adversely affecting trade from sister states was one of the factors leading to the Annapolis conference"). As noted by Tench Coxe, one of the Pennsylvania Commissioners appointed to attend the Convention: "Goods of the growth product and manufacture of the Other States in Union were [in several of the States] charged with high Duties upon importation into the enacting State—as great in many instances as those imposed on foreign Articles of

the same Kinds." Coxe, Letter to the Virginia Commissioners at Annapolis, Sept. 13, 1786, reprinted in 9 The Papers of James Madison 125 (Rutland ed. 1975). Coxe thought the very purpose of the Annapolis Convention had been "[t]o procure an alteration" of this and other practices, which were, he added, "evidently opposed to the great principles and Spirit of the Union." *Ibid.*

Similarly, one of the first criticisms leveled against the Articles of Confederation during the ensuing Federal Convention was the general Government's inability to prevent "quarrels between states," including those arising from the various "duties" the States imposed upon each other, both on foreign goods moving through the seaport States and on each other's goods. See 1 Farrand 19, 25 (Edmund Randolph, May 29); see also Madison, Preface to Debates in the Convention of 1787 (draft), *circa* 1836, in 3 Farrand 547–548 ("Some of the States, as Connecticut, taxed imports as from Massts higher than imports even from G. B. of w[hi]ch Massts. complained to Virga. and doubtless to other States").

While the focus of the Convention quickly moved beyond the mere abolition of trade barriers, of course, there are passages in the available Convention debates which indicate that interstate trade barriers remained a concern, and that the words of the Import-Export Clause applied to interstate, as well as to foreign, trade. George Mason, for example, proposed to exempt from the Import-Export Clause prohibition duties necessary for the States' execution of their inspection laws. Otherwise, he argued, the "restriction on the States would prevent the incidental duties necessary for the inspection & safe-keeping of their produce, and be ruinous to the [Southern] Staple States." 2 Farrand 588 (Sept. 12). James Madison seconded the motion, and his comment that any feared abuse of the power to levy duties on exports for inspection purposes was perhaps best guarded against by "the right in the Genl. Government to regulate trade *between State & State*," *id.*, at 588–589 (emphasis added),

strongly suggests that exports to other States were within the Clause's reach.[15]

These references to duties on *interstate* imports and exports are bolstered by several more in the ratification debates. See, *e. g.*, 2 J. Elliot, Debates on the Federal Constitution 57–58 (2d ed. 1891) (hereinafter Elliot) (Dawes, Massachusetts ratifying convention) ("As to commerce, it is well known that the different states now pursue different systems of duties in regard to each other. By this, and for want of general laws of prohibition through the Union, we have not secured even our own domestic traffic that passes from state to state" (original emphasis deleted)). Indeed, one of the principal Anti-Federalist complaints against the new Constitution was that States were prohibited from laying *any* duties or imposts on imports or exports, a prohibition that, in their view, left only direct taxation as a means for the States to support their own governments. See, *e. g.*, Brutus 1, Oct. 18, 1787, in 13 Documentary History of the Ratification of the Constitution 415 (J. Kaminsky & G. Saladino eds. 1981) (hereinafter Doc. Hist.) ("No state can . . . lay any duties, or imposts, on imports, or exports . . . . [T]he only mean therefore left, for any state to support its government and discharge its debts, is by direct taxation").[16] This

[15] Furthermore, in response to concerns that the inspection exemption might be used merely as a pretext for taxing neighboring States, see 2 Farrand 589, Mason's proposal was further amended to make any such State inspection laws "subject to the revision and controul of Congress," *id.*, at 607, 624. The need for, and existence of, this further limitation on the States' authority to tax imports and exports suggests that the Commerce Clause power itself, referred to by Madison, would not operate to limit the States of its own accord. See *supra*, at 613–614, n. 7.

[16] See also John Quincy Adams to William Cranch, Oct. 14, 1787, in 14 Doc. Hist. 222 ("How will it be possible for each particular State to pay its debts, when the power of laying imposts or duties, on imports or exports, shall be taken from them—By direct taxes, it may be said"); George Lee Turberville to James Madison, Dec. 11, 1787, in *id.*, at 407 ("Why shou'd the states be prevented from raising a Revenue by Duties or

complaint overstates the case somewhat—States could still levy excises, and duties other than those on imports and exports. See, *e. g.*, The Federalist No. 32, p. 151 (M. Beloff ed. 1987) (A. Hamilton) ("([W]ith the sole exception of duties on imports and exports)[, States] would, under the plan of the convention, retain [the] authority [to raise their own revenues] in the most absolute and unqualified sense"). But it does suggest that the Anti-Federalists, at least, viewed the Import-Export Clause as prohibiting all other state taxes, including the duties then in place on goods imported from neighboring States. And moves in various States shortly after the Constitution's ratification to repeal the offending duties on interstate trade support the Anti-Federalist view. Compare An Act repealing the Laws made for levying and collecting a Duty on Articles imported into this State, 1789 Conn. Acts and Laws 377 (Jan. 1789), with, *e. g.*, An Act for levying and collecting Duties on the Importation of certain Articles, and for appropriating the same, 1784 Conn. Acts and Laws 309 (Oct. 1784) (providing for, inter alia, a duty of three pence "on each Pound of Sugar . . . whether the Produce or Manufacture of the United States, or not, imported into this State").

Justice Nelson, of course, pointed out in his *Woodruff* dissent that a lack of "security or protection" against "obstructions and interruptions of commerce among the States" was "one of the principal grievances that led to the Convention of 1787, and to the adoption of the Federal Constitution." 8 Wall., at 140–141. But he seems not to have had in his arse-

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Taxes—on their own Exports? Are the states not bound down to direct Taxation for the support of their police & government?"); A Federal Republican, A Review of the Constitution Proposed by the Late Convention, Oct. 28, 1787, in 3 The Complete Anti-Federalist 79 (H. Storing ed. 1981) (hereinafter Storing) ("The [Import-Export Clause] is reducing [the States] to the necessity of laying direct taxes"); Vox Populi, Massachusetts Gazette, Oct.–Nov. 1787, in 4 Storing 47 ("Must we be confined to a dry tax on polls and estates . . . ?").

nal many of the historical materials cited above, which indicate that the *words* used in the Import-Export Clause encompassed, at the time the Constitution was written, both interstate and foreign trade.[17] Indeed, the *Woodruff* majority itself felt compelled to note that its "research [had] extended" only so far as permitted by "the discussions on this subject, as they have come down to us from that time." *Id.*, at 136; see also *id.*, at 134 (referring to the "imperfectly . . . preserved" discussions of the Continental Congress). Whatever the cause, the *Woodruff* Court's analysis of the historical usage of the words overlooked many contrary examples and is thus not especially compelling.

The second contention that the *Woodruff* Court used to bolster its textual argument was a policy concern based on an unnecessarily broad view of the Import-Export Clause's prohibition. The *Woodruff* Court believed that the prohibition on "Duties or Imposts on Exports or Imports" exempted imported articles, and the merchants who traded in them, from state taxation of *any* kind, at least so long as they remained in their original packages. *Id.*, at 137. This view of the Clause's prohibition would result in "the grossest injustice," said the Court, were the Clause to be read as applying to "articles brought from one State into another," for "[n]either the State nor the city which protects [the import merchant's] life and property [could] make him contribute a dollar to support its government." *Ibid.*

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[17] Farrand did not publish his volumes until 1911 (although the *Woodruff* Court did have available to it Madison's notes, as well as the more perfunctory convention journal); Burnett's Letters were published between 1921 and 1936; the Journals of the Continental Congress were published between 1904 and 1937; volume 9 of The Papers of James Madison, in which Tench Coxe's letter was first reprinted, was not published until 1975; and a useful, readily accessible collection of the various Anti-Federalist writings was not available until 1981. This is not to say that the original documents reprinted in these volumes would not have been available to the *Woodruff* Court. But our ready access to, as well as our appreciation of, such documents has increased over time.

Woodruff's broad reading of the Clause's prohibition was explicitly adopted three years later in *Low* v. *Austin*, 13 Wall. 29 (1872), a case involving foreign imports. But we expressly overruled *Low* 20 years ago, in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 279 (1976), holding that the Import-Export Clause "cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies," *id.*, at 287; cf. *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 857–859 (1996) (distinguishing the Art. I, § 9, cl. 5, Export Clause, which bars the United States from imposing any *tax* on exports, from the Import-Export Clause, which prohibits States from levying only *duties* and *imposts*). While *Michelin* and *Low* dealt with foreign imports, the expansive interpretation of the Import-Export Clause's prohibition rejected by *Michelin* was the same interpretation that gave the *Woodruff* Court pause and that seems to have been an impetus to its refusal to read the Clause as applying to imports from other States. Thus, after *Michelin*, the second argument the *Woodruff* Court used to bolster its weak textual analysis—that it would be a gross injustice to prohibit States from levying *any* taxes on goods which were produced in other States—no longer has any force.

There is nothing else of consequence to support the *Woodruff* Court's holding. The only remaining argument made by the *Woodruff* majority was that it was "improbable" that the Convention would have permitted States to tax "imports" from other States merely with the assent of Congress, because the revenues that would accrue to Congress by granting such assent would prove too great a temptation for Congress to serve as a neutral arbiter regarding such taxes. *Woodruff*, *supra*, at 133. The *Woodruff* Court's speculation was without historical support, however, and pales in comparison to the substantial evidence described above regard-

ing the meaning of the words in the Clause, see *supra*, at 621–624.[18]

In short, there is little in the *Woodruff* opinion to sustain its holding, and its weakness is even more evident given the contrary precedent rejected by the *Woodruff* Court. In *Brown* v. *Maryland*, 12 Wheat. 419, 449 (1827), Chief Justice Marshall, writing for the Court, suggested: "[W]e suppose the principles laid down in this case [namely, that a state license tax on importers of foreign articles was invalid both under the Import-Export Clause and the Act of Congress which authorizes importation] to apply equally to importations from a sister State." And just eight years before *Woodruff*, Chief Justice Taney, writing for a unanimous Court, struck down a stamp tax on bills of lading for gold being shipped from California to New York, holding that "the State tax in question is a duty upon the *export* of gold and silver, and consequently repugnant to the [Import-Export] clause in the Constitution." *Almy* v. *California*, 24 How. 169, 175 (1861) (emphasis added).

Chief Justice Marshall's statement in *Brown* was merely dicta, of course, but the *Woodruff* majority's rejection of the precedential force of *Almy*, based solely on its assertion that "[i]t seems to have escaped the attention of counsel on both sides, and of the Chief Justice who delivered the opinion,

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[18] Indeed, were I similarly to speculate, I would not find it "improbable" that the Convention would have trusted Congress to serve as a referee between individual States. Since many States would necessarily be harmed by a single State's impost, the institutional checks would in all likelihood be sufficient to counter any revenue "temptation" Congress might have faced, especially given the extensive revenue authority granted directly to Congress in Art. I, §8, cl. 1. My "speculation" is at least consistent with the recorded Convention debates. Roger Sherman proposed the requirement that any revenues raised by congressionally approved state imposts go into the federal treasury not as a separate means of raising national revenues, but to ensure that the States not use a protectionist impost as a pretext for raising revenues from other States. See 2 Farrand 441–442 (Aug. 28).

that the case was one of inter-state commerce," 8 Wall., at 137, is harder to sustain. The *Almy* Court expressly noted that Mr. Almy was charged with failing to pay the stamp tax on a bill of lading for "a quantity of gold-dust for transportation to New York" from San Francisco, 24 How., at 172, and the explicit "question presented by the case" was whether a State had a right "to tax such instruments when used in *commerce among the States*," Brief for Plaintiff in Error in *Almy* v. *California*, D. T. 1860, No. 23, pp. 1–2 (emphasis added); see also *id.*, at 3 (referring to fact that the tax was on bills of lading "for exports to other States"). *Woodruff*'s rejection of *Brown* and *Almy*—precedent which better reflected the historical record and common usage of the Clause's words—was thus highly questionable.

In sum, it would seem that *Woodruff* was, in all likelihood, wrongly decided. Of course, much of what the Import-Export Clause appears to have been designed to protect against has since been addressed under the negative Commerce Clause. As the majority recognizes, discriminatory state taxation of interstate commerce is one of the core pieces of our negative Commerce Clause jurisprudence. *Ante*, at 581. Were it simply a matter of invalidating state laws under one Clause of the Constitution rather than another, I might be inclined to leave well enough alone. Indeed, our rule that state taxes that discriminate against interstate commerce are virtually *per se* invalid under the negative Commerce Clause may well approximate the apparent prohibition of the Import-Export Clause itself. But, as already described, without the proper textual roots, our negative Commerce Clause has gone far afield of its core—and we have yet to articulate either a coherent rationale for permitting the courts effectively to legislate in this field, or a workable test for assessing which state laws pass negative Commerce Clause muster. Precedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of *stare decisis*. See *Holder*

v. *Hall*, 512 U. S. 874, 936–937 (1994) (THOMAS, J., concurring in judgment). And it is quite possible that, were we to revisit *Woodruff*, we might find that the Constitution already affords us a textual mechanism with which to address the more egregious of state actions discriminating against interstate commerce.

III

Were we thus to shed ourselves of our nontextual negative Commerce Clause and all the accompanying multifactor balancing tests we have employed, and instead merely apply what appears to me to be the relevant provision of the Constitution, this would seem to be a fairly straightforward case (although I reserve final judgment of the matter for a case when the Import-Export Clause is specifically addressed by the parties). Unlike the Export Clause of Art. I, § 9, which prohibits the Congress from levying *any* tax on exports, the Import-Export Clause only prohibits States from levying "duties" and "imposts." See *International Business Machines*, 517 U. S., at 857–858.

The Maine property tax at issue here is almost certainly not an impost, for, as 18th-century usage of the word indicates, an impost was a tax levied on *goods* at the time of *importation*. See, *e. g.*, The Observer-No. XII, Connecticut Courant and Weekly Intelligencer, Jan. 7, 1790, p. 1, col. 2 ("[I]mpost is a tax on merchandize, payable at the port of entry");[19] N. Bailey, An Universal Etymological English Dictionary (26 ed. 1789) (defining "impost" as "a tax or tribute, but more especially such as is received by a prince or state, for goods brought into any haven from other nations");[20]

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[19] See also Providence Gazette and Country Journal, Feb. 13, 1790, p. 1, col. 1 (reprinting same); Gazette of the United States, Jan. 9, 1790, p. 2, col. 1 (same).

[20] See also T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Impost . . . A tax; a toll; custom paid"); S. Johnson, A Dictionary of the English Language (7th ed. 1785) ("Impost. A tax; a toll; a custom paid. Taxes and *imposts* upon merchants do seldom good to the

Michelin, 423 U. S., at 287 ("[I]mposts and duties . . . are essentially taxes on the commercial privilege of bringing goods into a country"). Because the tax at issue here is levied on real property—property that cannot possibly have been "imported"—the tax would not seem to fit within any of the commonly accepted definitions of "impost."

"Duty," however, though frequently used like "impost" to denote "money paid for custom of goods," An Universal Etymological English Dictionary, *supra*, does not appear to have been limited to taxes assessed at portside. See, *e. g.*, S. Johnson, A Dictionary of the English Language (7th ed. 1785) ("Duty . . . Tax; impost; custom; toll. All the wines make their way through several *duties* and taxes, *before* they reach the port" (second emphasis added)); 2 Elliot 331 (John Williams, New York ratifying convention) (noting that Congress' Art. I, §8, power "extend[s] to duties on all kinds of goods, to tonnage and poundage of vessels, to duties on written instruments, newspapers, almanacs, &c"). In fact, "imposts" seems to have been viewed as a particular subclass of duties; the fact that the two words are used disjunctively in the Import-Export Clause suggests, therefore, that something broader than portside customs was within the constitutional prohibition.

Because of the somewhat ambiguous usage of the words "duty" and "impost," Luther Martin inquired of their meaning during the Convention. James Wilson, a member of the

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king's revenue; for that that he wins in the hundred, he loseth in the shire. Bacon's Essays"); Barclay's Universal English Dictionary 471 (B. Woodward rev. 1782) ("Impost. A toll; custom paid for goods or merchandise"); T. Blount, A Law-Dictionary (1670) ("Impost Tribute, Tallage, or Custom; but more particularly it is that Tax which the King receives for such merchandises as are imported into any Haven, from other Nations. . . . And it may be distinguished from *Custom*, which is rather that profit which the King raises from Wares exported; but they are sometimes confounded"); cf. 7 Oxford English Dictionary 733 (2d ed. 1989) ("[I]mpost . . . A tax, duty, imposition, tribute; *spec.* a customs-duty levied on merchandise. Now chiefly *Hist*").

Committee on Detail, replied as follows: "*[D]uties* are applicable to many objects to which the word *imposts* does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties &c." 2 Farrand 305 (emphasis in original); see also 2 Storing 54 (Luther Martin, in Maryland Convention, describing same colloquy); The Fallacies of the Freeman Detected by a Farmer, Freeman's Journal, April 1788, in 3 Storing 186–187 ("Under the term duties [in Art. I, § 8], every species of indirect taxes is included, but it especially means the power of levying money upon printed books, and written instruments"). What seems likely from these descriptions is that a duty, though broader than an impost, was still a tax *on* particular *goods* or written instruments.

It is important to note, moreover, that the Martin-Wilson colloquy is in reference to the Art. I, § 8, power given to Congress to levy duties. That power is broader than the prohibition on States found in Art. I, § 10, which reaches not all duties, but only those on "imports or exports."[21] But even without this additional limitation, one kind of tax that duties almost certainly did *not* encompass were "direct" taxes, such as property taxes and poll taxes. See, *e. g.*, The Federalist No. 12 (A. Hamilton) (distinguishing direct taxes,

[21] See, *e. g.*, DeWitt, Letter To the Free Citizens of the Commonwealth of Massachusetts, American Herald, Boston, Oct.–Dec. 1787, in 4 Storing 23 (noting that Congress "shall have the *exclusive* power of imposts and the duties on imports and exports, [and, implicitly, a concurrent] power of laying excises and other duties" (emphasis added)); Letters from The Federal Farmer, Oct. 10, 1787, in 2 Storing 239 (distinguishing between "impost duties, which are laid on imported goods [and] may usually be collected in a few seaport towns," and "internal taxes, [such] as poll and land taxes, excises, duties on all written instruments, etc. [which] may fix themselves on every person and species of property in the community"); Essays of Brutus, Dec. 13, 1787 in 2 Storing 392–393 (same); see also 2 Farrand 589 (noting that Morris "did not consider the dollar per Hhd laid on Tobo. in Virga. as a duty on exportation, as no drawback would be allowed on Tobo. taken out of the Warehouse for internal consumption").

such as property taxes, from indirect taxes, such as imposts, duties, and excises); Freeman's Journal, in 3 Storing 186–187 ("Under the term duties [in Art. I, § 8], every species of indirect taxes is included"); see also *Michelin*, *supra*, at 286, 290–291.

The tax at issue here is nothing more than a tax on real property. Such taxes were classified as "direct" taxes at the time of the framing, and were not within the class of "indirect" taxes encompassed by the common understanding of the word "duties." The amount of the Maine tax is tied to the value of the real property on which it is imposed, not to any particular goods, and not even to the number of campers served. It does not appear, therefore, to be a "duty" on "imports" in any sense of the words.[22] Even when coupled with the tax exemption for certain Maine charities (which is, in truth, no different than a subsidy paid out of the State's general revenues), Maine's property tax would not seem to be a "Duty or Impost on Imports or Exports" within the meaning of the Import-Export Clause. Thus, were we to overrule *Woodruff* and apply the Import-Export Clause to this case, I would in all likelihood sustain this tax under that Clause as well.

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[22] Even were I to agree with the majority that a particular property tax may be a property tax in name only, see *ante*, at 574–575, and even were I to assume that travel across state lines to consume services in another State renders those traveling consumers "imports," it is difficult to characterize the tax at issue here as a duty on imports. It is, rather, as the majority recognizes, a "generally applicable state property tax." *Ante*, at 567. Maine's grant of an exemption from the tax to some charitable organizations that dispense their charity primarily to Maine residents makes the tax something less than universal, but it does not make the tax, even in practical effect, one that is levied exclusively, or even primarily, on imports. See, *e. g.*, *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269 (1988); *Maryland* v. *Louisiana*, 451 U. S. 725, 756 (1981); *License Cases*, 5 How. 504, 576 (1847); cf. *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 821 (1989) (STEVENS, J., dissenting) (arguing, in an analogous context, that "the fact that a State may elect to grant a preference, or an exemption, to a small percentage of its residents does not make the tax discriminatory").

Syllabus

EDWARDS ET AL. *v.* BALISOK

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

No. 95–1352. Argued November 13, 1996—Decided May 19, 1997

Respondent, an inmate of a Washington state prison, was found guilty of prison rule infractions and sentenced to, *inter alia*, the loss of 30 days' good-time credit he had previously earned toward his release. Alleging that the procedures used in his disciplinary proceeding violated his Fourteenth Amendment due process rights, he filed this suit under 42 U. S. C. § 1983 for a declaration that those procedures were unconstitutional, compensatory and punitive damages for their use, and an injunction to prevent future violations. Although he expressly reserved the right to seek restoration of the lost good-time credits in an appropriate forum, he refrained from requesting that relief in light of *Preiser* v. *Rodriguez*, 411 U. S. 475, 500, under which the sole remedy in federal court for a prisoner seeking such restoration is habeas corpus. The District Court applied *Heck* v. *Humphrey*, 512 U. S. 477, 487, which held that a state prisoner's claim for damages is not cognizable under § 1983 if a judgment for him would "necessarily imply" the invalidity of his conviction or sentence, unless he can demonstrate that the conviction or sentence has previously been invalidated. Although holding that a judgment for respondent would necessarily imply the invalidity of his disciplinary hearing and the resulting sanctions, the court did not dismiss the suit, but stayed it pending filing and resolution of a state-court action for restoration of the good-time credits. The Ninth Circuit reversed, holding that a claim challenging only the procedures used in a disciplinary hearing is always cognizable under § 1983.

Held:

1. Respondent's claim for declaratory relief and money damages is not cognizable under § 1983. The principle relied on by the Ninth Circuit—that a claim seeking damages only for using the wrong procedures, not for reaching the wrong result, is always cognizable under § 1983—is incorrect, since it disregards the possibility, clearly envisioned by *Heck*, *supra*, at 482–483, 486–487, and n. 6, that the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment. If established, respondent's allegations of deceit and bias by the hearing officer at his disciplinary proceeding would necessarily imply the invalidity of the deprivation of his good-time credits. Cf., *e. g.*, *Tumey* v. *Ohio*, 273 U. S. 510, 535. His contrary contention, which

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is based on Washington's "some or any evidence" standard, is rejected. Pp. 644–648.

2. Although a prayer for prospective injunctive relief ordinarily will not "necessarily imply" the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983, respondent's claim for such relief must be remanded because it was not considered by either lower court, and its validity was neither briefed nor argued here. Pp. 648–649.

3. The District Court erred in staying this § 1983 action. That court was mistaken in its view that once respondent had exhausted his state remedies, the action could proceed. Section 1983 contains no judicially imposed exhaustion requirement, *Heck*, *supra*, at 481, 483; absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed. P. 649.

70 F. 3d 1277, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 649.

Kathleen D. Mix, Chief Deputy Attorney General of Washington, argued the cause for petitioners. With her on the briefs were *Christine O. Gregoire*, Attorney General, and *Talis Merle Abolins*, *William Berggren Collins*, *Mary E. Fairhurst*, and *Daniel J. Judge*, Assistant Attorneys General.

Thomas H. Speedy Rice argued the cause for respondent. With him on the brief was *George A. Critchlow*.*

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*A brief of *amici curiae* urging reversal was filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, and *Peter J. Siggins*, Senior Assistant Attorney General, *Charles F. C. Ruff*, Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Carla J. Stovall* of Kansas, *Mike Moore* of Mississippi, *Joe Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania,

JUSTICE SCALIA delivered the opinion of the Court.

In *Heck* v. *Humphrey*, 512 U. S. 477, 487 (1994), this Court held that a state prisoner's claim for damages is not cognizable under 42 U. S. C. § 1983 if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated. This case presents the question whether a claim for damages and declaratory relief brought by a state prisoner challenging the validity of the procedures used to deprive him of good-time credits is cognizable under § 1983.

Respondent Jerry Balisok is an inmate at the Washington State Penitentiary in Walla Walla. On August 16, 1993, he was charged with, and at a hearing on September 2 was found guilty of, four prison infractions. He was sentenced to 10 days in isolation, 20 days in segregation, and deprivation of 30 days' good-time credit he had previously earned toward his release. His appeal within the prison's appeal system was rejected for failure to comply with the applicable procedural requirements.

On January 26, 1994, respondent filed the present § 1983 action alleging that the procedures used in his disciplinary proceeding violated his Fourteenth Amendment due process rights. His amended complaint requested a declaration that the procedures employed by state officials violated due process, compensatory and punitive damages for use of the unconstitutional procedures, an injunction to prevent future violations, and any other relief the court deems just and equitable. Taking account of our opinion in *Preiser* v. *Rodriguez*, 411 U. S. 475, 500 (1973), which held that the sole remedy in federal court for a prisoner seeking restoration

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Charles Molony Condon of South Carolina, *James S. Gilmore III* of Virginia, and *James E. Doyle* of Wisconsin.

David C. Fathi, *John Midgley*, *Patricia J. Arthur*, *Don Saunders*, *Katrin E. Frank*, and *Steven R. Shapiro* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

of good-time credits is a writ of habeas corpus, Balisok's amended complaint did not request restoration of the lost credits. (As the District Court noted, however, he expressly reserved the right to seek that relief in an appropriate forum. App. to Pet. for Cert. F–4.)

The District Court, applying our opinion in *Heck*, held that a judgment in Balisok's favor "would necessarily imply the invalidity of the disciplinary hearing and the resulting sanctions." App. to Pet. for Cert. F–14. Rather than grant petitioners' motion to dismiss, however, the District Court stayed this action pending filing and resolution of a state-court action for restoration of the good-time credits. It authorized an immediate appeal of its ruling pursuant to 28 U. S. C. § 1292(b), and the Court of Appeals for the Ninth Circuit reversed, holding that a claim challenging only the procedures employed in a disciplinary hearing is always cognizable under § 1983. App. to Pet. for Cert. A–2, judgt. order reported at 70 F. 3d 1277 (1995). We granted certiorari. 517 U. S. 1166 (1996).

The violations of due process alleged by respondent are similar to those alleged by the plaintiff in *Heck*. There, the allegations were that the state officials had conducted an arbitrary investigation, had knowingly destroyed exculpatory evidence, and had caused an illegal voice identification procedure to be used at the plaintiff's criminal trial. 512 U. S., at 479. Here, respondent principally alleged that petitioner Edwards, who was the hearing officer at his disciplinary proceeding, concealed exculpatory witness statements and refused to ask specified questions of requested witnesses, App. to Pet. for Cert. I–3 to I–7, which prevented respondent from introducing extant exculpatory material and "intentionally denied" him the right to present evidence in his defense, Brief for Respondent 3. (Respondent also alleged that Edwards failed to provide a statement of the facts supporting the guilty finding against him, App. to Pet. for Cert. I–6

to I–7, and that petitioner Wood erroneously rejected his appeal as exceeding the page limitation, *id.*, at I–7 to I–8.)

There is, however, this critical difference from *Heck:* Respondent, in his amended complaint, limited his request to damages for depriving him of good-time credits *without due process*, not for depriving him of good-time credits *undeservedly* as a substantive matter.* That is to say, his claim posited that the procedures were wrong, but not necessarily that the result was. The distinction between these two sorts of claims is clearly established in our case law, as is the plaintiff's entitlement to recover at least nominal damages under § 1983 if he proves the former one without also proving the latter one. See *Carey* v. *Piphus*, 435 U. S. 247, 266–267 (1978). The Court of Appeals was of the view that this difference from *Heck* was dispositive, following Circuit precedent to the effect that a claim challenging only the procedures employed in a disciplinary hearing is always cognizable under § 1983. See App. to Pet. for Cert. A–2, citing *Gotcher* v. *Wood*, 66 F. 3d 1097, 1099 (CA9 1995), cert. pending, No. 95–1385.

That principle is incorrect, since it disregards the possibility, clearly envisioned by *Heck*, that the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment. This possibility is alluded to in the very passage from *Heck* relied upon by the Court of Appeals, a passage that distinguished the earlier case of *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), as follows:

> "In light of the earlier language characterizing the claim as one of 'damages for the deprivation of civil rights,' rather than damages for the deprivation of good-time credits, we think this passage recognized a § 1983 claim for using the wrong procedures, not for reaching the

*The amended complaint could be considered ambiguous on the point, but this was the Court of Appeals' interpretation, which has been accepted by petitioners. Brief for Petitioners 5.

> wrong result (*i. e.*, denying good-time credits). *Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits.* Thus, the claim at issue in *Wolff* did not call into question the lawfulness of the plaintiff's continuing confinement." *Heck*, 512 U. S., at 482–483 (emphasis added and deleted).

The same point was apparent in *Heck*'s summary of its holding:

> "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, *or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid*,[6] a § 1983 plaintiff must prove that the conviction or sentence has been [overturned]." *Id.*, at 486–487 (emphasis added).

The footnote appended to the above-italicized clause gave a concrete example of "a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful." *Id.*, at 486, n. 6. The Court of Appeals was thus incorrect in asserting that a claim seeking damages only "for using the wrong procedure, not for reaching the wrong result," *Gotcher, supra*, at 1099, would never be subject to the limitation announced in *Heck*.

The principal procedural defect complained of by respondent would, if established, necessarily imply the invalidity of the deprivation of his good-time credits. His claim is, first of all, that he was completely denied the opportunity to put on a defense through specifically identified witnesses who possessed exculpatory evidence. It appears that all witness testimony in his defense was excluded. See App. to Pet. for Cert. F–2 (District Court opinion) ("At the infraction hearing . . . , [respondent] asked that the witness statements be read into the record. According to [respondent], Edwards replied

that no witness statements had been submitted on his behalf"). This is an obvious procedural defect, and state and federal courts have reinstated good-time credits (absent a new hearing) when it is established. See, *e. g.*, *Kingsley* v. *Bureau of Prisons*, 937 F. 2d 26, 27, 31 (CA2 1991); *Dumas* v. *State*, 654 So. 2d 48, 49 (Ala. Crim. App. 1994); *Mahers* v. *State*, 437 N. W. 2d 565, 568–569 (Iowa 1989); *In re Contras*, 199 App. Div. 2d 601, 602, 604 N. Y. S. 2d 651, 652 (1993). Cf. *In re Reismiller*, 101 Wash. 2d 291, 293–297, 678 P. 2d 323, 325, 326 (1984); *In re Burton*, 80 Wash. App. 573, 585, 910 P. 2d 1295, 1304 (1996). Respondent's claim, however, goes even further, asserting that the cause of the exclusion of the exculpatory evidence was the deceit and bias of the hearing officer himself. He contends that the hearing officer lied about the nonexistence of witness statements, see App. to Pet. for Cert. I–4, I–6, I–7; Brief for Respondent 2–3; App. 4, and thus "intentionally denied" him the right to present the extant exculpatory evidence, Brief for Respondent 3. A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him. *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927); *Arizona* v. *Fulminante*, 499 U. S. 279, 308 (1991). The due process requirements for a prison disciplinary hearing are in many respects less demanding than those for criminal prosecution, but they are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence. Cf. *Wolff*, *supra*, at 570–571.

Respondent contends that a judgment in his favor would not imply the invalidity of the loss of his good-time credits because Washington courts follow a "some or any evidence" standard, under which, "if there is any evidence in the record to support the prison hearing determination, then the court will not undertake an entire review of the record and will uphold prison hearing results." Brief for Respondent 7, citing *Superintendent, Mass. Correctional Institution at Walpole* v. *Hill*, 472 U. S. 445 (1985); Brief for Respondent 21

(citing Washington state cases). Here, respondent points out, the record contains ample evidence to support the judgment under this standard. That may be true, but when the basis for attacking the judgment is not insufficiency of the evidence, it is irrelevant. As the Washington Supreme Court has explained: "The *evidentiary requirements* of due process are satisfied if there is 'some evidence' in the record to support a prison disciplinary decision revoking good time credits." *In re Johnston*, 109 Wash. 2d 493, 497, 745 P. 2d 864, 867 (1987) (emphasis added). Similarly, our discussion in *Hill* in no way abrogated the due process requirements enunciated in *Wolff*, but simply held that in addition to those requirements, revocation of good-time credits does not comport with "'the minimum requirements of procedural due process,'" unless the findings are "supported by some evidence in the record." 472 U. S., at 454 (quoting *Wolff*, *supra*, at 558).

We conclude, therefore, that respondent's claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983. Respondent also requests, however, prospective injunctive relief. His amended complaint alleges that prison officials routinely fail to date-stamp witness statements that are made in cases involving "jail house attorney[s]" like himself, in order to weaken any due process challenge for failure to call witnesses. App. to Pet. for Cert. I–4. He requests an injunction requiring prison officials to date-stamp witness statements at the time they are received. *Id.*, at I–10. Ordinarily, a prayer for such prospective relief will not "necessarily imply" the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983. To prevail, of course, respondent must establish standing, see *Lewis* v. *Casey*, 518 U. S. 343, 351–354 (1996), and meet the usual requirements for injunctive relief, see, *e. g.*, *O'Shea* v. *Littleton*, 414 U. S. 488, 499, 502 (1974). Nei-

ther the Ninth Circuit nor the District Court considered this injunctive claim, and its validity was neither briefed nor argued here. We leave this issue for consideration by the lower courts on remand.

Since we are remanding, we must add a word concerning the District Court's decision to stay this § 1983 action while respondent sought restoration of his good-time credits, rather than dismiss it. The District Court was of the view that once respondent had exhausted his state remedies, the § 1983 action could proceed. App. to Pet. for Cert. F–14. This was error. We reemphasize that § 1983 contains no judicially imposed exhaustion requirement, *Heck*, 512 U. S., at 481, 483; absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed.

The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

I agree that Balisok's claim is not cognizable under 42 U. S. C. § 1983 to the extent that it is "based on allegations of deceit and bias on the part of the decisionmaker," *ante*, at 648; those allegations, as the Court explains, "necessarily imply the invalidity of the punishment imposed," *ibid.;* see *ante*, at 646–648. Balisok alleged other procedural defects, however, including the failure of prison official Edwards "to specify what facts and evidence supported the finding of guilt." App. to Pet. for Cert. F–3 (District Court order); see *Wolff* v. *McDonnell*, 418 U. S. 539, 564–565 (1974) (inmate subjected to discipline is entitled to a written statement of reasons and evidence relied on). A defect of this order, unlike the principal "deceit and bias" procedural defect Balisok alleged, see *ante*, at 646–647, would not neces-

sarily imply the invalidity of the deprivation of his good-time credits, and therefore is immediately cognizable under § 1983. On this understanding, I join the Court's opinion.

Syllabus

EDMOND *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 96–262. Argued February 24, 1997—Decided May 19, 1997*

The Coast Guard Court of Criminal Appeals (formerly the Coast Guard Court of Military Review) hears appeals from the decisions of courts-martial, and its decisions are subject to review by the United States Court of Appeals for the Armed Forces. Under Article 66(a) of the Uniform Code of Military Justice (UCMJ), its judges may be commissioned officers or civilians. During the times here relevant, the court had two civilian members, both of whom were originally assigned to the court by the General Counsel of the Department of Transportation. In anticipation of the possible invalidation of these assignments under the Appointments Clause, Art. II, § 2, cl. 2, the Secretary of Transportation issued a memorandum "adopting" the General Counsel's earlier judicial assignments as appointments of his own. In *Ryder* v. *United States*, 515 U. S. 177, this Court overturned a conviction that had been affirmed, before the secretarial appointments, by a Coast Guard Court of Military Review panel that included both civilian members, as it was conceded that the judges had not been validly appointed pursuant to the Appointments Clause. The present case concerns the validity of six convictions that were affirmed by the Coast Guard Court of Criminal Appeals (or its predecessor), with one or both civilian judges participating, after the secretarial appointments. The Court of Appeals for the Armed Forces affirmed the convictions, relying on its holding on remand in *Ryder* that the Secretary's appointments were valid and cured the defect that had previously existed.

Held: The judicial appointments at issue are valid. Pp. 655–666.

(a) Congress has authorized the Secretary to appoint civilian members of the Coast Guard Court of Criminal Appeals. Petitioners' argument that those appointments are invalid because the Secretary lacks the power under 49 U. S. C. § 323(a) to appoint Coast Guard judges is rejected. Although § 323(a) does not specifically mention such judges, its plain language authorizes the Secretary to "appoint and fix the pay of officers and employees of the Department." This Court rejects peti-

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*Together with *Lazenby* v. *United States; Leaver* v. *United States; Leonard* v. *United States; Nichols* v. *United States;* and *Venable* v. *United States*, also on certiorari to the same court (see this Court's Rule 12.4).

Syllabus

tioners' assertion that § 323(a) is a default statute superseded by express language in Article 66(a) of the UCMJ giving the Judge Advocate General of each military branch exclusive authority to appoint Court of Criminal Appeals judges. Conspicuously absent from Article 66(a) is any mention of "appointment." Instead, the statute refers only to judges "who are *assigned* to a Court of Criminal Appeals" (emphasis added). The fact that this Court found the distinction to be significant in *Weiss* v. *United States*, 510 U. S. 163, 171–172, suggests that Article 66(a) concerns not the appointment of judges, but only their assignment. A contrary interpretation of Article 66(a) would render it unconstitutional, for under the Appointments Clause Congress could not give Judge Advocates General power to "appoint" even inferior officers of the United States. Pp. 655–658.

(b) The Secretary's authorization to appoint civilian Court of Criminal Appeals judges is constitutional. The Appointments Clause gives the President the exclusive power to select principal officers by and with the advice and consent of the Senate, but authorizes Congress to "vest the Appointment of . . . inferior Officers . . . in the Heads of Departments." Despite the importance of the responsibilities the judges in question bear, they are "inferior Officers" under the Clause. Generally speaking, "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senate's advice and consent. See, *e. g.*, ch. 4, §§ 1, 2, 1 Stat. 28. Supervision of the work of Coast Guard Court of Criminal Appeals judges is divided between the General Counsel of the Department of Transportation (who is subordinate to the Secretary) and the Court of Appeals for the Armed Forces. See Arts. 66(f), 67(a), UCMJ. Significantly, these judges have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers, and hence they are inferior within the meaning of Article II. *Morrison* v. *Olson*, 487 U. S. 654, 671–672, and *Freytag* v. *Commissioner*, 501 U. S. 868, distinguished. Pp. 658–666.

45 M. J. 19 (first judgment), 44 M. J. 273 (second, third, fifth, and sixth judgments), and 44 M. J. 272 (fourth judgment), affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined, and in which SOUTER, J., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 666.

Alan B. Morrison argued the cause for petitioners. With him on the briefs was *Allen Lotz.*

Malcolm L. Stewart argued the cause for the United States. With him on the brief were *Acting Solicitor General Dellinger*, *Deputy Solicitor General Dreeben*, *Douglas N. Letter*, *Nancy E. McFadden*, *Paul M. Geier*, *Peter J. Plocki*, and *Frank R. Levi.*

JUSTICE SCALIA delivered the opinion of the Court.

We must determine in this case whether Congress has authorized the Secretary of Transportation to appoint civilian members of the Coast Guard Court of Criminal Appeals, and if so, whether this authorization is constitutional under the Appointments Clause of Article II.

I

The Coast Guard Court of Criminal Appeals (formerly known as the Coast Guard Court of Military Review) is an intermediate court within the military justice system. It is one of four military Courts of Criminal Appeals; others exist for the Army, the Air Force, and the Navy-Marine Corps. The Coast Guard Court of Criminal Appeals hears appeals from the decisions of courts-martial, and its decisions are subject to review by the United States Court of Appeals for the Armed Forces (formerly known as the United States Court of Military Appeals).[1]

Appellate military judges who are assigned to a Court of Criminal Appeals must be members of the bar, but may be commissioned officers or civilians. Art. 66(a), Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 866(a). During the times relevant to this case, the Coast Guard Court of Criminal Appeals has had two civilian members, Chief Judge Joseph H. Baum and Associate Judge Alfred F. Bridgman, Jr. These judges were originally assigned to serve on the court by the General Counsel of the Department of Transportation,

[1] The names of the Courts of Military Review and of the United States Court of Military Appeals were changed, effective October 5, 1994, by Pub. L. 103–337, § 924, 108 Stat. 2831.

who is, ex officio, the Judge Advocate General of the Coast Guard, Art. 1(1), UCMJ, 10 U. S. C. § 801(1). Subsequent events, however, called into question the validity of these assignments.

In *Weiss* v. *United States*, 510 U. S. 163 (1994), we considered whether the assignment of commissioned military officers to serve as military judges without reappointment under the Appointments Clause was constitutional. We held that military trial and appellate judges are officers of the United States and must be appointed pursuant to the Appointments Clause. *Id.*, at 170. We upheld the judicial assignments at issue in *Weiss* because each of the military judges had been previously appointed by the President as a commissioned military officer, and was serving on active duty under that commission at the time he was assigned to a military court. We noted, however, that "allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question." *Id.*, at 170, n. 4.

In anticipation of our decision in *Weiss*, Chief Judge Baum sent a memorandum to the Chief Counsel of the Coast Guard requesting that the Secretary, in his capacity as a department head, reappoint the judges so the court would be constitutionally valid beyond any doubt. See *United States* v. *Senior*, 36 M. J. 1016, 1018 (C. G. C. M. R. 1993). On January 15, 1993, the Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments to the Coast Guard Court of Military Review "as judicial appointments of my own." The memorandum then listed the names of "[t]hose judges presently assigned and appointed by me," including Chief Judge Baum and Judge Bridgman. Addendum to Brief for Petitioners A6.

Two Terms ago, in *Ryder* v. *United States*, 515 U. S. 177 (1995), we considered the validity of a conviction that had been affirmed by a panel of the Coast Guard Court of Military Review, including its two civilian members, before the

secretarial appointments of January 15, 1993. The Government conceded that the civilian judges of the Court of Military Review had not been appointed pursuant to the Appointments Clause, see Brief for United States in *Ryder* v. *United States*, O. T. 1994, No. 94–431, p. 9, n. 9, but argued that Ryder's conviction should be affirmed notwithstanding this defect. We disagreed, holding that Ryder was "entitled to a hearing before a properly appointed panel of" the Coast Guard Court of Military Review. 515 U. S., at 188. We did not consider the validity of convictions affirmed by the court after the secretarial appointments.

Each of the petitioners in the present case was convicted by court-martial. In each case the conviction and sentence were affirmed, in whole or in part, by the Coast Guard Court of Criminal Appeals (or its predecessor the Court of Military Review) after the January 15, 1993, secretarial appointments. Chief Judge Baum participated in each decision, and Judge Bridgman participated in the appeals involving two of the petitioners. The Court of Appeals for the Armed Forces affirmed the convictions, relying on its holding on remand in *United States* v. *Ryder*, 44 M. J. 9 (1996), that the Secretary of Transportation's appointments were valid and cured the defect that had previously existed. 45 M. J. 19 (1996); 44 M. J. 273 (1996); 44 M. J. 272 (1996). Petitioners sought review in a consolidated petition pursuant to this Court's Rule 12.4, and we granted certiorari, 519 U. S. 977 (1996).

II

Petitioners argue that the Secretary's civilian appointments to the Coast Guard Court of Criminal Appeals are invalid for two reasons: First, the Secretary lacks authority under 49 U. S. C. § 323(a) to appoint members of the court; second, judges of military Courts of Criminal Appeals are principal, not inferior, officers within the meaning of the Appointments Clause, and must therefore be appointed by the

President with the advice and consent of the Senate. We consider these contentions in turn.

Congress has established the Coast Guard as a military service and branch of the Armed Forces that, except in time of war (when it operates as a service within the Navy), is part of the Department of Transportation. 14 U. S. C. §§ 1–3. The Secretary of Transportation has broad authority over the Coast Guard, including the power to "promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," § 633. The Commandant of the Coast Guard is required to "carry out duties and powers prescribed by the Secretary of Transportation," and he "reports directly to the Secretary." 49 U. S. C. § 108(b). Most relevant to the present case, § 323(a) provides: "The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers." Petitioners do not dispute that judges of the Coast Guard Court of Criminal Appeals are officers of the Department of Transportation. Thus, although the statute does not specifically mention Coast Guard judges, the plain language of § 323(a) appears to give the Secretary power to appoint them.

Petitioners argue, however, that § 323(a) is a default statute, applicable only where Congress has not otherwise provided for the appointment of specific officers. Petitioners contend that Article 66(a) of the UCMJ, 10 U. S. C. § 866(a), gives the Judge Advocate General of each military branch exclusive authority to appoint judges of his respective Court of Criminal Appeals. That provision reads as follows:

> "Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . Appellate military judges who are assigned to a Court of

> Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as senior judge on each panel."

Were we to accept petitioners' interpretation of Article 66(a) as providing for the "appointment" of Court of Criminal Appeals judges, their argument that Congress intended it to be the exclusive means of appointment might prove persuasive. Ordinarily, where a specific provision conflicts with a general one, the specific governs. *Busic* v. *United States*, 446 U. S. 398, 406 (1980). Conspicuously absent from Article 66(a), however, is any mention of the "appointment" of military judges. Instead, the statute refers to judges "who are *assigned* to a Court of Criminal Appeals" (emphasis added). The difference between the power to "assign" officers to a particular task and the power to "appoint" those officers is not merely stylistic. In *Weiss*, we upheld the assignment of military officers to serve on military courts because they had previously been "appointed" as officers of the United States pursuant to the Appointments Clause, and because Congress had not designated the position of a military judge as one requiring reappointment. 510 U. S., at 176. We noted in *Weiss* that Congress has consistently used the word "appoint" with respect to military positions requiring a separate appointment, rather than using terms not found within the Appointments Clause, such as "assign": "Congress repeatedly and consistently distinguished between an office that would require a separate appointment and a position or duty to which one could be 'assigned' or 'detailed' by a superior

officer." *Id.*, at 172. We found it significant that the sections of the UCMJ relating to military judges "speak explicitly and exclusively in terms of 'detail' or 'assign'; nowhere in these sections is mention made of a separate appointment." *Ibid.* This analysis suggests that Article 66(a) concerns not the appointment of Court of Criminal Appeals judges, but only their assignment.

Moreover, we see no other way to interpret Article 66(a) that would make it consistent with the Constitution. Under the Appointments Clause, Congress could not give the Judge Advocates General power to "appoint" even inferior officers of the United States; that power can be conferred only upon the President, department heads, and courts of law. Thus, petitioners are asking us to interpret Article 66(a) in a manner that would render it clearly unconstitutional—which we must of course avoid doing if there is another reasonable interpretation available. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979); *Blodgett* v. *Holden*, 275 U. S. 142 (1927). Petitioners respond that reading § 323(a) to permit the Secretary to appoint Court of Criminal Appeals judges causes us unnecessarily to reach the constitutional question whether those judges are inferior officers under the Appointments Clause, since Congress may vest only the appointment of inferior officers in a department head. But a constitutional question confronted in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily.

We conclude that Article 66(a) does not give Judge Advocates General authority to appoint Court of Criminal Appeals judges; that § 323(a) does give the Secretary of Transportation authority to do so; and we turn to the constitutional question whether this is consistent with the Appointments Clause.

III

The Appointments Clause of Article II of the Constitution reads as follows:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U. S. Const., Art. II, § 2, cl. 2.

As we recognized in *Buckley* v. *Valeo*, 424 U. S. 1, 125 (1976) *(per curiam)*, the Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. See *id.*, at 128–131; *Weiss*, *supra*, at 183–185 (SOUTER, J., concurring); *Freytag* v. *Commissioner*, 501 U. S. 868, 904, and n. 4 (1991) (SCALIA, J., concurring). This disposition was also designed to assure a higher quality of appointments: The Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body. "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation." The Federalist No. 76, p. 387 (M. Beloff ed. 1987) (A. Hamilton); accord, 3 J. Story, Commentaries on the Constitution of the United States 374–375 (1833). The President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the "Advice and Consent of the Senate." This serves both to curb Executive abuses of the appointment power, see 3 Story, *supra*, at 376–377, and "to promote a judicious choice of [persons] for filling the offices of the union," The Federalist No. 76, at 386–387.

By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one. Hamilton observed:

> "The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made, the executive for nominating, and the senate for approving, would participate, though in different degrees, in the opprobrium and disgrace." *Id.*, No. 77, at 392.

See also 3 Story, *supra*, at 375 ("If [the President] should . . . surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favour").

The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers. "[B]ut," the Appointments Clause continues, "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." This provision, sometimes referred to as the "Excepting Clause," was added to the proposed Constitution on the last day of the Grand Convention, with little discussion. See 2 M. Farrand, Records of the Federal Convention of 1787, pp. 627–628 (1911 ed.). As one of our early opinions suggests, its obvious purpose is administrative convenience, see *United States* v. *Germaine*, 99 U. S. 508, 510 (1879)—but that convenience was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of "inferior Officers." Section 323(a), which confers appointment power upon the Secretary of Transportation, can constitutionally be

applied to the appointment of Court of Criminal Appeals judges only if those judges are "inferior Officers."

Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes. Among the offices that we have found to be inferior are that of a district court clerk, *Ex parte Hennen*, 13 Pet. 225, 258 (1839), an election supervisor, *Ex parte Siebold*, 100 U. S. 371, 397–398 (1880), a vice consul charged temporarily with the duties of the consul, *United States* v. *Eaton*, 169 U. S. 331, 343 (1898), and a "United States commissioner" in district court proceedings, *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 352–354 (1931). Most recently, in *Morrison* v. *Olson*, 487 U. S. 654 (1988), we held that the independent counsel created by provisions of the Ethics in Government Act of 1978, 28 U. S. C. §§ 591–599, was an inferior officer. In reaching that conclusion, we relied on several factors: that the independent counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited. 487 U. S., at 671–672.

Petitioners are quite correct that the last two of these conclusions do not hold with regard to the office of military judge at issue here. It is not "limited in tenure," as that phrase was used in *Morrison* to describe "appoint[ment] essentially to accomplish a single task [at the end of which] the office is terminated." *Id.*, at 672. Nor are military judges "limited in jurisdiction," as used in *Morrison* to refer to the fact that an independent counsel may investigate and prosecute only those individuals, and for only those crimes, that are within the scope of jurisdiction granted by the special three-judge appointing panel. See *Weiss*, 510 U. S., at 192 (SOUTER, J., concurring). However, *Morrison* did not purport to set forth a definitive test for whether an office is "inferior" under the Appointments Clause. To the contrary, it explicitly stated: "We need not attempt here to decide ex-

actly where the line falls between the two types of officers, because in our view [the independent counsel] clearly falls on the 'inferior officer' side of that line." 487 U. S., at 671.

To support principal-officer status, petitioners emphasize the importance of the responsibilities that Court of Criminal Appeals judges bear. They review those court-martial proceedings that result in the most serious sentences, including those "in which the sentence, as approved, extends to death, dismissal . . . , dishonorable or bad-conduct discharge, or confinement for one year or more." Art. 66(b)(1), UCMJ, 10 U. S. C. § 866(b)(1). They must ensure that the court-martial's finding of guilt and its sentence are "correct in law and fact," *id.*, Art. 66(c), § 866(c), which includes resolution of constitutional challenges. And finally, unlike most appellate judges, Court of Criminal Appeals judges are not required to defer to the trial court's factual findings, but may independently "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Ibid.* We do not dispute that military appellate judges are charged with exercising significant authority on behalf of the United States. This, however, is also true of offices that we have held were "inferior" within the meaning of the Appointments Clause. See, *e. g.*, *Freytag* v. *Commissioner*, 501 U. S., at 881–882 (special trial judges having "significan[t] . . . duties and discretion" are inferior officers). The exercise of "significant authority pursuant to the laws of the United States" marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and nonofficer. 424 U. S., at 126.

Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a

higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

This understanding of the Appointments Clause conforms with the views of the first Congress. On July 27, 1789, Congress established the first Executive department, the Department of Foreign Affairs. In so doing, it expressly designated the Secretary of the Department as a "principal officer," and his subordinate, the Chief Clerk of the Department, as an "inferior officer:

> "Section 1. *Be it enacted* . . . That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution, relative to [matters respecting foreign affairs]; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.
>
> "Sec. 2. *And be it further enacted,* That there shall be in the said department, an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief Clerk in the Department of Foreign Affairs. . . ." Ch. 4, 1 Stat. 28.

Congress used similar language in establishing the Department of War, repeatedly referring to the Secretary of that department as a "principal officer," and the Chief Clerk, who would be "employed" within the Department as the Secretary "shall deem proper," as an "inferior officer." Ch. 7, 1 Stat. 49.

Supervision of the work of Court of Criminal Appeals judges is divided between the Judge Advocate General (who in the Coast Guard is subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed Forces. The Judge Advocate General exercises administrative oversight over the Court of Criminal Appeals. He is charged with the responsibility to "prescribe uniform rules of procedure" for the court, and must "meet periodically [with other Judge Advocates General] to formulate policies and procedure in regard to review of court-martial cases." Art. 66(f), UCMJ, 10 U. S. C. § 866(f). It is conceded by the parties that the Judge Advocate General may also remove a Court of Criminal Appeals judge from his judicial assignment without cause. The power to remove officers, we have recognized, is a powerful tool for control. *Bowsher* v. *Synar*, 478 U. S. 714, 727 (1986); *Myers* v. *United States*, 272 U. S. 52 (1926).

The Judge Advocate General's control over Court of Criminal Appeals judges is, to be sure, not complete. He may not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings, Art. 37, UCMJ, 10 U. S. C. § 837, and has no power to reverse decisions of the court. This latter power does reside, however, in another Executive Branch entity, the Court of Appeals for the Armed Forces.[2] That court reviews every decision of the

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[2] Article 141 of the UCMJ, 10 U. S. C. § 941, states that the Court of Appeals for the Armed Forces "is established under article I of the Constitution," and "is located for administrative purposes only in the Department of Defense." Although the statute does not specify the court's "location" for nonadministrative purposes, other provisions of the UCMJ make clear that it is within the Executive Branch. The court reviews the judg-

Courts of Criminal Appeals in which: (a) the sentence extends to death; (b) the Judge Advocate General orders such review; or (c) the court itself grants review upon petition of the accused. *Id.*, Art. 67(a), § 867(a). The scope of review is narrower than that exercised by the Court of Criminal Appeals: so long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces will not reevaluate the facts. *Id.*, Art. 67(c), § 867(c); *United States* v. *Wilson*, 6 M. J. 214 (C. M. A. 1979). This limitation upon review does not in our opinion render the judges of the Court of Criminal Appeals principal officers. What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.

Finally, petitioners argue that *Freytag* v. *Commissioner*, 501 U. S. 868 (1991), which held that special trial judges charged with assisting Tax Court judges were inferior officers and could be appointed by the Chief Judge of the Tax Court, suggests that Court of Criminal Appeals judges are principal officers. Petitioners contend that Court of Criminal Appeals judges more closely resemble Tax Court judges—who we implied (according to petitioners) were principal officers—than they do special trial judges. We note initially that *Freytag* does not hold that Tax Court judges are principal officers; only the appointment of special trial judges was at issue in that case. Moreover, there are two significant distinctions between Tax Court judges and Court of Criminal Appeals judges. First, there is no Execu-

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ments of only military tribunals, *id.*, Art. 67, § 867; its judges must meet annually in committee with the Judge Advocates General and two members appointed by the Secretary of Defense to survey the operation of the military justice system, *id.*, Art. 146, § 946; and the President may remove its judges for neglect of duty, misconduct, or mental or physical disability, *id.*, Art. 142(c), § 942(c).

tive Branch tribunal comparable to the Court of Appeals for the Armed Forces that reviews the work of the Tax Court; its decisions are appealable only to courts of the Third Branch. 26 U. S. C. § 7482. And second, there is no officer comparable to a Judge Advocate General who supervises the work of the Tax Court, with power to determine its procedural rules, to remove any judge without cause, and to order any decision submitted for review. *Freytag* does not control our decision here.

* * *

We conclude that 49 U. S. C. § 323(a) authorizes the Secretary of Transportation to appoint judges of the Coast Guard Court of Criminal Appeals; and that such appointment is in conformity with the Appointments Clause of the Constitution, since those judges are "inferior Officers" within the meaning of that provision, by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces. The judicial appointments at issue in this case are therefore valid.

Accordingly, we affirm the judgment of the Court of Appeals for the Armed Forces with respect to each petitioner.

It is so ordered.

JUSTICE SOUTER, concurring in part and concurring in the judgment.

I join in Parts I and II of the Court's opinion and agree with the reasoning in Part III insofar as it describes an important, and even necessary, reason for holding judges of the Coast Guard Court of Criminal Appeals to be inferior officers within the meaning of the Appointments Clause, U. S. Const., Art. II, § 2, cl. 2. The Court states that "[g]enerally speaking, the term 'inferior officer' connotes a relationship [of supervision and direction] with some higher

ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Ante*, at 662. The Court goes on to show that administrative supervision of these judges by the Judge Advocate General of the Coast Guard, combined with his power to control them by removal from a case, establishes that the intermediate appellate judges here have the necessary superior. With this conclusion I agree, but unlike the Court I am not prepared to decide on that basis alone that these judges are inferior officers.

Because the term "inferior officer" implies an official superior, one who has no superior is not an inferior officer. This unexceptionable maxim will in some instances be dispositive of status; it might, for example, lead to the conclusion that United States district judges cannot be inferior officers, since the power of appellate review does not extend to them personally, but is limited to their judgments. See *In re Sealed Case*, 838 F. 2d 476, 483 (CADC), rev'd *sub nom. Morrison* v. *Olson*, 487 U. S. 654 (1988) (suggesting that "lower federal judges . . . are principal officers" because they are "not subject to personal supervision," 838 F. 2d, at 483); cf. *ante*, at 665.

It does not follow, however, that if one is subject to some supervision and control, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it. See, *e. g.*, *Morrison* v. *Olson*, 487 U. S., at 654, 722 ("To be sure, it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can be a principal officer") (SCALIA, J., dissenting). Accordingly, in *Morrison*, the Court's determination that the independent counsel was "to some degree 'inferior'" to the Attorney General, see *id.*, at 671, did not end the enquiry. The Court went on to weigh the duties, jurisdiction, and tenure associated with the office, *id.*, at 671–672, before concluding that the independent counsel was an infe-

rior officer. Thus, under *Morrison*, the Solicitor General of the United States, for example, may well be a principal officer, despite his statutory "inferiority" to the Attorney General. See, *e. g.*, 28 U. S. C. § 505 (directing Presidential appointment, with the advice and consent of the Senate, of a Solicitor General to "assist the Attorney General in the performance of his duties"). The mere existence of a "superior" officer is not dispositive.

In this case, as the Court persuasively shows, the Judge Advocate General has substantial supervisory authority over the judges of the Coast Guard Court of Criminal Appeals. As the Court notes, the Judge Advocate General prescribes rules of procedure for the Court of Criminal Appeals, formulates policies for review of court-martial cases, and is authorized to remove judges from their judicial assignments without cause. See *ante*, at 664. While these facts establish that the condition of supervision and control necessary for inferior officer status has been met, I am wary of treating them as sufficient to demonstrate that the judges of the Court of Criminal Appeals are actually inferior officers under the Constitution.

In having to go beyond the Court's opinion to decide that the criminal appeals judges are inferior officers, I do not claim the convenience of a single sufficient condition, and, indeed, at this stage of the Court's thinking on the matter, I would not try to derive a single rule of sufficiency. What is needed, instead, is a detailed look at the powers and duties of these judges to see whether reasons favoring their inferior officer status within the constitutional scheme weigh more heavily than those to the contrary. Having tried to do this in a concurring opinion in *Weiss* v. *United States*, 510 U. S. 163, 182 (1994), I will not repeat the essay. See *id.*, at 192–194 (reviewing the *Morrison* factors, including tenure, jurisdiction, duties, and removal; concluding that because it is "hard to say with any certainty" whether Courts of Military Review judges should be considered principal or inferior of-

ficers, deference to the political branches' judgment is appropriate). Here it is enough to add that after the passage of three Terms since writing in *Weiss*, I am unrepentant. I therefore join not only in the Court's conclusion that the necessary supervisory condition for inferior officer status is satisfied here, but in the Court's ultimate holding that the judges of the Coast Guard Court of Criminal Appeals are inferior officers within the meaning of the Appointments Clause.

Syllabus

UNITED STATES *v.* HYDE

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

No. 96–667. Argued April 15, 1997—Decided May 27, 1997

Respondent pleaded guilty to several federal fraud counts, pursuant to a plea agreement in which the Government agreed to move for dismissal of other charges. The District Court accepted the plea but deferred decision on whether to accept the plea agreement, pending completion of the presentence report. Before sentencing and the court's decision on the plea agreement, respondent sought to withdraw his plea. Finding that he had not provided a "fair and just reason" for withdrawing the plea before sentencing, as required by Federal Rule of Criminal Procedure 32(e), the court denied respondent's request. The court then accepted the plea agreement, entered judgment, and sentenced respondent. The Court of Appeals reversed, holding that if a court defers acceptance of a plea or of a plea agreement, a defendant may withdraw his plea for any or no reason, until the court accepts both the plea and the agreement.

Held: In the circumstances presented here, a defendant may not withdraw his plea unless he shows a "fair and just reason" under Rule 32(e). Nothing in the text of Rule 11, which sets out the prerequisites to accepting a guilty plea and plea agreement, supports the Court of Appeals' holding. That text shows that guilty pleas can be accepted while plea agreements are deferred and the acceptance of the two can be separated in time. The Court of Appeals' requirement that a district court shall not accept a guilty plea without accepting the plea agreement is absent from the list of prerequisites to accepting a plea set out in Rules 11(c) and (d). If a court decides to reject a plea agreement such as the one here, the defendant is given "the opportunity to then withdraw the plea," Rule 11(e)(4), and he does not have to comply with Rule 32(e)'s "fair and just reason" requirement. This provision implements the commonsense notion that a defendant can no longer be bound by an agreement that the court has refused to sanction, and its necessary implication is that if the court has neither rejected nor accepted the agreement, the defendant is not granted the "opportunity" to automatically withdraw his plea. The Court of Appeals' holding contradicts this implication and thus strips Rule 11(e)(4) of any meaning. It also debases the judicial proceeding at which a defendant pleads and the court accepts his plea by allowing him to withdraw his plea simply on a lark.

In addition, the holding would allow little, if any, time for the "fair and just reason" standard to apply, for a court's decision to accept a plea agreement is often made at the sentencing hearing. Respondent's arguments—that the "fair and just reason" standard was not meant to apply to guilty pleas conditioned on acceptance of the plea agreement, and that the Advisory Committee's Notes to Rule 32(b)(3) support the Court of Appeals' holding—are rejected. Pp. 673–680.

92 F. 3d 779, reversed.

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

James A. Feldman argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger*, *Acting Assistant Attorney General Richard*, *Deputy Solicitor General Dreeben*, and *Patty Merkamp Stemler*.

Jonathan D. Soglin, by appointment of the Court, 519 U. S. 1106, argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Rule 32(e) of the Federal Rules of Criminal Procedure states that a district court may allow a defendant to withdraw his guilty plea before he is sentenced "if the defendant shows any fair and just reason." After the defendant in this case pleaded guilty, pursuant to a plea agreement, the District Court accepted his plea but deferred decision on whether to accept the plea agreement. The defendant then sought to withdraw his plea. We hold that in such circumstances a defendant may not withdraw his plea unless he shows a "fair and just reason" under Rule 32(e).

A federal grand jury indicted respondent Robert Hyde on eight counts of mail fraud, wire fraud, and other fraud-related crimes. On the morning of his trial, respondent indicated his desire to enter plea negotiations with the Government. Those negotiations produced a plea agreement

**Lisa Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

in which respondent agreed to plead guilty to four of the counts. In exchange, the Government agreed to move to dismiss the remaining four counts and not to bring further charges against respondent for other allegedly fraudulent conduct.

That afternoon, the parties appeared again before the District Court and submitted the plea agreement to the court, along with respondent's "application for permission to enter [a] plea of guilty." After placing respondent under oath, the court questioned him extensively to ensure that his plea was knowing and voluntary, and that he understood the consequences of pleading guilty, including the possibility of a maximum sentence of 30 years. The court asked respondent what he had done, and respondent admitted committing the crimes set out in the four counts. The court then asked the Government to set out what it was prepared to prove, and the Government did so. The court asked respondent whether he was pleading guilty because he was in fact guilty of the crimes set out in the four counts. Respondent said that he was. Finally, the court asked respondent how he pleaded to each count, and respondent stated "guilty."

The District Court concluded that respondent was pleading guilty knowingly, voluntarily, and intelligently, and that there was a factual basis for the plea. The court therefore stated that it was accepting respondent's guilty plea. It also stated that it was deferring decision on whether to accept the plea agreement, pending completion of the presentence report.

One month later, before sentencing and the District Court's decision about whether to accept the plea agreement, respondent filed a motion to withdraw his guilty plea. His motion alleged that he had pleaded guilty under duress from the Government and that his admissions to the District Court had in fact been false. After holding an evidentiary hearing, the court concluded that there was no evidence to support respondent's claim of duress, and that respondent

had not provided a "fair and just reason" for withdrawing his guilty plea, as required by Rule 32(e). The court therefore refused to let respondent withdraw his guilty plea. The court then accepted the plea agreement, entered judgment against respondent on the first four counts, dismissed the indictment's remaining four counts on the Government's motion, and sentenced respondent to a prison term of 2½ years.

The Court of Appeals for the Ninth Circuit reversed, holding that respondent had an absolute right to withdraw his guilty plea before the District Court accepted the plea agreement. 92 F. 3d 779, 781 (1996). The court reasoned as follows: First, before a district court has accepted a defendant's guilty plea, the defendant has an absolute right to withdraw that plea. *Id.*, at 780 (citing *United States* v. *Washman*, 66 F. 3d 210, 212–213 (CA9 1995)). Second, the guilty plea and the plea agreement are "'inextricably bound up together,'" such that the court's deferral of the decision whether to accept the plea agreement also constitutes an automatic deferral of its decision whether to accept the guilty plea, even if the court explicitly states that it is accepting the guilty plea. 92 F. 3d, at 780 (quoting *United States* v. *Cordova-Perez*, 65 F. 3d 1552, 1556 (CA9 1995)). Combining these two propositions, the Court of Appeals held that "[i]f the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement." 92 F. 3d, at 781.

The Courts of Appeals for the Fourth and Seventh Circuits have reached the opposite conclusion on this issue. *United States* v. *Ewing*, 957 F. 2d 115, 118–119 (CA4 1992); *United States* v. *Ellison*, 798 F. 2d 1102, 1106 (CA7 1986). We granted certiorari to resolve the conflict, 519 U. S. 1086 (1997), and now reverse.

To understand why we hold that Rule 32(e) governs here, we must go back to Rule 11, the principal provision in the Federal Rules of Criminal Procedure dealing with the sub-

ject of guilty pleas and plea agreements. The Court of Appeals equated acceptance of the guilty plea with acceptance of the plea agreement, and deferral of the plea agreement with deferral of the guilty plea. Nothing in the text of Rule 11 supports these conclusions. In fact, the text shows that the opposite is true: Guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time.

The prerequisites to accepting a guilty plea are set out in subdivisions (c) and (d) of Rule 11. Subdivision (c) says: "Before accepting a plea of guilty . . . , the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," numerous consequences of pleading guilty. For example, the court must ensure the defendant understands the maximum possible penalty that he may face by pleading guilty, Rule 11(c)(1), and the important constitutional rights he is waiving, including the right to a trial, Rules 11(c)(3), (4). Subdivision (d) says: "The court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, determining that the plea is voluntary."[1] The opening words of these two subdivisions are important: Together, they speak of steps a district court must take "[b]efore accepting a plea of guilty," and without which it "shall not accept a plea of guilty." Based on this language, we conclude that once the court has taken these steps, it may, in its discretion, accept a defendant's guilty plea. The Court of Appeals would read an additional prerequisite into this list: A district court shall not accept a plea of guilty without first accepting the plea agreement. But that "prerequisite" is absent from the list set out in subdivisions (c) and (d), strongly suggesting that no such addition is warranted.

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[1] See also Fed. Rule Crim. Proc. 11(f) (court should not enter judgment on an accepted guilty plea without confirming that the plea has a factual basis).

Subdivision (e), which covers plea agreements, also contradicts the Court of Appeals' holding. That subdivision divides plea agreements into three types, based on what the Government agrees to do: In type A agreements, the Government agrees to move for dismissal of other charges; in type B, it agrees to recommend (or not oppose the defendant's request for) a particular sentence; and in type C, it agrees that the defendant should receive a specific sentence. As to type A and type C agreements, the Rule states that "the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report."[2] Rule 11(e)(2). The plea agreement in this case is a type A agreement: The Government agreed to move to dismiss four counts, did not agree to recommend a particular sentence, and did not agree that a specific sentence was the appropriate disposition. The District Court deferred its decision about whether to accept or reject the agreement.

If the court had decided to reject the plea agreement, it would have turned to subdivision (e)(4) of Rule 11. That subdivision, a critical one for our purposes, provides:

> "If the court rejects the plea agreement, the court shall . . . advise the defendant personally . . . that the court is not bound by the plea agreement, *afford the defendant the opportunity to then withdraw the plea*, and advise the defendant that if the defendant persists in a guilty plea . . . the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." Rule 11(e)(4) (emphasis added).

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[2] Under the Sentencing Guidelines, a district court is *required* to defer its decision about whether to accept a type A or type C agreement until after it has reviewed the presentence report, unless the court believes that a presentence report is not required. United States Sentencing Commission, Guidelines Manual § 6B1.1(c) (Nov. 1995) (USSG).

Thus, if the court rejects the agreement, the defendant can "then" withdraw his plea for any reason and does not have to comply with Rule 32(e)'s "fair and just reason" requirement. This provision implements the commonsense notion that a defendant can no longer be bound by an agreement that the court has refused to sanction.

Under the Court of Appeals' holding, however, the defendant can withdraw his plea "for any reason or for no reason" even if the district court does not reject the plea agreement, but merely defers decision on it. Thus, for the Court of Appeals, the rejection of the plea agreement has no significance: Before rejection, the defendant is free to withdraw his plea; after rejection, the same is true. But the text of Rule 11(e)(4) gives the rejection of the agreement a great deal of significance. Only "then" is the defendant granted "the opportunity" to withdraw his plea. The necessary implication of this provision is that if the court has neither rejected nor accepted the agreement, the defendant is not granted "the opportunity to then withdraw" his plea. The Court of Appeals' holding contradicts this implication, and thus strips subdivision (e)(4) of any meaning.

Not only is the Court of Appeals' holding contradicted by the very language of the Rules, it also debases the judicial proceeding at which a defendant pleads and the court accepts his plea. After the defendant has sworn in open court that he actually committed the crimes, after he has stated that he is pleading guilty because he is guilty, after the court has found a factual basis for the plea, and after the court has explicitly announced that it accepts the plea, the Court of Appeals would allow the defendant to withdraw his guilty plea simply on a lark. The Advisory Committee, in adding the "fair and just reason" standard to Rule 32(e) in 1983, explained why this cannot be so:

> "Given the great care with which pleas are taken under [the] revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal be-

> fore sentence whenever the government cannot establish prejudice. 'Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but a "grave and solemn act," which is "accepted only with care and discernment."'" Advisory Committee's Notes on Fed. Rule Crim. Proc. 32, 18 U. S. C. App., p. 794 (quoting *United States* v. *Barker*, 514 F. 2d 208, 221 (CADC 1975), in turn quoting *Brady* v. *United States*, 397 U. S. 742, 748 (1970)).

We think the Court of Appeals' holding would degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess.

The basis for the Court of Appeals' decision was its prior statement in *Cordova-Perez* that "[t]he plea agreement and the [guilty] plea are inextricably bound up together." 65 F. 3d, at 1556 (internal quotation marks omitted). This statement, on its own, is not necessarily incorrect. The guilty plea and the plea agreement are "bound up together" in the sense that a rejection of the agreement simultaneously frees the defendant from his commitment to plead guilty. See Rule 11(e)(4). And since the guilty plea is but one side of the plea agreement, the plea is obviously not wholly independent of the agreement.

But the Rules nowhere state that the guilty plea and the plea agreement must be treated identically. Instead, they explicitly envision a situation in which the defendant performs his side of the bargain (the guilty plea) before the Government is required to perform its side (here, the motion to dismiss four counts). If the court accepts the agreement and thus the Government's promised performance, then the contemplated agreement is complete and the defendant gets the benefit of his bargain. But if the court rejects the Gov-

ernment's promised performance, then the agreement is terminated and the defendant has the right to back out of his promised performance (the guilty plea), just as a binding contractual duty may be extinguished by the nonoccurrence of a condition subsequent. See J. Calamari & J. Perillo, Law of Contracts § 11–7, p. 441 (3d ed. 1987); 3A A. Corbin, Corbin on Contracts § 628, p. 17 (1960).[3]

If the Court of Appeals' holding were correct, it would also be difficult to see what purpose Rule 32(e) would serve. Since 1983, that Rule has provided: "If a motion to withdraw a plea of guilty . . . is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Under the Court of Appeals' holding, the "fair and just reason" standard would only be applicable between the time that the plea agreement is accepted and the sentence is imposed. Since the decision whether to accept the plea agreement will often be deferred until the sentencing hearing, see Rule 11(e)(2); USSG § 6B1.1(c), at which time the presentence report will have been submitted to the parties, objected to, revised, and filed with the court, see Fed. Rule Crim. Proc. 32(b)(6), the decision whether to accept the plea agreement will often be made at the same time that the defendant is sentenced. This leaves little, if any, time in which the "fair and just

[3] Respondent argues that it is unfair to bind the defendant to the terms of the plea agreement before the Government is so bound. He therefore argues that, as a policy matter, an interpretation of the Rules that results in such a differential treatment should be rejected. Even if respondent were correct in arguing that the defendant is bound before the Government is bound (a point we do not decide), the fact remains that our task here is not to act as policymaker, deciding how to make the Rules as fair as possible, but rather to determine what the Rules actually provide. Cf. *Carlisle* v. *United States*, 517 U. S. 416, 444–445 (1996) (district court may not use "inherent supervisory power" to correct perceived unfairness in application of Fed. Rule Crim. Proc. 29(a)'s 7-day time limit for filing motions for judgment of acquittal, if use of the power would "circumvent or conflict with the Federal Rules of Criminal Procedure").

reason" standard would actually apply. We see no indication in the Rules to suggest that Rule 32(e) can be eviscerated in this manner, and the Court of Appeals did not point to one.

Respondent defends this cramped understanding of Rule 32(e) by arguing that the "fair and just reason" standard was meant to apply only to "fully accepted" guilty pleas, as opposed to "conditionally accepted" pleas—*i. e.*, pleas that are accepted but later withdrawn under Rule 11(e)(4) if the plea agreement is rejected. He points out that the "fair and just reason" standard was derived from dictum in our pre-Rules opinion in *Kercheval* v. *United States*, 274 U. S. 220, 224 (1927), see Advisory Committee's Notes on Rule 32, 18 U. S. C. App., p. 794, and that *Kercheval* spoke of a guilty plea as a final, not a conditional, act, see 274 U. S., at 223 ("A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence"). He then argues that since the Rule 32(e) standard was derived from *Kercheval*, the Rule must also have incorporated the *Kercheval* view that a guilty plea is a final, unconditional act. Thus, since his guilty plea was conditioned on the District Court accepting the plea agreement, the Rule simply does not apply.

We reject this somewhat tortuous argument. When the "fair and just reason" standard was added in 1983, the Rules already provided that the district court could defer decision on whether to accept the plea agreement, that it could then reject the agreement, and that the defendant would then be able to withdraw his guilty plea. Guilty pleas made pursuant to plea agreements were thus already subject to this sort of condition subsequent. Yet neither the new Rule 32(e) nor the Advisory Committee's Notes accompanying it attempted to draw a distinction between "fully accepted" and "conditionally accepted" guilty pleas. Instead, the Rule simply

says that the standard applies to motions to withdraw a guilty plea "made before sentence is imposed." Respondent's speculation that the Advisory Committee, this Court, and Congress had the *Kercheval* view of a guilty plea in mind when Rule 32(e) was amended in 1983 is thus contradicted by the Rules themselves.

Respondent's only other substantial argument in defense of the Court of Appeals' holding relies on an interpretation of the Advisory Committee's Notes to Rule 32(b)(3). That Rule, concerning presentence reports, provides: "The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty." This Rule obviously does not deal at all with motions to withdraw guilty pleas, and any comments in the Advisory Committee's Notes to this Rule dealing with plea withdrawal could not alter the meaning of Rules 11 and 32(e) as we have construed them.

The judgment of the Court of Appeals is therefore

Reversed.

Syllabus

CLINTON *v.* JONES

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

No. 95–1853. Argued January 13, 1997—Decided May 27, 1997

Respondent sued under 42 U. S. C. §§ 1983 and 1985 and Arkansas law to recover damages from petitioner, the current President of the United States, alleging, *inter alia*, that while he was Governor of Arkansas, petitioner made "abhorrent" sexual advances to her, and that her rejection of those advances led to punishment by her supervisors in the state job she held at the time. Petitioner promptly advised the Federal District Court that he would file a motion to dismiss on Presidential immunity grounds, and requested that all other pleadings and motions be deferred until the immunity issue was resolved. After the court granted that request, petitioner filed a motion to dismiss without prejudice and to toll any applicable statutes of limitation during his Presidency. The District Judge denied dismissal on immunity grounds and ruled that discovery could go forward, but ordered any trial stayed until petitioner's Presidency ended. The Eighth Circuit affirmed the dismissal denial, but reversed the trial postponement as the "functional equivalent" of a grant of temporary immunity to which petitioner was not constitutionally entitled. The court explained that the President, like other officials, is subject to the same laws that apply to all citizens, that no case had been found in which an official was granted immunity from suit for his unofficial acts, and that the rationale for official immunity is inapposite where only personal, private conduct by a President is at issue. The court also rejected the argument that, unless immunity is available, the threat of judicial interference with the Executive Branch would violate separation of powers.

Held:

1. This Court need not address two important constitutional issues not encompassed within the questions presented by the certiorari petition: (1) whether a claim comparable to petitioner's assertion of immunity might succeed in a state tribunal, and (2) whether a court may compel the President's attendance at any specific time or place. Pp. 689–692.

2. Deferral of this litigation until petitioner's Presidency ends is not constitutionally required. Pp. 692–710.

(a) Petitioner's principal submission—that in all but the most exceptional cases, the Constitution affords the President temporary immu-

nity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent. The principal rationale for affording Presidents immunity from damages actions based on their official acts—*i. e.*, to enable them to perform their designated functions effectively without fear that a particular decision may give rise to personal liability, see, *e. g.*, *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749, 752, and n. 32—provides no support for an immunity for *unofficial* conduct. Moreover, immunities for acts clearly *within* official capacity are grounded in the nature of the function performed, not the identity of the actor who performed it. *Forrester* v. *White*, 484 U. S. 219, 229. The Court is also unpersuaded by petitioner's historical evidence, which sheds little light on the question at issue, and is largely canceled by conflicting evidence that is itself consistent with both the doctrine of Presidential immunity as set forth in *Fitzgerald*, and rejection of the immunity claim in this case. Pp. 692–697.

(b) The separation-of-powers doctrine does not require federal courts to stay all private actions against the President until he leaves office. Even accepting the unique importance of the Presidency in the constitutional scheme, it does not follow that that doctrine would be violated by allowing this action to proceed. The doctrine provides a self-executing safeguard against the encroachment or aggrandizement of one of the three coequal branches of Government at the expense of another. *Buckley* v. *Valeo*, 424 U. S. 1, 122. But in this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as "executive." Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies, and, whatever the outcome, there is no possibility that the decision here will curtail the scope of the Executive Branch's official powers. The Court rejects petitioner's contention that this case—as well as the potential additional litigation that an affirmance of the Eighth Circuit's judgment might spawn—may place unacceptable burdens on the President that will hamper the performance of his official duties. That assertion finds little support either in history, as evidenced by the paucity of suits against sitting Presidents for their private actions, or in the relatively narrow compass of the issues raised in this particular case. Of greater significance, it is settled that the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, see, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, and may direct appropriate process to the President himself, see, *e. g.*, *United States* v. *Nixon*, 418 U. S. 683. It must follow that the federal courts have power to determine the legality of the President's unofficial conduct. The rea-

sons for rejecting a categorical rule requiring federal courts to stay private actions during the President's term apply as well to a rule that would, in petitioner's words, require a stay "in all but the most exceptional cases." Pp. 697–706.

(c) Contrary to the Eighth Circuit's ruling, the District Court's stay order was not the "functional equivalent" of an unconstitutional grant of temporary immunity. Rather, the District Court has broad discretion to stay proceedings as an incident to its power to control its own docket. See, *e. g.*, *Landis* v. *North American Co.*, 299 U. S. 248, 254. Moreover, the potential burdens on the President posed by this litigation are appropriate matters for that court to evaluate in its management of the case, and the high respect owed the Presidency is a matter that should inform the conduct of the entire proceeding. Nevertheless, the District Court's stay decision was an abuse of discretion because it took no account of the importance of respondent's interest in bringing the case to trial, and because it was premature in that there was nothing in the record to enable a judge to assess whether postponement of trial after the completion of discovery would be warranted. Pp. 706–708.

(d) The Court is not persuaded of the seriousness of the alleged risks that this decision will generate a large volume of politically motivated harassing and frivolous litigation and that national security concerns might prevent the President from explaining a legitimate need for a continuance, and has confidence in the ability of federal judges to deal with both concerns. If Congress deems it appropriate to afford the President stronger protection, it may respond with legislation. Pp. 708–710.

72 F. 3d 1354, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 710.

Robert S. Bennett argued the cause for petitioner. With him on the briefs were *Carl S. Rauh*, *Alan Kriegel*, *Amy R. Sabrin*, and *David A. Strauss.*

Acting Solicitor General Dellinger argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Malcolm L. Stewart*, and *Douglas N. Letter.*

Gilbert K. Davis argued the cause for respondent. With him on the brief was *Joseph Cammarata.**

JUSTICE STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

I

Petitioner, William Jefferson Clinton, was elected to the Presidency in 1992, and reelected in 1996. His term of office expires on January 20, 2001. In 1991 he was the Governor of the State of Arkansas. Respondent, Paula Corbin Jones, is a resident of California. In 1991 she lived in Arkansas, and was an employee of the Arkansas Industrial Development Commission.

On May 6, 1994, she commenced this action in the United States District Court for the Eastern District of Arkansas by filing a complaint naming petitioner and Danny Ferguson, a former Arkansas State Police officer, as defendants. The

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**John C. Jeffries, Jr.*, and *Pamela S. Karlan* filed a brief for Law Professors as *amicus curiae* urging reversal.

Christopher A. Hansen and *Steven R. Shapiro* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Briefs of *amicus curiae* were filed for the Coalition of American Veterans by *Laurence A. Elgin;* and for Law Professors by *Ronald D. Rotunda, Albert E. Jenner, Jr., Stephen B. Burbank, William Cohen, Geoffrey P. Miller, Robert F. Nagel,* and *Richard Parker.*

complaint alleges two federal claims, and two state-law claims over which the federal court has jurisdiction because of the diverse citizenship of the parties.[1] As the case comes to us, we are required to assume the truth of the detailed—but as yet untested—factual allegations in the complaint.

Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the Excelsior Hotel in Little Rock, Arkansas. The Governor delivered a speech at the conference; respondent—working as a state employee—staffed the registration desk. She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel, where he made "abhorrent"[2] sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. Finally, she alleges that after petitioner was elected President, Ferguson defamed her by making a statement to a reporter that implied she had accepted petitioner's alleged overtures, and that various persons authorized to speak for the President publicly branded her a liar by denying that the incident had occurred.

Respondent seeks actual damages of $75,000 and punitive damages of $100,000. Her complaint contains four counts. The first charges that petitioner, acting under color of state law, deprived her of rights protected by the Constitution, in violation of Rev. Stat. § 1979, 42 U. S. C. § 1983. The second charges that petitioner and Ferguson engaged in a conspiracy to violate her federal rights, also actionable under federal law. See Rev. Stat. § 1980, 42 U. S. C. § 1985. The third is a state common-law claim for intentional infliction of emotional distress, grounded primarily on the incident at the

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[1] See 28 U. S. C. § 1332. Jurisdiction over the federal claims is authorized by 28 U. S. C. §§ 1331 and 1343.

[2] Complaint ¶ 26.

hotel. The fourth count, also based on state law, is for defamation, embracing both the comments allegedly made to the press by Ferguson and the statements of petitioner's agents. Inasmuch as the legal sufficiency of the claims has not yet been challenged, we assume, without deciding, that each of the four counts states a cause of action as a matter of law. With the exception of the last charge, which arguably may involve conduct within the outer perimeter of the President's official responsibilities, it is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.[3]

II

In response to the complaint, petitioner promptly advised the District Court that he intended to file a motion to dismiss on grounds of Presidential immunity, and requested the court to defer all other pleadings and motions until after the immunity issue was resolved.[4] Relying on our cases holding that immunity questions should be decided at the earliest possible stage of the litigation, 858 F. Supp. 902, 905 (ED Ark. 1994), our recognition of the "'singular importance of the President's duties,'" *id.*, at 904 (quoting *Nixon* v. *Fitzgerald*, 457 U. S. 731, 751 (1982)), and the fact that the question did not require any analysis of the allegations of the complaint, 858 F. Supp., at 905, the court granted the request. Petitioner thereupon filed a motion "to dismiss . . . without prejudice and to toll any statutes of limitation [that may be applicable] until he is no longer President, at which time the plaintiff

[3] As the matter is not before us, see *Jones* v. *Clinton*, 72 F. 3d 1354, 1359, n. 7 (CA8 1996), we do not address the question whether the President's immunity from damages liability for acts taken within the "outer perimeter" of his official responsibilities provides a defense to the fourth count of the complaint. See *Nixon* v. *Fitzgerald*, 457 U. S. 731, 756 (1982).

[4] Record, Doc. No. 9; see 858 F. Supp. 902, 904 (ED Ark. 1994).

may refile the instant suit." Record, Doc. No. 17. Extensive submissions were made to the District Court by the parties and the Department of Justice.[5]

The District Judge denied the motion to dismiss on immunity grounds and ruled that discovery in the case could go forward, but ordered any trial stayed until the end of petitioner's Presidency. 869 F. Supp. 690 (ED Ark. 1994). Although she recognized that a "thin majority" in *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), had held that "the President has absolute immunity from civil damage actions arising out of the execution of official duties of office," she was not convinced that "a President has absolute immunity from civil causes of action arising prior to assuming the office."[6] She was, however, persuaded by some of the reasoning in our opinion in *Fitzgerald* that deferring the trial if one were required would be appropriate.[7] 869 F. Supp., at 699–700. Relying in part on the fact that respondent had failed to bring her complaint until two days before the 3-year period of limitations expired, she concluded that the public interest in avoiding litigation that might hamper the President in conducting the duties of his office outweighed any demonstrated need for an immediate trial. *Id.*, at 698–699.

Both parties appealed. A divided panel of the Court of Appeals affirmed the denial of the motion to dismiss, but because it regarded the order postponing the trial until the

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[5] See App. to Pet. for Cert. 53.

[6] 869 F. Supp., at 698. She explained: "Nowhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law." *Ibid.*

[7] Although, as noted above, the District Court's initial order permitted discovery to go forward, the court later stayed discovery pending the outcome of the appeals on the immunity issue. 879 F. Supp. 86 (ED Ark. 1995).

President leaves office as the "functional equivalent" of a grant of temporary immunity, it reversed that order. 72 F. 3d 1354, 1361, n. 9, 1363 (CA8 1996). Writing for the majority, Judge Bowman explained that "the President, like all other government officials, is subject to the same laws that apply to all other members of our society," *id.*, at 1358, that he could find no "case in which any public official ever has been granted any immunity from suit for his unofficial acts," *ibid.*, and that the rationale for official immunity "is inapposite where only personal, private conduct by a President is at issue," *id.*, at 1360. The majority specifically rejected the argument that, unless immunity is available, the threat of judicial interference with the Executive Branch through scheduling orders, potential contempt citations, and sanctions would violate separation-of-powers principles. Judge Bowman suggested that "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule" would avoid the perceived danger. *Id.*, at 1361.

In dissent, Judge Ross submitted that even though the holding in *Fitzgerald* involved official acts, the logic of the opinion, which "placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages," applies with equal force to this case. 72 F. 3d, at 1367. In his view, "unless exigent circumstances can be shown," all private actions for damages against a sitting President must be stayed until the completion of his term. *Ibid.* In this case, Judge Ross saw no reason why the stay would prevent respondent from ultimately obtaining an adjudication of her claims.

In response to the dissent, Judge Beam wrote a separate concurrence. He suggested that a prolonged delay may well create a significant risk of irreparable harm to respondent because of an unforeseeable loss of evidence or the possible

death of a party. *Id.*, at 1363–1364. Moreover, he argued that in civil rights cases brought under § 1983 there is a "public interest in an ordinary citizen's timely vindication of . . . her most fundamental right against alleged abuse of power by government officials." *Id.*, at 1365. In his view, the dissent's concern about judicial interference with the functioning of the Presidency was "greatly overstated." *Ibid.* Neither the involvement of prior Presidents in litigation, either as parties or as witnesses, nor the character of this "relatively uncomplicated civil litigation," indicated that the threat was serious. *Id.*, at 1365–1366. Finally, he saw "no basis for staying discovery or trial of the claims against Trooper Ferguson." *Id.*, at 1366.[8]

III

The President, represented by private counsel, filed a petition for certiorari. The Acting Solicitor General, representing the United States, supported the petition, arguing that the decision of the Court of Appeals was "fundamentally mistaken" and created "serious risks for the institution of the Presidency."[9] In her brief in opposition to certiorari, respondent argued that this "one-of-a-kind case is singularly inappropriate" for the exercise of our certiorari jurisdiction because it did not create any conflict among the Courts of Appeals, it "does not pose any conceivable threat to the functioning of the Executive Branch," and there is no precedent supporting the President's position.[10]

While our decision to grant the petition, 518 U. S. 1016 (1996), expressed no judgment concerning the merits of the case, it does reflect our appraisal of its importance. The

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[8] Over the dissent of Judge McMillian, the Court of Appeals denied a suggestion for rehearing en banc. 81 F. 3d 78 (CA8 1996).

[9] Brief for United States in Support of Petition 5.

[10] Brief in Opposition 8, 10, 23.

representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration.

It is true that we have often stressed the importance of avoiding the premature adjudication of constitutional questions.[11] That doctrine of avoidance, however, is applicable to the entire Federal Judiciary, not just to this Court, cf. *Arizonans for Official English* v. *Arizona*, *ante*, p. 43, and comes into play after the court has acquired jurisdiction of a case. It does not dictate a discretionary denial of every certiorari petition raising a novel constitutional question. It does, however, make it appropriate to identify two important constitutional issues not encompassed within the questions presented by the petition for certiorari that we need not address today.[12]

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[11] As we have explained: "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 105 [(1944)]. It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . .' *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 [(1945)]. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton* v. *United States*, 196 U. S. 283, 295 [(1905)]." *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 570, n. 34 (1947).

[12] The two questions presented in the certiorari petition are: "1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until the President leaves office"; and "2. Whether a district court,

First, because the claim of immunity is asserted in a federal court and relies heavily on the doctrine of separation of powers that restrains each of the three branches of the Federal Government from encroaching on the domain of the other two, see, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam)*, it is not necessary to consider or decide whether a comparable claim might succeed in a state tribunal. If this case were being heard in a state forum, instead of advancing a separation-of-powers argument, petitioner would presumably rely on federalism and comity concerns,[13] as well as the interest in protecting federal officials from possible local prejudice that underlies the authority to remove certain cases brought against federal officers from a state to a federal court, see 28 U. S. C. § 1442(a); *Mesa* v. *California*, 489 U. S. 121, 125–126 (1989). Whether those concerns would present a more compelling case for immunity is a question that is not before us.

Second, our decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place. We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that

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as a proper exercise of judicial discretion, may stay such litigation until the President leaves office." Our review is confined to these issues. See this Court's Rule 14.1(a).

[13] Because the Supremacy Clause makes federal law "the supreme Law of the Land," Art. VI, cl. 2, any direct control by a state court over the President, who has principal responsibility to ensure that those laws are "faithfully executed," Art. II, § 3, may implicate concerns that are quite different from the interbranch separation-of-powers questions addressed here. Cf., *e. g.*, *Hancock* v. *Train*, 426 U. S. 167, 178–179 (1976); *Mayo* v. *United States*, 319 U. S. 441, 445 (1943). See L. Tribe, American Constitutional Law 513 (2d ed. 1988) ("[A]bsent explicit congressional consent no state may command federal officials . . . to take action in derogation of their . . . federal responsibilities").

will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so.[14]

IV

Petitioner's principal submission—that "in all but the most exceptional cases," Brief for Petitioner i, the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent.

Only three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office. Complaints against Theodore Roosevelt and Harry Truman had been dismissed before they took office; the dismissals were affirmed after their respective inaugurations.[15] Two companion cases arising out of an automobile accident were filed against John F. Kennedy in 1960 during the Presidential campaign.[16] After taking office, he unsuccessfully argued that his status as Commander in Chief gave him a right to a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. App. §§ 501–525. The motion for a stay was denied by the District Court, and the matter was settled out of court.[17] Thus, none of those cases sheds any light on the constitutional issue before us.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of

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[14] Although Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony, see *infra*, at 704–705, no sitting President has ever testified, or been ordered to testify, in open court.

[15] See *People ex rel. Hurley* v. *Roosevelt*, 179 N. Y. 544, 71 N. E. 1137 (1904); *DeVault* v. *Truman*, 354 Mo. 1193, 194 S. W. 2d 29 (1946).

[16] See Complaints in *Bailey* v. *Kennedy*, No. 757,200, and *Hills* v. *Kennedy*, No. 757,201 (Cal. Super. Ct., filed Oct. 27, 1960).

[17] See 72 F. 3d, at 1362, n. 10.

their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.[18] We explained in *Ferri* v. *Ackerman*, 444 U. S. 193 (1979):

> "As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Id.*, at 202–204.

That rationale provided the principal basis for our holding that a former President of the United States was "entitled to absolute immunity from damages liability predicated on his official acts," *Fitzgerald*, 457 U. S., at 749. See *id.*, at 752 (citing *Ferri* v. *Ackerman*). Our central concern was to

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[18] Some of these cases defined the immunities of state and local officials in actions filed under 42 U. S. C. § 1983. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409, 422–423 (1976) (prosecutorial immunity); *Tenney* v. *Brandhove*, 341 U. S. 367, 376–377 (1951) (legislative immunity); *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967) (judicial immunity). The rationale underlying our official immunity jurisprudence in cases alleging constitutional violations brought against federal officials is similar. See, *e. g.*, *Butz* v. *Economou*, 438 U. S. 478, 500–501 (1978).

avoid rendering the President "unduly cautious in the discharge of his official duties." 457 U. S., at 752, n. 32.[19]

This reasoning provides no support for an immunity for *unofficial* conduct. As we explained in *Fitzgerald*, "the sphere of protected action must be related closely to the immunity's justifying purposes." *Id.*, at 755. Because of the President's broad responsibilities, we recognized in that case an immunity from damages claims arising out of official acts extending to the "outer perimeter of his authority." *Id.*, at 757. But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity. See *id.*, at 759 (Burger, C. J., concurring) (noting that "a President, like Members of Congress, judges, prosecutors, or congressional aides—all having absolute immunity—are not immune for acts outside official duties"); see also *id.*, at 761, n. 4.

Moreover, when defining the scope of an immunity for acts clearly taken *within* an official capacity, we have applied a functional approach. "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." *Id.*, at 755. Hence, for example, a judge's absolute immunity does not extend to actions performed in a purely administra-

[19] Petitioner draws our attention to dicta in *Fitzgerald*, which he suggests are helpful to his cause. We noted there that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government," 457 U. S., at 751, and suggested further that "[c]ognizance of . . . personal vulnerability frequently could distract a President from his public duties," *id.*, at 753. Petitioner argues that in this aspect the Court's concern was parallel to the issue he suggests is of great importance in this case, the possibility that a sitting President might be distracted by the need to participate in litigation during the pendency of his office. In context, however, it is clear that our dominant concern was with the diversion of the President's attention during the decisionmaking process caused by needless worry as to the possibility of damages actions stemming from any particular official decision. Moreover, *Fitzgerald* did not present the issue raised in this case because that decision involved claims against a *former* President.

tive capacity. See *Forrester* v. *White*, 484 U. S. 219, 229–230 (1988). As our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it." *Id.*, at 229.

Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent.

V

We are also unpersuaded by the evidence from the historical record to which petitioner has called our attention. He points to a comment by Thomas Jefferson protesting the subpoena *duces tecum* Chief Justice Marshall directed to him in the Burr trial,[20] a statement in the diaries kept by Senator William Maclay of the first Senate debates, in which then-Vice President John Adams and Senator Oliver Ellsworth are recorded as having said that "the President personally [is] not . . . subject to any process whatever," lest it be "put . . . in the power of a common Justice to exercise any Authority over him and Stop the Whole Machine of Government,"[21] and to a quotation from Justice Story's Commentaries on the Constitution.[22] None of these sources sheds much light on the question at hand.[23]

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[20] In Jefferson's view, the subpoena jeopardized the separation of powers by subjecting the Executive Branch to judicial command. See 10 Works of Thomas Jefferson 404, n. (P. Ford ed. 1905); *Fitzgerald*, 457 U. S., at 751, n. 31 (quoting Jefferson's comments).

[21] 9 Documentary History of First Federal Congress of the United States 168 (K. Bowling & H. Veit eds. 1988) (Diary of William Maclay).

[22] See 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1833).

[23] Jefferson's argument provides little support for petitioner's position. As we explain later, the prerogative Jefferson claimed was denied him by the Chief Justice in the very decision Jefferson was protesting, and this Court has subsequently reaffirmed that holding. See *United States* v. *Nixon*, 418 U. S. 683 (1974). The statements supporting a similar proposition recorded in Senator Maclay's diary are inconclusive of the issue before us here for the same reason. In addition, this material is hardly proof of the unequivocal common understanding at the time of the founding. Immediately after mentioning the positions of Adams and Ellsworth,

Respondent, in turn, has called our attention to conflicting historical evidence. Speaking in favor of the Constitution's adoption at the Pennsylvania Convention, James Wilson—who had participated in the Philadelphia Convention at which the document was drafted—explained that, although the President "is placed [on] high," "not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." 2 J. Elliot, Debates on the Federal Constitution 480 (2d ed. 1863) (emphasis deleted). This description is consistent with both the doctrine of Presidential immunity as set forth in *Fitzgerald* and rejection of the immunity claim in this case. With respect to acts taken in his "public character"—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.

In the end, as applied to the particular question before us, we reach the same conclusion about these historical materials that Justice Jackson described when confronted with an issue concerning the dimensions of the President's power.

Maclay went on to point out in his diary that he virulently disagreed with them, concluding that his opponents' view "[s]hows clearly how amazingly fond of the old leven many People are." Diary of Maclay 168.

Finally, Justice Story's comments in his constitutional law treatise provide no substantial support for petitioner's position. Story wrote that because the President's "incidental powers" must include "the power to perform [his duties], without any obstruction," he "cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and *for this purpose* his person must be deemed, in civil cases at least, to possess an official inviolability." 3 Story § 1563, at 418–419 (emphasis added). Story said only that "*an* official inviolability," *ibid.* (emphasis added), was necessary to preserve the President's ability to perform the functions of the office; he did not specify the dimensions of the necessary immunity. While we have held that an immunity from suits grounded on official acts is necessary to serve this purpose, see *Fitzgerald*, 457 U. S., at 749, it does not follow that the broad immunity from *all* civil damages suits that petitioner seeks is also necessary.

"Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side . . . . They largely cancel each other." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 634–635 (1952) (concurring opinion).

VI

Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is "above the law," in the sense that his conduct is entirely immune from judicial scrutiny.[24] The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was created by Article II of the Constitution, and relies on separation-of-powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that—given the nature of the office—the doctrine of separation of powers places limits on the authority of the

[24] For that reason, the argument does not place any reliance on the English ancestry that informs our common-law jurisprudence; he does not claim the prerogatives of the monarchs who asserted that "[t]he King can do no wrong." See 1 W. Blackstone, Commentaries *246. Although we have adopted the related doctrine of sovereign immunity, the common-law fiction that "[t]he king . . . is not only incapable of *doing* wrong, but even of *thinking* wrong," *ibid.*, was rejected at the birth of the Republic. See, *e. g.*, *Nevada* v. *Hall*, 440 U. S. 410, 415, and nn. 7–8 (1979); *Langford* v. *United States*, 101 U. S. 341, 342–343 (1880).

Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

We have no dispute with the initial premise of the argument. Former Presidents, from George Washington to George Bush, have consistently endorsed petitioner's characterization of the office.[25] After serving his term, Lyndon Johnson observed: "Of all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 a.m., and there were few mornings when I didn't wake up by 6 or 6:30."[26] In 1967, the Twenty-fifth Amendment to the Constitution was adopted to ensure continuity in the performance of the powers and duties of the office;[27] one of the sponsors of that Amendment stressed the importance of providing that "at all times" there be a President "who has complete control and will be able to perform" those duties.[28] As Justice Jackson has pointed out, the Presidency concentrates executive authority "in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S., at 653 (concurring opinion). We have, in short, long recognized the "unique position in the constitutional scheme" that this office occupies. *Fitzgerald*,

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[25] See, *e. g.,* A. Tourtellot, The Presidents on the Presidency 346–374 (1964) (citing comments of, among others, George Washington, John Quincy Adams, Benjamin Harrison, Theodore Roosevelt, William Howard Taft, and Woodrow Wilson); H. Finer, The Presidency: Crisis and Regeneration 35–37 (1960) (citing similar remarks by a number of Presidents, including James Monroe, James K. Polk, and Harry Truman).

[26] L. Johnson, The Vantage Point 425 (1971).

[27] The Amendment sets forth, *inter alia*, an elaborate procedure for Presidential succession in the event that the Chief Executive becomes incapacitated. See U. S. Const., Amdt. 25, §§ 3–4.

[28] 111 Cong. Rec. 15595 (1965) (remarks of Sen. Bayh).

457 U. S., at 749.[29] Thus, while we suspect that even in our modern era there remains some truth to Chief Justice Marshall's suggestion that the duties of the Presidency are not entirely "unremitting," *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807), we accept the initial premise of the Executive's argument.

It does not follow, however, that separation-of-powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government. The Framers "built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U. S., at 122.[30] Thus, for example, the Congress may not exercise the judicial power to revise final judgments, *Plaut* v. *Spendthrift*

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[29] We noted in *Fitzgerald:* "Article II, § 1, of the Constitution provides that '[t]he executive Power shall be vested in a President of the United States . . . .' This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to 'take Care that the Laws be faithfully executed'; the conduct of foreign affairs—a realm in which the Court has recognized that '[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret'; and management of the Executive Branch—a task for which 'imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.'" 457 U. S., at 749–750 (footnotes omitted).

[30] See *Loving* v. *United States*, 517 U. S. 748, 756–757 (1996); *Mistretta* v. *United States*, 488 U. S. 361, 382 (1989) ("[C]oncern of encroachment and aggrandizement . . . has animated our separation-of-powers jurisprudence"); The Federalist No. 51, p. 349 (J. Cooke ed. 1961) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others").

Farm, Inc., 514 U. S. 211 (1995),[31] or the executive power to manage an airport, see *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 276 (1991) (holding that "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it").[32] See *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 406 (1928) (Congress may not "invest itself or its members with either executive power or judicial power"). Similarly, the President may not exercise the legislative power to authorize the seizure of private property for public use. *Youngstown*, 343 U. S., at 588. And, the judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive,[33] or permit the federal courts to resolve nonjusticiable questions.[34]

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[31] See also *United States* v. *Klein*, 13 Wall. 128, 147 (1872) (noting that Congress had "inadvertently passed the limit which separates the legislative from the judicial power").

[32] See also *Bowsher* v. *Synar*, 478 U. S. 714, 726 (1986) ("structure of the Constitution does not permit Congress to execute the laws"). Cf. *INS* v. *Chadha*, 462 U. S. 919, 958 (1983); *Springer* v. *Philippine Islands*, 277 U. S. 189, 202–203 (1928).

[33] See *United States* v. *Ferreira*, 13 How. 40 (1852); *Hayburn's Case*, 2 Dall. 409 (1792). As we explained in *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113 (1948): "This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive." More generally, "we have broadly stated that 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.'" *Morrison* v. *Olson*, 487 U. S. 654, 677 (1988) (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 123 (1976) *(per curiam)*). These restrictions on judicial activities "help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches." 487 U. S., at 678; see also *Mistretta* v. *United States*, 488 U. S., at 385.

[34] We have long held that the federal courts may not resolve such matters. See, *e. g., Luther* v. *Borden*, 7 How. 1 (1849). As we explained in *Nixon* v. *United States*, 506 U. S. 224 (1993): "A controversy is nonjusticiable—*i. e.*, involves a political question—where there is a 'textually demon-

Of course the lines between the powers of the three branches are not always neatly defined. See *Mistretta* v. *United States*, 488 U. S. 361, 380–381 (1989).[35] But in this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as "executive." Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies. Whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch. The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that—as a byproduct of an otherwise traditional exercise of judicial power—burdens will be placed on the President that will hamper the performance of his official duties. We have recognized that "[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving* v. *United States*, 517 U. S. 748, 757 (1996); see also *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977). As a factual matter, petitioner contends that this particular case—as well as the potential

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strable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .' *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. See *ibid.; Powell* v. *McCormack*, 395 U. S. 486, 519 (1969)." *Id.*, at 228.

[35] See also *Olson*, 487 U. S., at 693–694; *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977); *United States* v. *Nixon*, 418 U. S. 683, 707 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring).

additional litigation that an affirmance of the Court of Appeals judgment might spawn—may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office.

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions.[36] See *supra*, at 692. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. "[O]ur . . . system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" *Mistretta*, 488 U. S., at 381 (quoting *Buck-*

[36] In *Fitzgerald*, we were able to discount the lack of historical support for the proposition that official-capacity actions against the President posed a serious threat to the office on the ground that a right to sue federal officials for damages as a result of constitutional violations had only recently been recognized. See 457 U. S., at 753, n. 33; *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The situation with respect to suits against the President for actions taken in his private capacity is quite different because such suits may be grounded on legal theories that have always been applicable to any potential defendant. Moreover, because the President has contact with far fewer people in his private life than in his official capacity, the class of potential plaintiffs is considerably smaller and the risk of litigation less intense.

ley, 424 U. S., at 121). As Madison explained, separation of powers does not mean that the branches "ought to have no *partial agency* in, or no *controul* over the acts of each other."[37] The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law. Our holding was an application of the principle established in *Marbury* v. *Madison*, 1 Cranch 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a subpoena *duces tecum* could be directed

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[37] The Federalist No. 47, pp. 325–326 (J. Cooke ed. 1961) (emphasis in original). See *Mistretta*, 488 U. S., at 381; *Nixon* v. *Administrator of General Services*, 433 U. S., at 442, n. 5.

to the President. *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807).[38] We unequivocally and emphatically endorsed Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. *United States* v. *Nixon*, 418 U. S. 683 (1974). As we explained, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.*, at 706.[39]

Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty. President Monroe responded to written interrogatories, see Rotunda, Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote, 1975 U. Ill. L. Forum 1, 5–6, President Nixon—as noted above—produced tapes in response to a subpoena

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[38] After the decision was rendered, Jefferson expressed his distress in a letter to a prosecutor at the trial, noting that "[t]he Constitution enjoins [the President's] constant agency in the concerns of 6. millions of people." 10 Works of Thomas Jefferson 404, n. (P. Ford ed. 1905). He asked: "Is the law paramount to this, which calls on him on behalf of a single one?" *Ibid.;* see also *Fitzgerald*, 457 U. S., at 751–752, n. 31 (quoting Jefferson's comments at length). For Chief Justice Marshall, the answer—quite plainly—was yes.

[39] Of course, it does not follow that a court may "'proceed against the president as against an ordinary individual,'" *United States* v. *Nixon*, 418 U. S., at 715 (quoting *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807)). Special caution is appropriate if the materials or testimony sought by the court relate to a President's official activities, with respect to which "[t]he interest in preserving confidentiality is weighty indeed and entitled to great respect." 418 U. S., at 712. We have made clear that in a criminal case the powerful interest in the "fair administration of criminal justice" requires that the evidence be given under appropriate circumstances lest the "very integrity of the judicial system" be eroded. *Id.*, at 709, 711–712.

duces tecum, see *United States* v. *Nixon*, President Ford complied with an order to give a deposition in a criminal trial, *United States* v. *Fromme*, 405 F. Supp. 578 (ED Cal. 1975), and President Clinton has twice given videotaped testimony in criminal proceedings, see *United States* v. *McDougal*, 934 F. Supp. 296 (ED Ark. 1996); *United States* v. *Branscum*, No. LRP–CR–96–49 (ED Ark., June 7, 1996). Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony. President Grant gave a lengthy deposition in a criminal case under such circumstances, 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 7.1 (2d ed. 1992), and President Carter similarly gave videotaped testimony for use at a criminal trial, *id.*, § 7.1(b) (Supp. 1997).

In sum, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Fitzgerald*, 457 U. S., at 753–754. If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere byproduct of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions.[40] We therefore hold that the doctrine of separation of powers does not

[40] There is, no doubt, some truth to Learned Hand's comment that a lawsuit should be "dread[ed] . . . beyond almost anything else short of sickness and death." 3 Association of the Bar of the City of New York, Lectures on Legal Topics 105 (1926). We recognize that a President, like any other official or private citizen, may become distracted or preoccupied by pending litigation. Presidents and other officials face a variety of demands on their time, however, some private, some political, and some as a result of official duty. While such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional separation-of-powers concerns.

require federal courts to stay all private actions against the President until he leaves office.

The reasons for rejecting such a categorical rule apply as well to a rule that would require a stay "in all but the most exceptional cases." Brief for Petitioner i. Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the "exceptional case" subcategory. In all events, the question whether a specific case should receive exceptional treatment is more appropriately the subject of the exercise of judicial discretion than an interpretation of the Constitution. Accordingly, we turn to the question whether the District Court's decision to stay the trial until after petitioner leaves office was an abuse of discretion.

VII

The Court of Appeals described the District Court's discretionary decision to stay the trial as the "functional equivalent" of a grant of temporary immunity. 72 F. 3d, at 1361, n. 9. Concluding that petitioner was not constitutionally entitled to such an immunity, the court held that it was error to grant the stay. *Ibid.* Although we ultimately conclude that the stay should not have been granted, we think the issue is more difficult than the opinion of the Court of Appeals suggests.

Strictly speaking the stay was not the functional equivalent of the constitutional immunity that petitioner claimed, because the District Court ordered discovery to proceed. Moreover, a stay of either the trial or discovery might be justified by considerations that do not require the recognition of any constitutional immunity. The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket. See, *e. g.*, *Landis* v. *North*

American Co., 299 U. S. 248, 254 (1936). As we have explained, "[e]specially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id.*, at 256. Although we have rejected the argument that the potential burdens on the President violate separation-of-powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.[41]

Nevertheless, we are persuaded that it was an abuse of discretion for the District Court to defer the trial until after the President leaves office. Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the statutory limitations period—albeit near the end of that period—and delaying trial would increase the danger of

[41] Although these claims are in fact analytically distinct, the District Court does not appear to have drawn that distinction. Rather than basing its decision on particular factual findings that might have buttressed an exercise of discretion, the District Court instead suggested that a discretionary stay was supported by the *legal conclusion* that such a stay was required by *Fitzgerald*. See 869 F. Supp., at 699. We therefore reject petitioner's argument that we lack jurisdiction over respondent's cross-appeal from the District Court's alternative holding that its decision was "also permitted," *inter alia*, "under the equity powers of the Court." *Ibid.* The Court of Appeals correctly found that pendent appellate jurisdiction over this issue was proper. See 72 F. 3d, at 1357, n. 4. The District Court's legal ruling that the President was protected by a temporary immunity from trial—but not discovery—was "inextricably intertwined," *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 51 (1995), with its suggestion that a discretionary stay having the same effect might be proper; indeed, "review of the [latter] decision [is] necessary to ensure meaningful review of the [former]," *ibid.*

prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.

The decision to postpone the trial was, furthermore, premature. The proponent of a stay bears the burden of establishing its need. *Id.*, at 255. In this case, at the stage at which the District Court made its ruling, there was no way to assess whether a stay of trial after the completion of discovery would be warranted. Other than the fact that a trial may consume some of the President's time and attention, there is nothing in the record to enable a judge to assess the potential harm that may ensue from scheduling the trial promptly after discovery is concluded. We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But no such impingement upon the President's conduct of his office was shown here.

VIII

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. See Fed. Rules Civ. Proc. 12, 56. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political

gain or harassment.[42] History indicates that the likelihood that a significant number of such cases will be filed is remote. Although scheduling problems may arise, there is no reason to assume that the district courts will be either unable to accommodate the President's needs or unfaithful to the tradition—especially in matters involving national security—of giving "the utmost deference to Presidential responsibilities."[43] Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. See *supra*, at 704–705. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. As petitioner notes in his brief, Congress has enacted more than one statute providing for the deferral of civil litigation to accommodate important public interests. Brief for Petitioner 34–36. See, *e. g.*, 11 U. S. C. § 362 (litigation against debtor stayed upon filing of bankruptcy petition); Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. App. §§ 501–525 (provisions governing, *inter alia*, tolling or stay of civil claims by or against military personnel during course of active duty). If the Constitution embodied the rule that

[42] See, *e. g.*, Fed. Rule Civ. Proc. 11; 28 U. S. C. § 1927; *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 50 (1991) (noting that "if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power" in imposing appropriate sanctions). Those sanctions may be set at a level "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. Rule Civ. Proc. 11(c)(2). As Rule 11 indicates, sanctions may be appropriate where a claim is "presented for any improper purpose, such as to harass," including any claim based on "allegations and other factual contentions [lacking] evidentiary support" or unlikely to prove well-grounded after reasonable investigation. Rules 11(b)(1), (3).

[43] *United States* v. *Nixon*, 418 U. S., at 710–711; see also *Fitzgerald*, 457 U. S., at 753 ("Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint").

the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.

The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BREYER, concurring in the judgment.

I agree with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct. Nor does the "doctrine of separation of powers . . . require federal courts to stay" virtually "all private actions against the President until he leaves office." *Ante,* at 705–706. Rather, as the Court of Appeals stated, the President cannot simply rest upon the claim that a private civil lawsuit for damages will "interfere with the constitutionally assigned duties of the Executive Branch . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit." 72 F. 3d 1354, 1361 (CA8 1996). To obtain a postponement the President must "bea[r] the burden of establishing its need." *Ante,* at 708.

In my view, however, once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes. At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle—a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties. I have no doubt that the Constitution contains such a principle applicable to civil suits, based upon Article II's vesting of the entire "executive Power" in a single individual, implemented through the Con-

stitution's structural separation of powers, and revealed both by history and case precedent.

I recognize that this case does not require us now to apply the principle specifically, thereby delineating its contours; nor need we now decide whether lower courts are to apply it directly or categorically through the use of presumptions or rules of administration. Yet I fear that to disregard it now may appear to deny it. I also fear that the majority's description of the relevant precedents de-emphasizes the extent to which they support a principle of the President's independent authority to control his own time and energy, see, *e. g.*, *ante*, at 693, 694 (describing the "central concern" of *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), as "to avoid rendering the President 'unduly cautious' "); *ante*, at 695, 696, and n. 23 (describing statements by Story, Jefferson, Adams, and Ellsworth as providing "little" or "no substantial support" for the President's position). Further, if the majority is wrong in predicting the future infrequency of private civil litigation against sitting Presidents, *ante*, at 702, acknowledgment and future delineation of the constitutional principle will prove a practically necessary institutional safeguard. For these reasons, I think it important to explain how the Constitution's text, history, and precedent support this principle of judicial noninterference with Presidential functions in ordinary civil damages actions.

I

The Constitution states that the "executive Power shall be vested in a President." Art. II, § 1. This constitutional delegation means that a sitting President is unusually busy, that his activities have an unusually important impact upon the lives of others, and that his conduct embodies an authority bestowed by the entire American electorate. He (along with his constitutionally subordinate Vice President) is the only official for whom the entire Nation votes, and is the only elected officer to represent the entire Nation both domestically and abroad.

This constitutional delegation means still more. Article II makes a single President responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch, or the entire Judiciary for those of the Judicial Branch. It thereby creates a constitutional equivalence between a single President, on the one hand, and many legislators, or judges, on the other.

The Founders created this equivalence by consciously deciding to vest Executive authority in one person rather than several. They did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many. Compare U. S. Const., Art. II, § 1 (vesting power in "a President"), with U. S. Const., Art. I, § 1 (vesting power in "a Congress" that "consist[s] of a Senate and House of Representatives"), and U. S. Const., Art. III, § 1 (vesting power in a "supreme Court" and "inferior Courts").

The authority explaining the nature and importance of this decision is legion. See, *e. g.*, J. Locke, Second Treatise of Civil Government § 144 (J. Gough ed. 1947) (desirability of a perpetual Executive); 1 W. Blackstone, Commentaries *242–*243 (need for single Executive); The Federalist No. 70, p. 423 (C. Rossiter ed. 1961) (A. Hamilton) (Executive "[e]nergy" needed for security, "steady administration of the laws," "protection of property," "justice," and protection of "liberty"); Ellsworth, The Landholder, VI, in Essays on the Constitution 161, 163 (P. Ford ed. 1892) ("supreme executive should be one person, and unfettered otherwise than by the laws he is to execute"); *Morrison* v. *Olson*, 487 U. S. 654, 698–699 (1988) (SCALIA, J., dissenting) (describing history); *id.*, at 705 (describing textual basis); *id.*, at 729 (describing

policy arguments). See also The Federalist No. 71, at 431 (A. Hamilton); P. Kurland, Watergate and the Constitution 135 (1978) (President is "sole indispensable man in government" and "should not be called" from his duties "at the instance of any other . . . branch of government"); Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 37–47 (1995). Cf. T. Roosevelt, An Autobiography 372 (1913).

For present purposes, this constitutional structure means that the President is not like Congress, for Congress can function as if it were whole, even when up to half of its members are absent, see U. S. Const., Art. I, § 5, cl. 1. It means that the President is not like the Judiciary, for judges often can designate other judges, *e. g.*, from other judicial circuits, to sit even should an entire court be detained by personal litigation. It means that, unlike Congress, which is regularly out of session, U. S. Const., Art. I, §§ 4, 5, 7, the President never adjourns.

More importantly, these constitutional objectives explain why a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it. And the related constitutional equivalence between President, Congress, and the Judiciary means that judicial scheduling orders in a private civil case must not only take reasonable account of, say, a particularly busy schedule, or a job on which others critically depend, or an underlying electoral mandate. They must also reflect the fact that interference with a President's ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entirety of Congress, or the Judicial Branch, to carry out its public obligations.

II

The leading case regarding Presidential immunity from suit is *Nixon* v. *Fitzgerald*. Before discussing *Fitzgerald*, it is helpful to understand the historical precedent on which it

relies. While later events have called into question some of the more extreme views on Presidential immunity, the essence of the constitutional principle remains true today. The historical sources, while not in themselves fully determinative, in conjunction with this Court's precedent inform my judgment that the Constitution protects the President from judicial orders in private civil cases to the extent that those orders could significantly interfere with his efforts to carry out his ongoing public responsibilities.

A

Three of the historical sources this Court cited in *Fitzgerald*, 457 U. S., at 749, 750–752, n. 31—a commentary by Joseph Story, an argument attributed to John Adams and Oliver Ellsworth, and a letter written by Thomas Jefferson—each make clear that this is so.

First, Joseph Story wrote in his Commentaries:

> "There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among those, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; *and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.*" 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1833) (emphasis added), quoted in *Fitzgerald*, *supra*, at 749.

As interpreted by this Court in *Nixon* v. *Fitzgerald*, the words "for this purpose" would seem to refer to the President's need for "official inviolability" in order to "perform" the duties of his office without "obstruction or impediment." As so read, Story's commentary does not explicitly define the

contours of "official inviolability." But it does suggest that the "inviolability" is timebound ("while . . . in the discharge of the duties of his office"); that it applies in private lawsuits (for it attaches to the President's "person" in "civil cases"); and that it is functional ("necessarily implied from the nature of the [President's] functions").

Since *Fitzgerald* did not involve a physical constraint, the Court's reliance upon Justice Story's commentary makes clear, in the Court's view, that the commentary does not limit the scope of "inviolability" to an immunity from a physical imprisonment, physical detention, or physical "arrest"—a now abandoned procedure that permitted the arrest of certain civil case defendants (*e. g.*, those threatened by bankruptcy) during a civil proceeding.

I would therefore read Story's commentary to mean what it says, namely, that Article II implicitly grants an "official inviolability" to the President "while he is in the discharge of the duties of his office," and that this inviolability must be broad enough to permit him "to perform" his official duties without "obstruction or impediment." As this Court has previously held, the Constitution may grant this kind of protection implicitly; it need not do so explicitly. See *Fitzgerald*, *supra*, at 750, n. 31; *United States* v. *Nixon*, 418 U. S. 683, 705–706, n. 16 (1974); cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 406 (1819).

Second, during the first Congress, then-Vice President John Adams and then-Senator Oliver Ellsworth expressed a view of an applicable immunity far broader than any currently asserted. Speaking of a sitting President, they said that the "'President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.'" 457 U. S., at 751, n. 31 (quoting Journal of William Maclay 167 (E. Maclay ed. 1890) (Sept. 26 journal entry reporting exchange between Sen. Maclay, Adams, and Ellsworth)). They

included in their claim a kind of immunity from criminal, as well as civil, process. They responded to a counterargument—that the President "was not above the laws," and would have to be arrested if guilty of crimes—by stating that the President would first have to be impeached, and could then be prosecuted. 9 Documentary History of First Federal Congress of United States 168 (K. Bowling & H. Veit eds. 1988) (Diary of William Maclay). This Court's rejection of Adams' and Ellsworth's views in the context of criminal proceedings, see *ante,* at 703–704, does not deprive those views of authority here. See *Fitzgerald*, *supra*, at 751–752, n. 31. Nor does the fact that Senator William Maclay, who reported the views of Adams and Ellsworth, "went on to point out in his diary that he virulently disagreed with them." *Ante,* at 696, n. 23. Maclay, unlike Adams and Ellsworth, was not an important political figure at the time of the constitutional debates. See Diary of William Maclay xi–xiii.

Third, in 1807, a sitting President, Thomas Jefferson, during a dispute about whether the federal courts could subpoena his presence in a criminal case, wrote the following to United States Attorney George Hay:

> "The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?" 10 Works of Thomas Jefferson 404, n. (P. Ford ed. 1905) (letter of June 20, 1807, from President Thomas Jefferson to United States Attorney George Hay), quoted in *Fitzgerald*, *supra*, at 751, n. 31.

Three days earlier Jefferson had written to the same correspondent:

> "To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function. It could not then mean that it should be withdrawn from its station by any co-ordinate authority." 10 Works of Thomas Jefferson, at 401 (letter of June 17, 1807, from Thomas Jefferson to George Hay).

Jefferson, like Adams and Ellsworth, argued strongly for an immunity from both criminal and civil judicial process—an immunity greater in scope than any immunity, or any special scheduling factor, now at issue in the civil case before us. The significance of his views for present purposes lies in his conviction that the Constitution protected a sitting President from litigation that would "withdraw" a President from his current "constitutional duties." That concern may not have applied to Mr. Fitzgerald's 1982 case against a *former* President, but it is at issue in the current litigation.

Precedent that suggests to the contrary—that the Constitution does *not* offer a sitting President significant protections from potentially distracting civil litigation—consists of the following: (1) In several instances sitting Presidents have given depositions or testified at criminal trials, and (2) this Court has twice authorized the enforcement of subpoenas seeking documents from a sitting President for use in a criminal case.

I agree with the majority that these precedents reject any absolute Presidential immunity from all court process. But they do not cast doubt upon Justice Story's basic conclusion that "in civil cases," a sitting President "possess[es] an official inviolability" as necessary to permit him to "perform" the duties of his office without "obstruction or impediment."

The first set of precedents tells us little about what the Constitution commands, for they amount to voluntary actions on the part of a sitting President. The second set of precedents amounts to a search for documents, rather than a direct call upon Presidential time. More important, both sets of precedents involve *criminal* proceedings in which the President participated as a witness. Criminal proceedings, unlike private civil proceedings, are public acts initiated and controlled by the Executive Branch; see *United States* v. *Nixon*, 418 U. S., at 693–696; they are not normally subject to postponement, see U. S. Const., Amdt. 6; and ordinarily they put at risk, not a private citizen's hope for monetary compensation, but a private citizen's freedom from enforced confinement, 418 U. S., at 711–712, and n. 19; *Fitzgerald*, 457 U. S., at 754, n. 37. See also *id.*, at 758, n. 41. Nor is it normally possible in a criminal case, unlike many civil cases, to provide the plaintiff with interest to compensate for scheduling delay. See, *e. g.*, *Winter* v. *Cerro Gordo County Conservation Bd.*, 925 F. 2d 1069, 1073 (CA8 1991); *Foley* v. *Lowell*, 948 F. 2d 10, 17–18 (CA1 1991); *Wooten* v. *McClendon*, 272 Ark. 61, 62–63, 612 S. W. 2d 105, 106 (1981).

The remaining precedent to which the majority refers does not seem relevant in this case. That precedent, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585 (1952), concerns *official* action. And any Presidential time spent dealing with, or action taken in response to, that kind of case *is* part of a President's official duties. Hence court review in such circumstances could not interfere with, or distract from, official duties. Insofar as a court orders a President, in any such a proceeding, to act or to refrain from action, it defines, or determines, or clarifies the legal scope of an official duty. By definition (if the order itself is lawful), it cannot impede, or obstruct, or interfere with the President's basic task—the lawful exercise of his Executive authority. Indeed, if constitutional principles counsel caution when judges consider an order that directly requires the President properly

to carry out his official duties, see *Franklin* v. *Massachusetts*, 505 U. S. 788, 827 (1992) (SCALIA, J., concurring in part and concurring in judgment) (describing the "apparently unbroken historical tradition . . . implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular Executive acts); *id.*, at 802–803 (plurality opinion of O'CONNOR, J.), so much the more must those principles counsel caution when such an order threatens to *interfere* with the President's properly carrying out those duties.

B

Case law, particularly, *Nixon* v. *Fitzgerald*, strongly supports the principle that judges hearing a private civil damages action against a sitting President may not issue orders that could significantly distract a President from his official duties. In *Fitzgerald*, the Court held that former President Nixon was absolutely immune from civil damages lawsuits based upon any conduct within the "outer perimeter" of his official responsibilities. 457 U. S., at 756. The holding rested upon six determinations that are relevant here.

First, the Court found that the Constitution assigns the President *singularly* important duties (thus warranting an "absolute," rather than a "qualified," immunity). *Id.*, at 750–751. Second, the Court held that "recognition of immunity" does not require a "specific textual basis" in the Constitution. *Id.*, at 750, n. 31. Third, although physical constraint of the President was not at issue, the Court nevertheless considered Justice Story's constitutional analysis, discussed *supra*, at 714–715, "persuasive." 457 U. S., at 749. Fourth, the Court distinguished contrary precedent on the ground that it involved criminal, not civil, proceedings. *Id.*, at 754, and n. 37. Fifth, the Court's concerns encompassed the fact that "the sheer prominence of the President's office" could make him "an easily identifiable target for suits for civil damages." *Id.*, at 752–753. Sixth, and most important, the Court rested its conclusion in important part upon

the fact that civil lawsuits "could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.*, at 753.

The majority argues that this critical, last-mentioned, feature of the case is dicta. *Ante*, at 694, n. 19. In the majority's view, since the defendant was a *former* President, the lawsuit could not have *distracted* him from his official duties; hence the case must rest entirely upon an alternative concern, namely, that a President's fear of civil lawsuits based upon his official duties could *distort* his official decisionmaking. The majority, however, overlooks the fact that *Fitzgerald* set forth a single immunity (an absolute immunity) applicable *both* to sitting *and* former Presidents. Its reasoning focused upon both. Its key paragraph, explaining why the President enjoys an absolute immunity rather than a qualified immunity, contains seven sentences, four of which focus primarily upon time and energy *distraction* and three of which focus primarily upon official decision *distortion.* Indeed, that key paragraph begins by stating:

> "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U. S., at 751.

Moreover, the Court, in numerous other cases, has found the problem of time and energy distraction a critically important consideration militating in favor of a grant of immunity. See, *e. g.*, *Harlow* v. *Fitzgerald*, 457 U. S. 800, 817–818 (1982) (qualified immunity for Presidential assistants based in part on "costs of trial" and "burdens of broad-reaching discovery" that are "peculiarly disruptive of effective government"); *Imbler* v. *Pachtman*, 424 U. S. 409, 423 (1976) (absolute immunity of prosecutors based in part upon concern about "deflection of the prosecutor's energies from his public duties"); *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951) (absolute im-

munity for legislators avoids danger they will "be subjected to the cost and inconvenience and distractions of a trial"). Indeed, cases that provide public officials, not with immunity, but with special protective procedures such as interlocutory appeals, rest *entirely* upon a "time and energy distraction" rationale. See *Behrens* v. *Pelletier*, 516 U. S. 299, 306, 308 (1996) ("[G]overnment official['s] right . . . to avoid standing trial [and] to avoid the burdens of such *pretrial* matters as discovery" are sufficient to support an immediate appeal from "denial of a claim of qualified immunity" (citations and internal quotation marks omitted)); *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985) ("[E]ntitlement not to stand trial or face the other burdens of litigation . . . is effectively lost if a case is erroneously permitted to go to trial" (citing *Harlow*, *supra*, at 818)).

It is not surprising that the Court's immunity-related case law should rely on *both* distraction and distortion, for the ultimate rationale underlying those cases embodies both concerns. See *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967) (absolute judicial immunity is needed because of "burden" of litigation, which leads to "intimidation"); *Bradley* v. *Fisher*, 13 Wall. 335, 349 (1872) (without absolute immunity a judge's "office [would] be degraded and his usefulness destroyed," and he would be forced to shoulder "burden" of keeping full records for use in defending against suits). The cases ultimately turn on an assessment of the threat that a civil damages lawsuit poses to a public official's ability to perform his job properly. And, whether they provide an absolute immunity, a qualified immunity, or merely a special procedure, they ultimately balance consequent potential public harm against private need. Distraction and distortion are equally important ingredients of that potential public harm. Indeed, a lawsuit that significantly distracts an official from his public duties can distort the content of a public decision just as can a threat of potential future liability. If the latter concern can justify an "absolute" immunity in the case of a Pres-

ident no longer in office, where distraction is no longer a consideration, so can the former justify, not immunity, but a postponement, in the case of a sitting President.

III

The majority points to the fact that private plaintiffs have brought civil damages lawsuits against a sitting President only three times in our Nation's history; and it relies upon the threat of sanctions to discourage, and "the court's discretion" to manage, such actions so that "interference with the President's duties would not occur." *Ante*, at 708. I am less sanguine. Since 1960, when the last such suit was filed, the number of civil lawsuits filed annually in Federal District Courts has increased from under 60,000 to about 240,000, see Administrative Office of the United States Courts, Statistical Tables for the Federal Judiciary 27 (1995); Annual Report of the Director of the Administrative Office of the United States Courts—1960, p. 224 (1961); the number of federal district judges has increased from 233 to about 650, see Administrative Office of United States Courts, Judicial Business of United States Courts 7 (1994); Annual Report of the Director of the Administrative Office of the United States Courts—1960, *supra*, at 205; the time and expense associated with both discovery and trial have increased, see, *e. g.*, Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush To Reform, 27 Ga. L. Rev. 1, 9–11 (1992); see also S. Rep. No. 101–416, p. 1 (1990); Judicial Improvements Act of 1990, Pub. L. 101–650, 104 Stat. 5089; an increasingly complex economy has led to increasingly complex sets of statutes, rules, and regulations that often create potential liability, with or without fault. And this Court has now made clear that such lawsuits may proceed against a sitting President. The consequence, as the Court warned in *Fitzgerald*, is that a sitting President, given "the visibility of his office," could well become "an easily identifiable target for suits for civil damages," 457 U. S., at 753. The threat of sanctions

could well discourage much unneeded litigation, *ante,* at 708–709, but some lawsuits (including highly intricate and complicated ones) could resist ready evaluation and disposition; and individual district court procedural rulings could pose a significant threat to the President's official functions.

I concede the possibility that district courts, supervised by the Courts of Appeals and perhaps this Court, might prove able to manage private civil damages actions against sitting Presidents without significantly interfering with the discharge of Presidential duties—at least if they manage those actions with the constitutional problem in mind. Nonetheless, predicting the future is difficult, and I am skeptical. Should the majority's optimism turn out to be misplaced, then, in my view, courts will have to develop administrative rules applicable to such cases (including postponement rules of the sort at issue in this case) in order to implement the basic constitutional directive. A Constitution that separates powers in order to prevent one branch of Government from significantly threatening the workings of another could not grant a single judge more than a very limited power to second-guess a President's reasonable determination (announced in open court) of his scheduling needs, nor could it permit the issuance of a trial scheduling order that would significantly interfere with the President's discharge of his duties—in a private civil damages action the trial of which might be postponed without the plaintiff suffering enormous harm. As Madison pointed out in The Federalist No. 51: "The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. *The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.*" *Id.*, at 321–322 (emphasis added). I agree with the majority's determination that a constitutional defense must await a more specific showing of need; I do not agree with what I

believe to be an understatement of the "danger." And I believe that ordinary case-management principles are unlikely to prove sufficient to deal with private civil lawsuits for damages unless supplemented with a constitutionally based requirement that district courts schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities.

IV

This case is a private action for civil damages in which, as the District Court here found, it is possible to preserve evidence and in which later payment of interest can compensate for delay. The District Court in this case determined that the Constitution required the postponement of trial during the sitting President's term. It may well be that the trial of this case cannot take place without significantly interfering with the President's ability to carry out his official duties. Yet, I agree with the majority that there is no automatic temporary immunity and that the President should have to provide the District Court with a reasoned explanation of why the immunity is needed; and I also agree that, in the absence of that explanation, the court's postponement of the trial date was premature. For those reasons, I concur in the result.

Syllabus

SUITUM *v.* TAHOE REGIONAL PLANNING AGENCY

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

No. 96–243. Argued February 26, 1997—Decided May 27, 1997

Petitioner Suitum owns an undeveloped lot near Lake Tahoe. Respondent Tahoe Regional Planning Agency determined that the lot is ineligible for development under agency regulations, but that Suitum is entitled to receive certain allegedly valuable "Transferable Development Rights" (TDR's) that she can sell to other landowners with the agency's approval. Suitum did not seek those rights, but instead brought this action for compensation under 42 U. S. C. § 1983, claiming that the agency's determinations amounted to a regulatory taking of her property without just compensation in violation of the Fifth and Fourteenth Amendments. The District Court held that her claim is not ripe for adjudication because she has not attempted to sell her TDR's, so that their specific values are unknown and the court could not realistically assess whether the agency's regulations have frustrated her reasonable expectations. The Ninth Circuit agreed and affirmed, reasoning, *inter alia*, that action on a TDR transfer application would be the requisite "final decision" by the agency regarding its regulations' application to Suitum's lot.

Held: Suitum's regulatory takings claim is ripe for adjudication. Pp. 733–744.

(a) Suitum must satisfy the prudential ripeness principle requiring that she receive a "final decision" from the agency regarding the application of its regulations to her property. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 186. Pp. 733–734.

(b) The Ninth Circuit's rationale for holding Suitum's claim unripe—that she had failed to obtain a final and authoritative agency decision—is unsupported by this Court's precedents. See, *e. g.*, *Williamson County*, *supra*, at 191, 193; *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 349. These precedents make two points clear about the finality requirement: it applies to decisions about how a takings plaintiff's particular parcel may be used, see, *e. g.*, *Williamson County*, *supra*, at 191, and it responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer, see, *e. g.*, *MacDonald*, *supra*, at 350. Suitum's claim satisfies the demand for finality. It is

undisputed that the agency has finally determined that her land lies entirely within a zone in which development is not permitted. Because the agency has no discretion to exercise over her right to use her land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on the particular parcel. Although the parties contest the relevance of the TDR's to the question whether a taking has occurred, resolution of that legal issue will require no further agency action of the sort demanded by *Williamson County*. Pp. 735–739.

(c) Contrary to the lower courts' holdings, action on a possible application by Suitum to transfer her TDR's is not the type of "final decision" required by the Court's *Williamson County* precedents. Although those precedents dealt with land, not TDR's, such a decision might be required, given the agency's position that TDR's should be considered when determining whether a taking has occurred, if there were any question here whether Suitum would obtain a discretionary award of salable TDR's. No such question is presented, however, since the parties agree on the particular TDR's to which Suitum is entitled, and no discretionary decision must be made by any agency official for her to obtain them or to offer them for sale. Pp. 739–740.

(d) The agency's argument that Suitum's case is not ripe because no values attributable to her TDR's are known is just a variation on the preceding position, and fares no better. First, as to her rights to receive TDR's that she may later sell, little or no uncertainty remains. Second, as to her right to transfer her TDR's, the only contingency apart from private market demand turns on the right of the agency or a local regulatory body to deny approval for a specific transfer based on the buyer's intended improper use of the TDR's. However, because the agency does not deny that there are many potential lawful buyers whose receipt of the TDR's would unquestionably be approved, the TDRs' valuation is simply an issue of fact about possible market prices, on which the District Court had considerable evidence. Similar determinations are routinely made by courts without the benefit of a market transaction in the subject property. Pp. 740–742.

(e) The agency's argument that Suitum's claim is unripe under the "fitness for review" requirement of *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148–149, is rejected. *Abbott Laboratories* is not on point because the petitioners there were challenging the validity of a regulation as beyond the scope of its issuing agency's authority, whereas Suitum seeks not to invalidate the regulations here at issue, but to be paid for their consequences. Indeed, to the extent that *Abbott Laboratories* is in any sense instructive in the disposition of this case, it cuts directly against the agency: Suitum is just as definitively barred from taking any

Syllabus

affirmative step to develop her land as the petitioners there, who prevailed against the contention that their claim was unripe, were bound to take affirmative steps to comply with the regulations they were challenging. Pp. 742–744.

80 F. 3d 359, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, GINSBURG, and BREYER, JJ., joined, and in which O'CONNOR, SCALIA, and THOMAS, JJ., joined except as to Parts II–B and II–C. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 745.

R. S. Radford argued the cause for petitioner. With him on the briefs were *Robin L. Rivett*, *Victor J. Wolski*, and *William Patterson Cashill*.

Richard J. Lazarus argued the cause for respondent. With him on the brief were *J. Peter Byrne*, *J. Thomas Susich*, *Vicki E. Hartigan*, *Rachelle J. Nicolle*, and *Susan E. Scholley*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Schiffer*, *Anne S. Almy*, and *John A. Bryson*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *Timothy S. Bishop*, *Michael F. Rosenblum*, *John J. Rademacher*, and *Richard L. Krause;* for the Building Industry Association of Washington by *Richard M. Stephens* and *John M. Groen;* for the Defenders of Property Rights et al. by *Nancie G. Marzulla;* for the Institute of Justice by *William H. Mellor*, *Clint Bolick*, *Scott G. Bullock*, and *Richard A. Epstein;* for the Southeastern Legal Foundation by *Henry D. Granberry III;* for the Tahoe Lakefront Owners' Association by *Ronald A. Zumbrun*, *John H. Findley*, and *Meriem L. Hubbard;* for the Tahoe-Sierra Preservation Council, Inc., by *Lawrence L. Hoffman;* and for the Mayhews et al. by *Charles L. Siemon*.

Briefs of *amici curiae* urging affirmance were filed for the Governor of California et al. by *Michael A. Mantell;* for the State of Nevada et al. by *Frankie Sue Del Papa*, Attorney General of Nevada, and *William J. Frey* and *C. Wayne Howle*, Deputy Attorneys General, and by the Attorneys

JUSTICE SOUTER delivered the opinion of the Court.

Petitioner Bernadine Suitum owns land near the Nevada shore of Lake Tahoe. Respondent Tahoe Regional Planning Agency, which regulates land use in the region, determined that Suitum's property is ineligible for development but entitled to receive certain allegedly valuable "Transferable Development Rights" (TDR's). Suitum has brought an action for compensation under Rev. Stat. § 1979, 42 U. S. C. § 1983, claiming that the agency's determinations amounted to a regulatory taking of her property. While the pleadings raise issues about the significance of the TDR's both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these TDR's may be considered in deciding the issue whether there has been a taking in this case, as opposed to the issue whether just compensation has been afforded for such a taking. The sole question here is whether the claim is ripe for adjudication,

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General for their respective States as follows: *Margery S. Bronster* of Hawaii, *Jeffrey L. Amestoy* of Vermont, *J. Joseph Curran, Jr.*, of Maryland, and *Joseph P. Mazurek* of Montana; for the State of New Jersey by *Peter Verniero*, Attorney General, *Mary C. Jacobson*, Assistant Attorney General, and *Rachel J. Horowitz*, Deputy Attorney General; for the State of New York by *Dennis C. Vacco*, Attorney General, *Barbara G. Billett*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *John J. Sipos* and *Lisa M. Burianek*, Assistant Attorneys General; for the City of New York by *Paul A. Crotty*, *Leonard J. Koerner*, *Stephen J. McGrath*, and *Cheryl Payer;* for the League to Save Lake Tahoe by *E. Clement Shute, Jr.*, and *Christy H. Taylor;* for the National League of Cities et al. by *Richard Ruda;* and for the National Trust for Historic Preservation in the United States et al. by *Jerold S. Kayden*, *Louise H. Renne*, *R. Jeffrey Lyman*, and *Elizabeth S. Merritt.*

Briefs of *amici curiae* were filed for the American Planning Association by *Brian W. Blaesser* and *H. Bissell Carey III;* for the Columbia River Gorge Commission by *Lawrence Watters;* for the National Association of Home Builders et al. by *John J. Delaney*, *Lawrence R. Liebesman*, *Mary V. DiCrescenzo*, and *Nick Cammarota;* and for Dr. James Nicholas et al. by *John D. Echeverria.*

even though Suitum has not attempted to sell the development rights she has or is eligible to receive. We hold that it is.

I

In 1969, Congress approved the Tahoe Regional Planning Compact between the States of California and Nevada, creating respondent as an interstate agency to regulate development in the Lake Tahoe basin. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 394 (1979). After the 1969 compact had proven inadequate for protection of the lake and its environment, the States proposed and Congress approved an amendment in 1980, requiring the agency to adopt a plan barring any development exceeding such specific "environmental threshold carrying capacities" as the agency might find appropriate. Pub. L. 96–551, Arts. I(b), V(b), V(g), 94 Stat. 3234, 3239–3241.[1]

In 1987, the agency adopted a new Regional Plan providing for an "Individual Parcel Evaluation System" (IPES) to rate the suitability of vacant residential parcels for building and other modification. Tahoe Regional Planning Agency Code of Ordinances, ch. 37 (TRPA Code). Whereas any property must attain a minimum IPES score to qualify for construction, *id.*, § 37.8.E; App. 145, an undeveloped parcel in certain areas carrying runoff into the watershed (known as "Stream Environment Zones" (SEZ's)) receives an IPES score of zero, TRPA Code § 37.4.A(3). With limited exceptions not relevant here, the agency permits no "additional land coverage or other permanent land disturbance" on such a parcel. *Id.*, § 20.4.

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[1] The 1980 compact defines "[e]nvironmental threshold carrying capacity" as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise." Art. II(i), 94 Stat. 3235.

Although the agency's 1987 plan does not provide for the variances and exceptions of conventional land-use schemes, it addresses the potential sharpness of its restrictions by granting property owners TDR's that may be sold to owners of parcels eligible for construction, *id.*, §§ 20.3.C, 34.0 to 34.3. There are three kinds of residential TDR's. An owner needs both a "Residential Development Right" and a "Residential Allocation" to place a residential unit on a buildable parcel, *id.*, §§ 21.6.C, 33.2.A; the latter permits construction to begin in a specific calendar year, but expires at year's end, *id.*, § 33.2.B(3)(b). An owner must also have "Land Coverage Rights" for each square foot of impermeable cover placed upon land. App. 145; see also TRPA Code, ch. 20. All owners of vacant residential parcels that existed at the effective date of the 1987 plan (July 1, 1987), including SEZ parcels, automatically receive one Residential Development Right, *id.*, § 21.6.A; owners of SEZ property may obtain and transfer bonus points equivalent to three additional Residential Development Rights, *id.*, §§ 35.2.C, 35.2.D. SEZ property owners also receive Land Coverage Rights authorizing coverage of an area equal to 1% of the surface area of their land. *Id.*, §§ 20.3.A, 37.11. Finally, SEZ owners, like other property owners, may apply for a Residential Allocation, awarded by local jurisdictions in random drawings each year.[2] *Id.*, § 33.2.B; App. 98–99. All three kinds of TDR's may be transferred for the benefit of any eligible property in the Lake Tahoe region, subject to approval by the agency based on the eligibility of the receiving parcel for development. TRPA Code §§ 20.3.C, 34.1 to 34.3.

In 1972, Suitum and her late husband bought an undeveloped lot in Washoe County, Nevada, within the agency's jurisdiction, and 17 years later, after adoption of the 1987

[2] Counsel for the agency at oral argument represented that "at this point" there are "fewer applicants than there are allocations" in Washoe County, where petitioner's land is located, and there is thus a "100 percent chance of winning the [drawing]." Tr. of Oral Arg. 39–40.

Regional Plan, Suitum obtained a Residential Allocation through Washoe County's annual drawing. When she then applied to the agency for permission to construct a house on her lot, the agency determined that her property was located within a SEZ, assigned it an IPES score of zero, and denied permission to build. Suitum appealed the denial to the agency's governing board, which itself denied relief.

After the agency turned down the request for a building permit, Suitum made no effort to transfer any of the TDR's that were hers under the 1987 plan, and there is no dispute that she still has the one Residential Development Right that owners of undeveloped lots automatically received, plus the Land Coverage Rights for 183 square feet that she got as the owner of 18,300 square feet of SEZ land. It is also common ground that Suitum has the right to receive three "bonus" Residential Development Rights. Although Suitum has questioned the certainty that she would obtain a new Residential Allocation if she sought one, the agency has represented to this Court that she undoubtably would, see n. 2, *supra.*

Instead, Suitum brought this 42 U. S. C. § 1983 action alleging that in denying her the right to construct a house on her lot, the agency's restrictions deprived her of "all reasonable and economically viable use" of her property, and so amounted to a taking of her property without just compensation in violation of the Fifth and Fourteenth Amendments.[3] App. 15, 16. The agency responded by objecting, among other things, that Suitum's takings claim was not ripe due to her "failure to obtain a final decision by TRPA as to the amount of development . . . that may be allowed by" the agency. *Id.*, at 10. On cross-motions for summary judgment, the District Court ordered supplemental briefing on

[3] Suitum's complaint may have also raised substantive due process and equal protection claims, see App. 16, 153, but her petition for a writ of certiorari did not address those issues and they are not considered here. See n. 6, *infra.*

the nature of Suitum's TDR's, including "what [TDR's] can be transferred in [Suitum's] case and the procedures, prerequisites and value of such transfer as applicable in this case." *Id.*, at 89. The agency introduced an affidavit from a real estate appraiser, whose opinion was that the Residential Development Right that Suitum already has, and the three more to which she is entitled, have a market value between $1,500 and $2,500 each; that her Land Coverage Rights can be sold for $6 to $12 per square foot ($1,098–$2,196 total); and that her lot devoid of all TDR's would sell for $7,125 to $16,750. *Id.*, at 131–132. The appraiser also said that if Suitum were to obtain a Residential Allocation and sell it with a Development Right, together they would bring between $30,000 and $35,000. *Ibid.* As if in spite of the figures supplied by its own affidavit, however, the agency maintained that the "*actual* benefits of the [TDR] program for [Suitum] . . . can only be known if she pursues an appropriate [transfer] application," with the result that Suitum's claim was not ripe for adjudication. *Id.*, at 91. For her part, Suitum insisted that trying to transfer her TDR's would be an "'idle and futile act'" because the TDR program is a "sham,"[4] and she supplied the affidavit of one of the agency's former employees whose view was that "there is little to no value to [Suitum's TDR's] at the present time as . . . either [there is] no market for them or the procedure for transferring one particular right would restrict the opportunity to transfer a remaining right." *Id.*, at 135.[5]

The District Court decided that Suitum's claim was not ripe for consideration because "[a]s things now stand, there

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[4] See Suitum's Response to Defendant's Memorandum Concerning its Transfer of Development Program 1–2.

[5] The District Court disregarded this affidavit, however, because "[t]here [was] no showing that [Suitum's affiant] is an expert . . . as to the valuation of development rights" sufficient to satisfy Federal Rule of Civil Procedure 56(e). No. CV–N–91–040–ECR (D. Nev., Mar. 30, 1994), App. to Pet. for Cert. C–2, n. 1.

is no final decision as to how [Suitum] will be allowed to use her property." No. CV–N–91–040–ECR (D. Nev., Mar. 30, 1994), App. to Pet. for Cert. C–3. Although the court found that "there is significant value in the transfer of [Suitum's TDR's], . . . until [specific] values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent [the agency's] regulations have frustrated [Suitum's] reasonable expectations." *Id.*, at C–3 to C–4.

The Court of Appeals for the Ninth Circuit affirmed this ripeness ruling for the like reason that "[w]ithout an application for the transfer of development rights" there would be no way to "know the regulations' full economic impact or the degree of their interference with [Suitum's] reasonable investment-backed expectations," and without action on a transfer application there would be no " 'final decision from [the agency] regarding the application of the regulation[s] to the property at issue.' "[6] 80 F. 3d 359, 362–363 (1996). We granted certiorari to consider the ripeness of Suitum's takings claim, 519 U. S. 926 (1996), and now reverse.

II

The only issue presented is whether Suitum's claim of a regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under prudential ripeness principles.[7] There are two independent

[6] The court held that "[t]hese ripeness requirements," while developed in the regulatory taking context, "are equally applicable to the due process and equal protection claims." 80 F. 3d, at 362, n. 1. We address only the ripeness requirements for Suitum's takings claim, however, and express no opinion on the ripeness of her other claims.

[7] "We have noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Social Services, Inc.*, 509 U. S. 43, 57, n. 18 (1993). The agency does not question that Suitum properly presents a genuine "case or controversy" sufficient to satisfy Article III, but maintains only that Suitum's action fails to satisfy our prudential ripeness requirements.

prudential hurdles to a regulatory takings claim brought against a state entity in federal court. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), explained that a plaintiff must demonstrate that she has both received a "final decision regarding the application of the [challenged] regulations to the property at issue" from "the government entity charged with implementing the regulations," *id.*, at 186, and sought "compensation through the procedures the State has provided for doing so," *id.*, at 194. The first requirement follows from the principle that only a regulation that "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), results in a taking under the Fifth Amendment, see, *e. g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes"); see also *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014–1019 (1992) (regulation "'goes too far'" and results in a taking "at leas[t] in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted"). The second hurdle stems from the Fifth Amendment's proviso that only takings without "just compensation" infringe that Amendment; "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation," *Williamson County*, *supra*, at 195. Because only the "final decision" prong of *Williamson* was addressed below and briefed before this Court, we confine our discussion here to that issue.[8]

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[8] We therefore do not decide whether *Williamson County*'s "state procedures" requirement has been satisfied in this case. Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court, unless the State does not provide adequate remedies for obtaining compensation. See *Williamson County*, 473 U. S., at 194–196. Suitum's counsel stated at oral argument

A

In holding Suitum's claim to be unripe, the Ninth Circuit agreed with the agency's argument that Suitum had failed to obtain a final and authoritative decision from the agency sufficient to satisfy the first prong of *Williamson County*, *supra*. Although it is unclear whether the agency still urges precisely that position before this Court, see, *e. g.*, Brief for Respondent 21 (conceding that "[w]e know the full extent of the regulation's impact in restricting petitioner's development of her own land"), we think it important to emphasize that the rationale adopted in the decision under review is unsupported by our precedents.

Agins v. *City of Tiburon*, 447 U. S. 255 (1980), is the first case in which this Court employed a notion of ripeness in declining to reach the merits of an as-applied regulatory takings claim.[9] In *Agins*, the landowners who challenged zon-

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that "the position of the Tahoe Regional Planning Agency is that they do not . . . have provisions for paying just compensation," Tr. of Oral Arg. 4, thus suggesting that the agency is not subject to inverse condemnation proceedings, and the agency's counsel did not disagree. Suitum's position therefore appears to be that the sole remedy against the agency for a taking without just compensation is a § 1983 suit for damages, such as she has brought here. Cf. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 911 F. 2d 1331, 1341–1342 (CA9 1990). We leave this matter to the Court of Appeals on remand.

[9] Two years earlier, in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), we reached the merits of Penn Central's claim that the New York City Landmarks Preservation Commission's denial of permission to construct an office building on top of Grand Central Terminal was a taking, despite our observation that

"it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the [City's] actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, . . . [t]he [City has] emphasized that whether any construction would be allowed depended upon whether the proposed addition 'would harmonize in scale, material, and character with [the Termi-

ing ordinances restricting the number of houses they could build on their property sued without seeking approval for any particular development on their land. We held that the only issue justiciable at that point was whether mere enactment of the statute amounted to a taking.[10] *Id.*, at 260. Without employing the term "ripeness," the Court explained that because the owners "ha[d] not submitted a plan for development of their property as the [challenged] ordinances permit[ted], there [was] as yet no concrete controversy regarding the application of the specific zoning provisions." *Ibid.*

The following Term, *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), toughened our nascent ripeness requirement. There, coal producers and landowners challenged the enactment of the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1201 *et seq.*, as a taking of their property. As in *Agins*, we concluded that an as-applied challenge was unripe, reasoning that "[t]here is no indication in the record that appellees ha[d] availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting . . . a variance from the [applicable provisions of the Act]," 452 U. S., at 297.[11] *Hodel* thus held that where the regulatory regime

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nal].' Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal." *Id.*, at 136–137 (citation omitted).

[10] Such "facial" challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an "uphill battle," *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 495 (1987), since it is difficult to demonstrate that "'mere enactment'" of a piece of legislation "deprived [the owner] of economically viable use of [his] property." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 297 (1981). Suitum does not purport to challenge the agency's regulations on their face.

[11] As in *Agins*, we found the *Hodel* plaintiffs' "facial" takings challenge to be ripe, but ruled it out on the merits. 452 U. S., at 295–297.

offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim.

Williamson County Regional Planning Comm'n v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), confirmed *Hodel*'s holding. In *Williamson County*, a developer's plan to build a residential complex was rejected by the local planning commission as inconsistent with zoning ordinances and subdivision regulations in eight different respects. This Court acknowledged that "[r]espondent ha[d] submitted a plan for developing its property, and thus ha[d] passed beyond the *Agins* threshold," 473 U. S., at 187, but nonetheless held the takings challenge unripe, reasoning that "among the factors of particular significance in the [takings] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations," *id.*, at 191, "factors [that] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," *ibid.* Thus, a developer must at least "resort to the procedure for obtaining variances . . . [and obtain] a conclusive determination by the Commission whether it would allow" the proposed development, *id.*, at 193, in order to ripen its takings claim.

MacDonald, Sommer & Frates v. *Yolo County*, 477 U. S. 340 (1986), reaffirmed *Williamson County*'s requirement of a final agency position. In *MacDonald*, a developer purchased property and presented a tentative subdivision plan to the local planning commission. After the commission treated the proposal as inconsistent with the zoning regulations in several respects, the developer immediately filed suit. Without even relying on the character of the dry run in the submission of a merely tentative plan, we emphasized that in the course of litigation two state courts had given opinions that development of the property was possible

under the regulations in question, flatly contrary to the developer's conclusory allegation that the regulations required him to provide a greenbelt as a public gratuity. See 477 U. S., at 345–347. Hence, we held the claim unripe under the rationale of *Williamson County:* "'the effect [of] the Commission's application of the zoning ordinance . . . on the value of respondent's property . . . cannot be measured until a final decision is made as to how the regulations will be applied to [the developer's] property.'" *MacDonald, supra,* at 349 (quoting *Williamson County, supra,* at 199–200).

Leaving aside the question of how definitive a local zoning decision must be to satisfy *Williamson County*'s demand for finality,[12] two points about the requirement are clear: it applies to decisions about how a takings plaintiff's own land may be used, and it responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer. As the Court said in *MacDonald*, "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." 477 U. S., at 350. When such flexibility or discretion may be brought to bear on the permissible use of property as singular as a

[12] *MacDonald* suggested that the *Williamson County* "final decision" requirement might sometimes require multiple proposals or variance applications before a landowner's case will be considered ripe. We wrote, for example, that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." 477 U. S., at 353, n. 9; compare *Williamson County,* 473 U. S., at 191 (applicant must obtain final definitive position on how regulations will be applied to the land in question), with *id.*, at 193 (applicant must obtain conclusive determination whether specific proposed development will be permitted). *Amici* the Mayhews et al. urge us to establish a rule that a takings plaintiff need only make a single proposal and a single request for a variance to ensure the ripeness of his claim. Brief for Mayhews et al. as *Amici Curiae* 22. That issue is not presented in this case.

parcel of land, a sound judgment about what use will be allowed simply cannot be made by asking whether a parcel's characteristics or a proposal's details facially conform to the terms of the general use regulations.

The demand for finality is satisfied by Suitum's claim, however, there being no question here about how the "regulations at issue [apply] to the particular land in question." *Williamson County*, *supra*, at 191. It is undisputed that the agency "has finally determined that petitioner's land lies entirely within an SEZ," Brief for Respondent 21, and that it may therefore permit "[n]o additional land coverage or other permanent land disturbance" on the parcel, TRPA Code § 20.4. Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel. The parties, of course, contest the relevance of the TDR's to the issue of whether a taking has occurred, but resolution of that legal issue will require no further agency action of the sort demanded by *Williamson County*.

B

The agency nonetheless argued below, and the lower courts agreed, see *supra*, at 732–733, that there remains a "final decision" for the agency to make: action on a possible application by Suitum to transfer the TDR's to which she is indisputably entitled. This is not, however, the type of "final decision" required by our *Williamson County* precedents. Those precedents addressed the virtual impossibility of determining what development will be permitted on a particular lot of land when its use is subject to the decision of a regulatory body invested with great discretion, which it has not yet even been asked to exercise. No such question is presented here. The parties agree on the particular TDR's to which Suitum is entitled, and no discretionary decision

must be made by any agency official for her to obtain them or to offer them for sale. The only decision left to the agency is approval of a particular transfer of TDR's to make certain that a given potential buyer may lawfully use them. But whether a particular sale of TDR's may be completed is quite different from whether TDR's are salable; so long as the particular buyer is not the only person who can lawfully buy, the rights would not be rendered unsalable even if the agency were to make a discretionary decision to kill a particular sale. And the class of buyers is not even arguably so limited here, where there is no question so far as the law is concerned that TDR's may be bought and used for the benefit of all sorts of land parcels and lots.

C

The agency's argument that Suitum's case is not ripe because no "'values attributable to [Suitum's TDR's] are known,'" Brief for Respondent 23 (quoting No. CV–N–91–040–ECR (D. Nev., Mar. 30, 1994), App. to Pet. for Cert. C–4, is just a variation on the preceding position, and fares no better. First, as to Suitum's rights to receive TDR's that she may later sell, we have already noted that little or no uncertainty remains. Although the value of a Residential Development Right may well be greater if it is offered together with a Residential Allocation, and although Suitum must still enter the lottery for the latter, there is no discretionary decision to be made in determining whether she will get one; in fact, the probability of her getting one is "100 percent" according to the agency, see Tr. of Oral Arg. 40, since there are fewer applications than available allocations, see *id.*, at 39–40. But even if that were not the case, as it probably will not always be, it would be unreasonable to require Suitum to enter the drawing in order to ripen her suit. The agency does not, and surely could not, maintain that if the odds of success in the allocation lottery were low,

Suitum's takings claim could be kept at bay from year to year until she actually won the drawing; such a rule would allow any local authority to stultify the Fifth Amendment's guarantee. Rather, in such circumstances, the value attributable to the allocation Suitum might or might not receive in the drawing would simply be discounted to reflect the mathematical likelihood of her obtaining one.

Second, as to Suitum's right to transfer her TDR's, the only contingency apart from private market demand turns on the right of the agency to deny approval for a specific transfer on grounds that the buyer's use of the TDR's would violate the terms of the scheme or other local land-use regulation, and the right of a local regulatory body to deny transfer approval for the latter reason. See TRPA Code §§ 20.3.C, 34.2, 34.3. But even if these potential bars based on a buyer's intended use of TDR's should turn out to involve the same degree of discretion assumed in the *Williamson County* ripeness requirement, that discretion still would not render the value of the TDR's nearly as unknowable as the chances of particular development being permitted on a particular parcel in the absence of a zoning board decision that could quite lawfully be either yes or no. While a particular sale is subject to approval, salability is not, and the agency's own position assumes that there are many potential, lawful buyers for Suitum's TDR's, whose receipt of those rights would unquestionably be approved.

The valuation of Suitum's TDR's is therefore simply an issue of fact about possible market prices, and one on which the District Court had considerable evidence before it, see *supra*, at 731–732.[13] Of course, as the agency appears to be saying, see, *e. g.*, Brief for Respondent 22–23, the very best evidence of the value of Suitum's TDR's might be their actual

[13] Moreover, the court may, of course, request additional briefing on this subject if necessary, and a trial could be held if the issue cannot be decided on summary judgment.

selling price (assuming, of course, that the sale were made in good faith and at arm's length). But similar determinations of market value are routinely made in judicial proceedings without the benefit of a market transaction in the subject property. See, *e. g.*, *United States* v. *819.98 Acres of Land, More or Less, Located in Wasatch and Summit Counties*, 78 F. 3d 1468, 1469–1470 (CA10 1996) (upholding valuation of condemned land based on expert testimony relating to comparable sales and discounted cash flow); *United States* v. *L. E. Cooke Co.*, 991 F. 2d 336, 338–339 (CA6 1993) (same with respect to valuation of mineral rights leases); see also 5 J. Sackman, Nichols' Law of Eminent Domain § 23–01, p. 23–6 (rev. 3d ed. 1997) ("[I]t is well established that the value of . . . land taken or injured by the exercise of the power of eminent domain may be shown by opinion evidence"); see generally 4 *id.*, § 12.02 (discussing establishment of market value of condemned land). While it is true that market value may be hard to calculate without a regular trade in TDR's, if Suitum is ready to proceed in spite of this difficulty, ripeness doctrine does not block her. In fact, the reason for the agency's objection is probably a concern that without much market experience in sales of TDR's, their market values will get low estimates. But this is simply one of the risks of regulatory pioneering, and the pioneer here is the agency, not Suitum.

III

Finally, the agency argues (for the first time, before this Court) that Suitum's claim is unripe under the "fitness for review" requirement of *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967). *Abbott Laboratories* arose on a petition under the Administrative Procedure Act (APA), 5 U. S. C. §§ 701–704 (1964 ed., Supp. II), by a group of drug manufacturers seeking review of a labeling regulation promulgated by the Commissioner of Food and Drugs (FDA) but not yet the subject of any enforcement action against the manufacturers. The petitioners claimed that the FDA lacked statu-

tory authority to impose the new labeling requirement; the FDA countered that the claim was not ripe for judicial review for want of any proceedings to enforce the regulation.

The Court dealt with ripeness under a two-pronged test:

> "Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U. S., at 148–149 (footnote omitted).

Under the "fitness for review" prong, we first noted that the FDA's adoption of the labeling regulation was "final agency action" within the meaning of § 10 of the APA, 5 U. S. C. § 704, and then rejected the Government's argument that review must await enforcement. 387 U. S., at 149–152. We reasoned that "the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage" because promulgation of the regulations "puts petitioners in a dilemma": "Either they must comply with the [labeling] requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." *Id.*, at 152 (internal quotation marks omitted). Similarly, the immediate impact of the regulation on the manufacturers satisfied the "hardship" prong: "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious

penalties attached to noncompliance," hardship has been demonstrated and "access to the courts . . . must be permitted." *Id.*, at 153.

Abbott Laboratories is not on point. The drug companies in that case were challenging the validity of a regulation as beyond the scope of the FDA's authority. Whatever the arguable merit of the FDA's position on ripeness may have been, it rested on the fact that the manufacturers could have precipitated their challenge (if they had wanted) by violating the regulation and defending any subsequent prosecution by placing the regulation's validity in question. Suitum is in a different position from the manufacturers. She does not challenge the validity of the agency's regulations; her litigating position assumes that the agency may validly bar her land development just as all agree it has actually done, and her only challenge to the TDR's raises a question about their value, not about the lawfulness of issuing them. Suitum seeks not to be free of the regulations but to be paid for their consequences, and even if for some odd reason she had decided to bring things to a head by building without a permit, a § 1983 action for money would not be a defense to an equity proceeding to enjoin development. Indeed, to the extent that *Abbott Laboratories* is in any sense instructive in the disposition of the case before us, it cuts directly against the agency: Suitum is just as definitively barred from taking any affirmative step to develop her land as the drug companies were bound to take affirmative steps to change their labels. The only discretionary step left to an agency in either situation is enforcement, not determining applicability.

* * *

Because we find that Suitum has received a "final decision" consistent with *Williamson County*'s ripeness requirement, we vacate the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join its opinion except for Parts II–B and II–C. Those sections consider whether the Tahoe Regional Planning Agency (TRPA) must have reached a final decision regarding Suitum's ability to sell her Transferable Development Rights (TDRs), and whether the value of Suitum's TDRs must be known. That discussion presumes that the answers to those questions may be relevant to the issue presented at this preliminary stage of the present case: whether Suitum's takings claim is ripe for judicial review under the "final decision" requirement. In my view they are not relevant to that issue, and the Court's discussion is beside the point.

To describe the nature of the "final decision" inquiry, the Court's opinion quotes only the vague language of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), that there must be a "final decision regarding the application of the [challenged] regulations to the property at issue," *id.*, at 186, quoted *ante*, at 734, and of *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340 (1986), that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes," *id.*, at 348, quoted *ante*, at 734. Unmentioned in the opinion are other, more specific, statements in those very cases (and elsewhere) which display quite clearly that the quoted generalizations (and the "final decision" inquiry) have nothing to do with TDRs. Later in *Williamson County*, for example, we explained that the purpose of the "final decision" requirement was to ensure that the Court can ascertain "how [the takings plaintiff] will be allowed to develop its property," *Williamson County*, *supra*, at 190. And on the very same page from which the Court extracted the vague statement, *MacDonald* says quite precisely that the essential function of the "final decision" re-

quirement is to ensure that there has been a "determination of the type and intensity of development legally permitted on the subject property," *MacDonald*, *supra*, at 348; and says later that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it," 477 U. S., at 351. The Court fails even to mention, in its otherwise encyclopedic description of the development of the "final decision" requirement, the most recent of our opinions addressing the subject, *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992), in which we relied exclusively on these more precise formulations and did not mention the vague language quoted by the Court today, see *id.*, at 1011.

The focus of the "final decision" inquiry is on ascertaining the extent of the governmental restriction on land use, not what the government has given the landowner in exchange for that restriction. When our cases say, as the Court explains *ante*, at 734, that without a "final decision" it is impossible to know whether the regulation "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), they mean "goes too far in restricting the profitable use of the land," not "goes not far enough in providing compensation for restricting the profitable use of the land." The latter pertains not to whether there has been a taking, but to the subsequent question of whether, if so, there has been just compensation.

In all of the cases discussed in Part II–A of the Court's opinion bearing on the question whether a "final decision" requisite to a takings claim had been made, the point at issue was whether the government had finally determined the permissible *use* of the land. In *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), discussed *ante*, at 735–736, the government had not yet determined how many houses the challenged zoning ordinance would permit on the plaintiff's property. In *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*,

Inc., 452 U. S. 264 (1981), discussed *ante*, at 736–737, the government had not yet determined whether a variance from the land-use restrictions of the Surface Mining Control and Reclamation Act of 1977 would be allowed. In *Williamson County*, *supra*, discussed *ante*, at 737, the government had not yet determined whether it would approve the developer's plan to build a residential complex. And in *MacDonald*, *supra*, discussed *ante*, at 737–738, the government had again not yet determined whether the developer's subdivision plan would be approved.

TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop *his* land. The latter is valuable, to be sure, but it is a *new* right conferred upon the landowner in exchange for the taking, rather than a *reduction* of the taking. In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others. Just as a cash payment from the government would not relate to whether the regulation "goes too far" (*i. e.*, restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation. It has no bearing upon whether there has been a "final decision" concerning the extent to which the plaintiff's land use has been constrained.

Putting TDRs on the taking rather than the just-compensation side of the equation (as the Ninth Circuit did

below) is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our Takings-Clause jurisprudence: Whereas once there *is* a taking, the Constitution requires just (*i. e.*, full) compensation, see, *e. g.*, *United States* v. *564.54 Acres of Monroe and Pike County Land*, 441 U. S. 506, 510 (1979) (owner must be put " 'in as good a position pecuniarily as if his property had not been taken' "); *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326 (1893) ("[T]he compensation must be a full and perfect equivalent for the property taken"), a regulatory taking generally does not *occur* so long as the land retains substantial (albeit not its full) value, see, *e. g.*, *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). If money that the government-regulator gives to the landowner can be counted on the question of whether there *is* a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here. It would be too obvious, of course, for the government simply to say "although your land is regulated, our land-use scheme entitles you to a government payment of $1,000." That is patently compensation and not retention of land value. It would be a little better to say "under our land-use scheme, TDRs are attached to every parcel, and if the parcel is regulated its TDR can be cashed in with the government for $1,000." But that still looks too much like compensation. The cleverness of the scheme before us here is that it causes the payment to come, not from the government *but from third parties*—whom the government reimburses for their outlay by granting them (as the TDRs promise) a variance from otherwise applicable land-use restrictions.

Respondent maintains that *Penn Central* supports the conclusion that TDRs are relevant to the question whether there has been a taking. In *Penn Central* we remarked that because the rights to develop the airspace above Grand Cen-

tral Terminal had been made transferable to other parcels in the vicinity (some of which the owners of the terminal themselves owned), it was "not literally accurate to say that [the owners] have been denied *all* use of [their] pre-existing air rights"; and that even if the TDRs were inadequate to constitute "just compensation" if a taking had occurred, they could nonetheless "be taken into account in considering the impact of regulation." *Id.*, at 137 (emphasis in original). This analysis can be distinguished from the case before us on the ground that it was applied to landowners who owned at least eight nearby parcels, some immediately adjacent to the terminal, that could be benefited by the TDRs. See *id.*, at 115. The relevant land, it could be said, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole, had not been diminished. It is for that reason that the TDRs affected "the impact of the regulation." This analysis is supported by the concluding clause of the opinion, which says that the restrictions "not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Id.*, at 138. If *Penn Central*'s one-paragraph expedition into the realm of TDRs were not distinguishable in this fashion, it would deserve to be overruled. Considering in the takings calculus the *market* value of TDRs is contrary to the import of a whole series of cases, before and since, which make clear that the relevant issue is the extent to which use or development of the land has been restricted. Indeed, it is contrary to the whole principle that land-use regulation, if severe enough, can constitute a taking which must be *fully* compensated.

I do not mean to suggest that there is anything undesirable or devious about TDRs themselves. To the contrary, TDRs can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so sub-

stantially as to produce a compensable taking. They may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property *is* taken. Accord, *Penn Central*, *supra*, at 152 (REHNQUIST, J., dissenting) (noting that Penn Central had been "offered substantial amounts" for its TDRs and suggesting the appropriateness of a remand for a determination of whether the TDRs are valuable enough to constitute full compensation). I suggest only that the relevance of TDRs is limited to the compensation side of the takings analysis, and that taking them into account in determining whether a taking has occurred will render much of our regulatory takings jurisprudence a nullity, see Comment, Environmental Interest Groups and Land Regulation: Avoiding the Clutches of *Lucas v. South Carolina Coastal Council*, 48 U. Miami L. Rev. 1179, 1212 (1994).

In sum, I would resolve the question of whether there has been a "final decision" in this case by looking only to the fixing of petitioner's rights to use and develop her land. There has never been any dispute over whether that has occurred. Before bringing the present suit, petitioner applied for permission to build a house on her lot, and was denied permission to do so on the basis of TRPA's determination that her property is located within a "Stream Environment Zone"—a designation that carries the consequence that "[n]o additional land coverage or other permanent land disturbance shall be permitted," TRPA Code § 20.4. Respondent in fact concedes that "[w]e know the full extent of the regulation's impact in restricting petitioner's development of her own land," Brief for Respondent 21. That is all we need to know to conclude that the "final decision" requirement has been met.

Syllabus

UNITED STATES *v.* LaBONTE ET AL.

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

No. 95–1726. Argued January 7, 1997—Decided May 27, 1997

Title 28 U. S. C. § 994(h) directs the United States Sentencing Commission to "assure" that its Sentencing Guidelines specify a prison sentence "at or near the maximum term authorized for categories of" adult offenders who commit their third felony drug offense or violent crime. The Commission sought to implement this directive in its "Career Offender Guideline," Guidelines Manual § 4B1.1. That Guideline initially failed to designate which "maximum term" a sentencing court should use when federal law establishes a basic statutory maximum for persons convicted of a particular offense, but also provides an enhanced penalty for career offenders convicted of that same offense. The District Court used such an enhancement in sentencing respondents, each of whom was convicted of federal drug felonies and qualified as a career offender under § 4B1.1. After the First Circuit affirmed the convictions and sentences, the Commission adopted Amendment 506, which, *inter alia*, altered § 4B1.1's commentary to preclude consideration of statutory sentence enhancements. One District Court Judge found that Amendment 506 was contrary to § 994(h) and refused to reduce the sentences of respondents Dyer and Hunnewell, but another such judge upheld the amendment and reduced respondent LaBonte's prison term. The First Circuit consolidated the ensuing appeals and held that § 4B1.1, as construed under Amendment 506, was a reasonable implementation of § 994(h)'s directive.

Held: Amendment 506 is inconsistent with § 994(h)'s plain and unambiguous language and therefore must give way. *Stinson* v. *United States*, 508 U. S. 36, 38. Assuming that Congress said what it meant in drafting § 994(h), and giving the words used their "ordinary meaning," *Moskal* v. *United States*, 498 U. S. 103, 108, the phrase "maximum term authorized" must be read to include all applicable statutory sentencing enhancements. Respondents' contrary argument that the phrase refers only to the highest penalty authorized by the offense of conviction, excluding any enhancements, has little merit. Their assertion that § 994(h) is ambiguous is based, at least in part, on a strained and flawed construction of the phrase "categories of defendants." Their claim that Amendment 506 satisfies Congress' mandate to sentence repeat offenders "at or near" the maximum sentence authorized is also rejected. Although the phrase "at or near" unquestionably permits a certain degree

of flexibility for upward and downward departures and adjustments, it does not license the Commission to select as the relevant "maximum term" a sentence that is different from the congressionally authorized maximum term. Finally, this Court is unmoved by respondents' heavy reliance on the Commission's inapposite assertions that Amendment 506 avoids unwarranted double counting of prior offenses and eliminates unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties. Pp. 757–762.

70 F. 3d 1396, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 762.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger*, *Acting Assistant Attorney General Keeney*, *Malcolm L. Stewart*, and *J. Douglas Wilson*.

David N. Yellen argued the cause for respondents. With him on the brief were *John A. Ciraldo*, by appointment of the Court, 518 U. S. 1037, *Peter Goldberger*, by appointment of the Court, 518 U. S. 1037, and *Michael C. Bourbeau*, by appointment of the Court, 518 U. S. 1037.*

JUSTICE THOMAS delivered the opinion of the Court.

In 28 U. S. C. § 994(h), Congress directed the United States Sentencing Commission (Commission) to "assure" that the Sentencing Guidelines specify a prison sentence "at or near the maximum term authorized for categories of" adult offenders who commit their third felony drug offense or violent crime. We are asked to decide whether, by "maximum term authorized," Congress meant (1) the maximum term available for the offense of conviction including any applicable

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**David Duncan*, *Lisa B. Kemler*, and *David M. Zlotnick* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

statutory sentencing enhancements, as the United States argues, or (2) the maximum term available without such enhancements, as the Commission has determined. We conclude that the Commission's interpretation is inconsistent with § 994(h)'s plain language, and therefore hold that "maximum term authorized" must be read to include all applicable statutory sentencing enhancements.

I

A

In 1984, Congress created the Commission and charged it with "establish[ing] sentencing policies and practices for the Federal criminal justice system." 28 U. S. C. § 991; see *Mistretta* v. *United States*, 488 U. S. 361, 367–370 (1989). The Commission, however, was not granted unbounded discretion. Instead, Congress articulated general goals for federal sentencing and imposed upon the Commission a variety of specific requirements. See §§ 994(b)–(n). Among those requirements, Congress directed that the Commission

> "shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> "(1) has been convicted of a felony that is—
>
> "(A) a crime of violence; or
>
> "(B) an offense described in section 401 of the Controlled Substances Act (21 U. S. C. 841) . . . ; and
>
> "(2) has previously been convicted of two or more prior [such] felonies . . . ." 28 U. S. C. § 994(h).

The Commission sought to implement this directive by promulgating the "Career Offender Guideline," which created a table of enhanced total offense levels to be used in calculating sentences for "career offenders." United States Sentencing Commission, Guidelines Manual § 4B1.1 (Nov. 1987)

(USSG). Pursuant to that Guideline, each defendant who qualifies for career offender status is automatically placed in criminal history "Category VI," the highest available under the Guidelines. The table then assigns the appropriate offense level based on the so-called "offense statutory maximum."

When the Commission coined the phrase "offense statutory maximum," it defined it, unhelpfully, as "the maximum term of imprisonment authorized for the offense of conviction." USSG App. C, amdt. 267 (Nov. 1989) (adding § 4B1.1, comment., n. 2). Neither the Career Offender Guideline itself, however, nor the accompanying commentary designated which "maximum term" was to be used when federal law established a basic statutory maximum for persons convicted of a particular offense, but also provided an enhanced maximum penalty for career offenders convicted of that same offense.[1] The Courts of Appeals, required to choose between sentencing "at or near the maximum" of the base sentence, or of the base sentence plus the relevant statutory enhancements, uniformly concluded that the "offense statutory maximum" for a defendant with prior convictions was the enhanced maximum term.[2]

The Commission subsequently amended the Career Offender Guideline's commentary to preclude consideration of statutory enhancements in calculating the "offense statutory maximum." Rejecting the approach prevailing in the

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[1] We note that imposition of an enhanced penalty is not automatic. Such a penalty may not be imposed unless the Government files an information notifying the defendant in advance of trial (or prior to the acceptance of a plea) that it will rely on that defendant's prior convictions to seek a penalty enhancement. 21 U. S. C. § 851(a)(1). If the Government does not file such notice, however, the lower sentencing range will be applied even though the defendant may otherwise be eligible for the increased penalty.

[2] See *United States* v. *Smith*, 984 F. 2d 1084, 1087 (CA10), cert. denied, 510 U. S. 873 (1993); *United States* v. *Garrett*, 959 F. 2d 1005, 1009–1011 (CADC 1992); *United States* v. *Amis*, 926 F. 2d 328, 329–330 (CA3 1991); *United States* v. *Sanchez-Lopez*, 879 F. 2d 541, 558–560 (CA9 1989).

Courts of Appeals, the Commission defined the phrase "offense statutory maximum" as:

> "the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record . . . ." USSG App. C, amdt. 506 (Nov. 1994) (amending USSG § 4B1.1, comment., n. 2).

Pursuant to its authority under 28 U. S. C. § 994(u), the Commission opted to give Amendment 506 retroactive effect, providing sentencing courts with discretion to reduce sentences imposed before the amendment's November 1, 1994, effective date. See USSG § 1B1.10(c) (Nov. 1996).

B

Prior to the adoption of Amendment 506, respondents George LaBonte, Alfred Lawrence Hunnewell, and Stephen Dyer were convicted of various federal controlled substance offenses in the United States District Court for the District of Maine. Each respondent qualified as a career offender under USSG § 4B1.1 (Nov. 1987), had received the required notice that an enhanced penalty would be sought, and was sentenced under the Career Offender Guideline using the enhancement. The First Circuit affirmed each respondent's conviction and sentence. Following the adoption of Amendment 506, however, each respondent sought a reduction in his sentence. In the cases of respondents Dyer and Hunnewell, the District Court found that the amendment was contrary to 21 U. S. C. § 841(b)(1)(C) and 28 U. S. C. § 994(h), and refused to reduce the sentences. In respondent LaBonte's case, however, a different judge of the same District Court upheld the amendment and reduced LaBonte's sentence. The First Circuit consolidated the ensuing appeals and a divided panel, applying the approach set forth in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*,

467 U. S. 837 (1984), upheld Amendment 506 as an appropriate exercise of the Commission's discretion. 70 F. 3d 1396, 1403–1409 (1995). The First Circuit looked to the statutory language and "f[ou]nd no clear congressional directive regarding the meaning of the term 'maximum' as that term is used in section 994(h)." *Id.*, at 1406. In the court's view, the meaning of the word "maximum" was influenced by its presence in the phrase " 'maximum term authorized for [certain] categories of defendants.' " *Id.*, at 1404 (bracketed term in original). While acknowledging that the phrase could apply exclusively to that category of repeat offenders for whom the Government filed a notice to seek sentence enhancement, the court also observed that the word "categories" could plausibly be defined "to include *all* offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant." *Id.*, at 1404–1405 (emphasis added). Under the latter view, the court reasoned, the word "maximum" would necessarily refer to the *unenhanced* statutory maximum "since this represents the highest possible sentence applicable to all defendants in the category." *Id.*, at 1405.

Based on that perceived ambiguity, the court explained that the "Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests." *Id.*, at 1407. The court thus held that the Career Offender Guideline, as construed under Amendment 506, was a reasonable implementation of § 994(h)'s command to designate sentences at or near the authorized maximum term. *Id.*, at 1409.

In validating Amendment 506, the First Circuit here reached the same conclusion as the Ninth Circuit later did in *United States* v. *Dunn*, 80 F. 3d 402, 404 (1996). Five other Courts of Appeals, however, have reached the opposite conclusion, finding Amendment 506 at odds with the plain lan-

guage of § 994(h).[3] We granted certiorari to resolve this conflict, 518 U. S. 1016 (1996), and now reverse.

II

Congress has delegated to the Commission "significant discretion in formulating guidelines" for sentencing convicted federal offenders. *Mistretta*, 488 U. S., at 377. Broad as that discretion may be, however, it must bow to the specific directives of Congress. In determining whether Amendment 506 accurately reflects Congress' intent, we turn, as we must, to the statutory language. If the Commission's revised commentary is at odds with § 994(h)'s plain language, it must give way. Cf. *Stinson* v. *United States*, 508 U. S. 36, 38 (1993) (explaining that the Guidelines commentary "is authoritative unless it violates the Constitution or a federal statute").

In § 994(h), Congress directed the Commission to "assure" that for adult offenders who commit their third felony drug offense or crime of violence, the Guidelines prescribe a sentence of imprisonment "at or near the maximum term authorized." 28 U. S. C. § 994(h). We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant. Giving the words used their "ordinary meaning," *Moskal* v. *United States*, 498 U. S. 103, 108 (1990), we find that the word "maximum" most naturally connotes the "greatest quantity or value attainable in a given case." Webster's New International Dictionary 1396 (2d ed. 1958); Black's Law Dictionary 979 (6th ed. 1990) ("The highest or greatest amount, quality, value, or degree"). We similarly

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[3] See *United States* v. *McQuilkin*, 97 F. 3d 723, 731–733 (CA3 1996), cert. pending, No. 96–6810; *United States* v. *Branham*, 97 F. 3d 835, 845–846 (CA6 1996); *United States* v. *Hernandez*, 79 F. 3d 584, 595–601 (CA7 1996), cert. pending, Nos. 95–8469, 95–9335; *United States* v. *Fountain*, 83 F. 3d 946, 950–953 (CA8 1996), cert. pending, No. 96–6001; *United States* v. *Novey*, 78 F. 3d 1483, 1486–1488 (CA10 1996), cert. pending, No. 95–8791.

conclude, and the parties do not dispute, that the phrase "term authorized" refers not to the period of incarceration specified by the Guidelines, but to that permitted by the applicable sentencing statutes.[4] Accordingly, the phrase "maximum term authorized" should be construed as requiring the "highest" or "greatest" sentence allowed by statute.

Respondents, however, argue that "maximum term authorized" refers only to the highest penalty authorized by the offense of conviction, excluding any statutory sentencing enhancements. We find little merit in that contention. In calculating the "highest" term prescribed for a specific offense, it is not sufficient merely to identify the basic penalty associated with that offense. Congress has expressly provided enhanced maximum penalties for certain categories of repeat offenders in an effort to treat them more harshly than other offenders. Section 994(h) explicitly refers, for example, to 21 U. S. C. § 841, which establishes a base "term of imprisonment of not more than 20 years" for certain drug traffickers, but then adds that "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term

[4] Indeed, the Commission has explicitly recognized that "the phrase 'maximum term authorized' should be construed as the maximum term authorized by *statute.*" USSG § 4B1.1, comment., backg'd (Nov. 1987) (emphasis added). And, in our view, the phrase refers to all applicable statutes that would affect the district court's calculation of the prison term. Contrary to the dissent's suggestion, however, 18 U. S. C. § 3584 does not affect the maximum *term* authorized. Section 3584 merely instructs a sentencing court whether to run "multiple *terms* of imprisonment" consecutively or concurrently; it says nothing about how the individual term is to be calculated. § 3584 (emphasis added). Of course, § 3584(c), which the dissent highlights, *post,* at 770, directs that "[m]ultiple terms of imprisonment . . . shall be treated for *administrative purposes* as a single, aggregate term of imprisonment." 18 U. S. C. § 3584(c) (emphasis added). Each of the sections cited by the dissent falls within this "administrative purposes" carve-out, which in no way undercuts, and in fact plainly bolsters, our point.

of imprisonment of not more than 30 years." § 841(b)(1)(C). Where Congress has enacted a base penalty for first-time offenders or nonqualifying repeat offenders, and an enhanced penalty for qualifying repeat offenders, the "maximum term authorized" for the qualifying repeat offenders is the enhanced, not the base, term. As a consequence, the "maximum term authorized" for repeat offenders convicted under § 841(b)(1)(C) is 30 years—the enhanced statutory maximum—not the unenhanced maximum of 20 years.

Respondents' assertion that § 994(h) is ambiguous is based, at least in part, on a strained construction of the phrase "categories of defendants." They claim that the word "categories" can be defined broadly to encompass all repeat offenders charged with violating the same criminal statute—including those for whom the Government did not file a notice under § 851(a)(1) and who are therefore ineligible for the penalty enhancement. See n. 1, *supra.* If "categories of defendants" is defined in this way, respondents argue, a sentence "at or near the maximum term authorized" for this broader "category" of repeat offenders would necessarily permit only the unenhanced maximum because this is the highest possible sentence that could apply to all of the defendants within that category.

We see at least two serious flaws in this reasoning. First, respondents' construction of the word "categories" is overinclusive because it subsumes within a single category both defendants who have received notice under § 851(a)(1) and those who have not. The statutory scheme, however, obviously contemplates two distinct categories of repeat offenders for each possible crime. The Commission is no more free to ignore this distinction than it is to ignore the distinction made between those defendants who distributed certain controlled substances and those whose distribution also directly resulted in the death of a user. See, *e. g.,* 21 U. S. C. § 841(b)(1)(C). Thus, for defendants who have received the

notice under § 851(a)(1), as respondents did here, the "maximum term authorized" is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies.

Second, to read the phrase "categories of defendants" as respondents suggest would largely eviscerate the penalty enhancements Congress enacted in statutes such as § 841. We are unwilling to read § 994(h) as essentially rendering meaningless entire provisions of other statutes to which it expressly refers. Under respondents' novel construction, a repeat drug or violent felon could only receive a sentence at or near the maximum allowed for defendants who had no such prior qualifying convictions or who had never received the notice under § 851(a)(1). Indeed, if this interpretation of the term "categories" were adopted, a sentencing court could be *forbidden* to impose the enhanced maximum penalty. Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity.

Respondents further seek to circumvent § 994(h)'s plain meaning by claiming that Amendment 506 satisfies Congress' mandate to sentence repeat offenders "at or near" the maximum sentence authorized. The flexibility afforded by the phrase "at or near," respondents contend, justifies the Commission's decision to rely on the unenhanced maximum. This statutory phrase unquestionably permits a certain degree of flexibility for upward and downward departures and adjustments. The pertinent issue, however, "is not how close the sentence must be to the statutory maximum, but to which statutory maximum it must be close." *United States* v. *Fountain*, 83 F. 3d 946, 952 (CA8 1996), cert. pending, No. 96–6001. Whatever latitude § 994(h) affords the Commission in deciding how close a sentence must come to the maximum to be "near" it, the statute does not license the Commission to select as the relevant "maximum term" a sen-

tence that is different from the congressionally authorized maximum term.[5]

Finally, respondents rely heavily on the Commission's stated justifications for choosing the unenhanced maximum. We are unmoved. First, the Commission asserted that, by precluding the use of the statutory enhancements, Amendment 506 "avoids unwarranted double counting" of the defendant's prior offenses. 59 Fed. Reg. 23608, 23609 (1994). That argument is entirely beside the point. Congress has instructed the Commission to assure that the sentences of repeat offenders closely track the statutory maximum. The number of steps the Commission employs to achieve that requirement is unimportant, provided the Commission's mechanism results in sentences "at or near" the "maximum term authorized."

Second, respondents invoke the Commission's assertion that its amended commentary eliminates "unwarranted disparity associated with variations in the exercise of prosecutional discretion in seeking enhanced penalties based on prior convictions." *Ibid.* As we understand it, this argument posits that if the Government provides notice under § 851(a)(1) to one defendant, but not to another, the resulting

[5] Respondents' reliance on *United States* v. *R. L. C.*, 503 U. S. 291 (1992), is inapposite. There, we construed 18 U. S. C. § 5037(c), which provides that the sentence ordered by a court for a juvenile delinquent may not extend beyond "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." We held that the applicable "maximum" term authorized was the upper limit of the Guidelines range that would apply to a similarly situated adult offender. 503 U. S., at 306–307. *R. L. C.* involved a directive to a sentencing court, however, whereas 28 U. S. C. § 994(h) is a directive to the Commission. Because § 994(h) is designed to cabin the Commission's discretion in the promulgation of guidelines for career offenders, it would be entirely circular to suggest that the Commission had complied with § 994(h) merely by specifying sentences "at or near" the top of the *Guidelines* range. The Commission itself recognizes that the "maximum term authorized" within the meaning of § 994(h) is the *statutory* maximum, not the otherwise applicable Guidelines maximum. See n. 4, *supra*.

difference in the maximum possible term is an "unwarranted disparity." Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors. See *United States* v. *Armstrong*, 517 U. S. 456, 464–465 (1996); *Wayte* v. *United States*, 470 U. S. 598, 607 (1985). Any disparity in the maximum statutory penalties between defendants who do and those who do not receive the notice is a foreseeable—but hardly improper—consequence of the statutory notice requirement.[6]

III

In sum, we hold that the phrase "at or near the maximum term authorized" is unambiguous and requires a court to sentence a career offender "at or near" the "maximum" prison term available once all relevant statutory sentencing enhancements are taken into account. Accordingly, we reverse the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

The United States Sentencing Commission has interpreted three statutory words—the words "maximum term authorized"—to mean "maximum term of imprisonment authorized for the offense of conviction . . . not including . . . sentencing enhancement provision[s]" for recidivists. 28 U. S. C.

[6] Inasmuch as we find the statute at issue here unambiguous, we need not decide whether the Commission is owed deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

§ 994(h); United States Sentencing Commission, Guidelines Manual § 4B1.1, comment., n. 2 (Nov. 1995) (USSG). The majority finds this interpretation unlawful. It believes that the three statutory words are unambiguous; that they are not susceptible to the Commission's interpretation; and that the only possible interpretation is one that does not except recidivist enhancement provisions.

In my view, however, the words "maximum term authorized" are ambiguous. They demand an answer to the question "authorized by *what?*" The statute itself does not tell us "what." Nor does the statute otherwise "directly [speak] to the precise [Guideline] question at issue." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984); see *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735 (1996). In light of the statutory ambiguity, we should defer to the Commission's views about what Guideline the statute permits it to write; and we should uphold the Guideline the Commission has written because it "is based on a permissible construction of the statute." *Chevron, supra,* at 843.

I

A

To understand the legal issue before us, one must keep in mind both what the Guidelines are and how they work. The Guidelines themselves are a set of legal rules written by the United States Sentencing Commission acting under authority delegated to it by a congressional statute, the Sentencing Reform Act of 1984 (Sentencing Act), Pub. L. 98–473, § 217, 98 Stat. 2017– 2026, as amended, 28 U. S. C. §§ 991–998. See generally *Mistretta* v. *United States*, 488 U. S. 361 (1989). Congress established the United States Sentencing Commission both to create a more honest sentencing system (through the elimination of parole, see Pub. L. 98–473, § 218(a)(5), 98 Stat. 2027) and to create a fairer system by reducing the "unjustifiably wide range of sentences [pre-

viously imposed upon] offenders with similar histories, convicted of similar crimes, committed under similar circumstances," under the pre-existing indeterminate system of sentencing. S. Rep. No. 98–225, p. 38 (1983). See also *Mistretta, supra,* at 366.

At the same time, Congress said that the Commission, when reducing disparity, should not "sacrific[e] proportionality"—the principle that criminal conduct of greater severity should be punished more harshly than less serious conduct. United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 13 (June 1987) (Supplementary Report). See also 18 U. S. C. § 3553(a)(2)(A) (sentences should "reflect the seriousness of the offense" and "provide just punishment"); 28 U. S. C. §§ 994(a)(2) and (g). This effort to achieve proportionality required the Commission to identify those factors that make criminal conduct more or less serious and provide a way for those factors to be taken into account in the Guidelines. Yet because the list of relevant sentencing factors is long, and their interaction impossibly complex, the Commission had to strike a compromise between the need for proportionality on the one hand and the need for Guidelines that were simple enough to be administered. USSG ch. 1, pt. A3, p. s. The upshot is a Guidelines system that balances various, sometimes conflicting, general goals, including reduction of disparity, proportionality, and administrability.

The Guidelines divide sentencing factors into two basic categories: "offense" characteristics and "offender" characteristics. See generally USSG § 1B1.1. The Guidelines first look to the characteristics of the "offense." The Guidelines tell a sentencing judge to consider the behavior in which an offender engaged when he committed the crime of which he was convicted. They assign a number—called a "Base Offense Level"—to the behavior that constituted the crime itself. (For example, they assign the Base Offense Level 20 to robbery. *Id.*, § 2B3.1(a).) They next tell the

judge to look to the *way* in which the offender committed the crime; and they provide specific upward adjustments in light of certain aggravating features of the criminal behavior—adjustments they call "Specific Offense Characteristics." (For example, if the robber used a gun, the judge adds six levels. *Id.*, § 2B3.1(b)(2)(B).)

The Guidelines then tell the judge to turn to the relevant characteristics of the defendant, see 28 U. S. C. § 994(d)—features not of the crime, but of the criminal. In particular, they tell the judge to assign a number of "points" determined by what the Commission has determined to be the single most important offender characteristic, namely, the offender's prior criminal behavior. These points in turn correspond to one of six Criminal History Categories. (For example, if the robber had one serious prior criminal conviction, that is, one that led to a sentence of imprisonment of more than 13 months, the judge will assign three points, which places the offender in Criminal History Category II. USSG § 4A1.1(a), and *id.*, ch. 5, pt. A (table).)

After determining the "offense level" and Criminal History Category applicable to the offender, the sentencing judge (after making various other possible adjustments) will consult a table, the rows of which consist of "levels" and the columns of which consist of "Categories." The intersection of the appropriate row and column will normally indicate a narrow range of months of imprisonment. (For example, at the intersection of level 26 and Category II lies a sentencing range of 70–87 months' imprisonment. *Id.*, ch. 5, pt. A (table).) In an ordinary case, the judge will sentence within that indicated range.

I say "in an ordinary case" because almost all Guideline rules are meant to govern typical cases. See 18 U. S. C. § 3553(b); 28 U. S. C. §§ 991(b)(1)(B), 994(b)(2) (requiring strict limits upon judge's sentencing discretion in ordinary cases). At the same time, the sentencing judge is free to depart from the Guidelines sentence in an atypical case—one

outside the "heartland" of cases embodying the conduct that individual Guidelines describe. 18 U. S. C. § 3553(b); USSG ch. 1, pt. A4(b); *Koon* v. *United States*, 518 U. S. 81, 92–96 (1996). This "departure authority" is important because no set of Guidelines can anticipate every situation. Where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," a judge has the authority to impose an appropriate sentence, so long as that sentence is within the range authorized by the statute under which the defendant was convicted. See 18 U. S. C. § 3553(b); see also 28 U. S. C. § 991(b)(1)(B).

As the Commission has pointed out, this system reflects the Sentencing Act's "detailed instructions . . . the most important of which directs the Commission to create categories of *offense behavior* and *offender characteristics*." USSG ch. 1, pt. A2 (emphasis added). See also 28 U. S. C. §§ 994(c) and (d). Twenty-five statutory subsections, §§ 994(a)–(y), contain these and other "detailed instructions"—instructions that both "delegat[e] broad authority to the Commission to . . . rationalize the federal sentencing process," USSG ch. 1, pt. A2, and also describe, at least in rough outline, how the Commission should go about exercising that authority. The case before us concerns 1 of those 25 subsections, 28 U. S. C. § 994(h), which I shall call the "career offender" subsection.

B

The "career offender" subsection provides more specific directions than most other subsections. It says that the Commission

> "shall assure that the guidelines specify a sentence to a term of imprisonment at or near the *maximum term authorized* for categories of defendants in which the defendant is eighteen years old or older and—
>
> "(1) has been convicted of a felony that is—
>
> "(A) a crime of violence; or

> "(B) an offense described in section 401 of the Controlled Substances Act (21 U. S. C. 841) . . . ; and
>
> "(2) has previously been convicted of two or more [similar] prior felonies . . . ." § 994(h) (emphasis added).

This provision, for present purposes, is not quite as complicated as it appears, for the words that follow the italicized words "*maximum term authorized*" do *not* modify or explain those italicized words. Rather, they describe the kind of person whom the Commission must make certain is sentenced to a term "at or near the maximum term authorized." It is as if the statute said to the Commission: Focus upon "categories" of individuals who have previously committed two serious crimes (involving drugs or violence) and make certain that the Guidelines specify, for those "categories" of individuals, "a sentence to a term of imprisonment at or near the maximum term authorized."

The Commission has recently rewritten the Guideline so that it now imposes sentences based upon

> "the maximum term of imprisonment authorized for the offense of conviction . . . not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." USSG § 4B1.1, comment., n. 2.

To understand how the new Guideline works, consider an example: The basic drug distribution statute, 21 U. S. C. § 841, has two relevant subsections, (a) and (b). Subsection (a) makes it a crime to "possess" a "controlled substance," such as cocaine, with "intent to distribute" it. Subsection (b) sets forth penalties—both minimum and maximum penalties—for violating subsection (a). Those penalties depend primarily upon the amount of drugs at issue, but also upon recidivism. One part of subsection (b), namely, subsection (b)(1)(B), for example, specifies a minimum penalty of 5 years and a maximum penalty of 40 years where the amount of cocaine ranges from 500 grams to 5 kilograms. A later por-

tion of that part increases the minimum penalty to 10 years and the maximum penalty to life if the offender has a previous drug felony conviction. The Commission's Career Offender Guideline treats the statutory term "authorized" as if it referred to the "maximums" that § 841 provides, *except for this last-mentioned part.*

II

We must decide whether the career offender statute permits the Commission to write this Career Offender Guideline—a Guideline that looks to the maximum sentences that individual criminal statutes authorize for the *behavior* that constitutes the offense. That Guideline does not look to the maximum sentence that an individual criminal statute authorizes for recidivism—perhaps the most important *offender* characteristic. In a sense, it says that the career offender statute, which tells the Commission to transform statutory maximums into approximate Guideline minimums, *is* Congress' basic recidivism provision. That is to say, the Commission's Guideline essentially reads the career offender statute as permitting an implementing Guideline that substitutes for, rather than supplements, other statutory recidivism-based maximum-sentence enhancements.

The question that divides this Court is not about the wisdom of this implementing interpretation. It is whether the "career offender" statute's words "maximum term authorized" are *open* to the Commission's interpretation or whether they *unambiguously* forbid it. In my view, the words, whether read by themselves, read within the context of sentencing law, or read against the historic background of sentencing reform, do not unambiguously forbid the Guideline. Rather, their ambiguity indicates that Congress simply has not "addressed the precise question." *Chevron*, 467 U. S., at 843.

First, the language itself—the words "maximum term authorized"—is ambiguous. As I previously pointed out,

supra, at 767, the immediately subsequent words (about categories of offenders) do not explain the words "maximum term authorized," for they do not modify those words. Hence the question remains, "authorized by what?" All parties agree that the relevant maximum is the maximum set by sentencing statutes and not, for example, the top of the otherwise applicable Guideline range. But still, to *which* sentencing statutes does the phrase refer? The answer to this question is not written upon the statute's face.

The phrase could not possibly refer to every sentencing statute, nor to every statute that controls the length of the maximum legally possible sentence for a particular offender or kind of offender. It seems most unlikely that the phrase was intended to include, for example, 18 U. S. C. § 3565(a)(2)—a statute that authorizes a sentence for a probation violator up to the maximum initially available for the underlying crime. I have never heard anyone claim that an offender who commits his third drug crime while on probation for, say, a minor part in a counterfeiting offense, see § 471; USSG § 2B5.1, should receive a sentence that approximates the statutory maximum for the drug offense *plus* the 15-year counterfeiting statutory maximum added in addition. But see *ante*, at 757–758.

Nor, to take another example, could the phrase mean to include the federal statute that governs "[m]ultiple sentences of imprisonment," 18 U. S. C. § 3584—a statute that grants sentencing judges broad authority to "run" multiple sentences either "concurrently or consecutively." That statute would permit a judge to impose, say, a 20-year maximum sentence for each count of a six-count indictment and run those sentences consecutively, producing a total sentence of 120 years. Yet judges would not impose a sentence of 120 years upon an offender who engaged in a single related set of six 10-gram cocaine sales, even if each sale were the subject of a separate count in a prosecutor's indictment. (The Guidelines would not permit this 120-year imaginary sen-

tence. See USSG §§3D1.2(d), 3D1.3(b).) No one thinks that Congress intended the Commission to write its "career offender" Guideline with an eye toward the maximum sentences that this kind of statute (the "multiple sentences" statute) theoretically would authorize.

The majority, in providing a set of arguments for the correct conclusion that the phrase "maximum term authorized" does not include the statute just mentioned, effectively concedes this point. The majority cannot say that the terms of imprisonment authorized by this statute do not even *potentially* fall within the scope of the phrase "maximum term authorized," for the majority's interpretation of this statute—intended to avoid its application—is itself neither obvious nor even necessarily correct. (Compare the majority's use of the words "term of imprisonment," for example, see *ante*, at 758, n. 4, with the numerous instances in which sentencing law, including a portion of the "multiple sentence" statute itself, 18 U. S. C. §3584(c), uses those words to refer to the actual time to be served as the result of a sentence imposed on a defendant. *E. g.*, §§3582, 3585, 3621, 3624.) And once one understands the need to engage in rather complex exercises in statutory interpretation to separate out, from the set of all potentially applicable sentencing statutes, those to which the word "authorized" refers, one understands that the referent of that word "authorized" is not *obvious*—and that is the main point here at issue.

Nor can one resolve the linguistic ambiguity by claiming (as the drafters of the relevant statutory language seem to have claimed, see *infra*, at 775) that Congress simply meant to refer to the maximum statutory penalties for the "offenses" of which offenders are convicted. That is because the word "offense" is a technical term in the criminal law, referring to a crime made up of statutorily defined "elements." See *Staples* v. *United States*, 511 U. S. 600, 604 (1994); *Liparota* v. *United States*, 471 U. S. 419, 424 (1985). Although some criminal statutes consider recidivism an ele-

ment of the offense, *e. g.*, 18 U. S. C. § 922(g) (felon in possession of a firearm), many other important criminal statutes do not. Under the drug possession statute, for example, recidivism is *not* an element of the offense, but, rather, a sentencing-related circumstance that the prosecution need not charge or prove at trial. Compare 21 U. S. C. § 841(a) (defining the offense) with § 841(b) (setting penalties). Thus, one might read the statute as referring to the maximum sentences imposed for "offenses" technically defined (a reading that would leave out most statutory recidivism enhancements) or one might not. The language of the statute, even if read as referring to offenses, does not say.

Second, background sentencing law does not provide an unambiguous answer to the "authorized by what" question. That background law includes a fundamental distinction between "offense characteristics" and "offender characteristics." This distinction underlies the Guidelines' basic structure, see *supra*, at 764–766; it is embodied in the Commission's authorizing statute, 28 U. S. C. §§ 994(c) and (d); and it grows out of pre-Guideline sentencing law, see, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality opinion); *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937). Thus, it is not surprising that the Commission should write a Career Offender Guideline that itself reflects that distinction; nor can one consider the distinction arbitrary, as if, for example, the Commission were to have picked and chosen among different *offense* characteristics. Cf. *ante*, at 759. To the contrary, this aspect of background sentencing law makes plausible a reading that sees this directive to create a generally applicable Career Offender Guideline as, in a sense, a *substitute* for other, more specific recidivism-based sentence enhancements already scattered throughout the Federal Criminal Code. Of course, one could also read the statute as a supplement to those provisions. But the statute itself does not tell us which reading is correct.

One further background circumstance helps to explain why the Commission's reading of the statute is not arbitrary, *i. e.*, why it is not unreasonable for the Guideline to treat recidivist enhancements differently from enhancements based on conduct. The career offender subsection was enacted in the context of a sweeping overhaul of the federal system of criminal sentencing brought about by the Sentencing Act. One objective of the Act was honesty in sentencing, the idea that an offender actually should serve approximately the time stated in the sentence that the judge imposed. S. Rep. No. 98–225, at 56. Congress achieved this objective by abolishing parole. It thereby transformed the sentence the judge pronounced from an enormous overstatement (given the fact that the offender would have spent perhaps one-third to one-half or even more of that time on parole), into *real-time* years almost all of which the offender would actually spend in prison. In other words, given parole, a 30-year sentence might mean 10 to 20 years; a 15-year sentence might mean 5. See generally *id.*, at 46–49; Supplementary Report, App. C.

When it abolished parole, however, Congress did not expect the Commission to write Guidelines that automatically transformed into "real time" the parole-inflated 20- or 30-year terms that judges had previously imposed upon, say, bank robbers or drug offenders. Rather Congress expected the Commission to adjust the length of the sentence the judge pronounced downward to reflect the fact that henceforth there would be no parole and the offender would really serve close to the entire term. See 28 U. S. C. § 994(m). That is what the Commission did. Supplementary Report 21.

This contextual circumstance helps to explain why Congress *might* indeed have expected that the Commission would read the career offender subsection to refer to statutory offenses plus conduct-based enhancements alone (without recidivism-based sentence enhancements). Congress realized that the pre-Guideline sentencing system would have

translated the words "20 years maximum" in, say, a drug statute into maximum sentences that approximated, say, 12 real-time years. Congress similarly realized that the pre-Guideline sentencing system would have translated the words "30 years maximum" in, say, a drug statute's recidivism provision, into maximum sentences that approximated, say, 20 real-time years. That is to say, Congress realized that, pre-Guidelines (because of parole), even the most serious class of recidivist offenders (in the absence of other aggravating *conduct*) would have likely been imprisoned for no more than 20 real-time years. Under these circumstances, a legislator could reasonably have taken the career offender statute's basic objective as one of assuring that all three-time recidivists serve the, say, 20 real-time years that only the worst of them would previously have served. That is to say, by mandating sentences at or near the (newly enacted) 20 year *non*recidivist maximum (for large quantities of cocaine), the career offender subsection would ensure that *all* career offenders serve terms at or near the real-time maximum that only the most serious offenders would have served under a pre-Guidelines (parole-based) system. And in this way as well, the career-offender provision would significantly increase the likely real-time sentences served by most three-time offenders.

To understand the impact of real-time sentencing thus helps explain why recidivist maximums are different from maximums associated with *offense* characteristics; it shows how the Commission's reading is consistent with Congress' obvious intent to increase recidivist sentences significantly; it shows how a general recidivist Guideline has an effect of a different kind than the statutory recidivist enhancements contained in prior law and hence might have been thought of as operating without reference to those enhancements; and it explains how legislators *might* reasonably have sought the goals implicit in the Commission's reading of the statute. Of course, it may also be the case that no legislator actually

considered the problem before us. Or Congress instead might have had quite different goals in mind. As the majority says, Congress *might* have intended the Commission to insist that all three-time career offenders serve a real-time sentence significantly longer that the worst of them would likely have served before the Guidelines. The important point for present purposes is that the statute itself does not tell us *which* of these alternative goals Congress sought to achieve. The basic objectives of the career offender subsection—ensuring increased penalties for recidivist offenders who have committed crimes involving drugs or violence—and of sentencing reform are consistent with either basic purpose and thus do not resolve the ambiguity.

Third, the statute's legislative history, insofar as it is relevant, helps to explain why any search for a clear expression of congressional intent is pointless. When first enacted into law, the career offender subsection did not leave the word "authorized" hanging in midair. Rather, it said "maximum term authorized *by section 3581(b) of title 18, United States Code.*" Pub. L. 98–473, 98 Stat. 2021 (emphasis added). The subsection to which the word "authorized" referred—a subsection that classified crimes by letter—read as follows:

> "Authorized Terms.—The authorized terms of imprisonment are—
>
> "(1) for a Class A felony, the duration of the defendant's life or any period of time;
>
> "(2) for a Class B felony, not more than twenty-five years;
>
> "(3) for a Class C felony, not more than twelve years;
>
> "(4) for a Class D felony, not more than six years;
>
> "(5) for a Class E felony, not more than three years;
>
> "(6) for a Class A misdemeanor, not more than one year;
>
> "(7) for a Class B misdemeanor, not more than six months;

"(8) for a Class C misdemeanor, not more than thirty days; and

"(9) for an infraction, not more than five days." 18 U. S. C. § 3581(b).

A cross-reference to this classifying subsection does not help, however, for that subsection serves almost no significant purpose in the Federal Criminal Code. In fact, Congress later enacted a technical amendment that eliminated the cross-reference (leaving the word "authorized" without an explicit reference), Pub. L. 99–646, 100 Stat. 3592, because the cross-reference was "misleading" and "incorrect" in that "[t]o date, no Federal offense" uses the classification system in the section to which it referred. H. R. Rep. No. 99–797, p. 18 (1986). The drafters of the technical amendment thought that the "maximum term of an offense is that term prescribed by the provision of law defining the offense." *Ibid.* But, as we have seen, this view of the matter is not conclusive. See *supra*, at 770–771.

One can find a possible historical explanation for what occurred. The classifying subsection, like the sentencing law itself, originated in a congressional effort to rewrite the entire Federal Criminal Code. See, *e. g.*, S. 1, 94th Cong., 1st Sess. (1975); S. 1437, 95th Cong., 2d Sess. (1978); S. 1630, 97th Cong., 2d Sess. (1981). That rewrite attached a classifying letter to each substantive crime. The classifying subsection attached a maximum penalty to each letter; and the penalty was a real-time penalty, for the rewrite contained the later enacted new sentencing law, which abolished parole and created real-time sentences. For example, the rewrite characterized its only drug recidivism provision—an enhanced penalty for a recidivist opiate crime—as a Class B felony; to which the classifying subsection attached a 25-year maximum sentence. See, *e. g.*, S. Rep. No. 95–605, pt. 1, pp. 798, 801 (1977). The rewrite did not become law. Congress, instead, enacted into law its sentencing provisions, which included a career offender statute that initially contained a

cross-reference to the classifying subsection that no longer served any significant purpose.

This history may help to explain why Congress did not directly provide a clear cross-reference in the career offender subsection. But it does not itself provide such a reference. A reader still might see in that subsection a predominating congressional focus upon increasing *all* career offenders' real-time terms to a typical real-time *maximum* term (in which case it is natural to read the subsection as omitting statutory recidivism provisions) or one might see in it a predominating congressional insistence upon further major increases in the real-time maximum terms themselves (in which case it is natural to read the subsection's cross-reference as picking up statutory recidivism provisions). The subsection's language, whether read by itself, read in a broader context of sentencing law, or read against the provision's history, is consistent with *either* interpretation.

Finally, the majority is wrong when it argues that the Career Offender Guideline "eviscerate[s] the penalty enhancements Congress enacted in statutes such as § 841." *Ante*, at 760. Section 841 increases maximum penalties for recidivists, for example, for crimes involving less than 500 grams of cocaine, from 20 years to 30 years. The Commission's career offender penalties for these offenses yield sentences "at or near" the "non-recidivist" maximum. This increased statutory maximum increases what would otherwise be a statutory cap on any sentence imposed, thereby permitting the sentencing judge to sentence a recidivist to more than the statute's first offender maximum (20 years for 30 grams). Consequently, the statutory increase authorizes a higher sentence when the relevant Guideline range reaches beyond that first offender maximum (as it does in the case of some of the ranges prescribed by the Career Offender Guideline). See, *e. g.*, USSG § 4B1.1 (table); *id.*, ch. 5, pt. A (table). It authorizes a higher sentence when the sentencing judge faces an atypical case warranting a departure upward. See 18

U. S. C. § 3553(b). And, most important, it authorizes a higher sentence should the Commission decide to write *other* Guidelines with specific offense characteristics that tell a judge to sentence certain especially dangerous recidivists (say, violent drug offenders) to more than the first offender maximums. See, *e. g.*, USSG § 2D1.1(a)(1).

The upshot is that the majority cannot find here, or anywhere else in sentencing law, a clear indication of what Congress *must have meant* by its open-ended term "authorized." The term is ambiguous.

III

Although the Court does not "decide whether the Commission is owed deference under *Chevron*," *ante*, at 762, n. 6, I believe that it is. *Chevron* directs courts to defer to "an agency's construction of the statute which it administers," 467 U. S., at 842, when Congress, because it has not clearly addressed an issue in the statute itself, likely intends that the consequent

> "ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows. See *Chevron*, *supra*, at 843–844." *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S., at 741.

This kind of inference makes sense in this case. Although the Commission is in the "judicial branch" of Government, 28 U. S. C. § 991(a); *Mistretta*, 488 U. S., at 384–397, Congress intended it to carry out a task similar to rulemaking tasks that Congress has often delegated to administrative agencies. The Commission's overall congressional mandate is sweeping. See 28 U. S. C. § 994(f) ("providing certainty and fairness in sentencing and reducing unwarranted sentence disparities"); § 991(b). Without broad delegated authority, it would not be possible to reconcile Congress' general objectives—of uniformity, proportionality, and administrability—nor to reconcile those general objectives with a host of more

specific statutory instructions. § 994. Thus the very nature of the task, along with the structure of the Sentencing Act, indicates a congressional intent to delegate primarily to the Commission the job of interpreting, and harmonizing, the authorizing Act's specific statutory instructions—subject, of course, to the kind of judicial supervision and review that courts would undertake were the Commission a typical administrative agency. This Court has previously implied that this is so. See *Stinson* v. *United States*, 508 U. S. 36, 44–45 (1993); cf. *Mistretta*, *supra*, at 393–394.

Were the Commission a typical administrative agency, we would ask whether its "policy" choice is "reasonable," hence "permissible," given the statute. *Chevron*, *supra*, at 843–844, 866. And we would give the Commission considerable interpretive leeway in light of the fact that the choice here at issue lies at the very heart of the Commission's policy-related "expertise." *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 651–652 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference"); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 845 (1986). The Commission's exercise of that expertise here—its Career Offender Guideline—meets this legal requirement.

As a matter of policy, the Commission could take account of the fact that the Guideline that the majority believes the statute requires would significantly interfere with one of the Sentencing Act's basic objectives—greater uniformity in sentencing. 28 U. S. C. §§ 991(b)(1)(B), 994(f). That is because at least one important set of statutory recidivist enhancements—the drug crime enhancements contained in 21 U. S. C. § 841(b)—may be imposed only when the prosecutor files a specific document requesting it. § 851(a). Consequently, the majority's interpretation of 28 U. S. C. § 994(h) places significant power in the hands of the prosecutor to determine the length of the offender's sentence; and different prosecutors at different times may exercise that power in

different ways. The Commission concluded that its interpretation avoids "unwarranted disparity associated with variations in the exercise of prosecut[orial] discretion," 59 Fed. Reg. 23608, 23609 (1994), in furtherance of the overriding congressional objective. 28 U. S. C. § 991(b)(1)(B).

The majority counters that "any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect." *Ante*, at 762. But this reply overlooks the fact that the Guidelines themselves, by basing punishments primarily upon the actual behavior that underlies an offense, are written to diminish the impact of such prosecutorial discretion. See USSG § 1B1.3. The Commission recognized that the problem is one of diminishing, rather than aggravating, sentencing disparity among similarly situated defendants. And the Commission's interpretation finds support in that basic objective.

As a matter of policy, the Commission was free to consider the practical impact of the competing interpretations—in terms both of their comparative effectiveness in furthering the basic goals of punishment (deterrence, incapacitation, just deserts, rehabilitation), 18 U. S. C. § 3553(a); 28 U. S. C. § 994(a)(2); USSG ch. 1, pt. A3, and their comparative costs in terms of real resources, 28 U. S. C. § 994(g). And it might have thought that its present interpretation better balanced these objectives.

Consider an example: The *ordinary* (non-Career Offender) Guideline sentence, applicable to a three-time offender, for possession with intent to distribute a single dose of cocaine is 18 months; for possession with intent to distribute 400 grams it is 6 years. The statutory first-offender maximum is 20 years. The recidivist maximum is 30 years. As a matter of policy, the Commission might have thought that an increase from 18 months (or 6 years) to 20 real-time years adequately served basic punishment objectives (as well as Congress' specific instruction to assure "substantial prison

terms" for repeat drug offenders, S. Rep. No. 98–225, at 175). And, at the same time, it might have thought an increase to 30 real-time years would have added significantly to costs, without significantly advancing any other punitive purpose. See generally Supplementary Report 71, 73 (predicting an 8%–10% increase in federal prison populations from 1987 to 2002 due solely to the effects of the career offender subsection).

Finally, as a matter of policy, the Commission might have believed the Guidelines would create a more coherent sentencing system if its Career Offender Guideline basically recreated recidivist real-time *maximums*, rather than increasing those maximums by folding in the additional time that previously had represented parole. *Supra*, at 772–774.

This discussion of policy may help to make clear one reason why I find the majority's decision regrettable. The decision interferes with a legitimate exercise of the Commission's authority to write Guidelines that reconcile the various, sometimes competing, goals that Congress set forth. The United States Criminal Code contains a highly complicated group of statutes. Congress wrote many of them long before it thought of creating sentencing Guidelines. Congress continues to write other statutes that the Commission, when revising its Guidelines, may, or may not, find easy to reconcile with what has gone before. Congress understood that the Commission's task is complex. Congress understood the importance of the statute's general goals—a fairer and more rational sentencing system. I believe that courts, when interpreting the authorizing Act, should recall Congress' overriding objectives and Congress' understood need to grant to this arm of the "judicial branch of the United States," 28 U. S. C. § 991(a), the discretionary authority necessary to achieve them. I would allow the Commission to interpret the ambiguous words of the statute before us with these general congressional objectives in mind.

I would affirm the judgment of the Court of Appeals.

Syllabus

McMILLIAN *v.* MONROE COUNTY, ALABAMA

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

No. 96–542. Argued March 18, 1997—Decided June 2, 1997

After spending six years on Alabama's death row, petitioner's capital murder conviction was reversed on the ground that the State had suppressed exculpatory evidence. He then sued respondent Monroe County and others under 42 U. S. C. § 1983 for the allegedly unconstitutional actions of, *inter alios*, County Sheriff Tom Tate in suppressing the evidence. A county is liable under § 1983 for those actions of its sheriff that constitute county "policy." *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694. The District Court dismissed the claims, holding that Tate's unlawful acts did not represent Monroe County's policy, because an Alabama county has no authority to make law enforcement policy. The Court of Appeals affirmed, agreeing that a sheriff acting in his law enforcement capacity is not a policymaker for the county.

Held: Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties. Pp. 784–796.

(a) In determining a local government's § 1983 liability, a court's task is to identify those who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the violation at issue. *Jett* v. *Dallas Independent School Dist.*, 491 U. S. 701, 737. The parties agree that Sheriff Tate has final policymaking authority in the area of law enforcement, but they disagree about whether Alabama sheriffs are policymakers for the State or the county when acting in their law enforcement capacity. In deciding this dispute, the question is not whether Alabama sheriffs act as county or state officials in all of their official actions, but whom they represent in a particular area or on a particular issue. *Ibid.* This inquiry is dependent on the definition of the official's functions under relevant state law. Cf. *Regents of Univ. of Cal.* v. *Doe*, 519 U. S. 425, 429, n. 5. Pp. 784–786.

(b) The Court defers considerably to the Court of Appeals' expertise in interpreting Alabama law, see *Jett*, *supra*, at 738, and concludes that the State's constitutional provisions concerning sheriffs, the historical development of those provisions, and the interpretation given them by the State Supreme Court strongly support Monroe County's contention that sheriffs represent the State when acting in their law enforcement capacity. The relevant portions of the Alabama Code, although less

compelling, also support this conclusion. Code provisions cutting in favor of the conclusion that sheriffs are county officials are insufficient to tip the balance in petitioner's favor. Pp. 786–793.

(c) The Court rejects petitioner's arguments that the result here will create a lack of uniformity in Alabama—by allowing 67 county sheriffs to have different state law enforcement policies in their counties—and throughout the country—by permitting sheriffs to be classified as state officials in some States and county officials in others. The common law itself envisioned the possibility that state law enforcement "policies" might vary locally, as particular sheriffs adopted varying practices for arresting criminals or securing evidence. And the Nation's federal nature allows the States wide authority to set up their state and local governments as they wish. Petitioner's and his *amici*'s concern that state and local governments will manipulate local officials' titles in a blatant effort to shield local governments from liability is foreclosed by *St. Louis* v. *Praprotnik*, 485 U. S. 112, 127 (plurality opinion). Pp. 793–796.

88 F. 3d 1573, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 796.

Bryan A. Stevenson argued the cause for petitioner. With him on the briefs was *Robert B. McDuff.*

Paul M. Smith argued the cause for respondent. With him on the brief were *Donald B. Verrilli*, *Thomas J. Perrelli*, *James W. Webb*, *Kendrick E. Webb*, *Daryl L. Masters*, and *Bart Harmon.**

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Dellinger*, *Acting Assistant Attorney General Pinzler*, *Deputy Solicitor General Waxman*, *Lisa Schiavo Blatt*, and *Miriam R. Eisenstein;* for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Paul C. Saunders*, *Marc L. Fleischaker*, *Norman Redlich*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Mitchell F. Dolin*, and *Robert A. Long, Jr.;* and for the Southern States Police Benevolent Association by *J. Michael McGuinness.*

Briefs of *amici curiae* urging affirmance were filed for Jefferson County, Alabama, by *Jeffrey M. Sewell* and *Charles S. Wagner;* and for the National Association of Counties et al. by *Richard Ruda* and *James I. Crowley.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner sued Monroe County, Alabama, under Rev. Stat. § 1979, 42 U. S. C. § 1983, for allegedly unconstitutional actions taken by Monroe County Sheriff Tom Tate. If the sheriff's actions constitute county "policy," then the county is liable for them. *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978). The parties agree that the sheriff is a "policymaker" for § 1983 purposes, but they disagree about whether he is a policymaker for Monroe County or for the State of Alabama. We hold that, as to the actions at issue here, Sheriff Tate represents the State of Alabama and is therefore not a county policymaker. We thus affirm the Court of Appeals' dismissal of petitioner's § 1983 claims against Monroe County.

I

In November 1986, Ronda Morrison was murdered in Monroe County, a sparsely populated county located in southwest Alabama. Petitioner and one Ralph Myers were indicted for this crime. Myers then pleaded guilty to a lesser offense and testified against petitioner at his trial. A jury convicted petitioner of capital murder, and the trial court sentenced him to death. After two remands, the Alabama Court of Criminal Appeals reversed petitioner's conviction, holding that the State had violated *Brady* v. *Maryland*, 373 U. S. 83 (1963), by suppressing statements from Myers that contradicted his trial testimony and other exculpatory evidence. *McMillian* v. *State*, 616 So. 2d 933, 942–948 (1993). Thus, after spending six years in prison, petitioner was released.

He then brought this § 1983 lawsuit in the District Court for the Middle District of Alabama against respondent Monroe County and numerous officials, including the three men in charge of investigating the Morrison murder—Tom Tate, the Sheriff of Monroe County; Larry Ikner, an investigator with the District Attorney's office in Monroe County; and Simon Benson, an investigator with the Alabama Bureau of

Investigation. Only two of the officials were sued in their official capacities—Sheriff Tate and investigator Ikner—and it is only these official-capacity suits that concern us here.[1] Petitioner principally alleged that Tate and Ikner, in their capacities as officials of Monroe County, not as officers of the State of Alabama, intimidated Myers into making false statements and suppressed exculpatory evidence. App. to Pet. for Cert. 26a–33a; *McMillian* v. *Johnson*, 878 F. Supp. 1473, 1486–1488 (MD Ala. 1995).

The District Court dismissed the claims against Monroe County and the claims against Tate and Ikner in their official capacities. The court held that "any unlawful acts of Defendants Tate and Ikner cannot be said to represent [Monroe] County's policy," because "an Alabama county has [no] authority to make policy in the area of law enforcement." App. to Pet. for Cert. 55a. Petitioner appealed the District Court's decision as to Sheriff Tate. The Court of Appeals for the Eleventh Circuit affirmed, agreeing with the District Court that "Sheriff Tate is not a final policymaker for Monroe County in the area of law enforcement, because Monroe County has no law enforcement authority." *McMillian* v. *Johnson*, 88 F. 3d 1573, 1583 (1996). We granted certiorari, 519 U. S. 1025 (1996), and now affirm.

II

A

We held in *Monell*, 436 U. S., at 694, that a local government is liable under § 1983 for its policies that cause constitutional torts. These policies may be set by the government's lawmakers, "or by those whose edicts or acts may fairly be said to represent official policy." *Ibid.* A court's task is to

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[1] The claims against the defendants in their individual capacities have proceeded independently in the lower courts, with some of petitioner's claims surviving motions for summary judgment. See *McMillian* v. *Johnson*, 878 F. Supp. 1473, 1544–1545 (MD Ala. 1995).

"identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett* v. *Dallas Independent School Dist.*, 491 U. S. 701, 737 (1989). Here, the parties agree that Sheriff Tate has "final policymaking authority" in the area of law enforcement. They sharply disagree, however, about whether Alabama sheriffs are policymakers for the State or for the county when they act in a law enforcement capacity.[2]

In deciding this dispute, our inquiry is guided by two principles. First, the question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, "all or nothing" manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue. See *ibid.* (court must identify "those officials who have the power to make official policy *on a particular issue*" (emphasis added)); *id.*, at 738 (question is whether school district superintendent "possessed final policymaking authority *in the area of* employee transfers" (emphasis added)); *St. Louis* v. *Praprotnik*, 485 U. S. 112, 123 (1988) (plurality opinion) ("[T]he challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy *in that area of* the city's business"). Thus, we are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate repre-

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[2] We have explained that a suit against a governmental officer "in his official capacity" is the same as a suit "'against [the] entity of which [the] officer is an agent,'" *Kentucky* v. *Graham*, 473 U. S. 159, 165 (1985) (quoting *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690, n. 55 (1978)), and that victory in such an "official-capacity" suit "imposes liability on the entity that [the officer] represents," *Brandon* v. *Holt*, 469 U. S. 464, 471 (1985).

sents the State or the county when he acts in a law enforcement capacity.

Second, our inquiry is dependent on an analysis of state law. Cf. *Jett*, *supra*, at 737 (" '[W]hether a particular official has "final policymaking authority" is a question of *state law*' " (quoting, with original emphasis, *Praprotnik*, *supra*, at 123 (plurality opinion))); *Pembaur* v. *Cincinnati*, 475 U. S. 469, 483 (1986) (plurality opinion) (same). This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law. Cf. *Regents of Univ. of Cal.* v. *Doe*, 519 U. S. 425, 429, n. 5 (1997) ("[The] federal question can be answered only after considering the provisions of state law that define the agency's character").

B

The Court of Appeals for the Eleventh Circuit determined that under Alabama law, a sheriff acting in his law enforcement capacity is not a policymaker for the county. Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law.[3] See *Jett*, *supra*, at 738 ("We think the Court of Appeals [for the Fifth Circuit], whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the school district superintendent] possessed final policymaking authority in the area of employee transfers"); *Pembaur*, *supra*, at 484, n. 13 ("We

[3] We note that two of the three judges on the Eleventh Circuit's panel are based in Alabama. In addition, this is the second Eleventh Circuit panel to have reached this conclusion. See *Swint* v. *Wadley*, 5 F. 3d 1435, 1450–1451 (1993), vacated for lack of appellate jurisdiction, 514 U. S. 35 (1995).

generally accord great deference to the interpretation and application of state law by the courts of appeals").

We begin with the Alabama Constitution, "the supreme law of the state." *Alexander* v. *State ex rel. Carver*, 150 So. 2d 204, 208 (Ala. 1963). We agree with the Court of Appeals that the constitutional provisions concerning sheriffs, the historical development of those provisions, and the interpretation given them by the Alabama Supreme Court strongly support Monroe County's contention that sheriffs represent the State, at least for some purposes. Alabama's Constitution, adopted in 1901, states that "[t]he executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county." Ala. Const. of 1901, Art. V, § 112. This designation is especially important for our purposes, because although every Alabama Constitution has included sheriffs as constitutional officers and has provided for their election by county voters, see Ala. Const. of 1819, Art. IV, § 24; Ala. Const. of 1861, Art. IV, § 24; Ala. Const. of 1865, Art. VII, § 3; Ala. Const. of 1867, Art. V, § 21; Ala. Const. of 1875, Art. V, § 26; Ala. Const. of 1901, Art. V, § 138, sheriffs have not always been explicitly listed as members of the state "executive department." Thus, the 1867 Constitution listed only the "governor, lieutenant governor, secretary of state, auditor, treasurer, and attorney general" as constituting "the executive department." Ala. Const. of 1867, Art. V, § 1. This changed with the 1875 Constitution, when sheriffs and the superintendent of education were added to the list. Ala. Const. of 1875, Art. V, § 1.[4]

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[4] Executive department officers have to take the constitutional oath of office, Ala. Const. of 1901, Art. XVII, § 279; Ala. Const. of 1875, Art. XV, § 1, and are required to submit written reports to the Governor on demand. Submitting a false report was originally a crime, Ala. Const. of 1875, Art. V, § 9, and is now an impeachable offense, Ala. Const. of 1901, Art. V, § 121.

The framers of the 1901 Constitution took two significant steps in an attempt to solidify the place of sheriffs in the executive department, and to clarify that sheriffs were acting for the State when exercising their law enforcement functions. First, faced with reports that sheriffs were allowing mobs to abduct prisoners and lynch them, the framers made such "neglect" by sheriffs an impeachable offense. See Ala. Const. of 1901, Art. V, § 138 ("Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached"); *State ex rel. Garber* v. *Cazalas*, 162 Ala. 210, 50 So. 296 (1909) (sheriff's failure to close jail doors, resulting in lynching of prisoner, constitutes impeachable offense); M. McMillan, Constitutional Development in Alabama, 1789–1901, p. 338, n. 186 (1955) (impeachment provision resulted in "much progress made against lynching").

Second, authority to impeach sheriffs was moved from the county courts to the State Supreme Court, because of "[t]he failure of county courts to punish sheriffs for neglect of duty." *Parker* v. *Amerson*, 519 So. 2d 442, 443 (Ala. 1987). One of the primary purposes of this change, proposed by ex-Governor Thomas Goode Jones at the 1901 Convention, was "to augment the power of the Governor." *Id.*, at 444. After this change, the Governor could order the State Supreme Court, rather than the county court, to begin impeachment proceedings against a wayward sheriff, and would not have to worry that local support for the sheriff would annul his effort at centralized control. See *ibid.;* Strengthening the Power of the Executive, Address of Emmet O'Neal, Governor of Alabama, pp. 9–10 (Sept. 12, 1911) (new impeachment provision increases Governor's control of sheriffs and "gives the Executive real power which is respected and feared"). Thus, sheriffs now share the same impeachment procedures as state legal officers and lower state court judges, Ala. Const. of 1901, Art. VII, § 174,

rather than county and municipal officers, Ala. Const. of 1875, Art. VII, § 3.

Critically for our case, the Alabama Supreme Court has interpreted these provisions and their historical background as evidence of "the framers' intent to ensure that sheriffs be considered executive officers of the state." *Parker*, 519 So. 2d, at 444. Based primarily on this understanding of the State Constitution, the court has held unequivocally that sheriffs are state officers, and that tort claims brought against sheriffs based on their official acts therefore constitute suits against the State, not suits against the sheriff's county. *Id.*, at 443–445.[5] Thus, Alabama counties are not liable under a theory of *respondeat superior* for a sheriff's official acts that are tortious. *Id.*, at 442. The issues in *Parker* are strikingly similar to the ones in the present case, and that decision is therefore strong evidence in favor of the Court of Appeals' conclusion that sheriffs act on behalf of the State, rather than the county, when acting in their law enforcement capacity.

Turning from the Alabama Constitution to the Alabama Code, the relevant provisions are less compelling, but still support the conclusion of the Court of Appeals to some extent. Section 36–22–3 of the code sets out a sheriff's duties. First, a sheriff must "attend upon" the state courts in his county, must "obey the lawful orders and directions" of those courts, and must "execute and return the process and orders" of any state court, even those outside his county. Ala. Code §§ 36–22–3(1), (2) (1991). Thus, judges (who are state officers, see Ala. Const. of 1901, Amdt. 328, § 6.01) may order

[5] As a result of this holding and the State Constitution's sovereign immunity provision, see Ala. Const. of 1901, Art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity"), the Alabama Supreme Court has held that a sheriff is absolutely immune from all suits for damages based on his official acts. *Parker* v. *Amerson*, 519 So. 2d 442, 446 (Ala. 1987). See also *King* v. *Colbert County*, 620 So. 2d 623, 626 (Ala. 1993); *Boshell* v. *Walker County Sheriff*, 598 So. 2d 843, 844 (Ala. 1992); *Hereford* v. *Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991).

the sheriff to take certain actions, even if the judge sits in a distant county. And under Ala. Code § 12–17–24 (1995), the presiding circuit judge "exercise[s] a general supervision" over the county sheriffs in his circuit,[6] just as if the sheriffs are normal "court [*i. e.*, state] employees," see § 12–17–1.

Second, the sheriff must give to the county treasurer a sworn written statement detailing the funds he has received for the county since his last statement, and must pay these funds to the treasurer. § 36–22–3(3). In contrast to the state judges, however, the county treasurer does not appear to have any statutory authority to direct the sheriff to take specific actions.

Third and most importantly, "[i]t shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county." § 36–22–3(4). By this mandate, sheriffs are given complete authority to enforce the state criminal law in their counties. In contrast, the "powers and duties" of the counties themselves—creatures of the State who have only the powers granted to them by the State, *Alexander*, 150 So. 2d, at 206—do not include any provision in the area of law enforcement. Ala. Code § 11–3–11 (1989). Thus, the "governing body" of the counties—which in every Alabama county is the county commission, see *Calvert* v. *Cullman County Comm'n*, 669 So. 2d 119 (Ala. 1995) (citing § 11–1–5)—cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime. And when the sheriff does secure such evidence, he has an obligation to share this information not with the county commission, but with the district attorney (a state official, see *Hooks* v. *Hitt*, 539 So. 2d 157, 159 (Ala. 1988)).

[6] Seventeen of the forty judicial circuits in Alabama contain more than one county, including the circuit in which Monroe County sits. Ala. Code § 12–11–2 (1995).

While the county commission thus has no direct control over how the sheriff fulfills his law enforcement duty, the Governor and the attorney general do have this kind of control. Pursuant to § 36–22–5, they can direct the sheriff to investigate "any alleged violation of law in their counties." And after "proceed[ing] promptly" to complete this investigation, the sheriff must "promptly" write a report to the state official in charge of the investigation, stating his findings, listing the witnesses he has secured, and summarizing what the witnesses can prove. *Ibid.* In addition, the salaries of all sheriffs are set by the state legislature, not by the county commissions. § 36–22–16.

To all of this, petitioner counters with four important provisions that cut in favor of the conclusion that sheriffs are county officials. First, the sheriff's salary is paid "out of the county treasury." *Ibid.* Second, the county provides the sheriff with equipment (including cruisers), supplies, lodging, and reimbursement for expenses, to the extent "reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office." § 36–22–18. Third, the sheriff's jurisdiction is limited to the borders of his county. See, *e. g.*, § 36–22–3(4) ("It shall be the duty of sheriffs *in their respective counties* . . . to ferret out crime" (emphasis added)). Fourth, the sheriff is elected locally by the voters in his county (as he has been since Alabama's 1819 Constitution). See Ala. Const. of 1901, Art. V, § 138; Ala. Const. of 1819, Art. IV, § 24.

We do not find these provisions sufficient to tip the balance in favor of petitioner. The county's payment of the sheriff's salary does not translate into control over him, since the county neither has the authority to change his salary nor the discretion to refuse payment completely. The county commissions do appear to have the discretion to deny funds to the sheriffs for their operations beyond what is "reasonably necessary." See *Etowah County Comm'n* v. *Hayes*, 569 So. 2d 397, 399 (Ala. 1990) *(per curiam)*. But at most, this

discretion would allow the commission to exert an attenuated and indirect influence over the sheriff's operations.

Petitioner's contention that sheriffs are county officials because "state policymakers" typically make policy for the entire State (without limits on their jurisdiction) and are typically elected on a statewide (not local) basis, surely has some force. But district attorneys and state judges are often considered (and in Alabama are considered) state officials, even though they, too, have limited jurisdictions and are elected locally. These characteristics are therefore consistent with an understanding of the 67 Alabama sheriffs as state officials who have been locally placed throughout the State, with an element of control granted to the officials and residents of the county that receives the sheriff's services.[7]

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[7] Petitioner also makes three other points that we believe have little merit. First, he points out that when the sheriff's office is vacant or when the sheriff is incapacitated, it is the county coroner that fills in for the sheriff. Ala. Code § 11–5–5 (1989). We note that this temporary assignment only lasts until the Governor appoints a replacement for the sheriff, who then serves out the remainder of the sheriff's term. Ala. Code § 36–9–17 (1991). Thus, even assuming that the county coroner is a county official, we place little weight on this assignment of temporary responsibility, which by its nature must fall to an official who is already in the county and available to step in for the sheriff at any time. Second, petitioner cites several instances in the code where a group of officials that includes the sheriff is designated a group of "county officials" or "county employees." See, *e. g.*, §§ 36–3–4, 36–15–1, 36–22–16. But in light of the Alabama Supreme Court's conclusion that (i) sheriffs are state officials according to the State Constitution, see *Parker*, 519 So. 2d, at 443, and (ii) contrary statements in that court's prior decisions had ignored the Constitution and therefore should not be followed, *id.*, at 445 (citing, among other cases, *In re Opinions of Justices*, 225 Ala. 359, 143 So. 345 (1932)), we think that any contrary implication in the code is entitled to little weight. Finally, petitioner relies on the Monroe County Commission's insurance policy—which, according to the District Court, "may cover . . . some, but not all, of the claims made against" Monroe County and Sheriff Tate in this suit, App. to Pet. for Cert. 77a—to establish that the commission will pay any judgment rendered against Sheriff Tate. But this policy shows, at the most, that there was uncertainty as to whether the courts would con-

In sum, although there is some evidence in Alabama law that supports petitioner's argument, we think the weight of the evidence is strongly on the side of the conclusion reached by the Court of Appeals: Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties. Cf. *Praprotnik*, 485 U. S., at 125 ("We are not, of course, predicting that state law will always speak with perfect clarity"); *id.*, at 126–127 ("It may not be possible to draw an elegant line that will resolve this conundrum").

C

Petitioner argues that this conclusion will create a lack of uniformity in Alabama and throughout the country. First, he argues that it is anomalous to have 67 different "state policymakers" in the person of Alabama's 67 county sheriffs, all of whom may have different "state law enforcement policies" in their counties. Second, he points out that most Federal Courts of Appeals have found county sheriffs to be county, not state, officials, and he implies that our affirmance of the Court of Appeals will either call those decisions into question or create an unacceptable patchwork of rulings as to § 1983 liability of counties for the acts of their sheriffs. We reject both arguments: The first ignores the history of sheriffs, and the second ignores our Nation's federal nature.

English sheriffs (or "shire-reeves") were the King's "reeves" (officers or agents) in the "shires" (counties), at least after the Norman Conquest in 1066. See C. Wigan & D. Meston, Mather on Sheriff and Execution Law 1–2 (1935). Although chosen locally by the shire's inhabitants, the sheriff did "all the king's business in the county," 1 W. Blackstone, Commentaries on the Laws of England 328 (1765), and was "the keeper of the king's peace," *id.*, at 332. See also Wigan & Meston, *supra*, at 2 ("It is this position of the Sher-

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sider Sheriff Tate a county policymaker in these circumstances, not that the county would pay any judgment against him.

iff as the executive officer of the Crown which has all along been the outstanding characteristic of the office").

As the basic forms of English government were transplanted in our country, it also became the common understanding here that the sheriff, though limited in jurisdiction to his county and generally elected by county voters,[8] was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace. See, *e. g.*, Wager, Introduction, in County Government Across the Nation 5 (P. Wager ed. 1950) ("The office of sheriff has an unbroken lineage from the Anglo-Saxon *shire-reeve*"); 1 W. Anderson, A Treatise on the Law of Sheriffs, Coroners and Constables 5 (1941) ("In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State and he has no superior in his county"); R. Cooley, Handbook on the Law of Municipal Corporations 512 (1914) ("Sheriffs, coroners, clerks and other so-called county officers are properly state officers for the county. Their functions and duties pertain chiefly to the affairs of state in the county"); 3 J. Bouvier, Bouvier's Law Dictionary 3058 (8th ed. 1914) (defining sheriff as "[a] county officer representing the executive or administrative power of the state within his county").

This historical sketch indicates that the common law itself envisioned the possibility that state law enforcement "policies" might vary locally, as particular sheriffs adopted varying practices for arresting criminals or securing evidence.[9]

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[8] See W. Murfree, A Treatise on the Law of Sheriffs and Other Ministerial Officers 6 (1890) (sheriffs elected by county voters in all States but two).

[9] Cf. *McMillian* v. *Johnson*, 88 F. 3d 1573, 1579 (CA11 1996) ("[W]e see no anomaly in having different state policymakers in different counties. Such a situation would be no different than if each of a city's police precinct commanders had unreviewable authority over how arrestees were processed. Each commander might have a different processing policy, but that does not render a commander's policy that of her precinct as opposed to that of the city when the city is sued under § 1983").

Thus, petitioner's disagreement with the concept that "county sheriffs" may actually be state officials is simply a disagreement with the ancient understanding of what it has meant to be a sheriff.

Petitioner's second concern is that under our holding here, sheriffs will be characterized differently in different States. But while it might be easier to decide cases arising under § 1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish. Understandably, then, the importance of counties and the nature of county government have varied historically from region to region, and from State to State. See, *e. g.*, Wager, *supra*, at 5–8 (describing different systems of rural government that developed in the Massachusetts, New York, Pennsylvania, and Virginia colonies, which later resulted in counties having widely varying roles in the four regions); Martin, American County Government, in County Governments in an Era of Change 3–5 (P. Berman ed. 1993) (same); DeSantis & Renner, Governing the County, *id.*, at 16–25 (describing varying levels of power currently exercised by counties in different States, and explaining how regional influences have resulted in different forms of county government in different States); *id.*, at 19 (listing Alabama as 37th among the 50 States in amount of discretionary authority granted to its counties). Thus, since it is entirely natural that both the role of sheriffs and the importance of counties vary from State to State, there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another.[10]

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[10] Compare, *e. g.*, *Strickler* v. *Waters*, 989 F. 2d 1375, 1390 (CA4 1993) (Virginia "city sheriff" does not set city policy in area of jail conditions); *Thompson* v. *Duke*, 882 F. 2d 1180, 1187 (CA7 1989) (Illinois sheriff does not set county policy in area of training jail employees, because county board of commissioners has no authority to set policy in this area), with *Dotson* v. *Chester*, 937 F. 2d 920, 926–928 (CA4 1991) (Maryland sheriff

The final concern of petitioner and his *amici* is that state and local governments will manipulate the titles of local officials in a blatant effort to shield the local governments from liability. But such efforts are already foreclosed by our decision in *Praprotnik*. See 485 U. S., at 127 (plurality opinion) ("[E]gregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded" by allowing plaintiffs to prove that "a widespread practice" has been established by "'custom or usage' with the force of law"). And there is certainly no evidence of such manipulation here; indeed, the Alabama provisions that cut most strongly against petitioner's position predate our decision in *Monell* by some time.

The judgment of the Court of Appeals is therefore

Affirmed.

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

Petitioner Walter McMillian, convicted of capital murder, spent nearly six years on Alabama's Death Row. In 1993, the Alabama Court of Criminal Appeals determined that government officials, including the Sheriff of Monroe County, had concealed evidence of McMillian's innocence. Based on that evidence, the court overturned the conviction. The State thereafter dismissed all charges against McMillian and released him from prison.

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sets county policy in area of jail conditions, based on exhaustive survey of Maryland law; citing no constitutional provision to the contrary); *Davis* v. *Mason County,* 927 F. 2d 1473, 1480 (CA9 1991) (Washington sheriff sets county policy in area of training deputy sheriffs, based on statutory provision labeling sheriff "chief executive officer . . . of the county"; citing no constitutional provision to the contrary (internal quotation marks omitted)); *Turner* v. *Upton County,* 915 F. 2d 133, 136–137 (CA5 1990) (Texas sheriff sets county policy in area of law enforcement, based on "unique structure of county government in Texas"; citing no constitutional provision to the contrary (internal quotation marks omitted)); *Crowder* v. *Sinyard,* 884 F. 2d 804, 828 (CA5 1989) (Arkansas sheriff sets county policy in area of law enforcement; citing no constitutional provision to the contrary).

Seeking redress for an arrest and years of incarceration in violation of his federal constitutional rights, McMillian commenced the instant action under 42 U. S. C. § 1983. He named as defendants both Monroe County and the County's Sheriff, Tom Tate. McMillian alleged that Sheriff Tate withheld exculpatory evidence, generated false, inculpatory evidence, and subjected him to gross racial insults and relentless intimidation.

Sheriff Tate, it is uncontested, has "final policymaking authority" under Alabama law over matters of law enforcement in Monroe County. Our precedent instructs that, if the sheriff makes policy for the State, Monroe County would not be accountable, under § 1983, for that policy; if, on the other hand, the sheriff acts as law enforcement policymaker for Monroe County, then the county would be answerable under § 1983. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978).

Alabama has 67 county sheriffs, each elected, paid, and equipped locally, each with countywide, not statewide, authority. Unlike judges who work within the State's judicial hierarchy, or prosecutors who belong to a prosecutorial corps superintended by the State's Attorney General, sheriffs are not part of a state command and serve under no "State Sheriff General." The Court, nonetheless, holds that the policies set by Sheriff Tate in Monroe County, though discrete from, and uncoordinated with, the policies of sheriffs in other counties, "may fairly be said to represent [Alabama] policy." See *ibid.* I disagree.

I

In my view, Alabama law defining the office of sheriff indicates that the sheriff acts within and for the county when setting and implementing law enforcement policy.[1] In ex-

[1] The Court observes that this Court must "defer considerably" to the Eleventh Circuit's construction of Alabama law. See *ante*, at 786. But cf. *Salve Regina College* v. *Russell*, 499 U. S. 225, 231 (1991) (courts of appeals review *de novo* district courts' state-law determinations). Deference, however, does not supplant careful review, see *St. Louis* v. *Praprot-*

plaining why it concludes otherwise and deems the sheriff the State's, not the county's, policymaker, the Court leans heavily on provisions of the State's Constitution. The Court relies on the Alabama Constitution's designation of "a sheriff for each county" as a member of the State's "executive department." See Ala. Const., Art. V, § 112; *ante*, at 787. In addition, the Court points to two 1901 amendments relating to the impeachment of sheriffs. See *ante*, at 788–789. These measures are the strongest supports for the Court's classification of county sheriffs as state actors. They are not sturdy enough, however, to justify the Court's holding that county sheriffs are state officials.

Alabama law does not consistently designate sheriffs as "executive department" officers; instead, Alabama law in several instances refers to sheriffs as county officials. See *In re Opinions of Justices*, 225 Ala. 359, 143 So. 345 (1932) (sheriffs are county officers for purposes of 1912 constitutional amendment regarding county officers' salaries); Ala. Code § 36–3–4(a) (1991) (sheriff, a "county officer," shall be elected to four-year term); Ala. Code § 36–22–16(a) (1991) (sheriffs shall be compensated out of the county treasury in same manner as "other county employees"). Moreover, designations Alabama attaches to sheriffs in its laws and decisions are not dispositive of a court's assessment of Sheriff Tate's status for § 1983 purposes. Cf. *Regents of Univ. of Cal.* v. *Doe*, 519 U. S. 425, 429, n. 5 (1997); *Howlett* v. *Rose*, 496 U. S. 356, 376 (1990) (defenses to § 1983 actions are questions of federal law); *Martinez* v. *California*, 444 U. S. 277, 284, and n. 8 (1980) (state law granting immunity to parole officers does not control question whether such officers have immunity under § 1983). If a State's designation sufficed to answer the federal question at issue, "States would then be

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nik, 485 U. S. 112, 129–130, 131–132 (1988) (plurality opinion) (reversing Court of Appeals determination that certain city officials were municipal policymakers), and, in any event, has little place here because the Court's reasoning differs substantially from that of the Eleventh Circuit.

free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People." *Howlett*, 496 U. S., at 383.

Nor are the 1901 impeachment measures secure indicators that a sheriff acts on behalf of the State, not the county. As the Court explains, the impeachment amendments were intended to provide a state check on county sheriffs in view of their glaring lapses in acquiescing to abductions and lynchings in the late 1800's. See *ante*, at 788. However, making an officer eligible for impeachment, by itself, does not change the governmental unit to which the officer belongs. See Ala. Const., Art. VII, § 175 (listing numerous county officials subject to impeachment); Ala. Code § 36–11–1(a) (1991) (same). And transferring impeachment proceedings from county courts to the State Supreme Court, see Ala. Const., Art. VII, § 174, is sensibly seen as an acknowledgment of the power wielded by sheriffs within their own counties, and the consequent need for placement of removal authority outside a sheriff's bailiwick. Furthermore, impeachment of sheriffs is not a power reserved exclusively to state officials; "five resident taxpayers" of the sheriff's county can initiate an impeachment. See Ala. Code § 36–11–6 (1991). Impeachment, in sum, provides an ultimate check on flagrant behavior, but does not serve as a tight control rein.

The prime controllers of a sheriff's service are the county residents, the people who select their sheriff at quadrennial elections. Sheriff Tate owes his position as chief law enforcement officer of Monroe County to the county residents who elected him, and who can unseat him. See Ala. Const., Art. V, § 138, as amended by Amdt. No. 35 ("A sheriff shall be elected in each county by the qualified electors thereof . . . ."). On the ballot, candidates for the office of sheriff are grouped with candidates for other county offices, and are not listed with state office candidates. See Ala. Code § 17–8–5 (1995).

Traditionally, Alabama sheriffs have had autonomy to formulate and execute law enforcement policy within the geographic confines of their counties. Under Alabama law, "[i]t shall be the duty of sheriffs *in their respective counties* . . . to ferret out crime, to apprehend and arrest criminals and . . . to secure evidence of crimes." Ala. Code § 36–22–3(4) (1991) (emphasis added); see also Ala. Code § 15–6–1 (1995) ("The sheriff is the principal conservator of the peace *in his county*, and it is his duty to suppress riots, unlawful assemblies and affrays. In the execution of such duty, he may summon to his aid as many of the men of his county as he thinks proper." (emphasis added)); § 15–10–1 (sheriffs may make arrests "within their respective counties").

Monroe County pays Sheriff Tate's salary, see Ala. Code § 36–22–16(a) (1991) (sheriffs shall be paid "out of the county treasury as the salaries of other county employees are paid"), and the sheriff operates out of an office provided, furnished, and equipped by the county, see § 36–22–18. The obligation to fully equip the sheriff is substantial, requiring a county commission to "furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto." *Ibid.* These obligations are of practical importance, for they mean that purse strings can be pulled at the county level; a county is obliged to provide a sheriff only what is "*reasonably needed* for the proper and efficient conduct of the affairs of the sheriff's office," *ibid.* (emphasis added). How generously the sheriff will be equipped is likely to influence that officer's day-to-day conduct to a greater extent than the remote prospect of impeachment. See *ibid.;* see also *Geneva Cty. Comm'n* v. *Tice*, 578 So. 2d 1070, 1075 (Ala. 1991) (county may reasonably limit budget for overtime pay for sheriff's deputies); Ala. Code § 36–22–16(a) (1991) (sheriff's salary, paid by county, may be

increased "by law by general or local act"); § 36–22–3(3) (sheriff must render to county treasurer a periodic written statement of moneys collected by sheriff on behalf of county).

Sheriff Tate, in short, is in vital respects a county official. Indeed, one would be hard pressed to think of a single official who more completely represents the exercise of significant power within a county. See *Pembaur* v. *Cincinnati*, 746 F. 2d 337, 340–341 (CA6 1984) (sheriff elected by residents of county to be county's chief law enforcement officer, paid and equipped by county, is "obvious[ly]" a county official), rev'd on other grounds, 475 U. S. 469 (1986).[2]

The Court observes that it is "most importan[t]" to its holding that Alabama sheriffs "are given complete authority to enforce the state criminal law in their counties." See *ante*, at 790. If the Court means to suggest that Sheriff Tate should be classified as a state actor because he is enforcing *state* (as opposed to county or municipal) law, the Court proves far too much. Because most criminal laws are of statewide application, relying on whose law the sheriff enforces yields an all-state categorization of sheriffs, despite the Court's recognition that such blanket classification is inappropriate. See *ante*, at 786. Sheriffs in Arkansas, Texas, and Washington, just like sheriffs in Alabama, enforce

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[2] The majority of Courts of Appeals to have addressed this question have similarly concluded that sheriffs, when engaged in a variety of activities, are county actors. See, *e. g.*, cases cited *ante*, at 795–796, n. 10; see also *Parker* v. *Williams*, 862 F. 2d 1471, 1477–1481 (CA11 1989) (Alabama sheriff acts for county in hiring chief jailor); *Lucas* v. *O'Loughlin*, 831 F. 2d 232, 234–235 (CA11 1987) (Florida sheriff acts for county in hiring and firing deputies); *Weber* v. *Dell*, 804 F. 2d 796, 802–803 (CA2 1986) (New York sheriff acts for county in setting county jail strip search policy); *Marchese* v. *Lucas*, 758 F. 2d 181, 188–189 (CA6 1985) (Michigan sheriff acts for county in training deputies and ratifying deputies' use of force); *Blackburn* v. *Snow*, 771 F. 2d 556, 571 (CA1 1985) (Massachusetts sheriff acts for county in setting county jail strip search policy). But see *Soderbeck* v. *Burnett*, 821 F. 2d 446, 451–452 (CA7 1987) (Wisconsin sheriff acts on behalf of State, not county, in hiring and firing employees).

the State's law, but that does not make them policymakers for the State rather than the county. See *ante*, at 795–796, n. 10.

In emphasizing that the Monroe County Commission cannot instruct Sheriff Tate how to accomplish his law enforcement mission, see *ante*, at 790, the Court indirectly endorses the Eleventh Circuit's reasoning: Because under Alabama law a county commission does not possess law enforcement authority, a sheriff's law enforcement activities cannot represent county policy. See *McMillian* v. *Johnson*, 88 F. 3d 1573, 1578 (CA11 1996). There is an irony in this approach: If a county commission lacks law enforcement authority, then the sheriff becomes a state official; but if a county commission possesses such authority and directs the sheriff's activities, then the sheriff presumably would not be a *final* policymaker in the realm of law enforcement, see *St. Louis* v. *Praprotnik*, 485 U. S. 112, 127 (1988) (plurality opinion).

Moreover, in determining who makes county policy, this Court has never reasoned that all policymaking authority must be vested in a single body that either exercises that power or formally delegates it to another. Few local governments would fit that rigid model. Cf. *id.*, at 124–125 ("The States have extremely wide latitude in determining the form that local government takes . . . . [O]ne may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies."). Nor does *Monell* support such a constricted view of the exercise of municipal authority; there, we spoke of § 1983 liability for acts by "lawmakers *or* by those whose edicts or acts may fairly be said to represent official policy." 436 U. S., at 694 (emphasis added). In this case, Sheriff Tate is "the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected." *Turner* v. *Upton Cty.*, 915 F. 2d 133, 136 (CA5 1990); see also *Blackburn* v. *Snow*, 771 F. 2d 556, 571 (CA1 1985); accord, *Vera* v. *Tue*, 73

F. 3d 604, 609 (CA5 1996) ("[T]he Sheriff, an elected county official [in Texas], had equal authority to the county commissioners in that jurisdiction [so] that his actions constituted those of the county just as much as those of the commissioners."). An Alabama sheriff is a county policymaker because he independently exercises law enforcement authority for the county. In this most crucial respect, the Alabama arrangement resembles the "unique structure of county government" in Texas. See *Turner*, 915 F. 2d, at 136–137, cited *ante*, at 796, n. 10.

The Court also suggests that because the Governor can direct a sheriff to investigate a violation of law in the county, an Alabama sheriff must be a state, not a county, official. See *ante*, at 791 (citing Ala. Code § 36–22–5 (1991)). It is worth noting that a group of county citizens can likewise trigger an investigation by the sheriff. See § 36–22–6(b). The respondent, Monroe County, did not inform us whether the Governor directs county sheriffs to conduct investigations with any regularity. More important, there is no suggestion that Sheriff Tate was proceeding under the Governor's direction when Tate pursued the investigation that led to McMillian's Death Row confinement. If Sheriff Tate were acting on instruction from the Governor, this would be a very different case. But the bare possibility that a Governor might sometime direct a sheriff's law enforcement activities does not lessen the sheriff's authority, as the final county policymaker, in the general run of investigations the sheriff undertakes.

II

The Court's reliance on "the ancient understanding of what it has meant to be a sheriff," *ante*, at 795, is no more persuasive than its interpretation of Alabama law. This emphasis on the historical understanding of the office of sheriff implies, again, an all-state categorization of sheriffs throughout the Nation; but because the Court expressly disclaims such a "blunderbuss" approach, *ibid.*, that cannot be what

this history lesson is intended to convey. In England, it is true, the sheriff did perform "the king's business in the county." 1 W. Blackstone, Commentaries *339. But the English sheriff, as Blackstone described him, was far closer to the crown than his contemporary counterpart is to the central state government. While sheriffs were for a time chosen locally, "[t]his election," according to Blackstone, "was in all probability not absolutely vested in the [inhabitants of the counties], but required the royal approbation." *Id.*, at *340. Eventually, the king chose the sheriff from a list proposed by the judges and other great officers. See *id.*, at *340–*341.

Whatever English history may teach, "[t]hroughout U. S. history, the sheriff has remained the principal law enforcement officer in the county." G. Felkenes, The Criminal Justice System: Its Functions and Personnel 53 (1973); see *id.*, at 52–53 (referring specifically to Alabama sheriffs). In the United States, "[i]n order to reserve control over the sheriff's department and its police functions, the people made the sheriff an elective officer." *Id.*, at 53. It is this status as the county's law enforcement officer chosen by the county's residents that is at the root of the contemporary understanding of the sheriff as a county officer.

* * *

A sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official. Nothing in Alabama law warrants a different conclusion. It makes scant sense to treat sheriffs' activities differently based on the presence or absence of state constitutional provisions of the limited kind Alabama has adopted.

The Court's Alabama-specific approach, however, assures that today's immediate holding is of limited reach. The Court does not appear to question that an Alabama sheriff may still be a county policymaker for some purposes, such

as hiring the county's chief jailor, see *Parker* v. *Williams*, 862 F. 2d 1471, 1477–1481 (CA11 1989). And, as the Court acknowledges, under its approach sheriffs may be policymakers for certain purposes in some States and not in others. See *ante*, at 795, and n. 10. The Court's opinion does not call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policymakers. Furthermore, the Court's recognition of the historic reasons why Alabama listed sheriffs as members of the State's "executive department," see *ante*, at 788–789, should discourage endeavors to insulate counties and municipalities from *Monell* liability by change-the-label devices. Thus, the Court's opinion, while in my view misguided, does little to alter § 1983 county and municipal liability in most jurisdictions.

Syllabus

De BUONO, NEW YORK COMMISSIONER OF HEALTH, et al. *v.* NYSA–ILA MEDICAL AND CLINICAL SERVICES FUND, by its trustees, BOWERS, et al.

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

No. 95–1594. Argued February 24, 1997—Decided June 2, 1997

New York's Health Facility Assessment (HFA) imposes a tax on gross receipts for patient services at, *inter alia,* diagnostic and treatment centers. The NYSA–ILA Medical and Clinical Services Fund (Fund), which administers a plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), owns and operates New York treatment centers for longshore workers, retirees, and their dependents. Respondents, the Fund's trustees, discontinued paying the tax and filed this action to enjoin petitioner state officials from making future assessments and to obtain a refund, alleging that the HFA is a state law that "relates to" the Fund within the meaning of § 514(a) of ERISA, and is therefore pre-empted as applied to hospitals run by ERISA plans. The District Court concluded that the HFA is not pre-empted because it is a tax of general application having only an incidental impact on benefit plans. The Second Circuit reversed, reasoning that the HFA relates to the Fund by reducing the amount of Fund assets that would otherwise be available to provide plan members with benefits, and could cause the plan to limit its benefits or to charge plan members higher fees. On remand from this Court in light of *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645—in which this Court held that ERISA did not pre-empt a New York statute requiring hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan—the Second Circuit reinstated its judgment, distinguishing *Travelers* on the ground that the statute there at issue had only an indirect economic influence on the decisions of ERISA plan administrators, whereas the HFA depletes the Fund's assets directly, and thus has an immediate impact on an ERISA plan's operations.

Held: Section 514(a) does not preclude New York from imposing a gross receipts tax on ERISA funded medical centers. Pp. 812–816.

(a) When the Second Circuit initially found the HFA pre-empted, it relied substantially on an expansive and literal interpretation of the

words "relate to" in § 514(a). It appears to have adhered to that approach on remand, failing to give proper weight to *Travelers*' rejection of such a strictly literal reading. In *Travelers*, the Court unequivocally concluded that the "relates to" language was not intended to modify "the starting presumption that Congress does not intend to supplant state law." 514 U. S., at 654. In evaluating whether the normal presumption against pre-emption has been overcome in a particular case, this Court must look to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive. *Id.*, at 656. Pp. 812–814.

(b) Following that approach here, the HFA clearly operates in a field that has been traditionally occupied by the States: the regulation of health and safety matters. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715. Nothing in the HFA's operation convinces this Court that it is the type of state law that Congress intended ERISA to supersede. It is one of myriad state laws of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not relate to them within the statute's meaning. See, *e. g.*, *Travelers*, 514 U. S., at 668. The supposed difference between direct and indirect impact—upon which the Second Circuit relied in distinguishing this case from *Travelers*—cannot withstand scrutiny. While the Fund has arranged to provide medical benefits for its beneficiaries directly, had it chosen to purchase the services at independently run hospitals, those hospitals would have passed their HFA costs onto the Fund through their rates. Although the tax would be "indirect," its impact on the Fund's decisions would be in all relevant respects identical to the "direct" impact felt here. Pp. 814–816.

74 F. 3d 28, reversed.

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. 816.

M. Patricia Smith, Assistant Attorney General of New York, argued the cause for petitioners. With her on the briefs were *Dennis C. Vacco*, Attorney General, *Barbara G. Billet*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *Daniel F. De Vita*, Assistant Attorney General.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Dellinger*,

James A. Feldman, *J. Davitt McAteer*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Judith D. Heimlich*.

Donato Caruso argued the cause for respondents. With him on the brief were *C. Peter Lambos*, *Thomas W. Gleason*, and *Ernest L. Mathews, Jr.**

JUSTICE STEVENS delivered the opinion of the Court.

This is another Employee Retirement Income Security Act of 1974 (ERISA) pre-emption case.[1] Broadly stated, the

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*Briefs of *amici curiae* urging reversal were filed by *Richard Blumenthal*, Attorney General of Connecticut, and *Phyllis E. Hyman*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Pamela Carter* of Indiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Peter Verniero* of New Jersey, *W. A. Drew Edmondson* of Oklahoma, *Theodore R. Kulongoski* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Dan Morales* of Texas, *Jeffrey L. Amestoy* of Vermont, *James S. Gilmore III* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *James E. Doyle* of Wisconsin; for the American Federation of State County and Municipal Employees, AFL–CIO, by *Larry Weinberg*, *John C. Dempsey*, *Andrew D. Roth*, and *Nancy E. Hoffman;* for the Healthcare Association of New York State et al. by *Jeffrey J. Sherrin* and *Mark Thomas;* for the National Employment Lawyers Association by *Mary Ellen Signorille* and *Jeffrey Lewis;* and for the National Governors' Association et al. by *Richard Ruda*.

Ronald S. Longhofer and *John H. Eggertsen* filed a brief for the Self-Insurance Institute of America, Inc., as *amicus curiae* urging affirmance.

[1] The boundaries of ERISA's pre-emptive reach have been the focus of considerable attention from this Court. This case is one of three addressing the issue this Term. See *Boggs* v. *Boggs*, *post*, p. 833; *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316 (1997). And in the 16 years since we first took up the question, we have decided no fewer than 13 cases. See *New York State Conference*

question presented is whether hospitals operated by ERISA plans are subject to the same laws as other hospitals. More precisely, the question is whether the opaque language in ERISA's §514(a)[2] precludes New York from imposing a gross receipts tax on the income of medical centers operated by ERISA funds. We hold that New York may collect its tax.

I

In 1990, faced with the choice of either curtailing its Medicaid program or generating additional revenue to reduce the program deficit, the New York General Assembly enacted the Health Facility Assessment (HFA).[3] The HFA imposes a tax on gross receipts for patient services at hospitals, residential health care facilities, and diagnostic and treatment

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of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U. S. 645 (1995); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust and Sav. Bank*, 510 U. S. 86 (1993); *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U. S. 125 (1992); *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133 (1990); *FMC Corp.* v. *Holliday*, 498 U. S. 52 (1990); *Massachusetts* v. *Morash*, 490 U. S. 107 (1989); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825 (1988); *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1 (1987); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58 (1987); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985); *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983); and *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504 (1981). The issue has also generated an avalanche of litigation in the lower courts. See *Greater Washington Bd. of Trade*, 506 U. S., at 135, and n. 3 (STEVENS, J., dissenting) (observing that in 1992, a LEXIS search uncovered more than 2,800 opinions on ERISA pre-emption).

[2] Section 514(a) of ERISA informs us that "[e]xcept as provided in subsection (b) of this section, the provisions of this [statute] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 88 Stat. 897, 29 U. S. C. §1144(a). None of the exceptions in subsection (b) is directly at issue in this case.

[3] N. Y. Pub. Health Law §2807–d (McKinney Supp. 1992).

centers.[4] The assessments become a part of the State's general revenues.

Respondents are the trustees of the NYSA–ILA Medical and Clinical Services Fund (Fund), which administers a self-insured, multiemployer welfare benefit plan. The Fund owns and operates three medical centers—two in New York and one in New Jersey—that provide medical, dental, and other health care benefits primarily to longshore workers, retirees, and their dependents. The New York centers are licensed by the State as "diagnostic and treatment centers," App. 80, and are thus subject to a 0.6 percent tax on gross receipts under the HFA. N. Y. Pub. Health Law § 2807–d(2)(c) (McKinney 1993).

During the period from January through November of 1991, respondents paid HFA assessments totaling $7,066 based on the two New York hospitals' patient care income of $1,177,670. At that time, they discontinued the payments and brought this action against appropriate state officials (petitioners) to enjoin future assessments and to obtain a refund of the tax paid in 1991. The complaint alleged that the HFA is a state law that "relates to" the Fund within the meaning of § 514(a) of ERISA, and is therefore pre-empted as applied to hospitals run by ERISA plans.

The District Court denied relief. It concluded that HFA was not pre-empted because it was a "tax of general application" that did not "interfere with the calculation of benefits or the determination of an employee's eligibility for benefits" and thus had only an incidental impact on benefit plans. App. to Pet. for Cert. 21a.[5]

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[4] In addition to taxing the income derived from patient services at these facilities, the HFA taxes investment income and certain operating income. N. Y. Pub. Health Law §§ 2807–d(3)(c), 2807–d(3)(d) (McKinney 1993). The taxation of these activities is not challenged here.

[5] In response to the complaint filed in 1992, petitioners objected to federal jurisdiction, relying on the Tax Injunction Act, 28 U. S. C. § 1341, which provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such

The Court of Appeals for the Second Circuit reversed. It distinguished cases in which we had found that certain "laws of general application" were not pre-empted by ERISA,[6] explaining that the HFA "targets only the health care industry," which is, "by definition, the realm where ERISA welfare plans must operate," *NYSA–ILA Medical and Clinical Services Fund* v. *Axelrod, M. D.*, 27 F. 3d 823, 827 (1994). The court reasoned that because the HFA "operates as an immediate tax on payments and contributions which were intended to pay for participants' medical benefits," it directly affects "the very operations and functions that make the Fund what it is, a provider of medical, surgical, and hospital

State." Respondents contended that the statute did not apply because the New York courts do not provide the "plain" remedy required to bar federal jurisdiction. The District Court appears to have agreed with respondents, see App. to Pet. for Cert. 19a, but when it ultimately granted summary judgment and dismissed the complaint, it did not squarely decide the question, *id.*, at 19a, 22a–23a. The Court of Appeals did not address the Tax Injunction Act in either of its two opinions in this case and there is no suggestion anywhere in the papers that the State raised the issue before that court. The Second Circuit had previously held, however, that the Tax Injunction Act is not a bar to actions such as this. See *Travelers Ins. Co.* v. *Cuomo*, 14 F. 3d 708, 713–714 (1993), rev'd on other grounds, *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645 (1995). In *Travelers*, we noted, but did not reexamine, that conclusion. See *id.*, at 652–653, n. 4. In the case at bar, the Court of Appeals presumably was satisfied that its jurisdiction was secure for the reasons given in *Travelers*. Before this Court, no party in either *Travelers* or the current case has mentioned the Tax Injunction Act or questioned the Court of Appeals' conclusion that a "plain" remedy is unavailable in the New York courts. Given our settled practice of according respect to the courts of appeals' greater familiarity with issues of state law, cf. *Bishop* v. *Wood*, 426 U. S. 341, 346–347, and n. 10 (1976), and the State's active participation in nearly four years of federal litigation with no complaint about federal jurisdiction, it is appropriate for us to presume that the Court of Appeals correctly determined that, under these circumstances, New York courts did not provide a "plain" remedy barring federal consideration of the state tax.

[6] See, *e. g.*, *Mackey*, 486 U. S., at 838 (generally applicable garnishment law not pre-empted); *Fort Halifax Packing Co.*, 482 U. S., at 19 (state law requiring one-time severance payment not pre-empted).

care to its participants and their beneficiaries." *Ibid.* The HFA, concluded the court, thus "related to" the Fund because it reduced the amount of Fund assets that would otherwise be available to provide plan members with benefits, and could cause the plan to limit its benefits, or to charge plan members higher fees.

The first petition for certiorari in this case was filed before we handed down our opinion in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645 (1995). In that case we held that ERISA did not pre-empt a New York statute that required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan. *Id.*, at 649–651. After deciding *Travelers*, we vacated the judgment of the Court of Appeals in this case and remanded for further consideration in light of that opinion. 514 U. S. 1094 (1995).

On remand the Court of Appeals reinstated its original judgment. The court distinguished the statute involved in *Travelers* on the ground that—by imposing a tax on the health insurance carriers who provided coverage to plans and their beneficiaries—it had only an indirect economic influence on the decisions of ERISA plan administrators, whereas the HFA "depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan," *NYSA–ILA Medical and Clinical Services Fund* v. *Axelrod, M. D.*, 74 F. 3d 28, 30 (1996). We granted the New York officials' second petition for certiorari, 519 U. S. 926 (1996), and now reverse.

II

When the Second Circuit initially found the HFA preempted as applied to Fund-operated hospitals, that court relied substantially on an expansive and literal interpretation of the words "relate to" in § 514(a) of ERISA. 27 F. 3d, at 826. In reconsidering the case on remand, the court appears to have adhered to that approach, failing to give proper

weight to *Travelers*' rejection of a strictly literal reading of § 514(a).

In *Travelers*, as in our earlier cases, we noted that the literal text of § 514(a) is "clearly expansive." 514 U. S., at 655. But we were quite clear in that case that the text could not be read to "extend to the furthest stretch of its indeterminacy, [or] for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere,' H. James, Roderick Hudson xli (New York ed., World's Classics 1980)." *Ibid.*[7]

In our earlier ERISA pre-emption cases, it had not been necessary to rely on the expansive character of ERISA's literal language in order to find pre-emption because the state laws at issue in those cases had a clear "connection with or reference to," *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 96–97 (1983), ERISA benefit plans. But in *Travelers* we confronted directly the question whether ERISA's "relates to" language was intended to modify "the starting presumption that Congress does not intend to supplant state law." 514 U. S., at 654.[8] We unequivocally concluded that it did not, and we acknowledged "that our prior attempt[s] to construe the phrase 'relate to' d[o] not give us much help drawing the line here." *Id.*, at 655. In order to evaluate whether the normal presumption against pre-emption has been overcome in a particular case, we concluded that we "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objec-

[7] See also *Dillingham Constr.*, 519 U. S., at 335 (SCALIA, J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").

[8] Where "federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that 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). See also *Dillingham Constr.*, 519 U. S., at 325.

tives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.*, at 656. We endorsed that approach once again earlier this Term in concluding that California's prevailing wage law was not pre-empted by ERISA. *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 325 (1997).[9]

Following that approach here, we begin by noting that the historic police powers of the State include the regulation of matters of health and safety. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715 (1985). While the HFA is a revenue raising measure, rather than a regulation of hospitals, it clearly operates in a field that " 'has been traditionally occupied by the States.' " *Ibid.* (quoting *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977)).[10] Respondents therefore bear the considerable burden of overcoming "the starting presumption that Congress does not intend to supplant state law." *Travelers*, 514 U. S., at 654.

There is nothing in the operation of the HFA that convinces us it is the type of state law that Congress intended ERISA to supersede.[11] This is not a case in which New

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[9] "The prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans. In this regard, it is 'no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate.' *Travelers*, 514 U. S., at 668. We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort. We thus conclude that California's prevailing wage laws and apprenticeship standards do not have a 'connection with,' and therefore do not 'relate to,' ERISA plans." *Dillingham Constr.*, 519 U. S., at 334.

[10] Indeed, the Court of Appeals rested its conclusion in no small part on the fact that the HFA "targets only the health care industry." *NYSA–ILA Medical and Clinical Services Fund* v. *Axelrod, M. D.*, 27 F. 3d 823, 827 (CA2 1994). Rather than warranting pre-emption, this point supports the application of the "starting presumption" against pre-emption.

[11] The respondents place great weight on the fact that in 1983 Congress added a specific provision to ERISA to save Hawaii's Prepaid Health Care Act from pre-emption, and that in so doing, the Legislature noted that

York has forbidden a method of calculating pension benefits that federal law permits,[12] or required employers to provide certain benefits.[13] Nor is it a case in which the existence of a pension plan is a critical element of a state-law cause of action,[14] or one in which the state statute contains provisions that expressly refer to ERISA or ERISA plans.[15]

A consideration of the actual operation of the state statute leads us to the conclusion that the HFA is one of "myriad state laws" of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not "relate to" them within the meaning of the governing statute. See *Travelers*, 514 U. S., at 668; *Dillingham*

ERISA generally does pre-empt "any State tax law relating to employee benefit plans." 29 U. S. C. § 1144(b)(5)(B)(i). See Brief for Respondents 17–23. But there is no significant difference between the language in this provision and the pre-emption provision in § 514(a), and we are unconvinced that a stricter standard of pre-emption should apply to state tax provisions than to other state laws.

[12] See, *e. g.*, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S., at 524–525 ("Whatever the purpose or purposes of the New Jersey statute, we conclude that it 'relate[s] to pension plans' governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law").

[13] See, *e. g.*, *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983) (ERISA pre-empted state law requiring the provision of pregnancy benefits); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985) (law that required benefit plans to include minimum mental health benefits "related to" ERISA plans).

[14] See, *e. g.*, *Ingersoll-Rand Co.*, 498 U. S., at 139–140 ("We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. . . . Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself").

[15] See *Mackey*, 486 U. S., at 828–830 (a provision that explicitly refers to ERISA in defining the scope of the state law's application is pre-empted); *Greater Washington Bd. of Trade*, 506 U. S., at 130–131 ("Section 2(c)(2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted").

Constr., 519 U. S., at 333–334. The HFA is a tax on hospitals. Most hospitals are not owned or operated by ERISA funds. This particular ERISA fund has arranged to provide medical benefits for its plan beneficiaries by running hospitals directly, rather than by purchasing the same services at independently run hospitals. If the Fund had made the other choice, and had purchased health care services from a hospital, that facility would have passed the expense of the HFA onto the Fund and its plan beneficiaries through the rates it set for the services provided. The Fund would then have had to decide whether to cover a more limited range of services for its beneficiaries, or perhaps to charge plan members higher rates. Although the tax in such a circumstance would be "indirect," its impact on the Fund's decisions would be in all relevant respects identical to the "direct" impact felt here. Thus, the supposed difference between direct and indirect impact—upon which the Court of Appeals relied in distinguishing this case from *Travelers*—cannot withstand scrutiny. Any state tax, or other law, that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is pre-empted by the federal statute.[16]

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

"[I]t is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by

[16] As we acknowledged in *Travelers*, there might be a state law whose economic effects, intentionally or otherwise, were so acute "as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers" and such a state law "might indeed be pre-empted under § 514," 514 U. S., at 668. That is not the case here.

statute, is not exceeded." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908). Despite our obligation to examine federal-court jurisdiction even if the issue is not raised by either party, *ibid.*, and despite the Court's explicit acknowledgment, *ante*, at 810–811, n. 5, of the possibility that jurisdiction over this case is barred by the Tax Injunction Act, 28 U. S. C. § 1341, the Court proceeds to decide the merits of respondents' Employee Retirement Income Security Act of 1974 (ERISA) pre-emption challenge. The Court offers two grounds for passing over the threshold question of jurisdiction: our "settled practice of according respect to the courts of appeals' greater familiarity with issues of state law," and petitioners' "active participation in nearly four years of federal litigation with no complaint about federal jurisdiction." *Ante*, at 811, n. 5. In my view, neither of these factors justifies our proceeding without resolving the issue of jurisdiction.

The Tax Injunction Act bars federal-court jurisdiction over an action seeking to enjoin a state tax (such as the one at issue here) where "a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341; see *Arkansas* v. *Farm Credit Servs. of Central Ark.*, *post*, at 825 (describing the Act as a "jurisdictional rule" and "broad jurisdictional barrier"). The District Court in this case suggested that the Tax Injunction Act might not bar jurisdiction here, since New York courts might not afford respondents a "plain" remedy within the meaning of the Act. See *NYSA–ILA Medical and Clinical Services Fund* v. *Axelrod*, No. 92 Civ. 2779 (SDNY, Feb. 18, 1993), App. to Pet. for Cert. 19a. That suggestion was not, however, based upon the District Court's resolution of any "issues of state law," as today's opinion intimates, *ante*, at 811, n. 5; rather, it rested upon the District Court's conclusion that uncertainty over the implications of a *federal* statute—§ 502(e)(1) of ERISA, 29 U. S. C. § 1132(e)(1)—might render the availability of a state-

court remedy not "plain." App. to Pet. for Cert. 19a.* The Court of Appeals, in turn, made no mention of the jurisdictional issue, presumably because, under controlling Circuit precedent, jurisdiction was secure: The Second Circuit had previously held that state courts could not provide any remedy for ERISA-based challenges to state taxes within the meaning of the Tax Injunction Act, since "Congress has divested the state courts of jurisdiction" over ERISA claims. *Travelers Ins. Co.* v. *Cuomo*, 14 F. 3d 708, 714 (1993) (citing ERISA § 502(e)(1), 29 U. S. C. § 1132(e)(1)), rev'd on other grounds *sub nom. New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645 (1995). That holding (like the District Court's discussion of the issue in this case) in no way turns on New York state law, so I am at a loss to understand the Court's invoca-

*That the District Court rested its conclusion on 29 U. S. C. § 1132(e)(1) is demonstrated by the sole authorities it cited in support of that conclusion: *Travelers Ins. Co.* v. *Cuomo*, 813 F. Supp. 996 (SDNY 1993), aff'd in part and rev'd in part, 14 F. 3d 708 (CA2 1993), rev'd on other grounds *sub nom. New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645 (1995); and *National Carriers' Conference Committee* v. *Heffernan*, 440 F. Supp. 1280, 1283 (Conn. 1977). The only argument in *Travelers* that supports the conclusion reached here is the argument that "[b]ecause ERISA generally confers exclusive jurisdiction on the federal courts [under 29 U. S. C. § 1132(e)(1)], a New York state court might well feel compelled to dismiss a state court action on the grounds that its jurisdiction has been preempted . . . . Thus, at a minimum the availability of a state court remedy is not 'plain.'" 813 F. Supp., at 1001 (internal quotation marks and brackets omitted). Likewise, *Heffernan* (which arose in Connecticut, not New York) offers pertinent reasoning based only on federal law: "Jurisdiction over suits arising under ERISA is, with minor exceptions, vested exclusively in the federal courts. 29 U. S. C. § 1132(e)(1). If this suit were brought before a . . . state court, that court might well feel compelled to dismiss the action on the grounds that its jurisdiction had been preempted by federal legislation and the supremacy clause. Consequently the plaintiff cannot be said to have a 'plain, speedy and efficient' remedy in state court . . . ." 440 F. Supp., at 1283 (footnote omitted).

tion of "our settled practice of according respect to the courts of appeals' greater familiarity with issues of state law," *ante*, at 811, n. 5, as a basis for overlooking the question whether the Tax Injunction Act bars federal-court jurisdiction.

The second factor relied upon by the Court in support of its treatment of the jurisdictional issue is that petitioners dropped the issue after the District Court failed to adopt their interpretation of the Tax Injunction Act. But the fact that petitioners have "active[ly] participat[ed] in nearly four years of federal litigation with no complaint about federal jurisdiction," *ibid.*, cannot possibly confer upon us jurisdiction that we do not otherwise possess. It is our duty to resolve the jurisdictional question, whether or not it has been preserved by the parties. *Sumner* v. *Mata*, 449 U. S. 539, 548, n. 2 (1981); *Louisville & Nashville R. Co.*, *supra*, at 152. In *Sumner* we confronted the identical circumstance presented here—a jurisdictional argument raised before the District Court but abandoned before the Court of Appeals—and felt the need to address the jurisdictional issue. 449 U. S., at 547, n. 2.

I have previously noted the split among the Circuits on the question whether the Tax Injunction Act deprives federal courts of jurisdiction over ERISA-based challenges to state taxes. See *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1302–1303 (1991) (SCALIA, J., in chambers). In a prior case, we expressly left the question open, saying that "[w]e express no opinion [on] whether a party [can] sue under ERISA to enjoin or to declare invalid a state tax levy, despite the Tax Injunction Act"; we noted that the answer would depend on whether "state law provide[s] no 'speedy and efficient remedy' " and on whether "Congress intended § 502 of ERISA to be an exception to the Tax Injunction Act." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 20, n. 21 (1983). Because I am

uncertain of the federal courts' jurisdiction over this case, I would set the jurisdictional issue for briefing and argument, and would resolve that issue before reaching the merits of respondents' ERISA pre-emption claim. Accordingly, I respectfully dissent from today's opinion.

Syllabus

ARKANSAS *v.* FARM CREDIT SERVICES OF CENTRAL ARKANSAS ET AL.

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

No. 95–1918. Argued April 21, 1997—Decided June 2, 1997

The Tax Injunction Act (Act) restricts the federal district courts' power to prevent collection or enforcement of state taxes, but makes an exception to that jurisdictional bar where no plain, speedy, or efficient state-court remedy may be had. This Court has established another exception where the United States sues to protect itself or its instrumentalities from state taxation. *Department of Employment* v. *United States*, 385 U. S. 355, 358. Production Credit Associations (PCA's) are federally chartered corporate financial institutions organized by farmers primarily to make loans to farmers. During the relevant time period, federal law has exempted PCA's from state taxes on their notes, debentures, and other obligations. Respondent PCA's, claiming that they are also immune from Arkansas sales and income taxes, sought a declaratory judgment and an injunction prohibiting the State from levying such taxes on them. Seeking to overcome the Act's jurisdictional bar, they contended that, as instrumentalities of the United States, they are not subject to the Act's provisions any more than the United States itself. The District Court granted them summary judgment, and the Court of Appeals affirmed.

Held: PCA's are not included within the judicial exception to the Act by virtue of their designation as instrumentalities of the United States and so may not sue in federal court for an injunction against state taxation without the United States as co-plaintiff. Pp. 825–832.

(a) The Act, which has been interpreted and applied as a "jurisdictional rule" and a "broad jurisdictional barrier," *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 470, was enacted to confine federal-court intervention in state government. The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary. A State's power to tax is basic to its power to exist. Given the federal balance and the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Act which might defeat its purpose and text. Where the United States Government is a party, the other side of the federal balance must

be considered. The necessity to respect the National Government's authority underlies the rule that the Act does not constrain federal judicial power when the United States sues to protect itself and its instrumentalities from state taxation. Pp. 825–828.

(b) When the United States is not a party, the mere fact that a party challenging a tax has interests closely related to those of the Federal Government is not enough, in and of itself, to overcome the Act's bar. *Moe, supra*, at 471–472. An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes without the further inference that it has all of the rights and privileges of the National Government. The Courts of Appeals have adopted different standards for deciding whether a federal instrumentality may sue in federal court to enjoin state taxation where the United States is not a co-plaintiff. Under any of those tests, PCA's would not be exempt from the Act's restrictions. The United States is not joined as a co-plaintiff and opposes the exercise of jurisdiction. Regardless of whether a federal agency or body with substantial regulatory authority is exempt from the Act when it brings suit in its own name, cf. *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, PCA's are not entities of that description. Despite their formal and undoubted designation as instrumentalities of the United States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, they do not have or exercise power analogous to that of the National Labor Relations Board or other United States departments or regulatory agencies. Their business is making commercial loans, and their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. A holding that they are subject to the Act's restriction on federal-court jurisdiction furthers the State's interests without sacrificing those of the Federal Government. Pp. 828–832.

76 F. 3d 961, reversed.

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

Martha G. Hunt argued the cause and filed briefs for petitioner.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Argrett*, *David C. Frederick*, and *David English Carmack*.

Richard A. Hanson argued the cause for respondents. With him on the brief were *Rufus E. Wolff*, *Kevin J. Feeley*, and *Michael L. Fayhee*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The Tax Injunction Act, 28 U. S. C. § 1341, restricts the power of federal district courts to prevent collection or enforcement of state taxes. It states: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The statute, on its face, yields no exception to the jurisdictional bar save where the state remedy is wanting, but at least one other exception is established by our cases: The statute does not constrain the power of federal courts if the

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Jeffrey S. Sutton*, State Solicitor, *Robert C. Maier*, Assistant Attorney General, and *Steven M. Houron*, Acting Attorney General of New Hampshire, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Daniel E. Lungren* of California, *Richard Blumenthal* of Connecticut, *Robert Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Tom Udall* of New Mexico, *Heidi Heitkamp* of North Dakota, *Mark W. Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, *James S. Gilmore III* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *James E. Doyle* of Wisconsin; for the American Bankers Association et al. by *John J. Gill III* and *Michael F. Crotty;* for the Multistate Tax Commission by *Paull Mines;* and for the National Association of Securities and Commercial Law Attorneys by *Kevin P. Roddy*, *G. Robert Blakey*, *Patrick E. Cafferty*, *Bryan L. Clobes*, and *Jonathan W. Cuneo*.

Michael A. Cardozo and *William L. Daly* filed a brief for the National Hockey League as *amicus curiae* urging affirmance.

United States sues to protect itself or its instrumentalities from state taxation. *Department of Employment* v. *United States,* 385 U. S. 355, 358 (1966). The present case explores the limits of this judicial exception. We decide here whether instrumentalities called Production Credit Associations, corporations chartered under federal law, are included within the exception when they sue by themselves. We hold they are not and so may not sue in federal court for an injunction against state taxation without the United States as co-plaintiff. The action must be dismissed, and, as a result, we do not reach the merits of the taxation dispute.

I

Production Credit Associations (PCA's) are corporations chartered by the Farm Credit Administration under the Farm Credit Act of 1971, 85 Stat. 583, as amended, 12 U. S. C. § 2001 *et seq.* A PCA is a corporate financial institution organized by 10 or more farmers and designed in large part to make loans to farmers. §§ 2071, 2075. PCA's have had differing tax-exempt status at different times, depending on whether the United States owned shares of their stock. See, *e. g.,* Farm Credit Act of 1933, 48 Stat. 267. In the period relevant here (when all PCA stock has been in private hands) they have been exempted, by explicit federal statute, from state taxes on their "notes, debentures, and other obligations." 12 U. S. C. § 2077.

Four PCA's, respondents here, brought suit in the United States District Court for the Eastern District of Arkansas claiming a tax exemption going beyond the express statutory language of § 2077. They assert immunity not only from the taxes described in the exemption statute we have quoted but also from Arkansas sales and income taxes. They seek a declaratory judgment and an injunction prohibiting the State from levying the taxes against them. The District Court granted the PCAs' motion for summary judgment, and a di-

vided panel of the United States Court of Appeals for the Eighth Circuit affirmed. 76 F. 3d 961 (1996).

Entitlement to the immunity is the underlying substantive issue, were we to reach it. The Tax Injunction Act, however, is an initial obstacle, for by its terms it would bar the relief the PCA's seek absent some exception. Seeking to overcome the bar under the Tax Injunction Act, the PCA's, first in the trial court and now here, contended that they are instrumentalities of the United States and so not subject to the provisions of the Act any more than the United States itself. The first point is correct: PCA's are instrumentalities of the United States because the statute which charters them says so. 12 U. S. C. §§ 2071(b)(7), 2077. The PCAs' argument about what follows from the designation, however, is incorrect. Instrumentalities of the United States, by virtue of that designation alone, do not have the same right as does the United States to avoid the prohibitions of the Tax Injunction Act.

An observation is proper respecting our consideration of this threshold question. Although the trial court addressed the meaning and operation of the Tax Injunction Act, in the Court of Appeals the whole question seemed to disappear, though it goes to the heart of judicial authority. Neither party, we are advised, addressed the point and neither opinion in the Court of Appeals, majority or dissent, mentions it. While the question of the Act's applicability was not raised in the State's petition for certiorari, the United States, in an *amicus* brief in support of the petition, called our attention to the point. In granting the petition, we asked the parties to address, in addition to the merits, whether the District Court should have dismissed the case for lack of subject-matter jurisdiction in light of the Act. 519 U. S. 805 (1997).

We have interpreted and applied the Tax Injunction Act as a "jurisdictional rule" and a "broad jurisdictional barrier." *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U. S. 463, 470 (1976). In dismissing

an action filed in a United States District Court to challenge state taxes we held that the Tax Injunction Act "deprived the District Court of jurisdiction to hear [the] challenges." *California* v. *Grace Brethren Church*, 457 U. S. 393, 396 (1982). Further, we found no jurisdiction even though the defendant State argued in favor of the federal court's jurisdiction. *Id.*, at 417, n. 38. In explaining our holding in *Grace Brethren* that declaratory relief is as violative of the Tax Injunction Act as an injunction itself, we said the Act was first and foremost a vehicle "'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Id.*, at 408–409 (quoting *Rosewell* v. *LaSalle Nat. Bank*, 450 U. S. 503, 522 (1981)). These statements underscore the fundamental importance of the restrictions imposed by the Tax Injunction Act, restrictions we proceed to address.

II

The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary. The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation. In our constitutional system, the power of the State to tax is a concurrent power. "That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied." *McCulloch* v. *Maryland*, 4 Wheat. 316, 425 (1819). The power to tax is basic to the power of the State to exist. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940); *Rosewell*, *supra*, at 522.

Enactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal-court intervention

in state government, a concern prominent after the Court's ruling in *Ex parte Young*, 209 U. S. 123 (1908), that the Eleventh Amendment is not in all cases a bar to federal-court interference with individual state officers alleged to have acted in violation of federal law. See *Rosewell*, *supra*, at 522, n. 28; *Perez* v. *Ledesma*, 401 U. S. 82, 104–115 (1971) (Brennan, J., concurring in part and dissenting in part). Given the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text.

Where the Government of the United States is a party, of course, the other side of the federal balance must be considered. In our constitutional system the National Government has sovereign interests of its own. The necessity to respect the authority and prerogatives of the National Government underlies the now settled rule that the Tax Injunction Act is not a constraint on federal judicial power when the United States sues to protect itself and its instrumentalities from state taxation. The importance of allowing the United States to proceed in federal court to determine tax immunity questions is no doubt one reason why the exception was established with little discussion in *Department of Employment* v. *United States*. There the Court indicated the exception was consistent with a well-settled understanding that the Government is not bound by its own legislative restrictions on the exercise of remedial rights unless the intent to bind it is express. 385 U. S., at 358, n. 6 (citing *United States* v. *Livingston*, 179 F. Supp. 9, 12 (EDSC 1959) (three-judge District Court), aff'd, 364 U. S. 281 (1960); *United States* v. *Arlington County*, 326 F. 2d 929, 931 (CA4 1964); *United States* v. *Bureau of Revenue of N. M.*, 291 F. 2d 677, 679 (CA10 1961)). See also *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239 (1874). The Court concluded, "in accord with an unbroken line of authority, and

convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." 385 U. S., at 358 (footnotes omitted). In all the District Court and Court of Appeals cases cited in *Department of Employment*, the United States was either the sole plaintiff or a co-plaintiff. The United States had joined as co-plaintiff with the Red Cross in *Department of Employment*, arguing that the Red Cross was a federal instrumentality immune from state taxation, and we held that the Tax Injunction Act did not deprive the District Court of jurisdiction to decide the merits and order relief.

We have not before now considered whether federal instrumentalities fall under the exception to the Tax Injunction Act when they sue without the United States as co-plaintiff. In *Moe* v. *Confederated Salish and Kootenai Tribes*, we reasoned that when the United States is not a party, the mere fact that a party challenging the tax has interests closely related to those of the Federal Government is not enough, in and of itself, to avoid the bar of the Act. We considered whether the Act barred the exercise of federal judicial power when Indian tribes were challenging the lawfulness and constitutionality of certain state taxes. Although the tribes did not have formal designations as instrumentalities of the United States, we assumed the interests they asserted were aligned with the interests of the Federal Government. Reserving the question of the precise significance of a federal instrumentality designation, the Court said this congruence of interests was not sufficient to give the tribes an exemption from the Act. 425 U. S., at 471–472. We went on to find the tribes exempt from the Act only because a second federal statute granted sweeping federal-court jurisdiction where an Indian tribe was a party. *Id.*, at 472 (citing 28 U. S. C. § 1362 (1976 ed.)). *Moe* is instructive here. As in *Moe*, the PCA's say their own mission is defined and controlled by federal law and that their interests are the

same as those of the United States. We conclude here, as we did in *Moe*, that this argument is insufficient to justify an exception to the Tax Injunction Act.

True, important consequences flow from the congressional decision to designate a PCA formed pursuant to statute as "an instrumentality of the United States." 12 U. S. C. § 2071(b)(7). The tax immunity a PCA has under § 2077 is a permitted consequence of its status as a federal instrumentality. An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes, however, without the further inference that the instrumentality has all of the rights and privileges of the National Government.

Respondents attempt to counter this point by arguing that *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138 (1971), is applicable here and supports their cause. *Nash-Finch* involved not the Tax Injunction Act, but the Anti-Injunction Act, the statute which restricts the authority of federal courts to enjoin proceedings in state courts. 28 U. S. C. § 2283. The Anti-Injunction Act provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Just as the Tax Injunction Act is inapplicable where the United States is a party, a parallel rule prevails under § 2283. *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 225–226 (1957) (The restrictions of § 2283 are inapplicable in a suit brought by the National Government). The question in *Nash-Finch* was whether the National Labor Relations Board (NLRB) came within the United States' exception to § 2283. We held it did. In so ruling, we observed the NLRB's regulatory power "pre-empts the field." 404 U. S., at 144; see also *id.*, at 147 ("The exclusiveness of the federal domain is clear . . ."). The case does not aid the PCA's, for their powers are far different from those of the NLRB. As will be discussed in more detail below, the

PCA's more closely resemble the private entities *Nash-Finch* distinguished from the Federal Government and its agencies. *Id.*, at 146.

As to the Tax Injunction Act itself, the Courts of Appeals have adopted different standards over time for deciding whether a federal instrumentality may sue in federal court to enjoin state taxation where the United States is not a co-plaintiff. Under the most restrictive approach, there is no exception to the Tax Injunction Act for federal instrumentalities unless the United States sues as a co-plaintiff. See, *e. g.*, *United States* v. *State Tax Commission*, 481 F. 2d 963, 975 (CA1 1973) ("It is reasonable, as a prerequisite to by-passing normal state tax collection and litigation channels, that [the instrumentalities] persuade the Attorney General of the United States . . . to join in their claim"); *Housing Authority of Seattle* v. *State of Washington, Dept. of Revenue*, 629 F. 2d 1307, 1311 (CA9 1980) (agreeing with the First Circuit in *State Tax Commission* that "such joinder [with the United States as co-plaintiff] is necessary before a federal instrumentality can overcome the restrictions" of the Tax Injunction Act). After its decision in *State Tax Commission*, the Court of Appeals for the First Circuit modified what had seemed to be a bright-line rule to produce a different test: "[E]ach instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation." *Federal Reserve Bank of Boston* v. *Commissioner of Corporations and Taxation of Mass.*, 499 F. 2d 60, 64 (1974). Federal Reserve banks, the Court of Appeals noted, are not analogous to private corporations, but rather are "plainly and predominantly fiscal arms of the federal government" with interests "indistinguishable from those of the sovereign." *Id.*, at 62. The court also pointed to a federal statute giving a Federal Reserve bank "unrestricted access to the district courts," *id.*, at 63 (referring to 12 U. S. C. § 632); and to the Federal Reserve System's unusual position "outside the executive chain of

command," 499 F. 2d, at 63. See also *Bank of New England Old Colony* v. *Clark*, 986 F. 2d 600, 602–603 (CA1 1993) (describing *Federal Reserve bank* standard as a "flexible test").

Under any of the tests we have described, PCA's would not be exempt from the restrictions of the Tax Injunction Act. The United States has not joined as a co-plaintiff and indeed opposes the District Court's exercise of jurisdiction. We need not inquire whether the holding of *Nash-Finch*—to the effect that an agency with broad regulatory power is exempt from § 2283 when it sues in its own name and not through the Attorney General or in the name of the United States—is applicable as well to the Tax Injunction Act. Whatever may be the rule under the Tax Injunction Act where a federal agency or body with substantial regulatory authority brings suit, PCA's are not entities of that description. PCA's are not granted the right to exercise government regulatory authority but rather serve specific commercial and economic purposes long associated with various corporations chartered by the United States. Other examples include the Atlantic and Pacific Railroad Company (chartered under an Act of 1866 to construct and maintain a railroad and telegraph line from Springfield, Missouri, to the Pacific Ocean, see *Smith* v. *Reeves*, 178 U. S. 436, 436–437 (1900)); the Rural Telephone Bank (7 U. S. C. § 941); the United States Enrichment Corporation (42 U. S. C. § 2297a, repealed effective on date of privatization, Pub. L. 104–134, § 3116, 110 Stat. 1321). Indeed, in *Smith* v. *Reeves*, we treated the federally chartered corporation as a private citizen, not as an arm of the United States, and held it to be subject to the Eleventh Amendment bar on suits against States. 178 U. S., at 446–447.

The PCAs' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal and undoubted designation as instrumentalities of the United

States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, PCA's do not have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States. This suffices for us to conclude that instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act.

The Tax Injunction Act is grounded in the need of States to administer their fiscal affairs without undue interference from federal courts. As all parties concede, respondents have a "speedy, plain, and efficient remedy" in state court. In holding that the PCA's are subject to the Act's restriction on federal-court jurisdiction, we further the State's interests without sacrificing those of the Government of the United States.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Syllabus

BOGGS *v.* BOGGS ET AL.

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

No. 96–79. Argued January 15, 1997—Decided June 2, 1997

Respondents are the sons of Isaac and Dorothy Boggs. After Dorothy's death in 1979, Isaac married petitioner Sandra Boggs. When Isaac retired in 1985, he received various benefits from his employer's retirement plans, including a lump-sum savings plan distribution, which he rolled over into an individual retirement account (IRA); shares of stock from the company's employee stock ownership plan (ESOP); and a monthly annuity payment. Following his death in 1989, this dispute over ownership of the benefits arose between Sandra and the sons. The sons' claim is based on Dorothy's purported testamentary transfer to them, under Louisiana law, of a portion of her community property interest in Isaac's undistributed pension plan benefits. Sandra contested the validity of that transfer, arguing that the sons' claim is pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.* The Federal District Court disagreed and granted summary judgment against Sandra, and the Fifth Circuit affirmed.

Held: ERISA pre-empts a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits. Pp. 839–854.

(a) In order to resolve this case, the Court need not interpret ERISA's pre-emption clause, § 1144(a), but can simply apply conventional conflict pre-emption principles, asking whether Louisiana's community property law conflicts with ERISA and frustrates its purposes. Pp. 839–841.

(b) To the extent Louisiana law provides the sons with a right to a portion of Sandra's survivor's annuity, it is pre-empted. That annuity is a qualified joint and survivor annuity mandated by § 1055, the object of which is to ensure a stream of income to surviving spouses. ERISA's solicitude for the economic security of such spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity. Even a plan participant cannot defeat a nonparticipant surviving spouse's statutory entitlement to such an annuity. See § 1055(c)(2). Nothing in ERISA's language supports the conclusion that Congress decided to permit a predeceasing nonparticipant spouse to do so. Testamentary transfers such

as the one at issue could reduce the annuity below the ERISA minimum. See § 1055(d)(1). Perhaps even more troubling, the recipient of the transfer need not be a family member; *e. g.*, the annuity might be substantially reduced so that funds could be diverted to support an unrelated stranger. In the face of this direct clash between state law and ERISA's provisions and objectives, the state law cannot stand. See *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 98. Pp. 841–844.

(c) The sons' state-law claim to a portion of Isaac's monthly annuity payments, IRA, and ESOP shares is also pre-empted. ERISA's principal object is to protect plan participants and beneficiaries. See, *e. g.*, §§ 1001(b), (c), 1103(c)(1), 1104(a)(1), 1108(a)(2), 1132(a)(1)(B). The Act confers pension plan beneficiary status on a nonparticipant spouse or dependent only to the extent that a survivor's annuity is required in covered plans, § 1055(a), or a "qualified domestic relations order" awards the spouse or dependent an interest in a participant's benefits, §§ 1056(d)(3)(K) and (J). These provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory scheme. ERISA's silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist. Cf. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 147–148. The sons have no claim to a share of the benefits at issue because they are neither participants nor beneficiaries under §§ 1002(7) and (8), but base their claims on Dorothy's attempted testamentary transfer. It would be inimical to ERISA's purposes to permit them to prevail. Early cases holding that ERISA did not pre-empt spousal community property interests in pension benefits, regardless of who was the plan participant or beneficiary, are not applicable here in light of subsequent amendments to ERISA. Reading ERISA to permit nonbeneficiary interests, even if not enforced against the plan, would result in troubling anomalies that do not accord with the statutory scheme. That Congress intended to pre-empt respondents' interests is given specific and powerful reinforcement by § 1056(d)(1), which requires pension plans to specify that benefits "may not be assigned or alienated." Dorothy's testamentary transfer to her sons is such a prohibited "assignment or alienation" under the applicable regulations. Community property laws have, in the past, been pre-empted in order to prevent the diversion of retirement benefits. See, *e. g.*, *Free* v. *Bland*, 369 U. S. 663, 669. It does not matter that respondents have sought to enforce their purported rights only after Isaac's benefits were

distributed, since those rights are based on the flawed theory that they had an interest in the undistributed benefits. Pp. 844–854.

82 F. 3d 90, reversed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined, and in which REHNQUIST, C. J., and GINSBURG, J., joined as to Part III. BREYER, J., filed a dissenting opinion, in which O'CONNOR, J., joined, and in which REHNQUIST, C. J., and GINSBURG, J., joined except as to Part II–B–3, *post*, p. 854.

Marian Mysing Livaudais argued the cause for petitioner. With her on the briefs were *John Catlett Christian*, *F. Pierre Livaudais*, and *James F. Willeford*.

Paul R. Q. Wolfson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Dellinger*, *Deputy Solicitor General Kneedler*, *J. Davitt McAteer*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Judith D. Heimlich*.

Edward J. Deano, Jr., argued the cause for respondents. With him on the brief were *Guy L. Deano, Jr.*, and *Theresa D. Bewig*.*

JUSTICE KENNEDY delivered the opinion of the Court.†

We consider whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U. S. C. § 1001 *et seq.*, pre-empts a state law allowing a non-

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*Briefs of *amici curiae* urging reversal were filed for the American Association of Retired Persons by *Mary Ellen Signorille*, *Cathy Ventrell-Monsees*, and *Melvin Radowitz;* and for the Employers Council on Flexible Compensation by *Daniel B. Stone*.

Richard P. Ieyoub, Attorney General of Louisiana, *Thomas S. Halligan*, Assistant Attorney General, *William A. Reppy, Jr.*, and *Cynthia A. Samuel* filed a brief for the State of Louisiana as *amicus curiae* urging affirmance.

Robert E. Temmerman, Jr., *Keith P. Bartel*, *Randolph B. Godshall*, and *Michael J. Jones* filed a brief for the Estate Planning, Trust and Probate Law Section of the State Bar of California as *amicus curiae*.

†THE CHIEF JUSTICE and JUSTICE GINSBURG join Part III of this opinion.

participant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits. Given the pervasive significance of pension plans in the national economy, the congressional mandate for their uniform and comprehensive regulation, and the fundamental importance of community property law in defining the marital partnership in a number of States, the question is of undoubted importance. We hold that ERISA pre-empts the state law.

I

Isaac Boggs worked for South Central Bell from 1949 until his retirement in 1985. Isaac and Dorothy, his first wife, were married when he began working for the company, and they remained husband and wife until Dorothy's death in 1979. They had three sons. Within a year of Dorothy's death, Isaac married Sandra, and they remained married until his death in 1989.

Upon retirement, Isaac received various benefits from his employer's retirement plans. One was a lump-sum distribution from the Bell System Savings Plan for Salaried Employees (Savings Plan) of $151,628.94, which he rolled over into an Individual Retirement Account (IRA). He made no withdrawals and the account was worth $180,778.05 when he died. He also received 96 shares of AT&T stock from the Bell South Employee Stock Ownership Plan (ESOP). In addition, Isaac enjoyed a monthly annuity payment during his retirement of $1,777.67 from the Bell South Service Retirement Program.

The instant dispute over ownership of the benefits is between Sandra (the surviving wife) and the sons of the first marriage. The sons' claim to a portion of the benefits is based on Dorothy's will. Dorothy bequeathed to Isaac one-third of her estate, and a lifetime usufruct in the remaining two-thirds. A lifetime usufruct is the rough equivalent of a common-law life estate. See La. Civ. Code Ann., Art. 535 (West 1980). She bequeathed to her sons the naked owner-

ship in the remaining two-thirds, subject to Isaac's usufruct. All agree that, absent pre-emption, Louisiana law controls and that under it Dorothy's will would dispose of her community property interest in Isaac's undistributed pension plan benefits. A Louisiana state court, in a 1980 order entitled "Judgment of Possession," ascribed to Dorothy's estate a community property interest in Isaac's Savings Plan account valued at the time at $21,194.29.

Sandra contests the validity of Dorothy's 1980 testamentary transfer, basing her claim to those benefits on her interest under Isaac's will and 29 U. S. C. § 1055. Isaac bequeathed to Sandra outright certain real property including the family home. His will also gave Sandra a lifetime usufruct in the remainder of his estate, with the naked ownership interest being held by the sons. Sandra argues that the sons' competing claim, since it is based on Dorothy's 1980 purported testamentary transfer of her community property interest in undistributed pension plan benefits, is pre-empted by ERISA. The Bell South Service Retirement Program monthly annuity is now paid to Sandra as the surviving spouse.

After Isaac's death, two of the sons filed an action in state court requesting the appointment of an expert to compute the percentage of the retirement benefits they would be entitled to as a result of Dorothy's attempted testamentary transfer. They further sought a judgment awarding them a portion of: the IRA; the ESOP shares of AT&T stock; the monthly annuity payments received by Isaac during his retirement; and Sandra's survivor annuity payments, both received and payable.

In response, Sandra Boggs filed a complaint in the United States District Court for the Eastern District of Louisiana, seeking a declaratory judgment that ERISA pre-empts the application of Louisiana's community property and succession laws to the extent they recognize the sons' claim to an interest in the disputed retirement benefits. The District

Court granted summary judgment against Sandra Boggs. 849 F. Supp. 462 (1994). It found that, under Louisiana community property law, Dorothy had an ownership interest in her husband's pension plan benefits built up during their marriage. The creation of this interest, the court explained, does not violate 29 U. S. C. § 1056(d)(1), which prohibits pension plan benefits from being "assigned" or "alienated," since Congress did not intend to alter traditional familial and support obligations. In the court's view, there was no assignment or alienation because Dorothy's rights in the benefits were acquired by operation of community property law and not by transfer from Isaac. Turning to Dorothy's testamentary transfer, the court found it effective because "[ERISA] does not display any particular interest in preserving maximum benefits to any particular beneficiary." 849 F. Supp., at 465.

A divided panel of the Fifth Circuit affirmed. 82 F. 3d 90 (1996). The court stressed that Louisiana law affects only what a plan participant may do with his or her benefits after they are received and not the relationship between the pension plan administrator and the plan beneficiary. *Id.*, at 96. For the reasons given by the District Court, it found ERISA's pension plan anti-alienation provision, § 1056(d)(1), inapplicable to Louisiana's creation of Dorothy Boggs' community property interest in the pension plan benefits. It concluded that the transfer of the interest from Dorothy to her sons was not a prohibited assignment or alienation, as this transfer was "two steps removed from the disbursement of benefits." *Id.*, at 97.

Six members of the Court of Appeals dissented from the failure to grant rehearing en banc. 89 F. 3d 1169 (1996). In their view, a testamentary transfer of an interest in undistributed retirement benefits frustrates ERISA's goals of securing national uniformity in pension plan administration and of ensuring that retirees, and their dependents, are the actual recipients of retirement income. They believed that

Congress' creation of the qualified domestic relations order (QDRO) mechanism in § 1056(d)(3), whose requirements were not met by the 1980 judgment of possession, further supported their position. (A QDRO is a limited exception to the pension plan anti-alienation provision and allows courts to recognize a nonparticipant spouse's community property interest in pension plans under specific circumstances.)

The reasoning and holding of the Fifth Circuit's decision is in substantial conflict with the decision of the Court of Appeals for the Ninth Circuit in *Ablamis* v. *Roper*, 937 F. 2d 1450 (1991), which held that ERISA pre-empts a testamentary transfer by a nonparticipant spouse of her community property interest in undistributed pension plan benefits. The division between the Circuits is significant, for the Fifth Circuit has jurisdiction over the community property States of Louisiana and Texas, while the Ninth Circuit includes the community property States of Arizona, California, Idaho, Nevada, and Washington. Having granted certiorari to resolve the issue, 519 U. S. 957 (1996), we now reverse.

II

ERISA pre-emption questions are recurrent, two other cases on the subject having come before the Court in the current Term alone, see *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316 (1997); *De Buono* v. *NYSA–ILA Medical and Clinical Services Fund*, *ante*, p. 806. In large part the number of ERISA pre-emption cases reflects the comprehensive nature of the statute, the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force. ERISA is designed to ensure the proper administration of pension and welfare plans, both during the years of the employee's active service and in his or her retirement years.

This case lies at the intersection of ERISA pension law and state community property law. None can dispute the

central role community property laws play in the nine community property States. It is more than a property regime. It is a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship. State community property laws, many of ancient lineage, "must have continued to exist through such lengths of time because of their manifold excellences and are not lightly to be abrogated or tossed aside." 1 W. de Funiak, Principles of Community Property 11 (1943). The community property regime in Louisiana dates from 1808 when the territorial legislature of Orleans drafted a civil code that adopted Spanish principles of community property. *Id.*, at 85–89. Louisiana's community property laws, and the community property regimes enacted in other States, implement policies and values lying within the traditional domain of the States. These considerations inform our pre-emption analysis. See *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979).

The nine community property States have some 80 million residents, with perhaps $1 trillion in retirement plans. See Brief for Estate Planning, Trust and Probate Law Section of the State Bar of California as *Amicus Curiae* 1. This case involves a community property claim, but our ruling will affect as well the right to make claims or assert interests based on the law of any State, whether or not it recognizes community property. Our ruling must be consistent with the congressional scheme to assure the security of plan participants and their families in every State. In enacting ERISA, Congress noted the importance of pension plans in its findings and declaration of policy, explaining:

> "[T]he growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . they are affected with a national public interest [and] they have become an important factor affecting the stability of employment and

> the successful development of industrial relations . . . ." 29 U. S. C. § 1001(a).

ERISA is an intricate, comprehensive statute. Its federal regulatory scheme governs employee benefit plans, which include both pension and welfare plans. All employee benefit plans must conform to various reporting, disclosure, and fiduciary requirements, see §§ 1021–1031, 1101–1114, while pension plans must also comply with participation, vesting, and funding requirements, see §§ 1051–1086. The surviving spouse annuity and QDRO provisions, central to the dispute here, are part of the statute's mandatory participation and vesting requirements. These provisions provide detailed protections to spouses of plan participants which, in some cases, exceed what their rights would be were community property law the sole measure.

ERISA's express pre-emption clause states that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." § 1144(a). We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase "relate to" provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption, see *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982).

We first address the survivor's annuity and then turn to the other pension benefits.

III

Sandra Boggs, as we have observed, asserts that federal law pre-empts and supersedes state law and requires the surviving spouse annuity to be paid to her as the sole beneficiary. We agree.

The annuity at issue is a qualified joint and survivor annuity mandated by ERISA. Section 1055(a) provides:

> "Each pension plan to which this section applies shall provide that—
>
> "(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity."

ERISA requires that every qualified joint and survivor annuity include an annuity payable to a nonparticipant surviving spouse. The survivor's annuity may not be less than 50% of the amount of the annuity which is payable during the joint lives of the participant and spouse. § 1055(d)(1). Provision of the survivor's annuity may not be waived by the participant, absent certain limited circumstances, unless the spouse consents in writing to the designation of another beneficiary, which designation also cannot be changed without further spousal consent, witnessed by a plan representative or notary public. § 1055(c)(2). Sandra Boggs, as the surviving spouse, is entitled to a survivor's annuity under these provisions. She has not waived her right to the survivor's annuity, let alone consented to having the sons designated as the beneficiaries.

Respondents say their state-law claims are consistent with these provisions. Their claims, they argue, affect only the disposition of plan proceeds after they have been disbursed by the Bell South Service Retirement Program, and thus nothing is required of the plan. ERISA's concern for securing national uniformity in the administration of employee benefit plans, in their view, is not implicated. They argue Sandra's community property obligations, after she receives the survivor annuity payments, "fai[l] to implicate the regulatory concerns of ERISA." *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 15 (1987).

We disagree. The statutory object of the qualified joint and survivor annuity provisions, along with the rest of § 1055, is to ensure a stream of income to surviving spouses. Section 1055 mandates a survivor's annuity not only where a participant dies after the annuity starting date but also guarantees one if the participant dies before then. See §§ 1055(a)(2), (e). These provisions, enacted as part of the Retirement Equity Act of 1984 (REA), Pub. L. 98–397, 98 Stat. 1426, enlarged ERISA's protection of surviving spouses in significant respects. Before REA, ERISA only required that pension plans, if they provided for the payment of benefits in the form of an annuity, offer a qualified joint and survivor annuity as an option entirely within a participant's discretion. 29 U. S. C. §§ 1055(a), (e) (1982 ed.). REA modified ERISA to permit participants to designate a beneficiary for the survivor's annuity, other than the nonparticipant spouse, only when the spouse agrees. § 1055(c)(2). Congress' concern for surviving spouses is also evident from the expansive coverage of § 1055, as amended by REA. Section 1055's requirements, as a general matter, apply to all "individual account plans" and "defined benefit plans." § 1055(b)(1). The terms are defined, for § 1055 purposes, so that all pension plans fall within those two categories. See § 1002(35). While some individual account plans escape § 1055's surviving spouse annuity requirements under certain conditions, Congress still protects the interests of the surviving spouse by requiring those plans to pay the spouse the nonforfeitable accrued benefits, reduced by certain security interests, in a lump-sum payment. § 1055(b)(1)(C).

ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity. Even a plan participant cannot defeat a nonparticipant surviving spouse's statutory entitlement to an annuity. It would be odd, to say the least, if Congress permitted a predeceasing nonparticipant spouse

to do so. Nothing in the language of ERISA supports concluding that Congress made such an inexplicable decision. Testamentary transfers could reduce a surviving spouse's guaranteed annuity below the minimum set by ERISA (defined as 50% of the annuity payable during the joint lives of the participant and spouse). In this case, Sandra's annuity would be reduced by approximately 20%, according to the calculations contained in the sons' state-court filings. There is no reason why testamentary transfers could not reduce a survivor's annuity by an even greater amount. Perhaps even more troubling, the recipient of the testamentary transfer need not be a family member. For instance, a surviving spouse's § 1055 annuity might be substantially reduced so that funds could be diverted to support an unrelated stranger.

In the face of this direct clash between state law and the provisions and objectives of ERISA, the state law cannot stand. Conventional conflict pre-emption principles require pre-emption "where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 98 (1992) (internal quotation marks and citation omitted). It would undermine the purpose of ERISA's mandated survivor's annuity to allow Dorothy, the predeceasing spouse, by her testamentary transfer to defeat in part Sandra's entitlement to the annuity § 1055 guarantees her as the surviving spouse. This cannot be. States are not free to change ERISA's structure and balance.

Louisiana law, to the extent it provides the sons with a right to a portion of Sandra Boggs' § 1055 survivor's annuity, is pre-empted.

IV

Beyond seeking a portion of the survivor's annuity, respondents claim a percentage of: the monthly annuity pay-

ments made to Isaac Boggs during his retirement; the IRA; and the ESOP shares of AT&T stock. As before, the claim is based on Dorothy Boggs' attempted testamentary transfer to the sons of her community property interest in Isaac's undistributed pension plan benefits. Respondents argue further—and somewhat inconsistently—that their claim again concerns only what a plan participant or beneficiary may do once plan funds are distributed, without imposing any obligations on the plan itself. Both parties agree that the ERISA benefits at issue here were paid after Dorothy's death, and thus this case does not present the question whether ERISA would permit a nonparticipant spouse to obtain a devisable community property interest in benefits paid out during the existence of the community between the participant and that spouse.

A brief overview of ERISA's design is necessary to put respondents' contentions in the proper context. The principal object of the statute is to protect plan participants and beneficiaries. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans"). Section 1001(b) states that the policy of ERISA is "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." Section 1001(c) explains that ERISA contains certain safeguards and protections which help guarantee the "equitable character and the soundness of [private pension] plans" in order to protect "the interests of participants in private pension plans and their beneficiaries." The general policy is implemented by ERISA's specific provisions. Apart from a few enumerated exceptions, a plan fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." § 1104(a)(1). The assets of a plan, again with certain exceptions, are "held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of

administering the plan." § 1103(c)(1). The Secretary of Labor has authority to create exemptions to ERISA's prohibition on certain plan holdings, acquisitions, and transactions, but only if doing so is in the interests of the plan's "participants and beneficiaries." § 1108(a)(2). Persons with an interest in a pension plan may bring a civil suit under ERISA's enforcement provisions only if they are either a participant or beneficiary. Section 1132(a)(1)(B), for instance, provides that a civil action may be brought "by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

ERISA confers beneficiary status on a nonparticipant spouse or dependent in only narrow circumstances delineated by its provisions. For example, as we have discussed, § 1055(a) requires provision of a surviving spouse annuity in covered pension plans, and, as a consequence, the spouse is a beneficiary to this extent. Section 1056's QDRO provisions likewise recognize certain pension plan community property interests of nonparticipant spouses and dependents. A QDRO is a type of domestic relations order that creates or recognizes an alternate payee's right to, or assigns to an alternate payee the right to, a portion of the benefits payable with respect to a participant under a plan. § 1056(d)(3)(B)(i). A domestic relations order, in turn, is any judgment, decree, or order that concerns "the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant" and is "made pursuant to a State domestic relations law (including a community property law)." § 1056(d)(3)(B)(ii). A domestic relations order must meet certain requirements to qualify as a QDRO. See §§ 1056(d)(3)(C)–(E). QDRO's, unlike domestic relations orders in general, are exempt from both the pension plan anti-alienation provision, § 1056(d)(3)(A), and ERISA's general pre-emption clause,

§ 1144(b)(7). In creating the QDRO mechanism Congress was careful to provide that the alternate payee, the "spouse, former spouse, child, or other dependent of a participant," is to be considered a plan beneficiary. §§ 1056(d)(3)(K), (J). These provisions are essential to one of REA's central purposes, which is to give enhanced protection to the spouse and dependent children in the event of divorce or separation, and in the event of death the surviving spouse. Apart from these detailed provisions, ERISA does not confer beneficiary status on nonparticipants by reason of their marital or dependent status.

Even outside the pension plan context and its anti-alienation restriction, Congress deemed it necessary to enact detailed provisions in order to protect a dependent's interest in a welfare benefit plan. Through a § 1169 "qualified medical child support order" a child's interest in his or her parent's group health care plan can be enforced. A "medical child support order" is defined as any judgment, decree, or order that concerns the provision of child support "made pursuant to a State domestic relations law (including a community property law) and relates to benefits under such plan." § 1169(a)(2)(B)(i). As with a QDRO, a "medical child support order" must satisfy certain criteria in order to qualify. See §§ 1169(a)(3)–(4). In accordance with ERISA's care in conforming entitlements to benefits with participant or beneficiary status, the statute treats a child subject to such a qualifying order as a participant for ERISA's reporting and disclosure requirements and as a beneficiary for other purposes. § 1169(a)(7).

The surviving spouse annuity and QDRO provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory scheme. ERISA's silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support

for the conclusion that the right does not exist. Cf. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 147–148 (1985). It should cause little surprise that Congress chose to protect the community property interests of separated and divorced spouses and their children, a traditional subject of domestic relations law, but not to accommodate testamentary transfers of pension plan benefits. As a general matter, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U. S. 586, 593–594 (1890). Support obligations, in particular, are "deeply rooted moral responsibilities" that Congress is unlikely to have intended to intrude upon. See *Rose* v. *Rose*, 481 U. S. 619, 632 (1987); see also *id.*, at 636–640 (O'Connor, J., concurring). In accord with these principles, Congress ensured that state domestic relations orders, as long as they meet certain statutory requirements, are not pre-empted.

We conclude the sons have no claim under ERISA to a share of the retirement benefits. To begin with, the sons are neither participants nor beneficiaries. A "participant" is defined as an "employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit." § 1002(7). A "beneficiary" is a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." § 1002(8). Respondents' claims are based on Dorothy Boggs' attempted testamentary transfer, not on a designation by Isaac Boggs or under the terms of the retirement plans. They do not even attempt to argue that they are beneficiaries by virtue of the judgment of possession qualifying as a QDRO.

An *amicus*, the Estate Planning, Trust and Probate Law Section of the State Bar of California, in support of respondents' position, points to pre-REA case law holding that

ERISA does not pre-empt spousal community property interests in pension benefits, regardless of who is the plan participant or beneficiary. As did the District Court below, the *amicus* relies in particular upon *In re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), in which the California Court of Appeal for the First District held that ERISA does not bar California courts from joining pension funds in marriage dissolution proceedings and ordering the pension plan to divide pension payments between the employee and his or her former nonparticipant spouse. We dismissed the pension plan's appeal for want of a substantial federal question, 444 U. S. 1028 (1980), and, although not entitled to full precedential weight, see *Edelman* v. *Jordan*, 415 U. S. 651, 670–671 (1974), that disposition constitutes a decision on the merits, see *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). The state court in *Marriage of Campa* was not alone in refusing to find ERISA pre-emption in the divorce context. See, *e. g.*, *Stone* v. *Stone*, 450 F. Supp. 919 (ND Cal. 1978), aff'd, 632 F. 2d 740 (CA9 1980), cert. denied, 453 U. S. 922 (1981); *Savings and Profit Sharing Fund of Sears Employees* v. *Gago*, 717 F. 2d 1038 (CA7 1983); *Eichelberger* v. *Eichelberger*, 584 F. Supp. 899 (SD Tex. 1984). This judicial consensus, *amicus* argues, was codified by the QDRO provisions which were contained in the 1984 REA amendments. The *amicus* contends that since REA, or the pre-REA case law which it allegedly adopted, did not consider the community property rights of a nonparticipant spouse in the testamentary context, it should not be construed to pre-empt state law governing this different subject.

We disagree with this reasoning. It is true that the subject of testamentary transfers is somewhat removed from domestic relations law. The QDRO provisions address the rights of divorced and separated spouses, and their dependent children, which are the traditional concern of domestic relations law. The pre-REA federal common-law extension of § 1002(8)'s definition of "beneficiary" by courts in the con-

text of marital dissolution was in part based on an appreciation of the fact that domestic relations law is primarily an area of state concern, see *Marriage of Campa*, *supra*, at 124, 152 Cal. Rptr., at 367–368, and the basic principle that a beneficiary's interest in a spendthrift trust, despite otherwise applicable protections, can be reached in the context of divorce and separation. See E. Griswold, Spendthrift Trusts 389–391 (2d ed. 1947) (summarizing state case law); Restatement (Second) of Trusts § 157 (1959). The state court in *Marriage of Campa* took its implicit determination that the nonparticipant spouse was a beneficiary to its logical conclusion, forcing the pension plan to join the marital dissolution proceedings as a party and compelling it to pay the spouse her share of the pension benefits. Whether or not this extension of the definition of "beneficiary" was consistent with the statute then in force, these authorities are not applicable in light of the REA amendments. The QDRO and the surviving spouse annuity provisions define the scope of a nonparticipant spouse's community property interests in pension plans consistent with ERISA.

Respondents and their *amicus* in effect ask us to ignore § 1002(8)'s definition of "beneficiary" and, through case law, create a new class of persons for whom plan assets are to be held and administered. The statute is not amenable to this sweeping extratextual extension. It is unpersuasive to suggest that third parties could assert their claims without being counted as "beneficiaries." A plan fiduciary's responsibilities run only to participants and beneficiaries. § 1104(a)(1). Assets of a plan are held for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable expenses of administration. § 1103(c)(1). Reading ERISA to permit nonbeneficiary interests, even if not enforced against the plan, would result in troubling anomalies. Either pension plans would be run for the benefit of only a subset of those who have a stake in the plan or state law would have to move in to fill the appar-

ent gaps between plan administration responsibilities and ownership rights, resulting in a complex set of requirements varying from State to State. Neither result accords with the statutory scheme.

The conclusion that Congress intended to pre-empt respondents' nonbeneficiary, nonparticipant interests in the retirement plans is given specific and powerful reinforcement by the pension plan anti-alienation provision. Section 1056(d)(1) provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Statutory anti-alienation provisions are potent mechanisms to prevent the dissipation of funds. In *Hisquierdo* we interpreted an anti-alienation provision to bar a divorced spouse's interest in her husband's retirement benefits. See 439 U. S., at 583–590. ERISA's pension plan anti-alienation provision is mandatory and contains only two explicit exceptions, see §§ 1056(d)(2), (d)(3)(A), which are not subject to judicial expansion. See *Guidry* v. *Sheet Metal Workers Nat. Pension Fund*, 493 U. S. 365, 376 (1990). The anti-alienation provision can "be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement." J. Langbein & B. Wolk, Pension and Employee Benefit Law 547 (2d ed. 1995).

Dorothy's 1980 testamentary transfer, which is the source of respondents' claimed ownership interest, is a prohibited "assignment or alienation." An "assignment or alienation" has been defined by regulation, with certain exceptions not at issue here, as "[a]ny direct or indirect arrangement whereby a party acquires from a participant or beneficiary" an interest enforceable against a plan to "all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." 26 CFR § 1.401(a)–13(c)(1)(ii) (1997). Those requirements are met. Under Louisiana law community property interests are enforceable against a plan. See *Eskine* v. *Eskine*, 518 So. 2d 505, 508 (La. 1988). If respondents' claims were allowed to succeed

they would have acquired, as of 1980, an interest in Isaac's pension plan at the expense of plan participants and beneficiaries.

As was true with survivors' annuities, it would be inimical to ERISA's purposes to permit testamentary recipients to acquire a competing interest in undistributed pension benefits, which are intended to provide a stream of income to participants and their beneficiaries. See *Guidry*, *supra*, at 376 ("[The anti-alienation provision] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . and their dependents . . ."). Pension benefits support participants and beneficiaries in their retirement years, and ERISA's pension plan safeguards are designed to further this end. See § 1001(c). Besides the anti-alienation provision, Congress has enacted other protective measures to guarantee that retirement funds are there when a plan's participants and beneficiaries expect them. There are, for instance, minimum funding standards for pension plans and a pension plan termination insurance program which guarantees benefits in the event a plan is terminated before being fully funded. See §§ 1082, 1301–1461. Under respondents' approach, retirees could find their retirement benefits reduced by substantial sums because they have been diverted to testamentary recipients. Retirement benefits and the income stream provided for by ERISA-regulated plans would be disrupted in the name of protecting a nonparticipant spouses' successors over plan participants and beneficiaries. Respondents' logic would even permit a spouse to transfer an interest in a pension plan to creditors, a result incompatible with a spendthrift provision such as § 1056(d)(1).

Community property laws have, in the past, been preempted in order to ensure the implementation of a federal statutory scheme. See, *e. g.*, *McCune* v. *Essig*, 199 U. S. 382 (1905); *Wissner* v. *Wissner*, 338 U. S. 655 (1950); *Free* v. *Bland*, 369 U. S. 663 (1962); *Hisquierdo* v. *Hisquierdo*, 439

U. S. 572 (1979); *McCarty* v. *McCarty*, 453 U. S. 210 (1981); *Mansell* v. *Mansell*, 490 U. S. 581 (1989); cf. *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981). *Free* v. *Bland*, *supra*, is of particular relevance here. A husband had purchased United States savings bonds with community funds in the name of both spouses. Under Treasury regulations then in effect, when a co-owner of the bonds died, the surviving co-owner received the entire interest in the bonds. After the wife died, her son—the principal beneficiary of her will—demanded either one-half of the bonds or reimbursement for loss of the community property interest. The Court held that the regulations pre-empted the community property claim, explaining:

> "One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoiding complicated probate proceedings. Notwithstanding this provision, the State awarded full title to the co-owner but required him to account for half of the value of the bonds to the decedent's estate. Viewed realistically, the State has rendered the award of title meaningless." *Id.*, at 669.

The same reasoning applies here. If state law is not pre-empted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit. The obligation to provide an accounting, moreover, as with the probate proceedings referred to in *Free*, is itself a burden of significant proportions. Under respondents' view, a pension plan participant could be forced to make an accounting of a deceased spouse's community property interest years after the date of death. If the couple had lived in several States, the accounting could entail complex, expensive, and time-consuming litigation. Congress could not have intended that pension benefits from pension plans would be given to accountants and attorneys for this purpose.

Respondents contend it is anomalous and unfair that a divorced spouse, as a result of a QDRO, will have more control over a portion of his or her spouse's pension benefits than a predeceasing spouse. Congress thought otherwise. The QDRO provisions, as well as the surviving spouse annuity provisions, reinforce the conclusion that ERISA is concerned with providing for the living. The QDRO provisions protect those persons who, often as a result of divorce, might not receive the benefits they otherwise would have had available during their retirement as a means of income. In the case of a predeceased spouse, this concern is not implicated. The fairness of the distinction might be debated, but Congress has decided to favor the living over the dead and we must respect its policy.

The axis around which ERISA's protections revolve is the concepts of participant and beneficiary. When Congress has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are pre-empted. The judgment of the Fifth Circuit is

Reversed.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, and with whom THE CHIEF JUSTICE and JUSTICE GINSBURG join except as to Part II–B–3, dissenting.

The question in this case is whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.*, "pre-empts," and thereby nullifies, state community property law. The state law in question would permit a wife to leave to her children her share of the pension

assets that her husband has earned (or, to put the matter in "community property" terms, that she and her husband together have earned) during their marriage. From the perspective of property law, the issue is unusually important, for, we are told, the answer potentially affects nine community property States, with more than 80 million residents, and over $1 trillion in ERISA-qualified pension plans—plans that are often a couple's most important lifetime assets. In my view, Congress did not intend ERISA to pre-empt this testamentary aspect of community property law—at least not in the circumstances present here, where a first wife's bequest need not prevent a second wife from obtaining precisely those benefits that ERISA specifically sets aside for her. See § 1055(a). The Fifth Circuit's determination is consistent with this view. I would therefore affirm its judgment.

I

A

This case concerns the disposition of pension plan assets earned by an employee who was married; who had children; whose first wife died; who remarried; who retired; and who then died, survived by his second wife. To be more specific, the employee, Isaac Boggs, a resident of Louisiana, began work for South Central Bell Telephone Company (now known as BellSouth) in 1949. He participated in its ERISA-qualified pension plan for about 36 years. He was married to his first wife, Dorothy Boggs, during almost all of that time—from 1949 until 1979, when Dorothy died. The couple had three children. Isaac married his second wife, Sandra, in 1980. He retired in 1985. He died in 1989. Sandra survives him.

When Dorothy died, she left a will providing that Isaac would receive "'the maximum [share of her estate] permitted under the law,'" as well as a lifetime "'usufruct'" (rather like a common-law life estate) in the remainder. Brief for

Respondents 1, 2. The parties agree that this meant that Isaac received one-third of her estate outright. Under Louisiana law, the three sons of Dorothy and Isaac would receive what was left of the remaining two-thirds at Isaac's death (*i. e.*, the "naked ownership," or the equivalent of a common-law remainder).

Throughout his working life, and during his entire 30-year marriage to Dorothy, Isaac participated in a set of BellSouth's ERISA-qualified retirement plans. When Isaac retired in 1985 (six years after Dorothy's death), he received three assets from those plans: (1) *96 shares of AT&T stock* (from BellSouth's Employee Stock Ownership Plan); (2) *a cash payment of about $150,000* (from BellSouth's Savings Plan for Salaried Employees); and (3) *an annuity of about $1,800 per month* (from BellSouth's Management Pension Plan) for his life and afterwards for that of his surviving second spouse, Sandra. Isaac almost immediately placed the $150,000 cash payment in an Individual Retirement Account (IRA), thereby avoiding immediate payment of an income tax. See 26 U. S. C. § 408(e)(1); see also S. Bruce, Pension Claims: Rights and Obligations 7 (2d ed. 1993). Isaac bequeathed a lifetime usufruct in his property, presumably including some or all of the AT&T stock and the funds in the IRA, to his second wife, Sandra. Sandra, as his survivor, also began to receive the $1,800 monthly annuity.

B

On December 17, 1992, Sandra Boggs filed an action for declaratory judgment in Federal District Court. See 29 U. S. C. § 1132(a)(1)(B) (plan participant or beneficiary may bring action to "clarify . . . rights to future benefits"). She said that the three children of Isaac and Dorothy had themselves brought an action in state court against her and against Isaac's estate, seeking a portion of the pension benefits from the BellSouth plans. The children said that under Louisiana law, their mother, Dorothy, had owned a one-half

share in Isaac's rights under the BellSouth retirement plans (insofar as they had accrued prior to Dorothy's death) and that she had left them a portion of that share (two-thirds of the "naked interest" after Isaac's death). They asked (in Sandra's words) for "an accounting" as well as "for an undivided interest in, and/or the value of an undivided interest in, the assets and/or benefits" that were paid out of the pension plans. Petition for Declaratory Judgment in No. 92–4174 (ED La., Nov. 16, 1992), p. 3. Sandra asked the District Court to declare that, insofar as state law entitled the children to some of the plan benefits, ERISA pre-empted that state law. In a nutshell, she asked the court to say that the shares of stock, the cash, and the annuity payments were entirely hers.

The District Court disagreed with Sandra. It denied her motion for summary judgment and declared that "ERISA does not preempt Louisiana's community property laws." 849 F. Supp. 462, 467 (ED La. 1994); see also Judgment in No. 92–4174 (ED La., Mar. 9, 1994), p. 1. The Fifth Circuit Court of Appeals affirmed. We are reviewing the Fifth Circuit's decision in respect to pre-emption; and we must therefore assume its view of the relevant facts and state law.

II

Judge Wisdom, writing for the Fifth Circuit in this case, described Louisiana's community property law as a "system" that "conceives of marriage as a partnership in which each partner is entitled to an equal share." 82 F. 3d 90, 96 (1996); see also W. McClanahan, Community Property in the United States § 2:27, p. 38 (1982) (hereinafter McClanahan) (community property law views marriage "as a civil contract between two persons who ente[r] into the relationship as equals and retai[n] their individual personalities"). Recognizing "the value a spouse, though non-employed, contributes to a marriage," 82 F. 3d, at 96, the state law provides that the interest in pension benefits that accrued during Isaac's mar-

riage to Dorothy belongs *both* to Isaac and to Dorothy—that is, to them as a community—and not to the one any more than to the other. La. Civ. Code Ann., Art. 2338 (West 1985) (community property includes "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse"); *T. L. James & Co.* v. *Montgomery*, 332 So. 2d 834, 841–844, 846 (La. 1975) (pension benefits are community property even if the employee spouse makes no cash contributions to plan).

Louisiana law, like the law of other States, today allows both women and men to leave their property to their children. La. Civ. Code Ann., Art. 2346 (West 1985) ("Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law"). Cf. 16 K. Spaht & W. Hargrave, Louisiana Civil Law Treatise, Matrimonial Regimes 1–2 (1989) (until 1980, Louisiana law considered a husband to be the " 'head and master' " and exclusive manager of community property). And we must assume, as did the Fifth Circuit, that Louisiana law would permit Dorothy's children, to whom she left her property, to obtain an accounting to determine the extent to which the stock, the IRA, and the monthly annuity, in fact belong to them. See 82 F. 3d, at 97 ("[Dorothy's] spouse, or his estate, owes her an obligation to account for her share of the pension"); see also La. Civ. Code Ann., Art. 3261 (West 1961) (succession representative has broad power, subject to probate court approval, to liquidate an estate through sale or exchange of estate assets "to pay debts and legacies, or for any other purpose"). Cf. La. Rev. Stat. Ann. § 9:2801 (West 1991 and Supp. 1997) (judicial partition of assets on divorce); *Hare* v. *Hodgins*, 586 So. 2d 118, 123 (La. 1991) (to equalize allocation of community assets on termination, court may grant "cash or other property in lieu of an actual percentage of the pension payments"); *T. L. James*, *supra*, at 851, n. 2 (opinion on rehearing) (same); *Sims* v. *Sims*, 358 So. 2d 919, 924 (La. 1978) (formula for calculating a former spouse's

share of pension benefits); McClanahan § 12:15, pp. 547–550 (state courts may allocate entire pension to employee spouse and allocate to other spouse other community property equal in value to half of pension); cf. also *Succession of McVay*, 476 So. 2d 1070, 1073–1074 (La. App. 1985) (decedent's IRA, which contained community property assets, could not be listed as an asset of his estate because he had designated a beneficiary; however, his estate would be deemed to contain the equivalent cash value). See generally La. Civ. Code Ann., Art. 4 (West 1993) ("When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity").

We ask here whether—or the extent to which—ERISA stands as an obstacle to the enforcement of this state law as applied in this case. It does so if state law "relate[s] to any employee benefit plan," 29 U. S. C. § 1144(a), or if it conflicts with specific provisions of ERISA. Applying the relevant criteria, I can find no basis for pre-emption.

A

Louisiana community property law "relates to" an ERISA plan within the meaning of § 1144(a) if it expressly "refer[s]" to such a plan, or if it has an impermissible "connection with" a plan. *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 324 (1997). Neither of these grounds for pre-emption is present here.

The relevant Louisiana statute does not refer to ERISA or to pensions at all. It simply says that "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse" is "community property." La. Civ. Code Ann., Art. 2338 (West 1985). Nor does the statute act exclusively on, or rely on the existence of, ERISA plans. See *Dillingham*, *supra*, at 324–325. The statute's application to this case arises out of judicial interpretation, see *T. L. James*, *supra*, at 841; McClanahan § 6:21, p. 365, of a sort that is likely to be present whenever a generally

phrased state statute affects an ERISA plan, among other things. Hence there is no specific "reference" problem.

The "connection" problem is more difficult. Insofar as that term refers to a conflict with an ERISA purpose, I discuss the matter primarily in Part II–B, *infra.* The term "connection," however, might also encompass the question whether state law intrudes into an area Congress (given ERISA's basic objectives) would have wanted to reserve exclusively for federal legislation. *Dillingham*, *supra*, at 324 (quoting *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655 (1995)). Cf. *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978) (state law is pre-empted when it falls within a field that Congress has sought to occupy); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244–245 (1959) (States may not regulate activities that are protected or prohibited under National Labor Relations Act); *Garner* v. *Teamsters*, 346 U. S. 485, 498–499 (1953) (States may not add to or subtract from remedies provided in National Labor Relations Act). In my view, this latter problem (sometimes called "field preemption," see *Dillingham*, *supra*, at 336 (SCALIA, J., concurring)) is not present here.

The state law in question concerns the ownership of benefits. I concede that a primary concern of ERISA is the proper financial management of pension and welfare benefit funds themselves, *Dillingham*, *supra*, at 326–327 (citing *Massachusetts* v. *Morash*, 490 U. S. 107, 115 (1989)), and that payment of benefits (which amounts to the writing of checks from those funds) is closely "connected with" that management. I also concede that state laws that affect those payments lie closer to ERISA's federal heart than do state laws that, say, affect those goods and services that ERISA benefit plans purchase, such as apprenticeship training programs, 519 U. S., at 332–334, or medical benefits, *De Buono* v. *NYSA–ILA Medical and Clinical Services Fund*, *ante*, at 814–816. But, even so, I cannot say that the state law at

issue here concerns a subject that Congress wished to place outside the State's legal reach.

My reason in part lies in the fact that the state law in question involves family, property, and probate—all areas of traditional, and important, state concern. *Rose* v. *Rose*, 481 U. S. 619, 625 (1987) (domestic relations law traditionally left to state regulation); *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979) (same); *Zschernig* v. *Miller*, 389 U. S. 429, 440 (1968) ("The several States, of course, have traditionally regulated the descent and distribution of estates"). But see *ante*, at 848 (majority's effort to distinguish property interests passing at divorce from those passing by devise). When this Court considers pre-emption, it works "on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Dillingham*, *supra*, at 325 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947)).

I can find no reasonably defined relevant category of state law that Congress would have intended to displace. Obviously, Congress did not intend to pre-empt all state laws that govern property ownership. After all, someone must own an interest in ERISA plan benefits. Nor, for similar reasons, can one believe that Congress intended to pre-empt state laws concerning testamentary bequests. This is not an area like, say, labor relations, where Congress intended to leave private parties to work out certain matters on their own. See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 144–148 (1976). The question, "who owns the property?" needs an answer. Ordinarily, where federal law does not provide a specific answer, state law will have to do so.

Nor can I find some appropriately defined forbidden category by looking to the congressional purpose of establishing uniform laws to regulate the administration of pension funds. Cf. *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133 (1990);

Massachusetts v. *Morash*, *supra*, at 115. This case *does not involve a lawsuit against a fund.* I agree with the majority that ERISA would likely pre-empt state law that permitted such a suit. But this is not such a case; nor is there reason to believe Louisiana law would produce such a case. (*Eskine* v. *Eskine*, 518 So. 2d 505 (La. 1988), which is cited by the majority, involved a governmental plan that was not covered by ERISA. See *id.*, at 506; 29 U. S. C. §§ 1002(32), 1003(b)(1).)

The lawsuit before us concerns benefits that the fund has already distributed; it asks not the fund, but others, for a subsequent accounting. And, as I discuss in Part II–B–3 below, this lawsuit will not interfere with the payment of a survivor annuity to Sandra. See § 1055(a). Under these circumstances, I do not see how allowing the respondents' suit to go forward could interfere with the administration of the BellSouth pension plan according to ERISA's requirements. Whether or not the children are allowed to seek an accounting, the plan fiduciaries will continue to owe a duty only to plan participants and beneficiaries. See §§ 1103(c)(1), 1104(a)(1). Contrary to the majority's suggestion, Dorothy's children are not the equivalent of plan "participants" or "beneficiaries," see §§ 1002(7), 1002(8), any more than would be a grocery store, a bank, an IRA, or any other recipient of funds that have emerged from a pension plan in the form of a distributed benefit, and no one here claims the contrary. Moreover, the children here are seeking an accounting only after the plan participant has died. But even were that not so, any threat the children's lawsuit could pose to plan administration is far less than that posed by the division of plan assets upon separation or divorce, which is allowed under § 1056(d). See Part II–B–2, *infra*.

Of course, one could look for a still more narrowly defined category, such as the category of "testamentary bequests of ERISA pension benefits by one spouse who dies before the other." But to narrow the category to this extent is to

change the question from one about occupying the field, to one about whether, or the extent to which, Louisiana law frustrates or interferes with an important federal purpose.

That question is important. Indeed, the Court, in other cases, has found conflicts between state community property law and federal statutes governing retirement, insurance, and savings funds *operated and/or funded by the Federal Government.* See *Mansell* v. *Mansell*, 490 U. S. 581, 587–595 (1989); *McCarty* v. *McCarty*, 453 U. S. 210, 221–236 (1981); *Ridgway* v. *Ridgway*, 454 U. S. 46, 53–61 (1981); *Hisquierdo*, *supra*, at 582–590; *Free* v. *Bland*, 369 U. S. 663 (1962); *Wissner* v. *Wissner*, 338 U. S. 655, 658–660 (1950). But those cases turned on the particular federal purposes embodied in the particular federal statutes at issue. The question posed here similarly requires an examination of ERISA's specific statutory provisions to see whether they reveal language or an important purpose with which the State's community property laws conflict—either directly, or in the sense that the state laws "frustrate" the achievement of a statutory purpose. See *Malone*, 435 U. S., at 504. I now turn to that question.

B

Sandra Boggs, supported by the Acting Solicitor General, points to three statutory provisions with which, she believes, Louisiana law conflicts—an anti-alienation provision, 29 U. S. C. § 1056(d)(1), a provision dealing with an exception to the anti-alienation section for "qualified domestic relations order[s]," § 1056(d)(3)(A), and a provision that concerns joint and survivor pension annuities, § 1055. I shall consider each in turn.

1

ERISA's "anti-alienation" provision, § 1056(d)(1), says that "benefits provided under the [qualified ERISA plan] may not be assigned or alienated." We have stated that this provision reflects "a decision to safeguard a stream of income for

pensioners (and their dependents . . .)." *Guidry* v. *Sheet Metal Workers Nat. Pension Fund*, 493 U. S. 365, 376 (1990). Sandra Boggs and the Acting Solicitor General claim that Louisiana law interferes with a significant "anti-alienation" objective, both (1) by permitting Dorothy, the nonparticipant spouse, to obtain an undivided interest in the pension of Isaac, the participant spouse; and (2) by permitting Dorothy to transfer that interest on her death to her children, who, as far as ERISA is concerned, are third parties.

The first claim—simply attacking Dorothy's possession of an undivided one-half interest in that portion of retirement benefits that accrued during her marriage to Isaac—does not attack any "assign[ment]" of an interest nor any "alien-a[tion]" of an interest, for Dorothy's interest arose not through assignment or alienation, but through the operation of Louisiana's community property law itself. Thus, Sandra's claim must be that community property law's grant of an undivided one-half interest in retirement benefits to a nonparticipant wife or husband itself violates some congressional purpose. But what purpose could that be? Congress has recognized that community property law, like any other kind of property law, can create various property interests for nonparticipant spouses. See 29 U. S. C. §1056(d)(3)(B)(ii)(II). Community property law, like other property law, can provide an appropriate legal framework for resolving disputes about who owns what. §1056(d)(3). The anti-alienation provision is designed to prevent plan beneficiaries from prematurely divesting themselves of the funds they will need for retirement, not to prevent application of the property laws that define the legal interest in those funds. One cannot find frustration of an "anti-alienation" purpose simply in the state law's definition of property.

The second claim—attacking Dorothy's testamentary transfer to her children—is more plausible. Nonetheless, with one exception discussed below, ERISA does not concern itself with what a pension fund beneficiary, such as Isaac,

does with his pension money at his death. That is not surprising, for after the death of a beneficiary the money is no longer needed for that beneficiary's support. And if ERISA does not embody a congressional purpose to restrict what Isaac can do with his pension funds after his death, there is no reason to believe it embodies some similar general purpose with respect to Dorothy. Insofar as the pension is community property, it belongs to both Dorothy and Isaac equally; it is just as much hers as his. Why, then, should ERISA restrict her testamentary power in respect to her property any more than it restricts his?

I see one possible answer to this question. One might argue that, because Dorothy was the *first* to die, her testamentary transfer gave to third parties (persons to whom ERISA is indifferent) funds that Isaac might otherwise have used during his retirement; and, for that reason, the testamentary transfer tends to frustrate the purpose of the "anti-alienation" provision or some more general ERISA purpose. This argument (with one exception, see Part II–B–3, *infra*) is beside the point, however, for the state-law action here seeks an accounting that will take place after the deaths of *both* Dorothy and Isaac. Moreover, the argument depends upon doubtful assumptions about Congress' purposes. Consider the 96 shares of stock and $150,000 cash that Isaac received from the plans when he retired. Dorothy's bequest affects those assets—the stock and the cash—not while they remain in BellSouth's pension plan funds, but only after they have emerged from the plan in the form of a distributed payment. As far as ERISA is concerned, Isaac could have used the retirement benefits to pay for a vacation, to buy a house, or to bet at the races, or he could have given the money to his children. ERISA would have left Dorothy similarly free to do what she wished with her share of the stock and the cash, had she been alive at the time of their receipt. That being so, I do not understand why or how ERISA could be concerned about Dorothy's creation of a will, which affected

the retirement assets only after Isaac received them. I recognize that Isaac did not use the $150,000 to buy a new house, or to pay for medical expenses, or to gamble; rather, he put the money into an IRA. But no one has explained why that fact—which in all likelihood reflects the exigencies of tax law, see 26 U. S. C. § 408(e)(1)—should make any difference here.

2

Sandra Boggs and the Acting Solicitor General look for support to another portion of the anti-alienation section—an amendment that was part of the Retirement Equity Act of 1984 (REA), Pub. L. 98–397, 98 Stat. 1426—that affects the division of assets upon divorce. That section says that the "anti-alienation" provision, 29 U. S. C. § 1056(d)(1), "shall not apply if the order is determined to be a qualified domestic relations order" (QDRO). § 1056(d)(3)(A). The provision defines QDRO's to include certain court orders that are "made pursuant to a State domestic relations law (including a community property law)," § 1056(d)(3)(B)(ii)(II), and meet certain other requirements, §§ 1056(d)(3)(B)(i), 1056(d)(3)(C), 1056(d)(3)(D). The Government argues that this provision shows that court orders count as "alienations" prohibited under § 1056(d)(1), and that since the probate court orders effectuating Dorothy's testamentary transfers do not fall within the QDRO exception, the "anti-alienation" section, as amended and taken as a whole, pre-empts Louisiana law.

The QDRO provisions, in my view, do not support the Government's argument. The QDRO exception does not purport to interpret the "anti-alienation" provision (quoted *supra*, at 863). Rather, it simply says that the provision

> "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order . . . ." § 1056(d)(3)(A).

The section defines "domestic relations order" (not "*qualified* domestic relations order") as a court order, judgment, or decree made pursuant to state domestic relations law, which

> "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." § 1056(d)(3)(B)(ii)(I).

It then exempts "qualified" orders from the scope of the anti-alienation provision. § 1056(d)(3)(A). This language does not tell us what the word "alienation" would cover in its absence. It does not tell us whether the amendment taken as a whole *clarified* that the anti-alienation provision covers court orders (which would help Sandra) or *extended* that coverage so that it included domestic relations orders (which would help the children). Hence, the amendment tells us virtually nothing relevant about whether the prohibition on anti-alienation applies to matters not covered by the term "domestic relations orders," such as probate court orders.

Second, the amendment, taken as a whole, concerns divorce and separation, not probate. See Department of Labor Advisory Opinion 90–46A, issued Dec. 4, 1990 (citing 130 Cong. Rec. 13327 (1984); S. Rep. No. 98–575, pp. 18–19 (1984)) (in enacting REA, Congress focused on marital dissolution and dependent support). The amendment says that state-court judges cannot award pension-related property to a nonparticipant spouse *unless* the order doing so meets certain requirements, such as recordkeeping requirements and a prohibition against increasing the amount of benefits that an ERISA plan would otherwise have to pay. §§ 1056(d)(3)(C), 1056(d)(3)(D). As I have said, Congress did this by stating that the anti-alienation section covers divorce-related court orders, and then exempting "qualified" orders from the additional coverage just created. The amendment thus regulates transfers between living spouses;

it does not intend to affect testamentary transfers taking place after death.

Third, the QDRO provision shows that Congress did not object to court orders that transfer pension benefits from an ERISA plan participant to a former spouse who is alive—at least if those court orders meet certain procedural requirements. Why then, one might ask, would Congress object to court orders that transfer benefits to a former spouse after her death? Had Dorothy Boggs remained with Isaac for many years and then divorced him, she could have obtained a QDRO that would have declared her community property interest in Isaac's pension benefits, and she could then have left that interest to her children. That being so, it would be anomalous to find a congressional purpose in ERISA—despite the absence of express statutory language and any indication that Congress even considered the question—that would in effect deprive Dorothy of her interest because, instead of divorcing Isaac, she "stay[ed] with him till her last breath." Tr. of Oral Arg. 15.

Finally, the language of § 1056(d), even if taken literally, does not help Sandra significantly, for a probate court order awarding property to an estate or to children cannot easily be squeezed into the definition of "domestic relations order." An order placing property in the estate is not an order that provides property rights to a "spouse, former spouse, child, or dependent," and an order distributing an estate's property to a child is not readily described as an order relating to "marital property rights." See Department of Labor Advisory Opinion, *supra* (probate orders are not "domestic relations orders").

3

Sandra Boggs and the Acting Solicitor General rely on a third statutory provision, § 1055, which sets forth specific provisions concerning the payment of annuities to a plan participant's surviving spouse. Section 1055(a) says that an ERISA plan must ensure that "the accrued benefit" that is

"payable" to the plan "participant" takes "the form of a qualified joint and survivor annuity," § 1055(a)(1). The term "qualified joint and survivor annuity" means an "annuity" to a plan participant for his life, with a surviving spouse, such as Sandra, that is "not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse." § 1055(d).

The parties have not argued that this provision affects the shares of stock or the $150,000 lump sum. I need not decide whether that is so. That is because, if these assets do count as "accrued benefits" under § 1055(d), the plan would then have had to insist on a waiver from Sandra in order to pay them out in the way that it did—*i. e.*, in a form other than an annuity. Thus, I assume either that the stock and cash were not "accrued benefits" under § 1055(d), or that Sandra waived her rights under § 1055. Either way, § 1055 would not affect the outcome as to the stock and the cash.

The $1,800 monthly annuity payments, however, are a different matter. They were paid from the BellSouth Management Pension Plan, a "defined benefit" pension plan, initially to Isaac during his lifetime, and then to his second wife, Sandra, for her life. These annuities do fall within the scope of § 1055. This ERISA provision seeks to guarantee that the person who was a participant's spouse at the time of the participant's death will receive an annuity as described (unless the spouse has waived the right to receive the survivor annuity, §§ 1055(c) (waiver of survivor portion of annuity), 1055(g) (election of cash distribution rather than annuity)). See S. Rep. No. 98–575, at 12; 26 CFR § 1.401(a)–11 (1996). I agree with the majority that Louisiana cannot give Dorothy's children a share of the pension annuity that Sandra is receiving without frustrating the purpose of this provision.

This inconsistency does not end the matter, however, for Dorothy's children here sought different relief. Although the children apparently requested a portion of Sandra's

monthly annuity payments in their state-court pleading, Record 134, they stipulated at oral argument that they are seeking only an accounting, Tr. of Oral Arg. 33–34. And according to Sandra's complaint for declaratory judgment, the children have asked for an "accounting"; the Fifth Circuit, too, spoke only of an "accounting," and did not mention relief in the form of a percentage of Sandra's annuity. See 82 F. 3d, at 94, 97, 98.

The difference is important, for, as the children pointed out at oral argument, an accounting would simply declare that, when Dorothy died, she had a community property interest in Isaac's pension benefits. And it is possible that Louisiana law would permit Dorothy (or her heirs) to collect not the pension benefits themselves, but other nonpension community assets of equivalent value. See La. Civ. Code Ann., Art. 3261 (West 1961) (succession representative has broad power, subject to probate court approval, to liquidate an estate through sale or exchange of estate assets "to pay debts and legacies, or for any other purpose"). Cf. La. Rev. Stat. Ann. § 9:2801 (West 1991 and Supp. 1997) (judicial partition of assets on divorce); *Hare* v. *Hodgins*, 586 So. 2d, at 123 (to equalize allocation of community assets on termination, court may grant "cash or other property in lieu of an actual percentage of the pension payments"); *T. L. James*, 332 So. 2d, at 851, n. 2 (opinion on rehearing) (same); *Sims* v. *Sims*, 358 So. 2d, at 924 (setting forth formula for calculating a former spouse's share of pension benefits); McClanahan § 12:15, pp. 547–550 (state courts may allocate entire pension to employee spouse and allocate to other spouse other community property equal in value to half of pension).

In this case, Isaac apparently retained possession of other, nonpension assets from the Dorothy-Isaac community after Dorothy's death because her will gave him a lifetime usufruct in the portion of her estate that she did not bequeath to him outright. (And if Dorothy had not bequeathed that portion of her estate to anyone, it appears that Louisiana law

would automatically have given him a usufruct until his death or remarriage. See La. Civ. Code Ann., Art. 890 (West Supp. 1997).) In such a circumstance, Louisiana law might provide an accounting to allow Dorothy's estate, or her heirs, to recover Dorothy's community property share of those nonpension assets from Isaac's estate, or from his heirs, after his death. In applying such a law, a Louisiana court might allocate property so that federally granted property rights, such as Sandra's right to a survivor annuity, are fully protected. Cf. *Bendler* v. *Marshall*, 513 So. 2d 369 (La. App. 1987) (first wife is entitled to reimbursement of her community property share of husband's pension contributions, but not from second, surviving wife; first wife is not entitled to share of second wife's survivor annuity); *Succession of McVay*, 476 So. 2d, at 1073–1074 (decedent's IRA, which contained community property assets, could not be listed as an asset of his estate because he had designated a beneficiary; however, his estate would be deemed to contain the equivalent cash value). See generally La. Civ. Code Ann., Art. 4 (West 1993) ("When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity").

Of course, the lower courts did not describe the precise nature of Dorothy's state-law interest, nor did they explain exactly how the accounting worked. They did no more than deny Sandra's request for a declaratory judgment that ERISA prohibits an accounting. But that may reflect the fact that no one raised a § 1055 argument until after the Court of Appeals panel's decision in this case. We therefore should not grant Sandra her declaratory judgment unless we are certain Louisiana law could not lawfully permit Dorothy to leave her community property interest in the pension assets to her children. And, given the authority just cited, state law *might* lawfully do so, very roughly in the way the following imaginary example illustrates:

Assume at the time of Dorothy's death Dorothy and Isaac owned the following community property:

Pension assets	$ 60,000
Stock investments	140,000
Total	$200,000

Louisiana law might then provide that Dorothy and Isaac each owned $100,000 worth of community assets. Louisiana law might also provide (or permit a probate court to decide) that the share belonging to Dorothy's estate consisted of $100,000 worth of stock, leaving Isaac with $40,000 in stock and $60,000 in pension assets. If that is so, why should ERISA care? And if Louisiana law should simply *postpone* the division of the Dorothy-Isaac community's property until after Isaac's death because of his lifetime usufruct, why should ERISA care any more? Moreover, if Isaac bequeathed the entire $140,000 worth of stock to a charity, I assume that the probate court would block most of the bequest on the ground that $100,000 worth of stock was not Isaac's to give away. I assume it would do the same if he tried to give Sandra the entire $140,000. And I do not see why ERISA would care about the stock (which, after all, belonged to Dorothy) in either case.

I cannot understand why Congress would want to preempt Louisiana law if (or insofar as) that law provides for an accounting and collection from other property—*i. e.*, property other than the annuity that § 1055 requires the BellSouth plans to pay to Sandra. The survivor annuity provision assures Sandra that she will receive an annuity for the rest of her life. Louisiana law (on my assumption) would not take from her either that annuity or any other asset that belongs to her. The most one could say is that Sandra will not receive certain other assets—assets that belonged to the Dorothy-Isaac community and that Isaac had no right to give to anyone in the first place.

Nothing in ERISA suggests that it cares about what happens to those other assets. The survivor annuity provision says nothing about them. Indeed, Isaac, or the Dorothy-Isaac community, might, or might not, have had other assets. Isaac might, or might not, have tried to leave all, or some, of those other assets to Sandra, or to his children, or to charity. ERISA seems to be indifferent to the presence, or absence, of *other assets* and to what Isaac did or did not try to do with them. After all, if Dorothy had divorced Isaac, ERISA would have permitted state law to give her not only other assets, but also half of the pension itself (which would have left a later-appearing Sandra with a diminished annuity). See § 1056(d)(3)(A). Given Congress' purpose of allowing state courts to give first wives their community property share of pension assets, why would Congress have intended to include a silent implication that strips Dorothy of an asset that may be the bulk of her community property—simply because, instead of divorcing Isaac, she remained his wife until she died?

On the assumptions I have made, to find a conflict in this case, one would have to depart from what Congress actually said in ERISA and infer some more abstract general purpose, say to help a second wife at the expense of a first wife's state-law-created interest in other property. But should we take anything like this latter approach, there would be no logical stopping place. Confusion and unnecessary interference with state property laws would become inevitable. Moreover, we should be particularly careful in making assumptions about the interaction of § 1055 and Louisiana law, as the courts below did not consider § 1055 as a possible ground for conflict pre-emption.

In sum, an annuity goes to Sandra, a surviving spouse; but otherwise Dorothy would remain free not only to have, but to bequeath, her share of the marital estate to her children. This reading of the relevant statutory provisions and purposes protects Sandra, limits ERISA's interference with

basic state property and family law, and minimizes the extent to which ERISA would interfere with Dorothy's preexisting property. Cf. *Hodel* v. *Irving*, 481 U. S. 704, 717 (1987) (federal statute stripping property owner of right to pass interest by descent or devise constitutes taking under Fifth Amendment); *Babbitt* v. *Youpee*, 519 U. S. 234, 244–245 (1997) (statutory restriction on class of permissible heirs constitutes taking).

These general reasons, as well as the specific reasons provided above, convince me that ERISA does not pre-empt the Louisiana law in question. And I would therefore affirm the judgment below.

Syllabus

SARATOGA FISHING CO. *v.* J. M. MARTINAC & CO. ET AL.

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

No. 95–1764. Argued February 18, 1997—Decided June 2, 1997

In *East River S. S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858, this Court held that an admiralty tort plaintiff cannot recover for the physical damage a defective product causes to the "product itself," but can recover for physical damage the product causes to "other property." The parties here agree that the "product itself" consists at least of a ship as built and outfitted by its original manufacturer and sold to an initial user. Respondent J. M. Martinac & Co. built the fishing vessel M/V Saratoga, installing a hydraulic system designed by respondent Marco Seattle Inc. Joseph Madruga, the Initial User, bought the ship new, added extra equipment, used the ship, and resold it to petitioner Saratoga Fishing Co., the Subsequent User, who used it until it caught fire and sank. In this admiralty tort suit against respondents, the District Court found that the hydraulic system had been defectively designed and awarded Saratoga Fishing damages, including damages for the loss of the equipment added by Madruga. The Ninth Circuit reversed, holding that the added equipment was part of the ship when it was resold to Saratoga Fishing, and, for that reason, the equipment was part of the defective product that itself caused the harm.

Held: Equipment added by the Initial User before he sold the ship to the Subsequent User is "other property," not part of the product that itself caused physical harm. This Court held in *East River* that an injury to the defective product itself, even though physical, was a kind of "economic loss," for which tort law did not provide compensation. 476 U. S., at 871. Reasoning that "[c]ontract law, and the law of warranty in particular, is well suited" to setting the responsibilities of a seller of a product that fails to perform its intended function, *id.*, at 872–873, the Court found that, given the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better, *ibid.* The Ninth Circuit's holding that recovery should be denied for added equipment because the Subsequent User could have asked the Initial User for a warranty creates a tort damage immunity beyond that set by any relevant tort precedent. Had the ship remained in the Initial User's hands, the added equipment's loss could have been recovered in tort, and there is no suggestion in state or federal law that these

results would change with a subsequent sale. Indeed, other things being equal, a rule that diminishes liability because of resale would diminish a basic incentive of defective-product tort law: to encourage the manufacture of safer products. *East River* provides an unsatisfactory answer to the question why a series of resales should progressively immunize a manufacturer from liability for foreseeable physical damage that would otherwise fall upon it, since the Subsequent User does not contract directly with the manufacturer, and it is likely more difficult for a consumer to offer the appropriate warranty on used products. While nothing prevents a user/reseller from offering a warranty, respondents have not explained why the ordinary rules of a manufacturer's tort liability should be supplanted merely because the user/reseller may in theory incur an overlapping contract liability. The holding here does not affect *East River*'s rule that it is not a component part, but the vessel—as placed in the stream of commerce by the manufacturer and its distributors—that is the "product" that itself causes the harm. Nor does the holding impose too great a potential tort liability upon a manufacturer or a distributor. It merely maintains liability, for *equipment added* after the initial sale, despite the presence of a resale by the Initial User. Pp. 878–885.

69 F. 3d 1432, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed a dissenting opinion, *post,* p. 885. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post,* p. 885.

Keith Zakarin argued the cause for petitioner. With him on the briefs was *Forrest Booth.*

Daniel B. MacLeod argued the cause for respondents. With him on the brief was *Duncan Koler.**

JUSTICE BREYER delivered the opinion of the Court.

The issue before us concerns limits upon the damages that a tort plaintiff in admiralty can recover for physical damage to property caused by a defective product. In *East River*

**Steven B. Fisher* and *Michael H. Williamson* filed a brief for All Alaskan Seafoods, Inc., as *amicus curiae* urging reversal.

Jan S. Amundson, Quentin Riegel, and *Gregory S. Gilchrist* filed a brief for the National Association of Manufacturers et al. as *amici curiae* urging affirmance.

S. S. Corp. v. *Transamerica Delaval Inc.*, 476 U. S. 858 (1986), the Court held that an admiralty tort plaintiff cannot recover for the physical damage the defective product causes to the "product itself"; but the plaintiff can recover for physical damage the product causes to "other property." In this case all agree that the "product itself" consists *at least* of a ship as built and outfitted by its original manufacturer and sold to an initial user. This case asks how this corner of tort law treats the physical destruction of *extra equipment* (a skiff, a fishing net, spare parts) *added* by the initial user after the first sale and then resold as part of the ship when the ship itself is later resold to a subsequent user. Is that added equipment part of the "product itself," in which case the plaintiff cannot recover in tort for its physical loss? Or is it "other property," in which case the plaintiff can recover? We conclude that it is "other property." Hence (assuming other tort law requirements are satisfied) admiralty's tort rules permit recovery.

I

This case arises out of an engine room fire and flood that led to the sinking of the fishing vessel M/V Saratoga in January 1986. We must assume that a hydraulic system defectively designed by respondent Marco Seattle Inc. was one significant cause of the accident. About 15 years before the accident, respondent J. M. Martinac & Co. had built the ship, installed the hydraulic system, and sold the ship new to Joseph Madruga. Madruga then added extra equipment—a skiff, a seine net, and various spare parts—and used the ship for tuna fishing. In 1974, Madruga resold the ship to petitioner, Saratoga Fishing Co., which continued to use the ship for fishing. In 1987, after the ship caught fire and sank, Saratoga Fishing brought this tort suit in admiralty against Marco Seattle and J. M. Martinac.

The District Court found that the hydraulic system had been defectively designed, and it awarded Saratoga Fishing damages (adjusted to reflect Saratoga Fishing's own partial

fault). Those damages included damages for the loss of the equipment that Madruga had added after the initial purchase of the ship.

The Ninth Circuit held that the District Court should not have awarded damages for the added equipment. *Saratoga Fishing Co.* v. *Marco Seattle Inc.*, 69 F. 3d 1432, 1445 (1995). A majority noted that the equipment, though added by Madruga, was part of the ship when Madruga resold the ship to Saratoga Fishing, and, for that reason, the majority held, the added equipment was part of the defective product that itself caused the harm. Applying *East River*'s distinction between the product that itself caused the harm and "other property," the majority concluded that Saratoga Fishing could not recover in tort for the loss. A dissenting judge believed that the "product itself" was the ship when launched into the stream of commerce by Martinac, its original builder. Consequently, the added equipment was "other property." We granted certiorari to resolve this uncertainty about the proper application of *East River*. We now agree with the dissenting judge.

II

The facts before us show: (1) a Component Supplier who (2) provided a defective component (the hydraulic system) to a Manufacturer, who incorporated it into a manufactured product (the ship), which (3) the Manufacturer sold to an Initial User, who (4) after adding equipment and using the ship, resold it to a Subsequent User (Saratoga Fishing). The applicable law is general maritime law, "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules," drawn from both state and federal sources. *East River*, *supra*, at 865; see also *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 20 (1963); *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 630 (1959). The context is purely commercial. The particular question before us requires us to interpret the Court's deci-

sion in *East River:* Does the term "other property," as used in that case, include the equipment added by the Initial User before he sold the ship to the Subsequent User? We conclude that it does: When a manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the "product itself" under *East River.* Items added to the product by the Initial User are therefore "other property," and the Initial User's sale of the product to a Subsequent User does not change these characterizations.

East River arose at the intersection of two principles that govern recovery in many commercial cases involving defective products. The first principle is that tort law in this area ordinarily (but with exceptions) permits recovery from a manufacturer and others in the initial chain of distribution for foreseeable *physical* harm to property caused by product defects. See Restatement (Second) of Torts § 402A (1965); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 101 (5th ed. 1984); *East River*, 476 U. S., at 867. The second principle is that tort law in this area ordinarily (but with exceptions) does *not* permit recovery for purely economic losses, say, lost profits. See Restatement (Third) of Torts: Products Liability § 6, Comment *d* (Proposed Final Draft, Preliminary Version, Oct. 18, 1996); *e. g.*, *Rardin* v. *T & D Machine Handling, Inc.*, 890 F. 2d 24, 27–30 (CA7 1989). The Court in *East River* favored the second principle, for it held that an injury to the defective product itself, even though physical, was a kind of "economic loss," for which tort law did not provide compensation. 476 U. S., at 871.

The Court reasoned that the loss of the value of a product that suffers physical harm—say, a product that destroys itself by exploding—is very much like the loss of the value of a product that does not work properly or does not work at all. See *id.*, at 870. In all such cases, the Court held, "[c]ontract law, and the law of warranty in particular, is well suited" to setting the responsibilities of a seller of a product

that fails to perform the function for which it was intended. *Id.*, at 872–873. The commercial buyer and commercial seller can negotiate a contract—a warranty—that will set the terms of compensation for product failure. If the buyer obtains a warranty, he will receive compensation for the product's loss, whether the product explodes or just refuses to start. If the buyer does not obtain a warranty, he will likely receive a lower price in return. Given the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better. *Ibid.; Seely* v. *White Motor Co.*, 63 Cal. 2d 9, 18–19, 403 P. 2d 145, 151 (1965) (en banc).

The Ninth Circuit reasoned that *East River* required it to define the defective "product itself" by looking to that which the plaintiff had purchased, for that is the product that, in principle, the plaintiff could have asked the seller to warrant. Since Saratoga Fishing, the Subsequent User, might have asked Madruga, the Initial User, to warrant the M/V Saratoga, skiff, nets, and all, that product, skiff, nets, and all, is the "product itself" that stands outside the reach of tort recovery. In our view, however, this holding pushes *East River*'s principle beyond the boundary set by the principle's rationale.

For one thing, the Ninth Circuit's holding creates a tort damage immunity beyond that set by any relevant tort precedent that we have found. State law often distinguishes between items added to or used in conjunction with a defective item purchased from a Manufacturer (or its distributors) and (following *East River*) permits recovery for the former when physically harmed by a dangerously defective product. Thus the owner of a chicken farm, for example, recovered for chickens killed when the chicken house ventilation system failed, suffocating the 140,000 chickens inside. *A. J. Decoster Co.* v. *Westinghouse Electric Corp.*, 333 Md. 245, 634 A. 2d 1330 (1994). A warehouse owner recovered for damage to a building caused by a defective roof. *United Air Lines*,

Inc. v. *CEI Industries of Ill., Inc.*, 148 Ill. App. 3d 332, 499 N. E. 2d 558 (1986). And a prior case in admiralty (not unlike the one before us) held that a ship charterer, who adds expensive seismic equipment to the ship, may recover for its loss in a fire caused by a defective engine. *Nicor Supply Ships Assocs.* v. *General Motors Corp.*, 876 F. 2d 501 (CA5 1989). Indeed, respondents here conceded that, had the ship remained in the hands of the Initial User, the loss of the added equipment could have been recovered in tort. See Tr. of Oral Arg. 29–30. We have found no suggestion in state (or in federal) law that these results would change with a subsequent sale—that is, we have found no case, other than the Ninth Circuit case before us, that suggests that the courts would deny recovery to a subsequent chicken farmer, who had later purchased the farm, chickens, coop, ventilation system, and all.

Indeed, the denial of recovery for added equipment simply because of a subsequent sale makes the scope of a manufacturer's liability turn on what seems, in one important respect, a fortuity, namely, whether a defective product causes foreseeable physical harm to the added equipment before or after an Initial User (who added the equipment) resells the product to a Subsequent User. One important purpose of defective-product tort law is to encourage the manufacture of safer products. The various tort rules that determine which foreseeable losses are recoverable aim, in part, to provide appropriate safe-product incentives. And a liability rule that diminishes liability simply because of some such resale is a rule that, other things being equal, diminishes that basic incentive. That circumstance requires a justification. That is to say, why should a series of resales, after replacement and additions of ever more physical items, progressively immunize a manufacturer to an ever greater extent from the liability for foreseeable physical damage that would otherwise fall upon it?

The *East River* answer to this question—because the parties can contract for appropriate sharing of the risks of harm—is not as satisfactory in the context of resale after an initial use. That is because, as other courts have suggested, the Subsequent User does not contract directly with the manufacturer (or distributor). Cf. *Peterson* v. *Idaho First Nat. Bank*, 117 Idaho 724, 727, 791 P. 2d 1303, 1306 (1990); *Tillman* v. *Vance Equipment Co.*, 286 Ore. 747, 755–756, 596 P. 2d 1299, 1304 (1979). Moreover, it is likely more difficult for a consumer—a commercial user and reseller—to offer an appropriate warranty on the used product he sells akin to a manufacturer's (or distributor's) warranty of the initial product. The user/reseller did not make (or initially distribute) the product and, to that extent, he normally would know less about the risks that such a warranty would involve. Cf. *Tillman*, *supra*, at 755, 596 P. 2d, at 1303–1304; *Peterson*, *supra*, at 726–727, 791 P. 2d, at 1305–1306. That is to say, it would seem more difficult for a reseller to warrant, say, a ship's engine; as time passes, the ship ages, the ship undergoes modification, and it passes through the hands of users and resellers.

Of course, nothing prevents a user/reseller from offering a warranty. But neither does anything prevent a Manufacturer and an Initial User from apportioning through their contract potential loss of any other items—say, added equipment or totally separate physical property—that a defective manufactured product, say, an exploding engine, might cause. No court has thought that the mere possibility of such a contract term precluded tort recovery for damage to an Initial User's other property. Similarly, in the absence of a showing that it is ordinary business practice for user/resellers to offer a warranty comparable to those typically provided by sellers of new products, the argument for extending *East River*, replacing tort law with contract law, is correspondingly weak. That is to say, respondents have not explained why the ordinary rules governing the manufacturer's tort

liability should be supplanted merely because the user/reseller may in theory incur an overlapping liability in contract.

Respondents make two other important arguments. First, they say that our reasoning proves too much. They argue that, if a Subsequent User can recover for damage a defective manufactured product causes to property added by the Initial User, then a user might recover for damage a defective component causes the manufactured product, other than the component itself. Saratoga Fishing, for example, could recover the damage the defective hydraulic system caused to any other part of the ship. But the lower courts, following *East River*, have held that it is not a component part, but the vessel—as placed in the stream of commerce by the manufacturer and its distributors—that is the "product" that itself caused the harm. See *Shipco 2295, Inc.* v. *Avondale Shipyards, Inc.*, 825 F. 2d 925, 928 (CA5 1987); see also, *e. g.*, *National Union Fire Ins. Co. of Pittsburgh* v. *Pratt & Whitney Canada, Inc.*, 107 Nev. 535, 539–542, 815 P. 2d 601, 604–605 (1991). As the Court said in *East River:*

> "'Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of "property damage" in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict products liability.'" 476 U. S., at 867 (quoting *Northern Power & Engineering Corp.* v. *Caterpillar Tractor Co.*, 623 P. 2d 324, 330 (Alaska 1981)).

Our holding here, however, does not affect this rule, for the relevant relations among initial users, manufacturers, and component suppliers are typically different from those at issue here. Initial users, when they buy, typically depend upon, and likely seek warranties that depend upon, a manufacturer's primary business skill, namely, the assembly of workable product components into a marketable whole.

King v. *Hilton-Davis*, 855 F. 2d 1047, 1052 (CA3 1988); *Shipco 2295*, *supra*, at 929; *National Union Fire Ins.*, *supra*, at 541, 815 P. 2d, at 605. Moreover, manufacturers and component suppliers can allocate through contract potential liability for a manufactured product that does not work, thereby ensuring that component suppliers have appropriate incentives to prevent component defects that might destroy the product. *King*, *supra*, at 1054; cf. *Shipco 2295*, *supra*, at 930. There is no reason to think that initial users systematically control the manufactured product's quality or, as we have said, systematically allocate responsibility for user-added equipment, in similar ways. Regardless, the case law does suggest a distinction between the components added to a product by a manufacturer before the product's sale to a user, *e. g.*, *Airlift Int'l, Inc.* v. *McDonnell Douglas Corp.*, 685 F. 2d 267 (CA9 1982); *King*, *supra; Shipco 2295*, *supra;* and those items added by a user to the manufactured product, *e. g.*, *Nicor Supply Ships Assocs.* v. *General Motors Corp.*, 876 F. 2d 501 (CA5 1989); and we would maintain that distinction.

Second, respondents argue that our holding would impose too great a potential tort liability upon a manufacturer or a distributor. But we do not see how that is so. For one thing, a host of other tort principles, such as foreseeability, proximate cause, and the "economic loss" doctrine, already do, and would continue to, limit liability in important ways. For another thing, where such principles are satisfied, liability would exist anyway had the manufactured product simply remained in the hands of the Initial User. Our holding merely maintains liability, for *equipment added* after the initial sale, despite the presence of a resale by the Initial User.

We conclude that equipment added to a product after the Manufacturer (or distributor selling in the initial distribution chain) has sold the product to an Initial User is not part of the product that itself caused physical harm. Rather, in *East River*'s language, it is "other property." (We are

speaking, of course, of added equipment that itself played no causal role in the accident that caused the physical harm.) Thus the extra skiff, nets, spare parts, and miscellaneous equipment at issue here, added to the ship by a user after an initial sale to that Initial User, are not part of the product (the original ship with the defective hydraulic system) that itself caused the harm.

The decision of the Ninth Circuit is

Reversed.

JUSTICE O'CONNOR, dissenting.

I do not disagree with our decision to grant certiorari in this case, but I agree with JUSTICE SCALIA—and for the reasons he states—that we should affirm the judgment of the Court of Appeals.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In *East River S. S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858 (1986), we adopted as part of admiralty law the so-called "economic loss" rule, which denies the purchaser of a defective product a tort action against the seller or manufacturer for purely economic losses sustained as a result of the product's failure. Applying this rule, we held that a plaintiff may not recover in tort when a defective product damages only itself, but may recover for personal injuries and for damage to other property. See *id.*, at 871–875. The present case involves a relative detail of application of the *East River* holding: whether, and under what circumstances, "other property" can include property added to the defective product, not by the plaintiff-purchaser himself, but by some earlier purchaser in the chain of ownership leading back to the manufacturer. In the context of the present case, the question is whether a skiff, a net, and communications and navigational electronics added by Joseph Madruga to the M/V Saratoga before she was sold to petitioner constitute

part of the product itself (for which recovery is not available) or "other property" (for which recovery is available).

It would have been better, in my view, not to grant certiorari in this case. By the time *East River* was decided, we had a wealth of lower court development to draw upon, including well-reasoned opinions taking no less than three distinct positions on the economic-loss rule. See *id.*, at 868–871. We could be confident in our decision, knowing that it broke little new ground; the rule we adopted had been endorsed by a majority of state courts and had been tested for two decades since its enunciation by Chief Justice Traynor in *Seely* v. *White Motor Co.*, 63 Cal. 2d 9, 403 P. 2d 145 (1965). In the present case, by contrast, the Court sets sail into uncharted seas. Not a single lower court decision (other than the one under review) has addressed the precise question presented: the status as "other property" of additions made by a prior purchaser who was a user. I would feel less uncomfortable about our plying these unknown waters if we were skilled navigators. But unlike state courts, we have little first-hand experience in the development of new common-law rules of tort and contract governing commercial transactions. Better to have followed some state-court pilots than to proceed on our own—and even, perhaps, to lead state courts aground. With this disclaimer, and with the admission that I am only modestly more confident of my resolution of this case than I am of the Court's, I proceed (reluctantly) to discussion of the merits.

The Court's opinion suggests that this is a rather straightforward case. The relevant facts—according to the Court—are quite simple, showing: "(1) a Component Supplier who (2) provided a defective component . . . to a Manufacturer, who incorporated it into a manufactured product (the ship), which (3) the Manufacturer sold to an Initial User, who (4) after adding equipment and using the ship, resold it to a Subsequent User." *Ante,* at 878. What the Court's opinion does not disclose is that Madruga—the Court's "Initial

User"—was perhaps not only a user of the boat but also an entrepreneur in the business of designing, assembling, and distributing what might be described as "fully equipped tuna-fishing machines." The M/V Saratoga was not an isolated purchase by tuna-fisherman Madruga from Martinac, but was the third of seven steel-hull tuna seiners Madruga commissioned. She was designed, in part by Madruga, specifically for use as a tuna seiner, and her construction at Martinac's shipyard was supervised personally by Madruga and by an engineer in Madruga's employ. Madruga negotiated over the specifications and equipment for the vessel and ordered numerous changes to it during the course of construction. When delivered by Martinac, the M/V Saratoga was certainly functional as a boat, but it was not yet capable of performing the task for which it was specially designed. It was arguably still just a component of a larger tuna-fishing machine that would not be complete until Madruga installed the seine, skiff, and electronic equipment; and arguably a component of a tuna-fishing machine that Madruga was in the business of marketing.

As respondents point out, there is no finding in the record as to whether Madruga was engaged in the business of selling such products and the issue was never raised or considered. Brief for Respondents 33, n. 28. I assume that the Court disregards this issue (neither resolving it nor remanding for its consideration) because the Court deems the question irrelevant. Under the Court's test, as I understand it, the "product" is fixed when it is sold to an "Initial User," even if that user is also in the business of modifying and reselling the product. In my view, there is little to recommend such a rule.

The Court is driven to take the position it does by the concern that liability would otherwise turn on "a fortuity, namely, whether a defective product causes . . . harm to the added equipment before or after an Initial User (who added the equipment) resells the product to a Subsequent User."

Ante, at 881. But the initial-user rule the Court embraces simply makes liability turn on a different fortuity, namely, whether the person who adds additional equipment to the product uses that product before selling it. If Madruga was engaged in the business of assembling and distributing tuna seiners, why should the fact that he briefly used the vessel before selling it enable petitioner to obtain tort damages that would plainly not be recoverable if Madruga had simply installed the components and sold the vessel? Or put in more commonplace terms: Why should the buyer of a car whose engine catches fire and destroys the entire vehicle be able to recover in a tort action against the manufacturer for the value of the dealer-added hi-fi stereo system if the car was a "demo," but not if the car was brand new?

One rule that generally avoids making liability turn on either of the above described "fortuities" is what might be called the "last-402A-seller rule." Under this rule, the "product" would be fixed when it is sold by the last person in the chain of distribution who is, in the words of § 402A of the Restatement (Second) of Torts (1964), "engaged in the business of selling such a product." This would offer at least as much predictability as can be expected from the Court's approach, would ensure that the availability of tort remedies will be uniform with regard to all end-users, and would avoid making liability turn on the seemingly irrelevant question whether the distributor of the product used it before sale. The last-402A-seller rule is also more consistent with one of the principal considerations underlying our decision in *East River:* the desirability of invoking tort protection only where contract-warranty protection is infeasible. Defining the product as what was sold by the last person engaged in the business of selling such products denies tort recovery for those additions to the originally manufactured product which the purchaser could have covered by warranty protection (persons in the business will generally offer

warranties covering the entire product; user-sellers will generally not).

The last-402A-seller rule appears to me superior to the initial-user rule adopted by the Court today, but the two are in reality quite similar and will in most cases produce the same result. Each essentially attempts to differentiate between additions made before and after the product has left the market chain of distribution. I doubt, however, whether leaving the market chain of distribution ought to be so momentous an event for the purpose at hand. So long as the plaintiff is a commercial entity (and I understand the rule under consideration to be one applicable only to commercial, as opposed to consumer, transactions, see *ante*, at 878–879) it seems to me to make no difference whether the purchase was made from a "402A seller" or not. Commercial entities do not typically suffer, at the time they make their purchase, a disparity in bargaining power that makes it impossible for them to obtain warranty protection on the entire product; nor are they unable to insure the product they have purchased, including those portions of it added by upstream owners. Our decision in *East River* suggests that in such circumstances there is inadequate reason to interfere with private ordering by importing tort liability—that is, inadequate reason to permit the purchaser to recover *any* tort damages for loss of the product *he* purchased. See *East River*, 476 U. S., at 872–873.

In recognition of that reality, an impressive line of lower court decisions, applying both federal and state law, has held that the purchaser of a product damaged by a defective component cannot recover in tort against the manufacturer of the component on the theory that the remainder of the product is "other property." See, *e. g.*, *Pulte Home Corp.* v. *Osmose Wood Preserving, Inc.*, 60 F. 3d 734, 741–742 (CA11 1995) (Florida law); *American Eagle Ins. Co.* v. *United Technologies Corp.*, 48 F. 3d 142, 144–145 (CA5 1995) (Texas law);

Transport Corp. of America, Inc. v. *International Business Machines Corp.*, 30 F. 3d 953, 957 (CA8 1994) (Minnesota law); *King* v. *Hilton-Davis*, 855 F. 2d 1047, 1051–1053 (CA3 1988) (Pennsylvania law), cert. denied, 488 U. S. 1030 (1989); *Shipco 2295, Inc.* v. *Avondale Shipyards, Inc.*, 825 F. 2d 925, 928–929 (CA5 1987) (federal maritime law), cert. denied, 485 U. S. 1007 (1988). Although the holdings of these cases are not precisely on point (since the plaintiff was the initial purchaser-user of the defective product), the rationale of those decisions is in tension with the Court's holding today, and supports what might be called an "object-of-the-bargain" rule. They rest on the premise that one must look to the product purchased or bargained for by the plaintiff in determining whether additions constitute "other property." See, *e. g.*, *King*, *supra*, at 1051 ("In determining whether a product 'injures only itself' for purposes of applying the *East River* rule . . . [one must] look to the product purchased by the plaintiff"); *Shipco 2295*, *supra*, at 928; *American Eagle*, *supra*, at 145; *Casa Clara Condominium Assn.* v. *Charley Toppino and Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993) ("The character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant"); see also Fox & Loftus, Riding the Choppy Waters of East River: Economic Loss Doctrine Ten Years Later, 64 Def. Couns. J. 260, 264, n. 29 (1997) (citing numerous other cases and observing that "[t]he trend in defining 'economic loss' is to focus on what the plaintiff purchased rather than what the defendant agreed to provide"). These courts have adopted this purchaser-oriented approach on the belief, which I think correct, that it is in accord with the policy judgments underlying our decision in *East River*. As the Third Circuit in *King* explained:

> "As we read *East River*, it is the character of the plaintiff's loss that determines the nature of the available remedies. When loss of the benefit of a bargain is

> the plaintiff's sole loss, the judgment of the Supreme Court was that the undesirable consequences of affording a tort remedy in addition to a contract-based recovery were sufficient to outweigh the limited interest of the plaintiff in having relief beyond that provided by warranty claims. The relevant bargain in this context is that struck by the plaintiff. It is that bargain that determines his or her economic loss and whether he or she has been injured beyond that loss." 855 F. 2d, at 1051.

There are undoubtedly other rules that can be—and have been—conceived of. One recent article describes the current state of the law regarding damage to "other property" on construction projects as follows:

> "There has been a growing trend in many jurisdictions to interpret 'economic loss' broadly to include damage that formerly was considered 'other property.' Courts that follow this trend have utilized the following rationales:
>
> "• There is no damage to 'other property' where the damage extends only to property within the confines of the bargain. . . . 'Other property' does not include damage to property if those losses are direct and consequential losses that were within the contemplation of the parties and could have been the subject of negotiations between the parties.
>
> "• The phrase 'other property' does not include the type of property that one would reasonably expect, on a foreseeability test, to be damaged as a direct consequence of the failure of the product at issue.
>
> "• No 'other property' has been damaged, because the allegedly defective product has been incorporated into the structure that has been damaged.
>
> "• Losses caused by the inferior quality of the product must be considered 'economic' and therefore cannot be

> considered 'property.'" Fox & Loftus, *supra*, at 265–266 (footnotes omitted).

And there can of course be combinations of the various rules. For example, one might adopt an "integrated unit" exception to the initial-user rule that the Court announces today.

As I have confessed above, I have little confidence in my ability to make the correct policy choice in an area where courts more experienced than we have not yet come to rest. I would have been inclined to let the lower federal courts struggle with this issue somewhat longer, in the hope that there would develop a common-law consensus to which we could refer for our admiralty rule, as we did in *East River*. Put to a choice, however, I would not select the rule adopted by the Court today. I would adopt the rule proposed by respondents and define the "product" for purposes of *East River*'s economic-loss rule as the object of the purchaser's bargain. That was essentially the approach followed by the Court of Appeals below, and I would accordingly affirm its judgment.

I respectfully, and indeed diffidently, dissent.

Syllabus

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS *v.* CONTINENTAL INSURANCE CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96–1033. Decided June 2, 1997

Petitioner, a condominium owners' association, filed suit in Maryland state court to compel respondent insurer to pay a $1.1 million judgment it had obtained against respondent's insured, the condominium developer, for numerous defects in the complex. Under the insurance policy, only property damage caused by an "accident" was covered. Respondent removed the action to the Federal District Court based on diversity of citizenship. That court granted respondent summary judgment, and the Fourth Circuit affirmed, holding that, as a matter of Maryland law, a negligent act does not constitute an "accident." When petitioner subsequently learned that Maryland's highest court had recently decided, in *Sheets* v. *Brethren Mutual Ins. Co.*, 342 Md. 634, 679 A. 2d 540, that a negligent act constitutes an "accident" under a liability insurance policy when the resulting damage took place without the insured's foresight or expectations, it asked the Fourth Circuit to recall or stay its mandate. The court denied the request, finding it "without merit."

Held: In these circumstances, it is proper for this Court to grant the certiorari petition, vacate the lower court's judgment, and remand the case (GVR) for further consideration. This order is in keeping with the Court's longstanding practice of vacating a court of appeals' decision based on a state-law construction that appears to contradict a recent decision of the highest state court. *Sheets*' explicit disapproval of the cases on which the Court of Appeals relied calls into question the correctness of that court's decision, and the ambiguous statement that petitioner's request to recall the mandate was "without merit" does not establish that the court actually considered and rejected the *Sheets* argument. The most likely ground on which the Fourth Circuit rested its denial of petitioner's motion is, as respondent contended, that it lacked authority to recall its mandate. Moreover, this Court has previously issued a GVR order where petitioners notified the Federal Court of Appeals of an intervening State Supreme Court's opinion in a second rehearing petition, which the Court of Appeals denied. See *Huddleston* v. *Dwyer*, 322 U. S. 232, 235 *(per curiam)*.

Certiorari granted; vacated and remanded.

PER CURIAM.

In this diversity case, the holding of the federal appellate court below has been called into question by a recent decision of the highest state court in Maryland. We must decide whether it is appropriate, in these circumstances, for this Court to grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration.

Petitioner, an association of condominium owners, sued respondent in Maryland state court, seeking to compel respondent to pay a $1.1 million judgment it had obtained against respondent's insured, the developer of its condominium complex. In a previous action, a jury had held the developer liable for numerous defects in the complex, finding that the developer had made misrepresentations and breached various warranty obligations. Respondent had issued a general liability insurance policy covering the developer. The policy provided that respondent would pay "'those sums that [the developer] becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies.'" App. to Pet. for Cert. 2a. Under the policy, "property damage" was covered only if it was caused by an "accident."

Respondent removed the action to the United States District Court for the District of Maryland, based on the parties' diversity of citizenship. The District Court granted summary judgment in favor of respondent. On August 6, 1996, the Court of Appeals for the Fourth Circuit affirmed. The Court of Appeals held that, as a matter of Maryland law, an "accident" does not include the "natural and ordinary consequences of a negligent act." *Id.*, at 4a (internal quotation marks omitted) (citing *IA Construction Corp.* v. *T&T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (Md. 1993) (quoting *Ed. Winkler & Son, Inc.* v. *Ohio Casualty Ins. Co.*, 51 Md. App. 190, 194–195, 441 A. 2d 1129, 1132 (1982))). Because the damages awarded in the underlying action were for breach

of warranties and misrepresentations relating to poor workmanship, the Court of Appeals concluded that the damages were not caused by an "accident" within the meaning of respondent's insurance policy. The Court of Appeals denied a petition for rehearing on September 3, 1996, and issued the mandate on September 11, 1996.

On September 17, 1996, petitioner's counsel learned of *Sheets* v. *Brethren Mutual Ins. Co.*, 342 Md. 634, 679 A. 2d 540, a recent decision of the Maryland Court of Appeals—the highest court in Maryland. (Although *Sheets* was handed down on July 26, 1996, 11 days before the Court of Appeals' decision, the parties were not aware of the decision until after the mandate was issued, and therefore had not brought the case to the attention of the Court of Appeals. Pet. for Cert. 11.) *Sheets* cast doubt on the soundness of the Court of Appeals' decision because it held that "an act of negligence constitutes an 'accident' under a liability insurance policy when the resulting damage was 'an event that takes place without [the insured's] foresight or expectation.'" 342 Md., at 652, 679 A. 2d, at 548 (citation and internal quotation marks omitted). The Maryland Court of Appeals also expressly disapproved *Ed. Winkler & Son*, *supra*, at 1132, and *IA Construction Corp.*, *supra*, at 1215, two decisions on which the Court of Appeals had primarily relied. 342 Md., at 654–655, and n. 4, 679 A. 2d, at 549–550, and 550, n. 4.

On September 20, 1996, petitioner filed a motion asking the Court of Appeals to recall or stay its mandate based on this development in Maryland law. In its response, respondent argued in part that the Court of Appeals lacked authority to recall an already issued mandate. In a brief order, the Court of Appeals denied petitioner's request, ruling only that "the said petition and motions are without merit." App. to Pet. for Cert. 11a. Petitioner now asks us to grant certiorari, vacate the judgment below, and remand the case to the Court of Appeals for further consideration in light of *Sheets*. Pet. for Cert. 13–14.

This case fits within the category of cases in which we have held it is proper to issue a GVR order. "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate." *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) *(per curiam)*. The situation here is virtually identical to that in *Thomas* v. *American Home Products, Inc.*, 519 U. S. 913 (1996), a state-law case from earlier in this Term. There, after the Court of Appeals for the Eleventh Circuit ruled against petitioners, the Georgia Supreme Court overruled the holding that was the basis for the federal appeals court's holding. *Id.*, at 914 (SCALIA, J., concurring). The appellate court nevertheless denied a petition for rehearing, and we GVR'd. As JUSTICE SCALIA wrote in concurrence, our order was in keeping with our "longstanding practice" of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest state court. *Id.*, at 915. "[A] judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." *Huddleston* v. *Dwyer*, 322 U. S. 232, 236 (1944) *(per curiam)*.

Given *Sheets*' explicit disapproval of the cases on which the Court of Appeals based its decision, there is reason to question the correctness of the Court of Appeals' decision. It is true that petitioner brought *Sheets* to the attention of the Court of Appeals in a motion to stay or recall its mandate and that the Court of Appeals denied this motion. But the Court of Appeals' ambiguous statement that petitioner's re-

quest was "without merit" does not establish that it actually considered and rejected petitioner's *Sheets* argument. In opposing petitioner's motion, respondent argued that a court of appeals lacks authority to recall its mandate, and the Court of Appeals may have rested its denial of petitioner's motion on this procedural ground. Respondent does not argue otherwise. Indeed, the procedural ground is by far the most likely, given *Sheets'* explicit repudiation of the precedent on which the Court of Appeals' original judgment hinged. Moreover, we have at least once before issued a GVR order where petitioners notified the Federal Court of Appeals of an intervening State Supreme Court's opinion in a second petition for rehearing, which the Court of Appeals denied. See *Huddleston*, *supra*, at 235.

In these circumstances, we now grant certiorari, vacate the judgment below, and remand the case to the Court of Appeals for further consideration.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BREYER joins, dissenting.

In *Thomas* v. *American Home Products, Inc.*, 519 U. S. 913 (1996), the Court granted, vacated, and remanded a decision of the Court of Appeals for the Eleventh Circuit for reconsideration in the light of a decision of the Georgia Supreme Court that was handed down after the Court of Appeals had denied a petition for rehearing. The lower court there had had no opportunity to consider the impact of the new state-law decision.

Here, by contrast, *Sheets* v. *Brethren Mutual Ins. Co.*, 342 Md. 634, 679 A. 2d 540 (1996), was expressly considered by the court below. Although *Sheets* was not brought to the attention of the Fourth Circuit until after it had rendered its decision and denied rehearing, petitioner raised it nonetheless before that court in a motion to recall or stay the mandate. Petitioner's motion did not fall on deaf ears; indeed, the Fourth Circuit went to the unusual lengths of requesting

a response to the motion and then, after the response was received, issuing a written order rejecting the claim. The only question discussed in that order is whether "*Sheets* should have required a different disposition of this case than the [original] disposition." App. to Pet. for Cert. 10a. And the court resolved that question, concluding "[w]e are of [the] opinion the said petition and motions are without merit."* *Id.*, at 11a.

If this Court has, without any briefs on the merits, concluded that the Court of Appeals' refusal to alter its opinion in the light of *Sheets* was wrong, it should either set the case for argument or summarily reverse. True, this would require the investment of still more time and effort in a case that is in the federal courts only by reason of diversity of citizenship, see *Thomas*, *supra*, at 917 (REHNQUIST, C. J., dissenting), but it would have the virtue of explicitly telling the Court of Appeals how to dispose of the case. The Court's decision to grant, vacate, and remand in the light of *Sheets*, on the contrary, is muddled and cryptic. Surely the judges of the Court of Appeals are, in fairness, entitled to some clearer guidance from this Court than what they are now given.

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*Although it is possible to construe this statement as being based on the procedural impropriety of raising such an issue on a motion to recall the mandate, such a construction is nowhere suggested in the order, nor is it the natural implication of the language ("without merit") used by the court below. I see no reason for us not to take the Fourth Circuit's order at face value.

Syllabus

BRACY *v.* GRAMLEY, WARDEN

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

No. 96–6133. Argued April 14, 1997—Decided June 9, 1997

Petitioner was tried, convicted, and sentenced to death before then-Judge Thomas J. Maloney, an Illinois judge who was later convicted on federal charges of taking bribes from criminal defendants. In this federal habeas petition, petitioner claims that Maloney had an interest in his conviction to deflect suspicion that the judge was taking bribes in other murder cases during and around the time of petitioner's trial, and that this interest violated the fair-trial guarantee of the Due Process Clause. The District Court denied both the claim and a supplemental discovery motion. In affirming, the Seventh Circuit held, *inter alia*, that petitioner had not shown "good cause" for discovery to prove his claim, as required by Rule 6(a) of the Rules Governing § 2254 Cases.

Held: Petitioner has made a sufficient factual showing, under Habeas Corpus Rule 6(a), to establish "good cause" for discovery on his claim of actual judicial bias in his case. Pp. 904–910.

(a) Before addressing whether petitioner is entitled to discovery, his claim's essential elements must be identified. See *United States* v. *Armstrong*, 517 U. S. 456, 468. Due process requires a fair trial before a judge without actual bias against the defendant or an interest in the outcome of his particular case. Petitioner claims that Maloney's acceptance of bribes from criminal defendants not only rendered him biased against the State in those cases, but also induced a compensatory bias against defendants who did not bribe him, since he did not want to appear "soft" on criminal defendants. There is no question that, if proved, such compensatory, camouflaging bias in petitioner's own case would violate due process. Pp. 904–905.

(b) Petitioner has shown good cause for appropriate discovery to prove his claim. The usual presumption that public officials have properly discharged their official duties has been soundly rebutted here. Maloney's public trial and conviction show that he was thoroughly corrupt. A Government proffer in that case details his corruption as both a trial attorney and a judge. Additional evidence supports the claim that Maloney was biased in petitioner's own case. His trial attorney was a former associate of Maloney's in a law practice that was familiar and comfortable with corruption, who announced that he was ready for trial just a few weeks after his appointment and requested no additional

time before trial to prepare for the penalty phase of the case. Petitioner alleges that Maloney appointed the attorney with the understanding that he would not object to, or interfere with, a prompt trial, so that petitioner's case could camouflage bribe negotiations being conducted in another murder case. The Government's proffer confirms that petitioner's murder trial was sandwiched tightly between other murder trials that Maloney fixed. Although petitioner may be unable to obtain evidence sufficient to support a finding of actual judicial bias in his trial, he has made a sufficient showing to establish "good cause" for discovery. Although, given the facts of this particular case, it would be an abuse of discretion not to permit any discovery, Habeas Corpus Rule 6(a) provides that the scope and extent of discovery is a matter confided to the District Court's discretion. Pp. 906–909.

81 F. 3d 684, reversed and remanded.

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

Gilbert H. Levy, by appointment of the Court, 519 U. S. 1106, argued the cause for petitioner. With him on the briefs was *Martin S. Carlson.*

Barbara A. Preiner, Solicitor General of Illinois, argued the cause for respondent. With her on the brief were *James E. Ryan*, Attorney General, and *Arleen C. Anderson* and *Steven J. Zick*, Assistant Attorneys General.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William Bracy was tried, convicted, and sentenced to death before then-Judge Thomas J. Maloney for his

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**Thomas F. Geraghty* filed a brief for Concerned Illinois Lawyers and Law Professors as *amicus curiae* urging reversal.

A brief of *amicus curiae* urging affirmance was filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, *Carol Wendelin Pollack*, Senior Assistant Attorney General, *Donald E. DeNicola*, Supervising Deputy Attorney General, and *David F. Glassman*, Deputy Attorney General, joined by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *M. Jane Brady* of Delaware, *Dennis C. Vacco* of New York, *James S. Gilmore III* of Virginia, *Grant Woods* of Arizona, *Frankie Sue Del Papa* of Nevada, and *W. A. Drew Edmondson* of Oklahoma.

role in an execution-style triple murder.[1] Maloney was later convicted of taking bribes from defendants in criminal cases. Although he was not bribed in this case, he "fixed" other murder cases during and around the time of petitioner's trial. Petitioner contends that Maloney therefore had an interest in a conviction here to deflect suspicion that he was taking bribes in other cases, and that this interest violated the fair-trial guarantee of the Fourteenth Amendment's Due Process Clause. We hold that petitioner has made a sufficient factual showing to establish "good cause," as required by Habeas Corpus Rule 6(a), for discovery on his claim of actual judicial bias in his case.

Maloney was one of many dishonest judges exposed and convicted through "Operation Greylord," a labyrinthine federal investigation of judicial corruption in Chicago. See *United States* v. *Maloney*, 71 F. 3d 645 (CA7 1995), cert. denied, 519 U. S. 927 (1996); see generally J. Tuohy & R. Warden, Greylord: Justice, Chicago Style (1989). Maloney served as a judge from 1977 until he retired in 1990, and it appears he has the dubious distinction of being the only Illinois judge ever convicted of fixing a murder case.[2] Before he was appointed to the bench, Maloney was a criminal defense attorney with close ties to organized crime who often

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[1] *People* v. *Collins*, 106 Ill. 2d 237, 478 N. E. 2d 267 *(Collins I)* (affirming convictions and death sentences), cert. denied, 474 U. S. 935 (1985); *People* v. *Collins*, 153 Ill. 2d 130, 606 N. E. 2d 1137 (1992) *(Collins II)* (affirming denial of petition for postconviction relief), cert. denied, 508 U. S. 915 (1993). Bracy is also under a death sentence for two murders in Arizona. *State* v. *Bracy*, 145 Ariz. 520, 703 P. 2d 464 (1985), cert. denied, 474 U. S. 1110 (1986); *Bracy* v. *Arizona*, 497 U. S. 1031 (1990) (denying petition for writ of certiorari to Arizona Supreme Court to review denial of Bracy's petition for review of state court's denial of petition for postconviction relief); *Bracy* v. *Arizona*, 514 U. S. 1130 (1995) (same).

[2] Although apparently the first in Illinois, Maloney is not, unfortunately, the first American judge to be convicted of taking bribes in murder cases. See, *e. g.*, *Ohio* v. *McGettrick*, 40 Ohio App. 3d 25, 531 N. E. 2d 755 (1988); *In re Brennan*, 65 N. Y. 2d 564, 483 N. E. 2d 484 (1985).

paid off judges in criminal cases. App. 54–66; 81 F. 3d 684, 696 (CA7 1996) (Rovner, J., dissenting) ("[B]y the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption"). Once a judge, Maloney exploited many of the relationships and connections he had developed while bribing judges to solicit bribes for himself. For example, Lucius Robinson, a bailiff through whom Maloney had bribed judges while in practice, and Robert McGee, one of Maloney's former associates, both served as "bag men," or intermediaries, between Maloney and lawyers looking for a fix. Two such lawyers, Robert J. Cooley and William A. Swano, were key witnesses against Maloney at his trial. *Maloney*, *supra*, at 650–652.

Maloney was convicted in Federal District Court of conspiracy, racketeering, extortion, and obstructing justice in April 1993. Four months later, petitioner filed this habeas petition in the United States District Court for the Northern District of Illinois, claiming, among other things, that he was denied a fair trial because "in order to cover up the fact that [Maloney] accepted bribes from defendants in some cases, [he] was prosecution oriented in other cases." *United States ex rel. Collins* v. *Welborn*, 868 F. Supp. 950, 990 (ND Ill. 1994). Petitioner also sought discovery in support of this claim. Specifically, he requested (1) the sealed transcript of Maloney's trial; (2) reasonable access to the prosecution's materials in Maloney's case; (3) the opportunity to depose persons associated with Maloney; and (4) a chance to search Maloney's rulings for a pattern of pro-prosecution bias.[3] The District Court rejected petitioner's fair-trial claim and denied his supplemental motion for discovery, concluding that "[petitioner's] allegations contain insufficient

[3] The Government apparently conducted such research in the *Maloney* case. See Proffer of the Government's Evidence in Aggravation, App. 67 ("[A] review of computer printouts listing all of [one attorney's] felony cases before Judge Maloney reveals that [the attorney] obtained not guilty results in all six of the cases he had before Judge Maloney").

specificity or good cause to justify further discovery." *Id.*, at 991.

The Court of Appeals affirmed by a divided vote. The court conceded the "appearance of impropriety" in petitioner's case but reasoned that this appearance did not require a new trial because it "provide[d] only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it." 81 F. 3d, at 688–689. Next, the court agreed that petitioner's theory—that Maloney's corruption "permeate[d] his judicial conduct"—was "plausible," *id.*, at 689, but found it not "sufficiently compelling [an] empirical proposition" to justify presuming actual judicial bias in petitioner's case, *id.*, at 690. Finally, the court held that petitioner had not shown "good cause" for discovery to prove his claim, as required by 28 U. S. C. § 2254 Rule 6(a). 81 F. 3d, at 690. This was because, in the court's view, even if petitioner were to uncover evidence that Maloney sometimes came down hard on defendants who did not bribe him, "it would not show that he followed the practice *in this case.*" *Id.*, at 691 (emphasis added). In any event, the court added, because petitioner had failed to uncover any evidence of actual bias without discovery, "the probability is slight that a program of depositions aimed at crooks and their accomplices . . . will yield such evidence." *Ibid.*[4] We granted certiorari to address whether, on the basis of the showing made in this particular case, petitioner should have been granted discovery under Habeas Corpus Rule 6(a) to support his judicial-bias claim. 519 U. S. 1074 (1997). We now reverse.

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[4] The dissenting judge insisted that petitioner had shown "good cause" for discovery to support his judicial-bias claim, 81 F. 3d, at 696–699 (opinion of Rovner, J.), and went on to state that, in her view, petitioner was entitled to relief whether or not he could prove that Maloney's corruption had any impact on his trial, *id.*, at 699–703. The latter conclusion, of course, would render irrelevant the discovery-related question presented in this case.

A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course. Thus, in *Harris* v. *Nelson*, 394 U. S. 286, 295 (1969), we concluded that the "broad discovery provisions" of the Federal Rules of Civil Procedure did not apply in habeas proceedings. We held, however, that the All Writs Act, 28 U. S. C. § 1651, gave federal courts the power to "fashion appropriate modes of procedure," 394 U. S., at 299, including discovery, to dispose of habeas petitions "as law and justice require," *id.*, at 300. We then recommended that "the rulemaking machinery . . . be invoked to formulate rules of practice with respect to federal habeas corpus . . . proceedings." *Id.*, at 300, n. 7. Accordingly, in 1976, we promulgated and Congress adopted the Rules Governing § 2254 Cases. Of particular relevance to this case is Rule 6(a), which provides:

> "A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."

Before addressing whether petitioner is entitled to discovery under this Rule to support his judicial-bias claim, we must first identify the "essential elements" of that claim. See *United States* v. *Armstrong*, 517 U. S. 456, 468 (1996). Of course, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 828 (1986). Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. See, *e. g.*, *id.*, at 820–821; *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927); 28 U. S. C. §§ 144, 455; ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980). But the floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal,"

Withrow v. *Larkin*, 421 U. S. 35, 46 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. See, *e. g.*, *Aetna*, *supra*, at 821–822; *Tumey*, *supra*, at 523.

The facts of this case are, happily, not the stuff of typical judicial-disqualification disputes. A judge who accepts bribes from a criminal defendant to fix that defendant's case is "biased" in the most basic sense of that word, but his bias is directed against the State, not the defendant. Petitioner contends, however, that Maloney's taking of bribes from some criminal defendants not only rendered him biased against the *State* in those cases, but also induced a sort of compensatory bias against *defendants* who did *not* bribe Maloney. Maloney was biased in this latter, compensatory sense, petitioner argues, to avoid being seen as uniformly and suspiciously "soft" on criminal defendants. The Court of Appeals, in its opinion, pointed out that this theory is quite speculative; after all, it might be equally likely that a judge who was "on the take" in *some* criminal cases would be careful to at least appear to favor *all* criminal defendants, so as to avoid apparently wild and unexplainable swings in decisions and judicial philosophy. 81 F. 3d, at 689–690.[5] In any event, difficulties of proof aside, there is no question that, if it could be proved, such compensatory, camouflaging bias on Maloney's part in petitioner's own case would violate the Due Process Clause of the Fourteenth Amendment. We now turn to the question whether petitioner has shown "good

[5] At Maloney's trial, however, attorney William Swano provided testimony that lends some support to petitioner's compensatory-bias theory. See 81 F. 3d, at 697 (Rovner, J., dissenting). According to Swano, Maloney retaliated against one of Swano's clients in one of the rare cases when Swano failed to offer Maloney a bribe and, in bribe negotiations in a later case, Maloney's bag man Robert McGee admitted as much. Swano testified that he learned that in order "'to practice in front of Judge Maloney . . . we had to pay.'" *Ibid.*

cause" for appropriate discovery to prove his judicial-bias claim.

In the District Court, petitioner contended that he was "deprived of his right to a fair trial" because "[t]here is cause to believe that Judge Maloney's discretionary rulings in this case may have been influenced by a desire on his part to allay suspicion of his pattern of corruption and dishonesty." App. 5.[6] In support, he submitted a copy of Maloney's 1991 indictment, App. 16–35, and a newspaper article describing testimony from Maloney's trial, in which attorney William Swano described an additional, uncharged incident where he bribed Maloney to fix a murder case. App. 12, n. 1, 36–38. In a supplemental motion for discovery, petitioner's co-defendant Roger Collins alleged that "[a] Government witness in the Maloney case has advised . . . that co-defendant Bracy's trial attorney was a former partner of Thomas Maloney." App. 51. Collins attached to that motion a copy of the United States' proffer of evidence in aggravation in Maloney's case, which describes in considerable detail Maloney's corruption both before and after he became a judge. See App. 54 ("Although [it is] difficult to imagine, Thomas Maloney's life of corruption was considerably more expansive than proved at trial"). The United States' proffer asserts, for example, that Maloney fixed serious felony cases regularly while a practicing criminal defense attorney;[7] that, as a judge, he continued to corrupt justice through the same

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[6] We express no opinion on the correctness of the various discretionary rulings cited by petitioner as examples of Maloney's bias. See Brief for Petitioner 5–6. We note, however, that many of these rulings have been twice upheld, and that petitioner's convictions and sentence have been twice affirmed, by the Illinois Supreme Court. See n. 1, *supra.*

[7] The Government introduced evidence that Maloney regularly bribed Judge Maurice Pompey and Cook County Deputy Sheriff Lucius Robinson (who would later serve as Maloney's "bag man"); that on numerous occasions, using his organized-crime connections, Maloney fixed cases for his client Michael Bertucci; and that Maloney helped orchestrate the fix in the murder case of underworld hit man Harry Aleman. App. 54–66.

political relationships and organized-crime connections he had exploited as a lawyer;[8] and that at least one attorney from Maloney's former law firm, Robert McGee, was actively involved in assisting Maloney's corruption, both before and after he became a judge, and also bribed Maloney himself, App. 55, 68–72. In addition, the proffer confirms that petitioner's murder trial was sandwiched tightly between other murder trials that Maloney fixed.[9]

As just noted above, petitioner's attorney at trial was a former associate of Maloney's, App. 51, and Maloney appointed him to defend this case in June 1981. The lawyer announced that he was ready for trial just a few weeks later. He did not request additional time to prepare penalty-phase evidence in this death penalty case even when the State an-

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[8] For example, Lucius Robinson and Robert McGee, who were involved in Maloney's corruption as a lawyer, later facilitated his bribe taking when he became a judge. *United States* v. *Maloney*, 71 F. 3d 645, 650–652 (CA7 1995), cert. denied, 519 U. S. 927 (1996); App. 22–24; 54–55. As the Government alleged in its proffer: "Maloney was closely tied to the *[sic]* La Cosa Nostra prior to his appointment to the bench and . . . major organized crime figures looked forward to [his] appointment as an opportunity to have a 'good friend' on the bench . . . [and] after his elevation to the bench, Maloney continued his close First Ward/organized crime connections, fixing the results of several murder cases of import to organized crime." App. 54–55.

[9] Petitioner was tried in July 1981. William Swano testified at Maloney's trial that, in October 1980, he bribed Maloney in the murder case of Swano's client, Wilfredo Rosario. Maloney excluded Rosario's confession and, in May 1981, acquitted Rosario after a bench trial. *Maloney*, *supra*, at 650; App. 12, n. 1, 53, n. 1. Also in May 1981, Maloney took a bribe to throw the murder case of Lenny Chow, a hit man for a Chinatown crime organization. At a bench trial that August, Maloney admitted a dying declaration, but found it unreliable, and acquitted Chow. *Maloney*, *supra*, at 650; App. 20–22, 27. In 1982, Maloney and Swano fixed another murder case in which one Owen Jones was charged with beating a man to death with a lead pipe. Maloney took $4,000–$5,000 from Jones' mother, using his former associate Robert McGee as a "bag man," to acquit Jones on the felony-murder charge, and to convict him of voluntary manslaughter only. *Maloney*, *supra*, at 651; App. 20, 22, 28.

nounced at the outset that, if petitioner were convicted, it would introduce petitioner's then-pending Arizona murder charges as evidence in aggravation. Tr. of Oral Arg. 43.[10] At oral argument before this Court, counsel for petitioner suggested, given that at least one of Maloney's former law associates—Robert McGee—was corrupt and involved in bribery, see *supra*, at 907, that petitioner's trial lawyer might have been appointed with the understanding that he would not object to, or interfere with, a prompt trial, so that petitioner's case could be tried before, and camouflage the bribe negotiations in, the *Chow* murder case. Tr. of Oral Arg. 17–18, 43–44.[11] This is, of course, only a theory at this point; it is not supported by any solid evidence of petitioner's trial lawyer's participation in any such plan. It is true, however, that McGee was corrupt and that petitioner's trial coincided with bribe negotiations in the *Chow* case and closely followed the *Rosario* murder case, which was also fixed. See n. 9, *supra*.

We conclude that petitioner has shown "good cause" for discovery under Rule 6(a). In *Harris*, we stated that "where specific allegations before the court show reason to

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[10] Petitioner's lawyer *did* request a continuance after petitioner was convicted, on July 29, 1981, and again on July 30. Maloney denied these requests, however, and the sentencing hearing was conducted the next day. See *People* v. *Collins*, 106 Ill., at 280–281, 478 N. E. 2d, at 286; 81 F. 3d, at 694–695 ("Defense lawyers know . . . [that] if they wish to gather evidence of mitigating circumstances they must do so before the trial ends, because they will have no time to do so after the trial ends. But in this case the defendants' lawyers dropped the ball"); *United States ex rel. Collins* v. *Welborn*, 868 F. Supp. 950, 986–987 (ND Ill. 1994) (noting that "no witnesses were presented by [petitioner or his codefendant]").

[11] Petitioner's counsel admitted that he "ha[d] not made this exact same argument on a previous occasion, but it is supported by the record." Tr. of Oral Arg. 43. Cf. Reply Brief for Petitioner 6 ("[I]t is impossible to say with confidence that Judge Maloney did not deliberately select a less experienced lawyer to represent Petitioner due to a corrupt motive, such as a desire to insure a guilty verdict and a death sentence in a high profile case").

believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." 394 U. S., at 300. Habeas Corpus Rule 6 is meant to be "consistent" with *Harris.* Advisory Committee's Note on Habeas Corpus Rule 6, 28 U. S. C., p. 479. Ordinarily, we presume that public officials have "'properly discharged their official duties.'" *Armstrong,* 517 U. S., at 464 (quoting *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1, 14–15 (1926)). Were it possible to indulge this presumption here, we might well agree with the Court of Appeals that petitioner's submission and his compensatory-bias theory are too speculative to warrant discovery. But, unfortunately, the presumption has been soundly rebutted: Maloney was shown to be thoroughly steeped in corruption through his public trial and conviction. We emphasize, though, that petitioner supports his discovery request by pointing not only to Maloney's conviction for bribe taking in other cases, but also to additional evidence, discussed above, that lends support to his claim that Maloney was actually biased *in petitioner's own case.* That is, he presents "specific allegations" that his trial attorney, a former associate of Maloney's in a law practice that was familiar and comfortable with corruption, may have agreed to take this capital case to trial quickly so that petitioner's conviction would deflect any suspicion the rigged *Rosario* and *Chow* cases might attract. It may well be, as the Court of Appeals predicted, that petitioner will be unable to obtain evidence sufficient to support a finding of actual judicial bias in the trial of his case, but we hold that he has made a sufficient showing, as required by Habeas Corpus Rule 6(a), to establish "good cause" for discovery. Although, given the facts of this particular case, it would be an abuse of discretion not to permit any discovery, Rule 6(a) makes it clear that the scope and extent of such discovery is a matter confided to the discretion of the District Court.

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.

Syllabus

JOHNSON ET AL. *v.* FANKELL

CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 96–292. Argued February 26, 1997—Decided June 9, 1997

Respondent filed this 42 U. S. C. § 1983 damages action in Idaho state court, alleging that the termination of her state employment by petitioner officials deprived her of property without due process in violation of the Fourteenth Amendment. The trial court denied petitioners' motion to dismiss, which asserted that they were entitled to qualified immunity. The Idaho Supreme Court dismissed their appeal from that ruling, explaining that the denial was neither an appealable final order under Idaho Appellate Rule 11(a)(1) nor appealable as a matter of federal right under § 1983.

Held: Defendants in a state-court § 1983 action do not have a federal right to an interlocutory appeal from a denial of qualified immunity. Pp. 914–923.

(a) State officials performing discretionary functions have a "qualified immunity" defense that, in appropriate circumstances, shields them both from liability for damages under § 1983 and from the burdens of trial. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818. A federal district court order rejecting such a defense on the ground that the defendant's actions—if proved—would have violated clearly established law may be appealed immediately as a "final decision" under the general federal appellate jurisdiction statute, 28 U. S. C. § 1291. *Mitchell* v. *Forsyth*, 472 U. S. 511, 524–530. Relying on respondent's federal statutory claim and their own federal defense, petitioners submit that the Idaho courts must protect their right to avoid the burdens of trial by allowing the same interlocutory appeal that would be available in a federal court. Pp. 914–916.

(b) This Court rejects petitioners' argument that when the Idaho courts construe their own Rule 11(a)(1), they must accept the federal definition of a "final decision" in cases brought under § 1983. Even if the Idaho Rule and § 1291 contained identical language—and they do not—the Idaho Supreme Court's interpretation of the Rule would be binding on federal courts, which have no authority to place a different construction upon it. See, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747, 767. Idaho could voluntarily place the same construction on the Rule as the *Mitchell* Court placed on § 1291, but this Court cannot command that choice. Pp. 916–918.

(c) Also unpersuasive is petitioners' contention that Rule 11(a)(1) is pre-empted by § 1983 to the extent that it does not allow an interlocu-

Syllabus

tory appeal. Petitioners' arguments are not strong enough to overcome two considerable hurdles. First, the normal presumption against pre-emption is buttressed here by the fact that the Idaho Supreme Court's dismissal of the appeal rested squarely on a neutral state rule for administering state courts. *Howlett* v. *Rose*, 496 U. S. 356, 372. Second, because the qualified immunity defense's ultimate purpose is to protect the State and its officials from overenforcement of federal rights, Rule 11(a)(1)'s application in this context is less an interference with *federal* interests, as petitioners claim, than a judgment about how best to balance competing *state* interests. In arguing that pre-emption is necessary to avoid different "outcomes" in § 1983 litigation based solely on whether the claim is asserted in state or federal court, petitioners misplace their reliance on *Felder* v. *Casey*, 487 U. S. 131, 138. "[O]utcom[e]," as used there, referred to the ultimate disposition of the case, whereas the postponement of the appeal until after final judgment will not affect the ultimate outcome of this case if petitioners' qualified immunity claim is meritorious. Their argument that Rule 11(a)(1) does not adequately protect their right to prevail on the immunity question in advance of trial also fails, given the precise source and scope of the federal right at issue. In contrast to the right to have the trial court rule on the immunity defense's merits, which presumably has its source in § 1983 and is fully protected by Idaho, the right to immediate appellate review of such a ruling in a federal case has its source in § 1291, not § 1983, see *Johnson* v. *Jones*, 515 U. S. 304, 317, and is a federal procedural right that simply does not apply in a nonfederal forum. Pp. 918–923.

Affirmed.

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

Michael S. Gilmore, Deputy Attorney General of Idaho, argued the cause for petitioners. With him on the briefs were *Alan G. Lance*, Attorney General, *David G. High*, Chief Deputy Attorney General, and *Margaret R. Hughes*, Deputy Attorney General.

W. B. Latta, Jr., argued the cause for respondent. With him on the brief was *Eric Schnapper*.*

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*A brief of *amici curiae* was filed for the Commonwealth of Kentucky et al. by *A. B. Chandler III*, Attorney General of Kentucky, *Bill Pettus*, Assistant Attorney General, *Scott White*, Assistant Deputy Attorney General, and *Brent Irvin*, Assistant Attorney General, and by the Attorneys

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether defendants in an action brought under Rev. Stat. § 1979, 42 U. S. C. § 1983, in state court have a federal right to an interlocutory appeal from a denial of qualified immunity. We hold that they do not.

I

Petitioners are officials of the Idaho Liquor Dispensary. Respondent, a former liquor store clerk, brought this action for damages under § 1983 in the District Court for the County of Bonner, Idaho. She alleged that petitioners deprived her of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution when they terminated her employment. Petitioners moved to dismiss the complaint on the ground that they were entitled to qualified immunity. They contended that, at the time of respondent's dismissal, they reasonably believed that she was a probationary employee who had no property interest in her job. Accordingly, petitioners argued, her termination did not violate clearly established law. The trial court

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General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Margery S. Bronster* of Hawaii, *James E. Ryan* of Illinois, *Tom Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Mark Barnett* of South Dakota, *Dan Morales* of Texas, *Jeffrey L. Amestoy* of Vermont, *Julio A. Brady* of the Virgin Islands, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *James E. Doyle* of Wisconsin.

denied the motion,[1] and petitioners filed a timely notice of appeal to the Supreme Court of the State of Idaho.

The State Supreme Court entered an order dismissing the appeal. The court explained that an order denying a motion for summary judgment is not appealable under Idaho Appellate Rule 11(a)(1) "for the reason it is not from a final order or Judgment." App. 67. It also rejected petitioners' arguments that the order was appealable under 42 U. S. C. § 1983 and *Behrens* v. *Pelletier*, 516 U. S. 299 (1996). Petitioners sought rehearing, again arguing that the order was final within the meaning of the Idaho Appellate Rule, and, in the alternative, that they had a right to appeal as a matter of federal law. The court denied rehearing and dismissed the appeal.

Petitioners then filed a petition in this Court seeking either a writ of certiorari or a writ of mandamus. They pointed out that some state courts, unlike the Idaho Supreme Court, allow interlocutory appeals of orders denying qualified immunity on the theory that such review is necessary to protect a substantial federal right, see *McLin* v. *Trimble*, 795 P. 2d 1035, 1037–1038 (Okla. 1990); *Lakewood* v. *Brace*, 919 P. 2d 231, 238–240 (Colo. 1996). We granted certiorari to resolve the conflict, 519 U. S. 947 (1996), and now affirm.

II

We have recognized a qualified immunity defense for both federal officials sued under the implied cause of action asserted in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and state officials sued under 42 U. S. C. § 1983. In both situations, "officials performing discretionary function[s] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a rea-

[1] Because affidavits had been filed in support of the motion, the court treated it as a motion for summary judgment.

sonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982).

This "qualified immunity" defense is valuable to officials asserting it for two reasons. First, if it is found applicable at any stage of the proceedings, it determines the outcome of the litigation by shielding the official from damages liability. Second, when the complaint fails to allege a violation of clearly established law or when discovery fails to uncover evidence sufficient to create a genuine issue whether the defendant committed such a violation, it provides the defendant with an immunity from the burdens of trial as well as a defense to liability.[2] Indeed, one reason for adopting the objective test announced in *Harlow* was to "permit the resolution of many insubstantial claims on summary judgment." *Ibid.*

Consistent with that purpose, we held in *Mitchell* v. *Forsyth*, 472 U. S. 511, 524–530 (1985), that a Federal District Court order rejecting a qualified immunity defense on the ground that the defendant's actions—if proved—would have violated clearly established law may be appealed immediately as a "final decision" within the meaning of the general federal appellate jurisdiction statute, 28 U. S. C. § 1291.[3] If this action had been brought in a federal court, therefore, petitioners would have had a right to take an appeal from the trial court's order denying their motion for summary judgment.

Relying on the facts (a) that respondent has asserted a federal claim under a federal statute, and (b) that they are

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[2] Of course, when a case can be dismissed on the pleadings or in an early pretrial stage, qualified immunity also provides officials with the valuable protection from "the burdens of broad-reaching discovery," *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982).

[3] While *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985), involved a *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), action against a federal official, we have also construed § 1291 to authorize similar appeals in actions brought against state officials under § 1983. See, *e. g.*, *Johnson* v. *Jones*, 515 U. S. 304 (1995).

asserting a defense provided by federal law, petitioners submit that the Idaho courts must protect their right to avoid the burdens of trial by allowing the same interlocutory appeal that would be available in a federal court. They support this submission with two different arguments: First, that when the Idaho courts construe their own rules allowing appeals from final judgments, they must accept the federal definition of finality in cases brought under § 1983; and second, that if those rules do not authorize the appeal, they are pre-empted by federal law. We find neither argument persuasive.

III

We can easily dispense with petitioners' first contention that Idaho must follow the federal construction of a "final decision." Even if the Idaho and federal statutes contained identical language—and they do not[4]—the interpretation of the Idaho statute by the Idaho Supreme Court would be binding on federal courts. Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State. See, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747, 767 (1982); *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S. 207, 226, n. 9 (1980); *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 465 (1967). This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules. See *Wardius* v. *Oregon*, 412 U. S. 470, 477 (1973).

The definition of the term "final decision" that we adopted in *Mitchell* was an application of the "collateral order" doctrine first recognized in *Cohen* v. *Beneficial Industrial Loan*

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[4] "Final decision" is the operative term of § 1291, whereas "[j]udgments, orders and decrees which are final" is the language of Idaho Appellate Rule 11(a)(1).

Corp., 337 U. S. 541 (1949). In that case, as in all of our cases following it, we were construing the federal statutory language of 28 U. S. C. § 1291.[5] While some States have adopted a similar "collateral order" exception when construing their jurisdictional statutes,[6] we have never suggested that federal law compelled them to do so. Indeed, a number of States employ collateral order doctrines that reject the limitations this Court has placed on § 1291.[7] Idaho could, of

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[5] Thus, in *Mitchell* we explained: "In holding these and similar issues of absolute immunity to be appealable under the collateral order doctrine, see *Abney* v. *United States*, [431 U. S. 651 (1977)]; *Helstoski* v. *Meanor*, 442 U. S. 500 (1979); *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue. Accordingly, we hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U. S. C. § 1291 notwithstanding the absence of a final judgment." 472 U. S., at 528–530 (footnote omitted).

[6] See, *e. g.*, *Richardson* v. *Chevrefils*, 131 N. H. 227, 231, 552 A. 2d 89, 92 (1988) ("Although all of the court's rulings . . . would normally be treated as interlocutory, . . . [w]e have followed *Mitchell* in accepting the State defendants' appeal from the order denying their motion for summary judgment"); *Murray* v. *White*, 155 Vt. 621, 626, 587 A. 2d 975, 977–978 (1991) ("In *[Mitchell]*, the Supreme Court held that a trial court's denial of a claim of qualified immunity met these [collateral order] requirements, and we agree with this determination"); *Park County* v. *Cooney*, 845 P. 2d 346, 349 (Wyo. 1992) ("We believe the state decisions which allow appeal, for the reasons detailed in *Mitchell* . . . , are better reasoned; and we therefore hold that an order denying dismissal of a claim based on qualified immunity is an order appealable to this court").

[7] See, *e. g.*, *Goldston* v. *American Motors Corp.*, 326 N. C. 723, 727, 392 S. E. 2d 735, 737 (1990) (disqualification of counsel is appealable under state collateral order doctrine notwithstanding *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424 (1985)); *Hanson* v. *Federal Signal Corp.*, 451 Pa. Super. 260, 264–265, 679 A. 2d 785, 787–788 (1996) (same for class certification denial notwithstanding *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978)).

course, place the same construction on its Appellate Rule 11(a)(1) as we have placed on § 1291. But that is clearly a choice for that court to make, not one that we have any authority to command.

IV

Petitioners also contend that, to the extent that Idaho Appellate Rule 11(a)(1) does not allow an interlocutory appeal, it is pre-empted by § 1983. Relying heavily on *Felder* v. *Casey*, 487 U. S. 131 (1988), petitioners first assert that pre-emption is necessary to avoid "different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court," *id.*, at 138. Second, they argue that the state procedure "impermissibly burden[s]" the federal immunity from suit because it does not adequately protect their right to prevail on the immunity question in advance of trial.[8]

For two reasons, petitioners have a heavy burden of persuasion in making this argument. First, our normal presumption against pre-emption is buttressed by the fact that the Idaho Supreme Court's dismissal of the appeal rested squarely on a neutral state Rule regarding the administration of the state courts.[9] As we explained in *Howlett* v. *Rose*, 496 U. S. 356, 372 (1990):

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[8] See Brief for Petitioners 22.

[9] Unlike the notice-of-claim rule at issue in *Felder* v. *Casey*, 487 U. S., at 140–145, Idaho Appellate Rule 11(a)(1) does not target civil rights claims against the State. See also *Howlett* v. *Rose*, 496 U. S. 356, 380–381 (1990). Instead, it generally permits appeals only of "[j]udgments, orders and decrees which are final," without regard to the identity of the party seeking the appeal or the subject matter of the suit. Petitioners claim that the rule is not neutral because it permits interlocutory appeals in certain limited circumstances but denies an appeal here. But we have never held that a rule must be monolithic to be neutral. Absent evidence that Appellate Rule 11(a)(1) discriminates against interlocutory appeals of § 1983 qualified immunity determinations by defendants—as compared with other types of appeals—we must deem the state procedure neutral.

> "When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. See *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1 (1950); *Georgia Rail Road & Banking Co.* v. *Musgrove*, 335 U. S. 900 (1949) *(per curiam); Herb* v. *Pitcairn*, 324 U. S. 117 (1945); *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377 (1929). The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' Hart, [The Relations Between State and Federal Law], 54 Colum. L. Rev. [489, 508 (1954)]; see also *Southland Corp.* v. *Keating*, 465 U. S. 1, 33 (1984) (O'Connor, J., dissenting); *FERC* v. *Mississippi*, 456 U. S. [742, 774 (1982)] (opinion of Powell, J.). The States thus have great latitude to establish the structure and jurisdiction of their own courts."

A second barrier to petitioners' argument arises from the nature of the interest protected by the defense of qualified immunity. Petitioners' argument for pre-emption is bottomed on their claims that the Idaho rules are interfering with their federal rights. While it is true that the defense has its source in a federal statute (§ 1983), the ultimate purpose of qualified immunity is to protect the State and its officials from overenforcement of federal rights. The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with *federal* interests than a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and pro-

viding state officials with immediate review of the merits of their defense.[10]

Petitioners' arguments for pre-emption are not strong enough to overcome these considerable hurdles. Contrary to petitioners' assertions, Idaho's decision not to provide appellate review for the vast majority of interlocutory orders—including denials of qualified immunity in § 1983 cases—is not "outcome determinative" in the sense that we used that term when we held that Wisconsin's notice-of-claim statute could not be applied to defeat a federal civil rights action brought in state courts under § 1983. *Felder*, 487 U. S., at 153. The failure to comply with the Wisconsin statute in *Felder* resulted in a judgment dismissing a complaint that would not have been dismissed—at least not without a judicial determination of the merits of the claim—if the case had been filed in a federal court. One of the primary grounds for our decision was that, because the notice-of-claim requirement would "frequently and predictably produce different outcomes" depending on whether § 1983 claims were brought in state or federal court, it was inconsistent with the federal interest in uniformity. *Id.*, at 138.[11]

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[10] It does warrant observation that Rule 12(a) of the Idaho Appellate Rules provides that the State Supreme Court may grant permission "to appeal from an interlocutory order or decree . . . which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal . . . may materially advance the orderly resolution of the litigation." Presumably, petitioners could have sought review under this permissive provision, and the Idaho Supreme Court might have granted review if, in the view of that court, the officials' claim to immunity was so substantial that the suit should not proceed.

[11] See also *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 296–299 (1949) (Federal Employers' Liability Act (FELA) pre-empted different state pleading requirements when effect was to defeat plaintiff's cause of action); *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243–244 (1942) (federal Jones Act pre-empted different state burden of proof regarding releases when effect was to defeat plaintiff's cause of action).

Petitioners' reliance on *Felder* is misplaced because "outcome," as we used the term there, referred to the ultimate disposition of the case. If petitioners' claim to qualified immunity is meritorious, there is no suggestion that the application of the Idaho rules of procedure will produce a final result different from what a federal ruling would produce. Petitioners were able to argue their immunity from suit claim to the trial court, just as they would to a federal court. And the claim will be reviewable by the Idaho Supreme Court after the trial court enters a final judgment, thus providing petitioners with a further chance to urge their immunity. Consequently, the postponement of the appeal until after final judgment will not affect the ultimate outcome of the case.

Petitioners' second argument for pre-emption of the state procedural Rule is that the Rule does not adequately protect their right to prevail in advance of trial. In evaluating this contention, it is important to focus on the precise source and scope of the federal right at issue. The right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in § 1291. The former right is fully protected by Idaho. The latter right, however, is a federal procedural right that simply does not apply in a nonfederal forum.[12]

The locus of the right to interlocutory appeal in § 1291, rather than in § 1983 itself, is demonstrated by our holding

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[12] Petitioners' reliance on *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359 (1952), is therefore misplaced. In *Dice* we held that the FELA pre-empted a state rule denying a right to a jury trial. In that case, however, we made clear that Congress had provided *in FELA* that the jury trial procedure was to be part of claims brought under the Act. *Id.*, at 363 (citing *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 354 (1943)). In this case, by contrast, Congress has mentioned nothing about interlocutory appeals in § 1983; rather, the right to an immediate appeal in the federal court system is found in § 1291, which obviously has no application to state courts.

in *Johnson* v. *Jones*, 515 U. S. 304 (1995). In that case, government officials asserting qualified immunity claimed entitlement to an interlocutory appeal of a District Court order denying their motion for summary judgment on the ground that the record showed a genuine issue of material fact whether the officials actually engaged in the conduct that constituted a clear violation of constitutional law. *Id.*, at 307–308. We concluded that this circumstance was different from that presented in *Mitchell*, 472 U. S., at 528, in which the subject of the interlocutory appeal was whether a given set of facts showed a violation of clearly established law, and held that although § 1291 did allow an interlocutory appeal in the latter circumstance, such an appeal was not allowed in the former.

In so holding, we acknowledged that "whether a district court's denial of summary judgment amounts to (a) a determination about pre-existing 'clearly established' law, or (b) a determination about 'genuine' issues of fact for trial, it still forces public officials to trial." 515 U. S., at 317. But we concluded that the strong "countervailing considerations" surrounding appropriate interpretation of § 1291 were of sufficient importance to outweigh the officials' interest in avoiding the burdens of litigation.

The "countervailing considerations" at issue here are even stronger than those presented in *Johnson*. When preemption of state law is at issue, we must respect the "principles [that] are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." *Howlett*, 496 U. S., at 372–373. This respect is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts.[13] We therefore cannot agree with petitioners that

[13] We have made it quite clear that it is a matter for each State to decide how to structure its judicial system. See, *e. g.*, *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 111 (1996) (States under no obligation to provide appellate re-

§ 1983's recognition of the defense of qualified immunity preempts a State's consistent application of its neutral procedural rules, even when those rules deny an interlocutory appeal in this context.

The judgment of the Supreme Court of the State of Idaho dismissing petitioners' appeal is therefore affirmed.

It is so ordered.

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view) (citing cases); *Kohl* v. *Lehlback*, 160 U. S. 293, 299 (1895) ("[T]he right of review in an appellate court is purely a matter of state concern"); *McKane* v. *Durston*, 153 U. S. 684, 688 (1894) ("[W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself").

Syllabus

GILBERT, PRESIDENT, EAST STROUDSBURG UNIVERSITY, ET AL. *v.* HOMAR

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

No. 96–651. Argued March 24, 1997—Decided June 9, 1997

On August 26, 1992, while employed as a policeman at East Stroudsburg University (ESU), a Pennsylvania state institution, respondent was arrested by state police and charged with a drug felony. Petitioners, ESU officials, suspended him without pay, effective immediately, pending their own investigation. Although the criminal charges were dismissed on September 1, his suspension remained in effect. On September 18, he was provided the opportunity to tell his side of the story to ESU officials. Subsequently, he was demoted to groundskeeper. He then filed suit under 42 U. S. C. § 1983, claiming, *inter alia*, that petitioners' failure to provide him with notice and a hearing before suspending him without pay violated due process. The District Court granted petitioners summary judgment, but the Third Circuit reversed.

Held: In the circumstances here, the State did not violate due process by failing to provide notice and a hearing before suspending a tenured public employee without pay. Pp. 928–936.

(a) In *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, this Court held that before being fired a public employee dismissable only for cause was entitled to a limited pretermination hearing, to be followed by a more comprehensive posttermination hearing. The Third Circuit erred in relying on dictum in *Loudermill* to conclude that a suspension without pay must also be preceded by notice and a hearing. Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey* v. *Brewer*, 408 U. S. 471, 481; *FDIC* v. *Mallen*, 486 U. S. 230, 240. Pp. 929–931.

(b) Three factors are relevant in determining what process is constitutionally due: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. Respondent asserts an interest in an uninterrupted paycheck; but account must be taken of the length and finality of the temporary deprivation of his pay. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 434. So long as a suspended employee receives a sufficiently prompt postsuspension hearing, the lost

Syllabus

income is relatively insubstantial, and fringe benefits such as health and life insurance are often not affected at all. On the other side of the balance, the State has a significant interest in immediately suspending employees charged with felonies who occupy positions of public trust and visibility, such as police officers. While this interest could have been accommodated by suspending respondent *with* pay, the Constitution does not require the government to give an employee charged with a felony paid leave at taxpayer expense. The remaining *Mathews* factor is the most important in this case: The purpose of a pre-suspension hearing—to assure that there are reasonable grounds to support the suspension without pay, cf. *Loudermill*, *supra*, at 545–546—has already been assured by the arrest and the filing of charges. See *FDIC*, *supra*. That there may have been discretion not to suspend does not mean that respondent had to be given the opportunity to persuade officials of his innocence before the decision was made. See *id.*, at 234–235. Pp. 931–935.

(c) Whether respondent received an adequately prompt *post*-suspension hearing should be considered by the Third Circuit in the first instance. Pp. 935–936.

89 F. 3d 1009, reversed and remanded.

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

Gwendolyn T. Mosley, Senior Deputy Attorney General of Pennsylvania, argued the cause for petitioners. With her on the brief were *D. Michael Fisher*, Attorney General, *Calvin R. Koons*, Senior Deputy Attorney General, and *John G. Knoor III*, Chief Deputy Attorney General.

Ann Hubbard argued the cause for the United States as *amicus curiae* in support of petitioners. On the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Waxman*, *Deputy Assistant Attorney General Preston*, *David C. Frederick*, *William Kanter*, *Jeffrica Jenkins Lee*, *Lorraine P. Lewis*, and *Mary S. Mitchelson*.

James V. Fareri argued the cause for respondent. With him on the brief was *Jennifer Harlacher Sibum*.

Gregory O'Duden argued the cause for the National Treasury Employees Union as *amicus curiae* urging affirmance.

With him on the brief were *Elaine Kaplan* and *Barbara A. Atkin.**

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a State violates the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.

I

Respondent Richard J. Homar was employed as a police officer at East Stroudsburg University (ESU), a branch of Pennsylvania's State System of Higher Education. On August 26, 1992, when respondent was at the home of a family friend, he was arrested by the Pennsylvania State Police in a drug raid. Later that day, the state police filed a criminal complaint charging respondent with possession of marijuana,

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Julio A. Brady*, Attorney General of the Virgin Islands, *W. Bartlett Ary*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *Scott Harshbarger* of Massachusetts, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Jeffrey B. Pine* of Rhode Island, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, and *Jan Graham* of Utah; and for the International City-County Management Association et al. by *Richard Ruda* and *James I. Crowley.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Police Organizations, Inc., by *William J. Johnson;* for the National Education Association by *Robert H. Chanin* and *John M. West;* for the Pennsylvania State Lodge, Fraternal Order of Police, by *Gary M. Lightman;* and for the Southern States Police Benevolent Association by *J. Michael McGuinness.*

possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony. The state police notified respondent's supervisor, University Police Chief David Marazas, of the arrest and charges. Chief Marazas in turn informed Gerald Levanowitz, ESU's Director of Human Resources, to whom ESU President James Gilbert had delegated authority to discipline ESU employees. Levanowitz suspended respondent without pay effective immediately. Respondent failed to report to work on the day of his arrest, and learned of his suspension the next day, when he called Chief Marazas to inquire whether he had been suspended. That same day, respondent received a letter from Levanowitz confirming that he had been suspended effective August 26 pending an investigation into the criminal charges filed against him. The letter explained that any action taken by ESU would not necessarily coincide with the disposition of the criminal charges.

Although the criminal charges were dismissed on September 1, respondent's suspension remained in effect while ESU continued with its own investigation. On September 18, Levanowitz and Chief Marazas met with respondent in order to give him an opportunity to tell his side of the story. Respondent was informed at the meeting that the state police had given ESU information that was "very serious in nature," Record, Doc. No. 26, p. 48, but he was not informed that that included a report of an alleged confession he had made on the day of his arrest; he was consequently unable to respond to damaging statements attributed to him in the police report.

In a letter dated September 23, Levanowitz notified respondent that he was being demoted to the position of groundskeeper effective the next day, and that he would receive backpay from the date the suspension took effect at the rate of pay of a groundskeeper. (Respondent eventually received backpay for the period of his suspension at the rate of pay of a university police officer.) The letter maintained

that the demotion was being imposed "as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the [ESU] Police Department Manual." App. 82a. Upon receipt of this letter, the president of respondent's union requested a meeting with President Gilbert. The requested meeting took place on September 24, at which point respondent had received and read the police report containing the alleged confession. After providing respondent with an opportunity to respond to the charges, Gilbert sustained the demotion.

Respondent filed this suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, in the United States District Court for the Middle District of Pennsylvania against President Gilbert, Chief Marazas, Levanowitz, and a Vice President of ESU, Curtis English, all in both their individual and official capacities. He contended, *inter alia*, that petitioners' failure to provide him with notice and an opportunity to be heard before suspending him without pay violated due process. The District Court entered summary judgment for petitioners. A divided Court of Appeals reversed the District Court's determination that it was permissible for ESU to suspend respondent without pay without first providing a hearing. 89 F. 3d 1009 (CA3 1996). We granted certiorari. 519 U. S. 1052 (1997).

II

The protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected "property" interest. Although we have previously held that public employees who can be discharged only for cause have a constitutionally protected property interest in

their tenure and cannot be fired without due process, see *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 578 (1972); *Perry* v. *Sindermann*, 408 U. S. 593, 602–603 (1972), we have not had occasion to decide whether the protections of the Due Process Clause extend to discipline of tenured public employees short of termination. Petitioners, however, do not contest this preliminary point, and so without deciding it we will, like the District Court, "[a]ssum[e] that the suspension infringed a protected property interest," App. to Pet. for Cert. 59a, and turn at once to petitioners' contention that respondent received all the process he was due.

A

In *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532 (1985), we concluded that a public employee dismissable only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing. Stressing that the pretermination hearing "should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," *id.*, at 545–546, we held that pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story, *id.*, at 546. In the course of our assessment of the governmental interest in immediate termination of a tenured employee, we observed that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending *with pay.*" *Id.*, at 544–545 (emphasis added; footnote omitted).

Relying on this dictum, which it read as "strongly suggest-[ing] that suspension without pay must be preceded by notice and an opportunity to be heard *in all instances*," 89 F. 3d, at 1015 (emphasis added), and determining on its own that

such a rule would be "eminently sensible," *id.*, at 1016, the Court of Appeals adopted a categorical prohibition: "[A] governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of presuspension hearing, providing the employee with notice and an opportunity to be heard." *Ibid.* Respondent (as well as most of his *amici*) makes no attempt to defend this absolute rule, which spans all types of government employment and all types of unpaid suspensions. Brief for Respondent 8, 12–13. This is eminently wise, since under our precedents such an absolute rule is indefensible.

It is by now well established that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. See, *e. g.*, *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 53 (1993); *Zinermon* v. *Burch*, 494 U. S. 113, 128 (1990) (collecting cases); *Barry* v. *Barchi*, 443 U. S. 55, 64–65 (1979); *Dixon* v. *Love*, 431 U. S. 105, 115 (1977); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 314–320 (1908). Indeed, in *Parratt* v. *Taylor*, 451 U. S. 527 (1981), overruled in part on other grounds, *Daniels* v. *Williams*, 474 U. S. 327 (1986), we specifically noted that "we have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property." 451 U. S., at 540. And in *FDIC* v. *Mallen*, 486 U. S. 230 (1988), where we unanimously approved the Federal Deposit Insurance Corporation's (FDIC's) suspension, without prior hearing, of an indicted private bank employee, we said: "An important gov-

ernment interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.*, at 240.*

The dictum in *Loudermill* relied upon by the Court of Appeals is of course not inconsistent with these precedents. To say that when the government employer perceives a hazard in leaving the employee on the job it "can avoid the problem by suspending with pay" is not to say that that is the only way of avoiding the problem. Whatever implication the phrase "with pay" might have conveyed is far outweighed by the clarity of our precedents which emphasize the flexibility of due process as contrasted with the sweeping and categorical rule adopted by the Court of Appeals.

B

To determine what process is constitutionally due, we have generally balanced three distinct factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute pro-

*It is true, as respondent contends, that in *Mallen* we did not expressly state whether the bank president's suspension was with or without pay. But the opinion in *Mallen* recites no order from the FDIC, if it had authority to issue such an order, that the bank pay its president; only an order that the bank suspend its president's participation in the bank's affairs. Our opinion in *Mallen* certainly reflects the assumption that the suspension would be *without* pay. For example, in discussing the private interest at stake we considered "the severity of depriving someone of his or her livelihood." 486 U. S., at 243 (citing cases). And, Mallen argued to this Court that "denial of an income stream to underwrite these extraordinary expenses can be crucial, not only to Mallen's financial condition in general, but to his ability to pay for his criminal defense." Brief for Appellee in *FDIC* v. *Mallen,* O. T. 1987, No. 87–82, pp. 7–8.

> cedural safeguards; and finally, the Government's interest." *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

See also, *e. g., Mallen*, *supra*, at 242; *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 434 (1982).

Respondent contends that he has a significant private interest in the uninterrupted receipt of his paycheck. But while our opinions have recognized the severity of depriving someone of the means of his livelihood, see, *e. g., Mallen*, *supra*, at 243; *Loudermill*, 470 U. S., at 543, they have also emphasized that in determining what process is due, account must be taken of "the *length*" and "*finality* of the deprivation," *Logan*, *supra*, at 434 (emphasis added). Unlike the employee in *Loudermill*, who faced *termination*, respondent faced only a *temporary suspension* without pay. So long as the suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all, Brief for United States as *Amicus Curiae* 18; Record, Doc. No. 19, p. 7.

On the other side of the balance, the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers. Respondent contends that this interest in maintaining public confidence could have been accommodated by suspending him *with* pay until he had a hearing. We think, however, that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him. ESU's interest in preserving public confidence in its police force is at least as significant as the State's interest in preserving the integrity of the sport of horse racing, see *Barry* v. *Barchi*, *supra*, at 64,

an interest we "deemed sufficiently important . . . to justify a brief period of suspension prior to affording the suspended trainer a hearing," *Mallen,* 486 U. S., at 241.

The last factor in the *Mathews* balancing, and the factor most important to resolution of this case, is the risk of erroneous deprivation and the likely value of any additional procedures. Petitioners argue that any presuspension hearing would have been worthless because pursuant to an Executive Order of the Governor of Pennsylvania a state employee is automatically to be suspended without pay "[a]s soon as practicable after [being] formally charged with . . . a felony." 4 Pa. Code § 7.173 (1997). According to petitioners, supervisors have no discretion under this rule, and the mandatory suspension without pay lasts until the criminal charges are finally resolved. See Tr. of Oral Arg. 20. If petitioners' interpretation of this order is correct, there is no need for any presuspension process since there would be nothing to consider at the hearing except the independently verifiable fact of whether an employee had indeed been formally charged with a felony. See *Codd* v. *Velger,* 429 U. S. 624, 627–628 (1977) *(per curiam)*. Cf. *Loudermill*, *supra,* at 543. Respondent, however, challenges petitioners' reading of the Code, and contends that in any event an order of the Governor of Pennsylvania is a "mere directiv[e] which do[es] not confer a legally enforceable right." Brief for Respondent 20. We need not resolve this disputed issue of state law because even assuming the Code is only advisory (or has no application at all), the State had no constitutional obligation to provide respondent with a presuspension hearing. We noted in *Loudermill* that the purpose of a pre-*termination* hearing is to determine "whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." 470 U. S., at 545–546. By parity of reasoning, the purpose of any pre-*suspension* hearing would be to assure that there are reasonable grounds to support the suspension without pay.

Cf. *Mallen*, 486 U. S., at 240. But here that has already been assured by the arrest and the filing of charges.

In *Mallen*, we concluded that an "*ex parte* finding of probable cause" such as a grand jury indictment provides adequate assurance that the suspension is not unjustified. *Id.*, at 240–241. The same is true when an employee is arrested and then formally charged with a felony. First, as with an indictment, the arrest and formal charges imposed upon respondent "by an independent body demonstrat[e] that the suspension is not arbitrary." *Id.*, at 244. Second, like an indictment, the imposition of felony charges "itself is an objective fact that will in most cases raise serious public concern." *Id.*, at 244–245. It is true, as respondent argues, that there is more reason to believe an employee has committed a felony when he is indicted rather than merely arrested and formally charged; but for present purposes arrest and charge give reason enough. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted," *id.*, at 240, in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime.

Respondent further contends that since (as we have agreed to assume) Levanowitz had discretion *not* to suspend despite the arrest and filing of charges, he had to be given an opportunity to persuade Levanowitz of his innocence before the decision was made. We disagree. In *Mallen*, despite the fact that the FDIC had *discretion* whether to suspend an indicted bank employee, see 64 Stat. 879, as amended, 12 U. S. C. § 1818(g)(1); *Mallen*, *supra*, at 234–235, and n. 5, we nevertheless did not believe that a presuspension hearing was necessary to protect the private interest. Unlike in the case of a termination, where we have recognized that "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect," *Loudermill*, *supra*, at 543, in the case of a suspension there will be ample opportunity to invoke

discretion later—and a short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. Respondent "has an interest in seeing that a decision concerning his or her continued suspension is not made with excessive haste." *Mallen*, 486 U. S., at 243. If the State is forced to act too quickly, the decisionmaker "may give greater weight to the public interest and leave the suspension in place." *Ibid.*

C

Much of respondent's argument is dedicated to the proposition that he had a due process right to a presuspension hearing because the suspension was open-ended and he "theoretically may not have had the opportunity to be heard for weeks, months, or even years after his initial suspension without pay." Brief for Respondent 23. But, as respondent himself asserts in his attempt to downplay the governmental interest, "[b]ecause the employee is entitled, in any event, to a prompt post-suspension opportunity to be heard, the period of the suspension should be short and the amount of pay during the suspension minimal." *Id.*, at 24–25.

Whether respondent was provided an adequately prompt *post*-suspension hearing in the present case is a separate question. Although the charges against respondent were dropped on September 1 (petitioners apparently learned of this on September 2), he did not receive any sort of hearing until September 18. Once the charges were dropped, the risk of erroneous deprivation increased substantially, and, as petitioners conceded at oral argument, there was likely value in holding a prompt hearing, Tr. of Oral Arg. 19. Cf. *Mallen*, *supra*, at 243 (holding that 90 days before the agency hears and decides the propriety of a suspension does not exceed the permissible limits where coupled with factors that minimize the risk of an erroneous deprivation). Because neither the Court of Appeals nor the District Court addressed whether, under the particular facts of this case, peti-

tioners violated due process by failing to provide a sufficiently prompt postsuspension hearing, we will not consider this issue in the first instance, but remand for consideration by the Court of Appeals.

* * *

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.

VEY *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 96–8796. Decided June 9, 1997

Pro se petitioner seeks leave to proceed *in forma pauperis* so that she may file a petition for certiorari from a Third Circuit decision dismissing her appeal as frivolous. In the past 6½ years, she has filed 26 submissions in this Court, all of which have been denied; and eight weeks ago, the Clerk of the Court was instructed not to accept any further petitions for extraordinary writs from her absent the required fees, see *In re Vey*, *ante*, p. 303.

Held: Petitioner's motion to proceed *in forma pauperis* is denied. For the reasons stated in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 *(per curiam)*, she is barred from filing any further certiorari petitions in noncriminal matters unless she first complies with this Court's Rules.

Motion denied.

PER CURIAM.

Pro se petitioner Eileen Vey seeks leave to proceed *in forma pauperis* so that she may file a petition for certiorari from a decision of the Third Circuit dismissing her appeal as frivolous under 28 U. S. C. § 1915(e)(2)(B)(i) (1994 ed., Supp. II). Her underlying claims below, various alleged civil rights and Racketeer Influenced and Corrupt Organizations Act violations by the President of the United States, the First Lady, and numerous Senators, judges (including THE CHIEF JUSTICE), foreign officials, and private citizens, are patently frivolous. In the past 6½ years, she has filed 26 submissions in this Court, all of which have been denied. Just eight weeks ago, we went even further, instructing the Clerk of the Court not to accept any further petitions for extraordinary writs from her unless she first paid the required fees. See *In re Vey*, *ante*, p. 303 *(per curiam)*. Since that order has proved insufficient to deter petitioner's abusive conduct, we again

deny her motion to proceed *in forma pauperis* and now instruct the Clerk not to accept any further petitions for certiorari from petitioner in noncriminal matters unless she first complies with this Court's Rules. Petitioner is allowed until June 30, 1997, within which to pay the docketing fees required by Rule 38 and to submit her petition in compliance with Rule 33.1.

We enter the order barring future *in forma pauperis* filings for the reasons discussed in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

JUSTICE STEVENS, dissenting.

For reasons previously stated, see *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited, I respectfully dissent.

Syllabus

HUGHES AIRCRAFT CO. *v.* UNITED STATES ex rel. SCHUMER

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

No. 95–1340. Argued February 25, 1997—Decided June 16, 1997

In 1989, respondent Schumer filed an action against petitioner Hughes Aircraft Company under the *qui tam* provision of the False Claims Act (FCA), which permits, in certain circumstances, suits by private parties on behalf of the United States against anyone submitting a false claim to the Government. Hughes' allegedly false claims were submitted between 1982 and 1984. Prior to 1986, *qui tam* suits were barred if the information on which they were based was already in the Government's possession. A 1986 amendment, however, permits *qui tam* suits based on information in the Government's possession, except where the suit is based on publicly disclosed information and was not brought by an original source of the information. Hughes moved to dismiss, contending, *inter alia*, that the 1986 amendment was not retroactive, and that the *qui tam* provision in effect when Hughes engaged in its allegedly wrongful conduct precluded the suit because it was based on information that Hughes had already disclosed to the Government. The District Court denied the motion, but ultimately granted Hughes summary judgment on the merits. Schumer appealed that judgment, and Hughes cross-appealed from the denial of the motion to dismiss. The Ninth Circuit rejected the cross-appeal, holding that the 1986 amendment should be applied retroactively to suits based on pre-1986 conduct because the amendment involved only the courts' subject-matter jurisdiction to hear *qui tam* claims and did not affect *qui tam* defendants' substantive liability. Finding, further, that the action was not barred under the 1986 amendment, the court reversed in part and remanded for further consideration on the merits.

Held: Because the 1986 amendment does not apply retroactively to *qui tam* suits regarding allegedly false claims submitted prior to its enactment, this action should have been dismissed, as required by the pre-1986 version of the FCA. Pp. 945–952.

(a) This Court applies the time-honored presumption against retroactive legislation unless Congress has clearly manifested its intent to the contrary. *Landgraf* v. *USI Film Products*, 511 U. S. 244, 268. Nothing in the 1986 amendment evidences a clear intent by Congress that it be applied retroactively. Thus, under *Landgraf*'s analysis, if the

amendment has a retroactive effect, then it will not apply to the conduct alleged here, which occurred before its effective date. P. 946.

(b) Schumer's contention that the 1986 amendment lacks retroactive effect is rejected. His argument that the amendment does not impose new duties with respect to transactions already completed because it has been unlawful to knowingly submit a false claim to the United States since 1863 was made, and rejected, in *Landgraf.* 511 U. S., at 281–282. He is also mistaken in contending that the amendment does not change the substance of the extant cause of action. By eliminating a defense to a *qui tam* suit—prior disclosure to the Government—the amendment attaches a new disability in respect to transactions or considerations already past. *Id.*, at 269. Nor is it the case that the amendment does not create a new cause of action. As Schumer himself recognizes, it extended an FCA cause to private parties in circumstances where the action was previously foreclosed. This extension is not insignificant. *Qui tam* relators are motivated primarily by prospects of monetary reward rather than the public good and, thus, are less likely than is the Government to forgo an action involving a technical violation but no harm to the public fisc. The amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued. See, *e. g.*, *Winfree* v. *Northern Pacific R. Co.*, 227 U. S. 296, 302. Before the amendment, Schumer's action was completely barred because of Hughes' disclosure. The amendment would revive that action, subjecting Hughes to previously foreclosed *qui tam* litigation. Finally, Schumer errs in contending that the amendment is jurisdictional and, hence, an exception to the general *Landgraf* presumption against retroactivity. Statutes merely addressing *where* a suit may be brought may not meet the conditions for the *Landgraf* presumption, for they regulate only the secondary conduct of the litigation and not the underlying primary conduct of the parties. However, the amendment speaks to the parties' substantive rights by *creating* jurisdiction where none previously existed; it is therefore subject to the presumption against retroactivity. Pp. 946–952.

63 F. 3d 1512, vacated and remanded.

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

Kenneth W. Starr argued the cause for petitioner. With him on the briefs were *Christopher Landau*, *John J. Higgins*, *John T. Kuelbs*, and *Daniel R. Allemeier.*

Laurence Gold argued the cause for respondent. With him on the brief were *David Silberman* and *Leon Dayan.*

Deputy Solicitor General Waxman argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Hunger*, *Deputy Assistant Attorney General Preston*, *Malcolm L. Stewart*, *Michael F. Hertz*, *Douglas Letter*, and *Joan Hartman*.*

JUSTICE THOMAS delivered the opinion of the Court.

The *qui tam* provision of the False Claims Act (FCA or Act), 31 U. S. C. § 3730(b), permits, in certain circumstances, suits by private parties on behalf of the United States against anyone submitting a false claim to the Government. Prior to 1986, such suits were barred if the information on which they were based was already in the Government's possession. At issue in this case is whether a 1986 amendment to the FCA partially removing that bar applies retroactively to *qui tam* suits regarding allegedly false claims submitted prior to its enactment and, if so, whether this particular action meets the requirements of the amended Act. We hold

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*Briefs of *amici curiae* urging reversal were filed for the Aerospace Industries Association of America, Inc., by *Mac S. Dunaway* and *Gary E. Cross;* for the Association of American Medical Colleges et al. by *John T. Boese*, *Richard A. Sauber*, *Kirk B. Johnson*, *Michael L. Ile*, *John E. Steiner*, *Jr.*, and *Joseph A. Keyes, Jr.;* for the Chamber of Commerce of the United States of America et al. by *Clarence T. Kipps, Jr.*, *Alan I. Horowitz*, *Peter B. Hutt II*, *Alvaro I. Anillo*, *Stephen A. Bokat*, *Robin S. Conrad*, and *Franklin W. Losey;* for FMC Corp. by *Allan J. Joseph*, *Martin Quinn*, and *David F. Innis;* for Lockheed Martin Corp. by *James J. Gallagher*, *Mark R. Troy*, *Barbara J. Bacon*, and *Lester W. Schiefelbein, Jr.;* for Northrop Grumman Corp. by *Brad D. Brian*, *Kristin A. Linsley*, and *Daniel P. Collins;* and for the Washington Legal Foundation by *Stuart M. Gerson*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for the National Employment Lawyers Association by *James B. Helmer, Jr.*, *Frederick M. Morgan, Jr.*, and *Julie Webster Popham;* for the National Health Law Program, Inc., by *William J. Blechman;* for the Project on Government Oversight by *Charles Tiefer;* and for Taxpayers Against Fraud, The False Claims Act Legal Center, by *Priscilla R. Budeiri*.

that the 1986 amendment does not apply to this action and therefore that this action should have been dismissed, as required by the 1982 version of the Act.

I

In December 1981, the Northrop Corporation awarded petitioner Hughes Aircraft Company a subcontract to design and develop a radar system for the B–2 bomber, which Northrop was then constructing under contract with the Air Force. Both Northrop's subcontract with Hughes and the Air Force's contract with Northrop were "cost-plus" contracts, which provided that the subcontractor and the contractor, respectively, were to be reimbursed for all costs properly incurred plus a reasonable profit. Several months after Hughes was awarded the B–2 subcontract, the McDonnell-Douglas Corporation awarded Hughes a "fixed-price" subcontract to design and develop an upgraded radar system for the F–15 fighter aircraft, which McDonnell-Douglas was then building for the Air Force. (Under the fixed-price contract, Hughes was to receive a set price, regardless of costs.) When it became apparent to Hughes that the projects overlapped in significant respects, Hughes adopted two internal "commonality agreements" allocating between its F–15 and B–2 divisions various costs that were common to the two projects.

After costs in the B–2 program escalated, Northrop requested a Government audit of Hughes' accounting practices to ascertain whether Hughes had improperly shifted costs from the fixed-price F–15 subcontract to the cost-plus B–2 subcontract. The Air Force initially concluded, in a June 1986 preliminary classified audit report, that Hughes had improperly billed the B–2 program for certain development costs that should have been charged solely to the F–15 program. Between October 1986 and September 1988, the Defense Contract Audit Agency prepared a series of unclassified audit reports similarly concluding that Hughes had

misallocated costs between the two programs, and also concluding that Hughes had not adequately disclosed the company's commonality accounting practices in a Cost Accounting Standards report it had submitted to the Government in 1984. Based on those audits, the Government directed Northrop to withhold $15.4 million in B–2 contract payments from Hughes.[1]

On January 20, 1989, respondent William J. Schumer, formerly the Division Contracts Manager for Hughes' B–2 Division, commenced this action against Hughes pursuant to 31 U. S. C. § 3730(b), the *qui tam* provision of the FCA that authorizes private individuals, "relators," to bring claims on behalf of the United States against any person who knowingly presented false or fraudulent claims to the United States in violation of § 3729. Schumer's complaint alleged that Hughes knowingly mischarged Northrop—and through it the United States—for certain radar development costs that should have been allocated to the fixed-price F–15 subcontract with McDonnell-Douglas instead of to the cost-plus B–2 subcontract with Northrop. App. 72–80. Schumer's amended complaint alleged that Hughes' accounting practices resulted in a $50 million net overcharge, and sought treble damages in the amount of $150 million. *Id.*, at 102.[2]

Hughes moved to dismiss Schumer's action, contending that the 1986 FCA amendment was not retroactive and that

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[1] The Government ultimately reversed its preliminary determination, concluding that the commonality agreements had actually benefited the Government by charging costs to the fixed-price F–15 program that otherwise would have been borne solely by the cost-plus B–2 program. Accordingly, the Government withdrew its earlier finding of noncompliance, determined that any noncompliance with accounting disclosure requirements was immaterial, and directed that Hughes be paid the $15.4 million previously withheld on the B–2 project. App. 136–137; App. to Pet. for Cert. 68a.

[2] The Government chose not to intervene in the action, as it was entitled to do under 31 U. S. C. § 3730(b)(2), nor did it move to dismiss the action, as it was likewise entitled to do, see § 3730(c)(2)(A).

the *qui tam* provision in effect when Hughes engaged in its allegedly wrongful conduct precluded *qui tam* suits based on information already possessed by the Government. See 31 U. S. C. § 3730(b)(4) (1982 ed.). Hughes argued in the alternative that the suit was barred even under the 1986 version of the Act because it was "based upon the public disclosure of allegations . . . in a[n] . . . administrative . . . audit," within the meaning of 31 U. S. C. § 3730(e)(4)(A).[3] The District Court denied Hughes' motion.

Hughes then moved for summary judgment on the merits, contending that it had fully disclosed the basis of its cost accounting system to all of its customers and had complied with all applicable contractual and regulatory requirements relating to cost allocation. After full briefing, the District Court concluded that Hughes had allocated some costs between the F–15 and B–2 programs consistent with disclosures Hughes made to Northrop, App. to Pet. for Cert. 46a, had allocated other costs to the fixed-price F–15 contract that could have been charged to the cost-plus B–2 contract alone (thereby benefiting the Government), *id.*, at 50a, and had properly disclosed the contents of the commonality agreements to Northrop and the Air Force, *id.*, at 46a–48a, 56a. Accordingly, the District Court held that "Schumer has not shown that Hughes violated the False Claims Act." *Id.*, at 64a.

Schumer appealed from the grant of summary judgment against him, and Hughes cross-appealed from the denial of its motion to dismiss. The Ninth Circuit rejected Hughes' cross-appeal, holding that the 1986 amendment removing certain defenses to *qui tam* suits should be applied retroactively to suits based on pre-1986 conduct because the amendment involved only the "subject matter jurisdiction" of

[3] Hughes also raised several constitutional challenges to the *qui tam* provisions of the Act that are not presently before us. See 519 U. S. 926 (1996) (limiting grant of certiorari to the nonconstitutional questions presented by the petition).

courts to hear *qui tam* claims and did not affect the substantive liability of *qui tam* defendants. 63 F. 3d 1512, 1517 (1995). The court further determined that the action was not barred under the 1986 version of the Act because no "public disclosure" of information possessed by the Government had been made. *Id.*, at 1518. Finally, the court reversed in part and remanded for further consideration on the merits, holding that a material factual dispute existed as to whether Hughes had made misleading and incomplete disclosures about its commonality agreements, whether or not the allegedly incomplete disclosures resulted in any harm to the public fisc. *Id.*, at 1522–1525.

We granted the petition for certiorari to consider whether the 1986 amendment is applicable to pre-1986 conduct and, if so, whether the Government's release of its audits to Hughes employees constituted a public disclosure bar under the 1986 amendment and whether harm to the public fisc is an essential element of a *qui tam* action under the amended Act. 519 U. S. 926 (1996). Because we conclude that the lower courts should not have applied the 1986 amendment and therefore that this action should have been dismissed, we express no opinion as to the Ninth Circuit's "public disclosure" and "public fisc" holdings, or as to the merits of respondent's factual contentions.

II

The allegedly false claims at issue in this case were submitted by Hughes between 1982 and 1984. At that time, the FCA required a district court to "dismiss [a *qui tam*] action . . . based on evidence or information the Government had when the action was brought." 31 U. S. C. § 3730(b)(4) (1982 ed.). The Ninth Circuit accepted, and respondent does not dispute, that because "the government was aware of [respondent's] allegations before he filed his suit, the [1982 provision] would bar his claim," were it applicable. 63 F. 3d, at 1517.

Congress amended the FCA in 1986, however, to permit *qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information. See 31 U. S. C. § 3730(e)(4)(A). Because the 1986 amendment became effective before this suit was commenced, respondent contends that it, rather than the 1982 *qui tam* provision, controls. We disagree.

We have frequently noted, and just recently reaffirmed, that there is a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994). "The 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' " *Ibid.* (quoting *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 855 (1990) (SCALIA, J., concurring)). Accordingly, we apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary. 511 U. S., at 268.

Nothing in the 1986 amendment evidences a clear intent by Congress that it be applied retroactively, and no one suggests otherwise. Thus, under the analysis the Court adopted in *Landgraf*, if the 1986 amendment has a retroactive effect, then we presume it will not apply to the conduct alleged in this case, which occurred prior to its effective date.[4]

Respondent argues that the 1986 amendment has no retroactive effect because it does not fit within Justice Story's "influential definition" of impermissibly retroactive legislation, which we quoted with approval in *Landgraf:*

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[4] Because both the allegedly false claim submission and the disclosure to the Government of information about that submission occurred prior to the effective date of the 1986 amendments, we need not address which of these two events constitutes the relevant conduct for purposes of our retroactivity analysis.

> "'[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'" 511 U. S., at 269 (quoting *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CC NH 1814) (Story, J.)).

To the extent respondent contends that *only* statutes with one of these effects are subject to our presumption against retroactivity, he simply misreads our opinion in *Landgraf*. The language upon which he relies does not purport to define the outer limit of impermissible retroactivity. Rather, our opinion in *Landgraf*, like that of Justice Story, merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity. Indeed, we recognized that the Court has used various formulations to describe the "functional conceptio[n] of legislative 'retroactivity,'" and made no suggestion that Justice Story's formulation was the exclusive definition of presumptively impermissible retroactive legislation. 511 U. S., at 269.

In any event, even applying Justice Story's formulation, we reject respondent's contention that the 1986 amendment lacks retroactive effect. Respondent first argues that the 1986 amendment does not "'impose new duties with respect to transactions already completed'" because, since 1863, "the FCA has made it unlawful to knowingly submit a false claim for payment to the United States." Brief for Respondent 15 (quoting *Landgraf*, *supra*, at 280). The same argument was made, and rejected, in *Landgraf*. There, we noted that the provision of the Civil Rights Act of 1991 authorizing compensatory damages "does not make unlawful conduct that was lawful when it occurred," but we "[n]onetheless" held that "the new compensatory damages provision would operate 'retrospectively' if it were applied to conduct occurring

before" its effective date. 511 U. S., at 281–282; see also *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 303 (1994) (holding that an increase in monetary liability could not be applied retroactively even though the "normative scope of Title VII's prohibition on workplace discrimination" was not altered).

Respondent next contends that "the 1986 Amendments to the *qui tam* bar do not create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim by even a single penny [and] thus d[o] not 'increase a party's liability for past conduct.' " Brief for Respondent 15 (quoting *Landgraf, supra*, at 280). See also Brief for United States as *Amicus Curiae* 13–14. Again, respondent is mistaken. While we acknowledge that the monetary liability faced by an FCA defendant is the same whether the action is brought by the Government or by a *qui tam* relator, the 1986 amendment eliminates a defense to a *qui tam* suit—prior disclosure to the Government—and therefore changes the substance of the existing cause of action for *qui tam* defendants by " 'attach[ing] a new disability, in respect to transactions or considerations already past.' " *Landgraf, supra*, at 269 (quoting *Wheeler*, *supra*, at 767); see also Brief for United States as *Amicus Curiae* 14, n. 6 ("[P]roof that the government had the information when suit was brought was . . . a jurisdictional defense to an action brought by a qui tam relator" (internal quotation marks omitted)); cf. *Collins* v. *Youngblood*, 497 U. S. 37, 49 (1990) ("A law that abolishes an affirmative defense" violates the *Ex Post Facto* Clause); *Beazell* v. *Ohio*, 269 U. S. 167, 169–170 (1925) ("[A]ny statute . . . which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*").

Nor is it the case that the 1986 amendment does not "create a new cause of action." As respondent himself recognizes, "as a result of the 1986 Amendments, the federal

courts are open to an FCA action brought by a private relator on behalf of the United States," whereas "[p]rior to 1986, once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant." Brief for Respondent 16; see also Brief for United States as *Amicus Curiae* 14 (recognizing that the 1986 amendment "expanded the circumstances under which *qui tam* relators may pursue actions to enforce" a false claimant's liability to the Government).

The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. As we have previously recognized:

> "'[*Qui tam* statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.'" *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 541, n. 5 (1943) (quoting *United States* v. *Griswold*, 24 F. 361, 366 (Ore. 1885)).

Qui tam relators are thus less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.[5]

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[5] That a *qui tam* suit is brought by a private party "on behalf of the United States," see Brief for Respondent 17, does not alter the fact that a relator's interests and the Government's do not necessarily coincide. Moreover, as the statute specifies, *qui tam* actions are brought both

In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued. See, *e. g.*, *Winfree* v. *Northern Pacific R. Co.*, 227 U. S. 296, 302 (1913). Prior to the 1986 amendment, respondent's *qui tam* action was completely barred because of Hughes' disclosure to the Government of information about its claim submissions. The 1986 amendment would revive that action, subjecting Hughes to previously foreclosed *qui tam* litigation, much like extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action, see, *e. g.*, *Chenault* v. *U. S. Postal Service*, 37 F. 3d 535, 537, 539 (CA9 1994) (relying on *Landgraf* in concluding that "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party's liability" (internal quotation marks omitted)). This is true even if a cause of action remained open to some other party. It is simply not the case that, as respondent asserts, the elimination of a prior defense to *qui tam* actions does not "create a new cause of action" or "change the substance of the extant cause of action."

Finally, respondent contends that the 1986 amendment is jurisdictional, and hence that it is an exception to the general *Landgraf* presumption against retroactivity. Indeed, the Ninth Circuit went further, holding that, absent a clear statement of congressional intent, there is a strong presumption *in favor of* retroactivity for jurisdictional statutes. 63 F. 3d, at 1517. The Ninth Circuit simply misread our decision in *Landgraf*, for the only "presumption" mentioned in that opinion is a general presumption *against* retroactivity.

"*for the person* and for the United States Government." 31 U. S. C. § 3730(b)(1) (emphasis added).

The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself, as the United States recognizes. See Brief for United States as *Amicus Curiae* 15, and n. 8. As we stated in *Landgraf:*

> "Application of a new jurisdictional rule usually 'takes away no substantive right but simply *changes* the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " 511 U. S., at 274 (emphasis added; citations omitted).

Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Cf. *id.*, at 275; *id.*, at 291 (SCALIA, J., concurring). Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

III

In sum, whether we consider the relevant conduct to be Hughes' disclosure to the Government or its submission of the allegedly false claim, disclosure of information about the claim to the Government constituted a full defense to a *qui tam* action prior to 1986. If applied in this case, the legal effect of the 1986 amendment would be to deprive Hughes of

that defense. Given the absence of a clear statutory expression of congressional intent to apply the 1986 amendment to conduct completed before its enactment, we apply our presumption against retroactivity and hold that, under the relevant 1982 version of the FCA, the District Court was obliged to dismiss this action because it was "based on evidence or information the Government had when the action was brought." 31 U. S. C. § 3730(b)(4) (1982 ed.). We therefore vacate the judgment below, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

ASSOCIATES COMMERCIAL CORP. *v.* RASH ET UX.

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

No. 96–454. Argued April 16, 1997—Decided June 16, 1997

Petitioner Associates Commercial Corporation (ACC) holds a loan and lien on a tractor truck purchased by respondent Elray Rash for use in his freight-hauling business. Elray and Jean Rash, also a respondent, filed a joint petition and repayment plan under Chapter 13 of the Bankruptcy Code (Code), listing ACC as a secured creditor. Under the Code, ACC's claim for the $41,171 balance owed on the truck was secured only to the extent of the value of the collateral; its claim over and above that value was unsecured. See 11 U. S. C. § 506(a). The Rashes could gain confirmation of their Chapter 13 plan only if ACC accepted it, if the Rashes surrendered the truck to ACC, or if the Rashes invoked the so-called "cram down" provision. See § 1325(a)(5). The cram down option allows the debtor to keep the collateral over the objection of the creditor; the creditor retains the lien securing the claim, see § 1325(a)(5)(B)(i), and the debtor is required to provide the creditor with payments, over the life of the plan, that will total the present value of the collateral, see § 1325(a)(5)(B)(ii). The value of the allowed secured claim is governed by § 506(a) of the Code. The Rashes invoked the cram down power, proposing to keep the truck for use in the freight-hauling business. ACC objected to the plan, sought to repossess the truck, and disputed the value the Rashes had assigned to the truck. At an evidentiary hearing held to resolve the dispute, ACC maintained that the proper valuation was the price the Rashes would have to pay to purchase a like vehicle (the replacement-value standard), estimated to be $41,000. The Rashes, however, maintained that the proper valuation was the net amount ACC would realize upon foreclosure and sale of the collateral (the foreclosure-value standard), estimated to be $31,875. The Bankruptcy Court adopted the Rashes' valuation figure and approved the plan. The District Court and the Fifth Circuit affirmed.

Held: Under § 506(a), the value of property retained because the debtor has exercised Chapter 13's "cram down" option is the cost the debtor would incur to obtain a like asset for the same proposed use. Pp. 960–965.

(a) The words "the creditor's interest in the estate's interest in such property" contained in the first sentence of § 506(a) do not call for the foreclosure-value standard adopted by the Fifth Circuit. Even read in

isolation, the phrase imparts no valuation standard. The first sentence, read as a whole, instructs that a secured creditor's claim is to be divided into secured and unsecured portions. The sentence tells a court what it must evaluate, but it is not enlightening on how to value collateral. Section 506(a)'s second sentence, however, speaks to the *how* question, providing that "[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." By deriving a foreclosure-value standard from § 506(a)'s first sentence, the Fifth Circuit rendered inconsequential the sentence that expressly addresses how "value shall be determined." The "proposed disposition or use" of the collateral is of paramount importance to the valuation question. Such "disposition or use" turns on which alternative the debtor chooses when a secured creditor refuses to accept the debtor's Chapter 13 plan—in one case the collateral will be surrendered to the creditor, and in the other, the collateral will be retained and used by the debtor. Applying a foreclosure-value standard attributes no significance to the different consequences of the debtor's choice. A replacement-value standard, on the other hand, distinguishes retention from surrender and renders meaningful the key statutory words "disposition or use." Surrender and retention are not equivalent acts. When a debtor surrenders the property, a creditor obtains it immediately, and is free to sell it and reinvest the proceeds. If a debtor keeps the property and continues to use it, the creditor obtains at once neither the property nor its value, and is exposed to double risks against which the Code affords incomplete protection: The debtor may again default and the property may deteriorate from extended use. Of prime significance, the replacement-value standard accurately gauges the debtor's "use" of the property. The debtor in this case elected to use the collateral to generate an income stream. That actual use, rather than a foreclosure sale that will not take place, is the proper guide under a prescription hinged to the property's "disposition or use." Pp. 960–963.

(b) The Fifth Circuit considered the replacement-value standard disrespectful of Texas law, which permits the secured creditor to sell the collateral, thereby obtaining only its net foreclosure. In allowing Chapter 13 debtors to retain and use collateral over the objection of secured creditors, however, the Bankruptcy Code has reshaped debtor and creditor rights in marked departure from state law. It no more disrupts state law to make "disposition or use" the guide for valuation than to authorize the rearrangement of rights the cram down power entails. There is also no warrant in the Code for a valuation standard that uses the midpoint between foreclosure and replacement values. Pp. 964–965.

90 F. 3d 1036, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined, and in all but n. 4 of which SCALIA, J., joined. STEVENS, J., filed a dissenting opinion, *post,* p. 966.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Shalom L. Kohn*, *David M. Schiffman*, *Ben L. Aderholt*, and *Raymond J. Blackwood.*

Kent L. Jones argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Argrett*, *Deputy Solicitor General Wallace*, and *Gary D. Gray.*

John J. Durkay argued the cause and filed a brief for respondents.*

JUSTICE GINSBURG delivered the opinion of the Court.†

We resolve in this case a dispute concerning the proper application of § 506(a) of the Bankruptcy Code when a bankrupt debtor has exercised the "cram down" option for which Code § 1325(a)(5)(B) provides. Specifically, when a debtor, over a secured creditor's objection, seeks to retain and use the creditor's collateral in a Chapter 13 plan, is the value of the collateral to be determined by (1) what the secured creditor could obtain through foreclosure sale of the property (the "foreclosure-value" standard); (2) what the debtor would have to pay for comparable property (the "replacement-

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*Briefs of *amici curiae* urging reversal were filed for NationsBank, N. A., et al. by *John H. Culver III;* and for the Washington Legal Foundation by *David R. Kuney, Daniel J. Popeo*, and *Penelope K. Shapiro.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Chapter 13 Trustees by *Henry E. Hildebrand* and *Christopher M. Minton;* for the National Association of Consumer Bankruptcy Attorneys, Inc., by *Norma L. Hammes* and *James J. Gold;* and for Donald and Madelaine Taffi by *A. Lavar Taylor.*

Jan T. Chilton and *Phillip D. Brady* filed a brief for the American Automobile Manufacturers Association, Inc., et al. as *amici curiae.*

†JUSTICE SCALIA joins all but footnote 4 of this opinion.

value" standard); or (3) the midpoint between these two measurements? We hold that § 506(a) directs application of the replacement-value standard.

I

In 1989, respondent Elray Rash purchased for $73,700 a Kenworth tractor truck for use in his freight-hauling business. Rash made a downpayment on the truck, agreed to pay the seller the remainder in 60 monthly installments, and pledged the truck as collateral on the unpaid balance. The seller assigned the loan, and its lien on the truck, to petitioner Associates Commercial Corporation (ACC).

In March 1992, Elray and Jean Rash filed a joint petition and a repayment plan under Chapter 13 of the Bankruptcy Code (Code), 11 U. S. C. §§ 1301–1330. At the time of the bankruptcy filing, the balance owed to ACC on the truck loan was $41,171. Because it held a valid lien on the truck, ACC was listed in the bankruptcy petition as a creditor holding a secured claim. Under the Code, ACC's claim for the balance owed on the truck was secured only to the extent of the value of the collateral; its claim over and above the value of the truck was unsecured. See 11 U. S. C. § 506(a).

To qualify for confirmation under Chapter 13, the Rashes' plan had to satisfy the requirements set forth in § 1325(a) of the Code. The Rashes' treatment of ACC's secured claim, in particular, is governed by subsection (a)(5).[1] Under this

[1] Section 1325(a)(5) states:

"(a) Except as provided in subsection (b), the court shall confirm a plan if—

. . . . .

"(5) with respect to each allowed secured claim provided for by the plan—

"(A) the holder of such claim has accepted the plan;

"(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

"(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

provision, a plan's proposed treatment of secured claims can be confirmed if one of three conditions is satisfied: The secured creditor accepts the plan, see 11 U. S. C. § 1325(a)(5)(A); the debtor surrenders the property securing the claim to the creditor, see § 1325(a)(5)(C); or the debtor invokes the so-called "cram down" power, see § 1325(a)(5)(B). Under the cram down option, the debtor is permitted to keep the property over the objection of the creditor; the creditor retains the lien securing the claim, see § 1325(a)(5)(B)(i), and the debtor is required to provide the creditor with payments, over the life of the plan, that will total the present value of the allowed secured claim, *i. e.*, the present value of the collateral, see § 1325(a)(5)(B)(ii). The value of the allowed secured claim is governed by § 506(a) of the Code.

The Rashes' Chapter 13 plan invoked the cram down power. It proposed that the Rashes retain the truck for use in the freight-hauling business and pay ACC, over 58 months, an amount equal to the present value of the truck. That value, the Rashes' petition alleged, was $28,500. ACC objected to the plan and asked the Bankruptcy Court to lift the automatic stay so ACC could repossess the truck. ACC also filed a proof of claim alleging that its claim was fully secured in the amount of $41,171. The Rashes filed an objection to ACC's claim.

The Bankruptcy Court held an evidentiary hearing to resolve the dispute over the truck's value. At the hearing, ACC and the Rashes urged different valuation benchmarks. ACC maintained that the proper valuation was the price the Rashes would have to pay to purchase a like vehicle, an amount ACC's expert estimated to be $41,000. The Rashes, however, maintained that the proper valuation was the net amount ACC would realize upon foreclosure and sale of the collateral, an amount their expert estimated to be $31,875.

"(C) the debtor surrenders the property securing such claim to such holder."

The Bankruptcy Court agreed with the Rashes and fixed the amount of ACC's secured claim at $31,875; that sum, the court found, was the net amount ACC would realize if it exercised its right to repossess and sell the truck. See *In re Rash*, 149 B. R. 430, 431–432 (Bkrtcy. Ct. ED Tex. 1993). The Bankruptcy Court thereafter approved the plan, and the United States District Court for the Eastern District of Texas affirmed.

A panel of the Court of Appeals for the Fifth Circuit reversed. *In re Rash*, 31 F. 3d 325 (1994). On rehearing en banc, however, the Fifth Circuit affirmed the District Court, holding that ACC's allowed secured claim was limited to $31,875, the net foreclosure value of the truck. *In re Rash*, 90 F. 3d 1036 (1996).

In reaching its decision, the Fifth Circuit highlighted, first, a conflict it perceived between the method of valuation ACC advanced, and the law of Texas defining the rights of secured creditors. See *id.*, at 1041–1042 (citing Tex. Bus. & Com. Code Ann. §§ 9.504(a), (c), 9.505 (1991)). In the Fifth Circuit's view, valuing collateral in a federal bankruptcy proceeding under a replacement-value standard—thereby setting an amount generally higher than what a secured creditor could realize pursuing its state-law foreclosure remedy—would "chang[e] the extent to which ACC is secured from what obtained under state law prior to the bankruptcy filing." 90 F. 3d, at 1041. Such a departure from state law, the Fifth Circuit said, should be resisted by the federal forum unless "clearly compel[led]" by the Code. *Id.*, at 1042.

The Fifth Circuit then determined that the Code provision governing valuation of security interests, § 506(a), does not compel a replacement-value approach. Instead, the court reasoned, the first sentence of § 506(a) requires that collateral be valued from the creditor's perspective. See *id.*, at 1044. And because "the creditor's interest is in the nature of a security interest, giving the creditor the right to repos-

sess and sell the collateral and nothing more[,] . . . the valuation should start with what the creditor could realize by exercising that right." *Ibid.* This foreclosure-value standard, the Fifth Circuit found, was consistent with the other relevant provisions of the Code, economic analysis, and the legislative history of the pertinent provisions. See *id.*, at 1045–1059. Judge Smith, joined by five other judges, dissented, urging that the Code dictates a replacement-value standard. See *id.*, at 1061–1075.

Courts of Appeals have adopted three different standards for valuing a security interest in a bankruptcy proceeding when the debtor invokes the cram down power to retain the collateral over the creditor's objection. In contrast to the Fifth Circuit's foreclosure-value standard, a number of Circuits have followed a replacement-value approach. See, *e. g.*, *In re Taffi*, 96 F. 3d 1190, 1191–1192 (CA9 1996) (en banc), cert. pending *sub nom. Taffi* v. *United States*, No. 96–881;[2] *In re Winthrop Old Farm Nurseries, Inc.*, 50 F. 3d 72, 74–75 (CA1 1995); *In re Trimble*, 50 F. 3d 530, 531–532 (CA8 1995). Other courts have settled on the midpoint between foreclosure value and replacement value. See *In re Hoskins*, 102 F. 3d 311, 316 (CA7 1996); cf. *In re Valenti*, 105 F. 3d 55, 62 (CA2 1997) (bankruptcy courts have discretion to value at midpoint between replacement value and foreclosure value). We granted certiorari to resolve this conflict among the Courts of Appeals, see 519 U. S. 1086 (1997), and we now reverse the Fifth Circuit's judgment.

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[2] In *In re Taffi*, the Ninth Circuit contrasted replacement value with fair-market value and adopted the latter standard, apparently viewing the two standards as incompatible. See 96 F. 3d, at 1192. By using the term "replacement value," we do not suggest that a creditor is entitled to recover what it would cost the debtor to purchase the collateral brand new. Rather, our use of the term replacement value is consistent with the Ninth Circuit's understanding of the meaning of fair-market value; by replacement value, we mean the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition. See also *infra*, at 965, n. 6.

II

The Code provision central to the resolution of this case is § 506(a), which states:

> "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . . ." 11 U. S. C. § 506(a).

Over ACC's objection, the Rashes' repayment plan proposed, pursuant to § 1325(a)(5)(B), continued use of the property in question, *i. e.*, the truck, in the debtor's trade or business. In such a "cram down" case, we hold, the value of the property (and thus the amount of the secured claim under § 506(a)) is the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller.

Rejecting this replacement-value standard, and selecting instead the typically lower foreclosure-value standard, the Fifth Circuit trained its attention on the first sentence of § 506(a). In particular, the Fifth Circuit relied on these first sentence words: A claim is secured "to the extent of the value of such *creditor's interest* in the estate's interest in such property." See 90 F. 3d, at 1044 (emphasis added) (citing § 506(a)). The Fifth Circuit read this phrase to instruct that the "starting point for the valuation [is] what the creditor could realize if it sold the estate's interest in the property according to the security agreement," namely, through "repossess[ing] and sell[ing] the collateral." *Ibid.*

We do not find in the § 506(a) first sentence words—"the creditor's interest in the estate's interest in such property"—

the foreclosure-value meaning advanced by the Fifth Circuit. Even read in isolation, the phrase imparts no valuation standard: A direction simply to consider the "value of such creditor's interest" does not expressly reveal *how* that interest is to be valued.

Reading the first sentence of § 506(a) as a whole, we are satisfied that the phrase the Fifth Circuit considered key is not an instruction to equate a "creditor's interest" with the net value a creditor could realize through a foreclosure sale. The first sentence, in its entirety, tells us that a secured creditor's claim is to be divided into secured and unsecured portions, with the secured portion of the claim limited to the value of the collateral. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 238–239 (1989); 4 L. King, Collier on Bankruptcy ¶ 506.02[1][a], p. 506–6 (15th ed. rev. 1996). To separate the secured from the unsecured portion of a claim, a court must compare the creditor's claim to the value of "such property," *i. e.*, the collateral. That comparison is sometimes complicated. A debtor may own only a part interest in the property pledged as collateral, in which case the court will be required to ascertain the "estate's interest" in the collateral. Or, a creditor may hold a junior or subordinate lien, which would require the court to ascertain the creditor's interest in the collateral. The § 506(a) phrase referring to the "creditor's interest in the estate's interest in such property" thus recognizes that a court may encounter, and in such instances must evaluate, limited or partial interests in collateral. The full first sentence of § 506(a), in short, tells a court what it must evaluate, but it does not say more; it is not enlightening on how to value collateral.

The second sentence of § 506(a) does speak to the *how* question. "Such value," that sentence provides, "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." § 506(a). By deriving a foreclosure-value standard from § 506(a)'s first sentence, the Fifth Circuit rendered inconsequential the

sentence that expressly addresses how "value shall be determined."

As we comprehend § 506(a), the "proposed disposition or use" of the collateral is of paramount importance to the valuation question. If a secured creditor does not accept a debtor's Chapter 13 plan, the debtor has two options for handling allowed secured claims: surrender the collateral to the creditor, see § 1325(a)(5)(C); or, under the cram down option, keep the collateral over the creditor's objection and provide the creditor, over the life of the plan, with the equivalent of the present value of the collateral, see § 1325(a)(5)(B). The "disposition or use" of the collateral thus turns on the alternative the debtor chooses—in one case the collateral will be surrendered to the creditor, and in the other, the collateral will be retained and used by the debtor. Applying a foreclosure-value standard when the cram down option is invoked attributes no significance to the different consequences of the debtor's choice to surrender the property or retain it. A replacement-value standard, on the other hand, distinguishes retention from surrender and renders meaningful the key words "disposition or use."

Tying valuation to the actual "disposition or use" of the property points away from a foreclosure-value standard when a Chapter 13 debtor, invoking cram down power, retains and uses the property. Under that option, foreclosure is averted by the debtor's choice and over the creditor's objection. From the creditor's perspective as well as the debtor's, surrender and retention are not equivalent acts.

When a debtor surrenders the property, a creditor obtains it immediately, and is free to sell it and reinvest the proceeds. We recall here that ACC sought that very advantage. See *supra*, at 957. If a debtor keeps the property and continues to use it, the creditor obtains at once neither the property nor its value and is exposed to double risks: The debtor may again default and the property may deteriorate from extended use. Adjustments in the interest rate and secured

creditor demands for more "adequate protection," 11 U. S. C. § 361, do not fully offset these risks. See 90 F. 3d, at 1066 (Smith, J., dissenting) ("vast majority of reorganizations fail . . . leaving creditors with only a fraction of the compensation due them"; where, as here, "collateral depreciates rapidly, the secured creditor may receive far less in a failed reorganization than in a prompt foreclosure" (internal cross-reference omitted)); accord, *In re Taffi*, 96 F. 3d, at 1192–1193.[3]

Of prime significance, the replacement-value standard accurately gauges the debtor's "use" of the property. It values "the creditor's interest in the collateral in light of the proposed [repayment plan] reality: no foreclosure sale and economic benefit for the debtor derived from the collateral equal to . . . its [replacement] value." *In re Winthrop Old Farm Nurseries*, 50 F. 3d, at 75. The debtor in this case elected to use the collateral to generate an income stream. That actual use, rather than a foreclosure sale that will not take place, is the proper guide under a prescription hinged to the property's "disposition or use." See *ibid.*[4]

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[3] On this matter, *amici curiae* supporting ACC contended: "'Adequate protection' payments under 11 U. S. C. §§ 361, 362(d)(1) typically are based on the assumption that the collateral will be subject to only ordinary depreciation. Hence, even when such payments are made, they frequently fail to compensate adequately for the usually more rapid depreciation of assets retained by the debtor." Brief for American Automobile Manufacturers Association, Inc., et al. as *Amici Curiae* 21, n. 9.

[4] We give no weight to the legislative history of § 506(a), noting that it is unedifying, offering snippets that might support either standard of valuation. The Senate Report simply repeated the phrase contained in the second sentence of § 506(a). See S. Rep. No. 95–989, p. 68 (1978). The House Report, in the Fifth Circuit's view, rejected a "'replacement cost'" valuation. See *In re Rash*, 90 F. 3d 1036, 1056 (CA5 1996) (quoting H. Rep. No. 95–595, p. 124 (1977)). That Report, however, appears to use the term "replacement cost" to mean the cost of buying new property to replace property in which a creditor had a security interest. See *ibid.* In any event, House Report excerpts are not enlightening, for the provision pivotal here—the second sentence of § 506(a)—did not appear in the bill addressed by the House Report. The key sentence originated in the

The Fifth Circuit considered the replacement-value standard disrespectful of state law, which permits the secured creditor to sell the collateral, thereby obtaining its net foreclosure value "and nothing more." See 90 F. 3d, at 1044. In allowing Chapter 13 debtors to retain and use collateral over the objection of secured creditors, however, the Code has reshaped debtor and creditor rights in marked departure from state law. See, *e. g.*, Uniform Commercial Code §§ 9–504, 9–505, 3B U. L. A. 127, 352 (1992). The Code's cram down option displaces a secured creditor's state-law right to obtain immediate foreclosure upon a debtor's default. That change, ordered by federal law, is attended by a direction that courts look to the "proposed disposition or use" of the collateral in determining its value. It no more disrupts state law to make "disposition or use" the guide for valuation than to authorize the rearrangement of rights the cram down power entails.

Nor are we persuaded that the split-the-difference approach adopted by the Seventh Circuit provides the appropriate solution. See *In re Hoskins*, 102 F. 3d, at 316. Whatever the attractiveness of a standard that picks the midpoint between foreclosure and replacement values, there is no warrant for it in the Code.[5] Section 506(a) calls for the value the property possesses in light of the "disposition or use" in fact "proposed," not the various dispositions or uses that might have been proposed. Cf. *BFP* v. *Resolution Trust Corporation*, 511 U. S. 531, 540 (1994) (court-made rule defining, for purposes of Code's fraudulent transfer provi-

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Senate version of the bill, compare H. R. 8200, 95th Cong., 1st Sess., § 506(a) (1977), with S. 2266, 95th Cong., 1st Sess., § 506(a) (1977), and was included in the final text of the statute after the House-Senate conference, see 124 Cong. Rec. 33997 (1978).

[5] As our reading of § 506(a) makes plain, we also reject a ruleless approach allowing use of different valuation standards based on the facts and circumstances of individual cases. Cf. *In re Valenti*, 105 F. 3d 55, 62–63 (CA2 1997) (permissible for bankruptcy courts to determine valuation standard case-by-case).

sion, "reasonably equivalent value" to mean 70% of fair market value "represent[s] [a] policy determinatio[n] that the Bankruptcy Code gives us no apparent authority to make"). The Seventh Circuit rested on the "economics of the situation," *In re Hoskins*, 102 F. 3d, at 316, only after concluding that the statute suggests no particular valuation method. We agree with the Seventh Circuit that "a simple rule of valuation is needed" to serve the interests of predictability and uniformity. *Id.*, at 314. We conclude, however, that § 506(a) supplies a governing instruction less complex than the Seventh Circuit's "make two valuations, then split the difference" formulation.

In sum, under § 506(a), the value of property retained because the debtor has exercised the § 1325(a)(5)(B) "cram down" option is the cost the debtor would incur to obtain a like asset for the same "proposed . . . use."[6]

* * *

For the foregoing reasons, 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.

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[6] Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. We note, however, that replacement value, in this context, should not include certain items. For example, where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning. Cf. 90 F. 3d, at 1051–1052. Nor should the creditor gain from modifications to the property—*e. g.*, the addition of accessories to a vehicle—to which a creditor's lien would not extend under state law.

JUSTICE STEVENS, dissenting.

Although the meaning of 11 U. S. C. § 506(a) is not entirely clear, I think its text points to foreclosure as the proper method of valuation in this case. The first sentence in § 506(a) tells courts to determine the value of the "*creditor's* interest in the estate's interest" in the property. 11 U. S. C. § 506(a) (emphasis added). This language suggests that the value should be determined from the creditor's perspective, *i. e.*, what the collateral is worth, on the open market, in the creditor's hands, rather than in the hands of another party.

The second sentence explains that "[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." *Ibid.* In this context, the "purpose of the valuation" is determined by 11 U. S. C. § 1325(a)(5)(B). Commonly known as the Bankruptcy Code's "cram down" provision, this section authorizes the debtor to keep secured property over the creditor's objections in a Chapter 13 reorganization, but, if he elects to do so, directs the debtor to pay the creditor the "value" of the secured claim. The "purpose" of this provision, and hence of the valuation under § 506(a), is to put the creditor in the same shoes as if he were able to exercise his lien and foreclose.*

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*The Court states that "surrender and retention are not equivalent acts" from the creditor's perspective because he does not receive the property and is exposed to the risk of default and deterioration. *Ante*, at 962. I disagree. That the creditor does not receive the property is irrelevant because, as § 1325(a)(5)(B)(ii) directs, he receives the present value of his security interest. Present value includes both the underlying value and the time value of that interest. The time-value component similarly vitiates the risk concern. Higher risk uses of money must pay a higher premium to offset the same opportunity cost. In this case, for instance, the creditor was receiving nine percent interest, see *In re Rash*, 90 F. 3d 1036, 1039 (CA5 1996) (en banc), well over the prevailing rate for an essentially risk-free loan, such as a United States Treasury Bond. Finally, the concern with deterioration is addressed by another provision of the Code, 11 U. S. C. § 361, which authorizes the creditor to demand "adequate protec-

It is crucial to keep in mind that § 506(a) is a provision that applies *throughout* the various chapters of the Bankruptcy Code; it is, in other words, a "utility" provision that operates in many different contexts. Even if the words "proposed disposition or use" did not gain special meaning in the cram down context, this would not render them surplusage because they have operational significance in their many other Code applications. In this context, I also think the foreclosure standard best comports with economic reality. Allowing any more than the foreclosure value simply grants a general windfall to undersecured creditors at the expense of unsecured creditors. Cf. *In re Hoskins*, 102 F. 3d 311, 320 (CA7 1996) (Easterbrook, J., concurring in judgment). As Judge Easterbrook explained in rejecting the split-the-difference approach as a general rule, see *id.*, at 318–320, a foreclosure-value standard is also consistent with the larger statutory scheme by keeping the respective recoveries of secured and unsecured creditors the same throughout the various bankruptcy chapters.

Accordingly, I respectfully dissent.

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tion," including increased payments, to offset any derogation of his security interest during a cram down.

Syllabus

MAZUREK, ATTORNEY GENERAL OF MONTANA *v.* ARMSTRONG ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–1104. Decided June 16, 1997

Respondents, licensed physicians and a physician assistant practicing in Montana, challenged a state law restricting the performance of abortions to licensed physicians. In denying their motion for preliminary injunction, the Federal District Court found that they had not established any likelihood of prevailing on their claim that the law imposed an undue burden under *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833. The Ninth Circuit vacated the judgment, holding that respondents had met the Circuit's threshold requirement for a preliminary injunction by showing a fair chance of success on the merits. On remand, the District Court entered an injunction pending appeal and postponed hearing the merits of the preliminary injunction motion pending the disposition of petitioner's certiorari petition. As a consequence, the physician-only requirement is unenforceable at the present time against the only nonphysician licensed to perform abortions in Montana.

Held: The judgment of the Court of Appeals is reversed. Since the physician-only requirement at issue in *Casey* did not pose a "substantial obstacle to a woman seeking an abortion," it was not an undue burden on the right to abortion. 505 U. S., at 884–885. This precise passage was quoted by the District Court when it concluded that there was insufficient evidence to find a substantial obstacle in Montana. The Ninth Circuit never contested that conclusion, finding instead that the law's purpose made it arguably invalid. However, there is no evidence of a vitiating legislative purpose here. The Court of Appeals' decision is also contradicted by this Court's repeated statements that the performance of abortions may be restricted to physicians. See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113, 165. Since the Ninth Circuit's decision is clearly erroneous under this Court's precedents, and since its judgment has produced immediate consequences for Montana—in the form of an injunction against the law's implementation—and has raised a real threat of such consequences for the six other States in the Circuit that have physician-only requirements, summary reversal is appropriate.

Certiorari granted; 94 F. 3d 566, reversed and remanded.

PER CURIAM.

In 1995, the Montana Legislature enacted a statute restricting the performance of abortions to licensed physicians. 1995 Mont. Laws, ch. 321, § 2 (codified at Mont. Code Ann. § 50–20–109 (1995)). Similar rules exist in 40 other States in the Nation.[1] The Montana law was challenged almost im-

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[1] See Ala. Admin. Code Rules 420–5–1–.01(2)(k), 420–5–1–.03(2)(a) (Supp. 1990) (limiting performance of abortions to "physicians duly licensed in the State of Alabama," which in turn requires meeting the criteria in Ala. Code § 34–24–70 (Supp. 1996)); Alaska Stat. Ann. §§ 08.64.200, 18.16.010(a)(1) (1996); Ark. Code Ann. § 5–61–101(a) (1993); *id.*, § 17–95–403 (1995); Cal. Health & Safety Code Ann. § 123405 (West 1996) (as interpreted under prior statutory designation in 74 Op. Cal. Atty. Gen. 101 (1991)); Colo. Rev. Stat. § 12–36–107 (1991 and Supp. 1996); *id.*, §§ 18–6–101(1), 18–6–102 (1986); Conn. Agencies Regs. § 19–13–D54(a) (1997) (limiting performance of abortions to "person[s] licensed to practice medicine and surgery in the State of Connecticut," which in turn requires meeting the criteria in Conn. Gen. Stat. § 20–10 (Supp. 1997)); Del. Code Ann., Tit. 24, §§ 1720, 1790(a) (Supp. 1996); Fla. Stat. §§ 390.001(1)(a), 390.001(3) (1993); *id.*, §§ 458.311, 459.0055 (1991 and Supp. 1997); Ga. Code Ann. § 16–12–141(a) (1996); *id.*, § 43–34–27 (1994); Haw. Rev. Stat. §§ 453–4, 453–16(a)(1) (1993); Idaho Code § 18–608 (1997); *id.*, §§ 54–1803(3), 54–1803(4) (1994); Ill. Comp. Stat., ch. 225, § 60/11 (1993); *id.*, ch. 720, §§ 510/2(2), 510/3.1 (1993); Ind. Code §§ 16–18–2–202, 16–18–2–282, 16–34–2–1(1)(A) (1993); *id.*, § 25–22.5–3–1 (1995); Iowa Code § 148.3 (Supp. 1997); *id.*, § 707.7 (Supp. 1997); Ky. Rev. Stat. Ann. §§ 311.571, 311.750 (Michie 1995); La. Rev. Stat. Ann. § 37:1272 (West Supp. 1997); *id.*, §§ 40:1299.35.1, 40:1299.35.2(A) (West 1992); Me. Rev. Stat. Ann., Tit. 22, § 1598(3)(A) (1992); *id.*, Tit. 32, §§ 2571, 3271 (Supp. 1996); Md. Health Code Ann. § 20–208 (1996); Md. Health Occ. Code Ann. § 14–307 (Supp. 1995); Mass. Gen. Laws, ch. 112, §§ 2, 12K, 12L, 12M (1996); Minn. Stat. §§ 145.412, subd. 1(1), 147.02 (1989) (limiting performance of abortions to licensed physicians and "physician[s] in training under the supervision of . . . licensed physician[s]"); Miss. Code Ann. § 73–25–3 (1995); *id.*, § 97–3–3(1) (1994) (as interpreted in *Spears* v. *State*, 278 So. 2d 443 (Miss. 1973)); Mo. Rev. Stat. §§ 188.015(5), 188.020 (1996); *id.*, § 334.031 (1989); Neb. Rev. Stat. § 28–335 (1995); *id.*, § 71–1,104 (Supp. 1996); Nev. Rev. Stat. § 442.250(1)(a) (1991); *id.*, § 630.160 (1995); N. J. Admin. Code § 13:35–4.2(b) (1997) (limiting performance of abortions to "physician[s] licensed to practice medicine and surgery in the State of New

mediately by respondents, who are a group of licensed physicians and one physician-assistant practicing in Montana. The District Court denied respondents' motion for a preliminary injunction, finding that they had not established any likelihood of prevailing on their claim that the law imposed an "undue burden" within the meaning of *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). 906 F. Supp. 561, 567 (Mont. 1995). The Court of Appeals for the Ninth Circuit vacated the District Court's judgment, holding that respondents had shown a "fair chance of success on the merits" of their claim, and thus had met the threshold requirement for preliminary injunctive relief under Circuit precedent. 94 F. 3d 566, 567–568 (1996). The case was remanded to the District Court with instructions to reconsider the "balance of hardships" and determine whether entry of a preliminary injunction was ultimately warranted. *Ibid.*

Jersey," which in turn requires meeting the criteria in N. J. Stat. Ann. §§ 45:9–6, 45:9–7 (West 1991), and N. J. Stat. Ann. § 45:9–8 (West Supp. 1997)); N. M. Stat. Ann. §§ 30–5–1(C), 30–5–3 (1994) (as interpreted in N. M. Op. Atty. Gen. 90–19 (1990)); N. M. Stat. Ann. § 61–6–11 (1996); N. C. Gen. Stat. § 14–45.1(a) (1993); *id.*, § 90–9 (Supp. 1996); N. D. Cent. Code § 14–02.1–04(1) (1991); *id.*, § 43–17–18 (1993); Ohio Rev. Code Ann. § 2919.11 (1996); *id.*, §§ 4731.091, 4731.41 (1994); Okla. Stat., Tit. 59, § 493.1 (Supp. 1997); *id.*, Tit. 63, § 1–731(A) (1997); 18 Pa. Cons. Stat. §§ 3203, 3204(a) (1983 and Supp. 1997); 63 Pa. Cons. Stat. §§ 271.6, 422.28 (1996); R. I. Code R. 14.000.009, 600.1 (1996) (limiting performance of abortions to "physicians licensed under the [applicable provisions of Rhode Island law]," which in turn requires meeting the criteria in R. I. Gen. Laws § 5–37–2 (1995)); S. C. Code Ann. § 40–47–90 (Supp. 1996) (as implemented by S. C. Code Ann. Regs. §§ 81–80, 81–81, 81–90 (Supp. 1996)); S. C. Code Ann. §§ 44–41–10(b), 44–41–20 (1985); S. D. Codified Laws § 34–23A–1(4) (Supp. 1997); *id.*, §§ 34–23A–3, 34–23A–4, 34–23A–5 (1994); *id.*, § 36–4–11 (Supp. 1997); Tex. Health & Safety Code Ann. § 245.010(b) (1992); Tex. Rev. Civ. Stat. Ann., Art. 4495b, § 3.04 (Vernon Supp. 1997); Utah Code Ann. §§ 58–67–302, 58–68–302 (Supp. 1996); *id.*, § 76–7–302(1) (1995); Va. Code Ann. §§ 18.2–71, 18.2–72, 18.2–73, 18.2–74 (1996); *id.*, § 54.1–2930 (1994); Wash. Rev. Code §§ 9.02.110, 9.02.120, 9.02.170(4) (Supp. 1997); *id.*, §§ 18.57.020, 18.71.050 (Supp. 1997); Wis. Stat. § 448.01(5) (1988); *id.*, § 940.15(5) (1996); Wyo. Stat. § 33–26–303 (Supp. 1996); *id.*, § 35–6–111 (1994).

The District Court has not yet reconsidered the merits of the preliminary injunction motion, but it has entered (based on the parties' stipulations) an injunction pending appeal pursuant to Federal Rule of Civil Procedure 62(c), and has postponed its hearing on the preliminary injunction motion until our disposition of petitioner's certiorari petition. Order Granting Injunction Pending Appeal, No. CV 95–083–GF–PGH (Mont., Nov. 5, 1996), App. to Pet. for Cert. 31a–32a. As a consequence, Montana's physician-only requirement is unenforceable at the present time against respondent Susan Cahill, who is the only nonphysician licensed to perform abortions in Montana.

The Court of Appeals' conclusion that respondents had established a "fair chance of success on the merits" of their constitutional challenge is inconsistent with our treatment of the physician-only requirement at issue in *Casey.* That requirement involved only the provision of *information* to patients, and not the actual *performance* of abortions, yet we nonetheless held—overruling our prior holding in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 448 (1983)—that the limitation to physicians was valid. *Casey, supra,* at 884–885. We found that "[s]ince there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a *substantial obstacle to a woman seeking an abortion,* . . . it is not an undue burden." 505 U. S., at 884–885 (emphasis added). The District Court, quoting this precise passage, held: "There exists insufficient evidence in the record to support the conclusion [that] the requirement that a licensed physician perform an abortion would amount, 'in practical terms, to a *substantial obstacle to a woman seeking an abortion.*' Accordingly, it is unlikely that [respondents] will prevail upon their suggestion that the requirement constitutes an 'undue burden' within the meaning of *Casey.*" 906 F. Supp., at 567 (quoting *Casey, supra,* at 884 (emphasis added)).

The Court of Appeals never contested this District Court conclusion that there was "insufficient evidence" in the record that the requirement posed a "'substantial obstacle to a woman seeking an abortion.'" Instead, it held that the physician-only requirement was arguably invalid because its *purpose*, according to the Court of Appeals, may have been to create a substantial obstacle to women seeking abortions. 94 F. 3d, at 567. But even assuming the correctness of the Court of Appeals' implicit premise—that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right (here it is uncontested that there was insufficient evidence of a "substantial obstacle" to abortion) could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results, see, *e. g.*, *Washington* v. *Davis*, 426 U. S. 229, 246 (1976); much less do we assume it when the results are harmless. One searches the Court of Appeals' opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the Montana Legislature. If the motion at issue here were a defendant's motion for summary judgment, and if the plaintiff's only basis for proceeding with the suit were a claim of improper legislative purpose, one would demand *some* evidence of that improper purpose in order to avoid a nonsuit. And what is at issue here is not even a defendant's motion for summary judgment, but a plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher. "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129–130 (2d ed. 1995) (emphasis added; footnotes omitted).

Respondents claim in this Court that the Montana law must have had an invalid purpose because "all health evidence contradicts the claim that there is any health basis" for the law. Brief in Opposition 7. Respondents contend that "the only extant study comparing the complication rates for first-trimester abortions performed by [physician-assistants] with those for first-trimester abortions performed by physicians found no significant difference." *Ibid.* But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" 505 U. S., at 885 (emphasis added). Respondents fall back on the fact that an antiabortion group drafted the Montana law. But that says nothing significant about the legislature's purpose in passing it.

Today's dissent, for its part, claims that "there is substantial evidence indicating that the sole purpose of the statute was to target a particular licensed professional" (respondent Susan Cahill). *Post*, at 979–980. It is true that the law "targeted" Cahill in the sense that she was the only nonphysician performing abortions at the time it was passed. But it is difficult to see how that helps rather than harms respondents' case. The dissent does not claim that this was an unconstitutional bill of attainder, nor was that the basis on which the Court of Appeals relied. (Such a contention would be implausible as applied to a provision so commonplace as to exist in 40 other States, see n. 1, *supra.*) And the basis on which the Court of Appeals *did* rely (that the purpose of the law may have been to create a "substantial obstacle" to abortion) is positively contradicted by the fact that only a single practitioner is affected. That is especially so since under the old scheme Cahill could only perform

abortions with a licensed physician (who also performs abortions) present, see Brief in Opposition 4, meaning that no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available. All this strongly supports the District Court's finding, after hearing testimony, that there was insufficient evidence that the law created a "substantial obstacle" to abortion. And there is simply no evidence that the legislature intended the law to do what it plainly did not do.[2]

The Court of Appeals' decision is also contradicted by our repeated statements in past cases—none of which was so much as cited by the Court of Appeals, despite the District Court's discussion of two of them—that the performance of abortions may be restricted to physicians. We first expressed this view (although it was not necessary to our holding) in *Roe* v. *Wade*, 410 U. S. 113, 165 (1973), saying that "[t]he State may define the term 'physician,' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." We reiterated this view in *Connecticut* v. *Menillo*, 423 U. S. 9, 11 (1975) *(per curiam)*, where, in the course of holding that the Federal Constitution posed no bar to the conviction of a person with no medical training for the performance of an abortion, we said that "prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference." Finally, in *Akron*, in the course of striking down a requirement that licensed physicians rather than other medical personnel provide specified information to patients (the holding overruled in *Casey*), we emphasized that our prior cases "left no doubt that, to ensure the safety of

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[2] Since the record does not support a conclusion that "the legislature's predominant motive," *post*, at 980, was to create a "substantial obstacle" to abortion, it is quite unnecessary to address "whether the Court of Appeals misread this Court's opinions in *Miller* [v. *Johnson*, 515 U. S. 900 (1995),] and *Shaw*," *post*, at 981.

the abortion procedure, the States may mandate that only physicians perform abortions." 462 U. S., at 447 (citing *Roe*, *supra*, at 165, and *Menillo*, *supra*, at 11).

Respondents urge us to ignore the error in the Court of Appeals' judgment because the case comes to us prior to the entry of a final judgment in the lower courts. It is true that we are ordinarily reluctant to exercise our certiorari jurisdiction in that circumstance. See, *e. g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916). But our cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts, see, *e. g.*, *Estelle* v. *Gamble*, 429 U. S. 97, 98 (1976); *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); see also R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 4.18 (7th ed. 1993) (citing cases), and we conclude here that reversal of the Court of Appeals' judgment in a summary disposition is appropriate, for two reasons. First, as already noted, the Court of Appeals' decision is clearly erroneous under our precedents.[3] Second, the lower court's judgment has produced immediate consequences for Montana—in the form of a Rule 62(c) injunction against implementation of its law pending the District Court's resolution of respondents' motion for a preliminary injunction—and has created a real threat of such consequences for the six other States in the Ninth Circuit that have physician-only requirements.[4] Indeed, plaintiffs

[3] The dissent says that the Court of Appeals did not resolve any important issue of law in this case, but instead merely remanded to the District Court after "determin[ing] that a further inquiry into the facts [was] appropriate." *Post*, at 981. We disagree. The Court of Appeals expressly found, and it was necessary to its disposition, that respondents had shown a "fair chance of success" on their claim of undue burden. 94 F. 3d 566, 567–568 (CA9 1996). As already explained, that determination of law is inconsistent with our precedents.

[4] See Alaska Stat. Ann. §§ 08.64.200, 18.16.010(a)(1) (1996); Cal. Health & Safety Code Ann. § 123405 (West 1996) (as interpreted under prior statutory designation in 74 Op. Cal. Atty. Gen. 101 (1991));

in the Ninth Circuit seeking to challenge those States' laws may well be able to meet the threshold "fair chance of success" requirement for a preliminary injunction merely by alleging an improper purpose for the physician-only rule, since, as noted above, the Court of Appeals did not appear to rely on any evidence suggesting an unlawful motive on the part of the Montana Legislature.[5]

For the foregoing reasons, we grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Haw. Rev. Stat. §§ 453–4, 453–16(a)(1) (1993); Idaho Code § 18–608 (1997); *id.*, §§ 54–1803(3), 54–1803(4) (1994); Nev. Rev. Stat. § 442.250(1)(a) (1991); *id.*, § 630.160 (1995); Wash. Rev. Code §§ 9.02.110, 9.02.120, 9.02.170(4) (Supp. 1997); *id.*, §§ 18.57.020, 18.71.050 (Supp. 1997).

[5] The dissent contends that some States which restrict the performance of abortions to licensed physicians may define "licensed physician" to include "physician-assistant" when the latter works under the former's supervision; thus, the dissent says, the Court of Appeals' decision may not in fact be inconsistent with the physician-only regimes of other States. *Post*, at 980–981. But the provisions of state law to which the dissent points reflect the general definition of what qualifies as the "authorized practice" of medicine, without making any specific reference to abortion. See, *e. g.*, Fla. Stat. §§ 458.303(1)(a), 458.327(1), 458.347 (1991 and Supp. 1997); *post*, at 980–981, n. 7 (citing statutes). Thus, for example, under Florida law, the performance of an abortion by a physician-assistant would not constitute "practic[ing] medicine . . . without a license" for purposes of the felony defined in Fla. Stat. Ann. § 458.327(1) (Supp. 1997), but there is no reason to think it would not violate the more specific prohibition on the performance of abortions by persons other than "a doctor of medicine or osteopathic medicine licensed by the state under chapter 458 or chapter 459," Fla. Stat. §§ 390.001(1)(a), 390.001(3) (1993). A formal opinion by the Attorney General of California has reached precisely this conclusion under that State's law: "[W]e cannot accept the notion that the Legislature meant to gainsay th[e] carefully tailored and highly specific determination [that abortions should be performed by licensed physicians] when it . . . adopted the general language of the Physician Assistant Practice Act." 74 Op. Cal. Atty. Gen. 101, 108 (1991).

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

The Court may ultimately prove to be correct in its conclusion that the Court of Appeals should have affirmed the District Court's refusal to preliminarily enjoin that portion of the statute disqualifying Susan Cahill from performing abortions in Montana. Nevertheless, I do not agree that this decision has sufficient importance to justify review of the merits at this preliminary stage of the proceeding. The background of the litigation and a comment on the Court of Appeals' discussion of legislative motive will help to explain why I am not persuaded that the Court's summary disposition is appropriate.

Since 1977, respondent Cahill, a licensed physician's assistant, has been performing first-trimester abortions in Kalispell, Montana, under the supervision of Dr. James Armstrong. She is the only nonphysician in Montana who performs abortions.

Since 1974, Montana law has provided that an abortion could be performed only by a licensed physician. See Mont. Code Ann. § 50–20–109(1)(a) (1995). Because the term "licensed physician," as used in that statute, was construed to include licensed physician assistants working under the direct supervision of a physician pursuant to a state approved plan,[1] it did not disqualify Cahill from continuing her work with Dr. Armstrong.

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[1] See *Doe* v. *Esch*, No. CV–93–060–GF–PGH (Nov. 26, 1993), App. to Pet. for Cert. 33a (enjoining State from enforcing the licensed physician provision against a physician assistant, supervised by a licensed physician, who has received approval from the State Board of Medical Examiners to conduct abortions); see also Mont. Code Ann. § 37–20–403 (1993) (recognizing physician assistant as agent of the supervising physician); *id.*, § 37–20–303 (1995) (authorizing Board of Medical Examiners to approve physician assistant utilization plans detailing range of physician assistants' practice); 906 F. Supp. 561, 564 (Mont. 1995) (noting that the Montana

In 1995, the Montana Legislature enacted the statute at issue in this litigation. This statute banned physician assistants from performing abortions, provided that second-trimester abortions could only be performed in licensed hospitals, and prohibited any form of advertising of abortion services. See 1995 Mont. Laws, ch. 321. The record strongly indicates that the physician assistant provision was aimed at excluding one specific person—respondent Cahill—from the category of persons who could perform abortions. Although this is not apparent on the face of the statute, the parties agree that because Cahill is the only physician assistant who performs abortions in the State of Montana, she is the only person affected by the ban. Furthermore, the legislative hearings preceding the enactment of the statute contain numerous references to Cahill by name,[2] and the injunction against enforcement of this provision of the statute pending the appeal applies only to Cahill.[3]

The likelihood that the legislature may have enacted the statute for the sole purpose of targeting Cahill is suggested by the fact that the other two provisions in the 1995 Act—the hospitalization requirement and the advertising ban—were clearly invalid because they were reenactments of two provisions that already had been held unconstitutional in

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Board of Medical Examiners construed its authority to include approval of Cahill's utilization plan allowing her to perform first-trimester abortions).

[2] See Minutes of Committee on Public Health, Welfare & Safety, Montana Senate, 54th Legislature (Mar. 10, 1995), reprinted in App. to Pet. for Cert. 50a–60a.

[3] "1. The injunction shall apply only to Plaintiff Susan Cahill and will allow her to practice under those terms in *effect* prior to October 1, 1995. Plaintiff Cahill must be supervised by a licensed physician and shall operate under the physician assistant-certified utilization plan previously approved by the Montana State Board of Medical Examiners that includes the performance of abortions pursuant to the provisions of Mont. Code Ann. Title 37, chapter 20. No other physician assistants-certified will be allowed to perform abortions in Montana under the terms of this stipulation or the Court's order." App. to Pet. for Cert. 32a.

earlier litigation,[4] and that the State, in this litigation, conceded to be unconstitutional.[5] This history, together with Cahill's claim that the same antiabortion groups who had repeatedly targeted Cahill and Armstrong's practice were the proponents of the 1995 legislation, provided the basis for Cahill's argument that the statute was invalid as a bill of attainder, as well as an undue burden on the right to an abortion.

The discussion of legislative motive in the opinion of the Court of Appeals was a response to two decisions of this Court that suggest that such an inquiry is sometimes proper. In determining whether the "requirements serve no purpose other than to make abortions more difficult," within the meaning of *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 901 (1992), the Court of Appeals looked to our recent decisions in *Miller* v. *Johnson*, 515 U. S. 900 (1995), and *Shaw* v. *Hunt*, 517 U. S. 899 (1996).[6] Today, the Court ignores those cases, but concludes that the record is barren of evidence of any improper motive. As the discussion above indicates, this is not quite accurate; there is substantial evidence indicating that the sole purpose of the stat-

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[4] In *Doe* v. *Esch*, *supra*, the court enjoined enforcement of the hospitalization requirement, and in *Doe* v. *Deschamps*, 461 F. Supp. 682 (Mont. 1976), the court held that the advertising and solicitation prohibition were unconstitutional.

[5] Respondents challenged these two provisions—along with the ban on performance of abortions by physician assistants, and the State did not contest that it was bound by the prior judgments from enforcing these prohibitions. See 906 F. Supp., at 563.

[6] The Court of Appeals reasoned: "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.' *Miller*[, 515 U. S., at 916]. Such a forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment. *Shaw*[, 517 U. S., at 905–907]. A determination of purpose in the present case, then, may properly require an assessment of the totality of circumstances surrounding the enactment of Chapter 321, and whether that statute in fact can be regarded as serving a legitimate health function." 94 F. 3d 566, 567 (CA9 1996).

ute was to target a particular licensed professional. The statute removed the only physician assistant in the State who could perform abortions, yet there was no evidence that her practice posed any greater health risks than those performed by doctors with the assistance of unlicensed personnel. When one looks at the totality of circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature's predominant motive was to make abortions more difficult.

In any event, the Court of Appeals did not reach the constitutional issue that is presented by this litigation. The Court of Appeals simply remanded this action to the District Court because it found that the District Court had unduly confined its analysis of what constitutes an impermissible purpose. Although the parties stipulated to the entry of a limited injunction pending appeal that temporarily protects Cahill and no one else, there is no indication yet from either the District Court or the Court of Appeals that either a permanent or preliminary injunction will ever be entered against enforcement of the physician-only provision of the statute.

As I read the decisions of the Court of Appeals and the District Court, this case involves an extremely narrow issue concerning the State's power to reduce by one the small number of professionals in Montana who can lawfully perform abortions in that State. I do not perceive the slightest threat to the 40 "physician only" laws cited at the outset of the Court's opinion, particularly since some of these States might allow licensed assistants to perform abortions under the supervision of a physician as was the practice in Montana prior to 1995.[7] Because physician assistants working under

[7] Some of the States that have physician-only laws also have statutes that broadly define the medical duties that physicians can delegate to physician assistants. See, *e. g.*, Conn. Gen. Stat. §§ 20–12a, 20–12d (Supp. 1997); Fla. Stat. § 458.347 (Supp. 1997); Ill. Comp. Stat., ch. 225, §§ 95/1, 95/4(3) (1993 and Supp. 1997); Ind. Code §§ 25–27.5–5–2, 25–27.5–6–3 (1995);

the supervision of a physician might be included in the definition of "physician," it is not clear at this stage that the Court of Appeals' decision challenges any of this Court's statements (for the most part dicta), *ante*, at 974–975, that a State may restrict the performance of abortions to physicians. I think the Court would be well advised to await further developments in the case before intervening. Surely, the Court of Appeals' determination that a further inquiry into the facts is appropriate before making a final decision on the motion for a preliminary injunction does not provide a proper basis for summary action in this Court.

Having decided to take the case, however, it does seem to me that the Court should provide some enlightenment as to whether the Court of Appeals misread this Court's opinions in *Miller* and *Shaw* v. *Hunt*.

In my judgment, the petition for certiorari should be denied.

Iowa Code §§ 148C.1, 148C.4 (1989); La. Rev. Stat. Ann. §§ 37:1360.22(5), 37:1360.28, 37:1360.31.A(1), 37:1360.31.B (West Supp. 1997); Me. Rev. Stat. Ann., Tit. 32, § 3270–A (Supp. 1996); Mass. Gen. Laws § 112:9E (1996); Neb. Rev. Stat. § 71–1,107.17 (1996); R. I. Gen. Laws § 5–54–8 (1995). My research indicates that Montana and California are the only States that explicitly prohibit physician assistants from performing abortions. See 74 Op. Cal. Atty. Gen. 101 (1991) (declining to construe the physician assistant statute to allow physician assistants to perform abortions).

Reporter's Note

The next page is purposely numbered 1101. The numbers between 981 and 1101 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 3 THROUGH JUNE 18, 1997

MARCH 3, 1997

Certiorari Granted—Vacated and Remanded

No. 95–1028. UNITED STATES *v.* FADEM ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Brockamp*, 519 U. S. 347 (1997). Reported below: 52 F. 3d 202.

Miscellaneous Orders

No. D–1752. IN RE DISBARMENT OF FRIEZE. Disbarment entered. [For earlier order herein, see 519 U. S. 1004.]

No. D–1756. IN RE DISBARMENT OF ALLEN. Disbarment entered. [For earlier order herein, see 519 U. S. 1005.]

No. D–1786. IN RE DISBARMENT OF MARONEY. John W. Maroney, of Portland, Ore., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–61. JOSEPH ET AL. *v.* QUAGLINO TOBACCO & CANDY CO. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. M–62. DUNBAR *v.* IOWA. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 96–79. BOGGS *v.* BOGGS ET AL. C. A. 5th Cir. [Certiorari granted, 519 U. S. 957.] Motion of the Acting Solicitor General for leave to file a supplemental brief as *amicus curiae* after argument granted.

No. 96–272. METROPOLITAN STEVEDORE CO. *v.* RAMBO ET AL. C. A. 9th Cir. [Certiorari granted, 519 U. S. 1002.] Motion of the Acting Solicitor General for divided argument granted.

No. 96–318. RICHARDSON ET AL. *v.* MCKNIGHT. C. A. 6th Cir. [Certiorari granted, 519 U. S. 1002.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–491. INTER-MODAL RAIL EMPLOYEES ASSN. ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 9th Cir. [Certiorari granted, 519 U. S. 1003.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–651. GILBERT, PRESIDENT, EAST STROUDSBURG UNIVERSITY, ET AL. *v.* HOMAR. C. A. 3d Cir. [Certiorari granted, 519 U. S. 1052.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–5955. RICHARDS *v.* WISCONSIN. Sup. Ct. Wis. [Certiorari granted, 519 U. S. 1052.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–511. RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, 519 U. S. 1025.] Motion of appellees for divided argument denied.

No. 96–542. MCMILLIAN *v.* MONROE COUNTY, ALABAMA. C. A. 11th Cir. [Certiorari granted, 519 U. S. 1025.] Motion of Southern States Police Benevolent Association for leave to file a brief as *amicus curiae* granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 96–1324. ZARNES *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 96–7773. IN RE BONNER. Petition for writ of habeas corpus denied.

No. 96–7613. IN RE SNIPE; and
No. 96–7730. IN RE WILLIAMS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 96–795. ALLENTOWN MACK SALES & SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari granted. Reported below: 83 F. 3d 1483.

Certiorari Denied

No. 95–746. LINSCOMB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 56 F. 3d 1386.

No. 95–8279. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 254.

No. 96–845. ANDERSON ET AL. *v.* CLOW ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 89 F. 3d 1399.

No. 96–846. CEMEX, S. A. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 95 F. 3d 1164.

No. 96–895. FRANKLIN ET AL. *v.* HISER. C. A. 9th Cir. Certiorari denied. Reported below: 94 F. 3d 1287.

No. 96–922. MERCHANTS BANK OF CALIFORNIA, N. A. *v.* MARDULA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 43 Cal. App. 4th 790, 51 Cal. Rptr. 2d 63.

No. 96–943. HOME DEPOT U. S. A., INC. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (BUTLER ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 96–968. CIGNA HEALTHCARE OF CONNECTICUT, INC. *v.* NAPOLETANO ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 238 Conn. 216, 680 A. 2d 127.

No. 96–985. CHAMORRO-TORRES *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied.

No. 96–1015. ROBOKOFF ET AL. *v.* WOMEN'S CHOICE OF BERGEN COUNTY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 96–1018. WILSON, BY AND THROUGH WILSON AS CONSERVATOR OF THE PERSON AND ESTATE OF WILSON, ET AL. *v.* BROTHER RECORDS, INC., ET AL. Sup. Ct. N. H. Certiorari denied. Reported below: 141 N. H. 322, 682 A. 2d 714.

No. 96–1024. OHIO ASSOCIATION OF INDEPENDENT SCHOOLS ET AL. *v.* GOFF ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 92 F. 3d 419.

No. 96–1032. CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 94 F. 3d 198.

No. 96–1046. SHAPER *v.* TRACY, TAX COMMISSIONER OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 76 Ohio St. 3d 241, 667 N. E. 2d 368.

No. 96–1047. COUNTY OF NASSAU ET AL. *v.* AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO (AFSCME), ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 96 F. 3d 644.

No. 96–1048. ZIELINSKI *v.* OAK FOREST POLICE PENSION BOARD. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 281 Ill. App. 3d 1137, 701 N. E. 2d 839.

No. 96–1074. DAVIS *v.* HANOVER INSURANCE CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 98 F. 3d 1333.

No. 96–1083. LIFE COLLEGE, INC. *v.* MANGUM, DIRECTOR, NONPUBLIC POSTSECONDARY EDUCATION COMMISSION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 1156.

No. 96–1113. ROSATI *v.* COTTMAN TRANSMISSION SYSTEMS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 946.

No. 96–1119. BOYLE *v.* COLORADO BOARD OF MEDICAL EXAMINERS. Ct. App. Colo. Certiorari denied. Reported below: 924 P. 2d 1113.

No. 96–1147. LARK *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 671 So. 2d 824.

No. 96–1164. LAPLANT *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 204 Wis. 2d 412, 555 N. W. 2d 389.

No. 96–1169. DU VALL *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 96 F. 3d 1442.

No. 96–1176. DiSanto *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 86 F. 3d 1238.

No. 96–1192. Falcon *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 54.

No. 96–5938. Trevino-Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 86 F. 3d 65.

No. 96–6227. Woods et al. *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, et al. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 51.

No. 96–6570. Osume *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 1148.

No. 96–6608. Dexter *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 94 F. 3d 286.

No. 96–6899. Clarke *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 87 F. 3d 1214.

No. 96–7245. Block *v.* Wilkinson, Director, Ohio Department of Correction, et al. C. A. 6th Cir. Certiorari denied.

No. 96–7246. Myers *v.* Shumacher et al. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1158.

No. 96–7249. Ford *v.* Wilson. C. A. 7th Cir. Certiorari denied. Reported below: 90 F. 3d 245.

No. 96–7255. Gilliam *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 172 Ill. 2d 484, 670 N. E. 2d 606.

No. 96–7260. Slagel *v.* Shell Oil Co., Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 95 F. 3d 1154.

No. 96–7262. Philippeaux *v.* North Central Bronx Hospital et al. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 353.

No. 96–7267. Hualde-Redin et al. *v.* First Federal Savings Bank. C. A. 1st Cir. Certiorari denied. Reported below: 50 F. 3d 1.

No. 96–7270. ELLIOTT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 344 N. C. 242, 475 S. E. 2d 202.

No. 96–7278. TAYLOR *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–7280. STEPHEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–7288. HARRINGTON *v.* CALIFORNIA COMMITTEE OF BAR EXAMINERS. Sup. Ct. Cal. Certiorari denied.

No. 96–7291. SING CHO NG *v.* QUIET FOREST II HOMEOWNERS ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 87 F. 3d 1321.

No. 96–7293. AZUBUKO *v.* MONTGOMERY, CLERK-MAGISTRATE, DISTRICT COURT OF MASSACHUSETTS, SUFFOLK COUNTY. C. A. 1st Cir. Certiorari denied.

No. 96–7294. LEVINE *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 504.

No. 96–7296. NICKEL *v.* HANNIGAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 97 F. 3d 403.

No. 96–7297. BONNER *v.* ALABAMA DEPARTMENT OF HUMAN RESOURCES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 86 F. 3d 1170.

No. 96–7304. TATUM *v.* LAW OFFICES OF LINNIE L. DARDEN III ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–7306. MULLIGAN *v.* BARNETT BANK OF CENTRAL FLORIDA, N. A. Sup. Ct. Fla. Certiorari denied. Reported below: 678 So. 2d 339.

No. 96–7307. WOLF *v.* FEDERAL REPUBLIC OF GERMANY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 95 F. 3d 536.

No. 96–7308. TIMMONS *v.* TURNER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1140.

No. 96–7310. VRETTOS *v.* BELL ATLANTIC-NEW JERSEY, INC. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 949.

No. 96–7313. WILLIS *v.* PARRISH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 1469.

No. 96–7317. CARTER *v.* HOPKINS, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 92 F. 3d 666.

No. 96–7318. CARTER *v.* NEUSTRUP. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–7319. ARIGONI *v.* MASSACHUSETTS ET AL. App. Ct. Mass. Certiorari denied. Reported below: 40 Mass. App. 1129, 666 N. E. 2d 1331.

No. 96–7320. ELLISON *v.* FORREST CITY, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 96–7322. GALLEGO *v.* WILSON ET AL. C. A. 1st Cir. Certiorari denied.

No. 96–7323. DAY *v.* PAINTER, SHERIFF, MIDLAND COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 1135.

No. 96–7324. HENDRICKSON *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied.

No. 96–7326. SCOTT *v.* NACHMAN. Cir. Ct., City of Newport News, Va. Certiorari denied.

No. 96–7327. HOLCOMB *v.* THOMPSON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 87 F. 3d 1330.

No. 96–7359. DRINKARD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 97 F. 3d 751.

No. 96–7398. HOPPER *v.* GOOSBLY ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–7410. REYNA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 50.

No. 96–7414. PHIDD *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 42 Conn. App. 17, 681 A. 2d 310.

No. 96–7443. JACKSON *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 96–7444. MIXON *v.* JOHNSON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 96–7459. ADKINS *v.* GILMORE, ATTORNEY GENERAL OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 97 F. 3d 1446.

No. 96–7489. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 276 Ill. App. 3d 1144, 697 N. E. 2d 25.

No. 96–7527. MCKINLEY *v.* DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES. Ct. App. D. C. Certiorari denied.

No. 96–7528. MORETZ *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 96–7540. ASONYE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–7548. ONTIVEROS *v.* DORSEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 99 F. 3d 1150.

No. 96–7552. OLIVER *v.* FUCH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 947.

No. 96–7578. GLENN *v.* BARTLETT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 98 F. 3d 721.

No. 96–7579. BARNETT *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 96–7580. GRAY *v.* NIELSON. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1157.

No. 96–7581. HUFF *v.* CHAPLEAU, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 1341.

No. 96–7590. CAFFREY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 96–7603. MAROZSAN *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 90 F. 3d 1284.

No. 96–7605. SAWYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 649.

No. 96–7611. MACK *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 92 F. 3d 637.

No. 96–7622. CARDENAS CUELLAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 1179.

No. 96–7623. CHATRIAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 965.

No. 96–7648. MCDONNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1459.

No. 96–7653. GENINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 96–7666. NELSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 96 F. 3d 1455.

No. 96–7669. WOOD-EDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 95 F. 3d 58.

No. 96–7672. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 F. 3d 623.

No. 96–7673. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 359.

No. 96–7677. DOHERTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1159.

No. 96–7687. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 698.

No. 96–7688. SHAFFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 114.

No. 96–7690. SWANEY *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 957.

No. 96–7693. SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 375.

No. 96–7698. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 96–7700. MCKINNEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 98 F. 3d 974.

No. 96–7705. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 1014.

No. 96–7706. SANDOVAL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 1148.

No. 96–7710. DEMPSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 129.

No. 96–7711. GRESCHNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 99 F. 3d 1151.

No. 96–7725. MATTHEWS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–850. CITY OF ST. PETERSBURG *v.* BOWEN, TRUSTEE OF THE WILLIAM A. BOWEN TRUST AGREEMENT. Dist. Ct. App. Fla., 2d Dist. Motion of Florida League of Cities, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 675 So. 2d 626.

No. 96–860. ROE *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Motion of petitioner for leave to file redacted appendices to petition for writ of certiorari granted. Certiorari denied.

No. 96–1027. MICHIGAN *v.* FERNENGEL. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 216 Mich. App. 420, 549 N. W. 2d 361.

Rehearing Denied

No. 95–8502. TIDIK *v.* TIDIK, 519 U. S. 1076;

No. 96–409. DROBNY ET UX. *v.* UNITED STATES, 519 U. S. 1055;

No. 96–423. COULTER ET AL. *v.* METROPOLITAN LIFE INSURANCE CO., INC., ET AL., 519 U. S. 1040;

No. 96–809. GOULDING *v.* UNITED STATES, 519 U. S. 1059;

No. 96–835. BELL *v.* UNITED STATES POSTAL SERVICE, 519 U. S. 1078;

No. 96–5170. MORRIS ET UX. *v.* UNITED STATES ET AL., 519 U. S. 883;

No. 96–6427. COOPER *v.* MALONE ET AL., 519 U. S. 1062;

No. 96–6517. PARKER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 519 U. S. 1064;

No. 96–6617. BAST *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 519 U. S. 1081;

No. 96–6668. WOMBLE *v.* NORTH CAROLINA, 519 U. S. 1095;

No. 96–6737. WRONKE *v.* CANADY, 519 U. S. 1096;

No. 96–6813. FOX *v.* UNITED STATES, 519 U. S. 1068; and

No. 96–6932. IN RE DELESPINE, 519 U. S. 1054. Petitions for rehearing denied.

No. 95–6649. JONES *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 516 U. S. 1057. Motion for leave to file petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice White (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit during the period March 10 through March 11, 1997, and for such time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

MARCH 17, 1997

Certiorari Granted—Vacated and Remanded

No. 95–1546. SHOKETSU KINZOKU KOGYO KABUSHIKI CO., LTD., AKA SMC CORP., ET AL. *v.* FESTO CORP. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, *ante*, p. 17. Reported below: 72 F. 3d 857.

No. 96–874. HONEYWELL, INC. *v.* LITTON SYSTEMS, INC. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case

remanded for further consideration in light of *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co., ante,* p. 17. Reported below: 87 F. 3d 1559.

No. 96–939. BRANDT, AS CHAPTER 7 TRUSTEE OF THE ESTATE OF SOUTHEAST BANKING CORP., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N. A., ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Atherton* v. *FDIC,* 519 U. S. 213 (1997). Reported below: 92 F. 3d 1199.

Miscellaneous Orders

No. A–598. GESKE & SONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. D–1764. IN RE DISBARMENT OF MINCEY. Disbarment entered. [For earlier order herein, see 519 U. S. 1075.]

No. D–1765. IN RE DISBARMENT OF FIORE. Disbarment entered. [For earlier order herein, see 519 U. S. 1075.]

No. D–1766. IN RE DISBARMENT OF PITT. Disbarment entered. [For earlier order herein, see 519 U. S. 1075.]

No. D–1778. IN RE DISBARMENT OF RUDD. Jeffrey D. Rudd, of Roanoke, Va., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on February 18, 1997 [519 U. S. 1105], is discharged.

No. D–1787. IN RE DISBARMENT OF LEVY. Gerald Levy, of Parsippany, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1788. IN RE DISBARMENT OF AURIEMMA. Robert C. Auriemma, of Towaco, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1789. IN RE DISBARMENT OF DENKER. Aaron David Denker, of Mt. Laurel, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–32. BILLY-EKO *v.* UNITED STATES. Motion for reconsideration of order denying motion to direct the Clerk to file petition for writ of certiorari out of time [519 U. S. 991] denied.

No. M–63. PRINGLE *v.* DAVIS ET AL.; and
No. M–64. MILNES *v.* FLETCHER PACIFIC CONSTRUCTION CO. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 96–511. RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, 519 U. S. 1025.] Motion of James J. Clancy for leave to file a brief as *amicus curiae* granted.

No. 96–651. GILBERT, PRESIDENT, EAST STROUDSBURG UNIVERSITY, ET AL. *v.* HOMAR. C. A. 3d Cir. [Certiorari granted, 519 U. S. 1052.] Motion of National Treasury Employees Union for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: respondent, 20 minutes; National Treasury Employees Union, 10 minutes.

No. 96–1037. KIOWA TRIBE OF OKLAHOMA *v.* MANUFACTURING TECHNOLOGIES, INC. Ct. Civ. App. Okla.;
No. 96–1059. SYCUAN BAND OF MISSION INDIANS ET AL. *v.* WILSON, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir.; and
No. 96–1102. SOUTH CAROLINA ET AL. *v.* ENVIRONMENTAL TECHNOLOGY COUNCIL. C. A. 4th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 96–1330. BLACK *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 96–6673. STEVEN L. ET AL. *v.* BOARD OF EDUCATION OF DOWNERS GROVE GRADE SCHOOL DISTRICT NO. 58. C. A. 7th Cir.;

No. 96–7348. VEALE ET UX. *v.* CITIBANK, F. S. B. C. A. 11th Cir.; and

No. 96–7397. GUERRIERO *v.* LUFTHANSA GERMAN AIRLINES, INC. App. Ct. Mass. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 7, 1997, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 96–6867. O'DELL *v.* NETHERLAND, WARDEN, ET AL. C. A. 4th Cir. [Certiorari granted, 519 U. S. 1050.] Motion for appointment of counsel granted, and it is ordered that Robert S. Smith, Esq., of New York, N. Y., be appointed to serve as counsel for petitioner in this case.

No. 96–7185. BATES *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 519 U. S. 1108.] Motion for appointment of counsel granted, and it is ordered that C. Richard Oren, Esq., of Rochester, Ind., be appointed to serve as counsel for petitioner in this case.

No. 96–7824. IN RE IJEMBA; and

No. 96–7899. IN RE WILLIAMS. Petitions for writs of habeas corpus denied.

No. 96–7382. IN RE MARTIN; and

No. 96–7495. IN RE ATKINS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 96–188. GENERAL ELECTRIC CO. ET AL. *v.* JOINER ET UX. C. A. 11th Cir. Certiorari granted. Reported below: 78 F. 3d 524.

No. 96–670. FOSTER, GOVERNOR OF LOUISIANA, ET AL. *v.* LOVE ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 90 F. 3d 1026.

No. 96–779. ARKANSAS EDUCATIONAL TELEVISION COMMISSION *v.* FORBES. C. A. 8th Cir. Certiorari granted. Reported below: 93 F. 3d 497.

Certiorari Denied

No. 95–1096. MICRON SEPARATIONS, INC. *v.* PALL CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 66 F. 3d 1211.

No. 96–235. CALIFORNIA FRANCHISE TAX BOARD *v.* MACFARLANE. C. A. 9th Cir. Certiorari denied. Reported below: 83 F. 3d 1041.

No. 96–684. JONES *v.* RUNYON, POSTMASTER GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 91 F. 3d 1398.

No. 96–766. ARGENT CHEMICAL LABORATORIES, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 93 F. 3d 572.

No. 96–812. HINES *v.* FRANKLIN HOMES, INC., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 680 So. 2d 1033.

No. 96–815. D'AMELIA *v.* DOE. C. A. 2d Cir. Certiorari denied. Reported below: 81 F. 3d 1204.

No. 96–851. MAXWELL *v.* J. BAKER, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 86 F. 3d 1098.

No. 96–856. YEE *v.* HUGHES AIRCRAFT CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 92 F. 3d 1195.

No. 96–868. CONLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 92 F. 3d 157.

No. 96–900. VISWANATHAN *v.* BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 95 F. 3d 43.

No. 96–904. ZIMMERMAN ET AL. *v.* VOLKSWAGEN OF AMERICA, INC., ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 128 Idaho 851, 920 P. 2d 67.

No. 96–908. FORT STEWART ASSOCIATION OF EDUCATORS *v.* WESTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 87 F. 3d 1330.

No. 96–915. ASSOCIATED INDUSTRIES OF FLORIDA, INC., ET AL. *v.* AGENCY FOR HEALTH CARE ADMINISTRATION ET

AL. Sup. Ct. Fla. Certiorari denied. Reported below: 678 So. 2d 1239.

No. 96–924. PREFERRED RISK MUTUAL INSURANCE CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 86 F. 3d 789.

No. 96–928. WELLS FARGO BANK, N. A. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 88 F. 3d 1012.

No. 96–942. FIRST SECURITY BANK ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 91 F. 3d 130.

No. 96–945. CROSBY *v.* HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY, DBA SOUTH GEORGIA MEDICAL CENTER, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 93 F. 3d 1515.

No. 96–959. TEXAS *v.* CLARK. Ct. Crim. App. Tex. Certiorari denied. Reported below: 929 S. W. 2d 5.

No. 96–962. PRICE ET AL. *v.* CITY OF CHARLOTTE; and
No. 96–1141. CITY OF CHARLOTTE *v.* PRICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 93 F. 3d 1241.

No. 96–1007. OLIVER, ADMINISTRATRIX OF THE ESTATE OF OLIVER, DECEASED, ET AL. *v.* OSHKOSH TRUCK CORP. C. A. 7th Cir. Certiorari denied. Reported below: 96 F. 3d 992.

No. 96–1013. BUSTER ET AL. *v.* THOMAS, HEAD & GREISEN EMPLOYEES TRUST ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1449.

No. 96–1017. WEAVER *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 92 F. 3d 1207.

No. 96–1038. FISCHER ET AL. *v.* PHILADELPHIA ELECTRIC CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 96 F. 3d 1533.

No. 96–1040. BURNS *v.* AAF-MCQUAY, INC. C. A. 4th Cir. Certiorari denied. Reported below: 96 F. 3d 728.

No. 96–1054. SANDERS *v.* ARNESON PRODUCTS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 1351.

No. 96–1055. PARAGON PROPERTIES CO. *v.* CITY OF NOVI. Sup. Ct. Mich. Certiorari denied. Reported below: 452 Mich. 568, 550 N. W. 2d 772.

No. 96–1056. WORD OF FAITH WORLD OUTREACH CENTER CHURCH ET AL. *v.* SAWYER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 90 F. 3d 118.

No. 96–1061. MADRIL *v.* GALLEGO. Ct. App. Ariz. Certiorari denied.

No. 96–1063. PETTCO ENTERPRISES, INC., ET AL. *v.* WHITE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 98 F. 3d 1353.

No. 96–1066. BEGIER *v.* BEGIER. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–1069. HEALOW *v.* ANESTHESIA PARTNERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 92 F. 3d 1192.

No. 96–1070. FELTNER *v.* MCA TELEVISION, LTD. C. A. 11th Cir. Certiorari denied. Reported below: 89 F. 3d 766.

No. 96–1072. ROBB *v.* MISSISSIPPI BAR. Sup. Ct. Miss. Certiorari denied. Reported below: 684 So. 2d 615.

No. 96–1079. TREVINO *v.* GATES ET AL.; and
No. 96–1229. GATES ET AL. *v.* TREVINO. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 911.

No. 96–1084. MOREHEAD *v.* ATKINSON-KIEWIT, J. V., ET AL.; and DIGIOVANNI *v.* TRAYLOR BROTHERS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 97 F. 3d 603 (first judgment) and 624 (second judgment).

No. 96–1085. MCLEMORE ET AL. *v.* BRANCH BANKING & TRUST CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 F. 3d 1439.

No. 96–1092. CRAWFORD ET AL. *v.* LUNGREN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 380.

No. 96–1096. BAHETH ET AL. *v.* GUARANTY BANK & TRUST CO., NKA REGIONS BANK, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 953.

No. 96–1097. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA ET AL. *v.* CANSECO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 93 F. 3d 600.

No. 96–1103. MISSOURI PACIFIC RAILROAD CO., DBA UNION PACIFIC RAILROAD CO. *v.* JOHNSON ET UX., AS REPRESENTATIVES OF THE ESTATE OF JOHNSON, DECEASED. Ct. App. Okla. Certiorari denied.

No. 96–1105. GUICE ET AL. *v.* CHARLES SCHWAB & CO., INC., ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 89 N. Y. 2d 31, 674 N. E. 2d 282.

No. 96–1106. KUHN *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING. Commw. Ct. Pa. Certiorari denied.

No. 96–1110. SCHROERING *v.* COURIER-JOURNAL & LOUISVILLE TIMES CO. Ct. App. Ky. Certiorari denied.

No. 96–1111. CITY AND COUNTY OF SAN FRANCISCO ET AL. *v.* CARPENTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 93 F. 3d 627.

No. 96–1115. VERGARA *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 96–1117. UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN ET AL. *v.* LECKIE SMOKELESS COAL CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 573.

No. 96–1121. BRYAN *v.* EAST STROUDSBURG UNIVERSITY. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 689.

No. 96–1122. HARTMAN ET AL. *v.* NORTHERN SERVICES, INC., NKA HEALTH SERVICES MANAGEMENT, INC., ET AL. Ct. App. Minn. Certiorari denied.

No. 96–1123. MCCLAIN *v.* RHO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–1124. SMITH ET UX. *v.* ROMAN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–1125. IN RE BROADBELT, JUDGE, MUNICIPAL COURT OF NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 146 N. J. 501, 683 A. 2d 543.

No. 96–1127. UNITED STATES *v.* EXXON CORP. AND SUBSIDIARIES. C. A. Fed. Cir. Certiorari denied. Reported below: 88 F. 3d 968.

No. 96–1129. MOSCHETTI *v.* MARYLAND. Cir. Ct. Howard County, Md. Certiorari denied.

No. 96–1130. VINCI *v.* WASTE MANAGEMENT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 80 F. 3d 1372.

No. 96–1131. VOLBERG *v.* PATAKI, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 507.

No. 96–1135. CITY OF DETROIT PENSION FUND ET AL. *v.* PRUDENTIAL SECURITIES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 91 F. 3d 26.

No. 96–1136. HELTON *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 624 N. E. 2d 499.

No. 96–1137. TANCA *v.* NORDBERG, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF EMPLOYMENT AND TRAINING. C. A. 1st Cir. Certiorari denied. Reported below: 98 F. 3d 680.

No. 96–1138. UNITED STATES EX REL. SYLVESTER *v.* NORTHROP GRUMMAN CORP. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 155.

No. 96–1144. DAVIS *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO, CLC, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 98 F. 3d 1333.

No. 96–1145. UGWU *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 55 Ark. App. xxiii.

No. 96–1155. OVERFIELD *v.* BONSIGNORE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 99 F. 3d 1144.

No. 96–1158. SUAN SEE CHONG ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 105 F. 3d 671.

No. 96–1170. MOTHERSHED *v.* DURBIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–1185. McGillivray *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 86 F. 3d 1159.

No. 96–1194. Jones *v.* Forest Industries Insurance Exchange. Ct. App. Ore. Certiorari denied. Reported below: 142 Ore. App. 311, 920 P. 2d 182.

No. 96–1200. Spinden *v.* GS Roofing Products Co., Inc. C. A. 8th Cir. Certiorari denied. Reported below: 94 F. 3d 421.

No. 96–1209. Campbell *v.* Towse, Mayor, City of Alton, et al. C. A. 7th Cir. Certiorari denied. Reported below: 99 F. 3d 820.

No. 96–1217. Flores *v.* FMC Corp. et al. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 96–1220. Morewitz *v.* Ashmore. Sup. Ct. Va. Certiorari denied. Reported below: 252 Va. 141, 475 S. E. 2d 271.

No. 96–1225. Markson et ux. *v.* A & W Investors Group, Inc. Ct. App. Ariz. Certiorari denied.

No. 96–1226. Shaffett *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 1148.

No. 96–1232. Californiaa *v.* Clinton, President of the United States. C. A. 9th Cir. Certiorari denied.

No. 96–1235. Ilic *v.* Liquid Air Corp. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 555.

No. 96–1237. Patrick *v.* United States et al. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1139.

No. 96–1244. Beyong Chul Choi *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 101 F. 3d 92.

No. 96–1250. Fort *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 92 F. 3d 540.

No. 96–1255. Rheinstrom *v.* Robinson, Administrator, Illinois Attorney Registration and Disciplinary Commission. Sup. Ct. Ill. Certiorari denied.

No. 96–1262. Volpe *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 115.

No. 96–1266. ANTONIO PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–1285. DENMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 399.

No. 96–1292. THANH HAI VOMINH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 19.

No. 96–1298. SMALLWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 1136.

No. 96–1302. MAIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–1306. EMERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1140.

No. 96–1311. SEVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 953.

No. 96–6318. RUCCI *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 543 Pa. 261, 670 A. 2d 1129.

No. 96–6561. HARVEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 224 App. Div. 2d 713, 638 N. Y. S. 2d 963.

No. 96–6616. BEASLEY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 544 Pa. 554, 678 A. 2d 773.

No. 96–6653. OBOH *v.* UNITED STATES; and
No. 96–6658. BOWEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 F. 3d 1082.

No. 96–6714. BERMUDEZ-REYES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 1149.

No. 96–6758. MORDAN *v.* UNITED STATES; and
No. 96–6921. TAUIL-HERNANDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 88 F. 3d 576.

No. 96–6759. FLETCHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 91 F. 3d 48.

No. 96–6780. GOINS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 96–6898. AKAMIOKHOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 1468.

No. 96–6967. SADOWSKI *v.* NATIONAL CREDIT UNION ADMINISTRATION ET AL. (two judgments). C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 948.

No. 96–6990. NELSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 90 F. 3d 636.

No. 96–7011. FOSTER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 679 So. 2d 747.

No. 96–7022. WASHINGTON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 90 F. 3d 945.

No. 96–7063. VALDEZ-MEJIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 98 F. 3d 1352.

No. 96–7089. HEATWOLE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 344 N. C. 1, 473 S. E. 2d 310.

No. 96–7186. FULLWOOD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 343 N. C. 725, 472 S. E. 2d 883.

No. 96–7254. EMERSON *v.* GILMORE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 91 F. 3d 898.

No. 96–7273. SMITH *v.* PICK 'N SAVE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 133.

No. 96–7301. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 173 Ill. 2d 48, 670 N. E. 2d 638.

No. 96–7334. SCOTT *v.* DIME SAVINGS BANK OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 107.

No. 96–7340. ROSENBALM *v.* DEMORALES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 96–7344. SHEETS *v.* MOORE. C. A. 6th Cir. Certiorari denied. Reported below: 97 F. 3d 164.

No. 96–7346. SAIYED *v.* WASHINGTON. Super. Ct. Wash., King County. Certiorari denied.

No. 96–7347. RUTHERS *v.* GULCH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 85 F. 3d 617.

No. 96–7349. SOUTHERN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–7350. SMITH *v.* WHITE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 92 F. 3d 1186.

No. 96–7355. FINBERG *v.* WORKMEN'S COMPENSATION APPEAL BOARD OF PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied.

No. 96–7356. GEORGE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 323 S. C. 496, 476 S. E. 2d 903.

No. 96–7367. MITCHELL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 708.

No. 96–7385. LUX ET UX. *v.* COUNTY OF SPOTSYLVANIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 91 F. 3d 131.

No. 96–7386. WALL *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 132.

No. 96–7388. PIGRAM *v.* THYMES ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–7389. HAYS *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 85 F. 3d 1492.

No. 96–7391. BISHOP *v.* BISHOP. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 278 Ill. App. 3d 1121, 699 N. E. 2d 600.

No. 96–7401. FERRELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 680 So. 2d 390.

No. 96–7405. HERMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 98 F. 3d 171.

No. 96–7408. BRAYALL ET VIR *v.* DART INDUSTRIES ET AL. App. Ct. Mass. Certiorari denied.

No. 96–7409. SISCO *v.* AULT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 96–7418. MARCHMAN *v.* COLE. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 277 Ill. App. 3d 1099, 698 N. E. 2d 717.

No. 96–7419. TODD *v.* NEWBERRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 96–7420. JOHNSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 98 F. 3d 1339.

No. 96–7434. WIGGINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 278 Ill. App. 3d 1142, 699 N. E. 2d 610.

No. 96–7440. TURNER *v.* KUYKENDALL. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 648.

No. 96–7442. JOHNSON *v.* MILLER, SUPERINTENDENT, CORRECTIONAL INDUSTRIAL COMPLEX, PENDLETON, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 82 F. 3d 420.

No. 96–7445. JAE *v.* COYNE. C. A. 3d Cir. Certiorari denied. Reported below: 96 F. 3d 1433.

No. 96–7447. ARTIS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 687 A. 2d 194.

No. 96–7450. LIDMAN *v.* DEPARTMENT OF STATE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 947.

No. 96–7451. JACKSON *v.* CHAMPION, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 96 F. 3d 1453.

No. 96–7453. TOBIE *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1158.

No. 96–7456. LEDET *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 96–7465. FINKS *v.* AMES DEPARTMENT STORES, INC. C. A. 1st Cir. Certiorari denied.

No. 96–7468. GREEN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 221 Ga. App. 436, 472 S. E. 2d 1.

No. 96–7470. DODD *v.* OLIVER ET AL. Sup. Ct. Ga. Certiorari denied.

No. 96–7472. DOUGLAS *v.* SYLVESTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 97 F. 3d 1446.

No. 96–7476. VANN *v.* DARDEN. C. A. 2d Cir. Certiorari denied.

No. 96–7478. THOMPSON *v.* TRUSTY, JUDGE, DISTRICT COURT OF KENTUCKY, KENTON COUNTY. Cir. Ct. Kenton County, Ky. Certiorari denied.

No. 96–7480. BUNNELL *v.* SHELL OIL STATION ET AL. Ct. App. Ohio, Warren County. Certiorari denied.

No. 96–7481. HAWKINS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 96–7482. HENDERSON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1721.

No. 96–7483. DYER *v.* STEVENS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1138.

No. 96–7485. HOWARD *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 1134.

No. 96–7486. FITZPATRICK *v.* BOYER ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–7487. MORGAN, AKA HOLLIDAY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 92 F. 3d 1200.

No. 96–7488. MMUBANGO *v.* MINNESOTA POLLUTION CONTROL AGENCY. Ct. App. Minn. Certiorari denied.

No. 96–7492. GRACE ET AL. *v.* BURRILL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 503.

No. 96–7497. BURKS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–7500. WAFER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–7501. WAFER *v.* GAY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 48.

No. 96–7502. SPIEGELMAN *v.* REPRISE RECORDS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 685.

No. 96–7507. ZARAGOZA *v.* CIANCHETTI, JUDGE, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 966.

No. 96–7508. ATKINS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1122, 923 P. 2d 1119.

No. 96–7510. GRANT *v.* MCCOY, SUPERINTENDENT, CAYUGA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 353.

No. 96–7514. CRAWFORD *v.* HAWAII. C. A. 9th Cir. Certiorari denied. Reported below: 87 F. 3d 1318.

No. 96–7523. EDWARDS *v.* ANDREWS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 85 F. 3d 640.

No. 96–7524. FRENCH *v.* PEPE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 96–7534. WESLEY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 503, 916 P. 2d 793.

No. 96–7536. ABERNATHY *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 96–7538. BURNETT *v.* WILLETTE. Ct. App. Mich. Certiorari denied.

No. 96–7543. BREWER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–7604. LAUREANO *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 353.

No. 96–7609. TADROS *v.* BROOKLYN DEVELOPMENTAL CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 505.

No. 96–7614. SPRUILL *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP. C. A. 3d Cir. Certiorari denied.

No. 96–7638. STANDIFIRD *v.* RICHARDSON, COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 87 F. 3d 1322.

No. 96–7645. CUONG DUY NGUYEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 550.

No. 96–7649. NICOLAU *v.* NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 504.

No. 96–7650. JONES *v.* TOOMBS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 96–7657. WATTS *v.* RAILROAD RETIREMENT BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 1152.

No. 96–7658. WOOTEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 344 N. C. 316, 474 S. E. 2d 360.

No. 96–7659. AZUBUKO *v.* FIRST NATIONAL BANK OF BOSTON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 92 F. 3d 1169.

No. 96–7663. BOUIE *v.* PETERSON, ARCHIVIST OF THE UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 103 F. 3d 135.

No. 96–7674. HARRIS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 96–7695. PROPES *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 673 N. E. 2d 534.

No. 96–7697. BROWN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 682 So. 2d 340.

No. 96–7702. BOYKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 133.

No. 96–7708. ROWE *v.* BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 938 S. W. 2d 351.

No. 96–7718. EDELBACHER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 96–7719. DIES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1461.

No. 96–7721. SMART *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 98 F. 3d 1379.

No. 96–7722. RYION *v.* UNITED STATES;
No. 96–7736. BRUCE *v.* UNITED STATES;
No. 96–7745. BRUCE *v.* UNITED STATES; and
No. 96–7767. RIALES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 957.

No. 96–7723. MARTINEAU *v.* CITY OF CYPRESS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1158.

No. 96–7724. KHANNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 550.

No. 96–7728. MONACO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 707.

No. 96–7733. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 24.

No. 96–7735. CRAIG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 141.

No. 96–7738. CARRASCO RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 655.

No. 96–7739. BOWMAN *v.* GAMMON, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 85 F. 3d 1339.

No. 96–7741. BERARD *v.* GORCZYK, COMMISSIONER, VERMONT DEPARTMENT OF CORRECTIONS, ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–7743. TORRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 99 F. 3d 360.

No. 96–7744. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 710.

No. 96–7750. FARMER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 131.

No. 96–7752. GALLAGHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 329.

No. 96–7755. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 98 F. 3d 141.

No. 96–7756. FERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–7757. PORTER *v.* WEST, SECRETARY OF THE ARMY. C. A. 7th Cir. Certiorari denied. Reported below: 99 F. 3d 1142.

No. 96–7759. GRANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 695.

No. 96–7762. HENDRICKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 349.

No. 96–7763. GRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 96 F. 3d 769.

No. 96–7764. DEGEROLAMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 95 F. 3d 182 and 100 F. 3d 14.

No. 96–7766. PROU *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 101 F. 3d 106.

No. 96–7770. WEBBER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 709.

No. 96–7771. TREVINO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–7776. JARRETT *v.* UNITED STATES; and
No. 96–7786. GLOVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 234.

No. 96–7781. BUSTAMANTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 100 F. 3d 969.

No. 96–7784. CARPENTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 409.

No. 96–7785. ATLAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 94 F. 3d 447.

No. 96–7788. LEAL *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 98 F. 3d 1339.

No. 96–7789. MALKIEWICZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 655.

No. 96–7794. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 125.

No. 96–7795. OGBUEHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 692.

No. 96–7797. ANIMASHAUM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 387.

No. 96–7800. TILLMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 115.

No. 96–7801. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 553.

No. 96–7803. KEYS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 1135.

No. 96–7805. COTTRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 654.

No. 96–7806. ADKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–7808. WOODALL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 684 A. 2d 1258.

No. 96–7809. RENFROE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 92 F. 3d 1186.

No. 96–7810. RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 553.

No. 96–7811. OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 142.

No. 96–7812. RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 654.

No. 96–7813. PHILIPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 100 F. 3d 968.

No. 96–7814. SINDRAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 96–7816. PACHECO-MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 551.

No. 96–7817. PETERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1139.

No. 96–7819. ALSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 98 F. 3d 1335.

No. 96–7821. TIMBER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 709.

No. 96–7825. IVY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 103 F. 3d 135.

No. 96–7828. MORRISON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 98 F. 3d 619.

No. 96–7834. CRITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 96–7835. PIELECH ET AL. *v.* MASSASOIT GREYHOUND, INC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 423 Mass. 534, 668 N. E. 2d 1298.

No. 96–7836. MOORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 105 F. 3d 672.

No. 96–7837. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 95 F. 3d 58.

No. 96–7838. MARKS, AKA BUSH, AKA YOUNG, AKA HANSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1462.

No. 96–7846. DOUGLAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 F. 3d 1315.

No. 96–7847. ECKERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 333.

No. 96–7855. MOLLENHOUR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 506.

No. 96–7857. BREKKE ET VIR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 1043.

No. 96–7859. POWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 555.

No. 96–7860. RIDDICK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 96–7861. WOOTEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 555.

No. 96–7863. MCKOY *v.* MORRIS, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 947.

No. 96–7867. MASON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 95 F. 3d 1520.

No. 96–7868. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 105 F. 3d 671.

No. 96–7870. HAYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 F. 3d 429.

No. 96–7876. BARAMDYKA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 840.

No. 96–7880. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 354.

No. 96–7881. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 551.

No. 96–7884. WITHERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 F. 3d 1142.

No. 96–7886. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 F. 3d 706.

No. 96–7887. GONZALEZ *v.* KUHLMANN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 1392.

No. 96–7889. DeWitte et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 155.

No. 96–7894. Clark *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 99 F. 3d 1144.

No. 96–7897. Burdex *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 100 F. 3d 882.

No. 96–7903. Velazquez-Overa *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 418.

No. 96–7908. Hooper *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 696.

No. 96–7910. Hall *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 121.

No. 96–7912. Osias *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 360.

No. 96–7913. Alvarado Orozco *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 141.

No. 96–7915. Johnson *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 114.

No. 96–7939. Houston *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 1562.

No. 96–7948. Galvan *v.* Hurley, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 101 F. 3d 704.

No. 96–7949. Hunter *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 101 F. 3d 82.

No. 95–576. Williams et al. *v.* Planned Parenthood Shasta-Diablo, Inc. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 4th 1009, 898 P. 2d 402.

Justice Scalia, with whom Justice Kennedy and Justice Thomas join, dissenting.

The issue in this case is the constitutionality of an injunction against abortion protesters. The injunction limits their First Amendment activities to a sidewalk separated from the clinic that is the object of their protest by a busy four-lane avenue. The case has made its way back here after we set aside the Supreme

Court of California's earlier judgment approving the injunction, 7 Cal. 4th 860, 873 P. 2d 1224 (1994), and remanded the case so that the court could reconsider its holding in light of our decision in *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994). 513 U. S. 956 (1994). On remand, the Supreme Court of California concluded that the provision in question "is equally valid under the new standard set forth in *Madsen*," and therefore "reaffirm[ed] the judgment in favor of Planned Parenthood." 10 Cal. 4th 1009, 1012, 898 P. 2d 402, 404 (1995). That was in my view patent error, and has been confirmed as such by *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357 (1997). I think it important to the dignity of this Court and the integrity of its processes to set aside what can only be regarded as an intentional evasion of its decrees. I would grant the petition for certiorari, summarily reverse the judgment of the Supreme Court of California, and remand for further proceedings.

This case—unlike *Schenck*—is not one in which the record reveals instances of serious unlawful conduct by clinic protesters. The following was the testimony of Janice Schoenfeld, the "escort coordinator" of the clinic, at the hearing on the application for a permanent injunction:

> "Q. Did you ever see any of this group of defendants prevent somebody from getting in the front door of the clinic?
> "A. No.
> "Q. Did you ever see them manhandle any of your clients?
> "A. No.
> "Q. Was anybody, to the best of your knowledge, that wanted to get an abortion, prevented from getting an abortion?
> "A. No.
> "Q. Did you ever attempt to make a citizen's arrest of any of the defendants?
> "A. No, I did not.
> "Q. Do you know if any of them were ever arrested?
> "A. Not at the Vallejo clinic, that I know of. Some have been in other Operation Rescue activity.
> . . . . .
> "Q. Did you ever see any of the defendants prevent any cars from parking in the parking lot?
> "A. Not prevent them from parking, no." Tr. 54–55.

This is a record so devoid of threatening physical confrontation it would make an old-fashioned union organizer blush. Yet the trial court entered—and the Supreme Court of California approved—an injunction severely curtailing the speech rights of clinic protesters in a public forum.

The basis for that injunction—and for the Supreme Court of California's initial approval of it—was the perceived government interest in preventing "increased stress and anxiety" among abortion patients. 7 Cal. 4th, at 872–876, 873 P. 2d, at 1230–1233 (internal quotation marks and citation omitted). As the Supreme Court of California explained, "emotionally jarring confrontations with anti-abortion pickets or sidewalk 'counselors' may pose serious health risks." *Id.*, at 874, 873 P. 2d, at 1232. The "substantial governmental interest in protecting the patients' physical and emotional health and safety" justified restricting the abortion opponents to areas far removed from the clinic. *Id.*, at 876, 873 P. 2d, at 1233.

This holding was no longer supportable after we vacated the Supreme Court of California's judgment in light of *Madsen*, and remanded the case for further proceedings. *Madsen*, in disallowing an injunction which prevented abortion opponents from approaching persons seeking services at an abortion clinic, said:

> "Absent evidence that the protesters' speech is independently proscribable (*i. e.*, 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." 512 U. S., at 774 (citation omitted).

Despite this holding, the Supreme Court of California, on remand, did not abandon but reaffirmed its assertion that avoiding upset to the clinic's clients justified keeping the protesters at a distance. 10 Cal. 4th, at 1021, 898 P. 2d, at 410. When the defendants again petitioned us for certiorari, we held the case pending our decision in *Schenck*.

Whatever glimmer of hope *Madsen* might have left regarding the legitimacy of the Supreme Court of California's "emotional upset" justification was entirely snuffed by *Schenck*, in which we reiterated, in the most unmistakable terms, that there is no legitimate government interest in protecting the "right of the people approaching and entering [clinics] to be left alone" on the public streets, 519 U. S., at 383. *Schenck* would require, without further

analysis, a reversal of the judgment here, but for one additional factor: In its second opinion in this case—after our remand in light of *Madsen*—the California Supreme Court for the first time discerned a second state interest in support of the injunction: an interest in "ensuring unfettered access" to the clinic, 10 Cal. 4th, at 1022, 898 P. 2d, at 410. This, it should be noted with suspicion, is an interest which the court had expressly disclaimed in its first opinion, saying that "the critical issue [is] not access, but health and safety." 7 Cal. 4th, at 879, n. 10, 873 P. 2d 1235, n. 10.

It is not normally our practice to scrutinize the record support for the grounds asserted by state courts or lower federal courts as a basis for rejecting constitutional claims. We have, however, sometimes been disposed to do so when the abridgment of First Amendment rights was at issue. See, *e. g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 915, and n. 50 (1982); *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963). And we should in my view *always* be disposed to do so when the grounds are newly minted after a remand, contradict what was said before the remand, and bear indication of an attempt to evade the consequences of our holding prompting the remand. That is the case here; and an examination of the record for support of the newly minted ground discloses that it does not exist.

The trial court made many findings regarding activities tending to cause, not blocking of the entrances to the clinic parking lot, but "increased stress and anxiety" to clinic patrons and staff: protesters "confront and intimidate women seeking [respondent's] services," "force . . . 'counseling' upon [respondent's] staff and clients," "have called staff 'murderers' or asked them not to 'kill babies' in the presence of small children," "have pursued [respondent's] clients to their cars or public transportation in an effort to distribute literature and the plastic fetuses," and "bring small children to the area who run up and down the public sidewalk in front of plaintiff's premises." App. to Pet. for Cert. 42a–43a. The trial court also made findings regarding the impact of these activities on respondent, its patrons, and its staff: "[Respondent] must escort its clients through picket lines and [petitioners'] 'picketers/counselors' in its parking lot," and "[t]he conduct of [petitioners] and their picketers/counselors have *[sic]* caused some of the women seeking counselling or services from plaintiff to become emotionally distraught." *Ibid.* But the only finding remotely related to access to the clinic is the following: Protesters "stand directly in front of [respondent's] office door and interfer

[sic] with or obstruct entrance to and from [respondent's] clinic." *Id.*, at 42a. This finding (which, by the way, has no support in the record if it is interpreted to mean *physical* obstruction[1]) pertains to behavior *at the entrance to the clinic*—which is some 100 feet inside the parking lot, from which the injunction (without objection) excludes the protesters entirely. It obviously cannot support excluding protesters from the public sidewalk adjoining the entrances to the parking lot, where it has never been so much as suggested that any blocking of access occurred. The Supreme Court of California's opinion misrepresents this, saying that "the trial court found here, that petitioners had significantly blocked driveways . . . ." 10 Cal. 4th, at 1023, 898 P. 2d, at 411. The only authority cited for this proposition is that portion of the court's own pre-*Madsen* opinion which recites *(inter alia)* the trial court's finding that protesters "pursued patients to their cars . . . to distribute literature." 7 Cal. 4th, at 867, 873 P. 2d, at 1227. This obviously does not establish (or even suggest) that petitioners "blocked driveways."[2]

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[1] There was no testimony that petitioners had *blocked* the entrance, but only statements that they had stood very close to the entrance, trying to pass literature or other material to those going in. See Tr. 17–18 (testimony of Janice Schoenfeld at hearing on preliminary injunction) ("I did not say they blocked the door. I said they stand very close to the door") ("Q. Has any one of your clients ever been prevented from entering the clinic? A. No"); *id.*, at 54 (testimony of Schoenfeld at hearing on permanent injunction) ("Q. Did you ever see any of this group of defendants prevent somebody from getting in the front door of the clinic? A. No"); *id.*, at 65 (testimony of Marsha Anderson at hearing on permanent injunction) ("Q. Did you observe any of your patrons being denied entrance into the clinic by any of the defendants? A. I know they progressed to the front door, interrupted them, but not prohibited them"). Of course if, as the trial court believed, subjecting abortion clients to "emotional upset" was unlawful, forcing clients to expose themselves to such unlawful activity in order to enter or exit the clinic *would* constitute "interfer[ing] with" their access—and that is evidently what the trial court had in mind.

[2] In a separate portion of its opinion, the Supreme Court of California stated (without any citation of record support) that "[o]ne of the tactics of the sidewalk picketers was to walk slowly across the driveway entrance, thereby delaying cars attempting to turn into the parking lot from the street." 10 Cal. 4th, at 1012, 898 P. 2d, at 404. Apart from the fact that the *trial court* made no such finding in connection with its entry of the injunction, see App. to Pet. for Cert. 42a–43a, "delaying" the entry of cars into the lot as an incidental result of lawful picket activity is by no means equivalent to "blocking driveways."

Of course, even if there had been a finding of interference with free access to the parking lot, the challenged injunction would require further findings to establish that no restraint short of total exclusion of free speech from the public sidewalk—such as limiting the number of protesters—could have eliminated the interference. Cf. *Mine Workers* v. *Bagwell*, 512 U. S. 821, 823 (1994) (injunction imposing numerical limit on picketers). A conclusion that complete exclusion of protesters was necessary in this case would be difficult to square with the history of what happened: The trial court initially issued a temporary restraining order *drafted by respondent*, which *permitted two picketers* on the sidewalk in front of the clinic. App. to Pet. for Cert. 64a–66a. Shortly thereafter, it issued a preliminary injunction *increasing to four* the number of picketers allowed on that sidewalk. *Id.*, at 67a–68a. Despite this apparent sign of success—and without any request by respondent for more restrictive relief—11 months later the trial court imposed the permanent injunction at issue here, banning all picketing in front of the clinic. The reason, of course, was that (as the Supreme Court of California concluded the first time around) the trial court was not concerned about "impeding access"; it was concerned about preventing "stress and anxiety."

Since the trial court did not find that the challenged injunction provision was necessary to secure access, the Supreme Court of California took it upon itself to provide the requisite finding. "[T]he evidence at trial," the court proclaimed, "indicated that picketers had not followed the preliminary injunction . . . ." 10 Cal. 4th, at 1024, 898 P. 2d, at 411–412. For this the court offers no support other than citation of its earlier opinion in this case, 7 Cal. 4th, at 866–867, n. 2, 873 P. 2d, at 1227, n. 2, which in turn relies upon nothing more probative than the following testimony of Janice Schoenfeld:

> "Q. Have you observed picket activity since the injunction?
>
> "A. Yes, but they followed the injunction usually, except for picketers.
>
> "MS. RYER: Thank you. I have nothing further. Thank you.
>
> "THE COURT: You say that they followed the injunction?
>
> "THE WITNESS: They followed the injunction, yes, since the injunction." Tr. 52–53.

Even if the record did establish *some* violation of the preliminary injunction, it would still not establish a violation *related to access*, supporting the proposition that banishment to the other side of the avenue was "the only practicable means of ensuring unfettered access," 10 Cal. 4th, at 1022, 898 P. 2d, at 410. As far as appears, any failure to "follo[w] the injunction" might have related to one of the many prohibitions that had nothing to do with obstructing access. Indeed, the odds are in favor of that, since almost all of the prohibitions in the preliminary injunction were of that character. The record simply does not contain the facts necessary to support the challenged provision in the name of protection of access.

* * *

This case having been held pending the issuance of our opinion in *Schenck;* and *Schenck* having come out four-square against the principal theory relied upon by the Supreme Court of California; it is quite impossible to understand why any disposition short of a reversal and remand would be appropriate. If we were prepared to take at face value the court's post-*Madsen*-invented "obstruction of entrances" justification, then there was no reason to hold the case in the first place. The hold was correct, and today's denial of certiorari smiles upon injustice to these petitioners and disregard of the processes of this Court. I dissent.

No. 96–853. MUSTANG FUEL CORP. ET AL. *v.* HATCH ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 94 F. 3d 1382.

No. 96–1041. MCVICAR, WARDEN *v.* GRIFFIN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 84 F. 3d 880.

No. 96–1043. GILMORE, WARDEN *v.* EMERSON. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 91 F. 3d 898.

No. 96–1051. ILLINOIS *v.* NITZ. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 173 Ill. 2d 151, 670 N. E. 2d 672.

No. 96–1090. CSX TRANSPORTATION, INC. *v.* SIRBAUGH. Cir. Ct. Berkeley County, W. Va. Motion of Association of American

Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 96–1109. DAVIS *v.* AT&T COMMUNICATIONS, INC. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 98 F. 3d 1353.

No. 96–1112. MARTECH USA, INC. *v.* HOEFLICH. Ct. App. Cal., 1st App. Dist. Motion of Insurance Company of North America for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 96–1173. BEEMAN ET AL. *v.* COHEN. C. A. 9th Cir. Motion of Community College League of California et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 92 F. 3d 968.

Rehearing Denied

No. 96–796. KOREAN AIR LINES CO., LTD. *v.* BICKEL ET AL., 519 U. S. 1093;

No. 96–5996. MOORE *v.* ROBERTS, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., 519 U. S. 1093;

No. 96–6205. WESTLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 519 U. S. 1094;

No. 96–6287. BELCHER *v.* LESLEY ET AL., 519 U. S. 1031;

No. 96–6589. TUMLIN *v.* GOODYEAR TIRE & RUBBER CO. ET AL., 519 U. S. 1080;

No. 96–6678. STEPHEN *v.* PRUNTY, WARDEN, 519 U. S. 1095;

No. 96–6787. STRUVE *v.* PARK PLACE APARTMENTS, 519 U. S. 1097;

No. 96–6864. BROWN *v.* TURPIN, WARDEN, 519 U. S. 1098; and

No. 96–6904. PENLAND *v.* NORTH CAROLINA, 519 U. S. 1098. Petitions for rehearing denied.

No. 94–9848. GRESHAM *v.* TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION ET AL., 516 U. S. 860;

No. 96–594. MUDIE *v.* MILTLAND RALEIGH-DURHAM, 519 U. S. 1041; and

No. 96–6581. LURIE *v.* CAESAR'S TAHOE, INC., ET AL., 519 U. S. 1045. Motions for leave to file petitions for rehearing denied.

No. 96–675. GUILBEAU ET UX. *v.* W. W. HENRY CO. ET AL., 519 U. S. 1091. Motion of petitioners for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

MARCH 24, 1997

Affirmed on Appeal

No. 96–1034. PLAYBOY ENTERTAINMENT GROUP, INC. *v.* UNITED STATES ET AL.; and

No. 96–1108. SPICE ENTERTAINMENT COS., INC. *v.* RENO, ATTORNEY GENERAL, ET AL. Affirmed on appeals from D. C. Del. Reported below: 945 F. Supp. 772.

Certiorari Granted—Vacated and Remanded

No. 96–7621. CALAMIA *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lynce* v. *Mathis*, 519 U. S. 433 (1997). Reported below: 686 So. 2d 1337.

Miscellaneous Orders

No. D–1790. IN RE DISBARMENT OF FRIEDMAN. Bruce Michael Friedman, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–65. HARTNETT *v.* STEIN, DBA WESTERN CONTRUCTION CO.; and

No. M–66. TIDIK *v.* KAUFMAN ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 95–974. ARIZONANS FOR OFFICIAL ENGLISH ET AL. *v.* ARIZONA ET AL., *ante*, p. 43. In this case, the parties shall bear their own costs.

No. 96–454. ASSOCIATES COMMERCIAL CORP. *v.* RASH ET UX. C. A. 5th Cir. [Certiorari granted, 519 U. S. 1086.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–552. AGOSTINI ET AL. *v.* FELTON ET AL.; and

No. 96–553. CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL. *v.* FELTON ET AL. C. A. 2d Cir. [Certiorari granted, 519 U. S. 1086.] Motion of Sarah Peter et al. for leave to file a brief as *amici curiae* granted.

No. 96–663. KLEHR ET UX. *v.* A. O. SMITH CORP. ET AL. C. A. 8th Cir. [Certiorari granted, 519 U. S. 1073.] Motion of Plaintiffs' Executive Committee MDL No. 1069 et al. for leave to file a brief as *amici curiae* granted.

No. 96–7879. JAHANNES *v.* REID. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 14, 1997, 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. 96–7595. IN RE SERRA. Petition for writ of mandamus denied.

No. 96–8357 (A–674). IN RE MEDINA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 96–8358 (A–675). IN RE MEDINA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 96–653. BAKER ET AL. *v.* GENERAL MOTORS CORP. C. A. 8th Cir. Certiorari granted. Reported below: 86 F. 3d 811.

Certiorari Denied

No. 96–690. NORTH BELLE VERNON BOROUGH ET AL. *v.* LIVINGSTONE ET VIR. C. A. 3d Cir. Certiorari denied. Reported below: 91 F. 3d 515.

No. 96–978. WILSON *v.* DRAKE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 87 F. 3d 1073.

No. 96–998. RELIABLE BUSINESS COMPUTERS *v.* HEURTEBISE. Sup. Ct. Mich. Certiorari denied. Reported below: 452 Mich. 405, 550 N. W. 2d 243.

No. 96–1116. AIRCRAFT BRAKING SYSTEMS CORP. *v.* LOCAL 856, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 97 F. 3d 155.

No. 96–1139. MORROW *v.* WINSLOW, JUDGE, DISTRICT COURT OF TULSA COUNTY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 94 F. 3d 1386.

No. 96–1140. TARAPACKI *v.* NEW JERSEY REINSURANCE CO. Super. Ct. N. J., App. Div. Certiorari denied.

No. 96–1142. COLE ET UX. *v.* HUNTSVILLE MEMORIAL HOSPITAL ET AL. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 920 S. W. 2d 364.

No. 96–1146. VEMCO, INC. *v.* FEDERAL INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 96 F. 3d 1449.

No. 96–1161. BARAKAT *v.* LIFE INSURANCE COMPANY OF VIRGINIA. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 1520.

No. 96–1198. FOLTICE *v.* GUARDSMAN PRODUCTS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 933.

No. 96–1202. VON GRABE *v.* ZIFF DAVIS PUBLISHING CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–1221. JORDAN *v.* GOVERNING BOARD OF THE MARIN COMMUNITY COLLEGE DISTRICT. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–1222. CAUDLE ET AL. *v.* SEARS, ROEBUCK & CO. ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 281 Ill. App. 3d 1151, 701 N. E. 2d 844.

No. 96–1247. RICHARDSON *v.* BAKERY, CONFECTIONARY & TOBACCO WORKERS, LOCAL NO. 26. C. A. 10th Cir. Certiorari denied. Reported below: 92 F. 3d 1197.

No. 96–1256. KRAYTSBERG *v.* KRAYTSBERG. App. Ct. Mass. Certiorari denied. Reported below: 40 Mass. App. 1118, 664 N. E. 2d 486.

No. 96–1259. MISSOURI *v.* FUTO. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 932 S. W. 2d 808.

No. 96–1264. HOUGH *v.* RUNYON, POSTMASTER GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 89 F. 3d 856.

No. 96–1269. GAITHER *v.* RENO, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 124.

No. 96–1315. MILLUS *v.* NEWSDAY, INC., ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 89 N. Y. 2d 840, 675 N. E. 2d 461.

No. 96–1317. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 100 F. 3d 969.

No. 96–1331. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 97 F. 3d 1453.

No. 96–1336. MCMULLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 130.

No. 96–1373. SANGUANDIKUL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 114.

No. 96–6752. ARANDA-HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 95 F. 3d 977.

No. 96–6912. VELASCO *v.* HORGAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 85 F. 3d 520.

No. 96–6993. SPIKE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1743.

No. 96–7004. ZAMORA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1752.

No. 96–7007. WASHINGTON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1749.

No. 96–7023. IKO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1723.

No. 96–7027. MATHEWSON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1730.

No. 96–7028. LANE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1726.

No. 96–7041. CARDWELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1708.

No. 96–7049. FLORIO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1716.

No. 96–7050. GARCIA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1717.

No. 96–7051. GISEBURT *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1718.

No. 96–7052. HILTUNEN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1722.

No. 96–7060. DESPAIN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1712.

No. 96–7067. KELLY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–7074. SPARKS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1743.

No. 96–7103. MONROE, AKA GRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–7106. FITZGERALD *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1716.

No. 96–7195. WILLIAMS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 684 So. 2d 1179.

No. 96–7281. SMITH *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1743.

No. 96–7330. DAWS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1712.

No. 96–7369. MAY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1730.

No. 96–7423. REEVES *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1738.

No. 96–7504. LAFEVER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1726.

No. 96–7506. MADANAT *v.* ALPHA THERAPEUTIC CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 947.

No. 96–7511. WHEELER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1750.

No. 96–7525. ECKLES *v.* CONSOLIDATED RAIL CORPORATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 94 F. 3d 1041.

No. 96–7535. BENTSEN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1706.

No. 96–7542. BARRETT *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1705.

No. 96–7549. TIERNEY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 96–7550. WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 96–7553. PERRY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 344 Md. 204, 686 A. 2d 274.

No. 96–7555. SIDLES *v.* LEWIS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 964.

No. 96–7556. RUSSELL *v.* ROBERTSON COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1139.

No. 96–7562. PAYNE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 683 So. 2d 458.

No. 96–7566. HAMPTON *v.* KILLINGER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 91 F. 3d 138.

No. 96–7568. GRANT *v.* RIVERS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 96–7571. WILSON *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 550.

No. 96–7572. WARREN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 96–7576. LOVETT *v.* MINNESOTA DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 96–7582. JOHNSON *v.* IOWA. C. A. 8th Cir. Certiorari denied.

No. 96–7585. NELSON *v.* DeTELLA, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 96–7592. THOMAS *v.* TUSAN, JUDGE, SUPERIOR COURT OF GEORGIA, FULTON COUNTY, ET AL. Sup. Ct. Ga. Certiorari denied.

No. 96–7593. SOMERS *v.* NORTHWEST IOWA MENTAL HEALTH CENTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 94 F. 3d 649.

No. 96–7597. BLAIR *v.* CALDERON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–7599. McCAIN *v.* GRAMLEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 96 F. 3d 288.

No. 96–7602. ALI *v.* GOMEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–7606. REMETA *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 85 F. 3d 513.

No. 96–7607. TROWERY *v.* GALE ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–7608. TOLLIVER *v.* MYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–7617. TROBAUGH *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 96–7652. PATTERSON *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 96–7720. HARDEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 344 N. C. 542, 476 S. E. 2d 658.

No. 96–7737. ALLEN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 281 Ill. App. 3d 1147, 701 N. E. 2d 843.

No. 96–7742. BIANCHI *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 96–7778. MCNAMARA *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 111 Md. App. 745.

No. 96–7791. BUMPASS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 551.

No. 96–7832. SINGLETON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1742.

No. 96–7841. THOMAS *v.* WEST, SECRETARY OF THE ARMY. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 670.

No. 96–7843. WHARTON *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–7854. EASTER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 100 F. 3d 523.

No. 96–7864. KELLY *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 101 F. 3d 715.

No. 96–7904. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 96–7907. GARIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 103 F. 3d 687.

No. 96–7916. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 683 A. 2d 1087.

No. 96–7917. LICCIARDI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1462.

No. 96–7919. MARSHALL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 278 Ill. App. 3d 1136, 699 N. E. 2d 608.

No. 96–7923. KOCH *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 1146.

No. 96–7925. BADLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 131.

No. 96–7927. SCROGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 98 F. 3d 1256.

No. 96–7931. AGUILAR-HIGUERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 964.

No. 96–7935. BLACK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 686 A. 2d 1061.

No. 96–7938. HOLMAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 111 Md. App. 741.

No. 96–7947. SCHWEIHS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 83 F. 3d 424.

No. 96–7954. SOTELO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 97 F. 3d 782.

No. 96–7957. VEATCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 91 F. 3d 160.

No. 96–7958. WYATT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 102 F. 3d 241.

No. 96–7964. BENTLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 964.

No. 96–7965. GOLDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 142.

No. 96–7969. MCTEER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 121.

No. 96–7970. JONES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 96–7972. ISOM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 F. 3d 920.

No. 96–7973. VIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 122.

No. 96–7979. RIVAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 170.

No. 96–7985. LUCHKOWEC *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 956.

No. 96–7990. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 122.

No. 96–7991. SUTTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 696.

No. 96–7992. RODRIGUEZ SALINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 F. 3d 706.

No. 96–7993. PACHECO-CHONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 F. 3d 706.

No. 96–7994. SILVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 122.

No. 96–8001. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 98 F. 3d 1052.

No. 96–8003. BALLISTREA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 827.

No. 96–8008. MANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1139.

No. 96–8009. NOWACZYK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 98 F. 3d 1333.

No. 96–8013. BEMIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 1456.

No. 96–8016. HALPIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 139 F. 3d 310.

No. 96–8019. FASHINA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 97 F. 3d 1471.

No. 96–8021. GARZA-NEVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 1134.

No. 96–8027. CARRINGTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 96 F. 3d 1.

No. 96–8029. VISINTINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 96–8033. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 125.

No. 96–8036. HOWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 87 F. 3d 1214.

No. 96–8053. TOKARS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 95 F. 3d 1520.

No. 96–1149. TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY ET AL. *v.* FEDERAL EXPRESS CORP. ET AL. C. A. 3d Cir. Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 96 F. 3d 1432.

No. 96–1307. DUNCAN, WARDEN *v.* BAYLOR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 94 F. 3d 1321.

No. 96–1330. BLACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari before judgment denied.

No. 96–8320 (A–670). MEDINA *v.* FLORIDA. 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: 690 So. 2d 1241.

No. 96–8321 (A–671). MEDINA *v.* FLORIDA. 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: 690 So. 2d 1255.

No. 96–8359 (A–676). MEDINA *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. 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: 109 F. 3d 1556.

Rehearing Denied

No. 96–6659. SCOTT *v.* RECESSION HEARING OFFICIAL ET AL., 519 U. S. 1095;

No. 96–6684. BAST *v.* GLASBERG ET AL., 519 U. S. 1095;

No. 96–6973. FLEMING *v.* UNITED STATES, 519 U. S. 1083;

No. 96–7290. FOSTER *v.* GIANT FOOD, INC., 519 U. S. 1153;

No. 96–7343. SCHWARZ *v.* CLINTON ET AL., 519 U. S. 1135;
No. 96–7539. IN RE VISINTINE, 519 U. S. 1107; and
No. 96–7570. FOSTER *v.* UNITED STATES MARSHALS SERVICE, 519 U. S. 1154. Petitions for rehearing denied.

No. 96–6786. BURTON *v.* BURTON, 519 U. S. 1082. Motion for leave to file petition for rehearing denied.

MARCH 28, 1997

Dismissal Under Rule 46

No. 96–1216. JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER ET AL. *v.* RISHELL, CURATOR OF THE PERSON AND ESTATE OF LACEY, AN INCAPACITATED PERSON. C. A. 10th Cir. Certiorari dismissed only as to Jane Phillips Episcopal Memorial Medical Center under this Court's Rule 46. Reported below: 94 F. 3d 1407.

MARCH 31, 1997

Dismissal Under Rule 46

No. 96–1327. BASKIN *v.* BATH TOWNSHIP BOARD OF ZONING APPEALS ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 101 F. 3d 702.

Certiorari Granted—Reversed. (See No. 96–858, *ante*, p. 292.)

Miscellaneous Orders

No. D–1769. IN RE DISBARMENT OF DAVISON. Disbarment entered. [For earlier order herein, see 519 U. S. 1104.]

No. D–1771. IN RE DISBARMENT OF LYNN. Disbarment entered. [For earlier order herein, see 519 U. S. 1104.]

No. D–1774. IN RE DISBARMENT OF MCDONALD. Disbarment entered. [For earlier order herein, see 519 U. S. 1105.]

No. D–1791. IN RE DISBARMENT OF GROWNEY. William Edward Growney, of Pacifica, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1792. IN RE DISBARMENT OF SANDS. Henry William Sands, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1793. IN RE DISBARMENT OF BOEHME. Harry Boehme, Jr., of Miami, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1794. IN RE DISBARMENT OF ECHOLS. Hugh T. Echols, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1796. IN RE DISBARMENT OF HAMILTON. Jim D. Hamilton, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.*

No. M–67. WILLIAMS *v.* BORG & WARNER AUTOMOTIVE ELECTRONICS & MECHANICAL SYSTEMS CORP.;

No. M–68. BABIGIAN *v.* REHNQUIST, CHIEF JUSTICE OF THE UNITED STATES, ET AL.; and

No. M–69. ROWLS *v.* RUNYON, POSTMASTER GENERAL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 95–728. WARNER-JENKINSON CO., INC. *v.* HILTON DAVIS CHEMICAL CO., *ante*, p. 17. In this case, the parties shall bear their own costs.

No. 95–1081. INGALLS SHIPBUILDING, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL., 519 U. S. 248. Motion of respondent Maggie Yates for attorney's fees and expenses denied without

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*[REPORTER'S NOTE: This order was vacated on April 14, 1997, see *post*, p. 1164.]

prejudice to refiling in the United States Court of Appeals for the Fifth Circuit.

No. 95–1918. ARKANSAS *v.* FARM CREDIT SERVICES OF CENTRAL ARKANSAS ET AL. C. A. 8th Cir. [Certiorari granted, 519 U. S. 1085.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–552. AGOSTINI ET AL. *v.* FELTON ET AL.; and

No. 96–553. CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL. *v.* FELTON ET AL. C. A. 2d Cir. [Certiorari granted, 519 U. S. 1086.] Motion of the Acting Solicitor General for divided argument granted.

No. 96–663. KLEHR ET UX. *v.* A. O. SMITH CORP. ET AL. C. A. 8th Cir. [Certiorari granted, 519 U. S. 1073.] Motion of American Council of Life Insurance et al. for leave to participate in oral argument as *amici curiae* denied.

No. 96–5955. RICHARDS *v.* WISCONSIN. Sup. Ct. Wis. [Certiorari granted, 519 U. S. 1052.] Motion of Wayne County, Michigan, for leave to file a brief as *amicus curiae* denied.

No. 96–1177. IN RE CONSTANT; and

No. 96–1178. IN RE CONSTANT. Petitions for writs of mandamus denied.

Certiorari Granted

No. 96–957. JEFFERSON, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JEFFERSON, DECEASED, ET AL. *v.* CITY OF TARRANT, ALABAMA. Sup. Ct. Ala. Certiorari granted limited to the following question: "Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Ala. Code § 6–5–410 (1993), governs the recovery by the representative of the decedent's estate under 42 U. S. C. § 1983?" Reported below: 682 So. 2d 29.

No. 96–6839. ALMENDAREZ-TORRES *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 113 F. 3d 515.

Certiorari Denied

No. 96–859. Stevedoring Services of America et al. *v.* Director, Office of Workers' Compensation Programs, Department of Labor, et al. C. A. 9th Cir. Certiorari denied. Reported below: 86 F. 3d 895.

No. 96–1052. Tak How Investment Ltd. *v.* Nowak, Administrator of the Estate of Nowak, Deceased, et al. C. A. 1st Cir. Certiorari denied. Reported below: 94 F. 3d 708.

No. 96–1093. Cryo-Trans, Inc. *v.* General American Transportation Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 93 F. 3d 766.

No. 96–1098. Topp *v.* Idaho State Bar. Sup. Ct. Idaho. Certiorari denied. Reported below: 129 Idaho 414, 925 P. 2d 1113.

No. 96–1156. Presbytery of New Jersey of the Orthodox Presbyterian Church et al. *v.* Whitman, Governor of New Jersey, et al. C. A. 3d Cir. Certiorari denied. Reported below: 99 F. 3d 101.

No. 96–1165. United Artists Theatre Circuit, Inc., et al. *v.* Kahn, Director, New Orleans Department of Finance. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 698.

No. 96–1180. Royal King Fisheries et al. *v.* Fuszek. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 514.

No. 96–1181. Pennsylvania Public Utility Commission *v.* City of Philadelphia et al. Commw. Ct. Pa. Certiorari denied. Reported below: 676 A. 2d 1298.

No. 96–1182. Anderson *v.* Holifield et ux. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 96–1190. Kern *v.* City of Rochester et al. C. A. 2d Cir. Certiorari denied. Reported below: 93 F. 3d 38.

No. 96–1193. Beards et vir *v.* Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D. C., et al. Ct. App. D. C. Certiorari denied. Reported below: 680 A. 2d 419.

No. 96–1195. H&D Entertainment, Inc., et al. *v.* Fleet National Bank et al. C. A. 1st Cir. Certiorari denied. Reported below: 96 F. 3d 532.

No. 96–1197. GOEHRING ET AL. *v.* DEL JUNCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 94 F. 3d 1294.

No. 96–1199. MULLER, A MINOR CHILD, BY HIS PARENTS AND NEXT FRIENDS, MULLER ET AL. *v.* JEFFERSON LIGHTHOUSE SCHOOL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 98 F. 3d 1530.

No. 96–1208. MEEHAN *v.* TOWN OF EAST LYME ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 352.

No. 96–1214. CRANE *v.* OLSTEN STAFFING SERVICES ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 686 So. 2d 757.

No. 96–1218. LAFAYETTE MOREHOUSE, INC., ET AL. *v.* COUNTY OF CONTRA COSTA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 45 Cal. 4th 1335, 53 Cal. Rptr. 2d 647.

No. 96–1219. MICHIGAN DOCUMENT SERVICES, INC., ET AL. *v.* PRINCETON UNIVERSITY PRESS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1381.

No. 96–1239. NUNES *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 679 So. 2d 744.

No. 96–1282. DANIELS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 92 F. 3d 1207.

No. 96–1305. HAMPTON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 281 Ill. App. 3d 1140, 701 N. E. 2d 840.

No. 96–1308. LOVELL *v.* HURFORD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 656.

No. 96–1313. DODSON *v.* RUNYON, POSTMASTER GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 86 F. 3d 37.

No. 96–1333. YOUNG *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–1350. FARLEY *v.* CESSNA AIRCRAFT CO. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 690.

No. 96–1353. GLOVER ET AL. *v.* DURHAM. C. A. 6th Cir. Certiorari denied. Reported below: 97 F. 3d 862.

No. 96–6869. ABDUL-SALAAM *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 544 Pa. 514, 678 A. 2d 342.

No. 96–6887. SAMUEL *v.* DUNCAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 92 F. 3d 1194.

No. 96–6914. ULLOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 94 F. 3d 949.

No. 96–6927. HILL *v.* MCKEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 89 F. 3d 834.

No. 96–7217. LOSADA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 1149.

No. 96–7276. MILLER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 173 Ill. 2d 167, 670 N. E. 2d 721.

No. 96–7422. MARSHALL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 13 Cal. 4th 799, 919 P. 2d 1280.

No. 96–7454. UWAGBALE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied.

No. 96–7628. RICOTTA *v.* RICOTTA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–7636. ROSE *v.* WOODS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 53.

No. 96–7643. JAMES *v.* MCCLAIN ET AL. C. A. 11th Cir. Certiorari denied.

No. 96–7647. MUSE *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 125.

No. 96–7651. STONE *v.* BYRD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 652.

No. 96–7655. JUDY *v.* HINCKLEY ET AL. C. A. 10th Cir. Certiorari denied.

No. 96–7656. AZUBUKO *v.* REGISTRAR OF MOTOR VEHICLES. C. A. 1st Cir. Certiorari denied. Reported below: 95 F. 3d 1146.

No. 96–7660. COLE *v.* DICKMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 101 F. 3d 702.

No. 96–7665. LOWELL *v.* PRUNTY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 1358.

No. 96–7671. WILLIAMS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. (two judgments). C. A. 11th Cir. Certiorari denied.

No. 96–7675. FREDERICK *v.* COLUMBIA CORRECTIONAL INSTITUTION ET AL. Ct. App. Wis. Certiorari denied. Reported below: 204 Wis. 2d 109, 552 N. W. 2d 897.

No. 96–7676. EDMOND *v.* MARTIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 952.

No. 96–7682. FOX *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 96–7689. CLIFF *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 230 App. Div. 2d 865, 646 N. Y. S. 2d 834.

No. 96–7694. PORTER *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 96–7696. PARSONS *v.* BASF CORP. ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 676 So. 2d 1199.

No. 96–7699. MADRID *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–7707. PICKENS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 708.

No. 96–7712. GOONEWARDENA *v.* UNIVERSITY OF MINNESOTA ET AL. Ct. App. Minn. Certiorari denied.

No. 96–7713. NORWOOD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 344 N. C. 511, 476 S. E. 2d 349.

No. 96–7714. JOHNSON *v.* EN VOGUE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 1342.

No. 96–7715. LIGONS *v.* MOORE ET AL. Ct. App. Minn. Certiorari denied.

No. 96–7716. DOBOS *v.* CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–7717. DURHAM *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 682 So. 2d 1099.

No. 96–7780. LORENZ *v.* MARTIN MARIETTA CORP., INC. Ct. App. Colo. Certiorari denied.

No. 96–7827. MORRIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 96–7839. TOTORO *v.* H. A. DEHART & SON, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 96–7845. GONZALES *v.* THOMAS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 99 F. 3d 978.

No. 96–7877. LUTALO *v.* WALKER, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 98 F. 3d 1335.

No. 96–7891. HUIE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 698.

No. 96–7893. FOSTER *v.* WOLF, JUDGE, DISTRICT OF COLUMBIA SUPERIOR COURT. C. A. D. C. Cir. Certiorari denied.

No. 96–7911. SCOTT *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 120.

No. 96–7920. JAE *v.* KESSLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 690.

No. 96–7928. POLLARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 370.

No. 96–7956. AGCAOILI *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. 2d Cir. Certiorari denied.

No. 96–7966. GOMES *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1473, 930 P. 2d 701.

No. 96–7974. BRANDENBURG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 1456.

No. 96–7980. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 127.

No. 96–8000. SULLIVAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 98 F. 3d 686.

No. 96–8002. TAVARES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 100 F. 3d 995.

No. 96–8017. GLANT *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 684 So. 2d 723.

No. 96–8020. FARRUGIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 156.

No. 96–8037. DEVIN *v.* BARNETT, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 101 F. 3d 1206.

No. 96–8039. ORTIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 370.

No. 96–8041. BEATY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1347.

No. 96–8043. SMITH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 101 F. 3d 202.

No. 96–8044. LEIPHARDT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 93 F. 3d 1390.

No. 96–8049. GOMEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–8057. CURRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 121.

No. 96–8059. BARNES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 101 F. 3d 1263.

No. 96–8060. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1131.

No. 96–8062. SAFFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 103 F. 3d 136.

No. 96–8063. PETERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 375.

No. 96–8065. ROGERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 355.

No. 96–8066. DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 126.

No. 96–8067. GOGGINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 99 F. 3d 116.

No. 96–8069. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 96 F. 3d 1455.

No. 96–8071. LAWUARY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 103 F. 3d 135.

No. 96–8074. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 F. 3d 82.

No. 96–8079. BUENO-SIERRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 375.

No. 96–8082. BRUMFIELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 103 F. 3d 145.

No. 96–8083. RODRIGUEZ-MERAZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 414.

No. 96–8091. ESCOBAR-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 652.

No. 96–8092. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 105 F. 3d 671.

No. 96–8097. LUCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 1457.

No. 96–8098. MCCLAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 957.

No. 96–8115. CLEMONS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 282 Ill. App. 3d 1100, 707 N. E. 2d 294.

No. 96–8116. YOUNG *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 104 F. 3d 1407.

No. 96–8122. MAYS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 142.

No. 96–8132. JUVENILE MALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 126.

No. 96–723. LUCKY STORES, INC. *v.* HOLIHAN. C. A. 9th Cir. Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 87 F. 3d 362.

No. 96–1004. SHEPPARD *v.* DIAZ. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 85 F. 3d 1502.

No. 96–8058. PALMER *v.* UNITED STATES. Ct. App. D. C. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 683 A. 2d 61.

Rehearing Denied

No. 96–791. DAVIS *v.* WONDERLAND GREYHOUND PARK, INC., ET AL., 519 U. S. 1109;

No. 96–5594. CALDER *v.* ARMSTRONG ET AL., 519 U. S. 1078;

No. 96–6604. CRAWFORD *v.* BEXAR COUNTY TAX OFFICE ET AL., 519 U. S. 1080;

No. 96–6712. PERRYMAN *v.* PRADO, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, 519 U. S. 1066;

No. 96–6821. PIOTEREK *v.* LABOR AND INDUSTRY REVIEW COMMISSION ET AL., 519 U. S. 1097;

No. 96–6832. COLLIGAN *v.* TRANS WORLD AIRLINES, 519 U. S. 1097; and

No. 96–7261. OLSEN *v.* FLORIDA, 519 U. S. 1133. Petitions for rehearing denied.

APRIL 2, 1997

Certiorari Denied

No. 96–8463 (A–704). HERMAN *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.

APRIL 3, 1997

Certiorari Denied

No. 96–8486 (A–710). SPENCE *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.

No. 96–8487 (A–711). SPENCE *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.

APRIL 8, 1997

Miscellaneous Order

No. 96–8400 (A–695). BUCHANAN *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. 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 pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

APRIL 11, 1997

*Miscellaneous Orders**

No. 96–454. ASSOCIATES COMMERCIAL CORP. *v.* RASH ET UX. C. A. 5th Cir. [Certiorari granted, 519 U. S. 1086.] Motion of National Association of Consumer Bankruptcy Attorneys, Inc., for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

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*For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1287; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1307; amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1315; and amendments to the Federal Rules of Evidence, see *post,* p. 1325.

April 14, 1997

Miscellaneous Orders. (See also No. 96–8005, *ante*, p. 303.)

No. D–1796. In re Disbarment of Hamilton. Due to mistaken identity, the order entered March 31, 1997 [*ante*, p. 1153], is vacated, and the rule to show cause is discharged.

No. A–687. Banks *v.* Randolph. Super. Ct. D. C. Application for stay, addressed to Justice O'Connor and referred to the Court, denied.

No. M–70. Adams et ux. *v.* Moore et al.;

No. M–71. Harrington *v.* Attorney General of North Carolina;

No. M–72. Al-Hakim *v.* Florida et al.; and

No. M–73. Bartlett *v.* United States. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 95–1455. Reno, Attorney General *v.* Bossier Parish School Board et al.; and

No. 95–1508. Price et al. *v.* Bossier Parish School Board et al. D. C. D. C. [Probable jurisdiction noted, 517 U. S. 1232.] Motion of Harris County, Texas, et al. for leave to file a brief as *amici curiae* denied.

No. 96–7826. McCrea *v.* Andrews Federal Credit Union. Super. Ct. N. J., App. Div.;

No. 96–7872. Graham-Weber *v.* County of Essex et al. C. A. 3d Cir.; and

No. 96–7960. Marmolejo *v.* United States. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 5, 1997, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 96–8233. In re Stone. Petition for writ of habeas corpus denied.

No. 96–8119. In re Eidson. Petition for writ of prohibition denied.

Certiorari Granted

No. 96–910. City of Chicago et al. *v.* International College of Surgeons et al. C. A. 7th Cir. Certiorari granted. Reported below: 91 F. 3d 981.

No. 96–976. HUDSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. Reported below: 92 F. 3d 1026.

No. 96–7171. SPENCER *v.* KEMNA, SUPERINTENDENT, WESTERN MISSOURI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 91 F. 3d 1114.

Certiorari Denied

No. 96–388. SKINNER *v.* CITY OF MIAMI. C. A. 11th Cir. Certiorari denied. Reported below: 62 F. 3d 344.

No. 96–889. PRINCE GEORGE'S COUNTY ET AL. *v.* ALEXANDER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 95 F. 3d 312.

No. 96–930. MIDWEST INVESTMENTS ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 85 F. 3d 630.

No. 96–986. BELLER *v.* UNITED STATES; and
No. 96–7338. COFFMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 94 F. 3d 330.

No. 96–1044. CEDC FEDERAL CREDIT UNION *v.* NATIONAL CREDIT UNION ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 351.

No. 96–1080. CLEMENT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–1101. SILMON *v.* FIRST BANCORP OF LOUISIANA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 96 F. 3d 1444.

No. 96–1143. COKER *v.* DOUGLAS ET AL. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 96–1171. SMITH *v.* ALABAMA AVIATION AND TECHNICAL COLLEGE ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 683 So. 2d 431.

No. 96–1174. NIELSEN *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 2569, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 94 F. 3d 1107.

No. 96–1201. STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE *v.* BEASLEY, GOVERNOR OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 134.

No. 96–1207. MILLER ET AL. *v.* SCHOEMEHL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 93 F. 3d 449.

No. 96–1216. WELLSHEAR *v.* RISHELL, CURATOR OF THE PERSON AND ESTATE OF LACEY, AN INCAPACITATED PERSON. C. A. 10th Cir. Certiorari denied. Reported below: 94 F. 3d 1407.

No. 96–1224. MEYERS *v.* NORFOLK & WESTERN RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 97 F. 3d 1452.

No. 96–1227. RED ROCK COMMODITIES, LTD., ET AL. *v.* ABN–AMRO BANK, N. A. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 1394.

No. 96–1233. THORN AMERICAS, INC., FKA RENT-A-CENTER, INC., ET AL. *v.* FOGIE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 95 F. 3d 645.

No. 96–1234. RAYNOR, A MINOR, BY HER FATHER, RAYNOR, ET AL. *v.* MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE. Ct. Sp. App. Md. Certiorari denied. Reported below: 110 Md. App. 165, 676 A. 2d 978.

No. 96–1243. CARLEN *v.* DEPARTMENT OF HEALTH SERVICES OF SUFFOLK COUNTY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 351.

No. 96–1246. EASTERDAY *v.* GILBERT, SHERIFF, OKALOOSA COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 709.

No. 96–1251. BROCK *v.* CATERPILLAR, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 94 F. 3d 220.

No. 96–1253. WEAVER *v.* WEAVER. Ct. App. Kan. Certiorari denied. Reported below: 22 Kan. App. 2d ——, 923 P. 2d 523.

No. 96–1257. BONNELL *v.* AMTEX, INC. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 1154.

No. 96–1258. ATLAS TURNER, INC. *v.* STRAUB ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 407.

No. 96–1261. ATLANTIC COAST LIFE INSURANCE CO. ET AL. *v.* SHAW ET UX. Ct. App. S. C. Certiorari denied. Reported below: 322 S. C. 139, 470 S. E. 2d 382.

No. 96–1263. OI–NEG TV PRODUCTS, INC. *v.* DURKO; and
No. 96–1273. GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL AFL–CIO, CLC, NO. 243 *v.* DURKO. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 112.

No. 96–1265. ARIZONA *v.* MENDOZA DUARTE. Ct. App. Ariz. Certiorari denied.

No. 96–1270. TEI FU CHEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 1495.

No. 96–1272. KAHN *v.* EMERSON ELECTRIC CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 95 F. 3d 1166.

No. 96–1277. BRANCH *v.* TOWER AIR, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–1278. CLARK ET UX. *v.* CITY OF HERMOSA BEACH ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223.

No. 96–1281. GULF BEACH HOTEL, INC. *v.* HILTON INNS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 94 F. 3d 651.

No. 96–1284. CARMAN *v.* TEXAS (two judgments). Ct. App. Tex., 7th Dist. Certiorari denied.

No. 96–1288. MACCAFERRI GABIONS, INC. *v.* WILKINSON & JENKINS CONSTRUCTION CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 91 F. 3d 1431.

No. 96–1296. HORTON *v.* UNION RECOVERY LIMITED PARTNERSHIP. Sup. Ct. Va. Certiorari denied. Reported below: 252 Va. 418, 477 S. E. 2d 521.

No. 96–1301. JENSEN *v.* GOULD. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 96–1309. ZAFIRATOS *v.* MONROE TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 694.

No. 96–1319. MERIT CONTRACTING, INC. *v.* ROBERTS & SCHAEFER CO. C. A. 7th Cir. Certiorari denied. Reported below: 99 F. 3d 248.

No. 96–1320. EMERICK *v.* UNITED TECHNOLOGIES CORP. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 353.

No. 96–1325. MOUNT JUNEAU ENTERPRISES, INC., ET AL. *v.* CITY AND BOROUGH OF JUNEAU ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 923 P. 2d 768.

No. 96–1334. MATTOX ET VIR *v.* DALLAS BOARD OF ADJUSTMENTS. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 953.

No. 96–1338. PRESTONWOOD GOLF CLUB CORP., DBA PRESTONWOOD COUNTRY CLUB *v.* NIEDERLITZ ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 954.

No. 96–1340. GREEN ET VIR *v.* DOLSKY ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 546 Pa. 400, 685 A. 2d 110.

No. 96–1344. CONFEDERATED TRIBES OF THE CHEHALIS INDIAN RESERVATION ET AL. *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 334.

No. 96–1348. STEAMSHIP MUTUAL UNDERWRITING ASSN. (BERMUDA) LTD. *v.* BARIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 367.

No. 96–1349. SIMMONS *v.* BURNS, COMMISSIONER, CONNECTICUT DEPARTMENT OF TRANSPORTATION. C. A. 2d Cir. Certiorari denied.

No. 96–1351. LAWS, TRUSTEE *v.* UNITED MISSOURI BANK OF KANSAS CITY, N. A. C. A. 8th Cir. Certiorari denied. Reported below: 98 F. 3d 1047.

No. 96–1354. CATZ *v.* MCDONALD, TRIAL COMMISSIONER, DOMESTIC RELATIONS DIVISION OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIMA, ARIZONA (CHALKER, REAL PARTY IN INTEREST), ET AL. Ct. App. Ariz. Certiorari denied.

No. 96–1360. CLEMENTS *v.* BABCOCK & WILCOX CO. ET AL. C. A. 4th Cir. Certiorari denied.

No. 96–1362. CLOROX CO. *v.* HAILE. C. A. D. C. Cir. Certiorari denied.

No. 96–1368. VAN SCOY ET AL. *v.* SHELL OIL CO. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1348.

No. 96–1369. VAN SCOY *v.* SHELL OIL CO. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1348.

No. 96–1372. STAHL *v.* DIRECTOR, CENTRAL INTELLIGENCE AGENCY. C. A. 11th Cir. Certiorari denied. Reported below: 98 F. 3d 1354.

No. 96–1376. LORENZ ET AL. *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 928 P. 2d 1274.

No. 96–1385. HOUSE THE HOMELESS, INC., ET AL. *v.* WIDNALL, SECRETARY OF THE AIR FORCE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 94 F. 3d 176.

No. 96–1387. CRAWFORD, INDIVIDUALLY AND ON BEHALF OF HER DECEASED HUSBAND, CRAWFORD, ET AL. *v.* MARTIN-MARIETTA TECHNOLOGIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 550.

No. 96–1401. DIMENSIONS MEDICAL CENTER, LTD. *v.* ILLINOIS HEALTH FACILITIES PLANNING BOARD ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 282 Ill. App. 3d 1094, 707 N. E. 2d 291.

No. 96–1402. CLAY *v.* COUNCIL OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 683 A. 2d 1385.

No. 96–1410. ANDERSON ET AL. *v.* LAS VEGAS TRIBE OF PAIUTE INDIANS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 137.

No. 96–1413. LEIDNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 99 F. 3d 1423.

No. 96–1414. PALADIN *v.* FINNERTY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 356.

No. 96–1416. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 96–1419. FELDMAN, AKA FLEMING, AKA GIVNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 F. 3d 149.

No. 96–1420. CVIJANOVIC *v.* LORAL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 F. 3d 1438.

No. 96–1431. DAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 682 A. 2d 1125.

No. 96–1435. PICKETT *v.* AMERICAN BREEDERS SERVICE. Cir. Ct. Frederick County, Md. Certiorari denied.

No. 96–1436. DE WIEST *v.* DEHAENE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 370.

No. 96–1438. JENKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 92 F. 3d 430.

No. 96–1439. LYNCH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 357.

No. 96–1445. DOLAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1140.

No. 96–1446. AHERN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 92 F. 3d 1187.

No. 96–1449. PATRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1140.

No. 96–1453. SCANLIN *v.* COOPER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 96 F. 3d 1434.

No. 96–1492. EDWARDS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 98 F. 3d 1364.

No. 96–6978. SANTOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 93 F. 3d 761.

No. 96–7196. DAVIS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 684 So. 2d 643.

No. 96–7233. BOWERS ET AL. *v.* SATURN GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 95 F. 3d 1152.

No. 96–7257. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 92 F. 3d 309.

No. 96–7269. FORSMAN *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 151.

No. 96–7353. JEWITT *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 96–7411. SMITH *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY (two judgments). C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 948.

No. 96–7439. STOWE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 100 F. 3d 494.

No. 96–7491. GOFF *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 931 S. W. 2d 537.

No. 96–7532. WINDSOR *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 683 So. 2d 1042.

No. 96–7575. JACKSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 684 A. 2d 745.

No. 96–7701. CLARK *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 668 N. E. 2d 1206.

No. 96–7709. DUDLEY *v.* JOHNSON. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 1134.

No. 96–7727. LEDING *v.* OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied.

No. 96–7729. PARKER *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 94 F. 3d 458.

No. 96–7747. HICKS *v.* PRINCE GRAVES HOMES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 118.

No. 96–7748. FIDIS *v.* LAKESIDE MEDICAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 95 F. 3d 1154.

No. 96–7749. FORMICA *v.* TOWN OF HUNTINGTON, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 350.

No. 96–7751. HOGAN *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL INSTITUTE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 97 F. 3d 189.

No. 96–7753. DAVIS *v.* HUDGINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 87 F. 3d 1308.

No. 96–7754. HAWKINS *v.* UZZELL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 278 Ill. App. 3d 1124, 699 N. E. 2d 602.

No. 96–7760. FLOWERS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 96–7761. HOUSE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 96–7765. AINSWORTH *v.* STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 96–7769. WILKINSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 683 So. 2d 496.

No. 96–7772. BRIDGEWATER *v.* HARDISON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 961.

No. 96–7774. BURNETT *v.* EASTERN UPPER PENINSULA MENTAL HEALTH CENTER ET AL. Ct. App. Mich. Certiorari denied.

No. 96–7775. JASPER *v.* HEDGEPETH. C. A. 8th Cir. Certiorari denied.

No. 96–7777. JOSEPH *v.* HARDISON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 961.

No. 96–7779. MOORE *v.* PERRIN ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 683 So. 2d 484.

No. 96–7782. GREEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–7783. EDDMONDS *v.* WASHINGTON, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 93 F. 3d 1307.

No. 96–7787. HICKMON *v.* BARNETT. Sup. Ct. S. C. Certiorari denied.

No. 96–7790. McReynolds *v.* Gangel-Jacob, Justice, Appellate Division, Supreme Court of New York, First Judicial Department. C. A. 2d Cir. Certiorari denied.

No. 96–7792. Tyler *v.* Schriro, Director, Missouri Department of Corrections, et al. Cir. Ct. Washington County, Mo. Certiorari denied.

No. 96–7793. Ponder *v.* Dye et al. C. A. 9th Cir. Certiorari denied.

No. 96–7798. Cockrell *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 933 S. W. 2d 73.

No. 96–7799. Adams *v.* Duncan, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 961.

No. 96–7802. Powell *v.* California. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 96–7804. Carraway *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 96–7807. Beldotti *v.* Massachusetts. App. Ct. Mass. Certiorari denied. Reported below: 41 Mass. App. 185, 669 N. E. 2d 222.

No. 96–7818. Rose *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, et al. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 53.

No. 96–7823. Woratzeck *v.* Stewart, Director, Arizona Department of Corrections. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 329.

No. 96–7829. Marquez *v.* Dorsey, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 100 F. 3d 967.

No. 96–7830. Jones *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 96–7831. Smart *v.* Board of Trustees of the University of Illinois et al. C. A. 7th Cir. Certiorari denied.

No. 96–7844. Ferrell *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 686 So. 2d 1324.

No. 96–7848. HEARN *v.* VEASY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 83 F. 3d 422.

No. 96–7849. HARRIS *v.* CUYAHOGA COUNTY, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1066.

No. 96–7850. DAVIS *v.* PRICE, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 96 F. 3d 1441.

No. 96–7851. COLE *v.* IRVIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 96 F. 3d 1450.

No. 96–7852. CRAIG *v.* LEE ROSENBAUM & ASSOCIATES, P. C., ET AL. C. A. 10th Cir. Certiorari denied.

No. 96–7853. CLARK *v.* SIKES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 96–7856. GLENDORA *v.* CABLEVISION SYSTEMS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 503.

No. 96–7858. RISLEY *v.* FAUNCE, ADMINISTRATOR, BAYSIDE STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 113.

No. 96–7862. REYES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 545 Pa. 374, 681 A. 2d 724.

No. 96–7865. MAXWELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 173 Ill. 2d 102, 670 N. E. 2d 679.

No. 96–7866. MARSHALL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 554.

No. 96–7869. COVELLI *v.* CRYSTAL, CONNECTICUT COMMISSIONER OF REVENUE SERVICES. Sup. Ct. Conn. Certiorari denied. Reported below: 239 Conn. 257, 683 A. 2d 737.

No. 96–7871. FLETCHER *v.* SCHINDLER ELEVATOR CORP. ET AL. C. A. 5th Cir. Certiorari denied.

No. 96–7874. CARTER *v.* OHIO. Ct. App. Ohio, Paulding County. Certiorari denied.

No. 96–7878. MAXWELL *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 96–7882. CARNER *v.* TOWNSEND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 128.

No. 96–7883. BARRETT *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 96–7885. TURNER *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 408.

No. 96–7888. GARRETT *v.* MOORE MCCORMACK RESOURCES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 104 F. 3d 361.

No. 96–7900. WASHINGTON *v.* CITY OF JACKSONVILLE, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 1468.

No. 96–7902. WALKER *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 92 F. 3d 1195.

No. 96–7926. SEILER *v.* THALACKER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 101 F. 3d 536.

No. 96–7929. PEREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1132.

No. 96–7932. SCHWARZ *v.* OFFICE OF GOVERNMENT ETHICS. C. A. D. C. Cir. Certiorari denied.

No. 96–7940. HAMILTON *v.* KOONS STERLING FORD. Sup. Ct. Va. Certiorari denied.

No. 96–7943. SCHWARZ *v.* COMMISSION ON CIVIL RIGHTS. C. A. D. C. Cir. Certiorari denied. Reported below: 102 F. 3d 1272.

No. 96–7945. SCHWARZ *v.* WOODRUFF, INC. Ct. App. Utah. Certiorari denied.

No. 96–7946. SCHWARZ *v.* WOODRUFF, INC., ET AL. Ct. App. Utah. Certiorari denied.

No. 96–7952. RUNNELS *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 96–7953. RHODEN *v.* MORGAN, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 97 F. 3d 1452.

No. 96–7955. BUTLER *v.* MERCHANTS BANK & TRUST CO. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 1148.

No. 96–7961. MCCOLM *v.* JORDAN ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–7975. ALEXANDER *v.* PREWITT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 79 F. 3d 1152.

No. 96–7996. MOORE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 250 Neb. 805 and 251 Neb. 162, 553 N. W. 2d 120.

No. 96–8006. FIERRO RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 697.

No. 96–8015. GOLDEN *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 96–8018. ESPINOZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 85 F. 3d 640.

No. 96–8022. GREGORY *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 41 Mass. App. 1109, 671 N. E. 2d 223.

No. 96–8034. GOODROAD *v.* DELANO ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 363.

No. 96–8054. YOUNT *v.* FRANK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8056. SEAMON *v.* ROKOSIK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 106 F. 3d 403.

No. 96–8070. RAYMOND T. ET AL. *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8073. CROSBY *v.* MAZURKIEWICZ ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8075. KIERSTEAD *v.* SUTER ET AL. (two judgments). C. A. 3d Cir. Certiorari denied.

No. 96–8084. REAGANS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8089. HAWKINS *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 96–8100. SAULSGIVER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 115.

No. 96–8102. WEEKLY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 274 Ill. App. 3d 1111, 691 N. E. 2d 1200.

No. 96–8106. JACOBSON *v.* STEVENS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 100 F. 3d 969.

No. 96–8108. CLARK *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 1341.

No. 96–8109. ALTSCHUL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–8110. CRUTCHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 96 F. 3d 1457.

No. 96–8117. WHITE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8123. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 F. 3d 690.

No. 96–8128. CRAVEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 695.

No. 96–8139. NESBITT *v.* MEYER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1130.

No. 96–8152. PORTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 105 F. 3d 660.

No. 96–8153. SPEARS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 122.

No. 96–8154. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 96–8156. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 96–8158. ROGERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–8159. TUCKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 369.

No. 96–8162. CHAVEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 370.

No. 96–8163. BISHOP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 141.

No. 96–8165. BRADSHAW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 102 F. 3d 204.

No. 96–8168. MORALES *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–8169. MCCAULEY-BEY *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 1104.

No. 96–8171. DURANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 141.

No. 96–8173. GANT *v.* DRUG ENFORCEMENT AGENCY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 117.

No. 96–8178. DOCKETT *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 96–8179. GODWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 1155.

No. 96–8181. DITTRICH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 100 F. 3d 84.

No. 96–8183. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 127.

No. 96–8185. FRANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 654.

No. 96–8186. CUNNINGHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 370.

No. 96–8187. PENNY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 96–8191. STAPLEY *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 96–8193. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 651.

No. 96–8194. LAWAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 239.

No. 96–8197. BROWN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 1390.

No. 96–8199. HARVEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1347.

No. 96–8200. EDMONDS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 101 F. 3d 715.

No. 96–8201. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 392.

No. 96–8202. HAMMOND *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 387.

No. 96–8203. WARE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 340.

No. 96–8205. HAWKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 102 F. 3d 973.

No. 96–8206. BERGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 67.

No. 96–8209. JONES *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 96–8214. BAKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 98 F. 3d 330.

No. 96–8215. BALL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 344 N. C. 290, 474 S. E. 2d 345.

No. 96–8216. PENA-CASTREJON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 667.

No. 96–8218. MULLANIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 323.

No. 96–8219. LYONS *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 96–8221. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 1342.

No. 96–8222. MCCROY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 102 F. 3d 239.

No. 96–8224. ESPINOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 653.

No. 96–8225. GETHERS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 684 A. 2d 1266.

No. 96–8227. COLONEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 656.

No. 96–8228. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 120.

No. 96–8231. BREEDLOVE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 F. 3d 366.

No. 96–8236. KNIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 96 F. 3d 307.

No. 96–8238. LYNCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 369.

No. 96–8243. BARLOW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 654.

No. 96–8245. GRIFFIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 1341.

No. 96–8248. GREEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1131.

No. 96–8253. WEST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 96 F. 3d 1449.

No. 96–8254. YOUNG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 470.

No. 96–8256. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 869.

No. 96–8259. ARROYO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 654.

No. 96–8261. PORTILLO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 394.

No. 96–8263. WHITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 507.

No. 96–8266. CHORNEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 99 F. 3d 1128.

No. 96–8297. INGRAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 100 F. 3d 971.

No. 96–828. DRY CREEK RANCHERIA *v.* BRIDGET AND LUCY R., MINORS, ET AL. Ct. App. Cal., 2d App. Dist. Motion of respondents Bridget and Lucy R. for leave to proceed *in forma pauperis* granted. Motion of respondents Richard A. and Cindy R. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507.

No. 96–1075. ERNST & YOUNG LLP *v.* MCGANN ET AL. C. A. 9th Cir. Motion of American Institute of Certified Public Accountants for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 102 F. 3d 390.

No. 96–1339. CALTEX PETROLEUM CORP. ET AL. *v.* BARIS ET AL. C. A. 5th Cir. Motion of American Petroleum Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 101 F. 3d 367.

No. 96–1365. MILLER ET AL. *v.* BROWN ET AL. C. A. 10th Cir. Motion of American Hospital Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 101 F. 3d 1324.

No. 96–1249. LOUISIANA *v.* DIVERS. Sup. Ct. La. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 681 So. 2d 320.

Rehearing Denied

No. 96–652. KUCHINSKAS ET AL. *v.* BROWARD COUNTY, 519 U. S. 1148;

No. 96–884. TAKAHASHI *v.* LIVINGSTON UNION SCHOOL DISTRICT ET AL., 519 U. S. 1112;

No. 96–891. JORDAN *v.* KENTON COUNTY BOARD OF EDUCATION ET AL., 519 U. S. 1142;

No. 96–905. CITY OF TULSA *v.* SPRADLING ET AL., 519 U. S. 1149;

No. 96–909. CHERRY *v.* ROCKING HORSE RIDGE ESTATES ASSN. ET AL., 519 U. S. 1113;

No. 96–933. SEEGER *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY, 519 U. S. 1114;

No. 96–1045. GILL *v.* DALKON SHIELD CLAIMANTS TRUST, 519 U. S. 1150;

No. 96–1068. CASTRO *v.* UNITED STATES, 519 U. S. 1118;

No. 96–1074. DAVIS *v.* HANOVER INSURANCE CO. ET AL., *ante*, p. 1104;

No. 96–1086. RANDALL *v.* UNITED STATES, 519 U. S. 1150;

No. 96–6108. TUCKER *v.* DEPARTMENT OF EDUCATION ET AL., 519 U. S. 1013;

No. 96–6514. IVY *v.* MILLER, SUPERINTENDENT, BOONVILLE CORRECTIONAL CENTER, 519 U. S. 1064;

No. 96–6862. FREEMAN *v.* YOUNG, EXECUTIVE DIRECTOR, ALABAMA BOARD OF PARDONS AND PAROLES, ET AL., 519 U. S. 1121;

No. 96–6918. VEALE *v.* NEW HAMPSHIRE, 519 U. S. 1122;

No. 96–6969. SHOOBS *v.* ZAVELETTA ET AL., 519 U. S. 1123;

No. 96–7044. TUCKER *v.* COGGINS/CONTINENTAL GRANITE CO., INC., 519 U. S. 1125;

No. 96–7053. GRAVELY *v.* UNITED STATES, 519 U. S. 1099;

No. 96–7114. GARNER *v.* PENNINGTON ET AL., 519 U. S. 1128;

No. 96–7152. COOPER *v.* MISSOURI PAROLE BOARD ET AL., 519 U. S. 1129;

No. 96–7191. KARIM-PANAHI *v.* COMMISSIONER OF INTERNAL REVENUE, 519 U. S. 1131;

No. 96–7202. WELLS *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., 519 U. S. 1152;

No. 96–7207. BOULINEAU *v.* WEST, SECRETARY OF THE ARMY, ET AL., 519 U. S. 1152;

No. 96–7208. BATICADOS *v.* WHITE, WARDEN, ET AL., 519 U. S. 1152;

No. 96–7228. SMITH *v.* PENNSYLVANIA, 519 U. S. 1153;

No. 96–7247. WILLIAMS *v.* UNITED STATES, 519 U. S. 1133;

No. 96–7433. IN RE STEARMAN, 519 U. S. 1107; and

No. 96–7493. LUONGO *v.* UNITED STATES, 519 U. S. 1118. Petitions for rehearing denied.

No. 94–8262. LACKEY *v.* TEXAS, 514 U. S. 1045; and

No. 96–696. CULP *v.* HOOD ET AL., 519 U. S. 1042. Motions for leave to file petitions for rehearing denied.

APRIL 18, 1997

Miscellaneous Order

No. A–741. HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* WHITE, AS NEXT FRIEND TO HEIDNIK. Application to stay enforcement of order directing stay of execution, presented to JUSTICE SOUTER, and by him referred to the Court, granted, and it is ordered that the order staying the execution entered by the United States District Court on April 18, 1997, is vacated. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to stay.

APRIL 19, 1997

Miscellaneous Order

No. A–743. HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* WHITE, AS NEXT FRIEND TO HEIDNIK. Application to vacate the stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, dismissed.

APRIL 21, 1997

Certiorari Granted—Vacated and Remanded

No. 96–1297. UNITED STATES *v.* HUGHES AIRCRAFT CO. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, *ante*, p. 17. Reported below: 86 F. 3d 1566.

Miscellaneous Orders

No. D–1759. IN RE DISBARMENT OF PLUST. Disbarment entered. [For earlier order herein, see 519 U. S. 1037.]

No. D–1762. IN RE DISBARMENT OF PAYNE. Disbarment entered. [For earlier order herein, see 519 U. S. 1053.]

No. D–1763. IN RE DISBARMENT OF ELLIS. Disbarment entered. [For earlier order herein, see 519 U. S. 1075.]

No. D–1767. IN RE DISBARMENT OF DONNELLON. Disbarment entered. [For earlier order herein, see 519 U. S. 1088.]

No. D–1797. IN RE DISBARMENT OF REED. Norman Joseph Reed, of Las Vegas, Nev., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1798. IN RE DISBARMENT OF SLOBODA. Joseph Dominic Sloboda, of Miami Beach, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1799. IN RE DISBARMENT OF BENDET. Mark Bendet, of Paterson, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1800. IN RE DISBARMENT OF FRYE. John Rich Frye, Jr., of Corpus Christi, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1801. IN RE DISBARMENT OF SCHWARTZ. Martin Louis Schwartz, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1802. IN RE DISBARMENT OF BOYLE. Charles W. Boyle, of Atlanta, Ga., is suspended from the practice of law in this Court,

and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–74. STEVENSON-BEY *v.* LUNGREN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 96–1126. IOLAB CORP. *v.* HUNTER. Sup. Ct. Mo. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 96–8408. IN RE FARMER. Petition for writ of habeas corpus denied.

No. 96–8352. IN RE KIRBY. Petition for writ of mandamus denied.

Certiorari Granted

No. 96–1291. OUBRE *v.* ENTERGY OPERATIONS, INC. C. A. 5th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 102 F. 3d 551.

Certiorari Denied

No. 96–989. CASTILLO *v.* UNITED STATES;
No. 96–1028. WHITECLIFF *v.* UNITED STATES;
No. 96–7227. BRANCH ET AL. *v.* UNITED STATES; and
No. 96–7265. FATTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 91 F. 3d 699.

No. 96–1107. COMMISSIONER OF INTERNAL REVENUE *v.* TEXACO INC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 98 F. 3d 825.

No. 96–1114. WOOTTON, TRUSTEE *v.* LEMONS. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 953.

No. 96–1128. ALLIANCE AGAINST IFQS ET AL. *v.* SECRETARY OF COMMERCE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 F. 3d 343.

No. 96–1152. SHELTON ET AL. *v.* BARNES, RECEIVER FOR AMERICAN CAPITAL INVESTMENTS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1133.

No. 96–1157. LUCAS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 1401.

No. 96–1172. MILTON S. KRONHEIM & CO., INC. *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 91 F. 3d 193.

No. 96–1241. SAFFLE, DIRECTOR, OKLAHOMA STATE PENITENTIARY, ET AL. *v.* BATTLE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 100 F. 3d 967.

No. 96–1293. MCKENZIE *v.* RENBERG'S, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 94 F. 3d 1478.

No. 96–1295. SUNBURST PRODUCTS, INC., DBA FREESTYLE U. S. A. *v.* CYRK INC. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 98 F. 3d 1358.

No. 96–1303. CITY OF DANVILLE, KENTUCKY *v.* KENTUCKY RIVER AUTHORITY ET AL. Ct. App. Ky. Certiorari denied. Reported below: 932 S. W. 2d 374.

No. 96–1312. KEARNS *v.* GENERAL MOTORS CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 94 F. 3d 1553.

No. 96–1314. ENGLANDER ET UX. *v.* MILLS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 95 F. 3d 1028.

No. 96–1316. W. W. W. ENTERPRISES, INC., DBA WILLIAMSON OF HOMESTEAD *v.* PIDAL. C. A. 11th Cir. Certiorari denied. Reported below: 98 F. 3d 1351 and 1353.

No. 96–1321. BROWN UNIVERSITY ET AL. *v.* COHEN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 101 F. 3d 155.

No. 96–1322. FUTTERMAN *v.* NASSET ET AL. Ct. App. Minn. Certiorari denied.

No. 96–1335. SMITH *v.* METRO-NORTH COMMUTER RAILROAD. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 226 App. Div. 2d 168, 641 N. Y. S. 2d 8.

No. 96–1342. AMERICAN BROADCASTING COS., INC. *v.* LUNDELL MANUFACTURING CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 98 F. 3d 351.

No. 96–1345. CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE *v.* ELDREDGE. C. A. 9th Cir. Certiorari denied. Reported below: 94 F. 3d 1366.

No. 96–1356. PLATT ET AL. *v.* INDIANA ET AL. Ct. App. Ind. Certiorari denied. Reported below: 664 N. E. 2d 357.

No. 96–1374. SHALLER ET UX. *v.* WALKER ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 110 Md. App. 753.

No. 96–1380. MURRAY *v.* BABBITT, SECRETARY OF THE INTERIOR. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 386.

No. 96–1406. HENDERSON *v.* DETELLA, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 97 F. 3d 942.

No. 96–1418. GARNER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 80 Wash. App. 1084.

No. 96–1427. DICICCO *v.* BONSEY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 94 F. 3d 640.

No. 96–1468. BELL ET AL. *v.* DIMARIO, PUBLIC PRINTER OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 96–1488. WORTHINGTON *v.* GLICKMAN, SECRETARY OF AGRICULTURE. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 158.

No. 96–1500. WRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 87 F. 3d 1325.

No. 96–1510. MCQUEEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 700.

No. 96–1529. FURUKAWA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 1147.

No. 96–7238. MILES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 545 Pa. 500, 681 A. 2d 1295.

No. 96–7518. KINDER *v.* POTTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 92 F. 3d 1179.

No. 96–7526. HOLT *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 94 F. 3d 648.

No. 96–7554. PALOMO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 699.

No. 96–7565. WILLIAMS ET UX. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 96–7625. RODGERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 247.

No. 96–7842. WOOLLEY *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–7890. AZUBUKO *v.* LIBERTY MUTUAL INSURANCE GROUP ET AL. C. A. 1st Cir. Certiorari denied.

No. 96–7892. AZUBUKO *v.* BOARD OF DIRECTORS, BRITISH AIRWAYS. C. A. 1st Cir. Certiorari denied. Reported below: 101 F. 3d 106.

No. 96–7896. CARLSON *v.* KRISTI MICANDER, P. C., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 126.

No. 96–7898. BINGMAN *v.* WARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 653.

No. 96–7905. TYLER *v.* ULRICH, CHIEF JUDGE, COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 96–7906. HUSSEIN *v.* PIERRE HOTEL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 350.

No. 96–7909. FARMER *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1548.

No. 96–7914. ROY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 681 So. 2d 1230.

No. 96–7918. NEWMAN *v.* ASSOCIATED PRESS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 504.

No. 96–7922. MARTIN *v.* IDAHO. Ct. App. Idaho. Certiorari denied.

No. 96–7933. MASON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–7936. WATKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 96–7937. WILKINS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–7941. HOWARD *v.* WALT DISNEY CO. ET AL. C. A. 7th Cir. Certiorari denied.

No. 96–7942. COHEA *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 96–7944. SCHWARZ ET AL. *v.* BROWN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 99 F. 3d 1149.

No. 96–7950. HEARN *v.* ROBERTSON ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 453 Mich. 877, 554 N. W. 2d 2.

No. 96–7951. HAYWARD *v.* MURRAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 F. 3d 1438.

No. 96–7971. LINZA *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 96–7978. SPRAGUE *v.* KOBAYASHI AMERICA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 964.

No. 96–7987. LOVE *v.* ROUSE COMPANY OF MISSOURI INC. ET AL. C. A. 8th Cir. Certiorari denied.

No. 96–7988. MACKEY *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 396.

No. 96–8010. LOWE *v.* GIBSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 103 F. 3d 144.

No. 96–8040. BUFORD *v.* JAMES T. STRICKLAND YOUTH CENTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 1154.

No. 96–8042. ALFORD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8077. MEDINA *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 147 N. J. 43, 685 A. 2d 1242.

No. 96–8095. MINES *v.* PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 680 A. 2d 1227.

No. 96–8111. CARTER *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 1393.

No. 96–8129. VARTINELLI *v.* HUTCHINSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 131.

No. 96–8130. ZANKICH *v.* MARICOPA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1160.

No. 96–8155. KRIER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 96–8172. HALE *v.* RUNYON, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 97 F. 3d 1454.

No. 96–8177. HARGROVE *v.* COLONY OF STONE MOUNTAIN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 556.

No. 96–8182. FETT *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 117.

No. 96–8192. STAUP *v.* FIRST UNION NATIONAL BANK OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 687 So. 2d 1306.

No. 96–8208. KISER *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 43 Conn. App. 339, 683 A. 2d 1021.

No. 96–8212. SLABY *v.* DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION. Ct. App. D. C. Certiorari denied. Reported below: 685 A. 2d 1166.

No. 96–8217. PIZZO *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 96–8235. MUNDY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 686 So. 2d 586.

No. 96–8237. JEFFERSON *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 98 F. 3d 1360.

No. 96–8251. PONCE-BRAN *v.* TRUSTEES OF CALIFORNIA STATE UNIVERSITY AND COLLEGES. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 48 Cal. App. 4th 1656, 56 Cal. Rptr. 2d 358.

No. 96–8267. PINO-LARA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 357.

No. 96–8268. SO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 667.

No. 96–8274. COX *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 111 Md. App. 737.

No. 96–8275. RICARDO RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 698.

No. 96–8276. SHORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 96 F. 3d 1449.

No. 96–8291. WALKER *v.* UNITED STATES; and
No. 96–8332. COOK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 104 F. 3d 368.

No. 96–8293. LINVILLE *v.* LINVILLE. Ct. Sp. App. Md. Certiorari denied. Reported below: 110 Md. App. 749.

No. 96–8294. KEIRSEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 106 Md. App. 551, 665 A. 2d 700.

No. 96–8300. PARTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 104 F. 3d 361.

No. 96–8303. PULLOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 699.

No. 96–8304. BAIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 104 F. 3d 368.

No. 96–8309. KAISSERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 667.

No. 96–8313. DICKERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 108 F. 3d 1373.

No. 96–8314. HENTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 333.

No. 96–8317. O'CONNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 360.

No. 96–8333. CUNNINGHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 553.

No. 96–8336. JIMENEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 F. 3d 366.

No. 96–8337. MCDOUGALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 360.

No. 96–8339. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 F. 3d 133.

No. 96–8342. TUCKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 369.

No. 96–8346. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 12.

No. 96–8350. LEPPERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1347.

No. 96–8355. BALLARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–8364. BARCELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 964.

No. 96–8367. STEELE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 388.

No. 96–8369. VEGA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 102 F. 3d 1301.

No. 96–8371. PILLETTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 652.

No. 96–8376. HORTON *v.* UNITED STATES; and
No. 96–8393. GILLESPIE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 96 F. 3d 1450.

No. 96–8377. GORHAM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 107 F. 3d 923.

No. 96–8383. HICKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 837.

No. 96–8388. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 143.

No. 96–8389. CARTER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1131.

No. 96–8398. CLOVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 387.

No. 96–8399. CHANDLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 107 F. 3d 874.

No. 96–8406. BRACEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 359.

No. 96–1289. GENENTECH, INC. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 101 F. 3d 1386.

No. 96–1290. ARTHUR A. COLLINS, INC. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 78 F. 3d 581 and 103 F. 3d 125.

Rehearing Denied

No. 95–746. LINSCOMB *v.* UNITED STATES, *ante*, p. 1103;

No. 96–1169. DU VALL *v.* UNITED STATES ET AL., *ante*, p. 1104;

No. 96–6844. TUCKER BEY *v.* UNITED STATES, 519 U. S. 1098;

No. 96–6924. BROOKS *v.* SHEPPARD AIR FORCE BASE, 519 U. S. 1082;

No. 96–7204. WHITE *v.* ADAMS COUNTY DETENTION FACILITY ET AL., 519 U. S. 1152;

No. 96–7235. JONES *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, 519 U. S. 1153;

No. 96–7291. SING CHO NG *v.* QUIET FOREST II HOMEOWNERS ASSN. ET AL., *ante*, p. 1106;

No. 96–7292. AZUBUKO *v.* BOARD OF TRUSTEES, FRAMINGHAM STATE COLLEGE, 519 U. S. 1134;

No. 96–7306. MULLIGAN *v.* BARNETT BANK OF CENTRAL FLORIDA, N. A., *ante*, p. 1106;

No. 96–7323. DAY *v.* PAINTER, SHERIFF, MIDLAND COUNTY, TEXAS, *ante*, p. 1107;

No. 96–7440. TURNER *v.* KUYKENDALL, *ante*, p. 1124;

No. 96–7567. IN RE GALLARDO, 519 U. S. 1107;

No. 96–7590. CAFFREY *v.* WASHINGTON, *ante*, p. 1109;

No. 96–7650. JONES *v.* TOOMBS, WARDEN, *ante*, p. 1127;

No. 96–7673. ANDERSON *v.* UNITED STATES, *ante*, p. 1109;

No. 96–7773. IN RE BONNER, *ante*, p. 1102; and

No. 96–7828. MORRISON *v.* UNITED STATES, *ante*, p. 1131. Petitions for rehearing denied.

APRIL 23, 1997

Miscellaneous Orders

No. A–751. BROWN *v.* CAIN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 96–1683. IN RE CALDERON, WARDEN. Motion of petitioner to expedite consideration of petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 96–1671. RAINES, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ET AL. *v.* BYRD ET AL. Appeal from D. C. D. C. Motion of the parties to expedite consideration of the appeal granted. Probable jurisdiction noted. The parties' briefs are to be filed with the Clerk of this Court and served upon opposing counsel on or before 3 p.m., Friday, May 9, 1997. Reply briefs, if any, may be filed with the Clerk of this Court and served upon opposing counsel on or before 3 p.m., Wednesday, May 21, 1997. Briefs may be submitted in compliance with this Court's Rule 33.2 to be replaced as soon as possible with briefs prepared under Rule 33.1. Rule 29.2 does not apply. Oral argument is set for Tuesday, May 27, 1997, at 10 a.m. Reported below: 956 F. Supp. 25.

Certiorari Denied

No. 96–8028. BALDREE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 659.

No. 96–8624 (A–728). BROWN *v.* CAIN, WARDEN, ET AL. 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. Reported below: 104 F. 3d 744.

APRIL 28, 1997

Certiorari Granted—Vacated and Remanded

No. 96–8081. ALLEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cooper* v. *Oklahoma*, 517 U. S. 348 (1996). Reported below: 923 P. 2d 613.

Miscellaneous Orders

No. D–1768. IN RE DISBARMENT OF KAUFMAN. Disbarment entered. [For earlier order herein, see 519 U. S. 1104.]

No. D–1770. IN RE DISBARMENT OF HENRY. Disbarment entered. [For earlier order herein, see 519 U. S. 1104.]

No. D–1773. IN RE DISBARMENT OF TAKACS. Disbarment entered. [For earlier order herein, see 519 U. S. 1105.]

No. D–1775. IN RE DISBARMENT OF WEISMAN. Disbarment entered. [For earlier order herein, see 519 U. S. 1105.]

No. D–1780. IN RE DISBARMENT OF MAZZEI. Disbarment entered. [For earlier order herein, see 519 U. S. 1146.]

No. D–1781. IN RE DISBARMENT OF HAMILTON. Disbarment entered. [For earlier order herein, see 519 U. S. 1146.]

No. D–1785. IN RE DISBARMENT OF MUHAMMAD. Disbarment entered. [For earlier order herein, see 519 U. S. 1147.]

No. 96–1366. IN RE JOHNSON ET AL. Petition for writ of mandamus denied.

Certiorari Granted

No. 96–1060. MILLER *v.* ALBRIGHT, SECRETARY OF STATE. C. A. D. C. Cir. Certiorari granted.* Reported below: 96 F. 3d 1467.

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*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 1208.]

No. 96–8400. BUCHANAN *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 103 F. 3d 344.

Certiorari Denied

No. 96–1082. ALGERNON BLAIR, INC., ET AL. *v.* WALTERS. Sup. Ct. N. C. Certiorari denied. Reported below: 344 N. C. 628, 476 S. E. 2d 105.

No. 96–1148. OUTLAWS CLUB ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 94 F. 3d 643.

No. 96–1160. RICHARDSON *v.* ALBERTSON'S, INC. C. A. 10th Cir. Certiorari denied. Reported below: 92 F. 3d 1197.

No. 96–1168. DANGERFIELD *v.* STAR EDITORIAL, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1458.

No. 96–1211. CITY OF FLINT *v.* MIDDLETON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 92 F. 3d 396.

No. 96–1212. PEITZMEIER ET UX. *v.* HENNESSY INDUSTRIES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 293.

No. 96–1213. IN RE JAQUES. C. A. 5th Cir. Certiorari denied.

No. 96–1254. PAUL *v.* CRIBB ET UX. Ct. App. S. C. Certiorari denied.

No. 96–1280. WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS ET AL. *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 93 F. 3d 910.

No. 96–1283. PAOLO GUCCI DESIGN STUDIO, LTD. *v.* SINATRA, TRUSTEE OF THE SUBSTANTIVELY CONSOLIDATED ESTATES OF GUCCI, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 102 F. 3d 73 and 105 F. 3d 837.

No. 96–1343. SECTION 28 PARTNERSHIP, LTD. *v.* MARTIN COUNTY. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 676 So. 2d 532.

No. 96–1347. VICKERY *v.* JONES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 100 F. 3d 1334.

No. 96–1352. WILLOUGHBY *v.* POTOMAC ELECTRIC POWER CO. C. A. D. C. Cir. Certiorari denied. Reported below: 100 F. 3d 999.

No. 96–1364. SHEA & GOULD ET AL. *v.* DURKIN, TRUSTEE OF THE BENCHMARK IRREVOCABLE TRUST. C. A. 9th Cir. Certiorari denied. Reported below: 92 F. 3d 1510.

No. 96–1367. TAYLOR EQUIPMENT, INC., DBA MIDCON EQUIPMENT CO. *v.* JOHN DEERE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 98 F. 3d 1028.

No. 96–1371. LEWIS ET AL. *v.* IOWA DISTRICT COURT FOR DES MOINES COUNTY. Sup. Ct. Iowa. Certiorari denied. Reported below: 555 N. W. 2d 216.

No. 96–1382. CONNELL ET AL. *v.* DOUGLASS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 94 F. 3d 650.

No. 96–1384. MURPHY, COOK COUNTY PUBLIC GUARDIAN, AS GUARDIAN OF THE ESTATE AND PERSON OF WELLMAN, DECEASED *v.* YOUNG, INTERESTED PERSON AND EXECUTOR OF THE ESTATE OF WELLMAN, DECEASED. Sup. Ct. Ill. Certiorari denied. Reported below: 174 Ill. 2d 335, 673 N. E. 2d 272.

No. 96–1386. LICHTMAN *v.* LICHTMAN ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 96–1391. BLOUIN *v.* KAISER ALUMINUM & CHEMICAL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 127.

No. 96–1396. NESSON *v.* NESSON. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 96–1408. BURICK *v.* BROWARD COUNTY, FLORIDA, ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 683 So. 2d 566.

No. 96–1411. UNITED COMPANIES LENDING CORP. *v.* MCGEHEE ET UX. Sup. Ct. Ala. Certiorari denied. Reported below: 686 So. 2d 1171.

No. 96–1421. TRIEM *v.* ALASKA BAR ASSN. Sup. Ct. Alaska. Certiorari denied. Reported below: 929 P. 2d 634.

No. 96–1464. CAT CONTRACTING, INC., ET AL. *v.* INSITUFORM TECHNOLOGIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 99 F. 3d 1098.

No. 96–1490. SUNDWALL *v.* CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 356.

No. 96–1495. DENOUDEN *v.* UNIVERSITY OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–1541. ALLEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 961.

No. 96–1543. PAPPAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–1547. MALIK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 105 F. 3d 659.

No. 96–6673. STEVEN L. ET AL. *v.* BOARD OF EDUCATION OF DOWNERS GROVE GRADE SCHOOL DISTRICT NO. 58. C. A. 7th Cir. Certiorari denied. Reported below: 89 F. 3d 464.

No. 96–7119. MORENO RAMOS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 934 S. W. 2d 358.

No. 96–7321. DAVIS *v.* BURKS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 98 F. 3d 1338.

No. 96–7348. VEALE ET UX. *v.* CITIBANK, F. S. B. C. A. 11th Cir. Certiorari denied. Reported below: 85 F. 3d 577.

No. 96–7397. GUERRIERO *v.* LUFTHANSA GERMAN AIRLINES, INC. App. Ct. Mass. Certiorari denied. Reported below: 41 Mass. App. 1105, 669 N. E. 2d 233.

No. 96–7598. JONES *v.* NEVADA;
No. 96–7683. EVERHART *v.* NEVADA;
No. 96–7684. GAUTHIER *v.* NEVADA;
No. 96–7685. DORTCH *v.* NEVADA;
No. 96–7997. MACALINO *v.* NEVADA;
No. 96–8031. WOOD *v.* NEVADA; and
No. 96–8196. BONTA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1724 (Jones), 1715 (Everhart), 1718 (Gauthier), 1713 (Dortch), 1729 (Macalino), 1751 (Wood), and 1707 (Bonta).

No. 96–7631. SIMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 681 So. 2d 1112.

No. 96–7962. COHEA *v.* BARRIOS ET AL.; and COHEA *v.* WHITE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–7963. BAILEY ET AL. *v.* TURNER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 128.

No. 96–7968. SEALS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 684 So. 2d 368.

No. 96–7977. BROWN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 686 So. 2d 409.

No. 96–7981. PHILLIPS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 554.

No. 96–7982. OGDEN *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 96–7986. MCCOLM *v.* NELSON. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–7995. KNOTTS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 686 So. 2d 486.

No. 96–7998. STARTUP *v.* MINARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8004. WALLIS *v.* HERNANDO COUNTY, FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 680 So. 2d 426.

No. 96–8007. ALLAH *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1345.

No. 96–8024. PAGAN *v.* WARNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 99 F. 3d 1142.

No. 96–8025. PASTORIUS *v.* ROMER, GOVERNOR OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 97 F. 3d 1465.

No. 96–8026. STOKER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 701.

No. 96–8030. VRETTOS *v.* UNITED MACHINE SPECIALTIES CORP. ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8032. CARTER *v.* SIEGLER ET AL. Ct. App. Mich. Certiorari denied.

No. 96–8035. FAUST *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 101 F. 3d 675.

No. 96–8038. CHARM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 924 P. 2d 754.

No. 96–8045. NADAL *v.* CITY OF YONKERS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 356.

No. 96–8046. MCREYNOLDS *v.* VENKATARAGHAVEN ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–8047. JENKINS *v.* OAKLEY ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 122 N. M. 279, 923 P. 2d 1164.

No. 96–8048. ENGLISH *v.* LOUISIANA DEPARTMENT OF CORRECTIONS. Sup. Ct. La. Certiorari denied. Reported below: 683 So. 2d 290.

No. 96–8050. GREEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 934 S. W. 2d 92.

No. 96–8051. EBENHART *v.* HOWARD COMMUNITY SERVICES ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–8052. TUCKER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 324 S. C. 155, 478 S. E. 2d 260.

No. 96–8055. BROUSSARD *v.* EVANS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 127.

No. 96–8064. WILLIAMSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 681 So. 2d 688.

No. 96–8068. WOLFE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8078. ROBERTSON *v.* THORNELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 99 F. 3d 1144.

No. 96–8087. WRIGHT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 96–8090. HARTMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 344 N. C. 445, 476 S. E. 2d 328.

No. 96–8103. WILSON *v.* SABA, SHERIFF, DOUGHERTY COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 92 F. 3d 1201.

No. 96–8107. MANGRUM *v.* TAYLOR. C. A. 11th Cir. Certiorari denied.

No. 96–8180. FALCONER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 282 Ill. App. 3d 785, 668 N. E. 2d 1095.

No. 96–8204. O'NEILL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 684 So. 2d 720.

No. 96–8220. MELIUS *v.* WOOD, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 105 F. 3d 662.

No. 96–8223. MANUSSIER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 129 Wash. 2d 652, 921 P. 2d 473.

No. 96–8246. HENRY *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 95 F. 3d 41.

No. 96–8247. DOWNEY ET UX. *v.* KREMPIN ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 687 So. 2d 1303.

No. 96–8265. TAYLOR *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8270. SULLIVAN *v.* COLORADO. Dist. Ct. Colo., Elbert County. Certiorari denied.

No. 96–8271. FRANKLIN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1717.

No. 96–8272. REED *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 957.

No. 96–8277. Ross *v.* Groose, Superintendent, Jefferson City Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 96–8296. Maravilla *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 95 F. 3d 1146.

No. 96–8344. Willis *v.* DeTella, Warden. C. A. 7th Cir. Certiorari denied.

No. 96–8360. Cooper *v.* Gammon, Superintendent, Moberly Correctional Center. Sup. Ct. Mo. Certiorari denied.

No. 96–8362. Arnold *v.* Board of Commissioners of Effingham County et al. C. A. 11th Cir. Certiorari denied.

No. 96–8382. Holman *v.* United States Parole Commission; and Todd *v.* United States Parole Commission. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 656 (first judgment); 106 F. 3d 397 (second judgment).

No. 96–8391. Betancourt-Arestuche *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 96–8407. Ezeoke *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 953.

No. 96–8416. El Muhammad, aka Crawford *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 155.

No. 96–8417. Mason *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 957.

No. 96–8421. Allen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 88 F. 3d 765.

No. 96–8424. Bailey *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 96–8425. Pierson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 101 F. 3d 545.

No. 96–8427. Perales-Gonzalez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 141.

No. 96–8430. Jones *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 101 F. 3d 1263.

No. 96–8431. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 F. 3d 1180.

No. 96–8433. MUNDY *v.* WRIGHT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 359.

No. 96–8435. MORMON *v.* UNITED STATES; and
No. 96–8494. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 656.

No. 96–8437. SCHROEDER *v.* UNITED STATES; and
No. 96–8441. MUSSARI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 787.

No. 96–8439. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 1184.

No. 96–8445. MCCOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 649.

No. 96–8447. NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 F. 3d 1344.

No. 96–8456. HUMPHRIES *v.* UNITED STATES; and
No. 96–8459. GRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 359.

No. 96–8458. FITZGERALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 392.

No. 96–8472. BEARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 555.

No. 96–8479. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 96–8493. HILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 112.

No. 96–8506. DIAZ *v.* MITCHELL, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 355.

No. 96–8708. HILL *v.* HOPPER, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 112 F. 3d 1088.

No. 96–1179. INDICATED EXPANSION SHIPPERS *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 92 F. 3d 1239.

No. 96–1184. KAMILEWICZ ET AL. *v.* BANK OF BOSTON CORP. ET AL. C. A. 7th Cir. Motion of law teachers for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 92 F. 3d 506.

No. 96–1332. NORFOLK SOUTHERN RAILWAY CO. ET AL. *v.* LANG ET AL. Sup. Ct. Ala. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 686 So. 2d 1115.

No. 96–1355. CALDERON, WARDEN *v.* BEAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 96 F. 3d 1126.

No. 96–1357. SMITH, PERSONAL REPRESENTATIVE OF SMITH, DECEASED *v.* SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA ET AL. C. A. 2d Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 101 F. 3d 239.

No. 96–1428. ANHEUSER-BUSCH, INC., ET AL. *v.* SCHMOKE, MAYOR OF BALTIMORE, ET AL. C. A. 4th Cir. Motions of Washington Legal Foundation, Ronald Rotunda and John Nowak, and Association of National Advertisers, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 101 F. 3d 325.

No. 96–1429. PENN ADVERTISING OF BALTIMORE, INC. *v.* SCHMOKE, MAYOR OF BALTIMORE, ET AL. C. A. 4th Cir. Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 101 F. 3d 332.

Rehearing Denied

No. 96–6863. BANKS *v.* THOMAS, WARDEN, ET AL., 519 U. S. 1121;

No. 96–6981. PETERSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 519 U. S. 1123;

No. 96–7659. AZUBUKO *v.* FIRST NATIONAL BANK OF BOSTON ET AL., *ante*, p. 1127;

No. 96–7704. WELKY *v.* MAKOWSKI, WARDEN, ET AL., 519 U. S. 1156; and

No. 96–8029. VISINTINE *v.* UNITED STATES, *ante*, p. 1150. Petitions for rehearing denied.

MAY 1, 1997

Dismissal Under Rule 46

No. 96–1552. UPJOHN CO. *v.* AMBROSINI ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 101 F. 3d 129.

*Miscellaneous Order**

No. 96–8858 (A–777). IN RE HILL. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 96–8857 (A–776). HILL *v.* ALABAMA. Ct. Crim. App. Ala. 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: 695 So. 2d 1223.

MAY 6, 1997

Miscellaneous Order

No. 96–8891 (A–788). IN RE WASHINGTON. 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.

MAY 12, 1997

Certiorari Granted—Vacated and Remanded

No. 96–7167. LARSON *v.* WISCONSIN. Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* granted. Cer-

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*For revisions to the Rules of this Court effective this date, see 519 U. S. 1160.

tiorari granted, judgment vacated, and case remanded for further consideration in light of *Richards* v. *Wisconsin*, *ante*, p. 385. Reported below: 203 Wis. 2d 270, 551 N. W. 2d 870.

Miscellaneous Orders

No. A–702. LUI KIN-HONG *v.* UNITED STATES. C. A. 1st Cir. Application for stay of mandate, addressed to JUSTICE BREYER and referred to the Court, denied.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

The United Kingdom seeks to extradite petitioner to Hong Kong, where he will be charged with bribery. The District Court granted petitioner's request for a writ of habeas corpus, holding that the extradition treaty between the United States and the United Kingdom does not now permit his extradition to Hong Kong because his trial and any subsequent punishment would likely take place under the authority of the People's Republic of China, a nation with whom the United States does not have an applicable extradition treaty. The Court of Appeals for the First Circuit reversed. Lui now asks this Court for a stay pending a petition for certiorari.

The petition for certiorari that Lui intends to file would likely raise three questions. First, the treaty with the United Kingdom of Great Britain and Northern Ireland, 28 U. S. T. 227, as amended, June 25, 1985, T. I. A. S. No. 12050 (Treaty), grants the United Kingdom the power to seek the extradition of a fugitive offender. See Treaty, Art. I. This Court has defined "extradition" to mean "the surrender by one nation to another . . . which, *being competent to try and to punish him*, demands the surrender." *Terlinden* v. *Ames*, 184 U. S. 270, 289 (1902). Since Hong Kong will revert to the People's Republic of China on July 1, 1997, and, as the Government admits, no trial could be held before that date, does the United Kingdom have the "competen[ce] to try and to punish" Lui? And, if not, can it now seek his extradition?

Second, the Treaty provides that no person extradited shall "be extradited by [the requesting party] to a third State." Treaty, Art. XII. Does this provision prohibit Lui's extradition?

Third, under the terms of 18 U. S. C. §§ 3184 and 3186, does the Executive Branch have the exclusive power to interpret these provisions of the Treaty?

In essence, petitioner says that the United States intends to extradite him, not to the United Kingdom or to a crown colony of the United Kingdom, for trial, but rather to the People's Republic of China. In my view, the papers accompanying his motion for stay raise questions about the lawfulness of doing so, at least to the point where I would issue the stay, pending a response from the Solicitor General. For that reason I dissent from the Court's denial of petitioner's application.

No. D–1772. IN RE DISBARMENT OF STURGIS. Disbarment entered. [For earlier order herein, see 519 U. S. 1105.]

No. D–1776. IN RE DISBARMENT OF HANSEN. Disbarment entered. [For earlier order herein, see 519 U. S. 1105.]

No. D–1777. IN RE DISBARMENT OF WITCHELL. Disbarment entered. [For earlier order herein, see 519 U. S. 1105.]

No. D–1779. IN RE DISBARMENT OF GREGORY. Disbarment entered. [For earlier order herein, see 519 U. S. 1146.]

No. D–1782. IN RE DISBARMENT OF OLSON. Disbarment entered. [For earlier order herein, see 519 U. S. 1146.]

No. D–1783. IN RE DISBARMENT OF PASSMAN. Disbarment entered. [For earlier order herein, see 519 U. S. 1146.]

No. D–1784. IN RE DISBARMENT OF LEVINSON. Disbarment entered. [For earlier order herein, see 519 U. S. 1147.]

No. D–1786. IN RE DISBARMENT OF MARONEY. Disbarment entered. [For earlier order herein, see *ante*, p. 1101.]

No. D–1787. IN RE DISBARMENT OF LEVY. Disbarment entered. [For earlier order herein, see *ante*, p. 1112.]

No. D–1789. IN RE DISBARMENT OF DENKER. Disbarment entered. [For earlier order herein, see *ante*, p. 1113.]

No. D–1790. IN RE DISBARMENT OF FRIEDMAN. Bruce Michael Friedman, of Los Angeles, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on March 24, 1997 [*ante*, p. 1141], is discharged.

No. D–1803. IN RE DISBARMENT OF SCHWARTZ. Fred A. Schwartz, of Miami, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1804. IN RE DISBARMENT OF COOLEY. Donald R. Cooley, of Springfield, Mo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1805. IN RE DISBARMENT OF SCHLOTTMAN. Brent Alan Schlottman, of Chandler, Ariz., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–75. MILTON *v.* WORLD SAVINGS AND LOAN ASSN.;
No. M–76. MAUDAL *v.* TEXAS INSTRUMENTS CORP. ET AL.; and
No. M–77. SPEARS *v.* DSM COPOLYMER, INC. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 96–1060. MILLER *v.* ALBRIGHT, SECRETARY OF STATE. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1195.] The order granting the petition for writ of certiorari is amended to read: Certiorari granted limited to the following question: "Is the distinction in 8 U. S. C. § 1409 between 'illegitimate' children of United States citizen mothers and 'illegitimate' children of United States citizen fathers a violation of the Fifth Amendment to the United States Constitution?"

No. 96–1405. SMITHS INDUSTRIES MEDICAL SYSTEMS, INC. *v.* KERNATS, A MINOR, BY KERNATS, HER MOTHER AND NEXT FRIEND, ET AL. App. Ct. Ill., 1st Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 96–8443. IN RE SHORT;
No. 96–8601. IN RE WILLIAMS; and
No. 96–8639. IN RE RODRIGUEZ. Petitions for writs of habeas corpus denied.

No. 96–8012. IN RE KOGER. Petition for writ of mandamus denied.

No. 96–8105. IN RE JOHNSON; and

No. 96–8361. IN RE ALEXANDER. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 96–370. BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND *v.* FERBAR CORPORATION OF CALIFORNIA, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 73 F. 3d 971.

No. 96–1370. FIDELITY FINANCIAL SERVICES, INC. *v.* FINK, TRUSTEE. C. A. 8th Cir. Certiorari granted. Reported below: 102 F. 3d 334.

No. 96–7151. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.* Reported below: 92 F. 3d 1371.

Certiorari Denied

No. 95–1962. REPUBLICAN PARTY OF ALASKA *v.* O'CALLAGHAN ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 914 P. 2d 1250.

No. 96–1067. WHITE WING DEVELOPMENT, INC., DBA WHITE WING ASSOCIATES *v.* COUNTY OF SOLANO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–1183. FINALCO, INC. *v.* ROOSEVELT. C. A. 9th Cir. Certiorari denied. Reported below: 87 F. 3d 311 and 98 F. 3d 1169.

No. 96–1204. PEASE *v.* YELLOWSTONE COUNTY. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 1169.

No. 96–1205. BARNES, ADMINISTRATOR OF THE ESTATE OF PIERPOINT, DECEASED *v.* PIERPOINT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 94 F. 3d 813.

No. 96–1223. JOY TECHNOLOGIES, INC. *v.* SECRETARY OF LABOR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 99 F. 3d 991.

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*[REPORTER'S NOTE: For amendment of this order, see *post,* p. 1226.]

No. 96–1236. KRYGOSKI CONSTRUCTION CO., INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 94 F. 3d 1537.

No. 96–1238. SELLAND *v.* COHEN, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 100 F. 3d 950.

No. 96–1245. BRANDT, AS TRUSTEE OF THE CHAPTER 7 ESTATE OF SOUTHEAST BANKING CORP. *v.* FIRST UNION CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 93 F. 3d 750.

No. 96–1248. MARYLAND *v.* STANBERRY. Ct. App. Md. Certiorari denied. Reported below: 343 Md. 720, 684 A. 2d 823.

No. 96–1271. GUINN ET AL. *v.* KOPF. C. A. Fed. Cir. Certiorari denied. Reported below: 96 F. 3d 1419.

No. 96–1286. HAGELIN ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 97 F. 3d 553.

No. 96–1300. SOUTHWEST AIRLINES CO. *v.* FENNESSY. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 1359.

No. 96–1304. KARCHER *v.* EMERSON ELECTRIC CO.; and
No. 96–1506. EMERSON ELECTRIC CO. *v.* KARCHER. C. A. 8th Cir. Certiorari denied. Reported below: 94 F. 3d 502.

No. 96–1363. JONES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–1381. CONSTRUCTION INDUSTRY TRAINING COUNCIL OF WASHINGTON *v.* SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 129 Wash. 2d 787, 920 P. 2d 581.

No. 96–1388. HUFF *v.* FIRST NATIONAL BANK OF CENTRE HALL, NKA NORTHWEST SAVINGS BANK. Super. Ct. Pa. Certiorari denied. Reported below: 450 Pa. Super. 722, 676 A. 2d 289.

No. 96–1390. EVANS, BY HER MOTHER AND NEXT FRIEND, EVANS *v.* AVERY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 100 F. 3d 1033.

No. 96–1398. Barkley Seed, Inc., dba Pacific Southwest Seed & Grain, Inc. *v.* Botelho Shipping Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 961.

No. 96–1399. United States ex rel. Haycock *v.* Hughes Aircraft Co. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 1148.

No. 96–1403. National Railroad Passenger Corporation et al. *v.* Van Holt et vir. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 283 Ill. App. 3d 62, 669 N. E. 2d 1288.

No. 96–1407. Coleman *v.* Joseph E. Seagram & Sons, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 956.

No. 96–1409. Area G Home & Landowners Organization, Inc., et al. *v.* Municipality of Anchorage, Alaska. Sup. Ct. Alaska. Certiorari denied. Reported below: 927 P. 2d 728.

No. 96–1422. J. W., for Herself and as Next Friend of Doe, Her Minor Daughter *v.* Bryan Independent School District. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 651.

No. 96–1423. Devine *v.* Stone, Leyton & Gershman, P. C. C. A. 8th Cir. Certiorari denied. Reported below: 100 F. 3d 78.

No. 96–1424. Marisol A., by Her Next Friend, Forbes, et al. *v.* Giuliani, Mayor of New York City, et al. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 524.

No. 96–1434. Szmalec *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 927 S. W. 2d 213.

No. 96–1437. City of New York et al. *v.* Ivani Contracting Corp. C. A. 2d Cir. Certiorari denied. Reported below: 103 F. 3d 257.

No. 96–1441. West American Insurance Co. *v.* Freeman. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–1443. Nagle *v.* Bailey. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 1565.

No. 96–1450. Shinn et al., on Behalf of Shinn *v.* College Station Independent School District et al. C. A. 5th Cir. Certiorari denied. Reported below: 96 F. 3d 783.

No. 96–1451. COLLAGEN CORP. *v.* GREEN ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 546 Pa. 400, 685 A. 2d 110.

No. 96–1455. SACULLA *v.* WISCONSIN MEDICAL EXAMINING BOARD ET AL. Ct. App. Wis. Certiorari denied. Reported below: 205 Wis. 2d 111, 555 N. W. 2d 409.

No. 96–1457. HACKLANDER-READY *v.* WISCONSIN EX REL. SPRAGUE ET AL. Ct. App. Wis. Certiorari denied. Reported below: 205 Wis. 2d 110, 555 N. W. 2d 409.

No. 96–1458. VERDIN ET AL. *v.* LOUISIANA LAND & EXPLORATION CO. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 681 So. 2d 63.

No. 96–1460. WJM REALTY, INC. *v.* STATE ROADS COMMISSION OF THE MARYLAND HIGHWAY ADMINISTRATION. Ct. Sp. App. Md. Certiorari denied. Reported below: 111 Md. App. 752.

No. 96–1467. ADMINISTRACION NACIONAL DE TELECOMUNICACIONES (ANTEL) *v.* NEW VALLEY CORP. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 947.

No. 96–1474. MASTAW *v.* NORFOLK & WESTERN RAILWAY CO. Cir. Ct. Roanoke County, Va. Certiorari denied.

No. 96–1484. FJETLAND ET AL. *v.* LONE STAR NORTHWEST ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 962.

No. 96–1502. STANESCU ET UX. *v.* AETNA LIFE & CASUALTY INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 1393.

No. 96–1509. D'AMBROSIO *v.* SHOPPERS FOOD WAREHOUSE. Sup. Ct. Va. Certiorari denied.

No. 96–1536. SALTARIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1462.

No. 96–1540. KENNEDY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 387.

No. 96–1549. SAUNDERS *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 96–1554. PERSYN ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 106 F. 3d 424.

No. 96–1555. ARBEITER ET AL. *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Dept. Certiorari denied. Reported below: 169 Misc. 2d 771, 650 N. Y. S. 2d 915.

No. 96–1560. FULFREE *v.* MANCHESTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 503.

No. 96–1561. DELCOURT *v.* SILVERMAN ET AL. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 919 S. W. 2d 777.

No. 96–1564. DICKEY *v.* CITY OF HARTSVILLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 97 F. 3d 1446.

No. 96–1599. SHOWERS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 452 Pa. Super. 135, 681 A. 2d 746.

No. 96–1600. COTTRILL *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 45 M. J. 485.

No. 96–1601. CURTIS *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 45 M. J. 480.

No. 96–1604. COOKE ET UX. *v.* DINAPOLI, TRUSTEE, ET AL. App. Ct. Conn. Certiorari denied. Reported below: 43 Conn. App. 419, 682 A. 2d 603.

No. 96–6841. MCCULLAH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 1087.

No. 96–7329. DURHAM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–7430. MATHIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 96 F. 3d 1577.

No. 96–7589. COHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 69.

No. 96–7703. CARTER *v.* AMTRAK NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 9th Cir. Certiorari denied.

No. 96–7732. BADRU *v.* UNITED STATES; and
No. 96–7734. BADRU *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 97 F. 3d 1471.

No. 96–7815. POSEY *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 222 Ga. App. 405, 474 S. E. 2d 206.

No. 96–7820. TRILLO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1748.

No. 96–7822. WILDER ET AL. *v.* MASSACHUSETTS DEPARTMENT OF CORRECTION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 89 F. 3d 824.

No. 96–7840. JENSON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1724.

No. 96–7879. JAHANNES *v.* REID. Ct. App. Ga. Certiorari denied. Reported below: 222 Ga. App. XXIX.

No. 96–8023. FITZGERALD *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1716.

No. 96–8076. MITCHELL *v.* PARKER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 699.

No. 96–8085. RADCLIFFE *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 83 Haw. 545, 928 P. 2d 39.

No. 96–8086. TUERK *v.* OTIS ELEVATOR CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 692.

No. 96–8093. OLIVER *v.* ROSSEN ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 96–8094. MILLER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1732.

No. 96–8096. MULTANI *v.* UNITED STATES ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 233 App. Div. 2d 965, 649 N. Y. S. 2d 311.

No. 96–8099. FARMER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 147 N. J. 43, 685 A. 2d 1242.

No. 96–8104. VRETTOS *v.* STAGE HOUSE INN ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8112. BOOKER *v.* WORSHAM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 652.

No. 96–8113. BROWN *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 96–8118. WHITE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 96–8120. CROSS *v.* CROSS. App. Ct. Mass. Certiorari denied. Reported below: 40 Mass. App. 1133, 667 N. E. 2d 920.

No. 96–8121. JONES *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 96–8126. KENT *v.* HARVARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 109 F. 3d 772.

No. 96–8127. MALLARD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8131. TOLBERT *v.* DALLAS AREA RAPID TRANSIT. C. A. 5th Cir. Certiorari denied. Reported below: 96 F. 3d 1445.

No. 96–8133. JACKSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 684 So. 2d 1213.

No. 96–8134. DAVIS *v.* ZAVARAS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 100 F. 3d 750.

No. 96–8135. WILLIAMS *v.* MOBLEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 364.

No. 96–8136. WALSH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 96–8137. THOMAS *v.* OWENS, JUDGE, DISTRICT COURT OF OKLAHOMA, OKLAHOMA COUNTY, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8138. TURNER *v.* DENMARK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 710.

No. 96–8141. ARTEAGA *v.* HILL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 96–8142. PATE *v.* LOCKHEED MISSILES & SPACE CO., INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8143. RIEFLIN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 558 N. W. 2d 149.

No. 96–8146. ARTEAGA *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 96–8147. FIELDS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 923 P. 2d 624.

No. 96–8150. SCHWARZ *v.* DEPARTMENT OF JUSTICE. C. A. D. C. Cir. Certiorari denied.

No. 96–8151. LOWE *v.* BOONE. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8157. LOWE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8160. WOODS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 275 Ill. App. 3d 1134, 692 N. E. 2d 876.

No. 96–8161. THONGVANH *v.* AULT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 96–8164. PETRICK *v.* REYNOLDS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 414.

No. 96–8166. ROSS *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 96–8167. JACKSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 13 Cal. 4th 1164, 920 P. 2d 1254.

No. 96–8174. HAMILTON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 681 So. 2d 1217.

No. 96–8175. HENRY *v.* WILLIAMSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 363.

No. 96–8176. HILL *v.* CSC CREDIT SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 96 F. 3d 1443.

No. 96–8188. YOUNG *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8189. YARBOROUGH *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 894.

No. 96–8190. THORNTON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 187 Ariz. 325, 929 P. 2d 676.

No. 96–8195. ROBINSON *v.* CITY OF CLEVELAND HEIGHTS, OHIO, ET AL. C. A. 6th Cir. Certiorari denied.

No. 96–8198. BALDWIN *v.* GEORGE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 689.

No. 96–8207. SANDERS *v.* EDWARDS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 96–8210. JENKINS *v.* UNITED STATES POSTAL SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 1342.

No. 96–8211. REID *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 101 F. 3d 628.

No. 96–8213. BURNETT *v.* CHIPPEWA COUNTY BAR ASSN. Ct. App. Mich. Certiorari denied.

No. 96–8229. BROUSSARD *v.* BURKETT. C. A. 5th Cir. Certiorari denied.

No. 96–8249. DAWSON *v.* RICHMOND HEIGHTS LOCAL SCHOOL DISTRICT. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 96–8257. WITTER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 908, 921 P. 2d 886.

No. 96–8279. VADEN, AKA INGRAM *v.* POWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 96–8285. ELDRIDGE *v.* QUICK ET AL. Ct. App. D. C. Certiorari denied.

No. 96–8287. GLENDORA *v.* HOSTETTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 353.

No. 96–8295. LOHSE *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 669.

No. 96–8330. ELAM *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8348. BARDIN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8351. LE GRAND *v.* GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–8353. BRANCH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 685 So. 2d 1250.

No. 96–8366. SHEPHERD *v.* OLK LONG, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 96–8374. GIEBEL *v.* MONTANA SYSTEM OF HIGHER EDUCATION ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 280 Mont. 500, 929 P. 2d 252.

No. 96–8396. BROCK *v.* UNKNOWN. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 96–8403. MYERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 F. 3d 76.

No. 96–8404. NETTLES *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 408.

No. 96–8409. HARRIS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 96–8411. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 F. 3d 1144.

No. 96–8423. BLACKBURN *v.* UNITED STATES; and
No. 96–8473. HILTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 103 F. 3d 87.

No. 96–8438. PIZZO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 688 So. 2d 494.

No. 96–8448. NEVIUS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 281 Ill. App. 3d 1152, 701 N. E. 2d 845.

No. 96–8451. KROEMER *v.* IRVIN, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 96–8453. COURTNEY *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 129.

No. 96–8460. MOORE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 935 S. W. 2d 124.

No. 96–8461. BLANDINO *v.* LIPPOLD ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8462. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 105 F. 3d 671.

No. 96–8466. FETT *v.* MORRIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 647.

No. 96–8475. CARSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 96–8477. CORNISH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 302.

No. 96–8481. JUVENILE MALE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 18.

No. 96–8482. MERRITT *v.* BUREAU OF PRISONS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 104 F. 3d 1407.

No. 96–8485. SIMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 125.

No. 96–8488. BUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 1191.

No. 96–8490. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 108 F. 3d 343.

No. 96–8492. DEBOWALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 380.

No. 96–8495. COHEN *v.* COUNTY OF SARPY, NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied.

No. 96–8496. TRIPATI *v.* ARIZONA. Super. Ct. Ariz., Maricopa County. Certiorari denied.

No. 96–8497. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 103 F. 3d 1093.

No. 96–8507. BERNARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 667.

No. 96–8508. CROTTS ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 649.

No. 96–8509. RIVERA CONTRERAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 667.

No. 96–8510. RUSHING *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 935 S. W. 2d 30.

No. 96–8511. OWENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 101 F. 3d 559.

No. 96–8513. WARNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 650.

No. 96–8514. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 649.

No. 96–8518. BELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 99 F. 3d 870.

No. 96–8519. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 105 F. 3d 660.

No. 96–8520. COLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 92 F. 3d 1174.

No. 96–8522. WRIGHT, AKA FARROW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 394.

No. 96–8525. ALVAREZ RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 141.

No. 96–8526. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 655.

No. 96–8527. KEHM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 410.

No. 96–8528. KANAHELE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 142.

No. 96–8529. JUVENILE MALE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 18.

No. 96–8533. ROTHSCHILD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 653.

No. 96–8537. LAPLANTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 108 F. 3d 330.

No. 96–8540. MYLES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–8541. CAJINA *v.* UNITED STATES; and
No. 96–8542. CAJINA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 364.

No. 96–8545. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 9.

No. 96–8546. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 115.

No. 96–8547. WINDOM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 523.

No. 96–8549. CORREIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 96–8552. RAFAEL MEDRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–8554. SCHROEDER ET UX. *v.* INTERNAL REVENUE SERVICE. C. A. 8th Cir. Certiorari denied. Reported below: 105 F. 3d 662.

No. 96–8555. PATTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 688 A. 2d 408.

No. 96–8556. SOUTHALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 332.

No. 96–8558. GARNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 131.

No. 96–8559. GRADE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–8560. CLAYTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 648.

No. 96–8565. ALLBRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 59 F. 3d 1241.

No. 96–8567. WASHINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 96–8570. HARRIS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 106 F. 3d 426.

No. 96–8572. HANSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 96 F. 3d 1457.

No. 96–8574. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–8578. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 105 F. 3d 659.

No. 96–8581. ROWBAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 667.

No. 96–8583. SOLAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 100 F. 3d 969.

No. 96–8585. FORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 392.

No. 96–8586. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 418.

No. 96–8587. HUTCHINSON *v.* UNITED STATES; and
No. 96–8588. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 89 F. 3d 1501.

No. 96–8600. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 394.

No. 96–8602. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 78 F. 3d 1241.

No. 96–8603. TUCKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 369.

No. 96–8604. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 F. 3d 72.

No. 96–8608. HAMPTON *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 207 Wis. 2d 369, 558 N. W. 2d 884.

No. 96–8609. BAUTISTA DE LA CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 667.

No. 96–8612. MYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 102 F. 3d 227.

No. 96–8613. LAMB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 957.

No. 96–8614. MCNEIL *v.* AGUILOS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 107 F. 3d 3.

No. 96–8617. CUARTAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 356.

No. 96–8620. RHOADES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 410.

No. 96–8622. PORTER *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 96–8631. MARTINEZ-CANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 18.

No. 96–8633. KINCAID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 410.

No. 96–8635. IRVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–8645. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 864.

No. 96–8647. TALAMASEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 670.

No. 96–8663. JUVENILE MALE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 630.

No. 96–8670. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 F. 3d 1180.

No. 96–954. AMOCO PRODUCTION CO. ET AL. *v.* PUBLIC SERVICE COMPANY OF COLORADO ET AL.; and

No. 96–1230. WILLIAMS NATURAL GAS CO. ET AL. *v.* AMOCO PRODUCTION CO. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 91 F. 3d 1478.

No. 96–1186. ASSOCIATED GAS DISTRIBUTORS ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION;

No. 96–1187. AMERICAN PUBLIC GAS ASSN. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION;

No. 96–1188. NEW YORK PUBLIC SERVICE COMMISSION ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 96–1189. BURLINGTON RESOURCES OIL & GAS CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 88 F. 3d 1105.

No. 96–967. NEW YORK *v.* OWENS. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 227 App. Div. 2d 256, 642 N. Y. S. 2d 874.

No. 96–1461. OHIO ADULT PAROLE AUTHORITY ET AL. *v.* LYONS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 105 F. 3d 1063.

No. 96–1378. BARNABEI *v.* VIRGINIA. Sup. Ct. Va. Motions of National Legal Aid and Defender Association et al. and Virginia College of Criminal Defense Attorneys for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 252 Va. 161, 477 S. E. 2d 270.

No. 96–1393. MISSOURI PACIFIC RAILROAD CO. ET AL. *v.* HARPER. App. Ct. Ill., 5th Dist. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 282 Ill. App. 3d 19, 667 N. E. 2d 1382.

Rehearing Denied

No. 96–1096. BAHETH ET AL. *v.* GUARANTY BANK & TRUST CO., NKA REGIONS BANK, ET AL., *ante,* p. 1117;

No. 96–1144. DAVIS *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO, CLC, ET AL., *ante*, p. 1119;

No. 96–1161. BARAKAT *v.* LIFE INSURANCE COMPANY OF VIRGINIA, *ante*, p. 1143;

No. 96–1217. FLORES *v.* FMC CORP. ET AL., *ante*, p. 1120;

No. 96–1220. MOREWITZ *v.* ASHMORE, *ante*, p. 1120;

No. 96–1247. RICHARDSON *v.* BAKERY, CONFECTIONARY & TOBACCO WORKERS, LOCAL NO. 26, *ante*, p. 1143;

No. 96–1331. SMITH *v.* UNITED STATES, *ante*, p. 1144;

No. 96–6580. LEWIS LANG *v.* REYNOLDS ET AL., 519 U. S. 1120;

No. 96–6680. ASHTON *v.* UNITED STATES ET AL., 519 U. S. 1095;

No. 96–7040. MAXBERRY *v.* PARAMOUNT COMMUNICATIONS ET AL., 519 U. S. 1125;

No. 96–7195. WILLIAMS *v.* MISSISSIPPI, *ante*, p. 1145;

No. 96–7205. BURNETT *v.* BULSON; and BURNETT *v.* RIGGLE ET AL., 519 U. S. 1152;

No. 96–7293. AZUBUKO *v.* MONTGOMERY, CLERK-MAGISTRATE, DISTRICT COURT OF MASSACHUSETTS, SUFFOLK COUNTY, *ante*, p. 1106;

No. 96–7334. SCOTT *v.* DIME SAVINGS BANK OF NEW YORK, *ante*, p. 1122;

No. 96–7408. BRAYALL ET VIR *v.* DART INDUSTRIES ET AL., *ante*, p. 1123;

No. 96–7538. BURNETT *v.* WILLETTE, *ante*, p. 1126;

No. 96–7606. REMETA *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 1147;

No. 96–7656. AZUBUKO *v.* REGISTRAR OF MOTOR VEHICLES, *ante*, p. 1157;

No. 96–7781. BUSTAMANTE *v.* UNITED STATES, *ante*, p. 1129;

No. 96–7788. LEAL *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 1130; and

No. 96–7841. THOMAS *v.* WEST, SECRETARY OF THE ARMY, *ante*, p. 1148. Petitions for rehearing denied.

MAY 13, 1997

Miscellaneous Orders

No. A–807. WESTLEY *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 96–7151. LEWIS *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1209.] The order granting the petition for writ of certiorari is amended to read: Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether petitioner was properly charged and convicted for the murder of her four-year-old stepdaughter under the Assimilative Crimes Statute, 18 U. S. C. § 13, and the Louisiana child murder statute, La. Rev. Stat. Ann. § 14:30(A)(5) (West 1986), and if not, whether the sentence was proper?"

MAY 19, 1997

Certiorari Granted—Vacated and Remanded

No. 96–538. FROST ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *United States*, *ante*, p. 461. Reported below: 61 F. 3d 1518 and 77 F. 3d 1319.

No. 96–1089. UNITED STATES *v.* KEYS. C. A. 9th 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 *Johnson* v. *United States*, *ante*, p. 461. Reported below: 95 F. 3d 874.

No. 96–1323. CITY OF SANTA ANA *v.* HERNANDEZ ET AL.; and No. 96–1516. HERNANDEZ ET AL. *v.* CITY OF SANTA ANA. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Auer* v. *Robbins*, 519 U. S. 452 (1997). Reported below: 94 F. 3d 651.

No. 96–6348. MCKINNEY *v.* UNITED STATES. C. A. 8th 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 *Johnson* v. *United States*, *ante*, p. 461. Reported below: 79 F. 3d 105.

Miscellaneous Orders

No. A–416. WRIGHT *v.* UNITED STATES. Application for bail, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. M–79. RUSSELL *v.* CITY OF BRYAN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for fees and expenses granted, and the River Master is awarded $2,758 for the period January 1 through March 31, 1997, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 519 U. S. 979.]

No. 96–7171. SPENCER *v.* KEMNA, SUPERINTENDENT, WESTERN MISSOURI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. [Certiorari granted, *ante,* p. 1165.] Motion for appointment of counsel granted, and it is ordered that John William Simon, Esq., of Jefferson City, Mo., be appointed to serve as counsel for petitioner in this case.

No. 96–8400. BUCHANAN *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. [Certiorari granted, *ante,* p. 1196.] Motion for appointment of counsel granted, and it is ordered that Gerald T. Zerkin, Esq., of Richmond, Va., be appointed to serve as counsel for petitioner in this case.

No. 96–8242. IN RE SPYCHALA;
No. 96–8252. IN RE WHITE; and
No. 96–8667. IN RE GRUBBS. Petitions for writs of mandamus denied.

No. 96–8996 (A–815). IN RE CALLINS. 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.

No. 96–9000 (A–816). IN RE LACKEY. 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 Granted

No. 96–1133. UNITED STATES *v.* SCHEFFER. C. A. Armed Forces. Certiorari granted. Reported below: 44 M. J. 442.

No. 96–1462. LUNDING ET UX. *v.* NEW YORK TAX APPEALS TRIBUNAL ET AL. Ct. App. N. Y. Certiorari granted. Reported below: 89 N. Y. 2d 283, 675 N. E. 2d 816.

No. 96–1482. LEXECON INC. ET AL. *v.* MILBERG WEISS BERSHAD HYNES & LERACH ET AL. C. A. 9th Cir. Certiorari

granted limited to Question 1 presented by the petition. Reported below: 102 F. 3d 1524.

Certiorari Denied

No. 96–560. BARRICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 91 F. 3d 677.

No. 96–781. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 89 F. 3d 854.

No. 96–969. TEXAS INSTRUMENTS INC. *v.* CYPRESS SEMICONDUCTOR CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 90 F. 3d 1558.

No. 96–979. NIKOLITS, PROPERTY APPRAISER OF PALM BEACH COUNTY *v.* PARRISH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 86 F. 3d 1088.

No. 96–1240. LEAHY ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 96 F. 3d 228.

No. 96–1260. HOLT *v.* KMI-CONTINENTAL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 95 F. 3d 123.

No. 96–1268. CITY AND COUNTY OF DENVER, COLORADO *v.* SONNENFELD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 100 F. 3d 744.

No. 96–1275. CALIFORNIA *v.* OPUKU-BOATENG. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1461.

No. 96–1276. BRADLEY ET AL. *v.* FIRST GIBRALTAR BANK, FSB, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 98 F. 3d 1338.

No. 96–1287. IMPARATO *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 95 F. 3d 1126.

No. 96–1318. OCALA STAR-BANNER CORP. ET AL. *v.* MCNELY. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 1068.

No. 96–1328. ROBINSON *v.* GLOBAL MARINE DRILLING CO. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 35.

No. 96–1358. OCHOA *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 98 F. 3d 646.

No. 96–1404. LEWIS ET VIR *v.* ALAMANCE COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 600.

No. 96–1452. COLORADO ET AL. *v.* SANCHEZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 97 F. 3d 1303.

No. 96–1454. ROSENSTIEL ET AL. *v.* RODRIGUEZ, CHAIR, MINNESOTA ETHICAL PRACTICES BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 101 F. 3d 1544.

No. 96–1456. LUNDQUIST *v.* PREMIER FINANCIAL SERVICES-TEXAS, L. P. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 551.

No. 96–1459. PEDEN ET AL. *v.* KANSAS ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 261 Kan. 239, 930 P. 2d 1.

No. 96–1465. UNION PACIFIC RAILROAD CO. ET AL. *v.* COMSOURCE INDEPENDENT FOOD SERVICE COS., INC. C. A. 9th Cir. Certiorari denied. Reported below: 102 F. 3d 438.

No. 96–1466. COSENTINO ET AL. *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 102 F. 3d 71.

No. 96–1471. MORGAN *v.* TEXAS UTILITIES ELECTRIC CO. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 656.

No. 96–1472. HOLT *v.* JTM INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 89 F. 3d 1224.

No. 96–1475. TAVORA *v.* NEW YORK MERCANTILE EXCHANGE. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 907.

No. 96–1477. TATREAU *v.* MINNESOTA BOARD OF MEDICAL PRACTICE. Ct. App. Minn. Certiorari denied.

No. 96–1478. WOOD, ADMINISTRATOR OF THE ESTATE OF BOURGEOIS, DECEASED *v.* GARNER FOOD SERVICES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 89 F. 3d 1523.

No. 96–1483. ADVANCED SEMICONDUCTOR MATERIALS AMERICA, INC., ET AL. *v.* APPLIED MATERIALS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 98 F. 3d 1563.

No. 96–1485. GROSSBAUM ET AL. *v.* INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 100 F. 3d 1287.

No. 96–1486. COMMISSIONER OF INTERNAL REVENUE *v.* D'AMBROSIO, EXECUTRIX OF THE ESTATE OF D'AMBROSIO, DECEASED. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 309.

No. 96–1489. VANCE *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 97 F. 3d 987.

No. 96–1501. MORIEL *v.* PRUNTY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 101 F. 3d 706.

No. 96–1503. MCLEOD *v.* OREGON LITHOPRINT, INC., DBA NEWS-REGISTER PUBLISHING CO., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 102 F. 3d 376.

No. 96–1512. SOUTH CAROLINA *v.* FOWLER. Ct. App. S. C. Certiorari denied. Reported below: 322 S. C. 263, 471 S. E. 2d 706.

No. 96–1514. CONTE *v.* JOE CONTE TOYOTA, INC. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 654.

No. 96–1519. WILSON, GOVERNOR OF CALIFORNIA, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 828.

No. 96–1525. CZERKIES *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 99 F. 3d 1142.

No. 96–1530. HASHEMI *v.* AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 104 F. 3d 1122.

No. 96–1544. OVERSEAS BULKTANK CORP. ET AL. *v.* ROSE. Ct. App. La., 5th Cir. Certiorari denied.

No. 96–1638. SCOTT *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 101 F. 3d 748.

No. 96–1664. TIN YAT CHIN *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 95 F. 3d 1167.

No. 96–1686. FUENTES *v.* UNITED STATES; and
No. 96–8671. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 98.

No. 96–6929. HART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 92 F. 3d 1186.

No. 96–7082. BOYD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 86 F. 3d 719.

No. 96–7325. EMBREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 96–7740. AKUJOROBI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 709.

No. 96–7924. RIOS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 546 Pa. 271, 684 A. 2d 1025.

No. 96–8144. SHATNER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 174 Ill. 2d 133, 673 N. E. 2d 258.

No. 96–8148. HAYNES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 174 Ill. 2d 204, 673 N. E. 2d 318.

No. 96–8230. BARLOW *v.* HERRON, SHERIFF, RANDOLPH COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 389.

No. 96–8232. SOTO-FONG *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 187 Ariz. 186, 928 P. 2d 610.

No. 96–8234. LYNCH *v.* BOONE, SHERIFF, CASS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 653.

No. 96–8239. MACKENZIE *v.* CREAGER. Sup. Ct. Wash. Certiorari denied.

No. 96–8241. MITCHELL *v.* ALBUQUERQUE BOARD OF EDUCATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 103 F. 3d 145.

No. 96–8255. YOUNG *v.* STINE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 96–8258. CARSON ET UX. *v.* COAST VILLAGE PROPERTY OWNERS CORP. Ct. App. Ore. Certiorari denied. Reported below: 142 Ore. App. 597, 922 P. 2d 730.

No. 96–8260. WRIGHT *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 96–8262. TULLER *v.* NEAL, SUPERINTENDENT, COLORADO STATE PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 670.

No. 96–8264. JOHNSON *v.* LAMONT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1346.

No. 96–8269. SCHMIDT *v.* MARTIN ET AL. C. A. 11th Cir. Certiorari denied.

No. 96–8273. SISK *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 96–8278. WHITE *v.* O'CONNOR, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 109 F. 3d 767.

No. 96–8281. TOLBERT *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 116 Ohio App. 3d 86, 686 N. E. 2d 1375.

No. 96–8282. WILLIAMS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 669 N. E. 2d 1372.

No. 96–8283. GERALD *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8284. DYE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 96–8286. DINGLE *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 96–8288. ARTEAGA *v.* SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 96–8289. ARTEAGA *v.* COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 96–8290. COOK *v.* CROGAN, COUNTY PROBATION OFFICER, SAN DIEGO COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8292. MULTANI *v.* ROSS UNIVERSITY ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 233 App. Div. 2d 197, 650 N. Y. S. 2d 527.

No. 96–8298. SEWARD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 96–8301. FARRELL *v.* OHIO. Ct. App. Ohio, Sandusky County. Certiorari denied.

No. 96–8305. ALESSI *v.* NORTHWEST AIRLINES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 363.

No. 96–8306. MOLINA LOPEZ *v.* ARIZONA. Super. Ct. Ariz., Pima County. Certiorari denied.

No. 96–8315. FOSTER *v.* OLD TOWN TROLLEY ET AL. Ct. App. D. C. Certiorari denied.

No. 96–8316. EL-BADRAWI *v.* DICKSON SUPPLY CO. ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 96–8319. BRANCATO *v.* FISCHER. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 937 S. W. 2d 379.

No. 96–8338. MONTEZ *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 324 Ore. 343, 927 P. 2d 64.

No. 96–8397. SINGH *v.* GENERAL ACCOUNTING OFFICE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 106 F. 3d 427.

No. 96–8402. NICOLAUS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1102.

No. 96–8414. MARTIN *v.* RIVERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 12.

No. 96–8480. LEFF *v.* INSTITUTE OF SPECIALIZED MEDICINE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8498. REYNOLDS *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN'S SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8564. BARBARA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 96 F. 3d 1456.

No. 96–8590. HOWARD *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 99 F. 3d 895.

No. 96–8618. BURGESS *v.* EASLEY MUNICIPAL ELECTION COMMISSION. Sup. Ct. S. C. Certiorari denied. Reported below: 325 S. C. 6, 478 S. E. 2d 680.

No. 96–8625. COLEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 654.

No. 96–8627. NAGI *v.* C. E. FLEMING CORP. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 96–8655. GIBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 649.

No. 96–8656. GIRARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1347.

No. 96–8658. HOWARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 92 F. 3d 1192.

No. 96–8659. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 418.

No. 96–8662. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 22 F. 3d 1100.

No. 96–8669. MOTT *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 187 Ariz. 536, 931 P. 2d 1046.

No. 96–8676. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 411.

No. 96–8679. AKPAETI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 415 and 416.

No. 96–8683. HUMPHREY ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 F. 3d 65.

No. 96–8684. PIERRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 418.

No. 96–8685. CHURN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 106 F. 3d 402.

No. 96–8686. CAUSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 91 F. 3d 144.

No. 96–8687. GALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 709.

No. 96–8689. GIACOMEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 331.

No. 96–8691. IRONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 333.

No. 96–8692. JACKSON *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. Ct. App. D. C. Certiorari denied.

No. 96–8695. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 96–8697. TROWBRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 110 F. 3d 71.

No. 96–8701. BREWSTER ET AL. *v.* UNITED STATES;
No. 96–8718. LINDSEY *v.* UNITED STATES; and
No. 96–8727. BUGGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 415.

No. 96–8702. DAVID *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 414.

No. 96–8703. HOWARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 107 F. 3d 13.

No. 96–8705. GOINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 9.

No. 96–8706. HANSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 417.

No. 96–8710. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 398.

No. 96–8711. O'NEAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 9.

No. 96–8715. NELSON *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 963.

No. 96–8716. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 121.

No. 96–8717. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 333.

No. 96–8725. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 872.

No. 96–8726. BELTRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 397.

No. 96–8729. FULBRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 443.

No. 96–8735. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 23.

No. 96–8737. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 394.

No. 96–8738. TRIPLETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 1074.

No. 96–8741. THOMPSON *v.* TRUE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 414.

No. 96–8745. ESCOBAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 948.

No. 96–8747. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 54.

No. 96–8754. WARREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 392.

No. 96–1412. SPECKARD, SUPERINTENDENT, GROVELAND CORRECTIONAL FACILITY, ET AL. *v.* AYALA. C. A. 2d Cir. Motion

of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 89 F. 3d 91 and 102 F. 3d 649.

No. 96–1580. SHAY ET AL. *v.* HOWARD ET AL. C. A. 9th Cir. Motions of Crowley Maritime Corp. and American Academy of Actuaries for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 100 F. 3d 1484.

Rehearing Denied

No. 96–925. MCKINNEY ET UX. *v.* BALDWIN, 519 U. S. 1114;
No. 96–6761. HART/CROSS *v.* UNITED STATES, 519 U. S. 1120;
No. 96–6963. IN RE MINNIECHESKE, 519 U. S. 1054;
No. 96–7139. HAMM *v.* UNITED STATES, 519 U. S. 1129;
No. 96–7453. TOBIE *v.* DEPARTMENT OF THE INTERIOR ET AL., *ante*, p. 1124;
No. 96–7941. HOWARD *v.* WALT DISNEY CO. ET AL., *ante*, p. 1189; and
No. 96–8158. ROGERS *v.* UNITED STATES, *ante*, p. 1178. Petitions for rehearing denied.

No. 96–5268. GLOCK *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 519 U. S. 888. Motion for leave to file petition for rehearing denied.

MAY 20, 1997

Dismissal Under Rule 46

No. 96–8452. LABASTIDA *v.* NEVADA. Sup. Ct. Nev. Certiorari dismissed under this Court's Rule 46. Reported below: 112 Nev. 1502, 931 P. 2d 1334.

Miscellaneous Order

No. A–830. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* MARTINEZ-VILLAREAL. Application to vacate the stay of execution of sentence of death granted by the United States Court of Appeals for the Ninth Circuit on May 19, 1997, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

Certiorari Denied

No. 96–9068 (A–823). MARTINEZ-VILLAREAL *v.* ARIZONA. Sup. Ct. Ariz. Motion for leave to proceed *in forma pauperis*

without an affidavit of indigency executed by petitioner granted. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied.

MAY 27, 1997

Certiorari Granted—Vacated and Remanded

No. 95–1385. WOOD, SUPERINTENDENT, WALLA WALLA STATE PENITENTIARY, ET AL. *v.* GOTCHER. C. A. 9th 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 *Edwards* v. *Balisok*, *ante*, p. 641. Reported below: 66 F. 3d 1097.

Miscellaneous Orders

No. A–793. EINAUGLER *v.* SUPREME COURT OF NEW YORK ET AL. Application for stay of mandate, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. M–78. NOWICKI *v.* BRUFF ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 95–1726. UNITED STATES *v.* LABONTE ET AL. C. A. 1st Cir. [Certiorari granted, 518 U. S. 1016.] Motion of respondent Stephen Dyer to dismiss the writ of certiorari as improvidently granted denied.

No. 96–871. STATE OIL CO. *v.* KHAN ET AL. C. A. 7th Cir. [Certiorari granted, 519 U. S. 1107.] Motions of Association of the Bar of the City of New York and Business Roundtable for leave to file briefs 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.

No. 96–1252. PROFESSIONAL MEDICAL INSURANCE CO. ET AL. *v.* MURFF. C. A. 8th Cir. Motions of International Association of Insurance Receivers and Transit Casualty Co. for leave to file briefs as *amici curiae* granted.

No. 96–1346. PARADIES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioners for leave to amend petition for writ of certiorari granted.

No. 96–8809. IN RE WRIGHT. Petition for writ of habeas corpus denied.

No. 96–1675. IN RE GELB; and
No. 96–8392. IN RE ANDERSON. Petitions for writs of mandamus denied.

Certiorari Granted

No. 96–1487. UNITED STATES *v.* BAJAKAJIAN. C. A. 9th Cir. Certiorari granted. Reported below: 84 F. 3d 334.

No. 96–1279. ROGERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted limited to the following question: "Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element?" Reported below: 94 F. 3d 1519.

No. 96–7901. TREST *v.* CAIN, WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 94 F. 3d 1005.

Certiorari Denied

No. 96–752. ARAMONY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 F. 3d 1369.

No. 96–1163. MALLOTT & PETERSON ET AL. *v.* STADTMILLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1170.

No. 96–1242. ARMSTRONG ET AL. *v.* EXECUTIVE OFFICE OF THE PRESIDENT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 90 F. 3d 553.

No. 96–1310. SALAZAR-HARO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 95 F. 3d 309.

No. 96–1324. ZARNES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 96–1415. SUFFOLK PARENTS OF HANDICAPPED ADULTS ET AL. *v.* WINGATE, COMMISSIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 818.

No. 96–1426. HUTTON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HUTTON *v.* THREE RIVERS AREA HOSPITAL. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 956.

No. 96–1504. HUBBARD *v.* KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD. Ct. App. Ky. Certiorari denied.

No. 96–1505. BUSS *v.* PAINESVILLE TOWNSHIP. Ct. App. Ohio, Lake County. Certiorari denied.

No. 96–1507. LA FUERZA AEREA BOLIVIANA, AN INSTRUMENTALITY OF THE REPUBLIC OF BOLIVIA *v.* TRANSAERO, INC. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 538.

No. 96–1508. PRICKETT ET AL. *v.* NORFOLK SOUTHERN RAILWAY CO. ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 691 So. 2d 1055.

No. 96–1513. GRANT *v.* MISSISSIPPI ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 686 So. 2d 1078.

No. 96–1517. FIDEL ET AL. *v.* NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 664.

No. 96–1520. MUSE ET AL. *v.* INTERNATIONAL BUSINESS MACHINES CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 490.

No. 96–1521. WILLIAMS *v.* AVNET, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 346.

No. 96–1522. DUFFEY, DIRECTOR, UNITED STATES INFORMATION AGENCY *v.* HARTMAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 88 F. 3d 1232.

No. 96–1523. FOSTER *v.* CITY OF SOUTHFIELD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 106 F. 3d 400.

No. 96–1524. GROOMS ET AL. *v.* GLAZE ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 324 S. C. 249, 478 S. E. 2d 841.

No. 96–1527. PATEL ET AL. *v.* PENMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 868.

No. 96–1528. LOVING *v.* PIRELLI CABLE CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 96 F. 3d 1433.

No. 96–1532. NEW JERSEY CARPENTERS APPRENTICE TRAINING AND EDUCATION FUND *v.* BOROUGH OF KENILWORTH. Sup. Ct. N. J. Certiorari denied. Reported below: 147 N. J. 171, 685 A. 2d 1309.

No. 96–1533. SAULSBERRY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 691 So. 2d 1021.

No. 96–1535. RONWIN *v.* IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT. Sup. Ct. Iowa. Certiorari denied. Reported below: 557 N. W. 2d 515.

No. 96–1546. CONTINENTAL TREND RESOURCES, INC., ET AL. *v.* OXY USA INC. C. A. 10th Cir. Certiorari denied. Reported below: 101 F. 3d 634.

No. 96–1548. HUTTON *v.* HOWARD. Ct. App. Okla. Certiorari denied.

No. 96–1565. ORBACK ET AL. *v.* HEWLETT-PACKARD CO. C. A. 10th Cir. Certiorari denied. Reported below: 97 F. 3d 429.

No. 96–1583. VAN HARKEN ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 1346.

No. 96–1603. CORNFORTH *v.* HOWARD, SPECIAL JUDGE, DISTRICT COURT OF OKLAHOMA, OKLAHOMA COUNTY. C. A. 10th Cir. Certiorari denied. Reported below: 98 F. 3d 1349.

No. 96–1637. WOLFE *v.* DEBOSE ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 928 P. 2d 1315.

No. 96–1676. BENNALLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 409.

No. 96–1682. STELMOKAS, AKA STELMOKEVICIUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 100 F. 3d 302.

No. 96–1700. ABIDEKUN *v.* NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 352.

No. 96–1702. HARVEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 393.

No. 96–6825. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 94 F. 3d 125.

No. 96–7332. WEST *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 92 F. 3d 1385.

No. 96–7640. MORALES-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 698.

No. 96–7641. JOHNSON *v.* GOMEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 92 F. 3d 964.

No. 96–7872. GRAHAM-WEBER *v.* COUNTY OF ESSEX ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 112.

No. 96–7895. BASCUE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1461.

No. 96–7930. CHANDLER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 96–8240. JOHNSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 326 Ark. 430, 934 S. W. 2d 179.

No. 96–8244. DEVER ET AL. *v.* TURNER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1138.

No. 96–8250. FELTROP *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 91 F. 3d 1178.

No. 96–8299. SACERIO *v.* SCHOOL BOARD OF DADE COUNTY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 681 So. 2d 1151.

No. 96–8307. RIVERS *v.* FARCAS, STEWART, BROWNIE, HANDSON & BLISS. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 96–8318. PLEDGER *v.* ARKANSAS REGIONAL BLOOD SERVICE. Ct. App. Ark. Certiorari denied. Reported below: 55 Ark. App. xxv.

No. 96–8322. HILL *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 96–8323. HILL *v.* RAUP ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8324. HILL *v.* ACKER. C. A. 3d Cir. Certiorari denied.

No. 96–8325. HILL *v.* BECK ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8326. HILL *v.* GATES ET AL. (two judgments). C. A. 3d Cir. Certiorari denied.

No. 96–8327. HILL *v.* MCCLURE, JUDGE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 96–8328. HILL *v.* KEMP ET AL. (two judgments). C. A. 3d Cir. Certiorari denied.

No. 96–8329. HARRISON *v.* BARBOUR, SUPERINTENDENT, TWIN RIVERS CORRECTIONS CENTER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1345.

No. 96–8331. COHEA *v.* WHITE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8340. KLYNG *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8343. TOSH *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 96–8345. WAMBACH *v.* CREECY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 360.

No. 96–8347. PAGE *v.* SAUNDERS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 97 F. 3d 1448.

No. 96–8349. MILLER *v.* STATE INDUSTRIAL INSURANCE SYSTEM OF NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1112, 923 P. 2d 577.

No. 96–8354. CAREY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8356. ABELE *v.* SWIGERT. C. A. 11th Cir. Certiorari denied.

No. 96–8363. CANNON *v.* SIMMS ET AL. Super. Ct. Bibb County, Ga. Certiorari denied.

No. 96–8365. CRAIG *v.* BLACKBURN ET AL. C. A. 10th Cir. Certiorari denied.

No. 96–8370. WHITEROCK *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 775, 918 P. 2d 1309.

No. 96–8372. TREMBLAY *v.* SMITH ET AL. C. A. 1st Cir. Certiorari denied.

No. 96–8373. WERNER, AKA THOMAS *v.* MCCOTTER, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 414.

No. 96–8375. GARY *v.* TURPIN, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 96–8378. HOEKSTRA, BY AND THROUGH HER PARENTS, HOEKSTRA ET AL. *v.* INDEPENDENT SCHOOL DISTRICT NO. 283. C. A. 8th Cir. Certiorari denied. Reported below: 103 F. 3d 624.

No. 96–8381. CLAYTON *v.* CLAYTON. Ct. App. Ind. Certiorari denied. Reported below: 662 N. E. 2d 1014.

No. 96–8384. HOWARD *v.* HOWARD. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 96–8385. ECHOLS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 326 Ark. 917, 936 S. W. 2d 509.

No. 96–8386. BERNYS *v.* WING ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 96–8387. SPICER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 96–8390. BROWN *v.* BONACCORSO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 94 F. 3d 650.

No. 96–8394. ALTSCHUL *v.* TEXAS (four judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 96–8395. ASHING *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 282 Ill. App. 3d 1122, 707 N. E. 2d 304.

No. 96–8410. DARWALL *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 96–8412. BELTON *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 14.

No. 96–8419. BALLOD *v.* PENNSYLVANIA ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 676 A. 2d 1333.

No. 96–8428. JUDD *v.* UNIVERSITY OF NEW MEXICO ET AL. C. A. 10th Cir. Certiorari denied.

No. 96–8434. KABAKOW *v.* AMERICAN SAVINGS BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 95 F. 3d 1157.

No. 96–8446. JAMES *v.* COURT OF COMMON PLEAS OF SOUTH CAROLINA, SUMTER COUNTY, ET AL. Sup. Ct. S. C. Certiorari denied.

No. 96–8457. EVANS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1172, 926 P. 2d 265.

No. 96–8467. DRUMMOND *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1129.

No. 96–8484. VIEUX *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 41 Mass. App. 526, 671 N. E. 2d 989.

No. 96–8504. ALTSCHUL *v.* TEXAS (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 96–8521. SWEENEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–8539. MCRAE *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 106 F. 3d 424.

No. 96–8550. MALLIA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 89 N. Y. 2d 1013, 680 N. E. 2d 625.

No. 96–8657. HIGGASON *v.* SWIHART ET AL. C. A. 7th Cir. Certiorari denied.

No. 96–8720. MCBRIDE *v.* THOMPSON, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 1146.

No. 96–8728. GRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 956.

No. 96–8731. EATON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 868.

No. 96–8734. STEWART *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 104 F. 3d 1377.

No. 96–8744. GOLDY *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8752. BEASLEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 102 F. 3d 1440.

No. 96–8758. PERDUE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 24.

No. 96–8759. WATKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 398.

No. 96–8763. IBIDA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 393.

No. 96–8765. JOINER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 F. 3d 961.

No. 96–8766. IVORY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 106 F. 3d 403.

No. 96–8768. KIRKLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 104 F. 3d 1403 and 107 F. 3d 923.

No. 96–8771. STEWART *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 101 F. 3d 716.

No. 96–8775. CROWE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 392.

No. 96–8776. GELIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 709.

No. 96–8777. CANNON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 105 F. 3d 671.

No. 96–8779. OGLETREE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 25.

No. 96–8781. SOMERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 133.

No. 96–8784. KIMBLE, AKA KIMBALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 96–8785. LAWANSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 F. 3d 380.

No. 96–8787. MOLINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 106 F. 3d 1118.

No. 96–8789. BALL *v.* BOOKER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 104 F. 3d 362.

No. 96–8792. THORNTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 411.

No. 96–8794. VINES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 691 A. 2d 165.

No. 96–8795. WIMBUSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 F. 3d 968.

No. 96–8799. DIALLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–8801. DOBYNS ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 679 A. 2d 487.

No. 96–8802. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 108 F. 3d 344.

No. 96–8806. ROGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 104 F. 3d 361.

No. 96–8807. DUNCAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 555.

No. 96–8808. FIGUEROA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 105 F. 3d 874.

No. 96–8812. JACQUOT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 26.

No. 96–8816. MURPHY *v.* PERRILL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 107 F. 3d 880.

No. 96–8826. VASQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 369.

No. 96–8828. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 531.

No. 96–8829. PETERSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 24.

No. 96–8831. CHIQUITO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 311.

No. 96–8836. BOWLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 96–8838. COCIVERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 104 F. 3d 566.

No. 96–8842. CARGLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 107 F. 3d 13.

No. 96–1496. TIDEWATER MARINE WESTERN, INC., ET AL. *v.* CALIFORNIA LABOR COMMISSIONER ET AL. Sup. Ct. Cal. Motion of Maritime Law Association of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 14 Cal. 4th 557, 927 P. 2d 296.

No. 96–1553. ERNST & YOUNG *v.* SIMPSON. C. A. 6th Cir. Motions of 16 law firms and Arthur Anderson LLP et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 100 F. 3d 436.

No. 96–1605. BEAR VALLEY CHURCH OF CHRIST *v.* DEBOSE ET AL. Sup. Ct. Colo. Motion of National Baptist Convention of America, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 928 P. 2d 1315.

Rehearing Denied

No. 96–1308. LOVELL *v.* HURFORD ET AL., *ante,* p. 1156;
No. 96–7470. DODD *v.* OLIVER ET AL., *ante,* p. 1125;
No. 96–7514. CRAWFORD *v.* HAWAII, *ante,* p. 1126;
No. 96–7824. IN RE IJEMBA, *ante,* p. 1114;
No. 96–7825. IVY *v.* UNITED STATES, *ante,* p. 1131;
No. 96–7956. AGCAOILI *v.* BROWN, SECRETARY OF VETERANS AFFAIRS, *ante,* p. 1159; and
No. 96–8185. FRANKS *v.* UNITED STATES, *ante,* p. 1179. Petitions for rehearing denied.

No. 96–5454. MASON *v.* NORWEST BANK SOUTH DAKOTA, N. A., ET AL., 519 U. S. 910. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

MAY 28, 1997

Miscellaneous Order. (See also No. 96–9124, *infra.*)

No. 96–9158 (A–860). IN RE MADDEN. 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. 96–9124 (A–853). MADDEN *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. Combined petition for writ of certiorari, petition for writ of habeas corpus, and petition for an appropriate writ denied.

MAY 29, 1997

Dismissal Under Rule 46

No. 96–7563. RUSSELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari dismissed under this Court's Rule 46.

JUNE 2, 1997

Certiorari Granted—Vacated and Remanded. (See also No. 96–1033, *ante,* p. 893.)

No. 96–540. UNITED STATES *v.* DUNN. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *United States* v. *LaBonte*, *ante*, p. 751. Reported below: 80 F. 3d 402.

Miscellaneous Orders

No. 96–859. STEVEDORING SERVICES OF AMERICA ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL., *ante*, p. 1155. Motion of respondent Charles S. Sproull for attorney's fees denied without prejudice to refiling in the United States Court of Appeals for the Ninth Circuit.

No. 96–8882. IN RE NORDQUEST; and
No. 96–8932. IN RE FOREST. Petitions for writs of habeas corpus denied.

No. 96–1658. IN RE UNIVERSAL COMPUTER SYSTEMS, INC., ET AL.; and
No. 96–8850. IN RE MCCALL. Petitions for writs of mandamus denied.

No. 96–8465. IN RE HIGGINS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 96–1337. COUNTY OF SACRAMENTO ET AL. *v.* LEWIS ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF LEWIS, DECEASED. C. A. 9th Cir. Certiorari granted. Reported below: 98 F. 3d 434.

No. 96–1375. ST. PAUL-RAMSEY MEDICAL CENTER, INC. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari granted. Reported below: 91 F. 3d 57.

No. 96–1470. QUALITY KING DISTRIBUTORS, INC. *v.* L'ANZA RESEARCH INTERNATIONAL, INC. C. A. 9th Cir. Motions of Costco Cos., Inc., et al. and American Free Trade Association for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 98 F. 3d 1109.

Certiorari Denied

No. 95–8469. BRITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 79 F. 3d 584.

No. 95–8791. NOVEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 78 F. 3d 1483.

No. 95–9335. HERNANDEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 79 F. 3d 584.

No. 95–9361. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 79 F. 3d 1156.

No. 96–1203. WEAVER *v.* UNITED STATES INFORMATION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 87 F. 3d 1429.

No. 96–1206. MCGUIRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 99 F. 3d 671.

No. 96–1359. CITY OF NEW YORK ET AL. *v.* BERY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 97 F. 3d 689.

No. 96–1361. GRIJALVA *v.* DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 104 F. 3d 374.

No. 96–1377. AETNA HEALTH PLANS OF CALIFORNIA, INC., ET AL. *v.* ARDARY ET AL.; and

No. 96–1526. INLAND HEALTHCARE GROUP *v.* ARDARY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 496.

No. 96–1444. ARIAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 13 Cal. 4th 92, 913 P. 2d 980.

No. 96–1531. LEAK ET AL. *v.* GRANT MEDICAL CENTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 129.

No. 96–1534. SWEENEY *v.* SCHMOKE, MAYOR OF BALTIMORE, ET AL. Cir. Ct. Baltimore County, Md. Certiorari denied.

No. 96–1545. LANE *v.* MINISTRY OF DEFENSE, STATE OF ISRAEL. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 665.

No. 96–1558. URBAN SEARCH MANAGEMENT ET AL. *v.* TYUS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 102 F. 3d 256.

No. 96–1562. SISTRUNK *v.* CITY OF STRONGSVILLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 194.

No. 96–1567. JACKSON *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 672 So. 2d 215.

No. 96–1573. LAW OFFICES OF HERBERT HAFIF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 F. 3d 276.

No. 96–1575. DELONE *v.* MORRIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 386.

No. 96–1576. WESSELS *v.* IOWA. Ct. App. Iowa. Certiorari denied.

No. 96–1582. OREGON TAXPAYERS UNITED PAC *v.* KEISLING, OREGON SECRETARY OF STATE. Ct. App. Ore. Certiorari denied. Reported below: 143 Ore. App. 537, 924 P. 2d 853.

No. 96–1597. DOSTERT *v.* SUPREME COURT OF APPEALS OF WEST VIRGINIA ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 96–1640. BASIC ENERGY CORP. *v.* CHILES, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 418.

No. 96–1643. DANIELL *v.* OLD LINE LIFE INSURANCE COMPANY OF AMERICA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 695.

No. 96–1656. MULLINAX *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 327 Ark. 41, 938 S. W. 2d 801.

No. 96–1663. PIERSON *v.* WILSHIRE TERRACE CORP. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–1677. JENKINS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 104 F. 3d 376.

No. 96–1679. ELDRIDGE AUTO SALES, INC. *v.* PURTLE. C. A. 6th Cir. Certiorari denied. Reported below: 91 F. 3d 797.

No. 96–1690. PFLUGER *v.* ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 283 Ill. App. 3d 1119, 708 N. E. 2d 854.

No. 96–1716. KUMPAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 963.

No. 96–1736. MUCHNICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 100 F. 3d 740.

No. 96–1751. PRITCHARD *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 45 M. J. 126.

No. 96–1754. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 656.

No. 96–1767. ROE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 F. 3d 1140.

No. 96–5777. CALDWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 82 F. 3d 427.

No. 96–5865. ADAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 89 F. 3d 841.

No. 96–6001. FOUNTAIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 83 F. 3d 946.

No. 96–6496. SAUNDERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 92 F. 3d 1188.

No. 96–6518. VON HOFF *v.* UNITED STATES;
No. 96–6776. HOELZER *v.* UNITED STATES; and
No. 96–7731. BATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 96 F. 3d 1441.

No. 96–6810. MCQUILKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 97 F. 3d 723.

No. 96–7264. LIPPITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 97 F. 3d 1454.

No. 96–7618. BORKOWSKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1461.

No. 96–7639. ROANE *v.* UNITED STATES;
No. 96–7686. JOHNSON *v.* UNITED STATES; and
No. 96–7692. TIPTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 90 F. 3d 861.

No. 96–7796. SORIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 933 S. W. 2d 46.

No. 96–7873. HOLMAN *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 95 F. 3d 481.

No. 96–7921. LUFKIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 134.

No. 96–7959. SWIGER *v.* OHIO. Ct. App. Ohio, Tuscarawas County. Certiorari denied.

No. 96–7989. IYAMU *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 554.

No. 96–8011. NICOLETTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 F. 3d 1199.

No. 96–8061. RHODES *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 91 F. 3d 803.

No. 96–8072. MUHAYMIN, AKA MOSBY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 101 F. 3d 1278.

No. 96–8101. VILLAREAL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–8302. SMULLS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 935 S. W. 2d 9.

No. 96–8401. BABA *v.* 1133 BUILDING CORP. ET AL.; and BABA *v.* EVANS ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 210 App. Div. 2d 6, 619 N. Y. S. 2d 41 (first judgment); 213 App. Div. 2d 248, 624 N. Y. S. 2d 18 (second judgment).

No. 96–8415. MCREYNOLDS *v.* KAYE, CHIEF JUDGE, COURT OF APPEALS OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 96–8418. PUGH *v.* MORALES, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 331.

No. 96–8420. CASTEEL *v.* PIESCHEK, SHERIFF OF BROWN COUNTY JAIL, ET AL. C. A. 7th Cir. Certiorari denied.

No. 96–8429. MCREYNOLDS *v.* MURPHY, PRESIDING JUSTICE, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT. C. A. 2d Cir. Certiorari denied.

No. 96–8440. McReynolds *v.* Mark, Justice, Family Court of New York. C. A. 2d Cir. Certiorari denied.

No. 96–8442. Levy *v.* Fresh Fields Market, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1130.

No. 96–8444. Richards *v.* Brown et al. C. A. 6th Cir. Certiorari denied. Reported below: 89 F. 3d 835.

No. 96–8449. Neese *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, et al. C. A. 5th Cir. Certiorari denied.

No. 96–8450. Monroe *v.* Anderson, Superintendent, Mississippi State Penitentiary. C. A. 5th Cir. Certiorari denied.

No. 96–8454. Elison et ux. *v.* Bank of New York. Super. Ct. N. J., App. Div. Certiorari denied.

No. 96–8455. Etemad *v.* California Department of Water Resources Control Board. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 15.

No. 96–8464. Lambert *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 675 N. E. 2d 1060.

No. 96–8468. Easterwood *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8469. Hawkins *v.* Michigan Department of Corrections. C. A. 6th Cir. Certiorari denied.

No. 96–8471. Six *v.* Bowersox, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 94 F. 3d 469.

No. 96–8474. Houser *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 96–8476. Belton *v.* Dow Chemical Co. et al. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 137.

No. 96–8483. Taplin *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 96–8491. GANGI *v.* BAYBANK, FSB, ET AL. Sup. Ct. N. H. Certiorari denied.

No. 96–8500. THORNTON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 96–8502. ALLEN *v.* WESTWINDS APARTMENTS. Ct. App. S. C. Certiorari denied.

No. 96–8503. CARR *v.* RANEY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 96–8532. JENKINS ET AL. *v.* OAKLEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 99 F. 3d 1149.

No. 96–8538. NOE *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 396.

No. 96–8557. HERMAN *v.* RATELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8582. FELDER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 686 So. 2d 1305.

No. 96–8595. MCDONALD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 687 So. 2d 1304.

No. 96–8629. MAGHE *v.* KOCH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 107 F. 3d 21.

No. 96–8636. LOWE *v.* POGUE. Sup. Ct. Okla. Certiorari denied.

No. 96–8644. TIDIK *v.* RITSEMA ET AL. C. A. 6th Cir. Certiorari denied.

No. 96–8648. TURNPAUGH *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 871.

No. 96–8650. WILLIAMS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1750.

No. 96–8664. HADLEY *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 96–8666. HARRIS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 96–8688. DOGGINS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8690. ST. JOSEPH *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 408.

No. 96–8693. NELSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–8704. ELLIS *v.* PINKINS, CHIEF DEPUTY WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 337.

No. 96–8709. REESE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 94 F. 3d 1177.

No. 96–8714. NICHOLAS *v.* PATAKI, GOVERNOR OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 233 App. Div. 2d 657, 650 N. Y. S. 2d 317.

No. 96–8736. WATSON *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 284 Ill. App. 3d 1153, 708 N. E. 2d 1289.

No. 96–8749. JORDAN *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 937 S. W. 2d 262.

No. 96–8750. MCQUEEN *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 99 F. 3d 1302.

No. 96–8753. HARRIS *v.* CHAPMAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 499.

No. 96–8756. SCHWARTZ *v.* EMHART GLASS MACHINERY, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8770. ANTONELLI *v.* FUGETT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 101 F. 3d 110.

No. 96–8786. JAMES *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 397.

No. 96–8810. BIZBERG-GOGOL, AKA ZION *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 96–8813. LITTLEFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 527.

No. 96–8815. MCDONALD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 100 F. 3d 1320.

No. 96–8824. LEEPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 1457.

No. 96–8830. PRESCOTT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 107 F. 3d 5.

No. 96–8844. GALLARES *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 138.

No. 96–8847. HARDY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 284 Ill. App. 3d 1119, 708 N. E. 2d 1275.

No. 96–8849. MANGONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 105 F. 3d 29.

No. 96–8853. HEIMERMANN *v.* VANDER ARK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 96–8855. BATSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 392.

No. 96–8861. ROSE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 104 F. 3d 1408.

No. 96–8863. CARROLL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 105 F. 3d 740.

No. 96–8865. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 103 F. 3d 660.

No. 96–8866. FERRET-CASTELLANOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 339.

No. 96–8867. HICKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 106 F. 3d 187.

No. 96–8877. KRAFT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 98 F. 3d 1336.

No. 96–1610. CLARK, EXECUTRIX OF THE ESTATE OF CLARK, DECEASED *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: 105 F. 3d 646.

No. 96–8334. BETHLEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 685 So. 2d 1063.

Statement of JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, respecting the denial of certiorari.

It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought. *United States* v. *Carver*, 260 U. S. 482, 490 (1923). See *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (opinion of STEVENS, J., respecting denial of certiorari); *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of certiorari). That is certainly true of our decision to deny certiorari in this case. It is worth noting the existence of an arguable jurisdictional bar to our review. Our consideration of state-court decisions is confined to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257(a). Petitioner has been neither convicted of nor sentenced for any crime. As we have indicated, "in the context of a criminal prosecution, finality is normally defined by the imposition of the sentence." *Flynt* v. *Ohio*, 451 U. S. 619, 620 (1981). See *Baltimore Radio*, 338 U. S., at 918 (noting one reason for denial of certiorari is that "judgment of the lower court may not be final").

No. 96–8707. THOMPSON *v.* CALDERON, WARDEN. C. A. 9th Cir. Motion of respondent to strike *amici curiae* brief of Richard Gilbert et al. denied. Certiorari denied. Reported below: 109 F. 3d 1358.

Rehearing Denied

No. 96–1357. SMITH, PERSONAL REPRESENTATIVE OF SMITH, DECEASED *v.* SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA ET AL., *ante*, p. 1204;

No. 96–1380. MURRAY *v.* BABBITT, SECRETARY OF THE INTERIOR, *ante*, p. 1187;

No. 96–7790. McReynolds *v.* Gangel-Jacob, Justice, Appellate Division, Supreme Court of New York, First Judicial Department, *ante*, p. 1173;

No. 96–7823. Woratzeck *v.* Stewart, Director, Arizona Department of Corrections, *ante*, p. 1173;

No. 96–7871. Fletcher *v.* Schindler Elevator Corp. et al., *ante*, p. 1174;

No. 96–7900. Washington *v.* City of Jacksonville, Florida, et al., *ante*, p. 1175;

No. 96–8106. Jacobson *v.* Stevens et al., *ante*, p. 1177;

No. 96–8173. Gant *v.* Drug Enforcement Agency et al., *ante*, p. 1178; and

No. 96–8217. Pizzo *v.* Cain, Warden, et al., *ante*, p. 1190. Petitions for rehearing denied.

June 3, 1997

Miscellaneous Order

No. A–875. Harris *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. Application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, denied. Justice Scalia took no part in the consideration or decision of this application.

Certiorari Denied

No. 96–8892 (A–811). Behringer *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.

June 4, 1997

Dismissal Under Rule 46

No. 96–1126. Iolab Corp. *v.* Hunter. Sup. Ct. Mo. Certiorari dismissed under this Court's Rule 46.1. Reported below: 927 S. W. 2d 848.

Miscellaneous Order

No. 96–9244 (A–881). In re Losada. 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. 96–9138 (A–854). JOHNSON-BEY *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.

No. 96–9243 (A–876). LOSADA *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.

JUNE 9, 1997

Certiorari Granted—Vacated and Remanded

No. 96–896. JEFFERSON COUNTY, ALABAMA *v.* ACKER ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arkansas* v. *Farm Credit Servs. of Central Ark.*, *ante*, p. 821. Reported below: 92 F. 3d 1561.

No. 96–936. CITY OF ANAHEIM *v.* CALIFORNIA CREDIT UNION LEAGUE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arkansas* v. *Farm Credit Servs. of Central Ark.*, *ante*, p. 821. Reported below: 95 F. 3d 30.

Miscellaneous Orders. (See also No. 96–8796, *ante*, p. 937.)

No. A–792. SMITH *v.* COLORADO. Sup. Ct. Colo. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–802 (96–1843). SMITH *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ET AL. C. A. 10th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–1391. IN RE DISBARMENT OF CASTRO. Disbarment entered. [For earlier order herein, see 511 U. S. 1104.]

No. D–1788. IN RE DISBARMENT OF AURIEMMA. Disbarment entered. [For earlier order herein, see *ante*, p. 1112.]

No. D–1791. IN RE DISBARMENT OF GROWNEY. Disbarment entered. [For earlier order herein, see *ante*, p. 1152.]

No. D–1792. IN RE DISBARMENT OF SANDS. Disbarment entered. [For earlier order herein, see *ante*, p. 1153.]

No. D–1793. IN RE DISBARMENT OF BOEHME. Disbarment entered. [For earlier order herein, see *ante*, p. 1153.]

No. D–1794. IN RE DISBARMENT OF ECHOLS. Disbarment entered. [For earlier order herein, see *ante*, p. 1153.]

No. D–1806. IN RE DISBARMENT OF MORATH. Thomas D. Morath, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1807. IN RE DISBARMENT OF CALVERT. Stephen Bradford Calvert, of Stuart, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1808. IN RE DISBARMENT OF KIRK. Raymond D. Kirk, of Lexington, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1809. IN RE DISBARMENT OF LANDAN. Henry Sinclair Landan, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1810. IN RE DISBARMENT OF LASH. Michael Lewis Lash, of New Orleans, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 96–8961. IN RE RICHARDS. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 96–568. ONCALE *v.* SUNDOWNER OFFSHORE SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 83 F. 3d 118.

No. 96–1579. BROGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 96 F. 3d 35.

No. 96–1400. CALIFORNIA ET AL. *v.* DEEP SEA RESEARCH, INC., ET AL. C. A. 9th Cir. Motions of National Trust for Historic Preservation et al. and Columbus-America Discovery Group for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 102 F. 3d 379.

No. 96–1569. BOGAN ET AL. *v.* SCOTT-HARRIS. C. A. 1st Cir. Certiorari granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Are individual members of a local legislative body entitled to absolute immunity from liability under 42 U. S. C. § 1983 for actions taken in a legislative capacity?" Reported below: 134 F. 3d 427.

No. 96–1581. SOUTH DAKOTA *v.* YANKTON SIOUX TRIBE ET AL. C. A. 8th Cir. Motion of Montana Association of Counties for Reservation Counties for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 99 F. 3d 1439.

Certiorari Denied

No. 95–1763. J. M. MARTINAC & CO. ET AL. *v.* SARATOGA FISHING CO. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 1432.

No. 96–176. PRESSLEY, PERSONAL REPRESENTATIVE FOR THE ESTATE OF PRESSLEY, DECEASED *v.* PRESSLEY. C. A. 6th Cir. Certiorari denied. Reported below: 82 F. 3d 126.

No. 96–1397. VILLAGE OF AIRMONT *v.* LEBLANC-STERNBERG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 355.

No. 96–1417. CARGILL, INC. *v.* PARSLEY DAIRY FARM ET AL.; and

No. 96–1624. PARSLEY DAIRY FARM ET AL. *v.* CARGILL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 551.

No. 96–1425. TERRY ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 101 F. 3d 1412.

No. 96–1433. BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. *v.* LASHAWN A., BY HER NEXT FRIEND, MOORE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 107 F. 3d 923.

No. 96–1499. C. O. N. T. R. O. L. ET AL. *v.* NEILSEN ET AL. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 916 S. W. 2d 677.

No. 96–1515. CHRISTENSEN ET AL. *v.* GRIFFES, VERMONT COMMISSIONER OF MOTOR VEHICLES. Sup. Ct. Vt. Certiorari denied. Reported below: 166 Vt. 21, 686 A. 2d 964.

No. 96–1563. SC TESTING TECHNOLOGY, INC., ET AL. *v.* MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 688 A. 2d 421.

No. 96–1568. TEE ET AL. *v.* UAL CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 91 F. 3d 163.

No. 96–1572. HEALTHSOUTH REHABILITATION HOSPITAL *v.* AMERICAN NATIONAL RED CROSS, DBA AMERICAN RED CROSS SOUTH CAROLINA BLOOD SERVICES REGION. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 1005.

No. 96–1585. EDMUNDSON, ADMINISTRATOR OF THE ESTATE OF TURNAGE, DECEASED, ET AL. *v.* KEESLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 117.

No. 96–1586. KRUGER ET UX. *v.* SONIC RESTAURANTS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 670.

No. 96–1588. CLARK *v.* BURNS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 105 F. 3d 659.

No. 96–1589. COLFORD *v.* CHUBB LIFE INSURANCE COMPANY OF AMERICA. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 687 A. 2d 609.

No. 96–1592. OLKEY ET AL. *v.* HYPERION 1999 TERM TRUST, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 98 F. 3d 2.

No. 96–1593. HINCHLIFFE *v.* PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 677 A. 2d 406.

No. 96–1594. HAYS ET AL. *v.* CITY OF URBANA. C. A. 7th Cir. Certiorari denied. Reported below: 104 F. 3d 102.

No. 96–1608. TRIMIEW *v.* NORFOLK SOUTHERN RAILWAY CO. Sup. Ct. Va. Certiorari denied. Reported below: 253 Va. 22, 480 S. E. 2d 104.

No. 96–1609. LABOUR *v.* AMERICAN STATES INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 99 F. 3d 1145.

No. 96–1615. SCRUGGS *v.* WILSON ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 685 So. 2d 1206.

No. 96–1616. LEIJA ET VIR, AS NEXT FRIENDS OF LEIJA, A MINOR *v.* CANUTILLO INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 393.

No. 96–1620. SCHUNDLER, MAYOR OF JERSEY CITY, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 104 F. 3d 1435.

No. 96–1632. PSI REPAIR SERVICES, INC. *v.* HONEYWELL, INC. C. A. 6th Cir. Certiorari denied. Reported below: 104 F. 3d 811.

No. 96–1634. ASAM *v.* DEVEREAUX, CHAIRMAN, DISCIPLINARY BOARD, ALABAMA STATE BAR, ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 686 So. 2d 1222.

No. 96–1635. ASAM *v.* NORRIS ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 691 So. 2d 1056.

No. 96–1645. FLOYD AUTEN ELECTRIC, INC. *v.* BERRY CONSTRUCTION, INC., ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–1665. SANTIAGO, PERSONAL REPRESENTATIVE OF THE ESTATE OF SANTIAGO, DECEASED *v.* WARE ET AL. Ct. App. Wis. Certiorari denied. Reported below: 205 Wis. 2d 292, 556 N. W. 2d 356.

No. 96–1669. PADDOCK PUBLICATIONS, INC., DBA THE DAILY HERALD *v.* CHICAGO TRIBUNE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 42.

No. 96–1705. ORTON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 100 F. 3d 968.

No. 96–1711. STANLEY ET AL. *v.* BOLES. Sup. Jud. Ct. Me. Certiorari denied.

No. 96–1723. SMITH ET UX. *v.* NOYES. Sup. Ct. N. H. Certiorari denied.

No. 96–1739. SCHULZ ET AL. *v.* NEW YORK STATE UNIFIED COURT SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 356.

No. 96–1771. COLLINS *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 96–1774. CARPENTER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 46 M. J. 372.

No. 96–1775. DURST-LEE *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 101 F. 3d 714.

No. 96–7768. WHITEHEAD *v.* UNITED STATES; and
No. 96–7967. PRETTY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 98 F. 3d 1213.

No. 96–8114. BRITZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 174 Ill. 2d 163, 673 N. E. 2d 300.

No. 96–8124. LETSINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 93 F. 3d 140.

No. 96–8125. LOMBARD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 102 F. 3d 1.

No. 96–8505. HARRIS *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8512. SIKORA *v.* DOE ET AL. C. A. 8th Cir. Certiorari denied.

No. 96–8515. WOODARD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 234 App. Div. 2d 613, 652 N. Y. S. 2d 64.

No. 96–8517. RAHMAN *v.* PHILLIP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 356.

No. 96–8523. SHARP *v.* RAY. C. A. 6th Cir. Certiorari denied. Reported below: 103 F. 3d 130.

No. 96–8524. RODRIGUEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 104 F. 3d 694.

No. 96–8530. NOE *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 396.

No. 96–8534. SIDLES *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 96–8535. SIDDIQUI *v.* NEW YORK. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 386.

No. 96–8536. BUELL *v.* GELMAN. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 96–8543. COLLYER *v.* DARLING ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 98 F. 3d 211.

No. 96–8544. BOLIEK *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 96 F. 3d 1070.

No. 96–8551. LOWE *v.* ZIMMERMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 96–8561. CLEMY P. ET AL. *v.* MONTGOMERY COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. Md. Certiorari denied. Reported below: 344 Md. 458, 687 A. 2d 681.

No. 96–8562. RUTHRUFF *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 96–8563. RIDGEWAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8566. WATTS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 87 F. 3d 1282.

No. 96–8568. VELA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8571. GRAY *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 87 F. 3d 1318.

No. 96–8575. JOHNSON *v.* GIBBONS. Ct. App. D. C. Certiorari denied.

No. 96–8576. LOWE *v.* FIELDS ET AL. C. A. 10th Cir. Certiorari denied.

No. 96–8579. ALTSCHUL *v.* LOGUE, JUDGE. Sup. Ct. Tex. Certiorari denied.

No. 96–8584. HARMON *v.* SIKES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 555.

No. 96–8591. CORNETT *v.* LONGOIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 396.

No. 96–8592. BERNYS *v.* WING ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 96–8593. WONG ET AL. *v.* HAN KUK CHUN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1296.

No. 96–8594. NORBURY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8599. VIDAL *v.* FLORIDA. Cir. Ct. Fla., Dade County. Certiorari denied.

No. 96–8606. SHARP *v.* ALLSTATE INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 957.

No. 96–8607. HUMPHRIES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 325 S. C. 28, 479 S. E. 2d 52.

No. 96–8610. FLETCHER *v.* HARRISON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 96–8630. JACKSON *v.* BYRD, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MUNCY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 105 F. 3d 145.

No. 96–8638. ROBINSON *v.* BARBOUR, SUPERINTENDENT, TWIN RIVERS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1460.

No. 96–8649. WALKER *v.* KENTUCKY DEPARTMENT OF CORRECTIONS. Ct. App. Ky. Certiorari denied.

No. 96–8660. NELSON *v.* STRAWN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 867.

No. 96–8674. MICKENS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 252 Va. 315, 478 S. E. 2d 302.

No. 96–8724. MUNDY *v.* DUPREE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 862.

No. 96–8746. GARZA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 96–8780. ORNELAS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 96–8798. DOMINGUEZ *v.* HENRY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 877.

No. 96–8821. KIDD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 175 Ill. 2d 1, 675 N. E. 2d 910.

No. 96–8825. MCAFFEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 652.

No. 96–8860. UKANDU *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 101 F. 3d 692.

No. 96–8864. TROTTER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 285 Ill. App. 3d 1095, 709 N. E. 2d 313.

No. 96–8871. RODEA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 1401.

No. 96–8878. MCMULLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1155.

No. 96–8885. PAULUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 100 F. 3d 957.

No. 96–8887. AYBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 684.

No. 96–8888. ZACKARY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 23 and 25.

No. 96–8889. TARRANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 96–8895. TRIPLETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 1074.

No. 96–8898. CHILDRESS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 707.

No. 96–8902. HENSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 864.

No. 96–8903. HART *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 96–8906. COBB *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 108 F. 3d 1380.

No. 96–8907. COLLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 25.

No. 96–8910. VELAZQUEZ-MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 340.

No. 96–8913. MYERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 936.

No. 96–8914. KESHISHIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 18.

No. 96–8917. OKOLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 397.

No. 96–8920. FREISINGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 363.

No. 96–8921. DURHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 106 F. 3d 404.

No. 96–8933. FANELLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 863.

No. 96–8934. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 393.

No. 96–8935. LOAISIGA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 104 F. 3d 484.

No. 96–8936. VAN ZANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 110 F. 3d 65.

No. 96–8949. TILLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 331.

No. 96–8950. LANIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 121.

No. 96–8951. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 108 F. 3d 342.

No. 96–8954. MURRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 12.

No. 96–8955. MILES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 18.

No. 95–1913. THIOKOL CORP. ET AL. *v.* REVENUE DIVISION, DEPARTMENT OF TREASURY OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 76 F. 3d 751.

No. 96–1681. MORGAN, SUPERINTENDENT, KNOX COUNTY SCHOOLS *v.* CHRIS L., A MINOR, BY NEXT FRIEND, MIKE L. C. A. 6th Cir. Motions of Georgia School Boards Association, Inc., and National School Boards Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 106 F. 3d 401.

Rehearing Denied

No. 96–900. VISWANATHAN *v.* BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA ET AL., *ante,* p. 1115;

No. 96–7765. AINSWORTH *v.* STATE BAR OF CALIFORNIA ET AL., *ante,* p. 1172; and

No. 96–8154. CLARK *v.* UNITED STATES, *ante,* p. 1178. Petitions for rehearing denied.

JUNE 11, 1997

Miscellaneous Order

No. 96–9321 (A–894). IN RE BEHRINGER. 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.

JUNE 16, 1997

Certiorari Granted—Reversed and Remanded. (See No. 96–1104, *ante,* p. 968.)

Certiorari Granted—Vacated and Remanded

No. 96–6114. COLLINS *v.* WELBORN, WARDEN. C. A. 7th 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 *Bracy* v. *Gramley, ante,* p. 899. Reported below: 81 F. 3d 684.

No. 96–8184. DANIEL *v.* UNITED STATES. 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 *Old Chief* v. *United States,* 519 U. S. 172 (1997). Reported below: 103 F. 3d 131.

Miscellaneous Orders

No. D–1797. IN RE DISBARMENT OF REED. Disbarment entered. [For earlier order herein, see *ante,* p. 1184.]

No. D–1799. IN RE DISBARMENT OF BENDET. Disbarment entered. [For earlier order herein, see *ante,* p. 1184.]

No. D–1800. IN RE DISBARMENT OF FRYE. Disbarment entered. [For earlier order herein, see *ante,* p. 1184.]

No. D–1801. IN RE DISBARMENT OF SCHWARTZ. Disbarment entered. [For earlier order herein, see *ante,* p. 1184.]

No. D–1802. IN RE DISBARMENT OF BOYLE. Disbarment entered. [For earlier order herein, see *ante,* p. 1184.]

No. D–1811. IN RE DISBARMENT OF WATKINS. Brian R. Watkins, of Lincoln, Neb., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, re-

quiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–81. KOVACS *v.* MENTAL HEALTH SERVICES OF ORANGE COUNTY, FLORIDA;

No. M–82. GRASSIA *v.* LUONGO ET AL.; and

No. M–86. BENJAMIN ET AL. *v.* AROOSTOCK MEDICAL CENTER ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 120, Orig. NEW JERSEY *v.* NEW YORK. Report of the Special Master and Supplement received and ordered filed. Exceptions to the Report may be filed within 45 days. Replies, if any, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 519 U. S. 1038.]

No. 96–8637. IN RE ROBINSON; and

No. 96–8643. IN RE TYLER. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 96–827. CRAWFORD-EL *v.* BRITTON. C. A. D. C. Cir. Certiorari granted. Reported below: 93 F. 3d 813.

No. 96–1590. FEDERAL ELECTION COMMISSION *v.* AKINS ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 101 F. 3d 731.

No. 96–8653. GRAY *v.* MARYLAND. Ct. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 344 Md. 417, 687 A. 2d 660.

Certiorari Denied

No. 96–1150. MAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 92 F. 3d 1189.

No. 96–1167. JAIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 93 F. 3d 436.

No. 96–1252. PROFESSIONAL MEDICAL INSURANCE CO. ET AL. *v.* MURFF. C. A. 8th Cir. Certiorari denied. Reported below: 97 F. 3d 289.

No. 96–1274. DIGITAL EQUIPMENT CORP. *v.* DEPARTMENT OF REVENUE OF WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 129 Wash. 2d 177, 916 P. 2d 933.

No. 96–1329. LIGHTMAN ET AL. *v.* ZENITH INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1348.

No. 96–1341. BONDS ET AL. *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 93 F. 3d 801.

No. 96–1432. YOURDON, INC. *v.* BRIDGES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 102 F. 3d 56.

No. 96–1442. SOUTHERN COMPANY SERVICES, INC. *v.* PRITCHARD. C. A. 11th Cir. Certiorari denied. Reported below: 92 F. 3d 1130 and 102 F. 3d 1118.

No. 96–1463. METRO-NORTH COMMUTER RAILROAD CO. *v.* PADILLA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 92 F. 3d 117.

No. 96–1481. LEAVITT, GOVERNOR OF UTAH, ET AL. *v.* JANE L. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 102 F. 3d 1112.

No. 96–1537. SWINT ET AL. *v.* CHAMBERS COUNTY COMMISSION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 105 F. 3d 672.

No. 96–1606. KINGSTON CONSTRUCTORS, INC. *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. Sup. Ct. Cal. Certiorari denied. Reported below: 14 Cal. 4th 939, 928 P. 2d 581.

No. 96–1612. HARPER, JUDGE, COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY *v.* OFFICE OF DISCIPLINARY COUNSEL, SUPREME COURT OF OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 77 Ohio St. 3d 211, 673 N. E. 2d 1253.

No. 96–1619. BUREAU VERITAS *v.* CARBOTRADE S. P. A., ON ITS OWN BEHALF AND AS ASSIGNEE OF ESSEX CEMENT CO., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 86.

No. 96–1621. KING *v.* FIELDER ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 17.

No. 96–1622. KNAPP *v.* NORTHWESTERN UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 101 F. 3d 473.

No. 96–1623. GATES ET AL. *v.* SHINN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 463.

No. 96–1625. DELK ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 96 F. 3d 182.

No. 96–1626. ASAM *v.* RYAN, ACTING JUDGE, CIRCUIT COURT OF DALLAS COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 417.

No. 96–1629. PEELER *v.* SPARTAN RADIOCASTING, INC., ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 324 S. C. 261, 478 S. E. 2d 282.

No. 96–1630. BEISWENGER ENTERPRISES CORP. *v.* CARLETTA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 86 F. 3d 1032.

No. 96–1631. DORF & STANTON COMMUNICATIONS, INC., ET AL. *v.* MOLSON BREWERIES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 100 F. 3d 919.

No. 96–1636. LEBBOS *v.* MASSACHUSETTS STATE BAR. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 423 Mass. 753, 672 N. E. 2d 517.

No. 96–1644. GREEN *v.* UMANA. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 279 Ill. App. 3d 1117, 701 N. E. 2d 574.

No. 96–1646. GIORGIO ET UX. *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 92 F. 3d 1185.

No. 96–1649. KEATON ET AL. *v.* OHIO. Ct. App. Ohio, Fayette County. Certiorari denied. Reported below: 113 Ohio App. 3d 696, 681 N. E. 2d 1375.

No. 96–1650. SCHEETZ, TRUSTEE OF THE SEVILLE CORPORATE PARK SUBDIVISION TRUST U/A DATED DECEMBER 1, 1988 *v.* VILLAGE OF SEVILLE. Ct. App. Ohio, Medina County. Certiorari denied.

No. 96–1659. DOODY *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 187 Ariz. 363, 930 P. 2d 440.

No. 96–1660. DUNLAP *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 187 Ariz. 441, 930 P. 2d 518.

No. 96–1662. DANIELS *v.* KANSAS CITY SOUTHERN RAILWAY CO. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 935 S. W. 2d 690.

No. 96–1666. KUCEJ *v.* CONNECTICUT STATEWIDE GRIEVANCE COMMITTEE. Sup. Ct. Conn. Certiorari denied. Reported below: 239 Conn. 449, 686 A. 2d 110.

No. 96–1667. GATES *v.* COUNTY OF SAN LUIS OBISPO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–1673. PALLAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–1692. SPEEN *v.* CROWN CLOTHING CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 102 F. 3d 625.

No. 96–1697. GATES *v.* COUNTY OF SAN LUIS OBISPO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–1699. DAVID ET AL. *v.* MOSLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 117.

No. 96–1715. ARIZONA *v.* RICHCREEK. Sup. Ct. Ariz. Certiorari denied. Reported below: 187 Ariz. 501, 930 P. 2d 1304.

No. 96–1728. IN RE KEATHLEY. Sup. Ct. Mo. Certiorari denied.

No. 96–1741. HUCK, DERIVATIVELY ON BEHALF OF SEA AIR SHUTTLE CORP. *v.* DAWSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 45.

No. 96–1757. HOLTZMAN *v.* MULLON, DIRECTOR OF VETERANS ADMINISTRATION MEDICAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 100 F. 3d 959.

No. 96–1761. ROSENBAUM *v.* ROSENBAUM ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 282 Ill. App. 3d 1110, 707 N. E. 2d 299.

No. 96–1776. BRASTEN *v.* ZINDELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 6.

No. 96–1790. ORTEGA VENEGAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 122.

No. 96–1796. MEDLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 99 F. 3d 1142.

No. 96–1803. HOLLAR, JUDGE, TERRITORIAL COURT OF THE VIRGIN ISLANDS *v.* GOVERNMENT OF THE VIRGIN ISLANDS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 384.

No. 96–1808. OWENS *v.* DEPARTMENT OF THE INTERIOR. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 333.

No. 96–1812. GARCIA *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 397.

No. 96–1857. HESS *v.* ADVANCED CARDIOVASCULAR SYSTEMS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 106 F. 3d 976.

No. 96–8145. SLOAN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 1378.

No. 96–8149. DICKERSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–8226. CUMMINGS-EL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 684 So. 2d 729.

No. 96–8573. HOVER *v.* FLORIDA POWER & LIGHT CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 101 F. 3d 708.

No. 96–8596. PLYLER *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 100 F. 3d 365.

No. 96–8597. SIMPSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 325 S. C. 37, 479 S. E. 2d 57.

No. 96–8605. PECK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–8611. ISLES *v.* COSBY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 98 F. 3d 1333.

No. 96–8615. RHINE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8616. COHEA *v.* MUELLER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 407.

No. 96–8619. ABELLAN *v.* FAIRMONT HOTEL. C. A. 9th Cir. Certiorari denied. Reported below: 85 F. 3d 634.

No. 96–8621. SONG *v.* COUNTRYMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 666.

No. 96–8623. BURCHILL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 453 Pa. Super. 678, 683 A. 2d 308.

No. 96–8628. KLINGENSMITH *v.* ROY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 7.

No. 96–8632. MORRIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 940 S. W. 2d 610.

No. 96–8634. LAGANA, AKA RAGUSA *v.* DILLON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 355.

No. 96–8640. SCOTT *v.* SUTOR ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–8642. WIFORD *v.* BOONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 414.

No. 96–8646. WILLOUGHBY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8651. TAPIA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 113 Nev. 1656, 970 P. 2d 1137.

No. 96–8652. WARD *v.* GEORGETOWN UNIVERSITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 107 F. 3d 924.

No. 96–8654. ENGLAND *v.* STEPANIK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 96–8661. KUTNYAK *v.* WALTERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MERCER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8665. HILL *v.* GATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8668. HART *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 665.

No. 96–8673. MARSHALL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 99 F. 3d 1153.

No. 96–8675. MOFFITT *v.* CITY OF CHARLOTTE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 647.

No. 96–8677. BURNETT *v.* CHIPPEWA COUNTY SHERIFF'S DEPARTMENT. Ct. App. Mich. Certiorari denied.

No. 96–8678. BASEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 52.

No. 96–8680. CHALET *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8681. BERGNE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 96–8682. HUERTA *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8696. TEBBETTS *v.* WHITSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 670.

No. 96–8698. WOOLLEY *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8699. OBERUCH *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8700. ARTEAGA *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 96–8723. MCCOY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 661 N. E. 2d 911.

No. 96–8740. WALKER *v.* WHITE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8751. CHAMBERS *v.* WILSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 26.

No. 96–8778. SINKS *v.* SHANKS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 103 F. 3d 145.

No. 96–8820. JACKSON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 113 Nev. 1630, 970 P. 2d 1110.

No. 96–8827. VINES *v.* BUCHLER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 101 F. 3d 110.

No. 96–8859. TAVAKOLI-NOURI *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. (two judgments). C. A. 3d Cir. Certiorari denied.

No. 96–8879. KEALOHA *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 84 Haw. 85, 929 P. 2d 98.

No. 96–8919. DANCER *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 106 F. 3d 426.

No. 96–8937. VEATCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 670.

No. 96–8940. SKINNER *v.* RUNYON, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1131.

No. 96–8948. VACCARO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 864.

No. 96–8952. LEVESQUE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 111 F. 3d 122.

No. 96–8953. LANGDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 96–8957. SPEAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 416.

No. 96–8960. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 332.

No. 96–8962. OMORI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 18.

No. 96–8974. FEICHTINGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 105 F. 3d 1188.

No. 96–8980. BISSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 F. 3d 1461.

No. 96–8981. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 871.

No. 96–8985. GONZALEZ-QUEZADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 1386.

No. 96–8987. GRAVES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 868.

No. 96–8990. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 106 F. 3d 695.

No. 96–8992. JOHNSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 393.

No. 96–8994. MCHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 1027.

No. 96–8997. PANCHAL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 108 F. 3d 342.

No. 96–8998. SPEARMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 1452.

No. 96–9002. GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 127.

No. 96–9005. CISNEROS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 339.

No. 96–9006. CALLUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 878.

No. 96–9007. WORKMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 110 F. 3d 915.

No. 96–9010. ESCOBAR VELASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 110 F. 3d 71.

No. 96–9016. 1–95–CV–553–P1 *v.* 1–95–CV–553–D1 ET AL. C. A. 2d Cir. Certiorari denied.

No. 96–9022. NEGRETE-DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 340.

No. 96–9023. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 339.

No. 96–9025. JOYCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 107 F. 3d 22.

No. 96–9027. CHESNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 F. 3d 564.

No. 96–9029. BANKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 96–9032. MOORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 108 F. 3d 330.

No. 96–9034. DIGGS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 111 F. 3d 963.

No. 96–9039. RUELAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 1416.

No. 96–9053. KARAFA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 107 F. 3d 22.

No. 96–9054. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 104 F. 3d 193.

No. 96–9059. KIMBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 712.

No. 96–1476. ALLSTATE LIFE INSURANCE CO. *v.* HIBMA ET AL. Ct. App. Ariz. Motions of American Council of Life Insurance et al. and Association of California Life and Health Insurance Cos. for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 96–1655. SMITH, AS ASSIGNEE OF THE INTEREST OF ORIGINAL PLAINTIFF, FAULKENBERRY *v.* ELKINS ET AL. C. A. 5th Cir. Motion of International Biochemicals Group, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 105 F. 3d 655.

No. 96–8641. PANDEY *v.* GRAHAM ET AL. App. Ct. Mass. Certiorari denied. JUSTICE BREYER took no part in the consider-

ation or decision of this petition. Reported below: 41 Mass. App. 1120, 673 N. E. 2d 96.

No. 96–8894. ROBINSON *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

Rehearing Denied

No. 95–1100. BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA *v.* BROWN ET AL., *ante*, p. 397;

No. 95–1535. NEWTON *v.* BOARD TO DETERMINE FITNESS OF BAR APPLICANTS, SUPREME COURT OF GEORGIA, 517 U. S. 1209;

No. 96–1427. DICICCO *v.* BONSEY ET AL., *ante*, p. 1187;

No. 96–1561. DELCOURT *v.* SILVERMAN ET AL., *ante*, p. 1213;

No. 96–6887. SAMUEL *v.* DUNCAN, WARDEN, ET AL., *ante*, p. 1157;

No. 96–7144. WOLFGRAM *v.* STATE BAR OF CALIFORNIA ET AL., 519 U. S. 1129;

No. 96–7233. BOWERS ET AL. *v.* SATURN GENERAL MOTORS CORP., *ante*, p. 1170;

No. 96–7450. LIDMAN *v.* DEPARTMENT OF STATE ET AL., *ante*, p. 1124;

No. 96–7671. WILLIAMS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. (two judgments), *ante*, p. 1158;

No. 96–7757. PORTER *v.* WEST, SECRETARY OF THE ARMY, *ante*, p. 1129;

No. 96–7774. BURNETT *v.* EASTERN UPPER PENINSULA MENTAL HEALTH CENTER ET AL., *ante*, p. 1172;

No. 96–7906. HUSSEIN *v.* PIERRE HOTEL, *ante*, p. 1188;

No. 96–7955. BUTLER *v.* MERCHANTS BANK & TRUST CO., *ante*, p. 1176;

No. 96–7961. MCCOLM *v.* JORDAN ET AL., *ante*, p. 1176;

No. 96–8111. CARTER *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, *ante*, p. 1190;

No. 96–8150. SCHWARZ *v.* DEPARTMENT OF JUSTICE, *ante*, p. 1216;

No. 96–8177. HARGROVE *v.* COLONY OF STONE MOUNTAIN ET AL., *ante*, p. 1190;

No. 96–8209. JONES *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, *ante*, p. 1179;

No. 96–8247. DOWNEY ET UX. *v.* KREMPIN ET AL., *ante*, p. 1201;
No. 96–8344. WILLIS *v.* DeTELLA, WARDEN, *ante*, p. 1202;
No. 96–8360. COOPER *v.* GAMMON, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER, *ante*, p. 1202; and
No. 96–8361. IN RE ALEXANDER, *ante*, p. 1209. Petitions for rehearing denied.

JUNE 18, 1997

Miscellaneous Order

No. 96–9394 (A–910). IN RE TRISTAN MONTOYA. 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.

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 11, 1997, 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. 1286. 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, and 517 U. S. 1263.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 11, 1997

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 Advisory 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 11, 1997

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and new Rules 1020, 3017.1, 8020, and 9015.

[See *infra*, pp. 1289–1303.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 1997, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases 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 1010. Service of involuntary petition and summons; petition commencing ancillary case.

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on any other parties as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(l) F. R. Civ. P. apply when service is made or attempted under this rule.

Rule 1019. Conversion of Chapter 11 reorganization case, Chapter 12 family farmer's debt adjustment case, or Chapter 13 individual's debt adjustment case to Chapter 7 liquidation case.

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

. . . . .

(*3*) *Claims filed before conversion.*—All claims actually filed by a creditor before conversion of the case are deemed filed in the chapter 7 case.

. . . . .

(5) *Filing final report and schedule of postpetition debts.*

(A) *Conversion of Chapter 11 or Chapter 12 case.*—Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:

(i) not later than 15 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

(B) *Conversion of Chapter 13 case.*—Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7,

(i) the debtor, not later than 15 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account;

(C) *Conversion after confirmation of a plan.*—Unless the court orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:

(i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply;

(ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and

(iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion.

(*D*) *Transmission to United States trustee.*—The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5).

. . . . .

Rule 1020. Election to be considered a small business in a Chapter 11 reorganization case.

In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election not later than 60 days after the date of the order for relief.

Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.

(*a*) *Twenty-day notices to parties in interest.*—Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code;

. . . . .

(*n*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 1005. The caption of every notice required to be given by the debtor to a creditor shall include the information required to be in the notice by § 342(c) of the Code.

. . . . .

Rule 2007.1. Appointment of trustee or examiner in a Chapter 11 reorganization case.

(*a*) *Order to appoint trustee or examiner.*—In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner under § 1104(a) or § 1104(c) of the Code shall be made in accordance with Rule 9014.

(*b*) *Election of trustee.*

(*1*) *Request for an election.*—A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee.

(*2*) *Manner of election and notice.*—An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. The United States trustee shall preside at the meeting. A proxy for the purpose of voting in the election may be solicited only by a committee of creditors appointed under § 1102 of the Code or by any other party entitled to solicit a proxy pursuant to Rule 2006.

(*3*) *Report of election and resolution of disputes.*

(*A*) *Report of undisputed election.*—If the election is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person elected and a statement that the election is undisputed. The United States trustee shall file with the report an application for approval of the appointment in accordance with subdivision (c) of this rule. The report constitutes appointment of the elected person to serve as trustee, subject to court approval, as of the date of entry of the order approving the appointment.

(*B*) *Disputed election.*—If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report shall be accompanied by a verified statement by each candidate elected

under each alternative presented by the dispute, setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee. Not later than the date on which the report of the disputed election is filed, the United States trustee shall mail a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code. Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files the report, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee. If a motion for the resolution of the dispute is timely filed, and the court determines the result of the election and approves the person elected, the report will constitute appointment of the elected person as of the date of entry of the order approving the appointment.

(*c*) *Approval of appointment.*—An order approving the appointment of a trustee elected under § 1104(b) or appointed under § 1104(d), or the appointment of an examiner under § 1104(d) of the Code, shall be made on application of the United States trustee. The application shall state the name of the person appointed and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. Unless the person has been elected under § 1104(b), the application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party

in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

Rule 3014. Election under § 1111(b) by secured creditor in Chapter 9 municipality or Chapter 11 reorganization case.

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

Rule 3017. Court consideration of disclosure statement in Chapter 9 municipality and Chapter 11 reorganization cases.

(*a*) *Hearing on disclosure statement and objections.*—Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing on at least 25 days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the

trustee, any committee appointed under the Code, and any other entity designated by the court, at any time before the disclosure statement is approved or by an earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

(*b*) *Determination on disclosure statement.*—Following the hearing the court shall determine whether the disclosure statement should be approved.

(*c*) *Dates fixed for voting on plan and confirmation.*—On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(*d*) *Transmission and notice to United States trustee, creditors, and equity security holders.*—Upon approval of a disclosure statement,—except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders—the debtor in possession, trustee, proponent of the plan, or clerk as the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,

(1) the plan or a court-approved summary of the plan;

(2) the disclosure statement approved by the court;

(3) notice of the time within which acceptances and rejections of the plan may be filed; and

(4) any other information as the court may direct, including any court opinion approving the disclosure statement or a court-approved summary of the opinion.

In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. If the court opinion is

not transmitted or only a summary of the plan is transmitted, the court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on the date the order approving the disclosure statement is entered or another date fixed by the court, for cause, after notice and a hearing.

(*e*) *Transmission to beneficial holders of securities.*—At the hearing held pursuant to subdivision (a) of this rule, the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, determine the adequacy of the procedures, and enter any orders the court deems appropriate.

Rule 3017.1. Court consideration of disclosure statement in a small business case.

(*a*) *Conditional approval of disclosure statement.*—If the debtor is a small business and has made a timely election to be considered a small business in a chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Rule 3016(b). On or before conditional approval of the disclosure statement, the court shall:

(1) fix a time within which the holders of claims and interests may accept or reject the plan;

(2) fix a time for filing objections to the disclosure statement;

(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(4) fix a date for the hearing on confirmation.

(*b*) *Application of Rule 3017.*—Rule 3017(a), (b), (c), and (e) do not apply to a conditionally approved disclosure statement. Rule 3017(d) applies to a conditionally approved disclosure statement, except that conditional approval is considered approval of the disclosure statement for the purpose of applying Rule 3017(d).

(*c*) *Final approval.*

(*1*) *Notice.*—Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 and may be combined with notice of the hearing on confirmation of the plan.

(*2*) *Objections.*—Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix.

(*3*) *Hearing.*—If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.

Rule 3018. Acceptance or rejection of plan in a Chapter 9 municipality or a Chapter 11 reorganization case.

(*a*) *Entities entitled to accept or reject plan; time for acceptance or rejection.*—A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or

on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

. . . . .

Rule 3021. Distribution under plan.

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) that have been allowed. For the purpose of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution unless a different time is fixed by the plan or the order confirming the plan.

Rule 8001. Manner of taking appeal; voluntary dismissal.

(*a*) *Appeal as of right; how taken.*—An appeal from a judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U. S. C. § 158(a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice

of appeal to enable the clerk to comply promptly with Rule 8004.

(*b*) *Appeal by leave; how taken.*—An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U. S. C. § 158(a)(3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

. . . . .

(*e*) *Election to have appeal heard by district court instead of bankruptcy appellate panel.*—An election to have an appeal heard by the district court under 28 U. S. C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U. S. C. § 158(c)(1).

Rule 8002. Time for filing notice of appeal.

. . . . .

(*c*) *Extension of time for appeal.*

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;

(E) approves a disclosure statement under § 1125; or

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the

time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

Rule 8020. Damages and costs for frivolous appeal.

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Rule 9011. Signing of papers; representations to the court; sanctions; verification and copies of papers.

(*a*) *Signature.*—Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(*b*) *Representations to the court.*—By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(*c*) *Sanctions.*—If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(*1*) *How initiated.*

(*A*) *By motion.*—A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held

jointly responsible for violations committed by its partners, associates, and employees.

(*B*) *On court's initiative.*—On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(*2*) *Nature of sanction; limitations.*—A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(*3*) *Order.*—When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(*d*) *Inapplicability to discovery.*—Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(*e*) *Verification.*—Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U. S. C. § 1746 satisfies the requirement of verification.

(*f*) *Copies of signed or verified papers.*—When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Rule 9015. Jury trials.

(*a*) *Applicability of certain federal rules of civil procedure.*—Rules 38, 39, and 47–51 F. R. Civ. P., and Rule 81(c) F. R. Civ. P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made pursuant to Rule 38(b) F. R. Civ. P. shall be filed in accordance with Rule 5005.

(*b*) *Consent to have trial conducted by bankruptcy judge.*—If the right to a jury trial applies, a timely demand has been filed pursuant to Rule 38(b) F. R. Civ. P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U. S. C. § 157(e) by jointly or separately filing a statement of consent within any applicable time limits specified by local rule.

Rule 9035. Applicability of rules in judicial districts in Alabama and North Carolina.

In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are not inconsistent with any federal statute effective in the case.

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 11, 1997, 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. 1306. 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, and 517 U. S. 1279.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 11, 1997

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 Advisory 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 11, 1997

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 9 and 73, and abrogation of Rules 74, 75, and 76, and amendments to Forms 33 and 34.

[See *infra*, pp. 1309–1311.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1997, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases 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.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 9. Pleading special matters.

. . . . .

(*h*) *Admiralty and maritime claims.*—A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U. S. C. § 1292(a)(3).

Rule 73. Magistrate judges; trial by consent and appeal.

(*a*) *Powers; procedure.*—. . . A record of the proceedings shall be made in accordance with the requirements of Title 28, U. S. C. § 636(c)(5).

. . . . .

(*c*) *Appeal.*—In accordance with Title 28, U. S. C. § 636(c)(3), appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

[(d) Optional appeal route.] (Abrogated.)

[Rule 74. Method of appeal from magistrate judge to district judge under Title 28, U. S. C. § 636(c)(4) and Rule 73(d).] (Abrogated.)

[Rule 75. Proceedings on appeal from magistrate judge to district judge under Rule 73(d).] (Abrogated.)

[Rule 76. Judgment of the district judge on the appeal under Rule 73(d) and costs.] (Abrogated.)

APPENDIX OF FORMS

Form 33. Notice of Availability of Magistrate Judge to Exercise Jurisdiction

. . . . .

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court.

Copies of the Form for the "Consent to Jurisdiction by a United States Magistrate Judge" are available from the clerk of the court.

Form 34. Consent to Exercise of Jurisdiction by a United States Magistrate Judge

. . . . .

CONSENT TO JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of Title 28, U. S. C. § 636(c), the undersigned party or parties to the above-captioned civil matter hereby voluntarily consent to have a United States magistrate judge conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

_____ _____

Date *Signature*

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 11, 1997, 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. 1314. 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 Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, and 517 U. S. 1285.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 11, 1997

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 Criminal 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 Advisory 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 11, 1997

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 16 and 58.

[See *infra*, pp. 1317–1321.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1997, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases 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 Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and inspection.

(*a*) *Governmental disclosure of evidence.*

(*1*) *Information subject to disclosure.*

. . . . . .

(*E*) *Expert witnesses.*—At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(*2*) *Information not subject to disclosure.*—Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by gov-

ernment witnesses or prospective government witnesses except as provided in 18 U. S. C. § 3500.

. . . . .

(*b*) *The defendant's disclosure of evidence.*

(*1*) *Information subject to disclosure.*

. . . . .

(*C*) *Expert witnesses.*—Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

. . . . .

Rule 58. Procedure for misdemeanors and other petty offenses.

(*a*) *Scope.*

(*1*) *In general.*—This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to district judges in such cases tried by United States magistrate judges.

. . . . .

(*b*) *Pretrial procedures.*

. . . . .

(*2*) *Initial appearance.*—At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

. . . . .

(C) the right to request the appointment of counsel if the defendant is unable to obtain counsel, unless the charge is a petty offense for which an appointment of counsel is not required;

. . . . . .

(E) the right to trial, judgment, and sentencing before a district judge, unless:

(i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or

(ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) the right to trial by jury before either a United States magistrate judge or a district judge, unless the charge is a petty offense; and

(G) the right to a preliminary examination in accordance with 18 U. S. C. § 3060, and the general circumstances under which the defendant may secure pretrial release, if the defendant is held in custody and charged with a misdemeanor other than a petty offense.

(*3*) *Consent and arraignment.*

(*A*) *Plea before a United States magistrate judge.*—A magistrate judge shall take the defendant's plea in a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or orally on the record to be tried before the magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere.

(*B*) *Failure to consent.*—In a misdemeanor case—other than a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction—magistrate judge shall order the de-

fendant to appear before a district judge for further proceedings on notice, unless the defendant consents to trial before the magistrate judge.

. . . . .

(*g*) *Appeal.*

(*1*) *Decision, order, judgment or sentence by a district judge.*—An appeal from a decision, order, judgment or conviction or sentence by a district judge shall be taken in accordance with the Federal Rules of Appellate Procedure.

(*2*) *Decision, order, judgment or sentence by a United States magistrate judge.*

(*A*) *Interlocutory appeal.*—A decision or order by a magistrate judge which, if made by a district judge, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a district judge provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge.

(*B*) *Appeal from conviction or sentence.*—An appeal from a judgment of conviction or sentence by a magistrate judge to a district judge shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.

. . . . .

(*D*) *Scope of appeal.*—The defendant shall not be entitled to a trial de novo by a district judge. The

scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.

. . . . .

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 11, 1997, 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. 1324. 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 reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, and 511 U. S. 1187.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 11, 1997

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 Evidence 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 Advisory 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 11, 1997

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), and 806, and new Rules 804(b)(6) and 807.

[See *infra*, pp. 1327–1329.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1997, and shall govern in all proceedings 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 Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 407. Subsequent remedial measures.

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.

. . . . .

Rule 801. Definitions.

. . . . .

(*d*) *Statements which are not hearsay.*

. . . . .

(*2*) *Admission by party-opponent.*—The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the

declarant and the party against whom the statement is offered under subdivision (E).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

. . . . .

(*24*) *[Transferred to Rule 807.]*

Rule 804. Hearsay exceptions; declarant unavailable.

. . . . .

(*b*) *Hearsay exceptions.*

. . . . .

(*5*) *[Transferred to Rule 807.]*

(*6*) *Forfeiture by wrongdoing.*—A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 807. Residual exception.

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court de-

termines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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JUDICIAL BIAS. See **Habeas Corpus,** 2.

JUDICIAL BYPASS OF PARENTAL NOTIFICATION LAWS. See **Constitutional Law,** VIII, 1.

JURISDICTION.

Tribal courts—Personal injury actions—Defendants are not tribal members.—When an accident occurs on a public highway maintained by a State under a federally granted right-of-way over Indian reservation land, a tort suit against allegedly negligent nonmembers may not be brought in tribal court absent congressional authorization. Strate v. A–1 Contractors, p. 438.

JUSTICIABILITY. See also **Constitutional Law,** II.

Ripeness for adjudication—Regulatory taking of property.—Petitioner's claim—that respondent land use agency's denial of her request to build on her lot constitutes a taking of land without just compensation—is ripe for adjudication despite her failure to try to sell development rights that run with land. Suitum v. Tahoe Regional Planning Agency, p. 725.

KNOCK AND ANNOUNCE RULE. See **Constitutional Law,** IX, 2.

LIBERTY INTEREST. See **Constitutional Law,** IV, 1; **Criminal Law,** 4.

LOUISIANA. See **Employee Retirement Income Security Act of 1974,** 3.

MARITAL ESTATE TAX DEDUCTION. See **Taxes,** 1.

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MEDICAL CENTERS. See **Employee Retirement Income Security Act of 1974,** 1.

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MULTIPLE-PARTY CANDIDACIES FOR ELECTED OFFICE. See **Constitutional Law,** V.

MUNICIPALITY LIABILITY. See **Civil Rights Act of 1871,** 2.

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NEW RULES. See **Habeas Corpus,** 1.

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OKLAHOMA. See **Constitutional Law,** IV, 1.

PARENTAL NOTICE OF ABORTION ACT. See **Constitutional Law,** VIII, 1.

PARENTS AND CHILDREN. See **Constitutional Law,** VIII, 1; **Social Security Act.**

PAROLE. See **Constitutional Law,** IV, 1.

PATENT LAW.

Infringement—"*Doctrine of equivalents.*"—Doctrine—under which a product or process that does not literally infringe upon a patent claim's express terms may be found to infringe if there is equivalence between elements of accused product or process and claimed elements of patented invention—is affirmed substantially as it was set out in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605. Warner-Jenkinson Co. v. Hilton Davis Chemical Co., p. 17.

PENSION BENEFITS. See **Employee Retirement Income Security Act of 1974,** 2, 3.

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PERSONAL INJURY LAWSUITS. See **Jurisdiction.**

PHYSICIAN-ONLY ABORTION LAWS. See **Constitutional Law,** VIII, 2.

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POLICYMAKERS. See **Civil Rights Act of 1871,** 1.

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PRELIMINARY INJUNCTIONS. See **Constitutional Law,** VIII, 2.

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PRODUCT LIABILITY. See **Admiralty.**

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RIGHT TO FILE SUIT. See **Social Security Act.**

RIGHT TO LIBERTY. See **Constitutional Law,** IV, 1; **Criminal Law,** 4.

RIGHT TO NOTICE AND A HEARING. See **Constitutional Law,** IV, 2.

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State child support enforcement programs—Federal right to enforce program requirements.—Title IV–D of Act, which sets forth requirements for federally funded state child support enforcement programs, does not give individuals a federal right to force a state agency to substantially comply with those requirements. Blessing v. Freestone, p. 329.

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1. Amendments to Federal Rules of Bankruptcy Procedure, p. 1285.
2. Amendments to Federal Rules of Civil Procedure, p. 1305.
3. Amendments to Federal Rules of Criminal Procedure, p. 1313.
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5. *Diversity suit—Order granting certiorari petition, vacating judgment, and remanding (GVR).*—In this diversity case, where soundness of Fourth Circuit's holding has been called into question by Maryland's high court, it is appropriate for this Court to issue a GVR order. Lords

SUPREME COURT—Continued.

Landing Village Condominium Council of Unit Owners v. Continental Ins. Co., p. 893.

6. *In forma pauperis—Repetitious filings.*—Abusive filer is denied *in forma pauperis* status on this and further noncriminal certiorari petitions. In re Vey, p. 303; Vey v. Clinton, p. 937.

7. *Writ of certiorari—Dismissal.*—Because Alabama Supreme Court did not address federal issue on which certiorari was granted—whether trial court's approval of a class and a settlement agreement without affording class members right to exclude themselves violated due process—and it is now apparent that petitioners have failed to establish that they properly presented issue to that court, writ is dismissed as improvidently granted. Adams v. Robertson, p. 83.

SUSPENSION OF PUBLIC EMPLOYEES. See **Constitutional Law,** IV, 2.

SUSPICIONLESS SEARCHES. See **Constitutional Law,** IX, 1.

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TAXES. See also **Constitutional Law,** III; **Employee Retirement Income Security Act of 1974,** 1.

1. *Federal estate taxes—Reduction of marital and charitable deductions.*—Court of Appeals' decision that taxpayer did not have to reduce estate tax deduction for marital or charitable bequests to extent administration expenses were paid from income generated during administration by assets allocated to those bequests is affirmed. Commissioner v. Estate of Hubert, p. 93.

2. *Tax Injunction Act—Application to instrumentalities of United States.*—United States instrumentalities do not, by virtue of that designation alone, have same right as United States to avoid Act's restriction on federal courts' power to prevent collection or enforcement of state taxes. Arkansas v. Farm Credit Servs. of Central Ark., p. 821.

TAX INJUNCTION ACT. See **Taxes,** 2.

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UNITED STATES SENTENCING COMMISSION GUIDELINES.

Imposition of maximum term—Consideration of statutory sentence enhancement.—An amendment to Sentencing Guideline § 4B1.1 commentary, precluding a District Court from considering a statutory sentence enhancement in imposing "maximum term" on a career drug- or violent-crime offender, is inconsistent with 28 U. S. C. § 994(h)'s plain language, which directs Sentencing Commission to assure that Guidelines specify a prison sentence "at or near the maximum term authorized for categories of adult offenders who commit their third felony drug offense or violent crime." United States v. LaBonte, p. 751.

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VOTING DISCRIMINATION. See **Voting Rights Act of 1965.**

VOTING RIGHTS ACT OF 1965.

1. *Preclearance—Changes in voting registration system.*—Mississippi must preclear under § 5 of Act changes it made in its voter registration system in order to comply with National Voter Registration Act of 1993. Young v. Fordice, p. 273.

2. *Violation of § 2 as reason to deny § 5 preclearance.*—Preclearance under § 5 of Act may not be denied solely on basis that a new voting standard, practice, or procedure violates § 2 of Act, but § 2 evidence may be relevant to § 5 inquiry. Reno v. Bossier Parish School Bd., p. 471.

WATER PROJECTS. See **Endangered Species Act of 1973.**

WELFARE BENEFIT PLANS. See **Employee Retirement Income Security Act of 1974,** 2.

WORDS AND PHRASES.

1. *"At or near the maximum term authorized for categories of adult offenders who commit their third felony drug offense or violent crime."* 28 U. S. C. § 994(h). United States v. LaBonte, p. 751.

2. *"The sentence . . . under this subsection [shall not] run concurrently with any other term of imprisonment."* 18 U. S. C. § 924(c). United States v. Gonzales, p. 1.

WRITS OF CERTIORARI. See **Supreme Court,** 5, 6, 7.