UNITED STATES

REPORTS

506

OCT. TERM 1992

UNITED STATES REPORTS

VOLUME 506

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1992

BEGINNING OF TERM

OCTOBER 5, 1992, THROUGH FEBRUARY 19, 1993

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 1996

Printed on Uncoated Permanent Printing Paper

For sale by the U. S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, Chief Justice.
BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate 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.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
THURGOOD MARSHALL, Associate Justice.[1]

OFFICERS OF THE COURT

WILLIAM P. BARR, Attorney General.[2]
STEWART M. GERSON, Acting Attorney General.[3]
KENNETH W. STARR, Solicitor General.[4]
WILLIAM C. BRYSON, Acting Solicitor General.[5]
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
SHELLEY L. DOWLING, Librarian.

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*For notes, see p. IV.

NOTES

[1] Justice Marshall, who retired effective October 1, 1991 (502 U. S. VII), died on January 24, 1993. See *post*, p. VII.

[2] Attorney General Barr resigned effective January 15, 1993.

[3] Mr. Gerson became Acting Attorney General effective January 16, 1993.

[4] Solicitor General Starr resigned effective January 20, 1993.

[5] Mr. Bryson became Acting Solicitor General on January 20, 1993.

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 November 1, 1991, 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, Clarence Thomas, 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, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, Sandra Day O'Connor, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

For the Eleventh Circuit, Anthony M. Kennedy, Associate Justice.

For the Federal Circuit, William H. Rehnquist, Chief Justice.

November 1, 1991.

(For next previous allotment, and modifications, see 498 U. S., p. vi, and 501 U. S., p. v.)

DEATH OF JUSTICE MARSHALL

Supreme Court of the United States

MONDAY, JANUARY 25, 1993

Present: Chief Justice Rehnquist, Justice Blackmun, Justice O'Connor, Justice Scalia, Justice Kennedy, Justice Souter, and Justice Thomas.

The Chief Justice said:

As we open this morning, I announce with sadness that our friend and colleague Thurgood Marshall, a former Justice of this Court, died yesterday, January 24, 1993, at the National Naval Medical Center, Bethesda, Maryland.

Born in Baltimore, Maryland in 1908, Thurgood Marshall was the grandson of a Union soldier, his namesake, and a great-grandson of a slave. His father worked as a dining-car waiter and a chief steward at a segregated club, and early instilled in his son the urge to question the legal status of minorities in this country. His mother taught school for over three decades and devoted herself to her two sons while they were growing up. Justice Marshall worked his way through Lincoln University and excelled at Howard University Law School under the tutelage of Charles Houston.

After a brief period in solo practice in Baltimore, Justice Marshall joined the NAACP Legal Defense and Education Fund, eventually becoming its special counsel and, later, its director. The most influential civil rights lawyer of this century, Justice Marshall designed and implemented the NAACP's legal strategy to eradicate racial discrimination in education, transportation, housing, and the voting booth. In

courthouses across the country, he became the champion of equal opportunity for minorities. As an advocate, Justice Marshall won 29 cases before this Court, including the landmark *Brown* v. *Board of Education.*

He left the NAACP when President Kennedy appointed him to the United States Court of Appeals for the Second Circuit in 1961. In 1965, President Johnson named him Solicitor General and, two years later, appointed him an Associate Justice of this Court.

Justice Marshall's contributions to constitutional law before his appointment to this Court were singular. These contributions alone would entitle him to a prominent place in American history had he never served on this Court. Building on those earlier accomplishments, he became an important voice in shaping the decisional law during his twenty-four years on the Supreme Court bench.

The members of this Court will miss Justice Marshall's wit, warmth and charm, and I speak for them in expressing our profound sympathy to Mrs. Marshall, her sons Thurgood and John, the remainder of the Marshall family, and all those whose lives were touched by this extraordinary man. The recess this Court takes today will be in his memory. At an appropriate time, the traditional memorial observance of the Court and the Bar of the Court will be held in this Courtroom.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1988 edition.

Cases reported before page 801 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 801 *et seq.* are those in which orders were entered. The opinion reported on page 1301 *et seq.* is that written in chambers by an individual Justice.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1992

MARTIN *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL.

ON MOTION OF PETITIONER FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 92–5584. Decided November 2, 1992*

Since this Court's Rule 39.8 was invoked in November 1991 to first deny *pro se* petitioner Martin *in forma pauperis* status, he has filed 11 petitions for certiorari, all but one of which have been demonstrably frivolous.

Held: Martin is denied leave to proceed *in forma pauperis* in the instant cases, and the Clerk is directed not to accept any further petitions for certiorari from him in noncriminal matters unless he pays the required docketing fee and submits his petition in compliance with this Court's Rule 33. Martin is a notorious abuser of the Court's certiorari process, and consideration of his repetitious and frivolous petitions does not allow the Court to allocate its resources in a way that promotes the interests of justice.

Motions denied.

PER CURIAM.

Pro se petitioner James L. Martin requests leave to proceed *in forma pauperis* under Rule 39 of this Court. We deny this request pursuant to our Rule 39.8. Martin is al-

*Together with No. 92–5618, *Martin* v. *McDermott et al.*, also on motion of petitioner for leave to proceed *in forma pauperis.*

lowed until November 23, 1992, within which to pay the docketing fees required by Rule 38 and to submit his petitions in compliance with this Court's Rule 33. We also direct the Clerk not to accept any further petitions for certiorari from Martin in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33.

Martin is a notorious abuser of this Court's certiorari process. We first invoked Rule 39.8 to deny Martin *in forma pauperis* status last November. See *Zatko* v. *California*, 502 U. S. 16 (1991) *(per curiam)*. At that time, we noted that Martin had filed 45 petitions in the past 10 years, and 15 in the preceding 2 years alone. Although Martin was granted *in forma pauperis* status to file these petitions, all of these petitions were denied without recorded dissent. In invoking Rule 39.8, we observed that Martin is "unique—not merely among those who seek to file *in forma pauperis*, but also among those who have paid the required filing fees—because [he has] repeatedly made totally frivolous demands on the Court's limited resources." *Id.*, at 18. Unfortunately, Martin has continued in his accustomed ways.

Since we first denied him *in forma pauperis* status last year, he has filed nine petitions for certiorari with this Court. We denied Martin leave to proceed *in forma pauperis* under Rule 39.8 of this Court with respect to four of these petitions,[1] and denied the remaining five petitions outright.[2] Two additional petitions for certiorari are before us today, bringing the total number of petitions Martin has filed in the

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[1] *Martin* v. *Smith*, *post*, p. 810; *Martin* v. *Delaware*, *post*, p. 810; *Martin* v. *Sparks*, *post*, p. 810; *Martin* v. *Delaware*, 505 U. S. 1203 (1992).

[2] *Martin* v. *Delaware Law School of Widener Univ., Inc.*, *post*, p. 841; *Martin* v. *Delaware*, *post*, p. 886; *Martin* v. *Knox*, 502 U. S. 999 (1991); *Martin* v. *Knox*, 502 U. S. 1015 (1991); *Martin* v. *Medical Center of Delaware*, 502 U. S. 991 (1991).

past year to 11. With the arguable exception of one of these petitions, see *Martin* v. *Knox*, 502 U. S. 999 (1991) (STEVENS, J., joined by BLACKMUN, J., respecting denial of certiorari), all of Martin's filings, including those before us today, have been demonstrably frivolous.

In *Zatko*, we warned that "[f]uture similar filings from [Martin] will merit additional measures." 502 U. S., at 18. As we have recognized, "[e]very paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." *In re McDonald*, 489 U. S. 180, 184 (1989) *(per curiam)*. Consideration of Martin's repetitious and frivolous petitions for certiorari does not promote this end.

We have entered orders similar to the present one on two previous occasions to prevent *pro se* petitioners from filing repetitious and frivolous requests for extraordinary relief. See *In re Sindram*, 498 U. S. 177 (1991) *(per curiam); In re McDonald*, *supra*. Although this case does not involve abuse of an extraordinary writ, but rather the writ of certiorari, Martin's pattern of abuse has had a similarly deleterious effect on this Court's "fair allocation of judicial resources." See *In re Sindram*, *supra*, at 180. As a result, the same concerns which led us to enter the orders barring prospective filings in *Sindram* and *McDonald* require such action here.

We regret the necessity of taking this step, but Martin's refusal to heed our earlier warning leaves us no choice. His abuse of the writ of certiorari has been in noncriminal cases, and so we limit our sanction accordingly. The order will therefore not prevent Martin from petitioning to challenge criminal sanctions which might be imposed on him. But it will free this Court's limited resources to consider the claims

of those petitioners who have not abused our certiorari process.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In my opinion the judicial resources of the Court could be used more effectively by simply denying Martin's petitions than by drafting, entering, and policing the order the Court enters today. The theoretical administrative benefit the Court may derive from an order of this kind is far outweighed by the shadow it casts on the great tradition of open access that characterized the Court's history prior to its unprecedented decisions in *In re McDonald*, 489 U. S. 180 (1989) *(per curiam)*, and *In re Sindram*, 498 U. S. 177 (1991) *(per curiam)*. I continue to adhere to the views expressed in the dissenting opinions filed in those cases, and in the dissenting opinion I filed in *Zatko* v. *California*, 502 U. S. 16, 18 (1991) *(per curiam)*. See also *Talamini* v. *Allstate Ins. Co.*, 470 U. S. 1067 (1985), appeal dism'd (STEVENS, J., concurring).

MONTANA *v.* IMLAY

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 91–687. Argued October 7, 1992—Decided November 3, 1992

Certiorari dismissed. Reported below: 249 Mont. 82, 813 P. 2d 979.

Marc Racicot, Attorney General of Montana, argued the cause for petitioner. With him on the briefs was *Elizabeth L. Griffing*, Assistant Attorney General.

Billy B. Miller argued the cause and filed briefs for respondent.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

JUSTICE STEVENS, concurring.

When the trial judge revoked respondent's parole, he reinstated a 5-year sentence of imprisonment. On appeal, the Montana Supreme Court, in the decision before us, vacated the revocation order and remanded the case for resentencing. 249 Mont. 82, 813 P. 2d 979 (1991). The trial court subse-

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr*, *Assistant Attorney General Mueller*, and *Deputy Solicitor General Bryson;* and for the State of Vermont et al. by *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Donald F. Hartman, Jr.*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Charles E. Cole* of Alaska, *Paul J. McMurdie* of Arizona, *Charles M. Oberly III* of Delaware, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Frank J. Kelley* of Michigan, *Frankie Sue Del Papa* of Nevada, *Robert J. Del Tufo* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Lee Fisher* of Ohio, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, *Paul Van Dam* of Utah, and *Mary Sue Terry* of Virginia.

John E. B. Myers filed a brief for the American Professional Society on the Abuse of Children as *amicus curiae.*

quently resentenced respondent, again to a 5-year term of imprisonment, and the Montana Supreme Court upheld that sentence in a judgment not now before us for review.

Thus, no matter which party might prevail in this Court, the respondent's term of imprisonment will be the same. At oral argument, neither counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits—except, of course, for the potential benefit that might flow from an advisory opinion.* Because it is not the business of this Court to render such opinions, it wisely decides to dismiss a petition that should not have been granted in the first place.

JUSTICE WHITE, dissenting.

We granted certiorari to consider whether the Fifth Amendment bars a State from conditioning probation upon the probationer's successful completion of a therapy program in which he would be required to admit responsibility for his criminal acts. In the decision below, the Montana Supreme Court held that, "absent any grant of immunity" from prosecution for incriminating statements made during therapy, the Fifth Amendment "prohibit[s] augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." 249 Mont. 82, 91, 813 P. 2d 979, 985 (1991). The constitutional question is an important one and the decision below places the Montana Supreme Court in conflict with other courts. See *State* v. *Gleason*, 154 Vt. 205, 576 A. 2d 1246 (1990); *Henderson* v.

*Indeed, counsel for the State went so far as to explain that a victory for Montana on the merits would actually work to the advantage of respondent, by subjecting him to treatment leading to parole eligibility:

"Question: So you're really trying to advance his [respondent's] interests?

"[Answer]: Yes, sir, we are.

"Question: He is better off if you win than if you lose.

"[Answer]: In our judgment that is certainly the case." Tr. of Oral Arg. 5.

State, 543 So. 2d 344 (Fla. App. 1989); *Russell* v. *Eaves*, 722 F. Supp. 558 (ED Mo. 1989), appeal dism'd, 902 F. 2d 1574 (CA8 1990). I believe we should decide the question and resolve the conflict.

As an initial matter, there can be no doubt that the decision below is a "final judgment" for purposes of 28 U. S. C. § 1257. Although the Montana Supreme Court remanded the case for resentencing, this is clearly a case in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480 (1975); see also *Brady* v. *Maryland*, 373 U. S. 83, 85, n. 1 (1963).

At oral argument, however, two further questions were raised concerning whether any live controversy persists in this case. First, counsel for respondent stated that his client had been assured by state corrections officials that he would be paroled in the very near future. If this were true, the outcome of this case could have no practical effect upon respondent's sentence. Second, counsel for petitioner stated his belief that a probationer would enjoy immunity from prosecution for incriminating statements made during court-ordered therapy. This statement calls into doubt a critical assumption underpinning the Montana Supreme Court's judgment and might suggest that there really is no disagreement about the Fifth Amendment's application to this case.

In my view, however, neither party's representation is sufficient to deprive this case of its status as a case or controversy. First, as counsel for both parties readily acknowledged, there is nothing in the record to support the expectation of respondent's counsel that respondent will be paroled shortly without regard to his completion of the State's therapy program. As far as the record is concerned, a decision in this case would affect respondent's eligibility for parole and thus have real consequences for the litigants.

Nor does the State's "concession" that a defendant would have immunity from prosecution based upon incriminating statements made to a therapist moot this case or otherwise render it unsuitable for review. This "concession" appeared to rest solely on the State's assumption that this Court's decision in *Minnesota* v. *Murphy,* 465 U. S. 420 (1984), mandated such a result. That reading of *Murphy,* however, is at least debatable. Because the State's concession appears to reflect a possible misunderstanding of its obligations under the law rather than any unequivocal and unconditional declaration of its own future prosecutorial policy, this statement does not moot this case or obviate the controversy. If its reading of *Murphy* were shown to be erroneous, the State might well revert to the view that a defendant could be prosecuted on the basis of statements made during postconviction therapy. Such a qualified concession is too uncertain a basis to find that no live controversy is presented. Cf. *United States* v. *Generix Drug Corp.,* 460 U. S. 453, 456, n. 6 (1983); *United States* v. *Concentrated Phosphate Export Assn., Inc.,* 393 U. S. 199, 203 (1968). In any event, the Montana Supreme Court evidently was of the view that no grant of immunity protected respondent or others in his position and the State continues to suffer the consequences of its constitutional holding.

Because I believe that a genuine and important controversy is presented in this case, I respectfully dissent from the dismissal of the writ of certiorari.

Syllabus

CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* UNITED STATES ET AL.

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

No. 91–946. Argued October 6, 1992—Decided November 16, 1992

Pursuant to its jurisdiction under 26 U. S. C. §§ 7402(b) and 7604(a), the District Court ordered a state-court Clerk to comply with a summons issued by the Internal Revenue Service (IRS) for the production of, *inter alia*, two tapes in the Clerk's custody recording conversations between officials of petitioner Church of Scientology (Church) and their attorneys. Although the Church filed a timely notice of appeal, its request for a stay of the summons enforcement order was unsuccessful, and copies of the tapes were delivered to the IRS while the appeal was pending. The Court of Appeals dismissed the appeal as moot, ruling that no controversy existed because the tapes had already been turned over to the IRS.

Held: Compliance with the summons enforcement order did not moot the Church's appeal. Delivery of the tapes to the IRS did not mandate dismissal by making it impossible for the Court of Appeals to grant the Church "any effectual relief." See *Mills* v. *Green*, 159 U. S. 651, 653. Although it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, the Court of Appeals does have power to effectuate a partial remedy by ordering the Government to return or destroy any copies of the tapes that it may possess. Even if the Government is right that under §§ 7402(b) and 7604(a) the jurisdiction of the *district court* is limited to those matters directly related to whether or not the summons should be enforced, the question presented here is whether there was jurisdiction in the *appellate court* to review the allegedly unlawful summons enforcement order. There is nothing in the Internal Revenue Code to suggest that Congress sought to preclude such review, and, indeed, this Court has expressly held that IRS summons enforcement orders *are* subject to appellate review. See *Reisman* v. *Caplin*, 375 U. S. 440, 449. Although several Courts of Appeals have accepted the Government's argument in IRS enforcement proceedings, the force of that line of authority is matched by a similar array of decisions reaching a contrary conclusion in proceedings enforcing Federal Trade Commission discovery requests. There is no significant difference between the governing statutes that can explain the

divergent interpretations, nor any reason to conclude that production of records relevant to a tax investigation should have mootness consequences that production of other business records does not have. Pp. 12–18.

Vacated and remanded.

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

Eric M. Lieberman argued the cause for petitioner. With him on the briefs were *David B. Goldstein*, *Hillary Richard*, and *Michael Lee Hertzberg.*

Deputy Solicitor General Wallace argued the cause for the respondents. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Griffin*, *Kent L. Jones*, *Charles E. Brookhart*, and *John A. Dudeck*, *Jr.*

JUSTICE STEVENS delivered the opinion of the Court.

Two tapes recording conversations between officials of the Church of Scientology (Church) and their attorneys in July 1980 have been the principal bone of contention in this, and two earlier, legal proceedings.

In an action filed in the Los Angeles County Superior Court,[1] the Church contended that the defendant had unlawfully acquired possession of the tapes. Pending resolution of that action, the state court ordered its Clerk to take custody of the tapes and certain other documents.

In 1984, in connection with an investigation of the tax returns of L. Ron Hubbard, founder of the Church of Scientology, the Internal Revenue Service (IRS) sought access to the Church documents in the state-court Clerk's possession.[2]

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[1] *Church of Scientology of California* v. *Armstrong*, No. C420 153.

[2] The Commissioner of Internal Revenue, as the delegate of the Secretary of the Treasury, has broad authority to examine the accuracy of federal tax returns. See generally *Donaldson* v. *United States*, 400 U. S. 517, 523–525 (1971). Section 7602(a) of the Internal Revenue Code authorizes the Secretary to summon any person to provide documents relevant to such an examination:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any per-

After the Clerk was served with an IRS summons, he permitted IRS agents to examine and make copies of the tapes. Thereafter, in a federal action initiated by the Church in the Central District of California, the District Court entered a temporary restraining order directing the IRS to file its copies of the tapes, and all related notes, with the federal court.[3] Those copies were subsequently returned to the Clerk of the state court.

On January 18, 1985, the IRS commenced this proceeding by filing a petition to enforce the summons that had previously been served on the state-court Clerk.[4] The Church intervened and opposed production of the tapes on the ground that they were protected by the attorney-client privilege. After protracted proceedings, including review in this Court, see *United States* v. *Zolin*, 491 U. S. 554 (1989), on April 15, 1991, the District Court entered an order enforcing compliance with the summons. The Church filed a timely notice of appeal and unsuccessfully sought a stay of that order. While the appeal was pending, copies of the tapes were delivered to the IRS. Thereafter, the Court of Appeals ordered the Church to show cause why its ap-

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son for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry." 26 U. S. C. § 7602(a).

[3] *Church of Scientology* v. *Armstrong*, No. CV 84–9003–HLH (CD Cal., Nov. 27, 1984).

[4] Sections 7402(b) and 7604(a) confer jurisdiction on the federal district courts to enforce a summons issued by the IRS. Title 26 U. S. C. § 7402(b) provides:

"If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Section 7604(a) is virtually identical to § 7402(b) except that the word "records" appears in § 7604(a).

peal should not be dismissed as moot. After briefing on the mootness issue, the court dismissed the appeal. It explained:

> "Because it is undisputed that the tapes have been turned over to the IRS in compliance with the summons enforcement order, no controversy exists presently and this appeal is moot." *United States* v. *Zolin*, No. 91–55506 (CA9, Sept. 10, 1991).

We granted the Church's petition for certiorari to consider the narrow question whether the appeal was properly dismissed as moot. 503 U. S. 905 (1992).

I

It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U. S. 651, 653 (1895). See also *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975); *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed. *Mills*, 159 U. S., at 653. In this case, after the Church took its appeal from the April 15 order, in compliance with that order copies of the tapes were delivered to the IRS. The Government contends that it was thereafter impossible for the Court of Appeals to grant the Church any effectual relief. We disagree.

While a court may not be able to return the parties to the *status quo ante*—there is nothing a court can do to withdraw all knowledge or information that IRS agents may have acquired by examination of the tapes—a court can fashion *some* form of meaningful relief in circumstances such as

these. Taxpayers have an obvious possessory interest in their records. When the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief by ordering the Government to return the records. Moreover, even if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the Government's continued possession of those materials, namely, the affront to the taxpayer's privacy. A person's interest in maintaining the privacy of his "papers and effects" is of sufficient importance to merit constitutional protection.[5] Indeed, that the Church considers the information contained on the disputed tapes important is demonstrated by the long, contentious history of this litigation. Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot.[6]

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[5] The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] Petitioner also argues that a court can effectuate further relief by ordering the IRS to refrain from any future use of the information that it has derived from the tapes. Such an order would obviously go further towards returning the parties to the *status quo ante* than merely requiring the IRS to return the tapes and all copies thereof. However, as there is no guarantee that the IRS will in fact use the information gleaned from the tapes, it could be argued that such an order would be an impermissible advisory opinion. Cf. *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 359 (1977) (suppression of fruits of illegal IRS search "premature" as issue can be considered "if and when proceedings arise in which the Government seeks to use the documents or information obtained from them"). But

The Government argues, however, that these basic principles are inapplicable in IRS summons enforcement proceedings because of the particular nature of the statute governing such proceedings. Reasoning from the premise that federal courts are empowered to consider only those matters within their jurisdiction, the Government argues that in IRS summons enforcement proceedings the subject-matter jurisdiction of the district court is limited to determining only whether the court should "compel . . . production of" the information requested by the summons. 26 U. S. C. §§ 7402(b), 7604(a). See n. 4, *supra.* Once the court has answered that question and compliance has occurred, there is nothing more for the district court to decide and the jurisdiction of the district court evaporates.

We think the Government misconceives the inquiry in this case. The Government may or may not be right that under §§ 7402(b) and 7604(a) the jurisdiction of the *district court* is limited to those matters directly related to whether or not the summons should be enforced. Indeed, the scope of the district court's jurisdiction under those provisions was the issue over which this Court deadlocked in *United States* v. *Zolin*, 491 U. S. 554 (1989).[7] The question presented in the

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see *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F. 2d 900, 903 (CA5 1978) (court can effectuate relief, despite compliance with FTC subpoena, by requiring FTC to return subpoenaed documents and forbidding FTC to use materials in adjudicatory hearing). Because we are concerned only with the question whether *any* relief can be ordered, we leave the "future use" question for another day. For now, we need only hold that this case is not moot because a court has power to order the IRS to return or destroy any copies of the tapes that it may have in its possession.

[7] In *Zolin*, the District Court enforced the IRS summons, but placed restrictions on the IRS' ability to disclose the summoned materials to any other government agency. The Ninth Circuit affirmed, *United States* v. *Zolin*, 809 F. 2d 1411, 1416–1417 (1987), and we granted certiorari in part to consider whether the District Court, in conditioning its enforcement of the IRS summons, exceeded its jurisdiction under §§ 7402(b) and 7604(a). *Zolin*, 491 U. S., at 556. We were evenly divided on that question and therefore affirmed the Ninth Circuit. *Id.*, at 561. The issue still divides

current incarnation of this case is whether there was jurisdiction in the *appellate court* to review the allegedly unlawful summons enforcement order. On that question, the Government's elaborate statutory argument is largely irrelevant. There is nothing in the statute to suggest that Congress sought to preclude appellate review of district court enforcement orders. To the contrary, we have expressly held that IRS summons enforcement orders *are* subject to appellate review. See *Reisman* v. *Caplin*, 375 U. S. 440, 449 (1964). Thus, whether or not there is jurisdiction in the appellate court to review the District Court's order turns not on the subject matter of Congress' jurisdictional grant to the district courts, but on traditional principles of justiciability, namely, whether an intervening event has rendered the controversy moot. And, as we have already explained, this case is not moot because if the summons were improperly issued or enforced a court could order that the IRS' copies of the tapes be either returned or destroyed.

II

We recognize that several Courts of Appeals have accepted the Government's argument in IRS enforcement proceedings,[8] but the force of that line of authority is matched

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the lower courts. Compare *United States* v. *Zolin*, 809 F. 2d, at 1416–1417, and *United States* v. *Author Services, Inc.*, 804 F. 2d 1520, 1525–1526 (CA9 1986) (district court has "considerable" discretion to set terms of enforcement order), opinion amended, 811 F. 2d 1264 (1987), with *United States* v. *Barrett*, 837 F. 2d 1341 (CA5 1988) (en banc) (district court lacks authority to "conditionally enforce" IRS summons; inquiry limited to single question of whether summons should be enforced), cert. denied, 492 U. S. 926 (1989).

[8] *United States* v. *Kersting*, 891 F. 2d 1407, 1410, n. 8 (CA9 1989), cert. denied, 498 U. S. 812 (1990); *Hintze* v. *IRS*, 879 F. 2d 121, 124–125 (CA4 1989); *United States* v. *Church of World Peace*, 878 F. 2d 1281 (CA10 1989); *United States* v. *Sherlock*, 756 F. 2d 1145, 1146–1147 (CA5 1985); *United States* v. *First Family Mortgage Corp.*, 739 F. 2d 1275, 1278–1279 (CA7 1984); *United States* v. *Kis*, 658 F. 2d 526, 533 (CA7 1981), cert. denied, 455 U. S. 1018 (1982); *United States* v. *Equity Farmers Elevator*, 652 F. 2d 752

by a similar array of decisions reaching a contrary conclusion in proceedings enforcing Federal Trade Commission (FTC) discovery requests.[9] There is no significant difference between the governing statutes that can explain the divergent interpretations.[10] Nor is there any reason to conclude that

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(CA8 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F. 2d 710, 711 (CA9 1981); *United States* v. *Deak-Perera Int'l Banking Corp.*, 610 F. 2d 89 (CA2 1979); *Kurshan* v. *Riley*, 484 F. 2d 952 (CA4 1973); *United States* v. *Lyons*, 442 F. 2d 1144, 1145 (CA1 1971). But see *Gluck* v. *United States*, 771 F. 2d 750 (CA3 1985).

[9] See *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F. 2d, at 903 (compliance with district court order enforcing FTC subpoena does not moot appeal; court can effectuate relief by requiring FTC to return subpoenaed documents and forbidding FTC from using materials in adjudicatory hearing); *FTC* v. *Ernstthal*, 197 U. S. App. D. C. 174, 175, 607 F. 2d 488, 489 (1979) (compliance with FTC subpoena does not moot appeal where court can order FTC to return subpoenaed documents); *Atlantic Richfield Co.* v. *FTC*, 546 F. 2d 646, 650 (CA5 1977) (same); *FTC* v. *Browning*, 140 U. S. App. D. C. 292, 293–294, n. 1, 435 F. 2d 96, 97–98, n. 1 (1970) (same). Cf. *FTC* v. *Invention Submission Corp.*, 296 U. S. App. D. C. 124, 127, n. 1, 965 F. 2d 1086, 1089, n. 1 (1992) (compliance with district court order enforcing FTC civil investigative demand pursuant to 15 U. S. C. § 57b–1(e) does not moot appeal as court could order FTC "to return responsive materials and to destroy any records derived from them"); *Casey* v. *FTC*, 578 F. 2d 793 (CA9 1978) (action seeking to enjoin FTC investigation presents live controversy despite parties' compliance with FTC subpoena as appellate court can order FTC to return wrongfully subpoenaed records). See also *Government of Territory of Guam* v. *Sea-Land Service, Inc.*, 294 U. S. App. D. C. 292, 295, 958 F. 2d 1150, 1153 (1992) (compliance with district court order enforcing Federal Maritime Commission discovery order does not moot appeal where party seeks return of discovered materials).

There is no merit to the Government's contention that the FTC cases are distinguishable in that they involve adjudicative, as opposed to investigative, subpoenas. While *Gibson Products* involved an adjudicative subpoena, *Invention Submission*, *Casey*, and *Atlantic Richfield* all involved investigative subpoenas.

[10] In fact, the summons enforcement provisions of the Internal Revenue Code "closely paralle[l]" the corresponding provisions of the Federal Trade Commission Act. See Handler, Recent Antitrust Developments—

production of records relevant to a tax investigation should have mootness consequences that production of other business records does not have. Moreover, in construing these provisions of the Internal Revenue Code, the Court has considered it appropriate to rely on its earlier cases involving other statutes, including the Federal Trade Commission Act. See *United States* v. *Powell*, 379 U. S. 48, 57 (1964) (citing *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643 (1950)).

We therefore conclude that the appeal was improperly dismissed as moot. In so concluding we express no opinion on the merits of the Church's argument that the Government did not establish an adequate evidentiary basis to support the District Court's determination that the tapes fell within the crime-fraud exception to the attorney-client privilege. Nor do we express any opinion about the res judicata contention advanced in the Government's brief in opposition to the petition for certiorari. Brief for United States in Opposition

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1964, 63 Mich. L. Rev. 59, 90 (1964). Section 9 of the FTC Act provides, in pertinent part:

"Any of the district courts of the United States . . . may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation . . . to produce documentary evidence if so ordered . . . ." 38 Stat. 722, as amended, 15 U. S. C. §49.

In the words of Professor Handler:

"Section 7602 of the Internal Revenue Code authorizes the Secretary of the Treasury or his delegate to summon taxpayers or other witnesses to testify and to produce relevant and material documents. Section 9 of the FTC Act grants the same power to the Commission. Should a recipient of a summons or subpoena refuse to comply, both statutes afford the same enforcement procedures. In neither case is the administrative subpoena self-executing: obedience can be obtained only by court order. In addition, both statutes, which are in *pari materia*, make it a criminal offense to 'neglect' to appear or to produce subpoenaed documents." 63 Mich. L. Rev., at 91 (footnotes omitted).

13–14. We simply hold that compliance with the summons enforcement order did not moot the Church's appeal.[11]

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.

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[11] In reaching this conclusion, we reject petitioner's "fall back" argument that even if compliance with a summons enforcement order by the subject of the IRS investigation moots an appeal, compliance by a disinterested third party—here, the Clerk of the Los Angeles Superior Court—does not. Brief for Petitioner 25–34; Reply Brief for Petitioner 16–18. We agree with the Government that a "difference in the method of compliance does not create a distinction for the purpose of the constitutional case or controversy requirement." Brief for United States 30. This case presents a justiciable controversy not because a third party complied with the summons enforcement order, but because petitioner has a stake in the outcome of the proceeding and a federal court can effectuate relief should petitioner prevail on the merits.

There is a distinction in the law between the enforcement of discovery orders directed at parties and the enforcement of discovery orders directed at disinterested third parties, but that distinction derives from concerns regarding finality, not mootness. As a general rule, a district court's order enforcing a discovery request is not a "final order" subject to appellate review. A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order. See *United States* v. *Ryan*, 402 U. S. 530 (1971). However, under the so-called *Perlman* doctrine, see *Perlman* v. *United States*, 247 U. S. 7 (1918), a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance. *Ibid.* See generally 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.23, pp. 156–167 (2d ed. 1992). This distinction has no bearing on this case because a district court order enforcing an IRS summons is an appealable final order. See *Reisman* v. *Caplin*, 375 U. S. 440 (1964). There is no "third-party exception" because there is no general rule barring immediate appeal of IRS summons enforcement orders.

HADLEY *v.* UNITED STATES

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

No. 91–6646. Argued November 4, 1992—Decided November 16, 1992

Certiorari dismissed. Reported below: 918 F. 2d 848.

John Trebon, by appointment of the Court, 503 U. S. 958, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Jeffrey P. Minear*, and *Thomas E. Booth.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

Syllabus

PARKE, WARDEN *v.* RALEY

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

No. 91–719. Argued October 5, 1992—Decided December 1, 1992

In 1986, respondent Raley was charged with robbery and with being a persistent felony offender under a Kentucky statute that enhances sentences for repeat felons. He moved to suppress the 1979 and 1981 guilty pleas that formed the basis for the latter charge, claiming that they were invalid because the records contained no transcripts of the proceedings and hence did not affirmatively show, as required by *Boykin* v. *Alabama*, 395 U. S. 238, that the pleas were knowing and voluntary. Under the state procedures governing the hearing on his motion, the ultimate burden of persuasion rested with the government, but a presumption of regularity attached to the judgments once the Commonwealth proved their existence, and the burden then shifted to Raley to produce evidence of their invalidity. As to the 1981 plea, Raley testified that, among other things, he signed a form specifying the charges to which he agreed to plead guilty and the judge at least advised him of his right to a jury trial. His suppression motion was denied, he was convicted, and he appealed. The Kentucky Court of Appeals found that Raley was fully informed of his rights in 1979 and inferred that he remained aware of them in 1981. Raley then filed a federal habeas petition. The District Court rejected his argument that the state courts had erred in shifting the burden of production to him, but the Court of Appeals reversed as to the 1981 plea, holding, *inter alia*, that where no transcript is available, the prosecution has the entire burden of establishing a plea's validity by clear and convincing evidence and no presumption of regularity attaches to the prior judgment.

Held:

1. Kentucky's burden-of-proof scheme is permissible under the Due Process Clause. Pp. 26–35.

(a) "Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate" given the high rate of recidivism and the diversity of approaches that States have developed for addressing it. *Spencer* v. *Texas*, 385 U. S. 554, 566. Pp. 26–28.

(b) The deeply rooted presumption of regularity that attaches to final judgments would be improperly ignored if the presumption of invalidity applied in *Boykin* to cases on direct review were to be imported to recidivism proceedings, in which final judgments are collaterally at-

tacked. In the absence of an allegation of government misconduct, it cannot be presumed from the mere unavailability of a transcript on collateral review that a defendant was not advised of his rights. *Burgett* v. *Texas*, 389 U. S. 109, distinguished. The presumption of regularity makes it appropriate to assign a proof burden to the defendant even when a collateral attack rests on constitutional grounds. And the difficulty of proving the invalidity of convictions entered many years ago does not make it fundamentally unfair to place a burden of production on the defendant, since the government may not have superior access to evidence. Nor is Raley's position supported by the state courts' historical treatment of defendants in recidivism proceedings, the wide range of contemporary state practices regarding the allocation of the proof burden, or interpretations of analogous federal laws, see, *e. g.*, *United States* v. *Gallman*, 907 F. 2d 639, 643–645. Pp. 28–34.

(c) Due process does not require the Commonwealth to prove the validity of a prior conviction by clear and convincing extrarecord evidence. Even if *Boykin* had addressed the question of measure of proof, it would not necessarily follow that the same standard should apply in recidivism proceedings. Given the difficulties of proof for both sides, it is not fundamentally unfair to require something less than clear and convincing evidence when the government is assigned the burden of persuasion. There is no historical tradition setting the standard at this particular level, and contemporary practice is far from uniform. Pp. 34–35.

2. The Kentucky courts properly concluded that Raley's 1981 guilty plea was valid. Their factual determinations are entitled to the presumption of correctness accorded state court factual findings under 28 U. S. C. § 2254(d). *Marshall* v. *Lonberger*, 459 U. S. 422, 431–432. The Kentucky Court of Appeals fairly inferred from Raley's 1979 experience that he understood the consequences of his 1981 plea. See, *e. g.*, *id.*, at 437. That, combined with his admission that he understood the charges against him and his self-serving testimony that he could not remember whether the trial judge advised him of other rights, satisfied every court that has considered the issue that the government carried its burden of persuasion under the Kentucky scheme. It cannot be said that this was error. Pp. 35–37.

945 F. 2d 137, reversed.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Stevens, Scalia, Kennedy, Souter, and Thomas, JJ., joined. Blackmun, J., filed an opinion concurring in the judgment, *post*, p. 37.

Ian G. Sonego, Assistant Attorney General of Kentucky, argued the cause for petitioner. With him on the briefs were *Chris Gorman*, Attorney General, and *David A. Sexton,* Assistant Attorney General.

John F. Manning argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Sean Connelly.*

J. Gregory Clare, by appointment of the Court, 503 U. S. 957, argued the cause for respondent. With him on the brief was *Mark R. Brown.**

JUSTICE O'CONNOR delivered the opinion of the Court.

Kentucky's "Persistent felony offender sentencing" statute, Ky. Rev. Stat. Ann. § 532.080 (Michie 1990), provides mandatory minimum sentences for repeat felons. Under Kentucky law, a defendant charged as a persistent felony offender may challenge prior convictions that form the basis of the charge on the ground that they are invalid. Respondent, who was indicted under the statute, claimed that two convictions offered against him were invalid under *Boykin* v. *Alabama*, 395 U. S. 238 (1969). The trial court, after a hearing, rejected this claim, and respondent was convicted and sentenced as a persistent felony offender. After exhausting his state remedies, respondent petitioned for a writ of habeas corpus in the United States District Court for the Western District of Kentucky. The District Court denied relief, but the Court of Appeals for the Sixth Circuit ordered that the writ conditionally issue, concluding that the trial court proceedings were constitutionally infirm. As it comes to this Court, the question presented is whether Kentucky's procedure for determining a prior conviction's validity under *Boykin* violates the Due Process Clause of the Fourteenth

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Amendment because it does not require the government to carry the entire burden of proof by clear and convincing evidence when a transcript of the prior plea proceeding is unavailable.

I

In May 1986, the Commonwealth charged respondent Ricky Harold Raley with robbery and with being a persistent felony offender in the first degree.* The latter charge was based on two burglaries to which respondent had pleaded guilty in November 1979 and October 1981. Respondent never appealed his convictions for those crimes. He nevertheless moved to suppress them in the persistent felony offender proceeding, arguing that they were invalid under *Boykin* because the records did not contain transcripts of the plea proceedings and hence did not affirmatively show that respondent's guilty pleas were knowing and voluntary.

The trial court held a hearing according to procedures set forth in *Commonwealth* v. *Gadd*, 665 S. W. 2d 915 (Ky. 1984), and *Dunn* v. *Commonwealth*, 703 S. W. 2d 874 (Ky. 1985), cert. denied, 479 U. S. 832 (1986). In *Gadd*, the Supreme Court of Kentucky observed that the persistent felony offender statute requires that the prosecution prove only the *fact* of a previous conviction beyond a reasonable doubt; the Commonwealth need not also show that the conviction was validly obtained. 665 S. W. 2d, at 917. But, citing *Burgett* v. *Texas*, 389 U. S. 109 (1967), the court also held that defend-

*"A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies." Ky. Rev. Stat. Ann. § 532.080(3) (Michie 1990). The applicable penalty depends upon the nature of the offense for which the defendant presently stands convicted. A defendant convicted both of second-degree robbery (the crime to which respondent ultimately pleaded guilty) and of being a first-degree persistent felony offender faces a mandatory sentence of 10 to 20 years. §§ 515.030, 532.080(6)(b). A first-degree persistent felony offender is also ineligible for probation or parole until he has served at least 10 years. § 532.080(7).

ants must be able to attack a prior conviction's invalidity. 665 S. W. 2d, at 917. *Dunn* v. *Commonwealth* clarified the procedures to be followed. When a defendant challenges a previous conviction through a suppression motion, the Commonwealth must prove the existence of the judgment on which it intends to rely. Once this is done, a presumption of regularity attaches, and the burden shifts to the defendant to produce evidence that his rights were infringed or some procedural irregularity occurred in the earlier proceeding. If the defendant refutes the presumption of regularity, the burden shifts back to the government affirmatively to show that the underlying judgment was entered in a manner that did, in fact, protect the defendant's rights. 703 S. W. 2d, at 876.

After the prosecution filed certified copies of the prior judgments of conviction for burglary, both sides presented evidence about the earlier plea proceedings. Respondent testified that he had an 11th grade education, that he read adequately, that he was not intoxicated or otherwise mentally impaired when he entered the challenged pleas, and that he was represented by counsel on both occasions. He remembered the trial judge in each case asking him whether his plea was voluntary, but he said he could not remember whether he was specifically told about the rights he waived by pleading guilty. The government's evidence showed that in the 1979 proceeding, respondent signed (though he later claimed not to have read) a "Plea of Guilty" form, which stated that he understood the charges against him, the maximum punishment he faced, his constitutional rights, and that a guilty plea waived those rights. The attorney who represented respondent in the first case verified his own signature on another part of the form indicating that he had fully explained respondent's rights to him. As to the 1981 plea, respondent acknowledged signing a form that specified the charges to which he agreed to plead guilty. He also ad-

mitted that the judge had at least advised him of his right to a jury trial.

Based on this evidence, the trial court denied respondent's suppression motion. Respondent then entered a conditional guilty plea on the robbery and the persistent felony offender counts, reserving the right to appeal the suppression determination. The trial court sentenced him to 5 years for robbery, enhanced to 10 because of the persistent felony offender conviction.

The Kentucky Court of Appeals affirmed. It found the totality of circumstances surrounding the 1979 plea sufficient to support a finding that the plea was knowing and voluntary. It also upheld use of the 1981 conviction. The court explained that respondent's knowledge of his rights in November 1979 permitted an inference that he remained aware of them 23 months later. Respondent's testimony, moreover, indicated that his sophistication regarding his legal rights had increased substantially after his first conviction. The Supreme Court of Kentucky denied discretionary review.

Respondent then filed a federal habeas petition, arguing that the Kentucky courts had erred in requiring him to adduce evidence, rather than requiring the Commonwealth affirmatively to prove the prior convictions' validity. The District Court denied the petition for essentially the same reasons given by the Kentucky Court of Appeals. *Raley* v. *Parke*, Civ. Action No. C89–0756–L(A) (WD Ky., Mar. 15, 1990). The Court of Appeals for the Sixth Circuit, however, agreed with respondent, relying on its recent decision in *Dunn* v. *Simmons*, 877 F. 2d 1275 (1989), cert. denied, 494 U. S. 1061 (1990). 945 F. 2d 137 (1991). *Simmons* held that when no transcript of the prior guilty plea proceeding exists, the prosecution has the entire burden of establishing the plea's validity, and no presumption of regularity attaches to the final judgment. 877 F. 2d, at 1277. It also held that when the prosecution seeks to demonstrate the regularity of the prior proceeding with extrarecord evidence, that evi-

dence must be "clear and convincing." *Ibid.* Although *Simmons* was decided after respondent's persistent felony offender conviction became final, the Commonwealth did not argue that *Teague* v. *Lane*, 489 U. S. 288 (1989), barred its application to this case. Cf. *Collins* v. *Youngblood*, 497 U. S. 37, 40–41 (1990) (*Teague* not jurisdictional).

The Court of Appeals affirmed the District Court's determination with respect to the 1979 plea but reversed with respect to the 1981 plea. It declined to infer that respondent remembered his rights from 1979, reasoning that such an inference would give rise to line-drawing problems and would discriminate improperly between accused recidivists and first offenders on the basis of prior court experience. The Court of Appeals observed that because the trial court hearing took place before *Simmons* was decided, the Commonwealth had not yet had an opportunity to try to meet the higher standard of proof that decision imposed. Thus, rather than issue the writ of habeas corpus outright, the Court of Appeals directed the District Court to grant the writ if Kentucky did not hold a new hearing on the validity of the 1981 conviction in compliance with *Simmons* within 90 days. We granted certiorari. 503 U. S. 905 (1992).

II

A

Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times. See, *e. g.*, I The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay 52 (Boston 1869) (1692 statute providing progressive punishments for robbery and burglary); 3 Laws of Virginia 276–278 (W. Henning ed. 1823) (1705 recidivism statute dealing with hog stealing); see also *Graham* v. *West Virginia*, 224 U. S. 616, 623 (1912). Such laws currently are in effect in all 50 States, see Department of Justice, Statutes Requiring the Use of Criminal History Record Information 17–41 (June

1991) (NJC–129846), and several have been enacted by the Federal Government, as well, see, *e. g.*, 18 U. S. C. § 924(e) (Armed Career Criminal Act); 21 U. S. C. §§ 842(c)(2)(b), 843(c), 844(a) (provisions of the Controlled Substances Act); see also United States Sentencing Commission, Guidelines Manual § 4A1.1 (Nov. 1992) (prior criminal conduct enhances criminal history for purpose of determining sentencing range).

States have a valid interest in deterring and segregating habitual criminals. See *Rummel* v. *Estelle*, 445 U. S. 263, 284 (1980). We have said before that a charge under a recidivism statute does not state a separate offense, but goes to punishment only. See *Oyler* v. *Boles*, 368 U. S. 448, 452 (1962); *Graham*, *supra*, at 623–624; *McDonald* v. *Massachusetts*, 180 U. S. 311, 313 (1901). And we have repeatedly upheld recidivism statutes "against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." *Spencer* v. *Texas*, 385 U. S. 554, 560 (1967) (citing *Oyler*, *supra; Gryger* v. *Burke*, 334 U. S. 728 (1948); *Graham*, *supra; McDonald*, *supra; Moore* v. *Missouri*, 159 U. S. 673 (1895)). But see *Solem* v. *Helm*, 463 U. S. 277 (1983) (life sentence without parole imposed under recidivism statute violated Eighth Amendment when current conviction was for passing a bad check and prior offenses were similarly minor).

The States' freedom to define the types of convictions that may be used for sentence enhancement is not unlimited. In *Burgett* v. *Texas*, 389 U. S. 109 (1967), we held that uncounseled convictions cannot be used "against a person either to support guilt or enhance punishment for another offense." *Id.*, at 115. This Court has nevertheless also expressed a willingness to uphold, under the Due Process Clause, a variety of state procedures for implementing otherwise valid recidivism statutes. See *Spencer*, *supra* (due process allows government to introduce proof of past convictions before

jury has rendered guilt determination for current offense); *Oyler*, *supra* (due process does not require advance notice that trial for substantive offense will be followed by habitual-criminal accusation). As Justice Harlan observed 25 years ago in *Spencer*, the Court is not "a rule-making organ for the promulgation of state rules of criminal procedure." 385 U. S., at 564. "Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate" given the high rate of recidivism and the diversity of approaches that States have developed for addressing it. *Id.*, at 566. We think this reasoning remains persuasive today; studies suggest that as many as two-thirds of those arrested have prior criminal records, often from other jurisdictions. See Department of Justice, *supra*, at 1; see also *Spencer*, *supra*, at 566, n. 9. The narrow question we face is whether due process permits Kentucky to employ its particular burden-of-proof scheme when allowing recidivism defendants to attack previous convictions as invalid under *Boykin*. In our view, Kentucky's burden-shifting rule easily passes constitutional muster.

B

As an initial matter, we decline to reach the broad argument advanced by petitioner and the Solicitor General that Kentucky's procedure is *a fortiori* constitutional because, with narrow exceptions not applicable here, due process does not require state courts to permit challenges to guilty pleas used for enhancement purposes at all. Petitioner did not make this argument below or in his petition for certiorari. We ordinarily do not reach issues not raised in the petition for certiorari, see *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992), and it is unnecessary for us to determine whether States must allow recidivism defendants to challenge prior guilty pleas because Kentucky does allow such challenges. We turn, then, to the question before us.

It is beyond dispute that a guilty plea must be both knowing and voluntary. See, *e. g.*, *Boykin*, 395 U. S., at 242; *Mc-*

Carthy v. *United States*, 394 U. S. 459, 466 (1969). "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina* v. *Alford*, 400 U. S. 25, 31 (1970). That is so because a guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin*, 395 U. S., at 243.

In *Boykin* the Court found reversible error when a trial judge accepted a defendant's guilty plea without creating a record affirmatively showing that the plea was knowing and voluntary. *Id.*, at 242. The Sixth Circuit thought rejection of Kentucky's burden-shifting scheme compelled by *Boykin*'s statement that the waiver of rights resulting from a guilty plea cannot be "presume[d] . . . from a silent record." *Id.*, at 243. Kentucky favors the prosecution with only an initial presumption upon proof of the existence of a prior judgment; but because a defendant may be unable to offer rebuttal evidence, the Sixth Circuit reasoned that Kentucky's procedure improperly permits the Commonwealth to carry its burden of persuasion upon a "bare record of a conviction." *Simmons*, 877 F. 2d, at 1278.

We see no tension between the Kentucky scheme and *Boykin*. *Boykin* involved direct review of a conviction allegedly based upon an uninformed guilty plea. Respondent, however, never appealed his earlier convictions. They became final years ago, and he now seeks to revisit the question of their validity in a separate recidivism proceeding. To import *Boykin*'s presumption of invalidity into this very different context would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the "presumption of regularity" that attaches to final judgments, even when the question is waiver of constitutional rights. *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 468 (1938). Although we are perhaps most familiar with this principle in habeas corpus actions, see, *e. g.*, *Barefoot* v. *Estelle*, 463 U. S. 880,

887 (1983); *Johnson*, *supra*, it has long been applied equally to other forms of collateral attack, see, *e. g.*, *Voorhees* v. *Jackson*, 10 Pet. 449, 472 (1836) (observing, in a collateral challenge to a court-ordered sale of property in an ejectment action, that "[t]here is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears"). Respondent, by definition, collaterally attacked his previous convictions; he sought to deprive them of their normal force and effect in a proceeding that had an independent purpose other than to overturn the prior judgments. See Black's Law Dictionary 261 (6th ed. 1990); see also *Lewis* v. *United States*, 445 U. S. 55, 58, 65 (1980) (challenge to uncounseled prior conviction used as predicate for subsequent conviction characterized as "collateral").

There is no good reason to suspend the presumption of regularity here. This is not a case in which an extant transcript is suspiciously "silent" on the question whether the defendant waived constitutional rights. Evidently, no transcripts or other records of the earlier plea colloquies exist at all. Transcripts of guilty plea proceedings are normally made in Kentucky only if a direct appeal is taken or upon the trial judge's specific direction, Tr. of Oral Arg. 13–14, and the stenographer's notes and any tapes made of the proceedings normally are not preserved more than five years, *id.*, at 16–17. The circumstance of a missing or nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old. But *Boykin* colloquies have been required for nearly a quarter century. On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights. In this situation, *Boykin* does not prohibit a state court from presuming, at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained.

Burgett v. *Texas*, 389 U. S. 109 (1967), does not necessitate a different result. There the Court held that a prior conviction could not be used for sentence enhancement because the record of the earlier proceeding did not show that the defendant had waived his right to counsel. *Id.*, at 114–115. Respondent suggests that because *Burgett* involved a state recidivism proceeding, it stands for the proposition that every previous conviction used to enhance punishment is "presumptively void" if waiver of a claimed constitutional right does not appear from the face of the record. Brief for Respondent 14–15. We do not read the decision so broadly. At the time the prior conviction at issue in *Burgett* was entered, state criminal defendants' federal constitutional right to counsel had not yet been recognized, and so it was reasonable to presume that the defendant had not waived a right he did not possess. As we have already explained, the same cannot be said about a record that, by virtue of its unavailability on collateral review, fails to show compliance with the well-established *Boykin* requirements.

Respondent argues that imposing even a burden of production on him is fundamentally unfair because "a constitutionally protected right is in question." Brief for Respondent 15. By this he apparently refers to the Fifth and Sixth Amendment rights that a defendant waives by pleading guilty. Our precedents make clear, however, that even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant. See, *e. g.*, *Johnson*, *supra*, at 468–469.

Respondent also contends that Kentucky's rule is unfair because it may be difficult to prove the invalidity of a conviction entered many years ago, perhaps in another jurisdiction, when records are unavailable and witnesses inaccessible. We have little doubt that serious practical difficulties will confront any party assigned an evidentiary burden in such

circumstances. See *Loper* v. *Beto*, 405 U. S. 473, 500–501 (1972) (REHNQUIST, J., dissenting). "The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused." *Medina* v. *California*, 505 U. S. 437, 451 (1992). When a defendant challenges the validity of a previous guilty plea, the government will not invariably, or perhaps even usually, have superior access to evidence. Indeed, when the plea was entered in another jurisdiction, the defendant may be the only witness who was actually present at the earlier proceeding. If raising a *Boykin* claim and pointing to a missing record suffices to place the entire burden of proof on the government, the prosecution will not infrequently be forced to expend considerable effort and expense attempting to reconstruct records from farflung States where procedures are unfamiliar and memories unreliable. To the extent that the government fails to carry its burden due to the staleness or unavailability of evidence, of course, its legitimate interest in differentially punishing repeat offenders is compromised. In light of the relative positions of the defendant and the prosecution in recidivism proceedings, we cannot say that it is fundamentally unfair to place at least a burden of production on the defendant.

Respondent cites no historical tradition or contemporary practice indicating that Kentucky's scheme violates due process. See *Medina*, *supra*, at 446, 447. For much of our history, it appears that state courts altogether prohibited defendants in recidivism proceedings from challenging prior convictions as erroneous, as opposed to void for lack of jurisdiction. See, *e. g.*, *Kelly* v. *People*, 115 Ill. 583, 588, 4 N. E. 644, 645–646 (1886); accord, *State* v. *Webb*, 36 N. D. 235, 243, 162 N. W. 358, 361 (1917). In recent years state courts have permitted various challenges to prior convictions and have allocated proof burdens differently. Some, like the Sixth Circuit, evidently place the full burden on the prosecution.

See, *e. g.*, *State* v. *Elling*, 11 Ohio Misc. 2d 13, 15, 463 N. E. 2d 668, 670 (Com. Pl. 1983) (challenge to allegedly uncounseled conviction); *State* v. *Hennings*, 100 Wash. 2d 379, 382, 670 P. 2d 256, 257 (1983) (challenge to guilty plea). Others assign the entire burden to the defendant once the government has established the fact of conviction. See, *e. g.*, *People* v. *Harris*, 61 N. Y. 2d 9, 15, 459 N. E. 2d 170, 172 (1983) (guilty plea); see also D. C. Code Ann. § 23–111(c)(2) (1989); N. C. Gen. Stat. § 15A–980(c) (1988). Several, like Kentucky, take a middle position that requires the defendant to produce evidence of invalidity once the fact of conviction is proved but that shifts the burden back to the prosecution once the defendant satisfies his burden of production. See, *e. g.*, *Watkins* v. *People*, 655 P. 2d 834, 837 (Colo. 1982) (guilty plea); *State* v. *O'Neil*, 91 N. M. 727, 729, 580 P. 2d 495, 497 (Ct. App. 1978) (uncounseled conviction); *State* v. *Triptow*, 770 P. 2d 146, 149 (Utah 1989) (same). This range of contemporary state practice certainly does not suggest that allocating some burden to the defendant is fundamentally unfair.

Interpretations of analogous federal laws by the Courts of Appeals point even more strongly away from respondent's position. Under the Armed Career Criminal Act, 18 U. S. C. § 924(e), Courts of Appeals have placed on the defendant the entire burden of proving the invalidity of a prior conviction based on a guilty plea. See, *e. g.*, *United States* v. *Gallman*, 907 F. 2d 639, 643–645 (CA7 1990), cert. denied, 499 U. S. 908 (1991); accord, *United States* v. *Paleo*, 967 F. 2d 7, 13 (CA1 1992); *United States* v. *Day*, 949 F. 2d 973, 982–983 (CA8 1991); *United States* v. *Ruo*, 943 F. 2d 1274, 1276 (CA11 1991). Courts of Appeals have also allocated the full burden of proof to defendants claiming that an invalid guilty plea renders a prior conviction unavailable for purposes of calculating criminal history under the Sentencing Guidelines. See, *e. g.*, *United States* v. *Boyer*, 931 F. 2d 1201, 1204–1205 (CA7), cert. denied, 502 U. S. 873 (1991). And the text of the Comprehensive Drug Abuse Prevention and Control Act of 1970

itself clearly provides that a defendant raising a constitutional challenge to a prior conviction used for sentence enhancement bears the burden of proof. See 21 U. S. C. § 851(c)(2).

In sum, neither our precedents nor historical or contemporary practice compel the conclusion that Kentucky's burden-shifting rule violates due process, and we cannot say that the rule is fundamentally unfair in its operation. Accordingly, we hold that the Due Process Clause permits a State to impose a burden of production on a recidivism defendant who challenges the validity of a prior conviction under *Boykin*.

C

Petitioner also challenges the Sixth Circuit's holding that the prosecution's extrarecord evidence must be clear and convincing. In petitioner's view, the preponderance of the evidence standard applicable to constitutional claims raised on federal habeas, see, *e. g.*, *Johnson*, 304 U. S., at 468–469, is appropriate. The Sixth Circuit based its conclusion to the contrary on *Boykin*, observing that an "extraordinary standard of persuasion" is justified "in view of misgivings inherent in 'collateral proceedings that seek to probe murky memories.'" *Simmons*, 877 F. 2d, at 1277 (quoting *Boykin*, 395 U. S., at 244); see also *Roddy* v. *Black*, 516 F. 2d 1380, 1384 (CA6), cert. denied, 423 U. S. 917 (1975). Respondent, in support of the Sixth Circuit's heightened standard, reiterates his arguments regarding the importance of the constitutional rights at stake and the government's position relative to the defendant's.

Our analysis of this question parallels our discussion of the proper allocation of proof burdens. *Boykin* did not address the question of measure of proof, and even if it had, it would not necessarily follow that the same standard should apply in recidivism proceedings. We find respondent's arguments no more persuasive here than they were in the allocation context. Given the difficulties of proof for both sides, it is

not obvious to us that, once a State assigns the government the burden of persuasion, requiring anything less than clear and convincing extrinsic evidence is fundamentally unfair. Again, we are pointed to no historical tradition setting the standard of proof at this particular level. And contemporary practice is far from uniform; state courts that impose the ultimate burden on the government appear to demand proof ranging from preponderance, see *Triptow*, *supra*, at 149; *Watkins*, *supra*, at 837, to beyond a reasonable doubt, see *Hennings*, *supra*, at 382, 670 P. 2d, at 257. We are therefore unprepared to say that when the government carries the ultimate burden of persuasion and no transcript of the prior proceeding exists, the Due Process Clause requires the Commonwealth to prove the validity of the conviction by clear and convincing extrarecord evidence.

III

Respondent no longer challenges the validity of his 1979 plea. Thus, the final issue before us is whether the Kentucky courts properly concluded that respondent's 1981 guilty plea was valid. For the proper standard of review, petitioner cites *Marshall* v. *Lonberger*, 459 U. S. 422 (1983), a case quite similar to this one. In *Lonberger*, the state defendant challenged a prior conviction used to obtain a death sentence on the ground that the conviction was based on a guilty plea invalid under *Boykin*. We held that although "the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law," 459 U. S., at 431, questions of historical fact, including inferences properly drawn from such facts, are in this context entitled to the presumption of correctness accorded state court factual findings under 28 U. S. C. § 2254(d), *Lonberger*, *supra*, at 431–432; cf. *Miller* v. *Fenton*, 474 U. S. 104, 113, 115, 117 (1985) (holding that the question whether a confession is voluntary is subject to independent federal determination, expressly distinguishing *Lonberger*).

We said that the federal habeas courts in *Lonberger* were bound to respect the contents of the record of the prior plea proceeding, the state trial court's findings that the defendant was "an intelligent individual, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel," the similar conclusions of the state appellate court, and "inferences fairly deducible from these facts." *Lonberger*, *supra*, at 435 (internal quotation marks omitted); see also *Sumner* v. *Mata*, 449 U. S. 539, 545–547 (1981) (deference owed to findings of both state trial and appellate courts).

We note that petitioner's theory of the case, which we have declined to consider, suggests a different standard. If Kentucky's procedure is indeed not constitutionally mandated, the Kentucky courts' determination that respondent understood his rights when he entered his plea would seem to be reviewable at most for sufficiency of the evidence under *Jackson* v. *Virginia*, 443 U. S. 307 (1979). There is no need to choose between the two standards of review in this case, however, because we are convinced that the Kentucky courts' factual determinations are "fairly supported by the record" within the meaning of 28 U. S. C. § 2254(d)(8).

The Kentucky Court of Appeals, reviewing the trial court's decision not to suppress the 1981 conviction, observed that respondent had an 11th grade education, could read adequately, was represented by counsel in the 1981 proceedings, and was in no way mentally impaired when he entered his plea. The court noted that respondent had signed a form specifying the charges to which he agreed to plead guilty. And it found that he had been fully advised of his rights in 1979. Respondent does not now dispute those determinations. The Kentucky Court of Appeals inferred that respondent remained aware in 1981 of the rights of which he was advised in 1979. Supporting that inference was the court's determination, based on respondent's testimony at the trial court hearing, that his "knowledge and sophistica-

tion regarding his rights under our judicial system increased substantially after his first conviction." App. to Pet. for Cert. A32. Respondent knew, for example, the difference between first- and second-degree persistent felony offender charges, and he knew the sentencing and parole requirements for both offenses. "[H]e indicated that the evidence against him and his lack of a strong defense had persuaded him to accept the Commonwealth's offered plea bargain in return for a recommendation that he be given a minimum sentence. In fact, he voluntarily and knowingly chose not to risk the uncertainties of a jury trial." *Id.*, at 32–33.

We have previously treated evidence of a defendant's prior experience with the criminal justice system as relevant to the question whether he knowingly waived constitutional rights, see, *e. g.*, *Lonberger*, *supra*, at 437; *Gryger* v. *Burke*, 334 U. S., at 730, and we think the Kentucky Court of Appeals fairly inferred that respondent understood the full consequences of his 1981 plea. That, combined with respondent's admission that he understood the charges against him and his self-serving testimony that he simply could not remember whether the trial judge advised him of other rights, satisfied every court that has considered the issue that the government carried its burden of persuasion under the Kentucky framework. We cannot say that this was error.

The judgment of the Court of Appeals for the Sixth Circuit is accordingly

Reversed.

JUSTICE BLACKMUN, concurring in the judgment.

I agree that Kentucky's burden-shifting procedures established in *Dunn* v. *Commonwealth*, 703 S. W. 2d 874, 876 (Ky. 1985), cert. denied, 479 U. S. 832 (1986), are constitutional under the Due Process Clause and that the Court of Appeals erred in concluding that the Commonwealth had the burden of establishing by clear and convincing evidence that the prior guilty pleas complied with *Boykin* v. *Alabama*,

395 U. S. 238 (1969). I write separately, however, to emphasize that I agree with this conclusion only because Kentucky's persistent-felony-offender statute, Ky. Rev. Stat. Ann. § 532.080 (Michie 1990), is a sentencing provision rather than a statute creating a separate criminal offense.

The persistent-felony-offender provision is located not in the substantive criminal offense chapters of the Kentucky Revised Statutes but as part of chapter 532, where the offense classifications and the respective penalties are located. Section 532.080 is entitled "Persistent felony offender sentencing," and it is specifically concerned with enhancing the penalty that would otherwise follow from a conviction on the underlying criminal offense. In respondent's case, for example, his persistent-felony-offender status enhanced the punishment normally associated with a second-degree robbery conviction—at least 5 but not more than 10 years imprisonment—to a minimum of 10 and a maximum of 20 years. § 532.080(6)(b).

The Supreme Court of Kentucky has described the persistent-felony-offender statute:

> "There is no additional punishment imposed by a persistent felony offender conviction, merely a more severe punishment. KRS 532.080 does not create or define a criminal offense. It recognizes a status and, in a proceeding separate and apart from the initial trial, fixes a penalty which is to be imposed rather than the one fixed by the jury on the initial trial." *Hardin* v. *Commonwealth*, 573 S. W. 2d 657, 661 (Ky. 1978).

See also *Malicoat* v. *Commonwealth*, 637 S. W. 2d 640, 641 (Ky. 1982). Under Kentucky law, the Commonwealth has the burden of proving beyond a reasonable doubt each "element" of the offense of being a first-degree persistent-felony offender. *Hon* v. *Commonwealth*, 670 S. W. 2d 851, 853 (Ky. 1984). However,

> "[i]t is the fact of conviction which the Commonwealth seeks to prove in introducing the judgment against a defendant charged as a persistent felon. KRS 532.080 does not specify that the Commonwealth must affirmatively prove both the fact of conviction and that the previous conviction was not obtained by constitutionally impermissible means." *Commonwealth* v. *Gadd*, 665 S. W. 2d 915, 917 (Ky. 1984).

I believe that had Kentucky chosen to make being a persistent-felony offender a separate crime, as respondent mistakenly believes that it has, Brief for Respondent 12–13, the Commonwealth would have had the burden affirmatively to prove that the underlying felony convictions were obtained by constitutional means. Under those circumstances, *Boykin* would not permit the Commonwealth to rely on a silent record. But, because the persistent-felony-offender statute is properly understood to be a sentencing provision, I see no reason why the Commonwealth may not place the burden on the defendant to rebut the presumption of regularity that attaches to the prior convictions. For this reason, I agree that the Court of Appeals has demanded more of the Commonwealth of Kentucky than is constitutionally required.

Syllabus

RICHMOND *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 91–7094. Argued October 13, 1992—Decided December 1, 1992

Following a sentencing hearing on petitioner Richmond's first degree murder conviction, the Arizona trial judge found three statutory aggravating factors, including, under Ariz. Rev. Stat. Ann. § 13–703(F)(6), that the offense was committed in an "especially heinous, cruel or depraved manner" ((F)(6) factor). Concluding also that there were no mitigating circumstances sufficiently substantial to warrant leniency, the judge sentenced Richmond to death. The State Supreme Court affirmed, with each of the five justices joining one of three opinions. Among other things, the principal opinion for two of the justices found that the (F)(6) factor—which had been narrowed in *State* v. *Gretzler*, 135 Ariz. 42, 659 P. 2d 1, subsequent to Richmond's sentencing—was applicable. The principal opinion also conducted an independent review of the sentence and concluded that Richmond's mitigation evidence did not outweigh the aggravating factors. In a special concurrence, two of the other justices disagreed that the offense came within the (F)(6) factor as narrowed by *Gretzler*, but agreed that a death sentence was appropriate even absent that factor. The fifth justice filed a dissenting opinion urging reversal. After this Court denied certiorari, the Federal District Court declined to grant Richmond habeas corpus relief, and the Court of Appeals affirmed.

Held: Richmond's death sentence violates the Eighth Amendment. The (F)(6) factor was unconstitutionally vague at the time the sentencing judge gave it weight. *Walton* v. *Arizona*, 497 U. S. 639, 654. The State Supreme Court did not cure this error, because the two specially concurring justices did not actually reweigh the aggravating and mitigating circumstances in affirming the sentence. See, *e. g.*, *Clemons* v. *Mississippi*, 494 U. S. 738. Those justices did not purport to perform a new sentencing calculus, or even mention the evidence in mitigation. Nor can such a reweighing be presumed, since language in the concurrence plainly indicates that Richmond's aggravated criminal background provided a *conclusive* justification for the death penalty, thereby evincing the sort of automatic affirmance rule proscribed in a "weighing" State such as Arizona. *Id.*, at 751. Because a majority of the State Supreme Court did not perform a curative reweighing in voting to af-

firm Richmond's death sentence, the question whether the principal opinion properly relied on the (F)(6) factor as narrowed in *Gretzler* need not be decided by this Court. Pp. 46–52.

948 F. 2d 1473, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Blackmun, Stevens, Kennedy, Souter, and Thomas, JJ., joined. Thomas, J., filed a concurring opinion, *post,* p. 52. Scalia, J., filed a dissenting opinion, *post,* p. 53.

Timothy K. Ford argued the cause for petitioner. With him on the briefs were *Judith H. Ramseyer* and *Carla Ryan.*

Paul J. McMurdie argued the cause for respondents. With him on the brief were *Grant Woods,* Attorney General of Arizona, and *Jack Roberts,* Assistant Attorney General.

Justice O'Connor delivered the opinion of the Court.

The question in this case is whether the Supreme Court of Arizona has cured petitioner's death sentence of vagueness error.

I

On August 25, 1973, Bernard Crummett had the misfortune to meet Rebecca Corella in a Tucson, Arizona, bar. Crummett left the bar with Corella and, in the parking lot, met petitioner, who had been waiting for Corella with his girlfriend, Faith Erwin. Corella agreed to perform an act of prostitution with Crummett, and petitioner drove the group to Corella's hotel. There, Corella communicated to petitioner that Crummett was "loaded," and petitioner in turn whispered to Erwin that he intended to rob Crummett.

After Corella and Crummett concluded their encounter at the hotel, the group again went for a drive, this time to a deserted area outside Tucson, where, Crummett believed, Corella would perform another act of prostitution. Petitioner stopped the car and got out. He first struck Crummett to the ground and next threw several large rocks at Crummett's head. Crummett's watch and wallet were

taken by Corella, petitioner, or both, and these two then drove away with Erwin. Either petitioner or Corella was driving, and whoever it was drove the car over Crummett twice. Crummett suffered injuries to his head and trunk, and died.

The State of Arizona charged petitioner with robbery and first degree murder. Erwin testified at the jury trial that petitioner drove the car over Crummett, but admitted that she had been intoxicated by heroin at the time. A defense witness stated that Erwin previously had identified Corella as the driver. Neither Corella nor petitioner took the stand, although the prosecution did introduce a postarrest statement by petitioner in which he acknowledged robbing Crummett but claimed that Corella was the driver. There was medical testimony that a car had crushed Crummett's head, killing him, and that the injuries to his trunk, also vehicular, took place at least 30 seconds later.

Petitioner was convicted of both robbery and first degree murder. The jury was instructed as to the elements of felony murder as well as premeditated murder; the murder conviction was returned by a general verdict. Judge Roylston held the penalty hearing required by Ariz. Rev. Stat. Ann. § 13–703 (1989), then codified as § 13–454, and sentenced petitioner to death for the murder and 15–20 years' imprisonment for the robbery. The judge found two statutory aggravating factors: that petitioner had a prior felony conviction involving the use or threat of violence on another person, § 13–703(F)(2) (an armed kidnaping), and that petitioner "committed the offense in an especially heinous, cruel or depraved manner," § 13–703(F)(6) ((F)(6) factor). Specifically, Judge Roylston's written order stated that "the Defendant did commit the offense in an especially heinous and cruel manner." App. 44. There was no explicit finding about the identity of the driver of the vehicle.

Petitioner unsuccessfully sought postconviction relief in the trial court, attaching two affidavits by persons who

claimed to have been told by Corella that she, not petitioner, drove the car over Crummett. The Supreme Court of Arizona affirmed the sentence, conviction, and denial of postconviction relief. *State* v. *Richmond*, 114 Ariz. 186, 560 P. 2d 41 (1976). Although the opinion is ambiguous on this point, it appears that the court did not reach petitioner's vagueness challenge to the "especially heinous, cruel or depraved" factor because his death sentence was supported by another valid aggravating factor and no statutory mitigating factors applied. *Id.*, at 196–197, 560 P. 2d, at 51–52. We denied certiorari. 433 U. S. 915 (1977). Federal habeas corpus proceedings ensued, as a result of which petitioner's conviction was found valid but his sentence invalid because the sentencing judge had been constrained to consider a limited set of mitigating factors. *Richmond* v. *Cardwell*, 450 F. Supp. 519 (Ariz. 1978). Soon thereafter, the Supreme Court of Arizona held the Arizona death penalty statute unconstitutional insofar as it limited defendants to statutory mitigating factors, *State* v. *Watson*, 120 Ariz. 441, 444–445, 586 P. 2d 1253, 1256–1257 (1978), and vacated every pending Arizona death sentence, see Brief for Respondents 5.

Petitioner's resentencing took place in March 1980. At the hearing, one defense witness testified that Erwin had identified Corella as the driver, while another stated that Corella had admitted the same. The defense also produced evidence of petitioner's rehabilitation in prison and of the effect his execution would have on his family. Judge Roylston again sentenced petitioner to death, this time finding three statutory aggravating circumstances: under Ariz. Rev. Stat. Ann. § 13–703(F)(2) (prior violent felony) and § 13–703(F)(6) ("especially heinous, cruel or depraved" offense), as before, and also under § 13–703(F)(1) (prior felony meriting life imprisonment), for a murder charge of which petitioner had been convicted after the first sentencing even though the murder predated Crummett's. Once again, the judge found that "the Defendant did commit the offense in this case

in an especially heinous and cruel manner," App. 74, but did not explicitly find that petitioner was the driver. The findings as to mitigation were, among others, that "Rebecca Corella was involved in the offense but was never charged with any crime"; that "Faith [E]rwin was involved in the offense but was never charged with any crime"; that "the jury was instructed both on the matters relating to the felony murder rule, as well as matters relating to premeditated murder"; and that "the Defendant's family . . . will suffer considerable grief as a result of any death penalty that might be imposed." *Id.*, at 75. The judge was unable to make a definitive finding as to rehabilitation and concluded that "there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.*, at 76.

A divided Supreme Court of Arizona affirmed, with each of the five justices joining one of three opinions. *State* v. *Richmond*, 136 Ariz. 312, 666 P. 2d 57 (1983) *(Richmond II)*. Chief Justice Holohan wrote the principal opinion for himself and for Justice Hays, rejecting various challenges to petitioner's sentence, including a challenge to the (F)(6) factor. He reasoned that petitioner's offense was "heinous" and "depraved" (but not "cruel") and that this factor was not unconstitutionally vague:

> "In [*State* v. *Gretzler*, 135 Ariz. 42, 659 P. 2d 1, cert. denied, 461 U. S. 971 (1983)], we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. . . . Again the fact that the victim in the instant case was run over

twice and his skull was crushed, we find to be a ghastly mutilation of the victim." *Id.*, at 319, 666 P. 2d, at 64.

The principal opinion then conducted an independent review of the sentence, concluding that "the mitigation offered by [petitioner] is not sufficiently substantial to outweigh the [three] aggravating circumstances." *Id.*, at 321, 666 P. 2d, at 66.

Justice Cameron, joined by Vice Chief Justice Gordon, wrote a special concurrence. "I concur in the [principal opinion] except its finding that this crime was heinous and depraved, and I concur in the result." *Id.*, at 324, 666 P. 2d, at 69. The concurring justices contended that petitioner committed neither "gratuitous violence" nor "needless mutilation" within the meaning of *State* v. *Gretzler*, 135 Ariz. 42, 659 P. 2d 1, cert. denied, 461 U. S. 971 (1983). Gratuitous violence would have obtained only if petitioner "knew or should have known that the victim was dead after the first pass of the car"—if he "inflicted any violence on the victim which he must have known was 'beyond the point necessary to kill.'" *Richmond II*, 136 Ariz., at 323, 666 P. 2d, at 68. Similarly, needless mutilation was interpreted to mean "distinct acts, apart from the killing, specifically performed to mutilate the victim's body." *Ibid.* But the concurrence agreed that a death sentence was appropriate for petitioner, even absent the (F)(6) factor.

Justice Feldman dissented. He argued that the murder was not "especially heinous, cruel or depraved" and that the mitigating evidence of petitioner's rehabilitation precluded a death sentence. *Id.*, at 324–325, 666 P. 2d, at 69–70.

We denied certiorari. 464 U. S. 986 (1983). Petitioner filed a habeas corpus action in the United States District Court for the District of Arizona, challenging his sentence and conviction. The District Court denied relief, *Richmond* v. *Ricketts*, 640 F. Supp. 767 (1986), and the Ninth Circuit affirmed, 921 F. 2d 933 (1990). As to the (F)(6) factor, the panel held that a valid narrowing construction of that factor

had been imposed in *Richmond II* and, in the alternative, that petitioner's sentence could stand without that factor despite our decision in *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). "Elimination of the challenged factor would still leave enough support for [petitioner's] sentence because the statute at issue here is not a 'weighing' statute." 921 F. 2d, at 947. The opinion later was amended to omit that sentence, but the amended opinion still reasoned: "Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation 'weightier' or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here." 948 F. 2d 1473, 1488–1489 (1992).

The Ninth Circuit denied rehearing en banc, with four judges dissenting. *Id.*, at 1476. We granted certiorari, 503 U. S. 958 (1992), and now reverse.

II

Petitioner challenges his death sentence imposed at resentencing in 1980. He argues that the "especially heinous, cruel or depraved" aggravating factor specified by Ariz. Rev. Stat. Ann. § 13–703(F)(6) (1989), upon which the sentencing judge relied, was unconstitutionally vague, and that the Supreme Court of Arizona failed to cure this invalidity in *Richmond II*.

The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See, *e. g.*, *Maynard* v. *Cartwright*, 486 U. S. 356, 361–364 (1988); *Godfrey* v. *Georgia*, 446 U. S. 420, 427–433 (1980). Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors ob-

tain. See, *e. g.*, *Stringer* v. *Black*, 503 U. S. 222, 229–232 (1992); *Clemons* v. *Mississippi*, *supra*, at 748–752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See *Lewis* v. *Jeffers*, 497 U. S. 764 (1990); *Walton* v. *Arizona*, 497 U. S. 639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational factfinder" standard of *Jackson* v. *Virginia*, 443 U. S. 307 (1979). See *Lewis* v. *Jeffers*, *supra*, at 781.

Arizona's "especially heinous, cruel or depraved" factor was at issue in *Walton* v. *Arizona*, *supra*. As we explained, "there is no serious argument that [this factor] is not facially vague." 497 U. S., at 654. Respondents do not argue that the factor had been narrowed adequately prior to petitioner's resentencing. Thus it would have been error for Judge Roylston to give weight to the (F)(6) factor, if he indeed balanced the aggravating and mitigating factors in resentencing petitioner, and respondents now agree that the judge did engage in this weighing process. See Brief for Respondents 44 ("Arizona Is a Weighing State"). The Arizona sentencing statute provides:

> "In determining whether to impose a sentence of death . . . the court shall take into account the aggravating and mitigating circumstances included in . . . this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13–703(E) (1989).

This provision governed petitioner's resentencing and remains unamended in relevant part. Read most naturally, it requires the sentencer to weigh aggravating and mitigating circumstances—to determine the relative "substan[ce]" of the two kinds of factors. And the provision has been con-

strued thus by the Supreme Court of Arizona. See, *e. g.*, *State* v. *Brewer*, 170 Ariz. 486, 504, 826 P. 2d 783, 801, cert. denied, *post*, p. 872; *State* v. *Gretzler*, 135 Ariz., at 54–55, 659 P. 2d, at 13–14; *State* v. *Valencia*, 132 Ariz. 248, 250, 645 P. 2d 239, 241 (1982); *State* v. *Brookover*, 124 Ariz. 38, 42, 601 P. 2d 1322, 1326 (1979). Nor do respondents contend that the (F)(6) factor had no effect on the sentencing judge's calculus and therefore was harmless.

Rather, they point to *State* v. *Gretzler*, *supra*, which issued subsequent to the resentencing but prior to *Richmond II*, and which provided an adequate narrowing construction of the "especially heinous, cruel or depraved" factor. See *Lewis* v. *Jeffers*, *supra*, at 777–778 (holding that *Gretzler* definitions adequately narrowed (F)(6) factor); *Walton* v. *Arizona*, *supra*, at 652–655 (same). Respondents assert that the principal opinion in *Richmond II* properly applied the *Gretzler* construction of the (F)(6) factor, while the concurrence ignored the factor, and that both opinions reweighed. Petitioner argues that the principal opinion improperly applied *Gretzler*, and that the concurrence did not reweigh.

We agree with petitioner that the concurrence in *Richmond II* did not reweigh. Our prior cases do not specify the degree of clarity with which a state appellate court must reweigh in order to cure an otherwise invalid death sentence, see *Clemons* v. *Mississippi*, *supra*, at 750–752; cf. *Sochor* v. *Florida*, 504 U. S. 527, 540 (1992) (discussing clarity of state appellate court's harmless-error analysis); *Stringer* v. *Black*, 503 U. S., at 229–232 (same), and we need not do so here. At a minimum, we must determine that the state court actually reweighed. "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale," *id.*, at 232, nor can a court "cure" the error without deciding, itself, that the valid aggravating factors are weightier than the mitigating factors. "[O]nly constitutional harmless-error analysis or

reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." *Ibid.* Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.

The concurring justices in *Richmond II* did not purport to perform such a calculus, or even mention the evidence in mitigation. Respondents suggest that we presume reweighing, both because the justices of the Supreme Court of Arizona have an obligation to reweigh as part of their "independent review" of death sentences, and because Justices Cameron and Gordon concurred in the portion of the principal opinion that articulated this obligation. Although there is some force to this suggestion, any presumption of reweighing is overcome by the language of the concurrence itself. After arguing that petitioner's offense did not satisfy the (F)(6) factor, the concurrence offered this brief explanation why a death sentence was justified nonetheless.

> "The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty." *Richmond II*, 136 Ariz., at 323–324, 666 P. 2d, at 68–69.

The plain meaning of this passage is that petitioner's aggravated background provided a *conclusive* justification for the death penalty. The passage plainly evinces the sort of automatic affirmance rule proscribed in a "weighing" State—"a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance." *Clemons* v. *Mississippi*, 494 U. S., at 751.

As to the two justices who joined the principal opinion in *Richmond II*, Chief Justice Holohan and Justice Hays, petitioner argues that these justices erred by relying upon the (F)(6) "especially heinous, cruel or depraved" factor. Specifically, petitioner contends that the justices refrained from determining that he drove the car over Crummett; that in any case the record before the Supreme Court of Arizona did not suffice to support such a determination; and that the (F)(6) factor would not apply even if he were the driver, unless he knew when he drove the car over Crummett the second time that Crummett was already dead. Respondents dispute each of these points, arguing that Chief Justice Holohan and Justice Hays did determine petitioner to be the driver; that the sentencing judge had made an implicit finding on this score; and that the (F)(6) factor was applicable to the driver, whether or not he knew Crummett to be dead. The parties do agree that a state appellate court can cure a death sentence of constitutional error even where only a minority of the court relies upon a particular aggravating factor, as in *Richmond II*, if such reliance is otherwise legitimate. See Brief for Respondents 8–33; Reply Brief for Petitioner 3. We assume without deciding that the parties are correct on this point. Instead, the dispute here is simply whether the justices who relied upon the (F)(6) factor in *Richmond II* ought to have done so.

Of course, the question to be decided by a federal court on petition for habeas corpus is not whether the state sentencer committed state-law error in relying upon an adequately narrowed aggravating factor. See *Lewis* v. *Jeffers*, 497 U. S., at 780. Rather, the federal, constitutional question is whether such reliance is "so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Ibid.* *Gretzler*, the narrowing construction of Arizona's (F)(6) factor, reads as follows:

> "[T]he statutory concepts of heinous and depraved involve a killer's vile state of mind at the time of the mur-

> der, as evidenced by the killer's actions. Our cases have suggested specific factors which lead to a finding of heinousness or depravity.
>
> . . . . .
>
> "[One such factor] is the infliction of gratuitous violence on the victim. . . .
>
> "[Another] is the needless mutilation of the victim." 135 Ariz., at 51–52, 659 P. 2d, at 10–11.

A murderer who intentionally drives a car over his victim twice arguably commits "gratuitous violence" within the meaning of *Gretzler*, whether or not he knows that the victim is dead after the first pass. An Arizona sentencer would not commit constitutional error by relying on the (F)(6) factor in sentencing that murderer. Although it may be true that knowledge of the victim's condition is required as a matter of Arizona law, indeed *Richmond II* itself may now stand for that state-law proposition, "federal habeas corpus relief does not lie for errors of state law." *Lewis* v. *Jeffers*, *supra*, at 780. On the other hand, respondents do agree that, on the facts of this case, the Eighth Amendment would preclude the application of the (F)(6) factor to petitioner if he did not intentionally drive the car over Crummett. Tr. of Oral Arg. 38–39. Cf. *Tison* v. *Arizona*, 481 U. S. 137, 156–158 (1987) (conduct short of intentional killing may show culpable mental state that justifies death penalty).

But we need not decide whether the principal opinion in *Richmond II* remained within the constitutional boundaries of the (F)(6) factor. Respondents assume that at least a majority of the Supreme Court of Arizona needed to perform a proper reweighing and vote to affirm petitioner's death sentence if that court was to cure the sentence of the initial vagueness error. See Brief for Respondents 27, 49, n. 16. Thus, even assuming that the two justices who joined the principal opinion properly reweighed, their votes did not suffice to validate the death sentence. One more proper vote was needed, but there was none. As we have already ex-

plained, the concurring justices who also voted to affirm petitioner's sentence did not perform a curative reweighing, while the dissenter voted to reverse. Therefore petitioner's sentence is invalid, whether or not the principal opinion properly relied upon the "especially heinous, cruel or depraved" factor.

III

Petitioner's death sentence was tainted by Eighth Amendment error when the sentencing judge gave weight to an unconstitutionally vague aggravating factor. The Supreme Court of Arizona did not cure this error, because the two justices who concurred in affirming the sentence did not actually perform a new sentencing calculus. Thus the sentence, as it stands, violates the Eighth Amendment.

We reverse the judgment of the Court of Appeals and remand with instructions to return the case to the District Court to enter an order granting the petition for a writ of habeas corpus unless the State of Arizona within a reasonable period of time either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law.

It is so ordered.

JUSTICE THOMAS, concurring.

The Court holds that the concurring Arizona Supreme Court justices violated the rule of *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), by failing to reweigh aggravating and mitigating circumstances after concluding that only two of the three aggravating circumstances found by the trial court were present in this case. Respondents do not claim that this rule is a new one for purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989), and that it is consequently unavailable to a habeas petitioner. The reason, presumably, is that a *Teague* defense is foreclosed by *Stringer* v. *Black*, 503 U. S. 222 (1992), which held that "there was no arguable basis" in Feb-

ruary 1985 to support the view that an appellate court in a weighing State "was permitted to apply a rule of automatic affirmance to any death sentence supported by multiple aggravating factors, when one is invalid." *Id.*, at 231. Under *Stringer*, the concurring Arizona Supreme Court justices cannot be excused for their failure to reweigh; any reasonable jurist should have known that "automatic affirmance" in a weighing State violates the Eighth Amendment.*

I joined the dissent in *Stringer*, and I continue to think that case was wrongly decided. In particular, I remain convinced that *Stringer* transformed *Teague*'s retroactivity principle from a rule that validates "reasonableness" into a rule that mandates "prescience." 503 U. S., at 244 (SOUTER, J., dissenting). Had *Stringer* been decided differently, petitioner could not now complain that two Arizona Supreme Court justices violated the Constitution in 1983 by neglecting to reweigh. Nevertheless, because *Stringer* is good law, and because I agree that the concurring justices in this case did not reweigh, I join the Court's opinion.

JUSTICE SCALIA, dissenting.

The Court today holds that Justice Cameron's special concurrence erred in that, after having found that this murder was not committed in an "especially heinous, cruel or depraved manner," Ariz. Rev. Stat. Ann. § 13–703(F)(6) (1989), it failed thereupon to reweigh the remaining aggravating and mitigating circumstances before affirming petitioner's death sentence. The Court does not reach petitioner's claim that Chief Justice Holohan's opinion erred in applying the Arizona

*Richmond's conviction became final on November 14, 1983—15 months before Stringer's conviction became final. I cannot imagine, however, that this distinction renders *Stringer* inapplicable to this case. The decision in *Stringer* rested on the premise that the rule against automatic affirmance "emerges not from any single case," but from a "long line of authority," *Stringer* v. *Black*, 503 U. S., at 232, and that "line of authority" consists entirely of cases decided before Richmond's conviction became final, see *id.*, at 227–232.

limiting construction of this aggravating circumstance, see *State* v. *Gretzler*, 135 Ariz. 42, 659 P. 2d 1, cert. denied, 461 U. S. 971 (1983), and in thus finding this murder to have been "heinous."

Under Arizona law, a murderer is eligible for the death penalty if the trial court finds at least one statutory aggravating circumstance. Ariz. Rev. Stat. Ann. § 13–703(E) (1989). Even accepting both of petitioner's arguments with regard to the "especially heinous, cruel or depraved" factor, it is beyond dispute that two constitutionally valid aggravating circumstances were found— namely, that petitioner had "been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable" (specifically, first-degree murder), § 13–703(F)(1), and that petitioner had been "previously convicted of a felony in the United States involving the use or threat of violence on another person" (specifically, armed kidnaping), § 13–703(F)(2). App. 73–74. Thus, the death sentence unquestionably complied with the narrowing requirement imposed by the line of cases commencing with *Furman* v. *Georgia*, 408 U. S. 238 (1972). In my view this Court has no colorable basis, either in constitutional text or in national tradition, for imposing upon the States a further constitutional requirement that the sentencer consider mitigating evidence, see *Walton* v. *Arizona*, 497 U. S. 639, 671–673 (1990) (SCALIA, J., opinion concurring in part and concurring in judgment). As this and other cases upon our docket amply show, that recently invented requirement has introduced not only a mandated arbitrariness quite inconsistent with *Furman*, but also an impenetrable complexity and hence a propensity to error that make a scandal and a mockery of the capital sentencing process.

Since in my view compliance with *Furman* is all that was required, any error committed by Chief Justice Holohan's

opinion in finding "heinousness" was harmless, and any failure by Justice Cameron's special concurrence to reweigh raises no federal question. Accordingly, I would affirm.

Syllabus

SOLDAL ET UX. *v.* COOK COUNTY, ILLINOIS, ET AL.

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

No. 91–6516. Argued October 5, 1992—Decided December 8, 1992

While eviction proceedings were pending, Terrace Properties and its manager, Margaret Hale, forcibly evicted petitioners, the Soldal family, and their mobile home from a Terrace Properties' mobile home park. At Hale's request, Cook County, Illinois, Sheriff's Department deputies were present at the eviction. Although they knew that there was no eviction order and that Terrace Properties' actions were illegal, the deputies refused to take Mr. Soldal's complaint for criminal trespass or otherwise interfere with the eviction. Subsequently, the state judge assigned to the pending eviction proceedings ruled that the eviction had been unauthorized, and the trailer, badly damaged during the eviction, was returned to the lot. Petitioners brought an action in the Federal District Court under 42 U. S. C. § 1983, claiming that Terrace Properties and Hale had conspired with the deputy sheriffs to unreasonably seize and remove their home in violation of their Fourth and Fourteenth Amendment rights. The court granted defendants' motion for summary judgment, and the Court of Appeals affirmed. Acknowledging that what had occurred was a "seizure" in the literal sense of the word, the court reasoned that it was not a seizure as contemplated by the Fourth Amendment because, *inter alia*, it did not invade petitioners' privacy.

Held: The seizure and removal of the trailer home implicated petitioners' Fourth Amendment rights. Pp. 61–72.

(a) A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen*, 466 U. S. 109, 113. The language of the Fourth Amendment—which protects people from unreasonable searches and seizures of "their persons, houses, papers, and effects"—cuts against the novel holding below, and this Court's cases unmistakably hold that the Amendment protects property even where privacy or liberty is not implicated. See, *e. g.*, *ibid.; Katz* v. *United States*, 389 U. S. 347, 350. This Court's "plain view" decisions also make untenable the lower court's construction of the Amendment. If the Amendment's boundaries were defined exclusively by rights of privacy, "plain view" seizures, rather than being scrupulously subjected to Fourth Amendment inquiry, *Arizona* v. *Hicks*, 480 U. S. 321, 326–327, would not implicate that constitutional provision at all. Contrary to the Court of Ap-

peals' position, the Amendment protects seizures even though no search within its meaning has taken place. See, *e. g.*, *Jacobsen*, *supra*, at 120–125. Also contrary to that court's view, *Graham* v. *Connor*, 490 U. S. 386, does not require a court, when it finds that a wrong implicates more than one constitutional command, to look at the dominant character of the challenged conduct to determine under which constitutional standard it should be evaluated. Rather, each constitutional provision is examined in turn. See, *e. g.*, *Hudson* v. *Palmer*, 468 U. S. 517. Pp. 61–71.

(b) The instant decision should not foment a wave of new litigation in the federal courts. Activities such as repossessions or attachments, if they involve entering a home, intruding on individuals' privacy, or interfering with their liberty, would implicate the Fourth Amendment even on the Court of Appeals' own terms. And numerous seizures of this type will survive constitutional scrutiny on "reasonableness" grounds. Moreover, it is unlikely that the police will often choose to further an enterprise knowing that it is contrary to the law or proceed to seize property in the absence of objectively reasonable grounds for doing so. Pp. 71–72.

942 F. 2d 1073, reversed and remanded.

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

John L. Stainthorp argued the cause and filed briefs for petitioners.

Kenneth L. Gillis argued the cause for respondents. With him on the brief were *Jack O'Malley*, *Renee G. Goldfarb*, and *Kenneth T. McCurry.**

JUSTICE WHITE delivered the opinion of the Court.

I

Edward Soldal and his family resided in their trailer home, which was located on a rented lot in the Willoway Terrace

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**James D. Holzhauer*, *Timothy S. Bishop*, *John A. Powell*, *Steven R. Shapiro*, *Harvey M. Grossman*, and *Alan K. Chen* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Richard Ruda, *Carter G. Phillips*, *Mark D. Hopson*, and *Mark E. Haddad* filed a brief for the National League of Cities et al. as *amici curiae* urging affirmance.

mobile home park in Elk Grove, Illinois. In May 1987, Terrace Properties, the owner of the park, and Margaret Hale, its manager, filed an eviction proceeding against the Soldals in an Illinois state court. Under the Illinois Forcible Entry and Detainer Act, Ill. Rev. Stat., ch. 110, ¶ 9–101 *et seq.* (1991), a tenant cannot be dispossessed absent a judgment of eviction. The suit was dismissed on June 2, 1987. A few months later, in August 1987, the owner brought a second proceeding of eviction, claiming nonpayment of rent. The case was set for trial on September 22, 1987.

Rather than await judgment in their favor, Terrace Properties and Hale, contrary to Illinois law, chose to evict the Soldals forcibly two weeks prior to the scheduled hearing. On September 4, Hale notified the Cook County's Sheriff's Department that she was going to remove the trailer home from the park, and requested the presence of sheriff deputies to forestall any possible resistance. Later that day, two Terrace Properties employees arrived at the Soldals' home accompanied by Cook County Deputy Sheriff O'Neil. The employees proceeded to wrench the sewer and water connections off the side of the trailer home, disconnect the phone, tear off the trailer's canopy and skirting, and hook the home to a tractor. Meanwhile, O'Neil explained to Edward Soldal that "'he was there to see that [Soldal] didn't interfere with [Willoway's] work.'" Brief for Petitioner 6.

By this time, two more deputy sheriffs had arrived at the scene and Soldal told them that he wished to file a complaint for criminal trespass. They referred him to Deputy Lieutenant Jones, who was in Hale's office. Jones asked Soldal to wait outside while he remained closeted with Hale and other Terrace Properties employees for over 20 minutes. After talking to a district attorney and making Soldal wait another half hour, Jones told Soldal that he would not accept a complaint because "'it was between the landlord and the tenant . . . [and] they were going to go ahead and continue to move

out the trailer.'" *Id.*, at 8.[1] Throughout this period, the deputy sheriffs knew that Terrace Properties did not have an eviction order and that its actions were unlawful. Eventually, and in the presence of an additional two deputy sheriffs, the Willoway workers pulled the trailer free of its moorings and towed it onto the street. Later, it was hauled to a neighboring property.

On September 9, the state judge assigned to the pending eviction proceedings ruled that the eviction had been unauthorized and ordered Terrace Properties to return the Soldals' home to the lot. The home, however, was badly damaged.[2] The Soldals brought this action under 42 U. S. C. § 1983, alleging a violation of their rights under the Fourth and Fourteenth Amendments. They claimed that Terrace Properties and Hale had conspired with Cook County deputy sheriffs to unreasonably seize and remove the Soldals' trailer home. The District Judge granted defendants' motion for summary judgment on the grounds that the Soldals had failed to adduce any evidence to support their conspiracy theory and, therefore, the existence of state action necessary under § 1983.[3]

The Court of Appeals for the Seventh Circuit, construing the facts in petitioners' favor, accepted their contention that there was state action. However, it went on to hold that

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[1] Jones' statement was prompted by a district attorney's advice that no criminal charges could be brought because, under Illinois law, a criminal action cannot be used to determine the right of possession. See Ill. Rev. Stat., ch. 110, ¶ 9–101 *et seq.* (1991); *People* v. *Evans*, 163 Ill. App. 3d 561, 516 N. E. 2d 817 (1st Dist. 1987).

[2] The Soldals ultimately were evicted per court order in December 1987.

[3] Title 42 U. S. C. § 1983 provides that:

"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 . . . 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."

the removal of the Soldals' trailer did not constitute a seizure for purposes of the Fourth Amendment or a deprivation of due process for purposes of the Fourteenth.

On rehearing, a majority of the Seventh Circuit, sitting en banc, reaffirmed the panel decision.[4] Acknowledging that what had occurred was a "seizure" in the literal sense of the word, the court reasoned that, because it was not made in the course of public law enforcement and because it did not invade the Soldals' privacy, it was not a seizure as contemplated by the Fourth Amendment. 942 F. 2d 1073, 1076 (1991). Interpreting prior cases of this Court, the Seventh Circuit concluded that, absent interference with privacy or liberty, a "pure deprivation of property" is not cognizable under the Fourth Amendment. *Id.*, at 1078–1079. Rather, petitioners' property interests were protected only by the Due Process Clauses of the Fifth and Fourteenth Amendments.[5]

We granted certiorari to consider whether the seizure and removal of the Soldals' trailer home implicated their Fourth Amendment rights, 503 U. S. 918 (1992), and now reverse.[6]

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[4] The court reiterated the panel's conclusion that a conspiracy must be assumed on the state of the record and, therefore, that the case must be treated in its current posture "as if the deputy sheriffs themselves seized the trailer, disconnected it from the utilities, and towed it away." 942 F. 2d 1073, 1075 (1991).

[5] The court noted that, in light of the existence of adequate judicial remedies under state law, a claim for deprivation of property without due process of law was unlikely to succeed. *Id.*, at 1075–1076. See *Parratt* v. *Taylor*, 451 U. S. 527 (1981). In any event, the Soldals did not claim a violation of their procedural rights. As noted, the Seventh Circuit also held that respondents had not violated the Soldals' substantive due process rights under the Fourteenth Amendment. Petitioners assert that this was error, but in view of our disposition of the case we need not address the question at this time.

[6] Under 42 U. S. C. § 1983, the Soldals were required to establish that the respondents, acting under color of state law, deprived them of a constitutional right, in this instance, their Fourth and Fourteenth Amendment freedom from unreasonable seizures by the State. See *Monroe* v. *Pape*,

II

The Fourth Amendment, made applicable to the States by the Fourteenth, *Ker* v. *California*, 374 U. S. 23, 30 (1963), provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

A "seizure" of property, we have explained, occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen*, 466 U. S. 109, 113 (1984). In addition, we have emphasized that "at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). See also *Oliver* v. *United States*, 466 U. S. 170, 178–179 (1984); *Wyman* v. *James*, 400 U. S. 309, 316 (1971); *Payton* v. *New York*, 445 U. S. 573, 601 (1980).

As a result of the state action in this case, the Soldals' domicile was not only seized, it literally was carried away, giving new meaning to the term "mobile home." We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment. Whether the Amendment was in fact

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365 U. S. 167, 184 (1961). Respondents request that we affirm on the ground that the Court of Appeals erred in holding that there was sufficient state action to support a § 1983 action. The alleged injury to the Soldals, it is urged, was inflicted by private parties for whom the county is not responsible. Although respondents did not cross-petition, they are entitled to ask us to affirm on that ground if such action would not enlarge the judgment of the Court of Appeals in their favor. The Court of Appeals found that because the police prevented Soldal from using reasonable force to protect his home from private action that the officers knew was illegal, there was sufficient evidence of conspiracy between the private parties and the officers to foreclose summary judgment for respondents. We are not inclined to review that holding. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152–161 (1970).

violated is, of course, a different question that requires determining if the seizure was reasonable. That inquiry entails the weighing of various factors and is not before us.

The Court of Appeals recognized that there had been a seizure, but concluded that it was a seizure only in a "technical" sense, not within the meaning of the Fourth Amendment. This conclusion followed from a narrow reading of the Amendment, which the court construed to safeguard only privacy and liberty interests while leaving unprotected possessory interests where neither privacy nor liberty was at stake. Otherwise, the court said,

> "a constitutional provision enacted two centuries ago [would] make every repossession and eviction with police assistance actionable under—of all things—the Fourth Amendment[, which] would both trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts. That trivializing, this shift, can be prevented by recognizing the difference between possessory and privacy interests." 942 F. 2d, at 1077.

Because the officers had not entered Soldal's house, rummaged through his possessions, or, in the Court of Appeals' view, interfered with his liberty in the course of the eviction, the Fourth Amendment offered no protection against the "grave deprivation" of property that had occurred. *Ibid.*

We do not agree with this interpretation of the Fourth Amendment. The Amendment protects the people from unreasonable searches and seizures of "their persons, houses, papers, and effects." This language surely cuts against the novel holding below, and our cases unmistakably hold that the Amendment protects property as well as privacy.[7] This

[7] In holding that the Fourth Amendment's reach extends to property as such, we are mindful that the Amendment does not protect possessory interests in all kinds of property. See, *e. g., Oliver* v. *United States*, 466 U. S. 170, 176–177 (1984). This case, however, concerns a house, which the Amendment's language explicitly includes, as it does a person's effects.

much was made clear in *Jacobsen*, *supra*, where we explained that the first Clause of the Fourth Amendment

> "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interests in that property." 466 U. S., at 113 (footnote omitted).

See also *id.*, at 120; *Horton* v. *California*, 496 U. S. 128, 133 (1990); *Arizona* v. *Hicks*, 480 U. S. 321, 328 (1987); *Maryland* v. *Macon*, 472 U. S. 463, 469 (1985); *Texas* v. *Brown*, 460 U. S. 730, 747–748 (1983) (STEVENS, J., concurring in judgment); *United States* v. *Salvucci*, 448 U. S. 83, 91, n. 6 (1980). Thus, having concluded that chemical testing of powder found in a package did not compromise its owner's privacy, the Court in *Jacobsen* did not put an end to its inquiry, as would be required under the view adopted by the Court of Appeals and advocated by respondents. Instead, adhering to the teachings of *United States* v. *Place*, 462 U. S. 696 (1983), it went on to determine whether the invasion of the owners' "possessory interests" occasioned by the destruction of the powder was reasonable under the Fourth Amendment. *Jacobsen*, *supra*, at 124–125. In *Place*, although we found that subjecting luggage to a "dog sniff" did not constitute a search for Fourth Amendment purposes because it did not compromise any privacy interest, taking custody of Place's suitcase was deemed an unlawful seizure for it unreasonably infringed "the suspect's possessory interest in his luggage." 462 U. S., at 708.[8] Although lacking a privacy component, the property rights in both instances nonetheless were not

[8] *Place* also found that to detain luggage for 90 minutes was an unreasonable deprivation of the individual's "liberty interest in proceeding with his itinerary," which also is protected by the Fourth Amendment. 462 U. S., at 708–710.

disregarded, but rather were afforded Fourth Amendment protection.

Respondents rely principally on precedents such as *Katz* v. *United States*, 389 U. S. 347 (1967), *Warden, Maryland Penitentiary* v. *Hayden*, 387 U. S. 294 (1967), and *Cardwell* v. *Lewis*, 417 U. S. 583 (1974), to demonstrate that the Fourth Amendment is only marginally concerned with property rights. But the message of those cases is that property rights are not the sole measure of Fourth Amendment violations. The *Warden* opinion thus observed, citing *Jones* v. *United States*, 362 U. S. 257 (1960), and *Silverman* v. *United States*, 365 U. S. 505 (1961), that the "principal" object of the Amendment is the protection of privacy rather than property and that "this shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform." 387 U. S., at 304. There was no suggestion that this shift in emphasis had snuffed out the previously recognized protection for property under the Fourth Amendment. *Katz*, in declaring violative of the Fourth Amendment the unwarranted overhearing of a telephone booth conversation, effectively ended any lingering notions that the protection of privacy depended on trespass into a protected area. In the course of its decision, the *Katz* Court stated that the Fourth Amendment can neither be translated into a provision dealing with constitutionally protected areas nor into a general constitutional right to privacy. The Amendment, the Court said, protects individual privacy against certain kinds of governmental intrusion, "but its protections go further, and often have nothing to do with privacy at all." 389 U. S., at 350.

As for *Cardwell*, a plurality of this Court held in that case that the Fourth Amendment did not bar the use in evidence of paint scrapings taken from and tire treads observed on the defendant's automobile, which had been seized in a parking lot and towed to a police lockup. Gathering this evidence was not deemed to be a search, for nothing from the

interior of the car and "no personal effects, which the Fourth Amendment traditionally has been deemed to protect" were searched or seized. 417 U. S., at 591 (opinion of BLACKMUN, J.). No meaningful privacy rights were invaded. But this left the argument, pressed by the dissent, that the evidence gathered was the product of a warrantless and hence illegal seizure of the car from the parking lot where the defendant had left it. However, the plurality was of the view that, because under the circumstances of the case there was probable cause to seize the car as an instrumentality of the crime, Fourth Amendment precedent permitted the seizure without a warrant. *Id.*, at 593. Thus, both the plurality and dissenting Justices considered the defendant's auto deserving of Fourth Amendment protection even though privacy interests were not at stake. They differed only in the degree of protection that the Amendment demanded.

The Court of Appeals appeared to find more specific support for confining the protection of the Fourth Amendment to privacy interests in our decision in *Hudson* v. *Palmer*, 468 U. S. 517 (1984). There, a state prison inmate sued, claiming that prison guards had entered his cell without consent and had seized and destroyed some of his personal effects. We ruled that an inmate, because of his status, enjoyed neither a right to privacy in his cell nor protection against unreasonable seizures of his personal effects. *Id.*, at 526–528, and n. 8; *id.*, at 538 (O'CONNOR, J., concurring). Whatever else the case held, it is of limited usefulness outside the prison context with respect to the coverage of the Fourth Amendment.

We thus are unconvinced that any of the Court's prior cases supports the view that the Fourth Amendment protects against unreasonable seizures of property only where privacy or liberty is also implicated. What is more, our "plain view" decisions make untenable such a construction of the Amendment. Suppose, for example, that police officers lawfully enter a house, by either complying with the warrant requirement or satisfying one of its recognized exceptions—

e. g., through a valid consent or a showing of exigent circumstances. If they come across some item in plain view and seize it, no invasion of personal privacy has occurred. *Horton*, 496 U. S., at 133–134; *Brown*, *supra*, at 739 (opinion of REHNQUIST, J.). If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, "plain view" seizures would not implicate that constitutional provision at all. Yet, far from being automatically upheld, "plain view" seizures have been scrupulously subjected to Fourth Amendment inquiry. Thus, in the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only if they meet the probable-cause standard, *Arizona* v. *Hicks*, 480 U. S. 321, 326–327 (1987),[9] and if they are unaccompanied by unlawful trespass, *Horton*, 496 U. S., at 136–137.[10] That is because, the absence of a privacy interest notwithstanding, "[a] seizure of the article . . . would obviously invade the owner's possessory interest." *Id.*, at 134; see also *Brown*, 460 U. S., at 739 (opinion of REHNQUIST, J.). The plain-view doctrine "merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property." *Ibid.; Coolidge* v. *New Hampshire*, 403 U. S. 443, 468 (1971); *id.*, at 516 (WHITE, J., concurring and dissenting).

The Court of Appeals understandably found it necessary to reconcile its holding with our recognition in the plain-view cases that the Fourth Amendment protects property as such. In so doing, the court did not distinguish this case on the ground that the seizure of the Soldals' home took place in a

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[9] When "operational necessities" exist, seizures can be justified on less than probable cause. 480 U. S., at 327. That in no way affects our analysis, for even then it is clear that the Fourth Amendment applies. *Ibid.;* see also *United States* v. *Place*, 462 U. S. 696, 703 (1983).

[10] Of course, if the police officers' presence in the home itself entailed a violation of the Fourth Amendment, no amount of probable cause to believe that an item in plain view constitutes incriminating evidence will justify its seizure. *Horton*, 496 U. S., at 136–137.

noncriminal context. Indeed, it acknowledged what is evident from our precedents—that the Amendment's protection applies in the civil context as well. See *O'Connor* v. *Ortega*, 480 U. S. 709 (1987); *New Jersey* v. *T. L. O.*, 469 U. S. 325, 334–335 (1985); *Michigan* v. *Tyler*, 436 U. S. 499, 504–506 (1978); *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312–313 (1978); *Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523, 528 (1967).[11]

Nor did the Court of Appeals suggest that the Fourth Amendment applied exclusively to law enforcement activities. It observed, for example, that the Amendment's protection would be triggered "by a search or other entry into the home incident to an eviction or repossession," 942 F. 2d, at 1077.[12] Instead, the court sought to explain why the Fourth Amendment protects against seizures of property in the plain-view context, but not in this case, as follows:

> "[S]eizures made in the course of investigations by police or other law enforcement officers are almost always, as in the plain view cases, the culmination of searches. The police search in order to seize, and it is the search

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[11] It is true that *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), cast some doubt on the applicability of the Amendment to noncriminal encounters such as this. *Id.*, at 285. But cases since that time have shed a different light, making clear that Fourth Amendment guarantees are triggered by governmental searches and seizures "without regard to the use to which [houses, papers, and effects] are applied." *Warden, Maryland Penitentiary* v. *Hayden*, 387 U. S. 294, 301 (1967). *Murray's Lessee*'s broad statement that the Fourth Amendment "has no reference to civil proceedings for the recovery of debt" arguably only meant that the warrant requirement did not apply, as was suggested in *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 352 (1977). Whatever its proper reading, we reaffirm today our basic understanding that the protection against unreasonable searches and seizures fully applies in the civil context.

[12] This was the view expressed by the Court of Appeals for the Tenth Circuit in *Specht* v. *Jensen*, 832 F. 2d 1516 (1987), remanded on unrelated grounds, 853 F. 2d 805 (1988) (en banc), with which the Seventh Circuit expressly agreed. 942 F. 2d, at 1076.

> *and ensuing seizure* that the Fourth Amendment by its reference to 'searches and seizures' seeks to regulate. Seizure means one thing when it is the outcome of a search; it may mean something else when it stands apart from a search or any other investigative activity. The Fourth Amendment may still nominally apply, but, precisely because there is no invasion of privacy, the usual rules do not apply." *Id.*, at 1079 (emphasis in original).

We have difficulty with this passage. The court seemingly construes the Amendment to protect only against seizures that are the outcome of a search. But our cases are to the contrary and hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place. See, *e. g.*, *Jacobsen*, 466 U. S., at 120–125; *Place*, 462 U. S., at 706–707; *Cardwell*, 417 U. S., at 588–589.[13] More generally, an officer who happens to come across an individual's property in a public area could seize it only if Fourth Amendment standards are satisfied—for example, if the items are evidence of a crime or contraband. Cf. *Payton* v. *New York*,

[13] The officers in these cases were engaged in law enforcement and were looking for something that was found and seized. In this broad sense the seizures were the result of "searches," but not in the Fourth Amendment sense. That the Court of Appeals might have been suggesting that the plain-view cases are explainable because they almost always occur in the course of law enforcement activities receives some support from the penultimate sentence of the quoted passage, where the court states that the word "seizure" might lose its usual meaning "when it stands apart from a search *or any other investigative activity.*" *Id.*, at 1079 (emphasis added). And, in the following paragraph, it observes that "[o]utside of the law enforcement area the Fourth Amendment retains its force as a protection against searches, because they invade privacy. That is why we decline to confine the amendment to the law enforcement setting." *Id.*, at 1079–1080. Even if the court meant that seizures of property in the course of law enforcement activities, whether civil or criminal, implicate interests safeguarded by the Fourth Amendment, but that pure property interests are unprotected in the non-law-enforcement setting, we are not in accord, as indicated in the body of this opinion.

445 U. S., at 587. We are also puzzled by the last sentence of the excerpt, where the court announces that the "usual rules" of the Fourth Amendment are inapplicable if the seizure is not the result of a search or any other investigative activity "precisely because there is no invasion of privacy." For the plain-view cases clearly state that, notwithstanding the absence of any interference with privacy, seizures of effects that are not authorized by a warrant are reasonable only because there is probable cause to associate the property with criminal activity. The seizure of the weapons in *Horton*, for example, occurred in the midst of a search, yet we emphasized that it did not "involve any invasion of privacy." 496 U. S., at 133. In short, our statement that such seizures must satisfy the Fourth Amendment and will be deemed reasonable only if the item's incriminating character is "immediately apparent," *id.*, at 136–137, is at odds with the Court of Appeals' approach.

The Court of Appeals' effort is both interesting and creative, but at bottom it simply reasserts the earlier thesis that the Fourth Amendment protects privacy but not property. We remain unconvinced and see no justification for departing from our prior cases. In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question whether the Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all. As we have observed on more than one occasion, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara*, 387 U. S., at 530; see also *O'Connor*, 480 U. S., at 715; *T. L. O.*, 469 U. S., at 335.

The Court of Appeals also stated that even if, contrary to its previous rulings, "there is some element or tincture of a Fourth Amendment seizure, it cannot carry the day for the Soldals." 942 F. 2d, at 1080. Relying on our decision in *Graham* v. *Connor*, 490 U. S. 386 (1989), the court reasoned that it should look at the "dominant character of the conduct challenged in a section 1983 case [to] determine the constitutional standard under which it is evaluated." 942 F. 2d, at 1080. Believing that the Soldals' claim was more akin to a challenge against the deprivation of property without due process of law than against an unreasonable seizure, the court concluded that they should not be allowed to bring their suit under the guise of the Fourth Amendment.

But we see no basis for doling out constitutional protections in such fashion. Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's "dominant" character. Rather, we examine each constitutional provision in turn. See, *e. g.*, *Hudson* v. *Palmer*, 468 U. S. 517 (1984) (Fourth Amendment and Fourteenth Amendment Due Process Clause); *Ingraham* v. *Wright*, 430 U. S. 651 (1977) (Eighth Amendment and Fourteenth Amendment Due Process Clause). *Graham* is not to the contrary. Its holding was that claims of excessive use of force should be analyzed under the Fourth Amendment's reasonableness standard, rather than the Fourteenth Amendment's substantive due process test. We were guided by the fact that, in that case, both provisions targeted the same sort of governmental conduct and, as a result, we chose the more "explicit textual source of constitutional protection" over the "more generalized notion of 'substantive due process.'" 490 U. S., at 394–395. Surely, *Graham* does not bar resort in this case to the Fourth Amendment's specific protection for "houses, papers,

and effects" rather than the general protection of property in the Due Process Clause.

III

Respondents are fearful, as was the Court of Appeals, that applying the Fourth Amendment in this context inevitably will carry it into territory unknown and unforeseen: routine repossessions, negligent actions of public employees that interfere with individuals' right to enjoy their homes, and the like, thereby federalizing areas of law traditionally the concern of the States. For several reasons, we think the risk is exaggerated. To begin, our decision will have no impact on activities such as repossessions or attachments if they involve entry into the home, intrusion on individuals' privacy, or interference with their liberty, because they would implicate the Fourth Amendment even on the Court of Appeals' own terms. This was true of the Tenth Circuit's decision in *Specht* with which, as we previously noted, the Court of Appeals expressed agreement.

More significantly, "reasonableness is still the ultimate standard" under the Fourth Amendment, *Camara*, *supra*, at 539, which means that numerous seizures of this type will survive constitutional scrutiny. As is true in other circumstances, the reasonableness determination will reflect a "careful balancing of governmental and private interests." *T. L. O.*, *supra*, at 341. Assuming, for example, that the officers were acting pursuant to a court order, as in *Specht* v. *Jensen*, 832 F. 2d 1516 (CA10 1987), or *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), and as often would be the case, a showing of unreasonableness on these facts would be a laborious task indeed. Cf. *Simms* v. *Slacum*, 3 Cranch 300, 301 (1806). Hence, while there is no guarantee against the filing of frivolous suits, had the ejection in this case properly awaited the state court's judgment it is quite unlikely that the federal court would have been bothered with a § 1983 action alleging a Fourth Amendment violation.

Moreover, we doubt that the police will often choose to further an enterprise knowing that it is contrary to the law, or proceed to seize property in the absence of objectively reasonable grounds for doing so. In short, our reaffirmance of Fourth Amendment principles today should not foment a wave of new litigation in the federal courts.

IV

The complaint here alleges that respondents, acting under color of state law, dispossessed the Soldals of their trailer home by physically tearing it from its foundation and towing it to another lot. Taking these allegations as true, this was no "garden-variety" landlord-tenant or commercial dispute. The facts alleged suffice to constitute a "seizure" within the meaning of the Fourth Amendment, for they plainly implicate the interests protected by that provision. The judgment of the Court of Appeals is, accordingly, reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Syllabus

MISSISSIPPI ET AL. *v.* LOUISIANA ET AL.

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

No. 91–1158. Argued November 9, 1992—Decided December 14, 1992

After private plaintiffs brought suit against private defendants in the District Court to quiet title to certain land riparian to the Mississippi River, Louisiana intervened in the action and filed a third-party complaint against Mississippi seeking to determine the boundary between the two States in the vicinity of the disputed land. Following this Court's denial of leave to Louisiana to file a bill of complaint against Mississippi in this Court, the District Court found the land in question to be part of Mississippi and quieted title in the plaintiffs. The Court of Appeals reversed.

Held: The uncompromising language of 28 U. S. C. § 1251(a), which gives to this Court "original and *exclusive* jurisdiction of all controversies between two or more States" (emphasis added), deprived the District Court of jurisdiction over Louisiana's third-party complaint against Mississippi. Though § 1251(a) is phrased in terms of a grant of jurisdiction to this Court, the plain meaning of "exclusive" necessarily denies jurisdiction of such cases to any other federal court. See, *e. g.*, *California* v. *Arizona*, 440 U. S. 59, 63. The District Court's adjudication of a *private* action involving the location of the boundary between two States does not violate § 1251(a), since that section speaks in terms of parties, not claims or issues. But the adjudication of such an action would not be binding on the States in any way. Because both of the courts below intermixed the questions of title to real property and of the state boundary's location, it must be determined on remand whether on this record the claims of title may fairly be decided without additional proceedings in the District Court. Pp. 75–79.

937 F. 2d 247, reversed and remanded.

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

James W. McCartney argued the cause for petitioners. With him on the briefs were *Robert R. Bailess*, *Charles Alan Wright*, *Mike Moore*, *Robert E. Sanders*, and *Richard H. Page*.

Gary L. Keyser, Assistant Attorney General of Louisiana, argued the cause for respondents. With him on the brief were *Richard P. Ieyoub*, Attorney General of Louisiana, and *E. Kay Kirkpatrick*, Assistant Attorney General.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This action was originally commenced by private plaintiffs suing other private defendants in the District Court for the Southern District of Mississippi to quiet title to certain land riparian to the Mississippi River. The State of Louisiana intervened in the action and filed a third-party complaint against the State of Mississippi seeking to determine the boundary between the two States in the vicinity of the disputed land. We hold that 28 U. S. C. § 1251(a), granting to this Court original and exclusive jurisdiction of all controversies between two States, deprived the District Court of jurisdiction of Louisiana's third-party complaint against Mississippi.

The land in question lies along the west bank of the Mississippi River near Lake Providence, Louisiana. The private plaintiffs, known as the Houston Group, alleged that they own the land in fee simple as a result of a homestead patent issued by the United States in 1888 and a deed issued by Mississippi in 1933. Louisiana and the Lake Providence Port Commission intervened in the title dispute and filed a third-party complaint against Mississippi seeking a determination of the boundary between the States. Louisiana then sought leave to file a bill of complaint against Mississippi in this Court. Mississippi opposed the motion in view of the pendency of the District Court action, and also emphasized that the case was originally a dispute between private parties: "Houston brought the suit to establish the boundary line to their land. It is incidental that the boundary line is also alleged to be the State line." App. to Pet. for Cert. 86a.

We denied leave to file, *Louisiana* v. *Mississippi*, 488 U. S. 990 (1988).

The District Court thereafter found that the thalweg, frozen by an avulsive shift in the river, was to the west of the disputed land and thus placed it within Mississippi. Alternatively, the District Court concluded that the disputed land was part of Mississippi because "Louisiana has acquiesced in the exercise of the exclusive jurisdiction over the island by . . . Mississippi." App. to Pet. for Cert. 40a. Having found the land to be part of Mississippi, the District Court then considered the ownership question and quieted title in the Houston Group.

The Court of Appeals reversed, rejecting the District Court's rulings both on the location of the thalweg and on acquiescence, *Houston* v. *Thomas*, 937 F. 2d 247 (CA5 1991). We granted certiorari on these two questions and on a third that we formulated: "Did the District Court properly assert jurisdiction over respondents' third-party complaint against petitioner State of Mississippi?" 503 U. S. 935 (1992). We now reverse.

The constitutional and statutory provisions necessary to our decision are these:

Article III, § 2, of the Constitution:

> "The judicial Power [of the United States] shall extend . . . to Controversies between two or more States; . . . .
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."

Title 28 U. S. C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Title 28 U. S. C. § 1251(a): "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

Mississippi, even though its contentions as to the boundary between itself and Louisiana were rejected by the Court of Appeals, urges us to find that the District Court had jurisdiction of the third-party complaint that Louisiana brought against it. Mississippi argues that our refusal to allow Louisiana to file an original complaint to determine the boundary between the two States must, by implication, have indicated that the District Court was a proper forum for the resolution of that question. This is particularly true, Mississippi argues, since its opposition to Louisiana's motion to file its complaint in this Court was premised in part on the contention that the boundary question could be determined in the then-pending action between the private landowners in the District Court. Mississippi asserts that that court had jurisdiction by virtue of 28 U. S. C. § 1331, which confers jurisdiction of all civil actions arising under federal law on the District Court.

If it were not for the existence of 28 U. S. C. § 1251(a), Mississippi's arguments would be quite plausible. We have said more than once that our original jurisdiction should be exercised only "sparingly." See *Wyoming* v. *Oklahoma*, 502 U. S. 437, 450 (1992); *Maryland* v. *Louisiana*, 451 U. S. 725, 739 (1981); *Arizona* v. *New Mexico*, 425 U. S. 794, 796 (1976). Indeed, Chief Justice Fuller wrote nearly a century ago that our original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Louisiana* v. *Texas*, 176 U. S. 1, 15 (1900). Recognizing the "delicate and grave" character of our original jurisdiction, we have interpreted the Constitution and 28 U. S. C. § 1251(a) as making our original jurisdiction "obligatory only in appropriate cases," *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 93 (1972), and as providing us "with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court," *Texas* v. *New Mexico*, 462 U. S. 554, 570 (1983).

We first exercised this discretion not to accept original actions in cases within our nonexclusive original jurisdiction, such as actions by States against citizens of other States, see *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971), and actions between the United States and a State, see *United States* v. *Nevada*, 412 U. S. 534 (1973). But we have since carried over its exercise to actions between two States, where our jurisdiction is exclusive. See *Arizona* v. *New Mexico*, *supra; California* v. *West Virginia*, 454 U. S. 1027 (1981); *Texas* v. *New Mexico*, *supra.* Determining whether a case is "appropriate" for our original jurisdiction involves an examination of two factors. First, we look to "the nature of the interest of the complaining State," *Massachusetts* v. *Missouri*, 308 U. S. 1, 18 (1939), focusing on the "seriousness and dignity of the claim," *City of Milwaukee*, *supra*, at 93. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas* v. *New Mexico*, *supra*, at 571, n. 18. Second, we explore the availability of an alternative forum in which the issue tendered can be resolved. *City of Milwaukee*, *supra*, at 93. In *Arizona* v. *New Mexico*, for example, we declined to exercise original jurisdiction of an action by Arizona against New Mexico challenging a New Mexico electricity tax because of a pending state-court action by three Arizona utilities challenging the same tax: "[W]e are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." 425 U. S., at 797 (emphasis in original).

But Mississippi's argument for jurisdiction in the District Court here founders on the uncompromising language of 28 U. S. C. § 1251(a), which gives to this Court "original and *exclusive* jurisdiction of all controversies between two or more States" (emphasis added). Though phrased in terms of a grant of jurisdiction to this Court, the description of our jurisdiction as "exclusive" necessarily denies jurisdiction of

such cases to any other federal court.[1] This follows from the plain meaning of "exclusive," see Webster's New International Dictionary 890 (2d ed. 1942) ("debar from possession"), and has been remarked upon by opinions in our original jurisdiction cases, *e. g.*, *California* v. *Arizona*, 440 U. S. 59, 63 (1979) ("[A] district court could not hear [California's] claims against Arizona, because this Court has exclusive jurisdiction over such claims").

Because the District Court lacked jurisdiction over Louisiana's third-party complaint against Mississippi, the judgment of the Court of Appeals is reversed insofar as it purports to grant any relief to Louisiana against Mississippi. The District Court is conceded to have had jurisdiction over the claims of the private plaintiffs against the private defendants, and in deciding questions of private title to riparian property, it may be necessary to decide where the boundary lies between the two States. Adjudicating such a question in a dispute between private parties does not violate § 1251(a), because that section speaks not in terms of claims or issues, but in terms of parties.[2] The States, of course, are not bound by any decision as to the boundary between them which was rendered in a lawsuit between private litigants. See *Durfee* v. *Duke*, 375 U. S. 106, 115 (1963).

Because both the District Court and the Court of Appeals in this case intermixed the questions of title to real property and of the location of the state boundary, we are not in a position to say whether on this record the claims of title may

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[1] Neither party disputes Congress' authority to make our original jurisdiction exclusive in some cases and concurrent in others. This distinction has existed since the Judiciary Act of 1789, § 13, 1 Stat. 80–81, and has never been questioned by this Court, see *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 722 (1838); *Ames* v. *Kansas ex rel. Johnston*, 111 U. S. 449, 469 (1884).

[2] Mississippi and Louisiana do not question the District Court's jurisdiction over Louisiana's intervention in the title dispute. Louisiana's intervention is also unaffected by § 1251(a) because it does not seek relief against Mississippi.

fairly be decided without additional proceedings in the District Court. We therefore reverse the judgment of the Court of Appeals insofar as it adjudicated the complaint filed by Louisiana against Mississippi, with instructions that it direct the District Court to dismiss the complaint for want of jurisdiction. We remand the balance of the case to the Court of Appeals for the necessary inquiry as to whether further proceedings are required in order to adjudicate the claims of title in this action.

It is so ordered.

Syllabus

REPUBLIC NATIONAL BANK OF MIAMI *v.* UNITED STATES

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

No. 91–767. Argued October 5, 1992—Decided December 14, 1992

The Government filed a civil action in the District Court, alleging that a particular residence was subject to forfeiture under 21 U. S. C. § 881(a)(6) because its owner had purchased it with narcotics trafficking proceeds. After the United States Marshal seized the property, petitioner Bank, which claimed a lien under a recorded mortgage, agreed to the Government's request for a sale of the property, the proceeds of which were retained by the marshal pending disposition of the case. A trial on the merits resulted in a judgment denying the Bank's claim with prejudice and forfeiting the sale proceeds to the United States. When the Bank filed a timely notice of appeal but failed to post a supersedeas bond or seek to stay the execution of the judgment, the marshal, at the Government's request, transferred the sale proceeds to the United States Treasury. The Court of Appeals then granted the Government's motion to dismiss, holding, *inter alia*, that the removal of the sale proceeds from the judicial district terminated the District Court's *in rem* jurisdiction.

Held: The judgment is reversed, and the case is remanded.

932 F. 2d 1433, reversed and remanded.

JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that, in an *in rem* forfeiture action, the Court of Appeals is not divested of jurisdiction by the prevailing party's transfer of the res from the district. The "settled" rule on which the Government relies—that jurisdiction over such a proceeding depends upon continued control of the res—does not exist. Rather, the applicable general principle is that jurisdiction, once vested, is not divested by a discontinuance of possession, although exceptions may exist where, for example, release of the res would render the judgment "useless" because the res could neither be delivered to the complainant nor restored to the claimant. See, *e. g.*, *United States* v. *The Little Charles*, 26 F. Cas. 979. *The Brig Ann*, 9 Cranch 289, 290, distinguished. The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties, not to provide a prevailing party with a means of defeating its adversary's claim for redress. Pp. 84–89, 92–93.

THE CHIEF JUSTICE delivered the opinion of the Court in part, concluding that a judgment for petitioner in the underlying forfeiture action would not be rendered "useless" by the absence of a specific congressional appropriation authorizing the payment of funds to petitioner. Even if there exist circumstances where funds which have been deposited into the Treasury may be returned absent an appropriation, but cf. *Knote* v. *United States*, 95 U. S. 149, 154, it is unnecessary to plow that uncharted ground here. For together, 31 U. S. C. § 1304—the general appropriation for the payment of judgments against the United States—and 28 U. S. C. § 2465—requiring the return of seized property upon entry of judgment for claimants in forfeiture proceedings—would authorize the return of funds in this case in the event petitioner were to prevail below. See *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 432. Pp. 93–96.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined, and an opinion with respect to Part III, in which STEVENS and O'CONNOR, JJ., joined. REHNQUIST, C. J., delivered the opinion of the Court in part, as to which WHITE, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion concurring in part and concurring in the judgment, in which WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined, *post*, p. 93. WHITE, J., filed a concurring opinion, *post*, p. 96. STEVENS, J., *post*, p. 99, and THOMAS, J., *post*, p. 99, filed opinions concurring in part and concurring in the judgment.

Stanley A. Beiley argued the cause for petitioner. With him on the briefs were *Robert M. Sondak* and *David S. Garbett.*

Robert A. Long, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Roberts*, and *Joseph Douglas Wilson.*

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III.*

The issue in this case is whether the Court of Appeals may continue to exercise jurisdiction in an *in rem* civil forfeiture

*JUSTICE STEVENS and JUSTICE O'CONNOR join this opinion in its entirety.

proceeding after the res, then in the form of cash, is removed by the United States Marshal from the judicial district and deposited in the United States Treasury.

I

In February 1988, the Government instituted an action in the United States District Court for the Southern District of Florida seeking forfeiture of a specified single-family residence in Coral Gables. The complaint alleged that Indalecio Iglesias was the true owner of the property; that he had purchased it with proceeds of narcotics trafficking; and that the property was subject to forfeiture to the United States pursuant to § 511(a)(6) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, 92 Stat. 3777, 21 U. S. C. § 881(a)(6).[1] A warrant for the arrest of the property was issued, and the United States Marshal seized it.

In response to the complaint, Thule Holding Corporation, a Panama corporation, filed a claim asserting that it was the owner of the res in question. Petitioner Republic National Bank of Miami (Bank) filed a claim asserting a lien interest of $800,000 in the property under a mortgage recorded in 1987. Thule subsequently withdrew its claim. At the request of the Government, petitioner Bank agreed to a sale

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[1] Title 21 U. S. C. § 881(a) reads in pertinent part:

"The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . . . . .

"(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

of the property. With court approval, the residence was sold for $1,050,000. The sale proceeds were retained by the marshal pending disposition of the case. See App. 6, n. 2.

After a trial on the merits, the District Court entered judgment denying the Bank's claim with prejudice and forfeiting the sale proceeds to the United States pursuant to § 881(a)(6). *Id.*, at 25. The court found probable cause to believe that Iglesias had purchased the property and completed the construction of the residence thereon with drug profits. It went on to reject the Bank's innocent-owner defense to forfeiture. *United States* v. *One Single Family Residence Located at 6960 Miraflores Avenue, Coral Gables, Florida*, 731 F. Supp. 1563 (SD Fla. 1990).[2] Petitioner Bank filed a timely notice of appeal, but did not post a supersedeas bond or seek to stay the execution of the judgment.

Thereafter, at the request of the Government, the United States Marshal transferred the proceeds of the sale to the Assets Forfeiture Fund of the United States Treasury. The Government then moved to dismiss the appeal for want of jurisdiction. App. 4.

The Court of Appeals granted the motion. 932 F. 2d 1433 (CA11 1991). Relying on its 6-to-5 en banc decision in *United States* v. *One Lear Jet Aircraft, Serial No. 35A–280, Registration No. YN–BVO,* 836 F. 2d 1571, cert. denied, 487 U. S. 1204 (1988), the court held that the removal of the proceeds of the sale of the residence terminated the District Court's *in rem* jurisdiction. 932 F. 2d, at 1435–1436. The court also rejected petitioner Bank's argument that the District Court had personal jurisdiction because the Government had served petitioner with the complaint of forfeiture. *Id.*, at 1436–1437. Finally, the court ruled that the Govern-

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[2] The Government also had argued that the "relation-back" doctrine precluded the Bank from raising an innocent-owner defense. See 731 F. Supp., at 1567. That issue is pending before this Court in No. 91–781, *United States* v. *A Parcel of Land, Rumson, N. J.*, argued October 13, 1992.

ment was not estopped from contesting the jurisdiction of the Court of Appeals because of its agreement that the United States Marshal would retain the sale proceeds pending order of the District Court. *Id.*, at 1437.

In view of inconsistency and apparent uncertainty among the Courts of Appeals,[3] we granted certiorari. 502 U. S. 1090 (1992).

II

A civil forfeiture proceeding under § 881 is an action *in rem*, "which shall conform as near as may be to proceedings in admiralty." 28 U. S. C. § 2461(b). In arguing that the transfer of the res from the judicial district deprived the Court of Appeals of jurisdiction, the Government relies on what it describes as a settled admiralty principle: that jurisdiction over an *in rem* forfeiture proceeding depends upon continued control of the res. We, however, find no such established rule in our cases. Certainly, it long has been understood that a valid seizure of the res is a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding. *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 363 (1984); *Taylor* v. *Carryl*, 20 How. 583, 599 (1858); 1 S. Friedell, Benedict on Admiralty § 222, p. 14–39 (7th ed. 1992); H. Hawes, The Law Relating to the Subject of Jurisdiction of Courts § 92 (1886). See also Supplemental Rules for Certain Admiralty and Maritime Claims C(2) and C(3).

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[3] Compare *United States* v. *One Lot of $25,721.00 in Currency*, 938 F. 2d 1417 (CA1 1991); *United States* v. *Aiello*, 912 F. 2d 4 (CA2 1990), cert. denied, 498 U. S. 1048 (1991); *United States* v. *$95,945.18, United States Currency*, 913 F. 2d 1106 (CA4 1990), with *United States* v. *Cadillac Sedan Deville, 1983*, 933 F. 2d 1010 (CA6 1991) (appeal dism'd); *United States* v. *Tit's Cocktail Lounge*, 873 F. 2d 141 (CA7 1989); *United States* v. *$29,959.00 U. S. Currency*, 931 F. 2d 549 (CA9 1991); and the Court of Appeals' opinion in the present case. Compare also *United States* v. *$57,480.05 United States Currency and Other Coins*, 722 F. 2d 1457 (CA9 1984), with *United States* v. *Aiello*, 912 F. 2d, at 7, and *United States* v. *$95,945.18, United States Currency*, 913 F. 2d, at 1110, n. 4.

The bulk of the Government's cases stands merely for this unexceptionable proposition, which comports with the fact that, in admiralty, the "seizure of the RES, and the publication of the monition or invitation to appear, is regarded as equivalent to the particular service of process in the courts of law and equity." *Taylor* v. *Carryl*, 20 How., at 599.

To the extent that there actually is a discernible rule on the need for continued presence of the res, we find it expressed in cases such as *The Rio Grande*, 23 Wall. 458 (1875), and *United States* v. *The Little Charles*, 26 F. Cas. 979 (No. 15,612) (CC Va. 1818). In the latter case, Chief Justice Marshall, sitting as Circuit Justice, explained that "continuance of possession" was not necessary to maintain jurisdiction over an *in rem* forfeiture action, citing the "general principle, that jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised." *Id.*, at 982. The Chief Justice noted that in some cases there might be an exception to the rule, where the release of the property would render the judgment "useless" because "the thing could neither be delivered to the libellants, nor restored to the claimants." *Ibid.* He explained, however, that this exception "will not apply to any case where the judgment will have any effect whatever." *Ibid.* Similarly, in *The Rio Grande*, this Court held that improper release of a ship by a marshal did not divest the Circuit Court of jurisdiction. "We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control the jurisdiction was complete." 23 Wall., at 463. The Court there emphasized the impropriety of the ship's release. The Government now suggests that the case merely announced an "injustice" exception to the requirement of continuous control. But the question is

one of jurisdiction, and we do not see why the means of the res' removal should make a difference.[4]

Only once, in *The Brig Ann*, 9 Cranch 289, 290 (1815), has this Court found that events subsequent to the initial seizure destroyed jurisdiction in an *in rem* forfeiture action. In that case, a brig was seized in Long Island Sound and brought into the port of New Haven, where the collector took possession of it as forfeited to the United States. Several days later, the collector gave written orders for the release of the brig and its cargo from the seizure. Before the ship could leave, however, the District Court issued an information, and the brig and cargo were taken by the marshal into his possession. This Court held that, because the attachment was voluntarily released before the libel was filed and allowed, the District Court had no jurisdiction. Writing for the Court, Justice Story explained that judicial cognizance of a forfeiture *in rem* requires

> "a good subsisting seizure *at the time when the libel or information is filed and allowed.* If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made

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[4] See also *The Bolina*, 3 F. Cas. 811, 813–814 (No. 1,608) (CC Mass. 1812) (Story, J., as Circuit Justice) ("[O]nce a vessel is libelled, then she is considered as in the custody of the law, and at the disposal of the court, and monitions may be issued to persons having the actual custody, to obey the injunctions of the court . . . . The district court of the United States derives its jurisdiction, not from any supposed possession of its officers, but from the act and place of seizure for the forfeiture. . . . And when once it has acquired a regular jurisdiction, I do not perceive how any subsequent irregularity would avoid it. It may render the ultimate decree ineffectual in certain events, but the regular results of the adjudication must remain"); 1 J. Wells, A Treatise on the Jurisdiction of Courts 275 (1880) (An actual or constructive seizure provides jurisdiction in an admiralty forfeiture action. "And, having once acquired regular jurisdiction, no subsequent irregularity can defeat it; or accident, as, for example, an accidental fire").

> the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings; and it can be revived only by a new seizure. It is, in this respect, like a case of capture, which, although well made, gives no authority to the prize Court to proceed to adjudication, if it be voluntarily abandoned *before judicial proceedings are instituted.*" *Id.*, at 291 (emphasis added).

Fairly read, *The Brig Ann* simply restates the rule that the court must have actual or constructive control of the res when an *in rem* forfeiture suit is initiated. If the seizing party abandons the attachment prior to filing an action, it, in effect, has renounced its claim. The result is "to purge away all the prior rights acquired by the seizure," *ibid.*, and, unless a new seizure is made, the case may not commence. *The Brig Ann* stands for nothing more than this.

The rule invoked by the Government thus does not exist, and we see no reason why it should. The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties, see *Continental Grain Co.* v. *Barge FBL–585*, 364 U. S. 19, 23 (1960); *Harmony* v. *United States*, 2 How. 210, 233 (1844), not to provide a prevailing party with a means of defeating its adversary's claim for redress. Of course, if a "defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect," *One Lear Jet*, 836 F. 2d, at 1579 (Vance, J., dissenting), a court might determine that a judgment would be "useless." Cf. *The Little Charles*, 26 F. Cas., at 982. So, too, if the plaintiff abandons a seizure, a court will not proceed to adjudicate the case. These exceptions, however, are closely related to the traditional, theoretical concerns of jurisdiction: enforceability of judgments and fairness of notice to parties. See 1 R. Casad, Jurisdiction in Civil Actions § 1.02, pp. 1–13 to 1–14 (2d ed. 1991); cf. *Miller* v. *United States*, 11 Wall. 268, 294–295 (1871) ("Confessedly

the object of the writ was to bring the property under the control of the court and keep it there, as well as to give notice to the world. These objects would have been fully accomplished if its direction had been nothing more than to hold the property subject to the order of the court, and to give notice"). Neither interest depends absolutely upon the continuous presence of the res in the district.

Stasis is not a general prerequisite to the maintenance of jurisdiction. Jurisdiction over the person survives a change in circumstances, *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 454 (1932) ("[A]fter a final decree a party cannot defeat the jurisdiction of the appellate tribunal by removing from the jurisdiction, as the proceedings on appeal are part of the cause," citing *Nations* v. *Johnson*, 24 How. 195 (1861)), as does jurisdiction over the subject matter, *Louisville, N. A. & C. R. Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 566 (1899) (midsuit change in the citizenship of a party does not destroy diversity jurisdiction); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289–290 (1938) (jurisdiction survives reduction of amount in controversy). Nothing in the nature of *in rem* jurisdiction suggests a reason to treat it differently.

If the conjured rule were genuine, we would have to decide whether it had outlived its usefulness, and whether, in any event, it could ever be used by a plaintiff—the instigator of the *in rem* action—to contest the appellate court's jurisdiction. The rule's illusory nature obviates the need for such inquiries, however, and a lack of justification undermines any argument for its creation. We agree with the late Judge Vance's remark in *One Lear Jet*, 836 F. 2d, at 1577: "Although in some circumstances the law may require courts to depart from what seems to be fairness and common sense, such a departure in this case is unjustified and unsupported by the law of forfeiture and admiralty." We have no cause to override common sense and fairness here. We hold that, in an *in rem* forfeiture action, the Court of Appeals is not

divested of jurisdiction by the prevailing party's transfer of the res from the district.[5]

III

The Government contends, however, that this res no longer can be reached, because, having been deposited in the United States Treasury, it may be released only by congressional appropriation. If so, the case is moot, or, viewed another way, it falls into the "useless judgment" exception noted above, to appellate *in rem* jurisdiction.

The Appropriations Clause, U. S. Const., Art. I, § 9, cl. 7, provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In *Knote* v. *United States*, 95 U. S. 149 (1877), this Court held that the President could not order the Treasury to repay the proceeds from the sale of property forfeited by a convicted traitor who had been pardoned. But the Government—implicitly in its brief and explicitly at oral argument, see Tr. of Oral Arg. 37–39—now goes further, maintaining that, absent an appropriation, *any* funds that find their way into a Treasury account must remain there, regardless of their origin or ownership. Such a rule would lead to seemingly bizarre results. The Ninth Circuit recently observed: "If, for example, an

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[5] We note that on October 28, 1992, the President signed the Housing and Community Development Act of 1992, 106 Stat. 3672. Section 1521 of that Act (part of Title XV, entitled the Annunzio-Wylie Anti-Money Laundering Act) significantly amended 28 U. S. C. § 1355 to provide, among other things:

"In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond." 106 Stat. 4062–4063.

Needless to say, we do not now interpret that statute or determine the issue of its retroactive application to the present case.

agent of the United States had scooped up the cash in dispute and, without waiting for a judicial order, had run to the nearest outpost of the Treasury and deposited the money . . . it would be absurd to say that only an act of Congress could restore the purloined cash to the court." *United States* v. *Ten Thousand Dollars ($10,000.00) in United States Currency*, 860 F. 2d 1511, 1514 (1988). Yet that absurdity appears to be the logical consequence of the Government's position.

Perhaps it is not so absurd. In some instances where a private party pays money to a federal agency and is later deemed entitled to a refund, an appropriation has been assumed to be necessary to obtain the money. See 55 Comp. Gen. 625 (1976); United States General Accounting Office, Principles of Federal Appropriations Law 5–80 to 5–81 (1982). Congress, therefore, has passed a permanent indefinite appropriation for "'Refund of Moneys Erroneously Received and Covered' and other collections erroneously deposited that are not properly chargeable to another appropriation." 31 U. S. C. § 1322(b)(2). This appropriation has been interpreted to authorize, for example, the refund of charges assessed to investment advisers by the Securities and Exchange Commission and deposited in the Treasury, after those charges were held to be erroneous in light of decisions of this Court. See 55 Comp. Gen. 243 (1975); see also *National Presto Industries, Inc.* v. *United States*, 219 Ct. Cl. 626, 630 (1979) (suggesting that prior version of § 1322(b)(2) authorized refund of sum deposited in Treasury during litigation). Section 1322(b)(2) arguably applies here.

Petitioner offers a different suggestion. It identifies 28 U. S. C. § 2465 as an appropriation. That statute states: "Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent." That is hardly standard language of appropriation. Cf. 31 U. S. C. § 1301(d). Yet I have diffi-

culty imagining how an "appropriation" of funds determined on appeal not to belong to the United States could ever be more specific.[6]

In part for that reason, however, I believe that a formal appropriation is not required in these circumstances. The Appropriations Clause governs only the disposition of money that belongs to the United States. The Clause "assure[s] that *public funds* will be spent according to the letter of the difficult judgments reached by Congress." *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 428 (1990) (emphasis added); see also Stith, Congress' Power of the Purse, 97 Yale L. J. 1343, 1358, and n. 67 (1988) (Clause encompasses only funds that belong to the United States); 2 Story, Commentaries on the Constitution of the United States § 1348 (3d ed. 1858) (object of the Clause "is to secure regularity, punctuality, and fidelity, in the disbursements of the *public money*" (emphasis added)). I do not believe that funds held

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[6] THE CHIEF JUSTICE, writing for the Court on this question, *post*, p. 93, would find an appropriation in the judgment fund, 31 U. S. C. § 1304. While plausible, his analysis is nevertheless problematic. The judgment fund is understood to apply to money judgments only. See, *e. g.*, 58 Comp. Gen. 311 (1979). A final judgment in petitioner's favor, however, would be in the nature of a financial "acquittal"—a simple ruling that the res is not forfeitable. Unless we were to require the bank to sue on its judgment of nonforfeitability for return of a sum equivalent to the retained res, THE CHIEF JUSTICE's approach would seem to open the judgment fund to payment on nonmoney judgments. Moreover, as THE CHIEF JUSTICE acknowledges, see *post*, at 96, "the property subject to forfeiture in this case has been converted to proceeds now resting in the Assets Forfeiture Fund of the Treasury." Title 28 U. S. C. § 2465 can "be construed as authorizing the return of proceeds in such a case." *Post*, at 96. But a payment from the judgment fund would not achieve that purpose. The res is not in the judgment fund. A payment from that account, while no doubt entirely acceptable to petitioner, would not be a return of the forfeited property, and at the end of the episode (although I have no doubt that the Comptroller would manage to balance the books) the Assets Forfeiture Fund would be some $800,000 richer, and the judgment fund correspondingly diminished.

in the Treasury during the course of an ongoing *in rem* forfeiture proceeding—the purpose of which, after all, is to determine the ownership of the res, see, *e. g.*, *The Propeller Commerce*, 1 Black 574, 580–581 (1862); *The Maggie Hammond*, 9 Wall. 435, 456 (1870); *Jennings* v. *Carson*, 4 Cranch 2, 23 (1807)—can properly be considered public money. The Court in *Tyler* v. *Defrees*, 11 Wall. 331, 349 (1871), explained that once a valid seizure of forfeitable property has occurred and the court has notice of the fact, "[n]o change of the title or possession [can] be made, pending the judicial proceedings, which would defeat the final decree."

Contrary to the Government's broad submission here, the Comptroller General long has assumed that, in certain situations, an erroneous deposit of funds into a Treasury account can be corrected without a specific appropriation. See 53 Comp. Gen. 580 (1974); 45 Comp. Gen. 724 (1966); 3 Comp. Gen. 762 (1924); 12 Comp. Dec. 733, 735 (1906); Principles of Federal Appropriations Law, at 5–79 to 5–81. Most of these cases have arisen where money intended for one account was accidentally deposited in another. It would be unrealistic, for example, to require congressional authorization before a data processor who misplaces a decimal point can "undo" an inaccurate transfer of Treasury funds. The Government's absolutist view of the scope of the Appropriations Clause is inconsistent with these commonsense understandings.

I would hold that the Constitution does not forbid the return without an appropriation of funds held in the Treasury during the course of an *in rem* forfeiture proceeding to the party determined to be their owner. Because the funds therefore could be disgorged if petitioner is adjudged to be their rightful owner, a judgment in petitioner's favor would not be "useless."

IV

In a civil forfeiture proceeding, where the Government has the power to confiscate private property on a showing of mere probable cause, the right to appeal is a crucial safe-

guard against abuse. No settled rule requires continuous control of the res for appellate jurisdiction in an *in rem* forfeiture proceeding. Nor does the Appropriations Clause place the money out of reach. Accordingly, we hold that the Court of Appeals did not lose jurisdiction when the funds were transferred from the Southern District of Florida to the Assets Forfeiture Fund of the United States Treasury. 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.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court in part, concurred in part, and concurred in the judgment.*

I join the Court's judgment and Parts I, II, and IV of its opinion. I write separately, however, because I do not agree with the Appropriations Clause analysis set forth in Part III. JUSTICE BLACKMUN "would hold that the Constitution does not forbid the return without an appropriation of funds held in the Treasury during the course of an *in rem* forfeiture proceeding to the party determined to be their owner." *Ante*, at 92. JUSTICE BLACKMUN reaches this result because he concludes that funds deposited in the Treasury in the course of a proceeding to determine their ownership are not "public money." I have difficulty accepting the proposition that funds which have been deposited into the Treasury are not public money, regardless of whether the Government's ownership of those funds is disputed. Part of my difficulty stems from the lack of any support in our cases for this theory.

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*JUSTICE WHITE, JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE SOUTER join THE CHIEF JUSTICE's opinion in its entirety. JUSTICE THOMAS joins this opinion only insofar as it disposes of the Appropriations Clause issue.

In *Knote* v. *United States*, 95 U. S. 149, 154 (1877), we stated: "[I]f the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law." *Knote* is distinguishable in that the forfeiture proceeding in that case was final at the time the appropriations question arose. But the principle that once funds are deposited into the Treasury, they become public money—and thus may only be paid out pursuant to a statutory appropriation—would seem to transcend the facts of *Knote*. That there exists a specific appropriation for "'Refund of Moneys Erroneously Received and Covered' and other collections erroneously deposited that are not properly chargeable to another appropriation," 31 U. S. C. § 1322(b)(2), supports this understanding.*

JUSTICE BLACKMUN relies principally on language from *Tyler* v. *Defrees*, 11 Wall. 331, 349 (1871), to the effect that once a seizure of forfeitable property has occurred, "[n]o change of the title or possession [can] be made, pending the judicial proceedings, which would defeat the final decree." See *ante*, at 92. This language is dictum rendered in the course of deciding a dispute over the sufficiency of the marshal's seizure of the property subject to forfeiture. But even if it were the holding of the case, it would have no application to the present case, because here there *was* a

*As JUSTICE BLACKMUN points out, where funds have been accidently deposited into the wrong account, the Comptroller General has assumed that a deposit may be corrected without an express appropriation. *Ante*, at 92. So, too, reasons JUSTICE BLACKMUN, would it be "unrealistic . . . to require congressional authorization before a data processor who misplaces a decimal point can 'undo' an inaccurate transfer of Treasury funds." *Ibid.* This may be so, but this is not our case. For the funds at issue were not accidently deposited into the Treasury, but rather intentionally transferred there once a valid judgment of forfeiture had been entered by the District Court.

final decree entered by the District Court in favor of the Government. It is petitioner's failure to post a bond or obtain a stay of that judgment which has brought the present controversy to this Court.

In any event, even if there are circumstances in which funds that have been deposited into the Treasury may be returned absent an appropriation, I believe it unnecessary to plow that uncharted ground here. The general appropriation for payment of judgments against the United States provides in part:

> "(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
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> "(1) payment is not otherwise provided for;
>
> "(2) payment is certified by the Comptroller General; and
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> "(3) the judgment, award, or settlement is payable—
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> "(A) under section 2414, 2517, 2672, or 2677 of title 28. . . ." 31 U. S. C. § 1304.

Title 28 U. S. C. § 2414, in turn, authorizes the payment of "final judgments rendered by a district court . . . against the United States." Together, §§ 1304 and 2414 would seem to authorize the return of funds in this case in the event petitioner were to prevail in the underlying forfeiture action.

But further inquiry is required, for we have said that § 1304 "does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 432 (1990). The question, then, is whether petitioner would have a "substantive right to compensation" if it were to prevail in this forfeiture proceeding. I believe 28 U. S. C. § 2465 provides such a right here. That section provides: "Upon

the entry of judgment for the claimant in any proceeding to . . . forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent." Although § 2465 speaks of forfeitable "property" and not public money, the property subject to forfeiture in this case has been converted to proceeds now resting in the Assets Forfeiture Fund of the Treasury. I see no reason why § 2465 should not be construed as authorizing the return of proceeds in such a case. Therefore, I would hold that 31 U. S. C. § 1304, together with 28 U. S. C. § 2465, provide the requisite appropriation.

Because I believe there exists a specific appropriation authorizing the payment of funds in the event petitioner were to prevail in the underlying forfeiture action, I agree with JUSTICE BLACKMUN that a judgment for petitioner below would not be "useless." Accordingly, I concur in the judgment of the Court.

JUSTICE WHITE, concurring.

I agree with Parts I, II, and IV of the Court's opinion but would prefer not to address the Appropriations Clause issue.

As JUSTICE BLACKMUN indicates, *ante,* at 89, the Government argues that because the Appropriations Clause bars reaching the funds transferred to the Treasury's Assets Forfeiture Fund, the case is either moot or falls into the useless judgment exception to appellate *in rem* jurisdiction. I am surprised that the Government would take such a transparently fallacious position. The case is not moot and a ruling by the Court of Appeals would not be a useless judgment. Had the funds not been transferred to Washington, the Court of Appeals, if it thought the District Court had erred in rejecting the Bank's innocent-owner defense, would have been free to reverse the lower court, direct that the Bank be paid out of the res, and to that extent rule against the United States' forfeiture claim. The United States does not ques-

tion this, for when the property was sold, the Government agreed to hold the proceeds pending resolution of the claims against the res.

The funds are, of course, no longer in Florida, but that fact, as the Court now holds, did not deprive the Court of Appeals of jurisdiction to reverse the District Court and direct entry of judgment against the United States for the amount of the Bank's lien, nor did it prevent the Court of Appeals from declaring that the Bank was entitled to have its lien satisfied from the res and, therefore, that the Government had no legal entitlement to the proceeds from the sale of the house. The case is obviously not moot. Nor should the Government suggest that a final judgment against the United States by a court with jurisdiction to enter such a judgment is useless because the United States may refuse to pay it. Rather, it would be reasonable to assume that the United States obeys the law and pays its debts and that in most people's minds a valid judgment against the Government for a certain sum of money would be worth that very amount. This is such a reasonable expectation that there is no need in this case to attempt to extract the transferred res from whatever fund in which it now is held.

There is nothing new about expecting governments to satisfy their obligations. Thus, in *Steffel* v. *Thompson*, 415 U. S. 452, 468–471 (1974), the Court discussed the comparative propriety of entering a declaratory judgment as opposed to an injunction. Describing the cases of *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), the Court explained:

> "In those two cases, we declined to decide whether the District Courts had properly denied to the federal plaintiffs, against whom no prosecutions were pending, injunctive relief restraining enforcement of the Texas and Georgia criminal abortion statutes; instead, we affirmed the issuance of declaratory judgments of unconstitution-

> ality, anticipating that these would be given effect by state authorities." 415 U. S., at 469.

See also *Roe*, *supra*, at 166: "We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional"; *Bolton*, *supra*, at 201 (same). More generally, it goes without saying that a creditor must first have judgment before he is entitled to collect from one who has disputed the debt, and it frequently happens that the losing debtor pays up without more. Perhaps, however, the judgment creditor will have collection problems, but that does not render his judgment a meaningless event.

For the same reasons, it is unnecessary for the Court at this point to construe the Appropriations Clause, either narrowly or broadly. Normally, we avoid deciding constitutional questions when it is reasonable to avoid or postpone them. *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984); *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). It is apparent, moreover, that the Court has struggled to reach a satisfactory resolution of the Appropriations Clause issue. I would not anticipate that the United States would default and that the Bank would require the help of the Judiciary to collect the debt. I would leave it to the Executive Branch to determine in the first instance, when and if it suffers an adverse judgment, whether it would have authority under existing statutes to liquidate the judgment that might be rendered against it. It will be time enough to rule on the Appropriations Clause when and if the position taken by the Government requires it.

I bow, however, to the will of the Court to rule prematurely on the Appropriations Clause, and on that issue I agree with THE CHIEF JUSTICE and join his opinion.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

While I agree with JUSTICE BLACKMUN's analysis of the Government's Appropriations Clause argument, and join his opinion in its entirety, I also agree with THE CHIEF JUSTICE that 31 U. S. C. § 1304, together with 28 U. S. C. § 2465, provide a satisfactory alternative response. Moreover, like JUSTICE WHITE, and for the reasons stated in his separate opinion, I am surprised that the Government would make "such a transparently fallacious" argument in support of its unconscionable position in this case. See *ante*, at 96.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I cannot join the Court's discussion of jurisdiction because that discussion is unnecessary and may very well constitute an advisory opinion. In my view, we should determine the applicability of § 1521 of the Housing and Community Development Act of 1992, 106 Stat. 4062. Effective October 28, 1992, § 1521 amended 28 U. S. C. § 1355 to provide that "[i]n any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction." 106 Stat. 4062–4063. The clear import of the new law is to preserve the jurisdiction of a court of appeals in a civil forfeiture action where the res has been removed by the prevailing party—the very issue involved in this case. This law would appear by its plain terms to be dispositive of this case, thus rendering academic the discussion in Part II of the Court's opinion.*

The Court mentions § 1521 in a single footnote, stating simply that "we do not now interpret that statute or deter-

*By letter dated October 30, 1992, the Government advised the Court of the enactment of the new law without taking a position on its applicability. On November 3 petitioner informed us by letter that in its view § 1521 applies and is controlling.

mine the issue of its retroactive application to the present case." *Ante,* at 89, n. 5. As a general rule, of course, statutes affecting substantive rights or obligations are presumed to operate prospectively only. *Bennett* v. *New Jersey,* 470 U. S. 632, 639 (1985). "Thus, congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown Univ. Hospital,* 488 U. S. 204, 208 (1988). But not every application of a new statute to a pending case will produce a "retroactive effect." "[W]hether a particular application *is* retroactive" will "depen[d] upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno,* 494 U. S. 827, 857, and n. 3 (1990) (SCALIA, J., concurring) (emphasis in original).

In the case of newly enacted laws restricting or enlarging jurisdiction, one would think that the "determinative event" for retroactivity purposes would be the final termination of the litigation, since statutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties. That conclusion is supported by longstanding precedent. We have always recognized that when jurisdiction is conferred by an Act of Congress and that Act is repealed, "the power to exercise such jurisdiction [is] withdrawn, and . . . all pending actions f[a]ll, as the jurisdiction depend[s] entirely upon the act of Congress." *Assessors* v. *Osbornes,* 9 Wall. 567, 575 (1870). "This rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court." *Bruner* v. *United States,* 343 U. S. 112, 116–117 (1952). See *id.,* at 117, n. 8 (citing cases). Moreover, we have specifically noted that "[t]his jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Ibid.*

The same rule ordinarily mandates the application to pending cases of new laws *enlarging* jurisdiction. We so held in *United States* v. *Alabama*, 362 U. S. 602 (1960) *(per curiam)*. There, the District Court had concluded that it was without jurisdiction to entertain a civil rights action brought by the United States against a State, and the Court of Appeals had affirmed. *Id.*, at 603. While the case was pending before this Court, the President signed the Civil Rights Act of 1960, which authorized such actions. Relying on "familiar principles," we held that "the case *must* be decided on the basis of law now controlling, and the provisions of [the new statute] are applicable to this litigation." *Id.*, at 604 (emphasis added) (citing cases). We therefore held that "the District Court has jurisdiction to entertain this action against the State," and we remanded for further proceedings. *Ibid.* Similarly, in *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604 (1978), we held that because the general federal-question statute had been amended in 1976 to eliminate the amount-in-controversy requirement for suits against the United States, "the fact that in 1973 respondent in its complaint did not allege $10,000 in controversy *is now of no moment.*" *Id.*, at 608, n. 6 (emphasis added).

It could be argued that the language of § 1521 implies an earlier determinative event for retroactivity purposes—such as the removal of the res or the point when the final order disposing of the property "is appealed." 106 Stat. 4062. I do not find these terms sufficiently clear to overcome the general rule that statutes altering jurisdiction are to be applied to pending cases; I would therefore decide this case on the basis of the new law. If the Court is plagued with doubts about the "retroactive application" of § 1521, *ante*, at 89, n. 5, the Court should, at a minimum, seek further briefing from the parties on this question before embarking on what appears to me to be an unnecessary excursion through the law of admiralty. There is no legitimate reason not to take the time to do so, for if the Government were to concede the

new law's applicability, the Court's opinion would be advisory. I can, therefore, concur only in the Court's judgment on the issue of jurisdiction.

I do, however, join the opinion of THE CHIEF JUSTICE regarding the Appropriations Clause. Because the Court of Appeals retains continuing jurisdiction over this proceeding pursuant to § 1521, we cannot avoid addressing the Government's arguments on this issue.

Syllabus

FARRAR ET AL., COADMINISTRATORS OF ESTATE OF FARRAR, DECEASED *v.* HOBBY

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

No. 91–990. Argued October 7, 1992—Decided December 14, 1992

Petitioners, coadministrators of decedent Farrar's estate, sought $17 million in compensatory damages, pursuant to 42 U. S. C. §§ 1983 and 1985, from respondent Hobby and other Texas public officials for the alleged illegal closure of the school that Farrar and his son operated. However, the Federal District Court awarded them only nominal damages and, subsequently, awarded them $280,000 in attorney's fees under 42 U. S. C. § 1988. The Court of Appeals reversed the fee award on the ground that petitioners were not prevailing parties eligible for fees under § 1988.

Held:

1. A plaintiff who wins nominal damages is a prevailing party under § 1988. A plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Hewitt* v. *Helms*, 482 U. S. 755; *Rhodes* v. *Stewart*, 488 U. S. 1; *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782. Here, petitioners were entitled to nominal damages under *Carey* v. *Piphus*, 435 U. S. 247, 266, because they were able to establish Hobby's liability for denial of procedural due process, but could not prove the actual injury necessary for a compensatory damages award. Judgment for nominal damages entitled petitioners to demand payment and modified Hobby's behavior for petitioners' benefit by forcing him to pay an amount of money he otherwise would not have paid. The prevailing party inquiry does not turn on the magnitude of the relief obtained, and whether a nominal damages award is a "technical," "insignificant" victory does not affect the plaintiff's prevailing party status. Cf. *Garland*, *supra*, at 792. Pp. 109–114.

2. Petitioners are not entitled to a fee award. While the "technical" nature of a nominal damages award does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988. The most critical factor in determining a fee award's reasonableness is the degree of success obtained, since a fee based on the hours expended on the litigation as a whole may be excessive if a plaintiff achieves only partial or limited success. *Hensley* v. *Eckerhart*, 461 U. S. 424, 436.

Syllabus

When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all. In light of "the relationship between" the extent of petitioners' success on the merits and the award's amount, *id.*, at 438, the reasonable fee was not the District Court's $280,000 award but no fee at all. Pp. 114–116.

941 F. 2d 1311, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 116. WHITE, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, STEVENS, and SOUTER, JJ., joined, *post*, p. 122.

Gerald M. Birnberg argued the cause for petitioners. With him on the brief were *Michael A. Maness* and *Waggoner Carr*.

Finis E. Cowan argued the cause for respondent. With him on the brief were *Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, and *Thomas Gibbs Gee*.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Warren Price III*, Attorney General of Hawaii, and *Steven S. Michaels*, Deputy Attorney General, *Frankie Sue Del Papa*, Attorney General of Nevada, and *Brooke Nielsen*, Assistant Attorney General, *Jimmy Evans*, Attorney General of Alabama, *Charles E. Cole*, Attorney General of Alaska, *Winston Bryant*, Attorney General of Arkansas, *Daniel E. Lungren*, Attorney General of California, *Richard Blumenthal*, Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Larry EchoHawk*, Attorney General of Idaho, *Roland W. Burris*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Bonnie J. Campbell*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Chris Gorman*, Attorney General of Kentucky, *Richard P. Ieyoub*, Attorney General of Louisiana, *Michael E. Carpenter*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Mike Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Don Stenberg*, Attorney General of Nebraska, *John P. Arnold*,

JUSTICE THOMAS delivered the opinion of the Court.

We decide today whether a civil rights plaintiff who receives a nominal damages award is a "prevailing party" eligible to receive attorney's fees under 42 U. S. C. § 1988. The Court of Appeals for the Fifth Circuit reversed an award of attorney's fees on the ground that a plaintiff receiving only nominal damages is not a prevailing party. Although we hold that such a plaintiff is a prevailing party, we affirm the denial of fees in this case.

I

Joseph Davis Farrar and Dale Lawson Farrar owned and operated Artesia Hall, a school in Liberty County, Texas, for delinquent, disabled, and disturbed teens. After an Artesia Hall student died in 1973, a Liberty County grand jury returned a murder indictment charging Joseph Farrar with willful failure to administer proper medical treatment and

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Attorney General of New Hampshire, *Robert J. Del Tufo*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Lee Fisher*, Attorney General of Ohio, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *James E. O'Neil*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Mark Barnett*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, *Ken Eikenberry*, Attorney General of Washington, *Joseph B. Meyer*, Attorney General of Wyoming, *Jorge Perez-Diaz*, Attorney General of Puerto Rico, *Elizabeth Barrett-Anderson*, Attorney General of Guam, and *John Payton*, Corporation Counsel of the District of Columbia; for the County of Los Angeles by *Richard P. Towne*, *De Witt W. Clinton*, and *Patrick T. Meyers;* for Americans for Effective Law Enforcement, Inc., et al. by *George J. Franscell* and *Wayne W. Schmidt;* for the Equal Employment Advisory Council by *Ann Elizabeth Reesman*, *Robert E. Williams*, and *Douglas S. McDowell;* for the National League of Cities et al. by *Richard Ruda*, *Michael G. Dzialo*, and *Glen D. Nager;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Talbot S. D'Alemberte, *Eric B. Schnurer*, and *Carter G. Phillips* filed a brief for the American Bar Association as *amicus curiae.*

failure to provide timely hospitalization. The State of Texas also obtained a temporary injunction that closed Artesia Hall.

Respondent William P. Hobby, Jr., then Lieutenant Governor of Texas, participated in the events leading to the closing of Artesia Hall. After Joseph Farrar was indicted, Hobby issued a press release criticizing the Texas Department of Public Welfare and its licensing procedures. He urged the department's director to investigate Artesia Hall and accompanied Governor Dolph Briscoe on an inspection of the school. Finally, he attended the temporary injunction hearing with Briscoe and spoke to reporters after the hearing.

Joseph Farrar sued Hobby, Judge Clarence D. Cain, County Attorney Arthur J. Hartell III, and the director and two employees of the Department of Public Welfare for monetary and injunctive relief under 42 U. S. C. §§ 1983 and 1985. The complaint alleged deprivation of liberty and property without due process by means of conspiracy and malicious prosecution aimed at closing Artesia Hall. Later amendments to the complaint added Dale Farrar as a plaintiff, dropped the claim for injunctive relief, and increased the request for damages to $17 million. After Joseph Farrar died on February 20, 1983, petitioners Dale Farrar and Pat Smith, coadministrators of his estate, were substituted as plaintiffs.

The case was tried before a jury in the Southern District of Texas on August 15, 1983. Through special interrogatories, the jury found that all of the defendants except Hobby had conspired against the plaintiffs but that this conspiracy was not a proximate cause of any injury suffered by the plaintiffs. The jury also found that Hobby had "committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right," but it found that Hobby's conduct was not "a proximate cause of any damages" suffered by Joseph Farrar. App. to Brief in Opposition A–3. The jury made no findings in favor of Dale Farrar. In accordance with the jury's answers to the special interrogato-

ries, the District Court ordered that "Plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs." *Id.*, at A–6.

The Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. *Farrar* v. *Cain*, 756 F. 2d 1148 (1985). The court affirmed the failure to award compensatory or nominal damages against the conspirators because the plaintiffs had not proved an actual deprivation of a constitutional right. *Id.*, at 1151–1152. Because the jury found that Hobby had deprived Joseph Farrar of a civil right, however, the Fifth Circuit remanded for entry of judgment against Hobby for nominal damages. *Id.*, at 1152.

The plaintiffs then sought attorney's fees under 42 U. S. C. § 1988. On January 30, 1987, the District Court entered an order awarding the plaintiffs $280,000 in fees, $27,932 in expenses, and $9,730 in prejudgment interest against Hobby. The court denied Hobby's motion to reconsider the fee award on August 31, 1990.

A divided Fifth Circuit panel reversed the fee award. *Estate of Farrar* v. *Cain*, 941 F. 2d 1311 (1991). After reviewing our decisions in *Hewitt* v. *Helms*, 482 U. S. 755 (1987), *Rhodes* v. *Stewart*, 488 U. S. 1 (1988) *(per curiam)*, and *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782 (1989), the majority held that the plaintiffs were not prevailing parties and were therefore ineligible for fees under § 1988:

> "The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. . . . [T]he Farrars did succeed in securing a jury-finding that Hobby violated their civil rights and a nominal award of one dollar. However, this finding did not in any meaningful sense 'change the legal relationship' between the Farrars and Hobby. Nor was the result a success for the Farrars on a 'significant issue that achieve[d] some of the benefit the [Farrars] sought in bringing suit.'

> When the sole relief sought is money damages, we fail to see how a party 'prevails' by winning one dollar out of the $17 million requested." 941 F. 2d, at 1315 (citations omitted) (quoting *Garland*, *supra*, at 791–792).[1]

The majority reasoned that even if an award of nominal damages represented some sort of victory, "surely [the Farrars'] was 'a technical victory . . . so insignificant and . . . so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status.'" 941 F. 2d, at 1315 (quoting *Garland*, *supra*, at 792).[2]

The dissent argued that "*Hewitt*, *Rhodes* and *Garland* [do not] go so far" as to hold that "where plaintiff obtains only

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[1] Although the Fifth Circuit's original opinion on liability made clear that Joseph Farrar alone was to receive nominal damages for violation of his due process rights, *Farrar* v. *Cain*, 756 F. 2d 1148, 1152 (1985), the District Court on remand awarded attorney's fees not only to petitioners as coadministrators of Joseph Farrar's estate but also to Dale Farrar in his personal capacity, see App. to Pet. for Cert. A–12. The Fifth Circuit reversed Dale Farrar's fee award on the apparent assumption that he too had received nominal damages. Dale Farrar has not petitioned from the Fifth Circuit's judgment in his personal capacity, and the only issue before us is the award of attorney's fees to Dale Farrar and Pat Smith as coadministrators of Joseph Farrar's estate.

[2] The majority acknowledged its conflict with the Courts of Appeals for the Second, Eighth, Ninth, Tenth, and Eleventh Circuits. 941 F. 2d, at 1316–1317, and nn. 22 and 26. See *Ruggiero* v. *Krzeminski*, 928 F. 2d 558, 564 (CA2 1991); *Coleman* v. *Turner*, 838 F. 2d 1004, 1005 (CA8 1988); *Scofield* v. *Hillsborough*, 862 F. 2d 759, 766 (CA9 1988); *Nephew* v. *Aurora*, 830 F. 2d 1547, 1553, n. 2 (CA10 1987) (en banc) (Barrett, J., dissenting), cert. denied, 485 U. S. 976 (1988); *Garner* v. *Wal-Mart Stores, Inc.*, 807 F. 2d 1536, 1539 (CA11 1987). After the Fifth Circuit decided this case, the First and Ninth Circuits rejected the Fifth Circuit's position and held that a nominal damages award does confer prevailing party status on a civil rights plaintiff. *Domegan* v. *Ponte*, 972 F. 2d 401, 410 (CA1 1992); *Romberg* v. *Nichols*, 970 F. 2d 512, 519–520 (CA9 1992), cert. pending, No. 92–402; 970 F. 2d, at 525–526 (Wallace, C. J., concurring). The Fourth Circuit has adopted a position consistent with the Fifth Circuit's. *Lawrence* v. *Hinton*, 20 Fed. Rules Serv. 3d 934, 936–937 (1991); *Spencer* v. *General Elec. Co.*, 894 F. 2d 651, 662 (1990) (dicta).

nominal damages for his constitutional deprivation, he cannot be considered the prevailing party." 941 F. 2d, at 1317 (Reavley, J., dissenting).

We granted certiorari. 502 U. S. 1090 (1992).

II

The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U. S. C. § 1988, provides in relevant part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 . . . , or title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

"Congress intended to permit the . . . award of counsel fees only when a party has prevailed on the merits." *Hanrahan* v. *Hampton*, 446 U. S. 754, 758 (1980) *(per curiam)*. Therefore, in order to qualify for attorney's fees under § 1988, a plaintiff must be a "prevailing party." Under our "generous formulation" of the term, "'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983) (quoting *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278–279 (CA1 1978)). "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Kentucky* v. *Graham*, 473 U. S. 159, 165 (1985).

We have elaborated on the definition of prevailing party in three recent cases. In *Hewitt* v. *Helms*, 482 U. S. 755 (1987), we addressed "the peculiar-sounding question whether a party who litigates to judgment and loses on all of his claims

can nonetheless be a 'prevailing party.' " *Id.*, at 757. In his § 1983 action against state prison officials for alleged due process violations, respondent Helms obtained no relief. "The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim." *Id.*, at 760. Observing that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail," we held that Helms was not a prevailing party. *Ibid.* We required the plaintiff to prove "the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Id.*, at 761 (emphasis omitted).

In *Rhodes* v. *Stewart*, 488 U. S. 1 (1988) *(per curiam)*, we reversed an award of attorney's fees premised solely on a declaratory judgment that prison officials had violated the plaintiffs' First and Fourteenth Amendment rights. By the time the District Court entered judgment, "one of the plaintiffs had died and the other was no longer in custody." *Id.*, at 2. Under these circumstances, we held, neither plaintiff was a prevailing party. We explained that "nothing in *[Hewitt]* suggested that the entry of [a declaratory] judgment in a party's favor automatically renders that party prevailing under § 1988." *Id.*, at 3. We reaffirmed that a judgment—declaratory or otherwise—"will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Id.*, at 4. Whatever "modification of prison policies" the declaratory judgment might have effected "could not in any way have benefited either plaintiff, one of whom was dead and the other released." *Ibid.*[3]

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[3] Similarly, the plaintiff in *Hewitt* v. *Helms*, 482 U. S. 755, 763 (1987), "had long since been released from prison" by the time his failed lawsuit putatively prompted beneficial changes in prison policy. We held that the "fortuity" of a subsequent return to prison, which presumably allowed the plaintiff to benefit from the new procedures, could "hardly render him,

Finally, in *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782 (1989), we synthesized the teachings of *Hewitt* and *Rhodes*. "[T]o be considered a prevailing party within the meaning of § 1988," we held, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." 489 U. S., at 792. We reemphasized that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Id.*, at 792–793. Under this test, the plaintiffs in *Garland* were prevailing parties because they "obtained a judgment vindicating [their] First Amendment rights [as] public employees" and "materially altered the [defendant] school district's policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities." *Id.*, at 793.

Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt*, *supra*, at 760, or comparable relief through a consent decree or settlement, *Maher* v. *Gagne*, 448 U. S. 122, 129 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. See *Hewitt*, *supra*, at 764. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." *Rhodes*, *supra*, at 4. Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. *Garland*, *supra*, at 792–793. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the

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retroactively, a 'prevailing party' . . . , even though he was not such when the final judgment was entered." *Id.*, at 764.

defendant's behavior in a way that directly benefits the plaintiff.

III

A

Doubtless "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Carey* v. *Piphus*, 435 U. S. 247, 254 (1978). For this reason, no compensatory damages may be awarded in a § 1983 suit absent proof of actual injury. *Id.*, at 264. Accord, *Memphis Community School Dist.* v. *Stachura*, 477 U. S. 299, 307, 308, n. 11 (1986). We have also held, however, that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Carey*, *supra*, at 266. The awarding of nominal damages for the "absolute" right to procedural due process "recognizes the importance to organized society that [this] righ[t] be scrupulously observed" while "remain[ing] true to the principle that substantial damages should be awarded only to compensate actual injury." 435 U. S., at 266. Thus, *Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his right to procedural due process but cannot prove actual injury.

We therefore hold that a plaintiff who wins nominal damages is a prevailing party under § 1988. When a court awards nominal damages, it neither enters judgment for defendant on the merits nor declares the defendant's legal immunity to suit. Cf. *Kentucky* v. *Graham*, 473 U. S., at 165; *Supreme Court of Va.* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 738 (1980). To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, "the moral satisfaction [that] results from any favorable statement of law" cannot bestow prevailing party status.

Hewitt, 482 U. S., at 762. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant. A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages. A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay. As a result, the Court of Appeals for the Fifth Circuit erred in holding that petitioners' nominal damages award failed to render them prevailing parties.

We have previously stated that "a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status." *Garland*, 489 U. S., at 792.[4] The example chosen in *Garland* to illustrate this sort of "technical" victory, however, would fail to support prevailing party status under the test we adopt today. In that case, the District Court declared unconstitutionally vague a regulation requiring that "nonschool hour meetings be conducted only with prior approval from the local school principal." *Ibid.* We suggested that this finding alone would not sustain prevailing party status if there were "'no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours.'" *Ibid.* The deficiency in such a hypothetical "victory" is identical to the shortcoming in *Rhodes*. Despite winning a declaratory judgment, the plaintiffs could not alter the defendant school board's behavior toward them for their benefit. Now that we are confronted with the question whether a nominal damages award is the sort of "technical," "insignificant" victory that cannot confer

[4] We did not consider whether the plaintiffs in *Garland* could be denied prevailing party status on this basis, because "[t]hey prevailed on a significant issue in the litigation and . . . obtained some of the relief they sought." 489 U. S., at 793.

prevailing party status, we hold that the prevailing party inquiry does not turn on the magnitude of the relief obtained. We recognized as much in *Garland* when we noted that "the *degree* of the plaintiff's success" does not affect "eligibility for a fee award." 489 U. S., at 790 (emphasis in original). See also *id.*, at 793.

B

Although the "technical" nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988. Once civil rights litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award under *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). *Garland*, *supra*, at 793. Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." *Hensley*, *supra*, at 436. Accord, *Marek* v. *Chesny*, 473 U. S. 1, 11 (1985). In this case, petitioners received nominal damages instead of the $17 million in compensatory damages that they sought. This litigation accomplished little beyond giving petitioners "the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated" in some unspecified way. *Hewitt*, *supra*, at 762. We have already observed that if "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, *supra*, at 436. Yet the District Court calculated petitioners' fee award in precisely this fashion, without engaging in any measured exercise of discretion. "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Riverside* v. *Rivera*, 477 U. S. 561, 585 (1986) (Powell, J., concurring in judgment). Such a comparison promotes the

court's "central" responsibility to "make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard* v. *Bergeron*, 489 U. S. 87, 96 (1989). Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, see *Hensley*, 461 U. S., at 430, n. 3, or multiplying "the number of hours reasonably expended . . . by a reasonable hourly rate," *id.*, at 433.

In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. As we have held, a nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his "absolute" right to procedural due process through enforcement of a judgment against the defendant. *Carey*, 435 U. S., at 266. In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury. *Id.*, at 254–264. Whatever the constitutional basis for substantive liability, damages awarded in a § 1983 action "must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation.'" *Memphis Community School Dist.* v. *Stachura*, 477 U. S., at 309 (quoting *Carey*, *supra*, at 265) (emphasis and brackets in original). When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, see *Carey*, *supra*, at 256–257, 264, the only reasonable fee is usually no fee at all. In an apparent failure to heed our admonition that fee awards under § 1988 were never intended to "'produce windfalls to attorneys,'" *Riverside* v. *Rivera*, *supra*, at 580 (plurality opinion) (quoting S. Rep. No. 94–1011, p. 6 (1976)), the District Court awarded $280,000 in attorney's fees without "consider[ing] the relationship between

the extent of success and the amount of the fee award." *Hensley*, *supra*, at 438.

Although the Court of Appeals erred in failing to recognize that petitioners were prevailing parties, it correctly reversed the District Court's fee award. We accordingly affirm the judgment of the Court of Appeals.

So ordered.

JUSTICE O'CONNOR, concurring.

If ever there was a plaintiff who deserved no attorney's fees at all, that plaintiff is Joseph Farrar. He filed a lawsuit demanding 17 million dollars from six defendants. After 10 years of litigation and two trips to the Court of Appeals, he got one dollar from one defendant. As the Court holds today, that is simply not the type of victory that merits an award of attorney's fees. Accordingly, I join the Court's opinion and concur in its judgment. I write separately only to explain more fully why, in my view, it is appropriate to deny fees in this case.

I

Congress has authorized the federal courts to award "a reasonable attorney's fee" in certain civil rights cases, but only to "the prevailing party." 42 U. S. C. § 1988; *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 789 (1989). To become a prevailing party, a plaintiff must obtain, at an absolute minimum, "actual relief on the merits of [the] claim," *ante*, at 111, which "affects the behavior of the defendant towards the plaintiff," *Hewitt* v. *Helms*, 482 U. S. 755, 761 (1987) (emphasis omitted); accord, *ante*, at 111–112 (relief obtained must "alte[r] the legal relationship between the parties" and "modif[y] the defendant's behavior in a way that directly benefits the plaintiff"). Joseph Farrar met that minimum condition for prevailing party status. Through this lawsuit, he obtained an enforceable judgment for one dollar in nominal damages. One dollar is not exactly a bonanza, but it constitutes relief on the merits.

And it affects the defendant's behavior toward the plaintiff, if only by forcing him to pay one dollar—something he would not otherwise have done. *Ante*, at 113.

Nonetheless, *Garland* explicitly states that an enforceable judgment alone is not always enough: "Beyond th[e] absolute limitation [of some relief on the merits], a technical victory may be so insignificant . . . as to be insufficient" to support an award of attorney's fees. 489 U. S., at 792. While *Garland* may be read as indicating that this *de minimis* or technical victory exclusion is a second barrier to prevailing party status, the Court makes clear today that, in fact, it is part of the determination of what constitutes a reasonable fee. Compare *ibid.* (purely technical or *de minimis* victories are "insufficient to support prevailing party status") with *ante*, at 114 (the "'technical'" nature of the victory "does not affect the prevailing party inquiry" but instead "bear[s] on the propriety of fees awarded under § 1988"). And even if the exclusion's location is debatable, its effect is not: When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded. Such a plaintiff either has failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the reasonable fee is zero. The Court's opinion today and its unanimous opinion in *Garland* are thus in accord. See *ante*, at 115 (merely "forma[l]" victory can yield "no attorney's fees at all"); *Garland*, *supra*, at 792 ("Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that" denial of attorney's fees is appropriate).

Consequently, the Court properly holds that, when a plaintiff's victory is purely technical or *de minimis*, a district court need not go through the usual complexities involved in calculating attorney's fees. *Ante*, at 114–115 (court need not calculate presumptive fee by determining the number of hours reasonably expended and multiplying it by the reasonable hourly rate; nor must it apply the 12 factors bearing on reasonableness). As a matter of common sense and sound

judicial administration, it would be wasteful indeed to require that courts laboriously and mechanically go through those steps when the *de minimis* nature of the victory makes the proper fee immediately obvious. Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to "award low fees or no fees" at all. *Ante*, at 115.

Precedent confirms what common sense suggests. It goes without saying that, if the *de minimis* exclusion were to prevent the plaintiff from obtaining prevailing party status, fees would have to be denied. *Supra*, at 116. And if the *de minimis* victory exclusion is in fact part of the reasonableness inquiry, see *ante*, at 114, summary denial of fees is still appropriate. We have explained that even the prevailing plaintiff may be denied fees if "'special circumstances would render [the] award unjust.'" *Hensley* v. *Eckerhart*, 461 U. S. 424, 429 (1983) (citations omitted). While that exception to fee awards has often been articulated separately from the reasonableness inquiry, sometimes it is bound up with reasonableness: It serves as a short-hand way of saying that, even before calculating a lodestar or wading through all the reasonableness factors, it is clear that the reasonable fee is no fee at all. After all, where *the only* reasonable fee is no fee, an award of fees would be unjust; conversely, where a fee award would be unjust, the reasonable fee is no fee at all.

Of course, no matter how much sense this approach makes, it would be wholly inappropriate to adopt it if Congress had declared a contrary intent. When construing a statute, this Court is bound by the choices Congress has made, not the choices we might wish it had made. Felicitously, here they are one and the same. Section 1988 was enacted for a specific purpose: to restore the former equitable practice of awarding attorney's fees to the prevailing party in certain civil rights cases, a practice this Court had disapproved in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). *Hensley*, *supra*, at 429; see S. Rep. No. 94–1011,

p. 6 (1976) ("This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's *[Alyeska]* decision"). That practice included the denial of fees to plaintiffs who, although technically prevailing parties, had achieved only *de minimis* success. See, *e. g.*, *Tatum* v. *Morton*, 386 F. Supp. 1308, 1317–1319 (DC 1974) (fees denied where plaintiffs recovered $100 each); see also *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 392, 396 (1970) (under judge-made fee-shifting rule for shareholder actions that benefit the corporation, no fees are available if the only benefit achieved is merely "'technical in its consequence'" (quoting *Bosch* v. *Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 366, 367, 101 N. W. 2d 423, 426, 427 (1960))); cf. *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 688, n. 9 (1983) ("[W]e do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees under statutes setting out the 'when appropriate' standard"). And although Congress did not intend to restore every detail of pre-*Alyeska* practice, see *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 97–98 (1991), the practice of denying fees to Pyrrhic victors is one it clearly intended to preserve. Section 1988 expressly grants district courts discretion to withhold attorney's fees from prevailing parties in appropriate circumstances: It states that a court "may" award fees "in its discretion." 42 U. S. C. § 1988. As under pre-*Alyeska* practice, the occurrence of a purely technical or *de minimis* victory is such a circumstance. Chimerical accomplishments are simply not the kind of legal change that Congress sought to promote in the fee statute.

Indeed, § 1988 contemplates the denial of fees to *de minimis* victors through yet another mechanism. The statute only authorizes courts to award fees "as part of the costs." 42 U. S. C. § 1988. As a result, when a court denies costs, it

must deny fees as well; if there are no costs, there is nothing for the fees to be awarded "as part of." And when Congress enacted § 1988, the courts would deny even a prevailing party costs under Federal Rule of Civil Procedure 54(d) where the victory was purely technical. *Lewis* v. *Pennington*, 400 F. 2d 806, 819 (CA6) ("'prevailing party is prima facie entitled to costs'" unless "'the judgment recovered was insignificant in comparison to the amount actually sought and actually amounted to a victory for the defendant'" (quoting *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142, 146 (CA6 1959))), cert. denied, 393 U. S. 983 (1968); *Esso Standard (Libya), Inc.* v. *SS Wisconsin*, 54 F. R. D. 26, 27 (SD Tex. 1971) ("Circumstances justifying denial of costs to the prevailing party [exist] where the judgment recovered was insignificant in comparison to the amount actually sought"); see also *Brown* v. *GSA*, 425 U. S. 820, 828 (1976) (inquiry is Congress' understanding of the law, correct or not). Just as a Pyrrhic victor would be denied costs under Rule 54(d), so too should it be denied fees under § 1988.

II

In the context of this litigation, the technical or *de minimis* nature of Joseph Farrar's victory is readily apparent: He asked for a bundle and got a pittance. While we hold today that this pittance is enough to render him a prevailing party, *ante*, at 113–114, it does not by itself prevent his victory from being purely technical. It is true that Joseph Farrar recovered something. But holding that any award of nominal damages renders the victory material would "render the concept of de minimis relief meaningless. *Every* nominal damage award has as its basis a finding of liability, but obviously many such victories are Pyrrhic ones." *Lawrence* v. *Hinton*, 20 Fed. Rules Serv. 3d 934, 937 (CA4 1991); accord, *Commissioners Court of Medina County, Texas* v. *United States*, 221 U. S. App. D. C. 116, 123–124, 683 F. 2d 435, 442–443 (1982) (where "the net result achieved is so far from the

position originally propounded . . . it would be stretching the imagination to consider the result a 'victory' in the sense of vindicating the rights of the fee claimants"). That is not to say that *all* nominal damages awards are *de minimis*. Nominal relief does not necessarily a nominal victory make. See *ante*, at 115. But, as in pre-*Alyeska* and Rule 54(d) practice, see *supra*, at 119, 120, a substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical. See *ante*, at 115 ("A plaintiff who seeks compensatory damages but receives no more than nominal damages" may "formally 'prevai[l]' under § 1988" but will "often" receive no fees at all). Here that suggestion is quite strong. Joseph Farrar asked for 17 million dollars; he got one. It is hard to envision a more dramatic difference.

The difference between the amount recovered and the damages sought is not the only consideration, however. *Carey* v. *Piphus*, 435 U. S. 247, 254 (1978), makes clear that an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved. *Ante*, at 112. Accordingly, the courts also must look to other factors. One is the significance of the legal issue on which the plaintiff claims to have prevailed. *Garland*, 489 U. S., at 792. Petitioners correctly point out that Joseph Farrar in a sense succeeded on a significant issue—liability. But even on that issue he cannot be said to have achieved a true victory. Respondent was just one of six defendants and the only one not found to have engaged in a conspiracy. If recovering one dollar from the least culpable defendant and nothing from the rest legitimately can be labeled a victory—and I doubt that it can—surely it is a hollow one. Joseph Farrar may have won a point, but the game, set, and match all went to the defendants.

Given that Joseph Farrar got *some* of what he wanted—one seventeen millionth, to be precise—his success might be considered material if it also accomplished some public goal

other than occupying the time and energy of counsel, court, and client. Section 1988 is not "a relief Act for lawyers." *Riverside* v. *Rivera*, 477 U. S. 561, 588 (1986) (REHNQUIST, J., dissenting). Instead, it is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory. Yet one searches these facts in vain for the public purpose this litigation might have served. The District Court speculated that the judgment, if accompanied by a large fee award, might deter future lawless conduct, see App. to Pet. for Cert. A23–A24, but did not identify the kind of lawless conduct that might be prevented. Nor is the conduct to be deterred apparent from the verdict, which even petitioners acknowledge is "regrettably obtuse." Tr. of Oral Arg. 16. Such a judgment cannot deter misconduct any more than a bolt of lightning can; its results might be devastating, but it teaches no valuable lesson because it carries no discernable meaning. Cf. *Chicano Police Officer's Assn.* v. *Stover*, 624 F. 2d 127, 131 (CA10 1980) (nuisance settlement that does not promote any public purpose cannot support award of attorney's fees), cited and quoted in *Garland*, *supra*, at 792.

III

In this case, the relevant indicia of success—the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served—all point to a single conclusion: Joseph Farrar achieved only a *de minimis* victory. As the Court correctly holds today, the appropriate fee in such a case is no fee at all. Because the Court of Appeals gave Joseph Farrar everything he deserved—nothing—I join the Court's opinion affirming the judgment below.

JUSTICE WHITE, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join, concurring in part and dissenting in part.

We granted certiorari in this case to decide whether 42 U. S. C. § 1988 entitles a civil rights plaintiff who recovers

nominal damages to reasonable attorney's fees. Following our decisions in *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782 (1989), *Hewitt* v. *Helms*, 482 U. S. 755 (1987), *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), and *Carey* v. *Piphus*, 435 U. S. 247 (1978), the Court holds that it does. With that aspect of today's decision, I agree. Because Farrar won an enforceable judgment against respondent, he has achieved a "material alteration" of their legal relationship, *Garland*, *supra*, at 792–793, and thus he is a "prevailing party" under the statute.

However, I see no reason for the Court to reach out and decide what amount of attorney's fees constitutes a reasonable amount in this instance. That issue was neither presented in the petition for certiorari nor briefed by petitioners. The opinion of the Court of Appeals was grounded exclusively in its determination that Farrar had not met the threshold requirement under § 1988. At no point did it purport to decide what a reasonable award should be if Farrar was a prevailing party.

It may be that the District Court abused its discretion and misapplied our precedents by belittling the significance of the amount of damages awarded in ascertaining petitioners' fees. Cf. *Hensley*, *supra*, at 436. But it is one thing to say that the court erred as a matter of law in awarding $280,000; quite another to decree, especially without the benefit of petitioners' views or consideration by the Court of Appeals, that the only fair fee was no fee whatsoever.*

Litigation in this case lasted for more than a decade, has entailed a 6-week trial and given rise to two appeals. Civil rights cases often are complex, and we therefore have committed the task of calculating attorney's fees to the trial court's discretion for good reason. See, *e. g.*, *Hensley*, *supra*,

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*In his brief to the Fifth Circuit, respondent did not argue that petitioners should be denied all fees even if they were found to be prevailing parties. Rather, he asserted that the District Court misapplied the law by awarding "excessive" fees and requested that they be reduced. See Brief for Defendant-Appellant in No. 90–2830, pp. 38–42.

at 436–437; *Garland*, *supra*, at 789–790; *Blanchard* v. *Bergeron*, 489 U. S. 87, 96 (1989). Estimating what specific amount would be reasonable in this particular situation is not a matter of general importance on which our guidance is needed. Short of holding that recovery of nominal damages *never* can support the award of attorney's fees—which, clearly, the majority does not, see *ante*, at 115—the Court should follow its sensible practice and remand the case for reconsideration of the fee amount. Cf. *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 542 (1960). Indeed, respondent's counsel all but conceded at oral argument that, assuming the Court found Farrar to be a prevailing party, the question of reasonableness should be addressed on remand. See Tr. of Oral Arg. 31–32.

I would vacate the judgment of the Court of Appeals and remand the case for further proceedings. Accordingly, I dissent.

Syllabus

DISTRICT OF COLUMBIA ET AL. *v.* GREATER WASHINGTON BOARD OF TRADE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91–1326. Argued November 3, 1992—Decided December 14, 1992

Section 2(c)(2) of the District of Columbia Workers' Compensation Equity Amendment Act of 1990 requires employers who provide health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible for workers' compensation benefits. Respondent, an employer affected by this requirement, filed an action in the District Court against petitioners, the District of Columbia and its Mayor, seeking to enjoin enforcement of § 2(c)(2) on the ground that it is pre-empted by § 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), which provides that ERISA supersedes state laws that "relate to any employee benefit plan" covered by ERISA. Although petitioners conceded that § 2(c)(2) relates to an ERISA-covered plan, the court granted their motion to dismiss. Relying on this Court's decision in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, it held that § 2(c)(2) is not pre-empted because it also relates to respondent's workers' compensation plan, which is exempt from ERISA coverage, and because respondent could comply with the provision by creating a separate unit to administer the required benefits. The Court of Appeals reversed, holding that pre-emption of § 2(c)(2) is compelled by § 514(a)'s plain meaning and ERISA's structure.

Held: Section 2(c)(2) is pre-empted by ERISA. A state law "relate[s] to" a covered benefit plan for § 514(a) purposes if it refers to or has a connection with such a plan, even if the law is not designed to affect the plan or the effect is only indirect. See, *e. g., Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 139. Section 2(c)(2) measures the required health care coverage by reference to "the existing health insurance coverage," which is a welfare benefit plan subject to ERISA regulation. It does not matter that § 2(c)(2)'s requirements also "relate to" ERISA-exempt workers' compensation plans, since ERISA's exemptions do not limit § 514's pre-emptive sweep once it is determined that a law relates to a covered plan. See *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 525. Petitioners' reliance on *Shaw*, *supra*, is misplaced, since the statute at issue there did not "relate to" an ERISA-covered plan. Nor is there any support in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, for their position that § 514(a) requires a two-part analysis

under which a state law relating to an ERISA-covered plan would survive pre-emption if employers could comply with the law through separately administered exempt plans. Pp. 129–133.

292 U. S. App. D. C. 209, 948 F. 2d 1317, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 133.

Donna M. Murasky, Assistant Corporation Counsel of the District of Columbia, argued the cause for petitioners. With her on the briefs were *John Payton*, Corporation Counsel, and *Charles Reischel*, Deputy Corporation Counsel.

Lawrence P. Postol argued the cause for respondent. With him on the brief was *John N. Erlenborn*.*

JUSTICE THOMAS delivered the opinion of the Court.

The District of Columbia requires employers who provide health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible for

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *Richard Blumenthal*, Attorney General of Connecticut, and *Arnold B. Feigin*, Assistant Attorney General, and *Scott Harshbarger*, Attorney General of Massachusetts; for the State of Oklahoma *ex rel.* Dave Renfro, Commissioner of Labor, et al. by *Susan B. Loving*, Attorney General, *Rabindranath Ramana*, Assistant Attorney General, *Michael M. Sykes*, and *Kayla A. Bower;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* and for the American Optometric Association by *Bennett Boskey*, *Ellis Lyons*, and *Edward A. Groobert*.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Starr*, *Deputy Solicitor General Mahoney*, *Christopher J. Wright*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Deborah Greenfield;* for the Chamber of Commerce of the United States by *Mona C. Zeiberg* and *Hollis T. Hurd;* for the Connecticut Business and Industry Association by *Daniel L. FitzMaurice;* and for the District of Columbia Insurance Federation by *William A. Dobrovir* and *Lawrence H. Mirel*.

Steven S. Zaleznick and *Cathy Ventrell-Monsees* filed a brief for the American Association of Retired Persons as *amicus curiae*.

workers' compensation benefits. We hold that this requirement is pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1982 ed. and Supp. II).

I

ERISA sets out a comprehensive system for the federal regulation of private employee benefit plans, including both pension plans and welfare plans. A "welfare plan" is defined in § 3 of ERISA to include, *inter alia*, any "plan, fund, or program" maintained for the purpose of providing medical or other health benefits for employees or their beneficiaries "through the purchase of insurance or otherwise." § 3(1), 29 U. S. C. § 1002(1). Section 4 defines the broad scope of ERISA coverage. Subject to certain exemptions, ERISA applies generally to all employee benefit plans sponsored by an employer or employee organization. § 4(a), 29 U. S. C. § 1003(a). Among the plans exempt from ERISA coverage under § 4(b) are those "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." § 4(b)(3), 29 U. S. C. § 1003(b)(3).

ERISA's pre-emption provision assures that federal regulation of covered plans will be exclusive. Section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. § 514(a), 29 U. S. C. § 1144(a). Several categories of state laws, such as generally applicable criminal laws and laws regulating insurance, banking, or securities, are excepted from ERISA pre-emption by § 514(b), 29 U. S. C. § 1144(b), but none of these exceptions is at issue here.

Effective March 6, 1991, the District of Columbia Workers' Compensation Equity Amendment Act of 1990, 37 D. C. Register 6890 (Nov. 1990), amended several portions of the District's workers' compensation law, D. C. Code Ann. §§ 36–301

to 36–345 (1981 and Supp. 1992). Section 2(c)(2) of the Equity Amendment Act added the following requirement:

> "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter." D. C. Code Ann. § 36–307(a–1)(1) (Supp. 1992).

Under § 2(c)(2), the employer must provide such health insurance coverage for up to 52 weeks "at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits." § 36–307(a–1)(3).

Respondent Greater Washington Board of Trade, a nonprofit corporation that sponsors health insurance coverage for its employees, filed this action against the District of Columbia and Mayor Sharon Pratt Kelly seeking to enjoin enforcement of § 2(c)(2) on the ground that the "equivalent" benefits requirement is pre-empted by § 514(a) of ERISA. The District Court granted petitioners' motion to dismiss. App. to Pet. for Cert. 21a. Petitioners conceded that § 2(c)(2) "relate[s] to" an ERISA-covered plan in the sense that the benefits required under the challenged law "are set by reference to covered employee benefit plans." *Id.*, at 22a. Relying on our opinion in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983), however, the District Court held that § 2(c)(2) is not pre-empted because it also relates to respondent's workers' compensation plan, which is exempt from ERISA coverage, and because respondent could comply with § 2(c)(2) "by creating a 'separate administrative unit' to administer the required benefits." App. to Pet. for Cert. 24a (quoting *Shaw*, *supra*, at 108).

The Court of Appeals reversed. 292 U. S. App. D. C. 209, 948 F. 2d 1317 (1991). The court held that pre-emption of

§ 2(c)(2) is compelled by the plain meaning of § 514(a) and by the structure of ERISA. *Id.*, at 215–216, 948 F. 2d, at 1323–1324. In the court's view, ERISA pre-empts a law that relates to a covered plan and is not excepted from pre-emption by § 514(b), regardless of whether the law also relates to an exempt plan. *Ibid.* The Court of Appeals further concluded that this result would advance the policies and purposes served by ERISA pre-emption. *Id.*, at 217–218, 948 F. 2d, at 1325–1326. By tying the benefit levels of the workers' compensation plan to those provided in an ERISA-covered plan, "the Equity Amendment Act could have a serious impact on the administration and content of the ERISA-covered plan." *Id.*, at 217, 948 F. 2d, at 1325. Because the opinion below conflicts with the Second Circuit's decision in *R. R. Donnelley & Sons Co.* v. *Prevost*, 915 F. 2d 787 (1990), cert. denied, 499 U. S. 947 (1991), which upheld against a pre-emption challenge a Connecticut law substantially similar to § 2(c)(2), we granted certiorari. 503 U. S. 970 (1992). We now affirm.

II

We have repeatedly stated that a law "relate[s] to" a covered employee benefit plan for purposes of § 514(a) "if it has a connection with or reference to such a plan." *Shaw*, *supra*, at 97. *E. g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 139 (1990); *FMC Corp.* v. *Holliday*, 498 U. S. 52, 58 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 829 (1988); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 47 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 739 (1985). This reading is true to the ordinary meaning of "relate to," see Black's Law Dictionary 1288 (6th ed. 1990), and thus gives effect to the "deliberately expansive" language chosen by Congress. *Pilot Life*, *supra*, at 46. See also *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 383 (1992). Under § 514(a), ERISA pre-empts any state law that refers to or has a connection with

covered benefit plans (and that does not fall within a § 514(b) exception) "even if the law is not specifically designed to affect such plans, or the effect is only indirect," *Ingersoll-Rand*, *supra*, at 139, and even if the law is "consistent with ERISA's substantive requirements," *Metropolitan Life*, *supra*, at 739.[1]

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. The health insurance coverage that § 2(c)(2) requires employers to provide for eligible employees is measured by reference to "the existing health insurance coverage" provided by the employer and "shall be at the same benefit level." D. C. Code Ann. §§ 36–307(a–1)(1) and (3) (Supp. 1992). The employee's "existing health insurance coverage," in turn, is a welfare benefit plan under ERISA § 3(1), because it involves a fund or program maintained by an employer for the purpose of providing health benefits for the employee "through the purchase of insurance or otherwise." § 3(1), 29 U. S. C. § 1002(1).[2] Such employer-sponsored health insurance programs are subject to ERISA regulation, see § 4(a), 29 U. S. C. § 1003(a), and any state law imposing requirements by refer-

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[1] Pre-emption does not occur, however, if the state law has only a "tenuous, remote, or peripheral" connection with covered plans, *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 100, n. 21 (1983), as is the case with many laws of general applicability, see *Mackey*, 486 U. S., at 830–838, and n. 12; cf. *Ingersoll-Rand*, 498 U. S., at 139.

[2] In *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1 (1987), we construed the word "plan" to connote some minimal, ongoing "administrative" scheme or practice, and held that "a one-time, lump-sum payment triggered by a single event" does not qualify as an employer-sponsored benefit plan. *Id.*, at 12. Petitioners do not contend that employers in the District of Columbia provide health insurance for their employees without thereby administering welfare plans within the meaning of ERISA, and petitioners concede that the existing health insurance sponsored by respondent constitutes an ERISA plan. Tr. of Oral Arg. 14.

ence to such covered programs must yield to ERISA.[3] This conclusion is consistent with *Mackey* v. *Lanier Collection Agency*, which struck down a Georgia law that specifically exempted ERISA plans from a generally applicable garnishment procedure. 486 U. S., at 828, n. 2, and 829–830. It also follows from *Ingersoll-Rand*, where we held that ERISA § 514(a) pre-empted a Texas common-law cause of action for wrongful discharge based on an employer's desire to avoid paying into an employee's pension fund. Even though the employee sought no pension benefits, only "lost future wages, mental anguish and punitive damages," 498 U. S., at 136 (internal quotation marks omitted), we held the claim pre-empted because it was "premised on" the existence of an ERISA-covered pension plan. *Id.*, at 140.

It makes no difference that § 2(c)(2)'s requirements are part of the District's regulation of, and therefore also "relate to," ERISA-exempt workers' compensation plans. The exemptions from ERISA coverage set out in § 4(b), 29 U. S. C. § 1003(b), do not limit the pre-emptive sweep of § 514 once it is determined that the law in question relates to a covered plan. See *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 525 (1981) ("It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law, rather than directly, through a statute called 'pension regulation' "). *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983), does not support petitioners' position. *Shaw* dealt, in relevant part, with a New York disability law that required employers to pay weekly benefits to disabled employees equal to " 'one-half of the employee's average weekly wage.' " *Id.*, at 90, n. 4 (quoting N. Y. Work. Comp. Law § 204.2 (McKinney Supp. 1982–1983)). We held that this law was not pre-

[3] ERISA does not pre-empt § 2(c)(2) to the extent its requirements are measured only by reference to "existing health insurance coverage" provided under plans that are exempt from ERISA regulation, such as "governmental" or "church" plans, see ERISA §§ 4(b)(1) and (2), 29 U. S. C. §§ 1003(b)(1) and (2).

empted by § 514(a) because it related exclusively to exempt employee benefit plans "maintained solely for the purpose of complying with applicable . . . disability insurance laws" within the meaning of § 4(b)(3), 29 U. S. C. § 1003(b)(3). See 463 U. S., at 106–108. The fact that employers could comply with the New York law by administering the required disability benefits through a multibenefit ERISA plan did not mean that the law related to such ERISA plans for pre-emption purposes. See *id.*, at 108. We simply held that as long as the employer's disability plan, "as an administrative unit, provide[d] only those benefits required by" the New York law, it could qualify as an exempt plan under ERISA § 4(b)(3). *Id.*, at 107. Thus, unlike § 2(c)(2) of the District's Equity Amendment Act, the New York statute at issue in *Shaw* did not "relate to" an ERISA-covered plan.

Petitioners nevertheless point to *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985), in which we described *Shaw* as holding that "the New York Human Rights Law and that State's Disability Benefits Law 'relate[d] to' welfare plans governed by ERISA." *Id.*, at 739. Relying on this dictum and their reading of *Shaw*, petitioners argue that § 514(a) should be construed to require a two-step analysis: If the state law "relate[s] to" an ERISA-covered plan, it may still survive pre-emption if employers could comply with the law through separately administered plans exempt under § 4(b). See Tr. of Oral Arg. 16–17. But *Metropolitan Life* construed only the scope of § 514(b)(2)(A)'s safe harbor for state laws regulating insurance, see 471 U. S., at 739–747; it did not purport to add, by its passing reference to *Shaw*, any further gloss on § 514(a). And although we did conclude in *Shaw* that both New York laws at issue there related to "employee benefit plan[s]" in general, 463 U. S., at 100, only the Human Rights Law, which barred discrimination by ERISA plans, fell within the pre-emption provision. See *id.*, at 100–106. As we have explained, the Disability Benefits Law up-

held in *Shaw*—though mandating the creation of a "welfare plan" as defined in ERISA[4]—did not relate to a welfare plan subject to ERISA regulation. Section 2(c)(2) does, and that is the end of the matter. We cannot engraft a two-step analysis onto a one-step statute.

The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE STEVENS, dissenting.

The basic question that this case presents is whether Congress intended to prevent a State from computing workers' compensation benefits on the basis of the entire remuneration of injured employees when a portion of that remuneration is provided by an employee benefit plan. By converting unnecessarily broad dicta interpreting the words "relate to" as used in § 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1144(a), into a rule of law, and by underestimating the significance of the exemption of workers' compensation plans from the coverage of the Act, the Court has reached an incorrect conclusion in an unusually important case.

In today's world the typical employee's compensation is not just her take-home pay; it often includes fringe benefits such as vacation pay and health insurance. If an employee loses her job, by reason of either a wrongful discharge or a negligently inflicted physical injury, normal contract or tort principles would allow her to recover damages measured by her entire loss of earnings—including the value of fringe benefits such as health insurance. If I understand the Court's reasoning today, a state statute that merely announced that basic rule of damages law would be pre-empted

[4] "Welfare plans" include plans providing "benefits in the event of sickness, accident, [or] disability." § 3(1), 29 U. S. C. § 1002(1).

by ERISA if it "specifically refers" to each component of the damages calculation. *Ante*, at 130.[1]

Workers' compensation laws provide a substitute for tort actions by employees against their employers. They typically base the amount of the compensation award on the level of the employee's earnings at the time of the injury. In the District of Columbia's workers' compensation law, for example, an employee's "average weekly wages" provide the basic standard for computing the award regardless of the nature of the injury. D. C. Code Ann. § 36–308 (1988 and Supp. 1992). Because an employee who receives health insurance benefits typically has a correspondingly reduced average weekly wage, the District decided to supplement the standard level of workers' compensation with a component reflecting any health insurance benefits the worker receives. The Court seems to be holding today that such a supplement may never be measured by the level of the employee's health insurance coverage—at least if the state statutes or regulations specifically refer to that component of the calculation.

It is true, as the Court points out, that in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 96–97 (1983), we stated that a law "related to" an employee benefit plan, "in the normal sense of the phrase, if it has a connection with or reference to such a plan." It is also true that we have repeatedly quoted that language in later opinions.[2] Indeed, it has been

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[1] Similar arguments have been considered and rejected in several cases. See *Martori Bros. Distributors* v. *James-Massengale*, 781 F. 2d 1349, 1358–1359 (CA9), modified, 791 F. 2d 799, cert. denied, 479 U. S. 949 (1986); *Teper* v. *Park West Galleries, Inc.*, 431 Mich. 202, 216, 427 N. W. 2d 535, 541 (1988); *Schultz* v. *National Coalition of Hispanic Mental Health and Human Services Organizations*, 678 F. Supp. 936, 938 (DC 1988); *Jaskilka* v. *Carpenter Technology Corp.*, 757 F. Supp. 175, 178 (Conn. 1991).

[2] See *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 138–139 (1990); *FMC Corp.* v. *Holliday*, 498 U. S. 52, 58-59 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 829 (1988); *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 11 (1987); *Pilot Life Ins. Co.* v. *Dedeaux*,

reiterated so often that petitioners did not challenge the proposition that the statute at issue in this case "related to" respondent's ERISA plan. It nevertheless is equally true that until today that broad reading of the phrase has not been necessary to support any of this Court's actual holdings.

Given the open-ended implications of today's holding and the burgeoning volume of litigation involving ERISA pre-emption claims,[3] I think it is time to take a fresh look at the intended scope of the pre-emption provision that Congress enacted. Let me begin by repeating the qualifying language in the *Shaw* opinion itself and by emphasizing one word in the statutory text that is often overlooked.

After explaining why the two New York statutes at issue related to benefit plans, we noted:

> "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan. Cf. *American Telephone and Telegraph Co.* v. *Merry*, 592 F. 2d 118, 121 (CA2 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders is not pre-empted). The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Id.*, at 100, n. 21.

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481 U. S. 41, 47–48 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 739 (1985).

[3] Several years ago a District Judge who had read "nearly 100 cases about the reach of the ERISA preemption clause" concluded that "common sense should not be left at the courthouse door." See *Schultz* v. *National Coalition of Hispanic Mental Health and Human Services Organizations*, 678 F. Supp., at 938. A recent LEXIS search indicates that there are now over 2,800 judicial opinions addressing ERISA pre-emption. This growth may be a consequence of the growing emphasis on the meaning of the words "relate to," thus pre-empting reliance on what the District Judge referred to as "common sense."

In deciding where that line should be drawn, I would begin by emphasizing the fact that the so-called "pre-emption" provision in ERISA does not use the word "pre-empt." It provides that the provisions of the federal statute shall "*supersede* any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U. S. C. § 1144(a) (emphasis added). Thus the federal statute displaces state regulation in the field that is regulated by ERISA; it expressly disavows an intent to supersede state regulation of exempt plans; and its text is silent about possible pre-emption of state regulation of subjects not regulated by the federal statute. Thus, if we were to decide this case on the basis of nothing more than the text of the statute itself, we would find no pre-emption (more precisely, no "supersession") of the District's regulation of health benefits for employees receiving workers' compensation because that subject is entirely unregulated by ERISA.[4]

I would not decide this case on that narrow ground, however, because both the legislative history of ERISA and

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[4] See, *e. g., Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504, 516 (1992):

"Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947). Accordingly, '"[t]he purpose of Congress is the ultimate touchstone"' of pre-emption analysis. *Malone* v. *White Motor Corp.,* 435 U. S. 497, 504 (1978) (quoting *Retail Clerks* v. *Schermerhorn,* 375 U. S. 96, 103 (1963)).

. . . "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, see *Pacific Gas & Elec. Co.* v. *Energy Resources Conservation and Development Comm'n,* 461 U. S. 190, 204 (1983), or if federal law so thoroughly occupies a legislative field '"as to make reasonable the inference that Congress left no room for the States to supplement it."' *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U. S. 141, 153 (1982) (quoting *Rice* v. *Sante Fe Elevator Corp.,* 331 U. S., at 230)."

prior holdings by this Court have given the supersession provision a broader reading. Thus, for example, in *Shaw* itself we held that the New York Human Rights Law, which prohibited employers from structuring their employee benefit plans in a manner that discriminated on the basis of pregnancy, was pre-empted even though ERISA did not contain any superseding regulatory provisions. 463 U. S., at 98. State laws that directly regulate ERISA plans, or that make it necessary for plan administrators to operate such plans differently, "relate to" such plans in the sense intended by Congress. In my opinion, a state law's mere reference to an ERISA plan is an insufficient reason for concluding that it is pre-empted—particularly when the state law itself is related almost solely to plans that Congress expressly excluded from the coverage of ERISA. It is anomalous to conclude that ERISA has superseded state regulation in an area that is expressly excluded from the coverage of ERISA.

The statute at issue in this case does not regulate any ERISA plan or require any ERISA plan administrator to make any changes in the administration of such a plan. Although the statute may grant injured employees who receive health insurance a better compensation package than those who are not so insured, it does so only to prevent a converse windfall going to injured employees who receive high weekly wages and little or no health insurance coverage.[5] Even if the District's statute did encourage an employer to pay higher wages instead of providing better fringe benefits, that would surely be no reason to infer a congressional intent to supersede state regulation of a category of compensation programs that it exempted from federal coverage. Moreover, by requiring an injured worker's compensation to reflect his entire pay package, the statute attempts to replace *fully* the lost earning power of every injured employee. Noth-

[5] One of the statute's stated goals was "to promote a fairer system of compensation." Preamble to District of Columbia's Workers' Compensation Equity Amendment Act of 1990, 37 D. C. Register 6890 (Nov. 1990).

ing in ERISA suggests an intent to supersede the State's efforts to enact fair and complete remedies for work-related injuries; it is difficult to imagine how a State could measure an injured worker's health benefits without referring to the specific health benefits that worker receives. Any State that wishes to effect the equitable goal of the District's statute will be forced by the Court's opinion to require a predetermined rate of health insurance coverage that bears no relation to the compensation package of each injured worker. The Court thereby requires workers' compensation laws to shed their most characteristic element: postinjury compensation based on each individual worker's preinjury level of compensation.

Instead of mechanically repeating earlier dictionary definitions of the word "relate" as its only guide to decision in an important and difficult area of statutory construction, the Court should pause to consider, first, the wisdom of the basic rule disfavoring federal pre-emption of state laws, and second, the specific concerns identified in the legislative history as the basis for federal pre-emption. The most expansive statement of that purpose was quoted in our opinion in *Shaw.* As explained by Congressman Dent, the "crowning achievement" of the legislation was the "'reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.'" *Id.*, at 99 (quoting 120 Cong. Rec. 29197 (1974)).

The statute at issue in this case does not regulate even one inch of the pre-empted field, and poses no threat whatsoever of conflicting and inconsistent state regulation. By its holding today the Court enters uncharted territory. Where that holding will ultimately lead, I do not venture to predict. I am persuaded, however, that the Court has already taken a step that Congress neither intended nor foresaw.

Accordingly, I respectfully dissent.

Syllabus

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY *v.* METCALF & EDDY, INC.

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

No. 91–1010. Argued November 9, 1992—Decided January 12, 1993

Petitioner, an autonomous Puerto Rico government instrumentality, moved to dismiss the diversity action brought against it by respondent, a private firm, on the grounds that it was an "arm of the State," and that the Eleventh Amendment therefore prohibited the suit. After the District Court denied the motion, the Court of Appeals dismissed petitioner's appeal for want of jurisdiction, concluding that Circuit precedent barred both States and their agencies from taking an immediate appeal on a claim of Eleventh Amendment immunity.

Held: States and state entities that claim to be "arms of the State" may take advantage of the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, to appeal a district court order denying a claim of Eleventh Amendment immunity from suit in federal court. Although 28 U. S. C. § 1291 requires that appeals be taken from "final decisions of the district courts," *Cohen*, *supra*, at 546, provides that a "small class" of judgments that are not complete and final will be immediately appealable. Once it is acknowledged that a State and its "arms" are, in effect, immune from federal-court suit under the Amendment, see, *e. g.*, *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 480, it follows that the elements of the collateral order doctrine necessary to bring an order within *Cohen*'s "small class," see *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468, are satisfied. First, denials of Eleventh Amendment immunity claims purport to be conclusive determinations that States and their entities have no right not to be sued in federal court. Second, a motion to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection whose resolution generally will have no bearing on the merits of the underlying action. Third, the value to the States of their constitutional immunity—like the benefits conferred by qualified immunity to individual officials, see *Mitchell* v. *Forsyth*, 472 U. S. 511, 526—is for the most part lost as litigation proceeds past motion practice, such that the denial order will be effectively unreviewable on appeal from a final judgment. Respondent's claim that the Amendment does not confer immunity from suit, but merely a defense to liability, misunderstands the role of the Amendment in our system of federalism and is rejected.

Moreover, there is little basis for respondent's alternative argument that a distinction should be drawn between cases in which the determination of an Eleventh Amendment claim is bound up with factual complexities whose resolution requires trial and cases in which it is not. In any event, the determination of petitioner's Eleventh Amendment status does not appear to implicate any extraordinary factual difficulty and can be fully explored on remand. Pp. 142–147.

945 F. 2d 10, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 147. STEVENS, J., filed a dissenting opinion, *post*, p. 148.

Richard Taranto argued the cause for petitioner. With him on the briefs were *Perry M. Rosen*, *Paige E. Reffe*, and *Michael T. Brady.*

Peter W. Sipkins argued the cause for respondent. With him on the brief were *Michael J. Wahoske*, *Paul R. Dieseth*, *Carol A. Peterson*, and *Jay A. Garcia-Gregory.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Lee Fisher*, Attorney General of Ohio, and *Patrick A. Devine* and *Andrew I. Sutter*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *James H. Evans* of Alabama, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Elizabeth Barrett-Anderson* of Guam, *Warren Price III* of Hawaii, *Larry EchoHawk* of Idaho, *Roland W. Burris* of Illinois, *Linley E. Pearson* of Indiana, *Bonnie J. Campbell* of Iowa, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Michael E. Carpenter* of Maine, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Frankie Sue Del Papa* of Nevada, *Robert J. Del Tufo* of New Jersey, *Tom Udall* of New Mexico, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Nicholas J. Spaeth* of North Dakota, *Robert C. Naraja* of Northern Mariana Islands, *Susan Loving* of Oklahoma, *Charles Crookham* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *Jorge E. Perez Diaz* of Puerto Rico, *James E. O'Neil* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark W. Barnett* of South Dakota, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, *Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, *Mary*

JUSTICE WHITE delivered the opinion of the Court.

The question before the Court is whether a district court order denying a claim by a State or a state entity to Eleventh Amendment immunity from suit in federal court may be appealed under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). We conclude that it may.

I

Petitioner, the Puerto Rico Aqueduct and Sewer Authority (PRASA), is "an autonomous government instrumentality" which functions to "provide to the inhabitants of Puerto Rico an adequate drinking water, sanitary sewage service and any other service or facility proper or incidental thereto." P. R. Laws Ann., Tit. 22, §§ 142, 144 (1987). In 1985, PRASA entered into a consent decree with the federal Environmental Protection Agency under which it agreed to upgrade many of its wastewater treatment plants to ensure compliance with the federal Clean Water Act. PRASA subsequently contracted with respondent, a private engineering firm incorporated in Delaware, to assist it with this task. In 1990, PRASA withheld payments on the contract in light of alleged overcharging by respondent. Respondent brought a diversity action in the United States District Court for the District of Puerto Rico, alleging breach of contract and damage to its business reputation.

PRASA moved to dismiss on the grounds that it was an "arm of the State," and that the Eleventh Amendment therefore prohibited the suit.[1] The District Court found that

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Sue Terry of Virginia, *Kenneth Eikenberry* of Washington, *Mario J. Palumbo* of West Virginia, *James E. Doyle* of Wisconsin, and *Joseph B. Meyer* of Wyoming; and for the Council of State Governments et al. by *Richard Ruda*, *Michael G. Dzialo*, and *Clifton S. Elgarten.*

[1] As the case comes to us, the law of the First Circuit—that the Commonwealth of Puerto Rico is treated as a State for purposes of the Eleventh Amendment, see *Ramirez* v. *Puerto Rico Fire Serv.*, 715 F. 2d 694, 697 (1983)—is not challenged here, and we express no view on this mat-

petitioner did not qualify for immunity "because of its ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds" and denied the motion. App. to Pet. for Cert. A–9. PRASA filed a timely notice of appeal to the Court of Appeals for the First Circuit and sought to stay proceedings while the appeal was pending. The court denied the stay and subsequently dismissed the appeal for want of jurisdiction, 945 F. 2d 10, 14 (1991), concluding that First Circuit precedent barred both States and their agencies from taking an immediate appeal on a claim of Eleventh Amendment immunity. *Id.*, at 12 (discussing *Libby* v. *Marshall*, 833 F. 2d 402 (CA1 1987)).

In light of the conflict between the decision below and those of the other Courts of Appeals that have considered the issue, we granted certiorari.[2] 503 U. S. 918 (1992).

II

Title 28 U. S. C. § 1291 provides for appeal from "final decisions of the district courts." Appeal is thereby precluded "from any decision which is tentative, informal or incomplete," as well as from any "fully consummated decisions, where they are but steps towards final judgment in which they will merge." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S., at 546. Nevertheless, a judgment that is

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ter. Because the Court of Appeals dismissed the appeal on jurisdictional grounds, it did "not consider the merits of PRASA's Eleventh Amendment defense and [took] no view as to whether PRASA is actually entitled to the claimed immunity." 945 F. 2d 10, 14, n. 6 (CA1 1991). We likewise express no view on the merits of the immunity claim.

[2] See *Dube* v. *State University of New York*, 900 F. 2d 587, 594 (CA2 1990), cert. denied, 501 U. S. 1211 (1991); *Coakley* v. *Welch*, 877 F. 2d 304, 305 (CA4), cert. denied, 493 U. S. 976 (1989); *Chrissy F.* v. *Mississippi Dept. of Pub. Welfare*, 925 F. 2d 844, 848–849 (CA5 1991); *Kroll* v. *Board of Trustees of University of Illinois*, 934 F. 2d 904, 906 (CA7), cert. denied, 502 U. S. 941 (1991); *Barnes* v. *Missouri*, 960 F. 2d 63, 64 (CA8 1992) *(per curiam); Durning* v. *Citibank, N. A.*, 950 F. 2d 1419, 1422 (CA9 1991); *Schopler* v. *Bliss*, 903 F. 2d 1373, 1377 (CA11 1990) *(per curiam).*

not the complete and final judgment in a case will be immediately appealable if it

> "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.*

Thus, in *Cohen* itself, the Court held that appeal could be taken from a district court order denying the defendant's motion to compel the plaintiffs in a shareholder derivative suit to post a bond. The Court found the order appealable because it "did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment" and because, after final judgment, it would "be too late effectively to review the present order, and the rights conferred by the [bond] statute, if it is applicable, will have been lost." *Ibid.*

The Court has held that orders denying individual officials' claims of absolute and qualified immunity are among those that fall within the ambit of *Cohen.* See *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982); *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). *Mitchell* bears particularly on the present case. There, the Attorney General of the United States appealed from a District Court order denying his motion to dismiss on grounds of qualified immunity.[3] The Court of Appeals held that the order was not appealable and remanded the case for trial. We reversed, holding that the order denying qualified immunity was a collateral order immediately appealable under *Cohen.* We found that, absent immediate appeal, the central benefits of qualified immunity—avoiding the costs and general consequences of subjecting public officials to the

[3] The District Court also denied absolute immunity. This order was held appealable by the Court of Appeals and was affirmed, as it was by us. *Mitchell* v. *Forsyth*, 472 U. S., at 520.

risks of discovery and trial—would be forfeited, much as the benefit of the bond requirement would have been forfeited in *Cohen*. "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, *supra*, at 526 (emphasis in original).

Petitioner maintains, and we agree, that the same rationale ought to apply to claims of Eleventh Amendment immunity made by States and state entities possessing a claim to share in that immunity. Under the terms of the Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." This withdrawal of jurisdiction effectively confers an immunity from suit. Thus, "this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman* v. *Jordan*, 415 U. S. 651, 662–663 (1974). Absent waiver, neither a State nor agencies acting under its control may "be subject to suit in federal court." *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 480 (1987) (plurality opinion); see also *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 66 (1989); *Cory* v. *White*, 457 U. S. 85, 90–91 (1982); *Alabama* v. *Pugh*, 438 U. S. 781 (1978) *(per curiam); Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 280 (1977).

Once it is established that a State and its "arms" are, in effect, immune from suit in federal court, it follows that the elements of the *Cohen* collateral order doctrine are satisfied. "To come within the 'small class' of . . . *Cohen*, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v.

Livesay, 437 U. S. 463, 468 (1978) (footnote omitted). Denials of States' and state entities' claims to Eleventh Amendment immunity purport to be conclusive determinations that they have no right not to be sued in federal court. Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, cf. *Lauro Lines s.r.l.* v. *Chasser*, 490 U. S. 495, 502–503 (1989) (SCALIA, J., concurring), whose resolution generally will have no bearing on the merits of the underlying action. Finally, the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice.[4]

Respondent, following the rationale of the First Circuit in this case and in *Libby* v. *Marshall*, 833 F. 2d 402 (1987), maintains that the Eleventh Amendment does not confer immunity from suit, but merely a defense to liability. Were this true, petitioner arguably would not be entitled to avail itself of the collateral order doctrine. See, *e. g.*, *Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 526–527 (1988). Support for this narrow view of the Eleventh Amendment is drawn mainly from *Ex parte Young*, 209 U. S. 123 (1908), under which suits seeking prospective, but not compensatory or other retrospective relief, may be brought against state officials in federal court challenging the constitutionality of official conduct enforcing state law.

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[4] The result reached today was largely anticipated by *Ex parte New York*, 256 U. S. 490 (1921). There, private citizens brought an *in rem* libel action in Federal District Court against ships chartered and operated by New York State. New York moved to dismiss on the ground that the action was in the nature of an *in personam* proceeding and was thus barred by the Eleventh Amendment. When the District Court denied the motion, the State applied to the Court for a writ of prohibition. Although noting that the State's interest could be pressed on appeal, *id.*, at 497, the Court issued the extraordinary writ in order to vindicate fully the "fundamental" constitutional rule that a State may not be sued in federal court without its consent, *id.*, at 497, 503.

The doctrine of *Ex parte Young*, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity. See, *e. g.*, *Green* v. *Mansour*, 474 U. S. 64, 68 (1985). Moreover, the exception is narrow: It applies only to prospective relief, does not permit judgments against state officers declaring that they violated federal law in the past, *id.*, at 73, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought, *Cory* v. *White*, *supra*. Rather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies, which retain their immunity against all suits in federal court.

More generally, respondent's claim that the Eleventh Amendment confers only protection from liability misunderstands the role of the Amendment in our system of federalism: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U. S. 443, 505 (1887). The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. See *Hans* v. *Louisiana*, 134 U. S. 1, 13 (1890). It thus accords the States the respect owed them as members of the federation. While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated.[5]

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[5] For this reason, the First Circuit's attempt to distinguish *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985), on the grounds that the States, as compared to individual officials, are better able to bear the burden of litigation,

Respondent argues in the alternative that a distinction should be drawn between cases in which the determination of a State or state agency's claim to Eleventh Amendment immunity is bound up with factual complexities whose resolution requires trial and cases in which it is not. See Tr. of Oral Arg. 30–32; cf. *Dube* v. *State University of New York*, 900 F. 2d 587, 594 (CA2 1990) (immediate appeal will lie where immunity can be found as a matter of law), cert. denied, 501 U. S. 1211 (1991). On this view, for example, an order denying a motion to dismiss a suit against a named State would be immediately appealable, whereas the same order, when issued in a suit which presents difficult factual questions as to whether an agency is an "arm of the State," would not. We see little basis for drawing such a line. See *Mitchell* v. *Forsyth*, 472 U. S., at 527–529, and n. 10. In any event, it does not appear to us that the determination of PRASA's status under the Eleventh Amendment implicates any extraordinary factual difficulty and the issue of its entitlement to immunity can be fully explored in the Court of Appeals on remand.

III

We hold that States and state entities that claim to be "arms of the State" may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion but write separately to make plain once again my position on one feature. I continue to

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fails. See *Libby* v. *Marshall*, 833 F. 2d 402, 406 (1987). The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued.

believe that the Court's interpretation of the Eleventh Amendment as embodying a broad principle of state immunity from suit in federal court "simply cannot be reconciled with the federal system envisioned by our Basic Document and its Amendments." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 303 (1985) (BLACKMUN, J., dissenting). Nevertheless, because I believe that the Eleventh Amendment does preserve a State's immunity from suit in the limited context of an action by a citizen of another State or of a foreign country on a state-law cause of action brought in federal court, *id.*, at 301 (Brennan, J., dissenting), a claim of immunity under the Eleventh Amendment ought to be appealable immediately. Whether the assertion of an Eleventh Amendment claim is well founded—a matter not before us in this case, see *ante*, at 141–142, n. 1—is a question separate from the question whether the Eleventh Amendment interests are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). Because I believe that the Eleventh Amendment does guarantee immunity from suit in a narrow class of cases, I concur in the Court's opinion and judgment that, regardless of the merits, a district court's denial of a claim of immunity under the Eleventh Amendment should be appealable immediately. See *Sullivan* v. *Finkelstein*, 496 U. S. 617, 632 (1990) (opinion concurring in judgment).

JUSTICE STEVENS, dissenting.

This case arises out of a commercial dispute between respondent, a private engineering firm, and the Puerto Rico Aqueduct and Sewer Authority (PRASA or Authority). The parties entered into a multimillion dollar contract providing for the construction of extensive improvements to Puerto Rico's wastewater treatment facilities. Respondent brought suit in the Federal District Court for the District of

Puerto Rico alleging breach of contract. The Authority filed a motion to dismiss, claiming that the action was barred by the Eleventh Amendment. The District Court concluded that the claim had no merit and denied the motion to dismiss. The Court of Appeals dismissed PRASA's appeal from that order because it was not final within the meaning of 28 U. S. C. § 1291.

If the Authority were a private litigant engaged in a commercial dispute, it would be perfectly clear that the dismissal of its appeal was required by our precedents. For the denial of a motion to dismiss on jurisdictional grounds—a motion that asserts that the defendant cannot be sued in a particular forum—is not a final order within the meaning of § 1291. *Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 526–527 (1988); *Catlin* v. *United States*, 324 U. S. 229, 236 (1945). In this case, PRASA makes the same assertion—namely, that it may not be sued in a federal forum, but rather must be sued in another court. Brief for Petitioner 4–5.

Nonetheless, despite our decisions in *Biard* and *Catlin*, the Court holds that when a State or state entity claiming to be an "arm of the State" asserts that it cannot be sued in a federal forum because of the Eleventh Amendment, the "final decision" rule must give way and the claim must be subject to immediate appellate review. The Court reasons that such a claim is analogous to a government official's claim of absolute or qualified immunity, which we have held is subject to interlocutory appeal. *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982); *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). I cannot agree.

The defense of absolute or qualified immunity is designed to shield government officials from liability for their official conduct. In the absence of such a defense, we have held, "officials would hesitate to exercise their discretion in a way injuriously affecting the claims of particular individuals even when the public interest required bold and unhesitating action." *Nixon* v. *Fitzgerald*, 457 U. S., at 744–745 (internal

quotation marks and citation omitted). Because the specter of a long and contentious legal proceeding in and of itself would inhibit government officials from exercising their authority with the freedom and independence necessary to serve the public interest, we have held that claims of absolute or qualified immunity are subject to immediate appeal. *Id.*, at 742–743; *Mitchell* v. *Forsyth*, 472 U. S., at 526–527.

While the Eleventh Amendment defense available to States and state entities is often labeled an "immunity," that label is virtually all that it has in common with the defense of absolute or qualified immunity. In contrast to the latter, a defense based on the Eleventh Amendment, even when the Amendment is read at its broadest, does not contend that the State or state entity is shielded from liability for its conduct, but only that the federal courts are without jurisdiction over claims against the State or state entity. See *ante,* at 144. Nothing in the Eleventh Amendment bars respondent from seeking recovery in a different forum. Indeed, as noted above, petitioner acknowledges that it is not seeking immunity for its conduct, but merely that the suit be brought in the courts of the Commonwealth of Puerto Rico. Brief for Petitioner 4–5.

Plainly, then, the interests underlying our decisions allowing immediate appeal of claims of absolute or qualified immunity do not apply when the so-called "immunity" is one based on the Eleventh Amendment. *Whether* petitioner must bear the burden, expense, and distraction of litigation stemming from its contractual dispute with respondent has nothing whatsoever to do with the Eleventh Amendment; the Eleventh Amendment only determines *where,* or more precisely, *where not,* that suit may be brought.* Because the Amendment goes to the jurisdiction of the federal court, as opposed to the underlying liability of the State or state en-

*Not surprisingly, we have expressly characterized the Eleventh Amendment defense, albeit in a different context, as "partak[ing] . . . of a jurisdictional bar." *Edelman* v. *Jordan,* 415 U. S. 651, 678 (1974).

tity, *Biard* and *Catlin*, not *Nixon* and *Mitchell*, are the relevant precedent for determining whether PRASA's claim is subject to interlocutory appeal.

If indeed the interests underlying our decisions permitting immediate appeal of claims of absolute or qualified immunity do not apply to a State or state entity's objection to federal jurisdiction on Eleventh Amendment grounds, what then is driving the Court to hold that PRASA's claim under the Eleventh Amendment is subject to immediate appeal? The Court tells us, *ante*, at 146: "[The] ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated." Whereas a private litigant must suffer through litigation in a federal tribunal despite his claim that the court lacks jurisdiction, *e. g.*, *Biard* and *Catlin*, a State or state entity must be protected from the "*indignity*" of having to present its case—as to both the court's jurisdiction and the underlying merits—in the neutral forum of a federal district court.

I find that rationale to be embarrassingly insufficient. The mandate of § 1291 that appellate jurisdiction be limited to "final decisions of the district courts" is not predicated upon "mer[e] technical conceptions of 'finality,'" *Catlin*, 324 U. S., at 233, but serves important interests concerning the fair and efficient administration of justice. The "final decision" rule preserves the independence of the trial judge and conserves the judicial resources that are necessarily expended by piecemeal appeals. Moreover, and of particular relevance to this case, it serves an important "fairness" purpose by preventing "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise . . . ." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374 (1981) (internal quotation marks and citation omitted). Sacrificing those interests in the name of preserving the freedom and independence that government officials need to carry out their official du-

ties is one thing; doing so out of concern for the "dignitary" interest of a State or, in this case, a state aqueduct and sewer authority, is quite another.

For me, the balance of interests is easy. The cost to the courts and the parties of permitting piecemeal litigation of this sort clearly outweighs whatever benefit to their "dignity" States or state entities might derive by having their Eleventh Amendment claims subject to immediate appellate review. I would therefore hold, as did the court below, that the denial of a motion to dismiss on Eleventh Amendment grounds is not subject to immediate appellate review. Accordingly, I respectfully dissent.

Syllabus

BATH IRON WORKS CORP. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

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

No. 91–871. Argued November 4, 1992—Decided January 12, 1993

Upon learning after he retired that he suffered from a work-related hearing loss, respondent Brown, a former employee of petitioner Bath Iron Works Corp., filed a timely claim for disability benefits under the Longshore and Harbor Workers' Compensation Act. In calculating Brown's benefits, the Administrative Law Judge applied a hybrid of the compensation systems set forth in §§ 8(c)(13) and 8(c)(23) of that Act, and the Benefits Review Board affirmed. Rejecting the Board's reliance on § 8(c)(23), the Court of Appeals held that hearing loss claims, whether filed by current workers or retirees, must be compensated pursuant to § 8(c)(13). Under that section, a claimant who has suffered a disabling injury of a kind specifically identified in a schedule, including hearing loss, is entitled to certain benefits regardless of whether his earning capacity had actually been impaired. In contrast, the Courts of Appeals for the Fifth and Eleventh Circuits have held that a retiree's claim for occupational hearing loss should be compensated pursuant to § 8(c)(23). Under that section, a retiree who suffers from an occupational disease that did not become disabling until after retirement—one "which does not immediately result in death or disability" in the words of the Act—receives certain benefits based on the "time of injury," which is defined as the date on which the claimant becomes aware, or reasonably should have been aware, of the relationship between the employment, the disease, and the disability. In Brown's case, as in most cases, § 8(c)(13) benefits would be more generous than § 8(c)(23) benefits.

Held: Claims for hearing loss, whether filed by current workers or retirees, are claims for a scheduled injury and must be compensated under § 8(c)(13), not § 8(c)(23). Respondent Director's undisputed characterization of occupational hearing loss as a condition that *does* cause immediate disability must be accepted. A worker who is exposed to excessive noise suffers the injury of such loss, which, as a scheduled injury, is presumptively disabling, simultaneously with that exposure. Thus, the loss cannot be compensated under § 8(c)(23) as "an occupational disease which does not immediately result in . . . disability." In holding that claims for occupational hearing loss should be compensated pursu-

ant to § 8(c)(23), the Eleventh and Fifth Circuits have essentially read this key phrase out of the statute. To the extent there is any unfairness in the statutory scheme in that employers may be held liable for postretirement increases in hearing loss due to aging, they can protect themselves by giving employees audiograms at the time of retirement and thereby freezing the amount of compensable hearing loss. A lone Senator's single passing remark in the legislative history does not persuade this Court that retirees' hearing loss claims should be compensated under § 8(c)(23). Pp. 163–166.

942 F. 2d 811, affirmed.

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

Kevin M. Gillis argued the cause for petitioners. With him on the briefs was *Allan M. Muir.*

Christopher J. Wright argued the cause for the federal respondent. With him on the brief were *Solicitor General Starr*, *Deputy Solicitor General Mahoney*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Elizabeth Hopkins.* *Ronald W. Lupton* argued the cause and filed a brief for Ernest C. Brown, respondent under this Court's Rule 12.4.

JUSTICE STEVENS delivered the opinion of the Court.

Respondent Ernest C. Brown, a former employee of petitioner Bath Iron Works Corp., learned after he retired that he suffered from a work-related hearing loss. The parties agree that under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, respondent is entitled to disability benefits on account of his injury. They disagree, however, as to the proper method of calculating those benefits.

There are essentially three "systems"[1] for compensating partially disabled workers under the Act, two of which are at issue in this case. The "first" system provides for com-

[1] The various methods for calculating benefits under the Act were so labeled by the Court of Appeals, and the parties retain that characterization in their briefs before this Court. We find that characterization useful and adhere to it in our discussion of the Act.

pensation for partially disabled claimants who have suffered certain statutorily "scheduled" injuries, one of which is hearing loss. The "third" system provides for compensation for retirees who suffer from occupational diseases that do not become disabling until after retirement. In most, but not all, cases, benefits for scheduled injuries are more generous than those provided retirees suffering from latent occupational diseases. The question presented in this case is whether a claimant who discovers, after retirement, that he suffers from a work-related hearing loss should be compensated under the first system, because loss of hearing is a scheduled injury, or under the third system, because he did not become aware of the disabling condition until after retirement.

I

Prior to 1984, the LHWCA provided that compensation for a permanent partial disability should be determined in one of two ways. If the injury was of a kind specifically identified in the schedule set forth in § 8(c) of the Act, 33 U. S. C. §§ 908(c)(1)–(20) (1982 ed.), the injured employee was entitled to two-thirds of his average weekly wage at the time of the injury for a specific number of weeks, regardless of whether his earning capacity had actually been impaired. See *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U. S. 268, 269–270 (1980).[2] Loss of hearing was among those specified injuries.[3] In all other cases, the Act authorized compensation equal to two-thirds of the difference between the employee's average

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[2] For example, workers who lose an arm are entitled to two-thirds of their weekly pay for 312 weeks, 33 U. S. C. § 908(c)(1), whereas workers who lose a leg are entitled to such compensation for 288 weeks, § 908(c)(2).

[3] Section 8(c)(13), both before and after the LHWCA Amendments of 1984, authorized compensation of two-thirds of the average weekly wage for a period of 200 weeks for a total loss of hearing in both ears. For a partial loss of hearing, the Act requires a proportionate reduction in benefits. See n. 9, *infra*.

weekly wage and his postinjury earning capacity. 33 U. S. C. § 908(c)(21). In those cases, unlike the scheduled-injury cases in which disability was presumed, it was necessary for the employee to prove that his injury had actually decreased his earning capacity.[4]

In early 1984, the Benefits Review Board[5] was confronted with a case in which the claimant had contracted asbestosis, a latent occupational disease that did not manifest itself until after his retirement. Because the disease did not qualify as a scheduled benefit, the claimant was not entitled to a presumption of disability; moreover, because it did not affect his actual earnings, he could not establish "disability" as defined in § 902(10).[6] Therefore, the Board held, the claimant was not entitled to any compensation under the Act. *Aduddell* v. *Owens-Corning Fiberglass*, 16 BRBS 131, 134 (1984).[7] Three weeks after the *Aduddell* decision, the Board followed

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[4] Prior to 1984, § 902(10) defined the term "disability" to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U. S. C. § 902(10) (1982 ed.). An employee with a scheduled injury, however, is presumed to be disabled, even though the injury does not actually affect his earnings. As we held in *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U. S. 268 (1980), such an employee is only entitled to the scheduled benefit even when the actual impairment of his earnings would have produced a higher benefit if calculated under § 8(c)(21). *Id.*, at 270–271.

[5] The Benefits Review Board was created by Congress to "hear and determine appeals . . . with respect to claims of employees under [the Act]." 33 U. S. C. § 921(b)(3).

[6] See n. 4, *supra*.

[7] See also *Worrell* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 216 (1983) (Administrative Law Judge (ALJ) decision denying death benefits where claimant who had been exposed to asbestos developed and died from mesothelioma after retirement); *Newport News Shipbuilding and Dry Dock* v. *Director, Office of Workers' Compensation Programs*, 681 F. 2d 938, 942 (CA4 1982) ("Before retirement, the asbestosis was not disabling; after retirement there was no diminished capacity").

its reasoning in a case involving a hearing loss claim filed after the claimant's retirement. *Redick* v. *Bethlehem Steel Corp.*, 16 BRBS 155 (1984). Although the ALJ in *Redick* had made a finding of disability because "scheduled awards are conclusive presumptions of loss of wage-earning capacity and cannot be rebutted," *id.*, at 156, the Board vacated the award of benefits, reasoning that the "voluntary retirement was prior to manifestation of the injury, and was unrelated to his hearing loss," *id.*, at 157.

In 1984, Congress amended the Act by adding the "third" compensation system that unquestionably provides compensation for the type of claim rejected in *Aduddell* and the other asbestos cases. With the 1984 amendments, Congress authorized the payment of benefits to retirees suffering from occupational diseases that become manifest only after retirement. More precisely, a new § 10(i) addresses claims for death or disability "due to an occupational disease which does not immediately result in death or disability." 33 U. S. C. § 910(i).

As is the case under the first two compensation systems, compensation under the third system turns in large part on the "average weekly wage" used to calculate benefits. When the "time of injury"—defined as "the date on which the employee or claimant becomes aware, or . . . should have been aware, of the relationship between the employment, the disease, and the death or disability," *ibid.*—is within the first year of retirement, the claimant's average weekly wage is based upon the claimant's wages just prior to retirement. § 910(d)(2)(A). When the "time of injury" is more than one year after retirement, the average weekly wage is deemed to be the national average weekly wage at that time. § 910(d)(2)(B).

Once the "average weekly wage" is determined, a claimant's benefits are calculated under § 8 of the Act. For claims

in which "the average weekly wages are determined under section 910(d)(2)," that is, for retirees with claims involving "an occupational disease which does not immediately result in death or disability," 33 U. S. C. § 910(i), a new § 8(c)(23) provides that compensation shall be two-thirds of the applicable average weekly wage multiplied by the percentage of permanent impairment as determined by particular medical guides specified in the statute, 33 U. S. C. § 908(c)(23). The claimant is entitled to such benefits for the duration of the impairment. *Ibid.*[8]

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[8] Piecing all these various provisions together, § 8(c), 33 U. S. C. § 908(c), provides:

"Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, . . . and shall be paid to the employee, as follows:

. . . . . .

"(13) Loss of Hearing:

. . . . . .

"(B) Compensation for loss of hearing in both ears, two-hundred weeks.

. . . . . .

"(21) Other cases: In all other cases in the class of disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

. . . . . .

"(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be 66⅔ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment."

Section 10(d), 33 U. S. C. § 910(d), provides:

"(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs—

"(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

The differences between the first and third compensation systems can result in significantly differing benefits. An award to a claimant under the schedule, *i. e.*, the first system, is based upon the degree of loss to the scheduled body part, whereas an award under the third system is based on the extent to which the "whole body" has been impaired. In most cases, this difference makes recovery under the schedule more generous than that under the retiree provisions.[9]

II

Respondent was exposed to loud noise during his employment as a riveter and chipper at petitioner's iron works from 1939 until 1947, and again from 1950 until his retirement in 1972. In 1985 he received the results of an audiogram indicating an 82.4 percent loss of hearing. As authorized by a

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"(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage . . . applicable at the time of the injury."

Section 10(i), 33 U. S. C. § 910(i), provides:

"For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability."

[9] For example, because respondent's hearing loss is partial (82.4 percent), see *infra* this page, his recovery under the schedule would be reduced from two-thirds of his average weekly wage for 200 weeks to the same amount for 165 weeks (200 weeks times .824 equals 165 weeks). See 33 U. S. C. § 908(c)(19). Under the guides referenced in § 8(c)(23), however, an 82.4 percent hearing loss translates into a 29 percent impairment of the "whole person." Thus, under the third system respondent would only receive 29 percent of two-thirds of the appropriate average weekly wage.

There are some aspects of the third system, however, that may provide for more favorable treatment to claimants. For instance, benefits calculated pursuant to the third system are paid weekly for as long as the claimant is impaired, whereas benefits for a scheduled injury continue only for a specified number of weeks.

provision in the 1984 amendments that is not at issue in this case,[10] he then filed a timely claim for benefits.

The ALJ, following Board precedent, applied a hybrid of the first and third compensation systems to calculate respondent's benefits. The ALJ concluded that respondent's hearing loss fell within the scope of the 1984 amendments as an occupational disease that does not immediately result in disability and that the relevant "time of injury" was the date in September 1985 when respondent received his audiogram and became aware of his hearing loss. Accordingly, the ALJ identified the national average weekly wage in September 1985 as the relevant average weekly wage. At that point, however, the ALJ departed from the third system; instead of applying the formula in § 8(c)(23) applicable to claims for latent occupational diseases, he turned to the first system, the schedule in § 8(c)(13), to calculate respondent's weekly benefit. Respondent's benefits were thus limited to a precise number of weeks, as opposed to continuing throughout the duration of his disability as would be required under § 8(c)(23). Yet, because of the differing formulas used in §§ 8(c)(23) and 8(c)(13), the *amount* of each weekly benefit was higher than it would have been had respondent's benefit been calculated under § 8(c)(23).[11] The Benefits Review Board affirmed on the same rationale.

On appeal, petitioners (the employer and its insurance carrier) agreed with the ALJ and the Board that respondent suffers from a latent occupational disease within the meaning of § 10(i), but argued that the ALJ and the Board erred in

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[10] Title 33 U. S. C. § 908(c)(13)(D) provides:

"The time for filing a notice of injury, under section 912 of this title, or a claim for compensation, under section 913 of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing."

[11] See n. 9, *supra*, and accompanying text.

failing to apply the benefit formula in § 8(c)(23) appropriate to such claims. While petitioners challenged the method of computing the benefit, they did not contest the use of 82.4 percent as the measure of Brown's hearing loss, even though the record contains persuasive evidence that a portion of that loss is attributable to the aging process after his retirement.

The Director of the Department of Labor's Office of Workers' Compensation Programs challenged the ALJ's and the Board's reasoning on different grounds. The error they made, the Director argued, was in looking to the third compensation system at all, for hearing loss is not an occupational disease that "does not immediately result in death or disability." 33 U. S. C. § 910(i). Relying on undisputed scientific evidence, the Director argued that work-related hearing loss, unlike a disease such as asbestosis, *does* cause immediate disability:

> "[D]eafness is an injury that a worker typically suffers *before* retirement. After retirement a worker's workplace-noise-induced deafness will not ordinarily grow worse; if anything it will get better. See R. T. Sataloff & J. Sataloff, *Occupational Hearing Loss* 357 (1987). Moreover, unlike asbestosis, the symptoms of deafness occur simultaneously with the 'disease.' In other words, to say that a worker is '84.4% deaf' is to say that he has lost 84.4% of his hearing. If he does not notice his deafness, and does not file a claim until long after retirement, that fact does not mean he is not deaf; it does not mean he has no deafness symptom; rather, it means he may have grown accustomed to his deafness, which is quite a different matter." 942 F. 2d 811, 816 (CA1 1991) (summarizing Director's argument).

Accepting the Director's undisputed characterization of occupational hearing loss, the Court of Appeals held that respondent's disability was not "due to an occupational disease which does not immediately result in . . . disability," 33

U. S. C. § 910(i), and that therefore his claim did not fall within the third compensation system. "[U]sing ordinary English," the court noted, "one would normally say that deafness is a disease that causes its symptoms, namely loss of hearing, *simultaneously with its occurrence.* One simply cannot say that a person suffering from deafness is not deaf—whether or not he notices how deaf he is." 942 F. 2d, at 817 (emphasis added). Having ruled out application of the third compensation system, the court found that respondent's claim fell squarely within the first system, which draws no distinction between retired and working claimants and expressly provides for compensation for work-related hearing loss. The court thus affirmed the Board's result—application of the benefit calculation formula for scheduled injuries in § 8(c)(13)—but rejected its reliance on the third compensation system for latent occupational diseases.[12]

The Courts of Appeals for the Fifth and Eleventh Circuits have reached the opposite conclusion. While both courts have agreed with the court below in rejecting the Board's "hybrid" approach, they have both held, in contrast to the decision below, that a retiree's claim for occupational hearing loss is "a claim for compensation for . . . disability due to an occupational disease which does not immediately result in . . . disability," 33 U. S. C. § 910(i), and therefore should be compensated under the retiree provisions enacted in 1984. See *Ingalls Shipbuilding* v. *Director, Office of Workers' Compensation Programs,* 898 F. 2d 1088 (CA5 1990); *Alabama Dry Dock and Shipbuilding Corp.* v. *Sowell,* 933 F. 2d

[12] The Board did not *fully* apply the benefit calculation for scheduled injuries. Instead of using the average weekly wage at the time respondent was injured, it used the national average weekly wage in September 1985, the average weekly wage that would be appropriate had respondent in fact suffered from "an occupational disease which does not immediately result in death or disability." 33 U. S. C. § 910(i). See *supra,* at 160. Petitioners did not raise the issue below and the Court of Appeals considered it waived. 942 F. 2d, at 819. We do as well.

1561 (CA11 1991). We granted certiorari to resolve the conflict. 503 U. S. 935 (1992). We now affirm.

III

Petitioners do not dispute the Director's or the lower court's characterization of occupational hearing loss, and we find no basis for doing so ourselves. Once we accept that characterization, it follows that the retiree provisions enacted in 1984—the so-called "third" compensation system—do not apply to claims for occupational hearing loss. Occupational hearing loss, unlike a long-latency disease such as asbestosis, is not an occupational disease that does not "immediately result in . . . disability." 33 U. S. C. § 910(i). Whereas a worker who has been exposed to harmful levels of asbestos suffers no injury until the disease manifests itself years later, a worker who is exposed to excessive noise suffers the injury of loss of hearing, which, as a scheduled injury, is presumptively disabling, simultaneously with that exposure. Because occupational hearing loss *does* result in immediate disability, the plain language of § 10(i) leads to the conclusion that a retiree's claim for occupational hearing loss does not fall within the class of claims covered by the third compensation system.

The Courts of Appeals for the Fifth and Eleventh Circuits recognized the crucial distinction between occupational hearing loss and latent diseases such as asbestosis, but nonetheless concluded that Congress, in enacting the third compensation system, did not intend to distinguish between the different types of occupational diseases suffered by retirees. In particular, these courts were concerned that if a retiree's claim for occupational hearing loss was not deemed to be a claim with respect to "an occupational disease which does not immediately result in . . . disability," then the Act would be silent as to the appropriate "time of injury" for such a claim. That is, if the "time of injury" for a retiree's claim of occupational hearing loss is not "the date on which the em-

ployee or claimant becomes aware, or . . . should have been aware, of the relationship between the employment, the disease, and the death or disability," then when is it?[13] To the Director's response that in the case of occupational hearing loss the time of injury is the date on which the disabling condition is complete, that is, the date of last exposure to the workplace noise, both courts found that the "date of last exposure" rule had been rejected by other courts and by Congress and therefore should not be resurrected absent some indication of congressional intent to do so. *Ingalls*, 898 F. 2d, at 1093–1094; *Sowell*, 933 F. 2d, at 1566–1567.

We do not find the reasoning of these courts persuasive for two reasons. First, the statute provides that the retiree provisions apply not to every occupational disease, but just to an occupational disease "*which does not immediately result in . . . disability.*" 33 U. S. C. § 910(i) (emphasis added). Asbestosis is such a disease; hearing loss is not. In ignoring the fact that occupational hearing loss *does* immediately result in disability, the Courts of Appeals for the Fifth and Eleventh Circuits have essentially read that key phrase out of the statute. Congress certainly could have enacted a compensation system that treated retirees differently from current workers in *all* cases, regardless of the nature of the particular occupational disease from which they suffered. As we read the statute, however, that is not the path Congress took.

Second, while it is true that prior to the 1984 amendments some courts had rejected fixing the time of injury, and thus the applicable average weekly wage, as the date of last exposure to the harmful substance, those cases involved long-latency diseases such as asbestosis. See, *e. g.*, *Todd Ship-*

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[13] As explained above, the average weekly wage used to calculate benefits under the Act is the wage that the claimant was receiving at the time of injury. Thus, in order to calculate benefits under the Act, one must be able to identify the appropriate time of injury.

yards Corp. v. *Black*, 717 F. 2d 1280 (CA9 1983). In such cases, using the date of last exposure as the relevant time of injury was deemed inappropriate because, according to ordinary understanding, a worker is not injured at that time; the injury arises years later when the disease manifests itself. *Id.*, at 1290 ("The average person . . . would not consider himself 'injured' merely because the [asbestos] fibers were embedded in his lung"). For the reasons explained above, the same cannot be said about occupational hearing loss. The injury, loss of hearing, occurs simultaneously with the exposure to excessive noise. Moreover, the injury is complete when the exposure ceases. Under those circumstances, we think it quite proper to say that the date of last exposure—the date upon which the injury is complete—is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss.

Nor are we persuaded by petitioners' arguments as to why retiree claims for occupational hearing loss should be compensated pursuant to the third compensation system. Petitioners correctly point out that even though the portion of a retiree's hearing loss that is attributable to his occupation may remain constant after retirement, the aging process may cause it to worsen during retirement. In our view, however, this is a matter that is relevant to the computation of the amount of the benefit—a matter that is not in dispute in this case[14]—rather than to the retiree's eligibility for a scheduled benefit. To the extent there is any unfairness in the statutory scheme in that employers may be liable for hearing loss attributable to aging, employers can protect themselves by providing their employees with an audiogram at the time of retirement and thereby freezing the amount of compensable hearing loss attributable to the claimant's employment.

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[14] See *supra*, at 161.

Petitioners also point out, again correctly, that during debate on the 1984 amendments a Senator made a passing reference to the *Redick* case and suggested that the House and Senate conferees disagreed with the Board's decision in that case. 130 Cong. Rec. 26300 (1984) (statement of Sen. Hatch). Because that was a hearing loss case, they infer that the retiree provisions of the amendment should be construed to apply to such cases. In addition to the fact that the conclusion does not necessarily follow from the premise, we reject the argument for two reasons, each of which is sufficient. First, when carefully read, we find the text of the statute unambiguous on the point at issue; accordingly, we give no weight to a single reference by a single Senator during floor debate in the Senate. Second, as part of the 1984 amendments, Congress amended § 8(c)(13) to preserve the timeliness of hearing loss claims filed more than a year after the employee's last exposure.[15] It accomplished that purpose not by postponing the time of injury until the date of awareness, but, on the contrary, by providing that the "time for filing a . . . claim for compensation . . . shall not begin to run in connection with any claim for loss of hearing under this section . . . until the employee has received an audiogram . . . ." 33 U. S. C. § 908(c)(13)(D). Thus, Congress responded to its concern about latent diseases that are not scheduled and cause no loss of earnings by enacting the interrelated provisions constituting the "third" compensation system, whereas it responded to a concern about hearing loss claims by amending § 8(c)(13).

IV

For the reasons given, we hold, as did the court below, that claims for hearing loss, whether filed by current workers or retirees, are claims for a scheduled injury and must be

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[15] See n. 10, *supra*.

compensated pursuant to § 8(c)(13) of the LHWCA, not § 8(c)(23).[16]

The judgment of the Court of Appeals, accordingly, is affirmed.

It is so ordered.

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[16] In so holding, we reject respondent employee's arguments in support of the Board's hybrid approach. There is simply no basis in the statute for combining the compensation provisions applicable for retirees suffering from latent occupational diseases with those governing claimants with scheduled injuries. We note that even the Board has now receded from that interpretation of the Act. See *Harms* v. *Stevedoring Services of America*, 25 BRBS 375, 382 (1992) ("Where claimant is a retiree and Section 10(i) applies, the plain language of the statute renders the provisions of Section[s] 8(c)(1)–(22), including Section 8(c)(13), inapplicable").

Syllabus

COMMISSIONER OF INTERNAL REVENUE *v.* SOLIMAN

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

No. 91–998. Argued October 5, 1992—Decided January 12, 1993

During the 1983 tax year, respondent Soliman, an anesthesiologist, spent 30 to 35 hours per week administering anesthesia and postoperative care in three hospitals, none of which provided him with an office. He also spent two to three hours per day in a room in his home that he used exclusively as an office, where he did not meet patients but did perform a variety of tasks related to his medical practice. His claimed federal income tax deduction for the portion of his household expenses attributable to the home office was disallowed by petitioner Commissioner, who determined that the office was not Soliman's "principal place of business" under 26 U. S. C. § 280A(c)(1)(A). The Tax Court disagreed and allowed the deduction. In affirming, the Court of Appeals adopted the test used in the Tax Court, under which a home office may qualify as the "principal place of business" if (1) the office is essential to the taxpayer's business; (2) the taxpayer spends a substantial amount of time there; and (3) there is no other location available for performance of the business' office functions.

Held: Soliman was not entitled to a deduction for home office expenses. Pp. 172–179.

(a) The test used by the Court of Appeals is rejected because it fails to undertake a comparative analysis of the taxpayer's various business locations. This Court looks to words' "ordinary, everyday senses" in interpreting a revenue statute's meaning. *E. g.*, *Malat* v. *Riddell*, 383 U. S. 569, 571. Section 280A(c)(1)(A) refers to the "principal place of business," and both the commonsense and dictionary meanings of "principal" demonstrate that this constitutes the most important or significant place for the business, as determined through a comparison of all of the places where business is transacted. Contrary to the Court of Appeals' suggestion, the statute does not allow for a deduction whenever a home office may be characterized as legitimate. Pp. 172–174.

(b) Although no one test is always determinative and each case turns upon its particular facts, there are two primary considerations in deciding whether a home office is the principal place of business. First, the relative importance of the functions performed at each business location must be analyzed. This requires, as a preliminary step, an objective

Syllabus

description of the particular characteristics of the business in question. If the nature of that business requires the taxpayer to meet or confer with a client or patient or to deliver goods or services to a customer, the place where that contact occurs, though not conclusive, must be given great weight. Moreover, if the nature of the business requires that its services are rendered or its goods are delivered at a facility with unique or special characteristics, this is a further and weighty consideration. Contrary to the Court of Appeals' ruling, the essentiality of the functions performed at home, while relevant, is not controlling, whereas the availability of alternative office space is irrelevant. Second—and particularly if the foregoing analysis yields no definitive answer—the decisionmaker should compare the amount of time spent at the home with the time spent in each of the other places where the business is transacted. If the comparative analysis required by the statute reveals that there is no principal place of business, the courts and the Commissioner should not strain to conclude that a home office qualifies by default. Pp. 174–178.

(c) Application of these principles demonstrates that Soliman's home office was not his principal place of business. His home office activities, from an objective standpoint, must be regarded as less important to his business than the tasks he performed at the hospitals. The actual treatment of patients at these facilities having special characteristics was the essence of the professional service he provided and was therefore the most significant event in the professional transaction. Moreover, the hours he spent in the home office, when compared to the time he spent at the hospitals, are insufficient to render the home office the principal place of business in light of all of the circumstances of this case. Pp. 178–179.

935 F. 2d 52, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 179. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post,* p. 180. STEVENS, J., filed a dissenting opinion, *post,* p. 184.

Kent L. Jones argued the cause for petitioner. With him on the briefs were *Solicitor General Starr*, *Acting Assistant Attorney General Bruton*, *Deputy Solicitor General Wallace*, *Richard Farber*, and *Teresa E. McLaughlin.*

David M. Sokolow argued the cause and filed a brief for respondent.

JUSTICE KENNEDY delivered the opinion of the Court.

We address in this decision the appropriate standard for determining whether an office in the taxpayer's home qualifies as his "principal place of business" under 26 U. S. C. § 280A(c)(1)(A). Because the standard followed by the Court of Appeals for the Fourth Circuit failed to undertake a comparative analysis of the various business locations of the taxpayer in deciding whether the home office was the principal place of business, we reverse.

I

Respondent Nader E. Soliman, an anesthesiologist, practiced his profession in Maryland and Virginia during 1983, the tax year in question. Soliman spent 30 to 35 hours per week with patients, dividing that time among three hospitals. About 80 percent of the hospital time was spent at Suburban Hospital in Bethesda, Maryland. At the hospitals, Soliman administered the anesthesia, cared for patients after surgery, and treated patients for pain. None of the three hospitals provided him with an office.

Soliman lived in a condominium in McLean, Virginia. His residence had a spare bedroom which he used exclusively as an office. Although he did not meet patients in the home office, Soliman spent two to three hours per day there on a variety of tasks such as contacting patients, surgeons, and hospitals by telephone; maintaining billing records and patient logs; preparing for treatments and presentations; satisfying continuing medical education requirements; and reading medical journals and books.

On his 1983 federal income tax return, Soliman claimed deductions for the portion of condominium fees, utilities, and depreciation attributable to the home office. Upon audit, the Commissioner disallowed those deductions based upon his determination that the home office was not Soliman's principal place of business. Soliman filed a petition in the Tax Court seeking review of the resulting tax deficiency.

The Tax Court, with six of its judges dissenting, ruled that Soliman's home office was his principal place of business. 94 T. C. 20 (1990). After noting that in its earlier decisions it identified the place where services are performed and income is generated in order to determine the principal place of business, the so-called "focal point test," the Tax Court abandoned that test, citing criticism by two Courts of Appeals. *Id.*, at 24–25 (noting *Meiers* v. *Commissioner*, 782 F. 2d 75 (CA7 1986); *Weissman* v. *Commissioner*, 751 F. 2d 512 (CA2 1984); and *Drucker* v. *Commissioner*, 715 F. 2d 67 (CA2 1983)). Under a new test, later summarized and adopted by the Court of Appeals, the Tax Court allowed the deduction. The dissenting opinions criticized the majority for failing to undertake a comparative analysis of Soliman's places of business to establish which one was the principal place. 94 T. C., at 33, 35.

The Commissioner appealed to the Court of Appeals for the Fourth Circuit. A divided panel of that court affirmed. 935 F. 2d 52 (1991). It adopted the test used in the Tax Court and explained it as follows:

> "[The] test . . . provides that where management or administrative activities are essential to the taxpayer's trade or business and the only available office space is in the taxpayer's home, the 'home office' can be his 'principal place of business,' with the existence of the following factors weighing heavily in favor of a finding that the taxpayer's 'home office' is his 'principal place of business:' (1) the office in the home is essential to the taxpayer's business; (2) he spends a substantial amount of time there; and (3) there is no other location available for performance of the office functions of the business." *Id.*, at 54.

For further support, the Court of Appeals relied upon a proposed IRS regulation related to home office deductions for salespersons. Under the proposed regulation, salespersons

would be entitled to home office deductions "even though they spend most of their time on the road as long as they spend 'a substantial amount of time on paperwork at home.'" *Ibid.* (quoting proposed Treas. Reg. § 1.280A–2(b)(3), 45 Fed. Reg. 52399 (1980), as amended, 48 Fed. Reg. 33320 (1983)). While recognizing that the proposed regulation was not binding on it, the court suggested that it "evince[d] a policy to allow 'home office' deductions for taxpayers who maintain 'legitimate' home offices, even if the taxpayer does not spend a majority of his time in the office." 935 F. 2d, at 55. The court concluded that the Tax Court's test would lead to identification of the "true headquarters of the business." *Ibid.* Like the dissenters in the Tax Court, Judge Phillips in his dissent argued that the plain language of § 280A(c)(1)(A) requires a comparative analysis of the places of business to assess which one is principal, an analysis that was not undertaken by the majority. *Ibid.*

Although other Courts of Appeals have criticized the focal point test, their approaches for determining the principal place of business differ in significant ways from the approach employed by the Court of Appeals in this case, see *Pomarantz* v. *Commissioner*, 867 F. 2d 495, 497 (CA9 1988); *Meiers* v. *Commissioner*, *supra*, at 79; *Weissman* v. *Commissioner*, *supra*, at 514–516; *Drucker* v. *Commissioner*, *supra*, at 69. Those other courts undertake a comparative analysis of the functions performed at each location. We granted certiorari to resolve the conflict. 503 U. S. 935 (1992).

II

A

Section 162(a) of the Internal Revenue Code allows a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business." 26 U. S. C. § 162(a). That provision is qualified, however, by various limitations, including one that prohibits otherwise allowable deductions "with respect to the use of a dwelling

unit which is used by the taxpayer . . . as a residence." § 280A(a). Taxpayers may nonetheless deduct expenses attributable to the business use of their homes if they qualify for one or more of the statute's exceptions to this disallowance. The exception at issue in this case is contained in § 280A(c)(1):

> "Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—
>
> "(A) [as] *the principal place of business for any trade or business of the taxpayer[,]*
>
> "(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or
>
> "(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.
>
> "In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer." (Emphasis added.)

Congress adopted § 280A as part of the Tax Reform Act of 1976. Pub. L. 94–455, 94th Cong., 2d Sess. Before its adoption, expenses attributable to the business use of a residence were deductible whenever they were "appropriate and helpful" to the taxpayer's business. See, *e. g.*, *Newi* v. *Commissioner*, 432 F. 2d 998 (CA2 1970). This generous standard allowed many taxpayers to treat what otherwise would have been nondeductible living and family expenses as business expenses, even though the limited business tasks performed in the dwelling resulted in few, if any, additional or incremental costs to the taxpayer. H. R. Rep. No. 94–658, p. 160 (1975); S. Rep. No. 94–938, p. 147 (1976). Comparing the newly enacted section with the previous one, the apparent purpose of § 280A is to provide a narrower scope for the

deduction, but Congress has provided no definition of "principal place of business."

In interpreting the meaning of the words in a revenue Act, we look to the "'ordinary, everyday senses'" of the words. *Malat* v. *Riddell*, 383 U. S. 569, 571 (1966) *(per curiam)* (quoting *Crane* v. *Commissioner*, 331 U. S. 1, 6 (1947)). In deciding whether a location is "the principal place of business," the commonsense meaning of "principal" suggests that a comparison of locations must be undertaken. This view is confirmed by the definition of "principal," which means "most important, consequential, or influential." Webster's Third New International Dictionary 1802 (1971). Courts cannot assess whether any one business location is the "most important, consequential, or influential" one without comparing it to all the other places where business is transacted.

Contrary to the Court of Appeals' suggestion, the statute does not allow for a deduction whenever a home office may be characterized as legitimate. See 935 F. 2d, at 55. That approach is not far removed from the "appropriate and helpful" test that led to the adoption of § 280A. Under the Court of Appeals' test, a home office may qualify as the principal place of business whenever the office is essential to the taxpayer's business, no alternative office space is available, and the taxpayer spends a substantial amount of time there. See *id.*, at 54. This approach ignores the question whether the home office is more significant in the taxpayer's business than every other place of business. The statute does not refer to the "principal office" of the business. If it had used that phrase, the taxpayer's deduction claim would turn on other considerations. The statute refers instead to the "principal place" of business. It follows that the most important or significant place for the business must be determined.

B

In determining the proper test for deciding whether a home office is the principal place of business, we cannot de-

velop an objective formula that yields a clear answer in every case. The inquiry is more subtle, with the ultimate determination of the principal place of business being dependent upon the particular facts of each case. There are, however, two primary considerations in deciding whether a home office is a taxpayer's principal place of business: the relative importance of the activities performed at each business location and the time spent at each place.

Analysis of the relative importance of the functions performed at each business location depends upon an objective description of the business in question. This preliminary step is undertaken so that the decisionmaker can evaluate the activities conducted at the various business locations in light of the particular characteristics of the specific business or trade at issue. Although variations are inevitable in case-by-case determinations, any particular business is likely to have a pattern in which certain activities are of most significance. If the nature of the trade or profession requires the taxpayer to meet or confer with a client or patient or to deliver goods or services to a customer, the place where that contact occurs is often an important indicator of the principal place of business. A business location where these contacts occur has sometimes been called the "focal point" of the business and has been previously regarded by the Tax Court as conclusive in ascertaining the principal place of business. See 94 T. C., at 24–25. We think that phrase has a metaphorical quality that can be misleading, and, as we have said, no one test is determinative in every case. We decide, however, that the point where goods and services are delivered must be given great weight in determining the place where the most important functions are performed.

Section 280A itself recognizes that the home office gives rise to a deduction whenever the office is regularly and exclusively used "by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business." § 280A(c)(1)(B). In that circumstance,

the deduction is allowed whether or not the home office is also the principal place of business. The taxpayer argues that because the point of delivery of goods and services is addressed in this provision, it follows that the availability of the principal place of business exception does not depend in any way upon whether the home office is the point of delivery. We agree with the ultimate conclusion that visits by patients, clients, and customers are not a required characteristic of a principal place of business, but we disagree with the implication that whether those visits occur is irrelevant. That Congress allowed the deduction where those visits occur in the normal course even when some other location is the principal place of business indicates their importance in determining the nature and functions of any enterprise. Though not conclusive, the point where services are rendered or goods delivered is a principal consideration in most cases. If the nature of the business requires that its services are rendered or its goods are delivered at a facility with unique or special characteristics, this is a further and weighty consideration in finding that it is the delivery point or facility, not the taxpayer's residence, where the most important functions of the business are undertaken.

Unlike the Court of Appeals, we do not regard the necessity of the functions performed at home as having much weight in determining entitlement to the deduction. In many instances, planning and initial preparation for performing a service or delivering goods are essential to the ultimate performance of the service or delivery of the goods, just as accounting and billing are often essential at the final stages of the process. But that is simply because, in integrated transactions, all steps are essential. Whether the functions performed in the home office are necessary to the business is relevant to the determination of whether a home office is the principal place of business in a particular case, but it is not controlling. Essentiality, then, is but part of the assess-

ment of the relative importance of the functions performed at each of the competing locations.

We reject the Court of Appeals' reliance on the availability of alternative office space as an additional consideration in determining a taxpayer's principal place of business. While that factor may be relevant in deciding whether an employee taxpayer's use of a home office is "for the convenience of his employer," § 280(c)(1), it has no bearing on the inquiry whether a home office is the principal place of business. The requirements of particular trades or professions may preclude some taxpayers from using a home office as the principal place of business. But any taxpayer's home office that meets the criteria here set forth is the principal place of business regardless of whether a different office exists or might have been established elsewhere.

In addition to measuring the relative importance of the activities undertaken at each business location, the decisionmaker should also compare the amount of time spent at home with the time spent at other places where business activities occur. This factor assumes particular significance when comparison of the importance of the functions performed at various places yields no definitive answer to the principal place of business inquiry. This may be the case when a taxpayer performs income-generating tasks at both his home office and some other location.

The comparative analysis of business locations required by the statute may not result in every case in the specification of which location is the principal place of business; the only question that must be answered is whether the home office so qualifies. There may be cases when there is no principal place of business, and the courts and the Commissioner should not strain to conclude that a home office qualifies for the deduction simply because no other location seems to be the principal place. The taxpayer's house does not become a principal place of business by default.

Justice Cardozo's observation that in difficult questions of deductibility "[l]ife in all its fullness must supply the answer to the riddle," *Welch* v. *Helvering*, 290 U. S. 111, 115 (1933), must not deter us from deciding upon some rules for the fair and consistent interpretation of a statute that speaks in the most general of terms. Yet we accept his implicit assertion that there are limits to the guidance from appellate courts in these cases. The consequent necessity to give considerable deference to the trier of fact is but the law's recognition that the statute is designed to accommodate myriad and ever-changing forms of business enterprise.

III

Under the principles we have discussed, the taxpayer was not entitled to a deduction for home office expenses. The practice of anesthesiology requires the medical doctor to treat patients under conditions demanding immediate, personal observation. So exacting were these requirements that all of respondent's patients were treated at hospitals, facilities with special characteristics designed to accommodate the demands of the profession. The actual treatment was the essence of the professional service. We can assume that careful planning and study were required in advance of performing the treatment, and all acknowledge that this was done in the home office. But the actual treatment was the most significant event in the professional transaction. The home office activities, from an objective standpoint, must be regarded as less important to the business of the taxpayer than the tasks he performed at the hospital.

A comparison of the time spent by the taxpayer further supports a determination that the home office was not the principal place of business. The 10 to 15 hours per week spent in the home office measured against the 30 to 35 hours per week at the three hospitals are insufficient to render the home office the principal place of business in light of all of

the circumstances of this case. That the office may have been essential is not controlling.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion but add these few words primarily to fortify my own conclusions:

This case concerns § 280A(c)(1)(A) of the Internal Revenue Code, 26 U. S. C. § 280A(c)(1)(A). A deduction from gross income is a matter of grace, not of right, *Commissioner* v. *Sullivan*, 356 U. S. 27, 28 (1958); *Commissioner* v. *Tellier*, 383 U. S. 687, 693 (1966), so that our analysis starts with an assumption of nondeductibility. Precise exceptions to this are then provided by the statute.

Although he is a licensed physician who treats patients, respondent finds no solace in subsection (B) of § 280A(c)(1). Subsection (B) requires that the place of business be "used by patients . . . in meeting or dealing with the taxpayer," a factual element that is lacking here unless the physician-taxpayer's papers, records, and telephone calls are to be deemed to personify the patient in the office. Such an interpretation, in my view, would stretch the statute too far.

Respondent is thus confined to subsection (A), which uses the vital words "principal place of business." As JUSTICE KENNEDY points out, this phrase invites and compels a comparison, an exercise the Court of Appeals did not undertake. When comparison is made, this taxpayer loses his quest for a deduction. The bulk of his professional time and performance is spent in the hospitals. By any measure, the greater part of his remuneration is generated and earned there. His home office well may be important, even essential, to his professional activity, but it is not "principal." The fact that it is his primary, perhaps his only, office is not in itself enough.

This result is compelled by the language of the statute. Congress must change the statute's words if a different result is desired as a matter of tax policy.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Today the Court announces that there is "no one test," *ante*, at 175, to determine whether a home office constitutes a taxpayer's "principal place of business" within the meaning of 26 U. S. C. §280A(c)(1)(A), and concludes that whether a taxpayer will be entitled to a home office deduction will be "dependent upon the particular facts of each case," *ante*, at 175. The Court sets out two "primary considerations," *ibid.*, to guide the analysis—the importance of the functions performed at each business location and the time spent at each location. I think this inquiry, "subtle" though it may be, *ibid.*, will unnecessarily require the lower courts to conduct full-blown evidentiary hearings each time the Commissioner challenges a deduction under §280A(c)(1)(A). Moreover, as structured, the Court's "test" fails to provide clear guidance as to how the two-factor inquiry should proceed. Specifically, it is unclear whether the time element and importance-of-the-functions element are of equal significance. I write separately because I believe that in the overwhelming majority of cases (including the one before us), the "focal point" test—which emphasizes the place where the taxpayer renders the services for which he is paid or sells his goods—provides a clear, reliable method for determining whether a taxpayer's home office is his "principal place of business." I would employ the totality-of-the-circumstances inquiry, guided by the two factors discussed by the Court, only in the small minority of cases where the home office is one of several locations where goods or services are delivered, and thus also one of the multiple locations where income is generated.

I certainly agree that the word "principal" connotes "'most important,'" *ante*, at 174, but I do not agree that this definition requires courts in every case to resort to a totality-of-the-circumstances analysis when determining whether the taxpayer is entitled to a home office deduction under §280A(c)(1)(A). Rather, I think it is logical to assume that the single location where the taxpayer's business income is generated—*i. e.*, where he provides goods or services to clients or customers—will be his principal place of business. This focal point standard was first enunciated in *Baie* v. *Commissioner*, 74 T. C. 105 (1980),[1] and has been consistently applied by the Tax Court (until the present case) in determining whether a taxpayer's home office is his principal place of business.

Indeed, if one were to glance quickly through the Court's opinion today, one might think the Court was in fact adopting the focal point test. At two points in its opinion the Court hails the usefulness of the focal point inquiry: It states that the place where goods are delivered or services rendered must be given "great weight in determining the place where the most important functions are performed," *ante*, at 175, and that "the point where services are rendered or goods delivered is a principal consideration in most cases," *ante*, at 176. In fact, the Court's discomfort with the focal point test seems to rest on two fallacies—or perhaps one fallacy and a terminological obstinacy. First, the Court rejects the focal point test because "no one test is determinative in every case."

[1] In *Baie*, the taxpayer operated a hot dog stand. She prepared all the food in the kitchen at her home and transferred it daily to the stand for sale. She also used another room in her house exclusively for the stand's bookkeeping. The Tax Court denied the taxpayer a home office deduction under §280A(c)(1)(A), recognizing that although "preliminary preparation may have been beneficial to the efficient operation of petitioner's business, both the final packaging for consumption and sales occurred on the premises of the [hot dog stand]." 74 T. C., at 109–110. Thus, the court concluded that the hot dog stand was the "focal point of [the taxpayer's] activities." *Id.*, at 109.

Ante, at 175. But the focal point test, as I interpret it, is *not* always determinative: Where it provides no single principal place of business, the "totality of the circumstances" approach is invoked. Second, the Court rejects the focal point test because its name has a "metaphorical quality that can be misleading." *Ibid.* But rechristening it the "place of sale or service test"—or whatever label the Court would find less confusing—is surely a simple matter.

The Commissioner's quarrel with the focal point test is that "it ignores management functions." Tr. of Oral Arg. 24.[2] To illustrate this point, the Commissioner at oral argument presented the example of a sole proprietor who runs a rental car company with many licensees around the country, and who manages the licensees from his home, advising them on how to operate the businesses. Yet the Commissioner's unease is unfounded, since the focal point inquiry easily resolves this example. The taxpayer derives his income from *managing* his licensees, and he performs those services at his home office. Thus, his home office would be his "principal place of business" under §280A(c)(1)(A). On the other hand, if the taxpayer owned several car dealerships and used his home office to do the dealership's bookkeeping, he would not be entitled to deduct the expenses of his home office even if he spent the majority of his time there. This is because the focal points of that business would be the dealerships where the cars are sold—*i. e.*, where the taxpayer sells the goods for which he is paid.

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[2] The Commissioner's position is not entirely consistent. At one point in his brief he seems to advocate adopting the focal point test: "Since a 'business' under the Code must be an activity designed to produce income, the principal place of a 'business' should ordinarily refer to the principal place where income is earned. The 'focal point' test previously applied by the Tax Court properly encapsulates that principle." Brief for Petitioner 26, n. 17. At other points in his brief, however, the Commissioner appears to advocate the very test adopted by the Court. See *id.*, at 18, 23–24.

There will, of course, be the extraordinary cases where the focal point inquiry will provide no answer. One example is the sole proprietor who buys jewelry wholesale through a home office, and sells it both at various craft shows and through mail orders out of his home office. In that case, the focal point test would yield more than one location where income is generated, including the home. Where the taxpayer's business involves multiple points of sale, a court would need to fall back on a totality-of-the-circumstances analysis. That inquiry would be rationally guided, of course, by the two factors set out in the Court's opinion: an analysis of the relative importance of the functions performed at each business location and the time spent at each. The error of the Tax Court's original construction of the focal point test was the implicit view that the test allowed no escape valve. Clearly it must. Nevertheless, since in the vast majority of cases the focal point inquiry will provide a quick, objective, and reliable method of ascertaining a taxpayer's "principal place of business," I think the Court errs today in not unequivocally adopting it.

The difficulty with the Court's two-part test can be seen in its application to the facts of this case. It is uncontested that the taxpayer is paid to provide one service—anesthesiology. It is also undisputed that he performs this service at several different hospitals. At this juncture, under the focal point test, a lower court's inquiry would be complete: On these facts, the taxpayer's home office would not qualify for the § 280A(c)(1)(A) deduction. Yet under the Court's formulation, the lower court's inquiry has only just begun. It would need to hear evidence regarding the types of business activities performed at the home office and the relative amount of time the taxpayer spends there. It just so happens that in this case the taxpayer spent 30 to 35 hours per week at the hospitals where he worked. But how would a court answer the § 280A(c)(1)(A) question under the standard announced today if the facts were altered slightly, so that

the taxpayer spent 30 to 35 hours at his home office and only 10 hours actually performing the service of anesthesiology at the various hospitals? Which factor would take precedence? The importance of the activities undertaken at the home compared to those at the hospitals? The number of hours spent at each location? I am at a loss, and I am afraid the taxpayer, his attorney, and a lower court would be as well.

We granted certiorari to clarify a recurring question of tax law that has been the subject of considerable disagreement. Unfortunately, this issue is no clearer today than it was before we granted certiorari. I therefore concur only in the Court's judgment.

JUSTICE STEVENS, dissenting.

Respondent is self-employed. He pays the ordinary and necessary expenses associated with the operation of his office in McLean, Virginia; it is the only place of business that he maintains. In my opinion the Tax Court and the Court of Appeals correctly concluded that respondent is entitled to an income tax deduction for the cost of maintaining that office. This Court's contrary conclusion misreads the term "principal place of business" in § 280A of the Internal Revenue Code,[1] deviates from Congress' purpose in enacting that pro-

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[1] Section 601 of the Tax Reform Act of 1976, 90 Stat. 1520, 1569–1572, as amended, 26 U. S. C. § 280A, provides, in part:

"(a) General Rule

"Except as otherwise provided in this section, in the case of a taxpayer who is an individual . . . , no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

. . . . . .

"(c) Exceptions for certain business or rental use; limitation on deductions for such use

"(1) Certain business use

"Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—

vision, and unfairly denies an intended benefit to the growing number of self-employed taxpayers who manage their businesses from a home office.

I

This case involves an exception to the general rule that "ordinary and necessary" business expenses are deductible.[2] There is no dispute that the expenses at issue fall within that general category. They are questioned only because the office is located within respondent's residence. If that office were located in any other place—even in someone *else's* home—the general rule would apply, and respondent could have deducted the costs of its maintenance. If he had been prosperous enough to own a house and property on which a separate structure was located, he could have maintained that structure as an office and deducted the costs. If his business were so structured that he met regularly with clients and patients at his home office, he also could have deducted the costs. And if he spent two or three hours a day in his home office and a similar amount of time in each of three or four separate hospitals he might also be able to deduct the costs; at least the Court's opinion does not begin to explain how the deduction of the costs in that case might

"(A) [as] the principal place of business for any trade or business of the taxpayer[,]

"(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or

"(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

"In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer."

[2] Section 162(a) of the Code provides, in part:

"There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property . . . ."

be denied, except to insist that "[t]he taxpayer's house does not become a principal place of business by default." See *ante*, at 177. Because respondent chose to preserve one room in his home as an office, however, and because his business was so arranged that he spent most (though by no means all) of his working hours at one hospital, the Court holds that the costs of its maintenance may not be deducted.

Deductions, as JUSTICE BLACKMUN notes, *ante*, at 179, are a matter of legislative grace, but that is no reason to read into them unnecessary restrictions that result in the unequal treatment of similarly situated taxpayers. Such unfair treatment could, of course, have been required by the Tax Code, if Congress had wanted, for example, to discourage parents from working at home; to promote the construction of office buildings or separate structures on residential real estate; or to encourage hospitals to keep doctors near their patients. We have no reason to think that Congress intended any such results.[3] It is clear, in fact, that Congress intended only to prevent deductions for home offices that were not genuinely necessary business expenses. Because the tests Congress imposed to prevent abuse do not require us to deny respondent's claimed deductions for his home office, I would affirm the decision of the Court of Appeals.

II

Before 1976, home office deductions were allowed whenever the use of the office was "appropriate and helpful" to the taxpayer.[4] That generous standard was subject to both abuse and criticism; it allowed homeowners to take deductions for personal expenses that would have been incurred even if no office were maintained at home and its vagueness

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[3] As the Tax Court wrote, "Section 280A was not enacted to compel a taxpayer to rent office space rather than work out of his own home." 94 T. C. 20, 29 (1990).

[4] See *Commissioner* v. *Tellier*, 383 U. S. 687, 689 (1966); *Newi* v. *Commissioner*, 432 F. 2d 998 (CA2 1970).

made it difficult to administer.[5] It was particularly favorable to employees who worked at home on evenings and weekends even though they had adequate office facilities at their employer's place of business.[6] In response to these criticisms, Congress enacted § 280A to prohibit deductions for business uses of dwelling units unless certain specific conditions are satisfied.

The most stringent conditions in § 280A, enacted to prevent abuse by those who wanted to deduct purely residential costs, apply to deductions claimed by employees.[7] This provision alone prevents improper deduction for any *second* of-

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[5] See, *e. g.*, S. Rep. No. 94–938, pt. 1, p. 147 (1976):

"With respect to the 'appropriate and helpful' standard employed in the court decisions, the determination of the allowance of a deduction for these expenses is necessarily a subjective determination. In the absence of definitive controlling standards, the 'appropriate and helpful' test increases the inherent administrative problems because both business and personal uses of the residence are involved and substantiation of the time used for each of these activities is clearly a subjective determination. In many cases the application of the appropriate and helpful test would appear to result in treating personal living, and family expenses which are directly attributable to the home (and therefore not deductible) as ordinary and necessary business expenses, even though those expenses did not result in additional or incremental costs incurred as a result of the business use of the home."

[6] Congress may have been particularly offended by the home office deductions claimed by employees of the Internal Revenue Service. See *Bodzin* v. *Commissioner*, 60 T. C. 820 (1973), rev'd, 509 F. 2d 679 (CA4), cert. denied, 423 U. S. 825 (1975); *Sharon* v. *Commissioner*, 66 T. C. 515 (1976), aff'd, 591 F. 2d 1273 (CA9 1978), cert. denied, 442 U. S. 941 (1979). The Senate Report also used a common example of potential abuse:

"For example, if a university professor, who is provided an office by his employer, uses a den or some other room in his residence for the purpose of grading papers, preparing examinations or preparing classroom notes, an allocable portion of certain expenses . . . were incurred in order to perform these activities." S. Rep. No. 94–938, pt. 1, at 147.

[7] In addition to the conditions applicable to self-employed taxpayers, an employee must demonstrate that his office is maintained "for the convenience of his employer." See 26 U. S. C. § 280A(c)(1).

fice located at home and used merely for the taxpayer's convenience. It thus responds to the major concern of the Commissioner identified in the legislative history.[8]

Self-employed persons, such as respondent, must satisfy three conditions. Each is more strict and more definite than the "appropriate and helpful" standard that Congress rejected.

First, a portion of the dwelling unit must be used "exclusively" for a business purpose. The Commissioner's proposed regulations construe the exclusive use requirement with appropriate strictness. They state that a portion of a dwelling unit is used exclusively "only if there is no use of that portion of the unit at any time during the taxable year other than for business purposes."[9] This requirement is itself sufficient to eliminate many of the abuses associated with the pre-1976 "appropriate and helpful" standard; the taxpayer must now entirely devote a separately identifiable space, usually an entire room, to his business.[10] Respondent strictly satisfied that condition in this case.

Second, the portion of the dwelling unit that is set aside for exclusive business use must be so "used on a regular basis." Although this condition is not as specific as the "exclusive use" requirement, it obviously requires that the use

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[8] "With respect to the maintenance of an office in an employee's home, the position of the Internal Revenue Service is that the office must be required by the employer as a condition of employment and regularly used for the performance of the employee's duties. . . .

"Certain courts have held that a more liberal standard than that applied by the Internal Revenue Service is appropriate. Under these decisions, the expenses attributable to an office maintained in an employee's residence are deductible if the maintenance of the office is 'appropriate and helpful' to the employee's business." S. Rep. No. 94–938, pt. 1, at 144–145 (citations omitted); see also n. 6, *supra.*

[9] Proposed Treas. Reg. § 1.280A–2(g)(1), 45 Fed. Reg. 52399, 52404 (1980), as amended, 48 Fed. Reg. 33320, 33324 (1983).

[10] The Court fails to appreciate the significance of the exclusive use requirement when it criticizes the Court of Appeals' holding as "not far removed" from the test that led to the adoption of § 280A. See *ante,* at 174.

be substantial. In this case respondent spent two or three hours a day in his office communicating with surgeons, patients, insurance companies, and hospitals; doing his bookkeeping; handling his correspondence; and preparing himself for his professional assignments at other locations. He received business calls on his office answering machine and, of course, his business mail was addressed to that office. Again, because these uses occurred on a regular basis, it is undisputed that respondent has satisfied this requirement.

Third, the use of the space must be as a "place of business" satisfying one of three alternative requirements. It must be used as:

> "(A) the principal place of business for any trade or business of the taxpayer[,]
>
> "(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, *or*
>
> "(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business." 26 U. S. C. § 280A(c)(1) (emphasis added).

Subsection (C) is obviously irrelevant in this case, as is subsection (B). The office itself is not a separate structure, and respondent does not meet his patients there. Each of the three alternatives, however, has individual significance, and it is clear that subsection (A) was included to describe places where the taxpayer does *not* normally meet with patients, clients, or customers. Nevertheless, the Court suggests that Soliman's *failure* to meet patients in his home office supports its holding.[11] It does not. By injecting a requirement of subsection (B) into subsection (A) the Court renders the

[11] See *ante,* at 176: "That Congress allowed the deduction where those visits occur in the normal course even when some other location is the principal place of business indicates their importance in determining the nature and functions of any enterprise."

latter alternative entirely superfluous. Moreover, it sets the three subsections on unequal footing: Subsection (A) will rarely apply unless it includes subsection (B); subsection (B) is preeminent; and the logic of the Court's analysis would allow a future court to discover that, under subsection (C), a separate structure is not truly "separate" (as a principal place of business is not truly "principal") unless it is *also* the site of meetings with patients or clients.

The meaning of "principal place of business" may not be absolutely clear, but it is absolutely clear that a taxpayer may deduct costs associated with his home office if it is his principal place of business *or* if it is a place of business used by patients in the normal course of his business *or* if it is located in a separate structure used in connection with his business. A home office could, of course, satisfy all three requirements, but to suggest that it need always satisfy subsection (B), or even that whether it satisfies (B) has anything to do with whether it satisfies (A), encourages the misapplication of a relatively simple provision of the Revenue Code.

By conflating subsections (A) and (B) the Court makes the same mistake the Courts of Appeals refused to make when they rejected the Tax Court's "focal point" test, which proved both unworkable and unfaithful to the statute.[12] In this case the Tax Court itself rejected that test because it "merges the 'principal place of business' exception with the 'meeting clients' exception . . . from section 280A." 94 T. C. 20, 25 (1990). The Court today steps blithely into territory in which several Courts of Appeals and the Tax Court, whose experience in these matters is much greater than ours, have

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[12] See *Meiers* v. *Commissioner*, 782 F. 2d 75 (CA7 1986), rev'g 53 TCM 2475 (1984), ¶ 84,607 P–H Memo TC; *Weissman* v. *Commissioner*, 751 F. 2d 512 (CA2 1984); *Drucker* v. *Commissioner*, 715 F. 2d 67 (CA2 1983), rev'g 79 T. C. 605 (1982); see also Note, Home Office Deductions: Deserving Taxpayers Finally Get a Break, 45 Tax Law. 247, 251–254 (1991); Sommer, I. R. C. Section 280A: The Status of the Home Office Deduction—A Call to Congress to Get the House in Order, 16 So. Ill. U. L. J. 501, 519–522 (1992).

learned not to tread; in so doing it reads into the statute a limitation Congress never meant to impose.

The principal office of a self-employed person's business would seem to me to be the most typical example of a "principal place of business." It is, indeed, the precise example used in the Commissioner's proposed regulations of deductible home offices for taxpayers like respondent, who have no office space at the "focal point" of their work.[13] Moreover, it is a mistake to focus attention entirely on the adjective "principal" and to overlook the significance of the term "place of business." When the term "principal place of business" is used in other statutes that establish the jurisdiction or venue in which a corporate defendant may be sued, it commonly identifies the headquarters of the business.[14] The only place where a business is managed is fairly described as its "principal" place of business.[15]

The Court suggests that Congress would have used the term "'principal office'" if it had intended to describe a home office like respondent's. *Ante*, at 174. It is probable, however, that Congress did not select the narrower term because it did not want to exclude some business uses of dwelling units that should qualify for the deduction even though they

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[13] The proposed regulations stated that "if an outside salesperson has no office space except at home and spends a substantial amount of time on paperwork at home, the office in the home may qualify as the salesperson's principal place of business." 45 Fed. Reg. 52403 (1980), 48 Fed. Reg. 33324 (1983).

[14] For example, in *Texas* v. *New Jersey*, 379 U. S. 674, 680 (1965), we used the terms "main office" and "principal place of business" interchangeably. I recognize that there is disagreement over the proper interpretation of the term in 28 U. S. C. § 1332(c)(1), with some courts regarding the home office as the principal place of business and others regarding it as the place where the principal operations of the corporation are conducted. Under either view, however, the relevant place is one where the corporation owns or rents the premises; it is not a place owned by a third party for whom corporate representatives perform services.

[15] Among the definitions of the word "principal" is "chief" or "most influential." Webster's Third New International Dictionary (1966).

are not offices. Because some examples that do not constitute offices come readily to mind—an artist's studio, or a cabinetmaker's basement—it is easy to understand why Congress did not limit this category that narrowly.

The test applied by the Tax Court, and adopted by the Court of Appeals, is both true to the statute and practically incapable of abuse. In addition to the requirements of exclusive and regular use, those courts would require that the taxpayer's home office be essential to his business and be the only office space available to him. 935 F. 2d 52, 54 (CA4 1991); 94 T. C., at 29. Respondent's home office is the only place where he can perform the administrative functions essential to his business. Because he is not employed by the hospitals where he works, and because none of those hospitals offers him an office, respondent must pay all the costs necessary for him to have any office at all. In my judgment, a principal place of business is a place maintained *by* or (in the rare case) *for* the business. As I would construe the statute in this context, respondent's office is not just the "principal" place of his trade or business; it is the *only* place of *his* trade or business.[16]

Nothing in the history of this statute provides an acceptable explanation for disallowing a deduction for the expense of maintaining an office that is used exclusively for business purposes, that is regularly so used, and that is the only place available to the taxpayer for the management of his business. A self-employed person's efficient use of his or her resources should be encouraged by sound tax policy. When it is clear that no risk of the kind of abuse that led to the enactment of §280A is present, and when the taxpayer has satisfied a reasonable, even a strict, construction of each of the condi-

[16] If his tax form asked for the address of his principal place of business, respondent would certainly have given his office address (he did, of course, give that address as his business address on the relevant tax forms). It borders on the absurd to suggest that he should have identified a place over which he has no control or dominion as *his* place.

tions set forth in § 280A, a deduction should be allowed for the ordinary cost of maintaining his home office.

In my judgment, the Court's contrary conclusion in this case will breed uncertainty in the law,[17] frustrate a primary purpose of the statute, and unfairly penalize deserving taxpayers. Given the growing importance of home offices, the result is most unfortunate.

I respectfully dissent.

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[17] Most, if not all, of the uncertainty in cases debating the relative merits of the "focal point" test and the "facts and circumstances" test, as well as the uncertainty that today's opinion is sure to generate, would be eliminated by defining the term "place of business" to encompass only property that is owned or leased by the taxpayer or his employer.

Syllabus

ROWLAND, FORMER DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADVISORY COUNCIL

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

No. 91–1188. Argued October 6, 1992—Decided January 12, 1993

In a suit filed in the District Court against petitioner state correctional officers, respondent, a representative association of inmates in a California prison, sought leave to proceed *in forma pauperis* under 28 U. S. C. § 1915(a), which permits litigation without prepayment of fees, costs, or security "by a person who makes affidavit that he is unable to pay." The court denied the motion for an inadequate showing of indigency. In reversing that decision, the Court of Appeals noted that a "person" who may be authorized to proceed *in forma pauperis* under § 1915(a) may be an "association" under the Dictionary Act, 1 U. S. C. § 1, which in relevant part provides that "in determining the meaning of any Act of Congress, unless the context indicates otherwise" "'person'" includes "associations" and other artificial entities such as corporations and societies.

Held: Only a natural person may qualify for treatment *in forma pauperis* under § 1915. Pp. 199–212.

(a) "Context," as used in 1 U. S. C. § 1, means the text of the Act of Congress surrounding the word at issue or the texts of other related congressional Acts, and this is simply an instance of the word's ordinary meaning. Had Congress intended to point to a broader definition that would include things such as legislative history, it would have been natural to use a more spacious phrase. In contrast to the narrow meaning of "context," "indication" bespeaks something more than an express contrary definition, addressing the situation where Congress provides no particular definition, but the definition in § 1 seems not to fit. Pp. 199–201.

(b) Four contextual features indicate that "person" in 28 U. S. C. § 1915(a) refers only to individuals. First, the permissive language used in § 1915(d)—that a "court *may* request an attorney to represent any such person unable to employ counsel" (emphasis added)—suggests that Congress assumed that courts would sometimes leave the "person" to conduct litigation on his own behalf, and, thus, also assumed that the "person" has the legal capacity to petition the court for appointment of

counsel while unrepresented and the capacity to litigate *pro se* should the petition be denied. These assumptions suggest in turn that Congress was thinking in terms of natural persons, because the law permits corporations, see, *e. g.*, *Osborn* v. *President of Bank of United States*, 9 Wheat. 738, 829, and other artificial entities, see, *e. g.*, *Eagle Associates* v. *Bank of Montreal*, 926 F. 2d 1305, to appear in federal courts only through licensed counsel. Second, § 1915(d) describes the affidavit required by § 1915(a) as an allegation of "poverty," which is a human condition that does not apply to an artificial entity. Third, because artificial entities cannot take oaths, they cannot make the affidavits required in § 1915(a). It would be difficult to accept an affidavit on the entity's behalf from an officer or agent in this statutory context, since it would be hard to determine an affiant's authorization to act on behalf of an amorphous legal creature such as respondent; since the term "he" used in § 1915(a)'s requirement that the affidavit must state the "affiant's belief that *he* is entitled to redress" (emphasis added) naturally refers to the "affiant" as the person seeking *in forma pauperis* status; and since the affidavit cannot serve its deterrent function fully when applied to artificial entities, which may not be imprisoned for perjurious statements. Fourth, § 1915 gives no hint of how to resolve the issues raised by applying an "inability to pay" standard to artificial entities. Although the "necessities of life" criterion cannot apply, no alternative criterion can be discerned in § 1915's language and there is no obvious analogy, including insolvency, to that criterion in the organizational context. Nor does § 1915 guide courts in determining when to "pierce the veil" of the entity, which would be necessary to avoid abuse. Respondent's argument that there is no need to formulate comprehensive rules in the instant case because it would be eligible under any set of rules is rejected, since recognizing the possibility of organizational eligibility would force this Court to delve into difficult policy and administration issues without any guidance from § 1915. Pp. 201–209.

(c) Section 1915 manifests no single purpose that would be substantially frustrated by limiting the statutory reach to natural persons. *Wilson* v. *Omaha Tribe*, 442 U. S. 653, 666; *United States* v. *A & P Trucking Co.*, 358 U. S. 121, distinguished. In addition, denying respondent *in forma pauperis* status would not place an unconstitutional burden on its members' First Amendment rights to associate by requiring them to demonstrate their indigency status, since a court could hardly ignore the assets of an association's members in making an indigency determination for the organization. Pp. 209–212.

939 F. 2d 854, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. KENNEDY, J., filed a dissenting opinion, *post,* p. 212. THOMAS, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and KENNEDY, JJ., joined, *post,* p. 212.

James Ching, Supervising Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Daniel E. Lungren,* Attorney General, *George Williamson,* Chief Assistant Attorney General, *Kenneth C. Young,* Assistant Attorney General, and *Joan W. Cavanagh,* Supervising Deputy Attorney General.

Charles D. Weisselberg argued the cause for respondent. With him on the briefs were *Michael J. Brennan, Dennis E. Curtis,* and *Denise Meyer.*

JUSTICE SOUTER delivered the opinion of the Court.

Title 28 U. S. C. § 1915, providing for appearances *in forma pauperis,* authorizes federal courts to favor any "person" meeting its criteria with a series of benefits including dispensation from the obligation to prepay fees, costs, or security for bringing, defending, or appealing a lawsuit. Here, we are asked to decide whether the term "person" as so used applies to the artificial entities listed in the definition of that term contained in 1 U. S. C. § 1. We hold that it does not, so that only a natural person may qualify for treatment *in forma pauperis* under § 1915.

I

Respondent California Men's Colony, Unit II Men's Advisory Council (Council), is a representative association of prison inmates organized at the behest of one of the petitioners, the Warden of the Colony, to advise him of complaints and recommendations from the inmates, and to communicate his administrative decisions back to them. The general prison population elects the Council's members.

In a complaint filed in the District Court in 1989, the Council charged the petitioners, state correctional officers, with

violations of the Eighth and Fourteenth Amendments in discontinuing their practice of providing free tobacco to indigent inmates. The Council sought leave to proceed *in forma pauperis* under 28 U. S. C. § 1915(a), claiming by affidavit of the Council's chairman that the warden forbad the Council to hold funds of its own. The District Court denied the motion for an inadequate showing of indigency, though it responded to the Council's motion for reconsideration with a suggestion of willingness to consider an amended application containing "details of each individual's indigency."

On appeal, the Council was allowed to proceed *in forma pauperis* to enable the court to reach the very question "whether an organization, such as [the Council], may proceed in forma pauperis pursuant to 28 U. S. C. § 1915(a)." No. 90–55600 (CA9, July 20, 1990). The court requested that a lawyer represent the Council pursuant to 28 U. S. C. § 1915(d).[1]

The Court of Appeals reversed, 939 F. 2d 854 (CA9 1991), noting that a "person" who may be authorized by a federal court to proceed *in forma pauperis* under § 1915(a) may be an "association" under a definition provided in 1 U. S. C. § 1. The Council being an "association," it was a "person" within the meaning of § 1915(a), and could proceed *in forma pauperis* upon the requisite proof of its indigency. The court found it adequate proof that prison regulations prohibited the Council from maintaining a bank account, and, apparently, from owning any other asset.

We granted certiorari, 503 U. S. 905 (1992), to resolve a conflict between that decision and the holding in *FDM Manufacturing Co.* v. *Scottsdale Ins. Co.*, 855 F. 2d 213 (CA5 1988) *(per curiam)* ("person," within the meaning of § 1915(a), includes only natural persons). We reverse.

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[1] For a description of § 1915(d) and its relationship to § 1915(a), see *infra*, at 198, 203.

II

A

Both § 1915(a), which the Council invoked in seeking to be excused from prepaying filing fees, and § 1915(d) employ the word "person" in controlling access to four benefits provided by § 1915 and a related statute. First, a qualifying person may "commenc[e], prosecut[e] or defen[d] . . . any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor." 28 U. S. C. § 1915(a). Second, a court may in certain cases direct the United States to pay the person's expenses in printing the record on appeal and preparing a transcript of proceedings before a United States magistrate. § 1915(b). Third, if the person is unable to employ counsel, "[t]he court may request an attorney to represent [him]." § 1915(d). And, fourth, in an appeal, the United States will pay for a transcript of proceedings below "if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question)." 28 U. S. C. § 753(f); see *ibid.* (detailing slightly different criteria for habeas proceedings).

"Persons" were not always so entitled, for the benefits of § 1915 were once available only to "citizens," a term held, in the only two cases on the issue, to exclude corporations. See *Atlantic S. S. Corp.* v. *Kelley*, 79 F. 2d 339, 340 (CA5 1935) (construing the predecessor to § 1915); *Quittner* v. *Motion Picture Producers & Distributors of America, Inc.*, 70 F. 2d 331, 332 (CA2 1934) (same). In 1959, however, Congress passed a one-sentence provision that "section 1915(a) of title 28, United States Code, is amended by deleting the word 'citizen' and inserting in place thereof the word 'person.'" Pub. L. 86–320, 73 Stat. 590. For this amendment, the sole reason cited in the legislative history was to extend the statutory benefits to aliens.[2]

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[2] The House Report noted three reasons for "extend[ing] the same privilege of proceedings in forma pauperis as is now afforded citizens." H. R. Rep. No. 650, 86th Cong., 1st Sess., 2 (1959). First, "[i]t is the opinion of

B

The relevant portion of the Dictionary Act, 1 U. S. C. § 1, provides (as it did in 1959) that

> "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> . . . . .
>
> "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

See 1 U. S. C. § 1 (1958 ed.). "Context" here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts, and this is simply an instance of the word's ordinary meaning: "[t]he part or parts of a discourse preceding or following a 'text' or passage or a word, or so intimately associated with it as to throw light upon its meaning." Webster's New International Dictionary 576 (2d ed. 1942). While "context" can carry a secondary meaning of "[a]ssociated surroundings, whether material or mental," *ibid.*, we doubt that the broader sense applies here. The Dictionary Act uses "context" to give an

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the Department of Justice that this proposal would be consonant with the ideas or policies of the United States." *Ibid.* Second, "the Judicial Conference of the United States in recommending this legislation pointed out that the distinction between citizens and aliens as contained in existing law may be unconstitutional." *Ibid.* Third, "it may also be in violation of various treaties entered into by the United States with foreign countries which guarantees *[sic]* to their citizens access of the courts of the United States on the same terms as American citizens." *Ibid.;* see also S. Rep. No. 947, 86th Cong., 1st Sess., 2 (1959) (quoting the portion of the House Report containing these three reasons). None of these reasons supports extension of § 1915 benefits to artificial entities, or suggests that anyone involved with drafting or evaluating this legislation was thinking of such an extension. The House debate on the bill contains a discussion about the deportation of alien criminals, a matter which obviously concerns only natural persons, see 105 Cong. Rec. 13714 (1959) (remarks of Rep. Gross and Rep. Rogers); otherwise, the congressional debates provide no additional information, see *ibid.; id.*, at 18909 (remarks of Sen. Eastland).

instruction about how to "determin[e] the meaning of a[n] Act of Congress," a purpose suggesting the primary sense. If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like "evidence of congressional intent," in place of "context."

If "context" thus has a narrow compass, the "indication" contemplated by 1 U. S. C. § 1 has a broader one. The Dictionary Act's very reference to contextual "indication" bespeaks something more than an express contrary definition, and courts would hardly need direction where Congress had thought to include an express, specialized definition for the purpose of a particular Act; ordinary rules of statutory construction would prefer the specific definition over the Dictionary Act's general one. Where a court needs help is in the awkward case where Congress provides no particular definition, but the definition in 1 U. S. C. § 1 seems not to fit. There it is that the qualification "unless the context indicates otherwise" has a real job to do, in excusing the court from forcing a square peg into a round hole.

The point at which the indication of particular meaning becomes insistent enough to excuse the poor fit is of course a matter of judgment, but one can say that "indicates" certainly imposes less of a burden than, say, "requires" or "necessitates." One can also say that this exception from the general rule would be superfluous if the context "indicate[d] otherwise" only when use of the general definition would be incongruous enough to invoke the common mandate of statutory construction to avoid absurd results.[3] See, *e. g.*, *Mc-*

[3] This rule has been applied throughout the history of 1 U. S. C. § 1 and its predecessors. See, *e. g.*, *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 510–511 (1989); *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631, 643 (1978); *Commissioner* v. *Brown*, 380 U. S. 563, 571 (1965); *Helvering* v. *Hammel*, 311 U. S. 504, 510–511 (1941); *United States* v. *Katz*, 271 U. S. 354, 357 (1926); *Caminetti* v. *United States*, 242 U. S. 470, 490 (1917); *United States* v. *Kirby*, 7 Wall. 482, 486–487 (1869).

Nary v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction"). In fine, a contrary "indication" may raise a specter short of inanity, and with something less than syllogistic force.

III

Four contextual features indicate that "person" in § 1915(a) refers only to individuals, the first being the provision of § 1915(d) that "[t]he court *may* request an attorney to represent any such person unable to employ counsel." (Emphasis added.) This permissive language suggests that Congress assumed the court would in many cases not "request" counsel, see *Mallard* v. *United States District Court, Southern District of Iowa*, 490 U. S. 296, 301–302 (1989) (holding that § 1915(d) does not authorize mandatory appointments of counsel), leaving the "person" proceeding *in forma pauperis* to conduct litigation on his own behalf.[4] Underlying this congressional assumption are probably two others: that the "person" in question enjoys the legal capacity to appear before a court for the purpose of seeking such benefits as appointment of counsel without being represented by professional counsel beforehand, and likewise enjoys the capacity to litigate without counsel if the court chooses to provide none, in the exercise of the discretion apparently conferred by the permissive language. The state of the law, however, leaves it highly unlikely that Congress would have made either assumption about an artificial entity like an association, and thus just as unlikely that "person" in § 1915 was meant to cover more than individuals. It has been the law

[4] This assumption reflects a reality well known within the legal community. See, *e. g.*, Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 617 (1979) (study of 42 U. S. C. § 1983 cases filed by prisoners in five districts found that the "overwhelming majority" of cases were filed *in forma pauperis*, and that "almost all" the cases were filed *pro se*).

for the better part of two centuries, for example, that a corporation may appear in the federal courts only through licensed counsel. *Osborn* v. *President of Bank of United States*, 9 Wheat. 738, 829 (1824); see *Turner* v. *American Bar Assn.*, 407 F. Supp. 451, 476 (ND Tex. 1975) (citing the "long line of cases" from 1824 to the present holding that a corporation may only be represented by licensed counsel), affirmance order *sub nom. Taylor* v. *Montgomery*, 539 F. 2d 715 (CA7 1976), and aff'd *sub nom. Pilla* v. *American Bar Assn.*, 542 F. 2d 56 (CA8 1976). As the courts have recognized, the rationale for that rule applies equally to all artificial entities. Thus, save in a few aberrant cases,[5] the lower courts have uniformly held that 28 U. S. C. § 1654, providing that "parties may plead and conduct their own cases personally or by counsel," does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney. See, *e. g.*, *Eagle Associates* v. *Bank of Montreal*, 926 F. 2d 1305 (CA2 1991) (partnership); *Taylor* v. *Knapp*, 871 F. 2d 803, 806 (CA9) (nonprofit corporation formed by prison inmates), cert. denied, 493 U. S. 868 (1989); *Jones* v. *Niagara Frontier Transportation Authority*, 722 F. 2d 20, 22 (CA2 1983) (corporation); *Richdel, Inc.* v. *Sunspool Corp.*, 699 F. 2d 1366 (CA Fed. 1983) *(per curiam)* (corporation); *Southwest Express Co.* v. *ICC*, 670 F. 2d 53, 55

[5] Two federal cases cited by respondent are the only two, of which we are aware, to hold that artificial entities may be represented by persons who are not licensed attorneys: *United States* v. *Reeves*, 431 F. 2d 1187 (CA9 1970) *(per curiam)* (partner can appear on behalf of a partnership), and *In re Holliday's Tax Services, Inc.*, 417 F. Supp. 182 (EDNY 1976) (sole shareholder can appear for a closely held corporation), affirmance order *sub nom. Holliday's Tax Services, Inc.* v. *Hauptman*, 614 F. 2d 1287 (CA2 1979). These cases neither follow federal precedent, nor have themselves been followed. See, *e. g.*, *Eagle Associates* v. *Bank of Montreal*, 926 F. 2d 1305, 1309–1310 (CA2 1991) (criticizing and refusing to follow *Reeves*); *Jones* v. *Niagara Frontier Transportation Authority*, 722 F. 2d 20, 22, n. 3 (CA2 1983) (distinguishing and narrowing *Holliday's Tax Services*).

(CA5 1982) *(per curiam)* (corporation); *In re Victor Publishers, Inc.*, 545 F. 2d 285, 286 (CA1 1976) *(per curiam)* (corporation); *Strong Delivery Ministry Assn.* v. *Board of Appeals of Cook County*, 543 F. 2d 32, 34 (CA7 1976) *(per curiam)* (corporation); *United States* v. *9.19 Acres of Land*, 416 F. 2d 1244, 1245 (CA6 1969) *(per curiam)* (corporation); *Simbraw, Inc.* v. *United States*, 367 F. 2d 373, 374 (CA3 1966) *(per curiam)* (corporation). Viewing § 1915(d) against the background of this tradition, its assumption that litigants proceeding *in forma pauperis* may represent themselves tells us that Congress was thinking in terms of "persons" who could petition courts themselves and appear *pro se*, that is, of natural persons only.

The second revealing feature of § 1915(d) is its description of the affidavit required by § 1915(a) as an "allegation of poverty." Poverty, in its primary sense, is a human condition, to be "[w]anting in material riches or goods; lacking in the comforts of life; needy," Webster's New International Dictionary 1919 (2d ed. 1942), and it was in just such distinctly human terms that this Court had established the standard of eligibility long before Congress considered extending *in forma pauperis* treatment from "citizens" to "persons." As we first said in 1948, "[w]e think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'" *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331, 339. But artificial entities do not fit this description. Whatever the state of its treasury, an association or corporation cannot be said to "lac[k] the comforts of life," any more than one can sensibly ask whether it can provide itself, let alone its dependents, with life's "necessities." Artificial entities may be insolvent, but they are not well spoken of as "poor." So eccentric a description is not lightly to be imputed to Congress.

The third clue is much like the second. Section 1915(a) authorizes the courts to allow litigation without the prepayment of fees, costs, or security "by a person who makes affidavit that he is unable to pay such costs or give security therefor," and requires that the affidavit also "state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." Because artificial entities cannot take oaths, they cannot make affidavits. See, *e. g.*, *In re Empire Refining Co.*, 1 F. Supp. 548, 549 (SD Cal. 1932) ("It is, of course, conceded that a corporation cannot make an affidavit in its corporate name. It is an inanimate thing incapable of voicing an oath"); *Moya Enterprises, Inc.* v. *Harry Anderson Trucking, Inc.*, 162 Ga. App. 39, 290 S. E. 2d 145 (1982); *Strand Restaurant Co.* v. *Parks Engineering Co.*, 91 A. 2d 711 (D. C. 1952); 9A T. Bjur & C. Slezak, Fletcher Cyclopedia of Law of Private Corporations § 4629 (Perm. ed. 1992) ("A document purporting to be the affidavit of a corporation is void, since a corporation cannot make a sworn statement") (footnote omitted).

Of course, it is true that courts have often coupled this recognition of a corporation's incapacity to make an affidavit with a willingness to accept the affidavit of a corporate officer or agent on its behalf even when the applicable statute makes no express provision for doing so. See, *e. g.*, *In re Ben Weiss Co.*, 271 F. 2d 234 (CA7 1959). Any such accommodation would raise at least three difficulties in this particular statutory context, however. There would be, first, the frequent problem of establishing an affiant's authorization. The artificial entities covered by "person" in the Dictionary Act include not only corporations, for which lines of authority are well established by state law, but also amorphous legal creatures like the unincorporated association before us here. A court may not as readily determine whether a member of such an association, even a member styled as "president" or "chairman" or whatnot, has any business purporting to bind it by affidavit. Next, some weight should probably be given

to the requirement of § 1915(a) that the affidavit state the "affiant's belief that *he* is entitled to redress" (emphasis added). "He," read naturally, refers to the "affiant" as the person claiming *in forma pauperis* entitlement. If the affiant is an agent making an affidavit on behalf of an artificial entity, however, it would wrench the rules of grammar to read "he" as referring to the entity.[6] Finally, and most significantly, the affidavit requirement cannot serve its deterrent function fully when applied to artificial entities. We said in *Adkins* that "[o]ne who makes this affidavit exposes himself 'to the pains of perjury in a case of bad faith.' . . . This constitutes a sanction important in protection of the public against a false or fraudulent invocation of the statute's benefits." *Adkins*, *supra*, at 338 (quoting *Pothier* v. *Rodman*, 261 U. S. 307, 309 (1923)). The perjury sanction thus serves to protect the public against misuse of public funds by a litigant with adequate funds of his own, and against the filing of "frivolous or malicious" lawsuits funded from the public purse. 28 U. S. C. §§ 1915(a), 1915(d). The force of these sanctions pales when applied to artificial persons, however. Natural persons can be imprisoned for perjury, but artificial entities can only be fined. And while a monetary sanction may mean something to an entity whose agent has lied about its ability to pay costs or security, it has no teeth

[6] On occasion, when a party is a minor or incompetent, or fails to cooperate with appointed counsel, or is for some other reason unable to file a timely affidavit, we will accept an affidavit from a guardian ad litem or an attorney. By accepting such an affidavit, we bend the requirement that the affiant state that "he" is indigent and that "he" believes "he" is entitled to relief. In such a case, however, it is clear that the party himself is a "person" within the meaning of § 1915. The only question is whether Congress intended to deny § 1915 benefits to such a person who for some reason peculiar to him is disabled from filing an affidavit. It is quite a different question whether Congress intended to extend § 1915 to entities that, by their nature, could never meet the statute's requirements.

when the lie goes only to belief of entitlement to redress.[7] So far, then, as Congress assumed that the threat of a perjury conviction could deter an impoverished "person" from filing a frivolous or malicious lawsuit, it probably assumed that the person was an individual.

The fourth clue to congressional understanding is the failure of § 1915 even to hint at a resolution of the issues raised by applying an "inability to pay" standard to artificial entities. It is true, of course, that because artificial entities have no use for food or the other "necessities of life," Congress could not have intended the courts to apply the traditional "inability to pay" criterion to such entities. Yet no alternative standard can be discerned in the language of § 1915, and we can find no obvious analogy to the "necessities of life" in the organizational context. Although the most promising candidate might seem to be commercial-law "insolvency," commercial law actually knows a number of different insolvency concepts. See, *e. g.*, 11 U. S. C. § 101(32) (1988 ed., Supp. III) (defining insolvency as used in the Federal Bankruptcy Code); *Kreps* v. *Commissioner*, 351 F. 2d 1, 9 (CA2 1965) (discussing a type of "equity" insolvency); Uniform Commercial Code § 1–201(23), 1 U. L. A. 65 (1989) (combining three different types of insolvency). In any event, since it is common knowledge that corporations can often perfectly well pay court costs and retain paid legal counsel in spite of being temporarily "insolvent" under any or all of these definitions, it is far from clear that corporate insolvency is appropriately analogous to individual indigency.[8]

[7] We are not ignoring the fact that the individual who made the affidavit as the entity's agent could still be prosecuted for perjury. However, this is clearly a "second-best" solution; the law does not normally presume that corporate misbehavior can adequately be deterred solely by threatening to punish individual agents.

[8] One plausible motive for Congress to include artificial entities within the meaning of "person" in § 1915 would be to aid organizations in bankruptcy proceedings. But the fact that the law has been settled for almost 20 years that § 1915(a) does not apply to bankruptcy proceedings, see

If § 1915 yields no "inability to pay" standard applicable to artificial entities, neither does it guide courts in determining when to "pierce the veil" of the entity, that is, when to look beyond the entity to its owners or members in determining ability to pay. Because courts would necessarily have to do just this to avoid abuse, congressional silence on the subject indicates that Congress simply was not thinking in terms of granting *in forma pauperis* status to artificial entities.

While the courts that have nonetheless held § 1915 applicable to artificial entities have devised their own tests for telling when to "pierce the veil" for a look at individual members or owners, none of their tests is based on the language of § 1915 or on any assumption implicit in it. For example, the leading opinion on the subject, a dissent from a majority opinion that never reached the issue, appears to frame the issue as whether the individual shareholders of a corporation "have adopted the corporate form as a subterfuge to avoid the payment of court costs." *S. O. U. P., Inc.* v. *FTC*, 146 U. S. App. D. C. 66, 68, 449 F. 2d 1142, 1144 (1971) (Bazelon, C. J., dissenting) (footnote omitted). While this test certainly emphasizes why we could hardly hold that a court should never look beyond the organization to its individuals, it stems from nothing in § 1915 suggesting that entities claiming to have slight assets should be treated *in forma pauperis* unless they were organized to cheat the courts.[9]

United States v. *Kras*, 409 U. S. 434, 440 (1973), would seem to foreclose speculation about such a motive.

[9] Two other decisions allowing organizations to proceed *in forma pauperis* appear to place importance on the "public interest" character of the organization or the litigation in question. See *River Valley, Inc.* v. *Dubuque County*, 63 F. R. D. 123, 125 (ND Iowa 1974) (noting that the corporation at issue "was formed . . . for the purpose of assisting the poor and underprivileged"); *Harlem River Consumers Cooperative, Inc.* v. *Associated Grocers of Harlem, Inc.*, 71 F. R. D. 93, 96 (SDNY 1976) (finding that "[t]here is a public interest quality to the stated goal for which the corporation was formed" and that "there is a public interest aspect to any private suit for treble damages under the antitrust laws"). The language of

The Council makes the argument, apparently accepted by the court below, that however difficult it might be to formulate comprehensive rules for determining organizational eligibility to file *in forma pauperis*, we are excused from facing the difficulty in this case, because the Council's circumstances would make it eligible under any set of rules. But we cannot construe the statute very well by sidestepping the implications of deciding one way or the other, and even if we did assume that some narrow band of eligibility escaped the contrary contextual indicators, it is not wholly clear that the Council could conclusively establish *in forma pauperis* entitlement. It is not obvious, for example, why the Council's inability to maintain a separate bank account should conclusively establish pauper status under § 1915, any more than a bank account with a one-cent balance would be conclusive. Account or no account, the Council, like thousands of other associations, appears to have no source of revenue but the donations of its members. If members with funds must donate to pay court fees, why should it make a conclusive legal difference whether they are able to donate indirectly through an intermediate bank account, or through one member who transmits donations by making a payment to the federal court when the Council files a complaint?[10] Thus, recognizing the possibility of an organizational *in forma pauperis* status even in the supposedly "extreme" case of the Council would force us to delve into the difficult issues of policy and administration without any guidance from § 1915. This con-

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§ 1915, however, suggests indifference to the character of the litigant and to the type of litigation pursued, so long as it is not frivolous or malicious.

[10] There is no evidence in the record suggesting that an inmate would not be allowed to donate part of the Council's court costs directly from his personal account to the court, or that the inmates could not coordinate such donations.

text of congressional silence on these issues indicates the natural character of a § 1915 "person."[11]

IV

We do not forget our cases holding that the broad definition of "person" in 1 U. S. C. § 1 applies in spite of incongruities as strong, or stronger, than those produced by the four contextual features we have noted in § 1915. But in each of these cases, some other aspect of statutory context independently indicated the broad reading. In *Wilson* v. *Omaha Tribe*, 442 U. S. 653, 666 (1979), for example, we held that a statutory burden of proof on a "white person" involved in a property dispute with an Indian applied to the artificial "persons" listed in the Dictionary Act as well as to individuals. Because a wholly legal creature has no color, and belongs to no race, the use of the adjective "white" to describe a "person" is one of the strongest contextual indicators imaginable that "person" covers only individuals, and if there had been no more to the context at issue in *Omaha Tribe*, we would have to concede that our decision in that case is inconsistent with our conclusion here. But *Omaha Tribe* involved another important, countervailing contextual indication. The larger context of the whole statute and other laws

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[11] JUSTICE THOMAS asserts that, by drawing an inference from congressional silence, we "depar[t] from the definition of 'context' set out at the beginning of [our] opinion." *Post*, at 221, n. 9. It is not from some dimensionless void, however, that we draw our conclusion. Rather, it is from a pointed silence in the face of obvious problems created by applying to artificial entities the *text* of § 1915, in this case the requirement that the person seeking *in forma pauperis* status be "unable to pay" costs, fees, and security. As the dissent is willing to affirm without itself addressing these problems, it is apparently confident that workable, uncontroversial solutions can be drawn from the statute. Yet the rule it would affirm (that an unincorporated association is "unable to pay" whenever its "chairman" says that it cannot maintain a bank account in its own name) does not inspire confidence.

related to it revealed that the statute's purpose was "to protect Indians from claims made by non-Indian squatters on their lands," *id.*, at 665, and we recognized that construing the disability placed on "white persons" by the statute as extending only to individuals would virtually frustrate this purpose. "[I]n terms of the protective purposes of the Acts of which [the property dispute provision was] a part, it would make little sense to construe the provision so that individuals, otherwise subject to its burdens, could escape its reach merely by incorporating and carrying on business as usual." *Id.*, at 666.

United States v. *A & P Trucking Co.*, 358 U. S. 121 (1958), is a comparable case, involving two criminal statutes applying to truckers, one of which expressly applied to partnerships, and the other of which imposed criminal liability on "whoever" knowingly violated Interstate Commerce Commission regulations on transporting dangerous articles. The issue was whether partnerships could violate the statutes. We noted that the statutes required proof of knowing violations, and that a partnership at common law was deemed not to be a separate entity for purposes of suit. *Id.*, at 124. Nonetheless, given that "[t]he purpose of both statutes [was] clear: to ensure compliance by motor carriers, among others, with safety and other requirements laid down by the Interstate Commerce Commission in the exercise of its statutory duty to regulate the operations of interstate carriers for hire," *id.*, at 123–124, we concluded that it would make no sense if motor carriers could avoid criminal liability for violating the trucking regulations "merely because of the form under which they were organized to do business," *id.*, at 124 (footnote omitted).

Thus, in both *Omaha Tribe* and *A & P Trucking Co.*, we found that the statutes in question manifested a purpose that would be substantially frustrated if we did not construe the statute to reach artificial entities. Section 1915, however, manifests no such single purpose subject to substantial frus-

tration by limiting the statutory reach to natural persons. Denying artificial entities the benefits of § 1915 will not in any sense render nugatory the benefits that § 1915 still provides to individuals. Thus, *Omaha Tribe* and *A & P Trucking Co.* confirm our focus on context, but turned on contextual indicators not present here.[12]

V

The Council argues that denying it *in forma pauperis* status would place an unconstitutional burden on its members' First Amendment rights to associate, to avoid which we should construe § 1915 broadly. See, *e. g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"). We find no merit in this argument. It is true that to file a suit *in forma pauperis*, not in the Council's name, as such, but under the title "*X, Y, and Z, known as the Council* v. *Rowland*," X, Y, and Z would each need to file an affidavit stating that he met the indigency requirements of § 1915. Nothing, however, in § 1915 suggests that the requirements would be less burdensome if the suit were titled "*The Council* v. *Rowland*"; even if we held that an association could proceed *in forma pauperis*, our prior discussion shows that a court could hardly ignore the assets of the association's members in making the indigency determination. Because the extension of § 1915 to artificial entities need not lighten its practi-

[12] JUSTICE THOMAS suggests that our reference to statutory purpose here is inconsistent with our interpretation of "context" in 1 U. S. C. § 1. *Post*, at 213–214, n. 1. A focus on statutory text, however, does not preclude reasoning from statutory purpose. To the contrary, since "[s]tatutes . . . are not inert exercises in literary composition[, but] instruments of government," *United States* v. *Shirey*, 359 U. S. 255, 260 (1959) (per Frankfurter, J.), a statute's meaning is inextricably intertwined with its purpose, and we will look to statutory text to determine purpose because "the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words," *id.*, at 261.

cal requirements, the limitation of § 1915 to individuals puts no unconstitutional burden on the right to associate in the manner suggested.

VI

The judgment of the Court of Appeals is reversed, and the case is remanded with instructions that the case be remanded to the District Court, where the motion for leave to file *in forma pauperis* must be denied.

So ordered.

JUSTICE KENNEDY, dissenting.

In determining whether the context of a statute indicates an intent to confine a word to a meaning more narrow than the one contained in the Dictionary Act, 1 U. S. C. § 1, it seems to me permissible to ask whether the broad Dictionary Act definition is compatible with a workable construction of the statute. To the extent the Court attempts to uncover significant practical barriers to including artificial entities within 28 U. S. C. § 1915, its analysis is quite appropriate and ought not to be condemned as policymaking. The problem, in my view, is that the Court does not succeed in this attempt. As the dissenting opinion by JUSTICE THOMAS well illustrates, the broad definition of "person," the one the Dictionary Act tells us to prefer, is not inconsistent with a commonsense, workable implementation of § 1915.

With this observation, I join JUSTICE THOMAS' dissenting opinion.

JUSTICE THOMAS, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE KENNEDY join, dissenting.

The parties agree that the interpretive point of departure in deciding whether an association is a "person" for purposes of the *in forma pauperis* statute, 28 U. S. C. § 1915, is the first section of the United States Code. The question presented in this case may thus be formulated as follows: Must the presumption codified in 1 U. S. C. § 1—namely, that "[i]n

determining the meaning of any Act of Congress," the word "person" should be construed to include an association—be given effect in determining the meaning of the *in forma pauperis* statute, or has the presumption been overcome because the context "indicates otherwise"? The answer to that question ultimately turns on the meaning of the phrase "unless the context indicates otherwise." In my view, the Court's holding rests on an impermissibly broad reading of that language. I see no basis for concluding that an association is not entitled to *in forma pauperis* status.

The Court states that the word "context" in 1 U. S. C. § 1 "means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Ante*, at 199. The Court then goes on to say that the word "indicates" has a broader scope than the word "context"; that it "imposes less of a burden than, say, 'requires' or 'necessitates' "; and that "a contrary 'indication' may raise a specter short of inanity, and with something less than syllogistic force." *Ante*, at 200, 201. I share the Court's understanding of the word "context."[1] I do not share the Court's under-

[1] I should note, however, that the majority departs from that understanding in its discussion of *Wilson* v. *Omaha Tribe*, 442 U. S. 653 (1979), which presented the question whether a corporation is a "person" for purposes of a statute apportioning the burden of proof in property disputes between an Indian and a "white person." Instead of relying on the text surrounding the word "person," as it purports to do in this case, the majority defends *Omaha Tribe* on the ground that a narrow construction of "person" would frustrate the "purpose" of the statute at issue in that case. *Ante*, at 210. This is perhaps understandable, since it would be exceedingly difficult to defend *Omaha Tribe* on textual grounds. But if the word "context" in 1 U. S. C. § 1 refers only to the text that surrounds a word, either *Omaha Tribe* was wrongly decided or this case has been wrongly decided. They cannot both be correct. A strong argument can be made that the Court misinterpreted 1 U. S. C. § 1 in *Omaha Tribe*. But if it did not—if it was correct in holding that the statutory term "white person" includes a corporation (because the "context" does not "indicat[e] otherwise")—the conclusion that an association is a "person" for *in forma pauperis* purposes is inescapable. There is no language surrounding the

standing of the word "indicates," however, because its gloss on that word apparently permits (and perhaps even requires) courts to look beyond the words of a statute, and to consider the policy judgments on which those words may or may not be based. (It certainly enables the Court to do so in this case.) I agree that the exception to the rule of construction codified in 1 U. S. C. § 1 is not susceptible of precise definition, and that determining whether "the context indicates otherwise" in any given case is necessarily "a matter of judgment." *Ante,* at 200. Whatever "unless the context indicates otherwise" means, however, it cannot mean "unless there are sound policy reasons for concluding otherwise."

I

The *in forma pauperis* statute authorizes courts to allow "[1] the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who [2] makes affidavit that he is [3] unable to pay such costs or give security therefor." 28 U. S. C. § 1915(a). Section 1915(a) thus contemplates that the "person" who is entitled to the benefits of the provision will have three characteristics: He will have the capacity to sue or be sued, to make an affidavit, and to be unable to pay court costs. An association clearly has the capacity to do each of these things, and that, in my view, should be the end of the matter.

An artificial entity has the capacity to sue or be sued in federal court as long as it has that capacity under state law (and, in some circumstances, even when it does not). See Fed. Rule Civ. Proc. 17(b).[2] An artificial entity can make

word "person" in § 1915 that is even remotely comparable to the word "white," which, as the majority observes, is "one of the strongest contextual indicators imaginable," since a corporation "has no color, and belongs to no race." *Ante,* at 209.

[2] Under Rule 17(b), the capacity of a corporation to sue or be sued is determined by the law under which it was organized, and the capacity of an unincorporated association is determined by the law of the State in

an affidavit through an agent. See, *e. g.*, *Davidson* v. *Jones, Sullivan & Jones*, 196 S. W. 571, 572 (Tex. Civ. App. 1917) (partnership); *Sime* v. *Hunter*, 50 Cal. App. 629, 634, 195 P. 935, 937 (1920) (partnership); *In re McGill's Estate*, 52 Nev. 35, 44, 280 P. 321, 323 (1929) (corporation); *Payne* v. *Civil Service Employees Assn., Inc.*, 27 Misc. 2d 1006, 1006–1007, 218 N. Y. S. 2d 871, 872 (Sup.) (association), aff'd, 15 App. Div. 2d 265, 222 N. Y. S. 2d 725 (1961); *Kepl* v. *Manzanita Corp.*, 246 Ore. 170, 178, 424 P. 2d 674, 678 (1967) (corporation); *Federal Land Bank of St. Paul* v. *Anderson*, 401 N. W. 2d 709, 712 (N. D. 1987) (corporation).[3] And an artificial entity, like any other litigant, can lack the wherewithal to pay costs.

Permitting artificial entities to proceed *in forma pauperis* may be unwise, and it may be an inefficient use of the Government's limited resources, but I see nothing in the text of

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which the district court is located. An unincorporated association that lacks the capacity to sue or be sued under the law of the forum State may still litigate in federal court when the action is brought for the enforcement of a federal right.

[3] Before acknowledging that an agent can make an affidavit on behalf of an artificial entity, the majority pauses to say that such an entity cannot make an affidavit itself. *Ante*, at 204. I suppose this distinction has some metaphysical significance, but I fail to see how it is otherwise relevant, since *any* action an artificial entity takes must be done through an agent. (It is noteworthy that two of the cases cited by the majority for the proposition that an artificial entity cannot make an affidavit recognize that an agent can make an affidavit on an entity's behalf. See *In re Empire Refining Co.*, 1 F. Supp. 548, 549 (SD Cal. 1932) ("On its behalf some representative must speak"); *Strand Restaurant Co.* v. *Parks Engineering Co.*, 91 A. 2d 711, 712 (D. C. 1952).) In any event, there is authority for the view that at least under some circumstances, there is no distinction at all—theoretical or otherwise—between an affidavit made on behalf of an artificial entity and an affidavit of the entity itself. See *Utah Farm Production Credit Assn.* v. *Watts*, 737 P. 2d 154, 157 (Utah 1987) ("Where an affidavit is made by an officer, it is generally considered to be the affidavit of the corporation itself"); *American Soda Fountain Co.* v. *Stolzenbach*, 75 N. J. L. 721, 734, 68 A. 1078, 1083 (1908) ("[W]here it becomes necessary for a corporation . . . to make an affidavit, the affidavit may be made in its behalf by an officer thereof . . . ; . . . such affidavit is, in legal contemplation, the affidavit of the corporation, and not of an agent").

the *in forma pauperis* statute indicating that Congress has chosen to exclude such entities from the benefits of that law. While the "context indicates" that an artificial entity is not a "person" for purposes of a statute providing benefits to individuals with disabilities,[4] the same cannot be said of 28 U. S. C. § 1915, which provides benefits to impecunious litigants—a class encompassing both natural and artificial "persons."[5]

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[4] See, *e. g.*, 42 U. S. C. § 6001(5) (1988 ed., Supp. II) ("The term 'developmental disability' means a severe, chronic disability of a person"); 2 U. S. C. § 135b(a) ("[P]reference shall at all times be given to the needs of the blind and of the other physically handicapped persons").

[5] The context also "indicates otherwise" in statutes dealing with marriage, see, *e. g.*, 38 U. S. C. § 101(31) ("The term 'spouse' means a person of the opposite sex who is a wife or husband"); § 103(a) ("any claim filed by a person as the widow or widower of a veteran"), the military, see, *e. g.*, 18 U. S. C. § 244 ("any person wearing the uniform of any of the armed forces of the United States"); 38 U. S. C. § 101(2) ("The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable"), drug addiction, see, *e. g.*, 42 U. S. C. § 201(k) ("The term 'addict' means any person who habitually uses any habit-forming narcotic drugs"), drunk driving, see, *e. g.*, 18 U. S. C. § 3118(a) (1988 ed., Supp. II) ("such person's driving while under the influence of a drug or alcohol"), kidnaping, see, *e. g.*, § 1201(a) ("[w]hoever unlawfully seizes, confines, . . . kidnaps, abducts, or carries away and holds for ransom . . . any person"), sexual assault, see, *e. g.*, § 2241(a) ("[w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act"), language, see, *e. g.*, 28 U. S. C. § 1827(b)(1) ("persons who speak only or primarily a language other than the English language"), jury duty, see, *e. g.*, § 1865(a) ("The chief judge . . . shall determine . . . whether a person is unqualified for, or exempt, or to be excused from jury service"), "missing persons," see, *e. g.*, § 534(a)(3) ("The Attorney General shall . . . acquire, collect, classify, and preserve any information which would assist in the location of any missing person . . . and provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person"), and "homeless persons," see, *e. g.*, 42 U. S. C. § 12705(b)(2)(C) (1988 ed., Supp. II) ("helping homeless persons make the transition to permanent housing and independent living").

II

The Court's holding rests on the view that § 1915 has four "contextual features," *ante*, at 201, indicating that only a natural person is entitled to *in forma pauperis* status. These "features" include a few select words in § 1915 and a number of practical problems that may arise when artificial entities seek to proceed *in forma pauperis*. I do not believe that § 1915 contains any language indicating that an association is not a "person" for purposes of that provision, and I do not think it is appropriate to rely upon what are at bottom policy considerations in deciding whether "the context indicates otherwise." In my view, none of the "contextual features" discussed by the Court, either alone or in combination with the others, can overcome the statutory presumption that an association is a "person."

A

The first "contextual feature" identified by the Court is the portion of the *in forma pauperis* statute providing that "[t]he court may request an attorney to represent any such person unable to employ counsel." 28 U. S. C. § 1915(d). Because a corporation, partnership, or association may appear in federal court only through licensed counsel, and because the permissive language of § 1915(d) suggests that Congress assumed that there would be many cases in which the court would not appoint counsel, Congress, the Court says, "was thinking in terms of 'persons' who could petition courts themselves and appear *pro se*, that is, of natural persons only." *Ante*, at 203.

This does not follow at all. Congress' use of the word "may" is entirely consistent with an intent to include artificial entities among those "persons" entitled to the benefits of the *in forma pauperis* statute, and it does not necessarily rest on an "assumption that litigants proceeding *in forma pauperis* may represent themselves." *Ibid.* Section 1915 gives courts discretion both with respect to granting *in*

forma pauperis status and with respect to appointing counsel. When a natural person seeks the benefits of § 1915, a court will often allow that person to proceed *in forma pauperis* but refuse to appoint counsel. Under such circumstances, the person may either obtain counsel elsewhere or proceed *pro se.* When an *artificial* person seeks the benefits of § 1915, a court might likewise permit that "person" to proceed *in forma pauperis* but refuse to appoint counsel. Under these circumstances, the artificial person has fewer options than a natural person: It can either obtain counsel elsewhere or lose the opportunity to appear in federal court. That an artificial entity without funds may in some circumstances be unable to have its case heard in federal court, however, does not prove that Congress intended to exclude such an entity from the benefits of the *in forma pauperis* statute. An artificial entity's inability to proceed *pro se* bears upon the *extent* to which such an entity may benefit from § 1915, but it has no bearing upon *whether* it may benefit. And that, after all, is the question presented in this case.

The second "contextual feature" on which the Court focuses is the use of the word "poverty" in § 1915(d). "Poverty," in the Court's view, is a "human condition"; artificial entities "may be insolvent, but they are not well spoken of as 'poor.'" *Ante,* at 203.

I am not so sure.[6] "Poverty" may well be a human condition in its "primary sense," *ibid.,* but I doubt that using the word in connection with an artificial entity departs in any significant way from settled principles of English usage.

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[6] Nor, apparently, are petitioners. At oral argument counsel for petitioners was asked whether the word "poverty" in § 1915(d) "helps" him, since one does not "usually think of a corporation as making an affidavit of poverty." Tr. of Oral Arg. 11. In response, petitioners' counsel said that he "really d[id] believe that a bankrupt corporation could make an affidavit of poverty," *id.,* at 11–12, and conceded that he did not "pin much" on the word "poverty," *id.,* at 12.

One certainly need not search long or far to find examples of the use of "poor" in connection with nonhuman entities—and, indeed, in connection with the very entities listed in 1 U. S. C. § 1. No less a figure than Justice Holmes had occasion to write that the issuance of stock dividends renders a corporation "no poorer" than it was before their distribution, *Towne* v. *Eisner*, 245 U. S. 418, 426 (1918), and other judges have used the word "poor" (or one of its derivatives) in a similar fashion, see, *e. g.*, *Ordinetz* v. *Springfield Family Center, Inc.*, 142 Vt. 466, 468, 457 A. 2d 282, 283 (1983) ("[A] nonprofit corporation may be . . . wealthy or impoverished"); *In re Whitley* v. *Klauber*, 51 N. Y. 2d 555, 579, 416 N. E. 2d 569, 581 (1980) (Fuchsberg, J., dissenting) ("[T]he corporation is no richer or poorer for the transaction"). More important for our purposes, *Congress itself* has used the word "poor" to describe entities other than natural persons, referring in at least two provisions of the United States Code to the world's "poorest countries"—a term that is used as a synonym for the least developed of the so-called "developing" countries. See 22 U. S. C. §§ 262p–4f(a)(3), 2151d(d)(4). If Congress has seen fit to describe a country as "poor," I see no reason for concluding that the notion of a "poor" corporation, partnership, or association ought not to be "imputed to Congress." *Ante*, at 203.[7]

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[7] The majority says that we established the "standard of eligibility" for *in forma pauperis* status in "distinctly human terms," *ante*, at 203, in *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331 (1948), and then quotes the following language from our opinion in that case: "We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life,'" *id.*, at 339. But the "standard of eligibility" was cast in "distinctly human terms" in *Adkins* only because the parties seeking *in forma pauperis* status in that case were natural persons, and the language quoted by the Court was taken from their affidavits. See *id.*, at 334. Thus, contrary to the majority's suggestion, *Adkins* established no *a priori* standard of "poverty," and is in no way inconsistent with the view that an artificial entity may be "poor."

B

The third "contextual feature" is § 1915's affidavit requirement, which, in the Court's view, raises a number of "difficulties." *Ante*, at 204. One such "difficulty" is the "problem of establishing an affiant's authorization"; a court may have trouble determining whether a member of an unincorporated association "has any business purporting to bind it by affidavit." *Ibid.* Another "difficulty" is that the affidavit requirement's deterrent function cannot be served "fully" when the litigant is an artificial entity. *Ante*, at 205. This is because "[n]atural persons can be imprisoned for perjury, but artificial entities can only be fined," *ibid.*, and because the possibility of prosecuting the entity's perjurious agent is only a "'second-best' solution," *ante*, at 206, n. 7.

But these are classic policy considerations—the concerns of a legislature, not a court. Unlike the majority, I am perfectly willing to assume that in adding the word "person" to § 1915 Congress took into account the fact that it might be difficult to determine whether an association's member has the authority to speak on its behalf, and that the possibility of a perjury prosecution might not deter artificial entities sufficiently. In deciding that "the context indicates otherwise," the Court has simply second-guessed Congress' policy judgments.[8]

[8] The majority also gives "some weight," *ante*, at 204, to § 1915(a)'s requirement that the affidavit state the "affiant's belief that he is entitled to redress." If the "affiant" is "an agent making an affidavit on behalf of an artificial entity," according to the majority, "it would wrench the rules of grammar to read 'he' as referring to the entity." *Ante*, at 205. This may be so, but only if the majority's premise is correct. Since an "affiant" is simply a person who makes an affidavit, see Black's Law Dictionary 79 (4th ed. 1951), and an artificial entity can make an affidavit through an agent, it is hardly unreasonable to understand the word "affiant" in § 1915(a) as a reference not to the agent but to the entity on whose behalf the affidavit is made. Such an understanding is all the more reasonable when the agent is an officer of the entity, since courts have held that under

The fourth "contextual feature" identified by the Court is the difficulty of the "issues raised by applying an 'inability to pay' standard to artificial entities," *ante*, at 206, and the difficulty of determining "when to look beyond the entity to its owners or members in determining ability to pay," *ante*, at 207. These, too, are policy matters that Congress should be presumed to have considered when it inserted the word "person" into § 1915. As with the difficulties associated with the affidavit requirement, any difficulties associated with the "inability to pay" test are relevant to the issue of why Congress might have chosen to include artificial entities among those "persons" entitled to *in forma pauperis* status, but they are not relevant to the issue of whether Congress has in fact made this choice.[9]

Petitioners essentially concede that this argument is ultimately one of policy when they say that the "test for indigency" will create "procedural problems" and will have "practical effects . . . on the administration of justice." Brief for Petitioners 17. Today the Court accepts this argument, but a unanimous Court rejected a similar argument only four Terms ago in a case involving another provision of the *in*

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such circumstances the affidavit is considered to be the affidavit of the entity itself. See n. 3, *supra*.

[9] In discussing the difficulty of determining whether an artificial entity is unable to pay costs, the majority says that the "context of congressional silence on [this] issu[e] indicates the natural character of a § 1915 'person.'" *Ante*, at 208–209. See also *ante*, at 207. In relying upon "congressional silence" as a "contextual indicator," however, the majority once again departs from the definition of "context" set out at the beginning of its opinion: Rather than relying upon the words surrounding "person," the majority accords significance to the *absence* of words surrounding "person." Cf. n. 1, *supra*. But even if reliance on statutory silence is consistent with the majority's definition of "context," it is not apparent to me why the absence of a statutory "ability to pay" standard for artificial entities demonstrates that the *in forma pauperis* statute covers natural but not artificial persons, since § 1915 contains no such standard for *any* kind of "person."

forma pauperis statute. *Neitzke* v. *Williams*, 490 U. S. 319 (1989), presented the question whether a complaint that fails to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure is necessarily "frivolous" for purposes of 28 U. S. C. § 1915(d). Rejecting the argument that an affirmative answer to that question would help to lighten the burden that the *in forma pauperis* statute imposes on "efficient judicial administration," we stated that "our role in appraising petitioners' reading of § 1915(d) is not to make policy, but to interpret a statute," and that the proposed reading might be appealing "as a broadbrush means of pruning meritless complaints from the federal docket," but "as a matter of statutory construction it is untenable." 490 U. S., at 326.

The Court suggests that a reading of § 1915 under which an artificial entity is entitled to *in forma pauperis* status would force it to confront "difficult issues of policy and administration." *Ante*, at 208. Far from *avoiding* policy determinations, however, the Court effectively *engages* in policymaking by refusing to credit the legislative judgments that are implicit in the statutory language. Any reading of the phrase "unless the context indicates otherwise" that permits courts to override congressional policy judgments is in my view too broad. Congress has spoken, and we should give effect to its words.

III

Congress has created a rule of statutory construction (an association is a "person") and an exception to that rule (an association is not a "person" if the "context indicates otherwise"), but the Court has permitted the exception to devour the rule. In deciding that an association is not a "person" for purposes of 28 U. S. C. § 1915(a), the Court effectively reads 1 U. S. C. § 1 as if the presumption ran the other way—as if the statute said that "in determining the meaning of any Act of Congress, unless the context indicates otherwise, the word 'person' does *not* include corporations, partnerships, and associations." While it might make sense as a

matter of policy to exclude associations and other artificial entities from the benefits of the *in forma pauperis* statute, I do not believe that Congress has done so.

I respectfully dissent.

Syllabus

NIXON *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91–740. Argued October 14, 1992—Decided January 13, 1993

After petitioner Nixon, the Chief Judge of a Federal District Court, was convicted of federal crimes and sentenced to prison, the House of Representatives adopted articles of impeachment against him and presented them to the Senate. Following proceedings pursuant to Senate Rule XI—which allows a committee of Senators to hear evidence against an impeached individual and to report that evidence to the full Senate—the Senate voted to convict Nixon, and the presiding officer entered judgment removing him from his judgeship. He then commenced the present suit for a declaratory judgment and reinstatement of his judicial salary and privileges, arguing that, because Senate Rule XI prohibits the whole Senate from taking part in the evidentiary hearings, it violates the first sentence of the Constitution's Impeachment Trial Clause, Art. I, § 3, cl. 6, which provides that the "Senate shall have the sole Power to try all Impeachments." The District Court held that his claim was nonjusticiable, *i. e.*, involved a political question that could not be resolved by the courts. The Court of Appeals affirmed.

Held: Nixon's claim that Senate Rule XI violates the Impeachment Trial Clause is nonjusticiable. Pp. 228–238.

(a) A controversy is nonjusticiable where there is "a textually demonstrable 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. These two concepts are not completely separate; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch. Pp. 228–229.

(b) The language and structure of Art. I, § 3, cl. 6, demonstrate a textual commitment of impeachment to the Senate. Nixon's argument that the use of the word "try" in the Clause's first sentence impliedly requires a judicial-style trial by the full Senate that is subject to judicial review is rejected. The conclusion that "try" lacks sufficient precision to afford any judicially manageable standard of review is compelled by older and modern dictionary definitions, and is fortified by the existence of the three very specific requirements that the Clause's second and third sentences do impose—that the Senate's Members must be under oath or affirmation, that a two-thirds vote is required to convict, and

Syllabus

that the Chief Justice presides when the President is tried—the precise nature of which suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings. The Clause's first sentence must instead be read as a grant of authority to the Senate to determine whether an individual should be acquitted or convicted, and the commonsense and dictionary meanings of the word "sole" indicate that this authority is reposed in the Senate alone. Nixon's attempts to negate the significance of "sole" are unavailing, while his alternative reading of the word as requiring impeachment only by the full Senate is unnatural and would impose on the Senate additional procedural requirements that would be inconsistent with the three express limitations that the Clause sets out. A review of the Constitutional Convention's history and the contemporary commentary supports a reading of the constitutional language as deliberately placing the impeachment power in the Legislature, with no judicial involvement, even for the limited purpose of judicial review. Pp. 229–236.

(c) Justiciability is also refuted by (1) the lack of finality inherent in exposing the country's political life—particularly if the President were impeached—to months, or perhaps years, of chaos during judicial review of Senate impeachment proceedings, or during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated, and by (2) the difficulty of fashioning judicial relief other than simply setting aside the Senate's judgment of conviction. See *Baker*, *supra*, at 210. P. 236.

(d) A holding of nonjusticiability is consistent with this Court's opinion in *Powell* v. *McCormack*, 395 U. S. 486. Unlike the situation in that case, there is no separate constitutional provision which could be defeated by allowing the Senate final authority to determine the meaning of the word "try" in Art. I, §3, cl. 6. While courts possess power to review legislative action that transgresses identifiable textual limits, the word "try" does not provide such a limit on the authority committed to the Senate. Pp. 236–238.

290 U. S. App. D. C. 420, 938 F. 2d 239, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 238. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 239. SOUTER, J., filed an opinion concurring in the judgment, *post*, p. 252.

David Overlock Stewart argued the cause for petitioner. With him on the briefs were *Peter M. Brody*, *Thomas B. Smith*, *Boyce Holleman*, and *Michael B. Holleman*.

Solicitor General Starr argued the cause for respondents. With him on the brief were *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Jeffrey P. Minear*, *Douglas Letter*, *Michael Davidson*, *Ken U. Benjamin*, *Jr.*, *Morgan J. Frankel*, and *Claire M. Sylvia.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Walter L. Nixon, Jr., asks this Court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, §3, cl. 6. That Clause provides that the "Senate shall have the sole Power to try all Impeachments." But before we reach the merits of such a claim, we must decide whether it is "justiciable," that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.

Nixon, a former Chief Judge of the United States District Court for the Southern District of Mississippi, was convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison. See *United States* v. *Nixon*, 816 F. 2d 1022 (CA5 1987). The grand jury investigation stemmed from reports that Nixon had accepted a gratuity from a Mississippi businessman in exchange for asking a local district attorney to halt the prosecution of the businessman's son. Because Nixon refused to resign from his office as a United States District Judge, he continued to collect his judicial salary while serving out his prison sentence. See H. R. Rep. No. 101–36, p. 13 (1989).

On May 10, 1989, the House of Representatives adopted three articles of impeachment for high crimes and misde-

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**Patti A. Goldman* and *Alan B. Morrison* filed a brief for Public Citizen as *amicus curiae* urging reversal.

Joseph P. Galda, *Daniel J. Popeo*, and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance.

meanors. The first two articles charged Nixon with giving false testimony before the grand jury and the third article charged him with bringing disrepute on the Federal Judiciary. See 135 Cong. Rec. H1811.

After the House presented the articles to the Senate, the Senate voted to invoke its own Impeachment Rule XI, under which the presiding officer appoints a committee of Senators to "receive evidence and take testimony." Senate Impeachment Rule XI, reprinted in Senate Manual, S. Doc. No. 101–1, p. 186 (1989).[1] The Senate committee held four days of hearings, during which 10 witnesses, including Nixon, testified. S. Rep. No. 101–164, p. 4 (1989). Pursuant to Rule XI, the committee presented the full Senate with a complete transcript of the proceeding and a Report stating the uncontested facts and summarizing the evidence on the contested facts. See *id.*, at 3–4. Nixon and the House impeachment managers submitted extensive final briefs to the full Senate

[1] Specifically, Rule XI provides:

"[I]n the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

"Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate."

and delivered arguments from the Senate floor during the three hours set aside for oral argument in front of that body. Nixon himself gave a personal appeal, and several Senators posed questions directly to both parties. 135 Cong. Rec. S14493–14517 (Nov. 1, 1989). The Senate voted by more than the constitutionally required two-thirds majority to convict Nixon on the first two articles. *Id.*, at S14635 (Nov. 3, 1989). The presiding officer then entered judgment removing Nixon from his office as United States District Judge.

Nixon thereafter commenced the present suit, arguing that Senate Rule XI violates the constitutional grant of authority to the Senate to "try" all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings. See Art. I, § 3, cl. 6. Nixon sought a declaratory judgment that his impeachment conviction was void and that his judicial salary and privileges should be reinstated. The District Court held that his claim was nonjusticiable, 744 F. Supp. 9 (DC 1990), and the Court of Appeals for the District of Columbia Circuit agreed. 290 U. S. App. D. C. 420, 938 F. 2d 239 (1991). We granted certiorari. 502 U. S. 1090 (1992).

A controversy is nonjusticiable—*i. e.*, involves a political question—where there is "a textually demonstrable 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). As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the con-

clusion that there is a textually demonstrable commitment to a coordinate branch.

In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. It provides:

> "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."

The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word "sole" indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform: The Senate shall be on oath or affirmation, a two-thirds vote is required to convict, and when the President is tried the Chief Justice shall preside.

Petitioner argues that the word "try" in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial. From there petitioner goes on to argue that this limitation precludes the Senate from delegating to a select committee the task of hearing the testimony of witnesses, as was done pursuant to Senate Rule XI. "'[T]ry' means more than simply 'vote on' or 'review' or 'judge.' In 1787 and today, trying a case means hearing the evidence, not scanning a cold record." Brief for Petitioner 25. Petitioner concludes from this that courts may review whether or not the Senate "tried" him before convicting him.

There are several difficulties with this position which lead us ultimately to reject it. The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. Older dictionaries define try as

"[t]o examine" or "[t]o examine as a judge." See 2 S. Johnson, A Dictionary of the English Language (1785). In more modern usage the term has various meanings. For example, try can mean "to examine or investigate judicially," "to conduct the trial of," or "to put to the test by experiment, investigation, or trial." Webster's Third New International Dictionary 2457 (1971). Petitioner submits that "try," as contained in T. Sheridan, Dictionary of the English Language (1796), means "to examine as a judge; to bring before a judicial tribunal." Based on the variety of definitions, however, we cannot say that the Framers used the word "try" as an implied limitation on the method by which the Senate might proceed in trying impeachments. "As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require . . . ." *Dillon* v. *Gloss,* 256 U. S. 368, 376 (1921).

The conclusion that the use of the word "try" in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions is fortified by the existence of the three very specific requirements that the Constitution does impose on the Senate when trying impeachments: The Members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried. These limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word "try" in the first sentence.

Petitioner devotes only two pages in his brief to negating the significance of the word "sole" in the first sentence of Clause 6. As noted above, that sentence provides that "[t]he Senate shall have the sole Power to try all Impeachments." We think that the word "sole" is of considerable significance. Indeed, the word "sole" appears only one other time in the Constitution—with respect to the House of Representatives'

"*sole* Power of Impeachment." Art. I, §2, cl. 5 (emphasis added). The commonsense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. The dictionary definition bears this out. "Sole" is defined as "having no companion," "solitary," "being the only one," and "functioning . . . independently and without assistance or interference." Webster's Third New International Dictionary 2168 (1971). If the courts may review the actions of the Senate in order to determine whether that body "tried" an impeached official, it is difficult to see how the Senate would be "functioning . . . independently and without assistance or interference."

Nixon asserts that the word "sole" has no substantive meaning. To support this contention, he argues that the word is nothing more than a mere "cosmetic edit" added by the Committee of Style after the delegates had approved the substance of the Impeachment Trial Clause. There are two difficulties with this argument. First, accepting as we must the proposition that the Committee of Style had no authority from the Convention to alter the meaning of the Clause, see 2 Records of the Federal Convention of 1787, p. 553 (M. Farrand ed. 1966) (hereinafter Farrand), we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language. See *Powell* v. *McCormack*, 395 U. S., at 538–539. That is, we must presume that the Committee did its job. This presumption is buttressed by the fact that the Constitutional Convention voted on, and accepted, the Committee of Style's linguistic version. See 2 Farrand 663–667. We agree with the Government that "the word 'sole' is entitled to no less weight than any other word of the text, because the Committee revision perfected what 'had been agreed to.'" Brief for Respondents 25. Second, carrying Nixon's argument to its logical conclusion would constrain us to say that the *second to last draft* would govern in every instance where the Com-

mittee of Style added an arguably substantive word. Such a result is at odds with the fact that the Convention passed the Committee's version, and with the well-established rule that the plain language of the enacted text is the best indicator of intent.

Petitioner also contends that the word "sole" should not bear on the question of justiciability because Art. II, § 2, cl. 1, of the Constitution grants the President pardon authority "except in Cases of Impeachment." He argues that such a limitation on the President's pardon power would not have been necessary if the Framers thought that the Senate alone had authority to deal with such questions. But the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is "[a]n executive action that mitigates or sets aside *punishment* for a crime." Black's Law Dictionary 1113 (6th ed. 1990) (emphasis added). Authority in the Senate to determine procedures for trying an impeached official, unreviewable by the courts, is therefore not at all inconsistent with authority in the President to grant a pardon to the convicted official. The exception from the President's pardon authority of cases of impeachment was a separate determination by the Framers that executive clemency should not be available in such cases.

Petitioner finally argues that even if significance be attributed to the word "sole" in the first sentence of the Clause, the authority granted is to the Senate, and this means that "the Senate—not the courts, not a lay jury, not a Senate Committee—shall try impeachments." Brief for Petitioner 42. It would be possible to read the first sentence of the Clause this way, but it is not a natural reading. Petitioner's interpretation would bring into judicial purview not merely the sort of claim made by petitioner, but other similar claims based on the conclusion that the word "Senate" has imposed by implication limitations on procedures which the Senate might adopt. Such limitations would be inconsistent with the construction of the Clause as a whole, which, as we

have noted, sets out three express limitations in separate sentences.

The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language. The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers. See 290 U. S. App. D. C., at 424, 938 F. 2d, at 243; R. Berger, Impeachment: The Constitutional Problems 116 (1973). This silence is quite meaningful in light of the several explicit references to the availability of judicial review as a check on the Legislature's power with respect to bills of attainder, *ex post facto* laws, and statutes. See The Federalist No. 78, p. 524 (J. Cooke ed. 1961) ("Limitations . . . can be preserved in practice no other way than through the medium of the courts of justice").

The Framers labored over the question of where the impeachment power should lie. Significantly, in at least two considered scenarios the power was placed with the Federal Judiciary. See 1 Farrand 21–22 (Virginia Plan); *id.*, at 244 (New Jersey Plan). Indeed, James Madison and the Committee of Detail proposed that the Supreme Court should have the power to determine impeachments. See 2 *id.*, at 551 (Madison); *id.*, at 178–179, 186 (Committee of Detail). Despite these proposals, the Convention ultimately decided that the Senate would have "the sole Power to try all Impeachments." Art. I, §3, cl. 6. According to Alexander Hamilton, the Senate was the "most fit depositary of this important trust" because its Members are representatives of the people. See The Federalist No. 65, p. 440 (J. Cooke ed. 1961). The Supreme Court was not the proper body because the Framers "doubted whether the members of that tribunal would, at all times, be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task" or whether the Court "would possess the degree of

credit and authority" to carry out its judgment if it conflicted with the accusation brought by the Legislature—the people's representative. See *id.*, at 441. In addition, the Framers believed the Court was too small in number: "The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons." *Id.*, at 441–442.

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. See Art. I, § 3, cl. 7. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments:

> "Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision?" The Federalist No. 65, p. 442 (J. Cooke ed. 1961).

Certainly judicial review of the Senate's "trial" would introduce the same risk of bias as would participation in the trial itself.

Second, judicial review would be inconsistent with the Framers' insistence that our system be one of checks and

balances. In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. On the topic of judicial accountability, Hamilton wrote:

> "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.*" *Id.*, No. 79, at 532–533 (emphasis added).

Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. See *id.*, No. 81, at 545. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.[2]

Nevertheless, Nixon argues that judicial review is necessary in order to place a check on the Legislature. Nixon fears that if the Senate is given unreviewable authority to interpret the Impeachment Trial Clause, there is a grave risk that the Senate will usurp judicial power. The Framers anticipated this objection and created two constitutional

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[2] Nixon contends that justiciability should not hang on the mere fact that the Judiciary's interest may be implicated or affected by the legislative action in question. In support, he cites our decisions in *Mistretta* v. *United States*, 488 U. S. 361 (1989), and *Morrison* v. *Olson*, 487 U. S. 654 (1988). These cases do not advance his argument, however, since neither addressed the issue of justiciability. More importantly, neither case involved a situation in which judicial review would remove the only check placed on the Judicial Branch by the Framers.

safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge. *Id.*, No. 66, at 446. This split of authority "avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalency of a factious spirit in either of those branches." The second safeguard is the two-thirds supermajority vote requirement. Hamilton explained that "[a]s the concurrence of two-thirds of the senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire." *Ibid.*

In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. See *Baker* v. *Carr*, 369 U. S., at 210. We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." 290 U. S. App. D. C., at 427, 938 F. 2d, at 246. This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Petitioner finally contends that a holding of nonjusticiability cannot be reconciled with our opinion in *Powell* v. *McCormack*, 395 U. S. 486 (1969). The relevant issue in *Powell* was whether courts could review the House of Representa-

tives' conclusion that Powell was "unqualified" to sit as a Member because he had been accused of misappropriating public funds and abusing the process of the New York courts. We stated that the question of justiciability turned on whether the Constitution committed authority to the House to judge its Members' qualifications, and if so, the extent of that commitment. *Id.*, at 519, 521. Article I, § 5, provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." In turn, Art. I, § 2, specifies three requirements for membership in the House: The candidate must be at least 25 years of age, a citizen of the United States for no less than seven years, and an inhabitant of the State he is chosen to represent. We held that, in light of the three requirements specified in the Constitution, the word "qualifications"—of which the House was to be the Judge—was of a precise, limited nature. *Id.*, at 522; see also The Federalist No. 60, p. 409 (J. Cooke ed. 1961) ("The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are *unalterable by the legislature*") (emphasis added) (quoted in *Powell*, *supra*, at 539).

Our conclusion in *Powell* was based on the fixed meaning of "[q]ualifications" set forth in Art. I, § 2. The claim by the House that its power to "be the Judge of the Elections, Returns and Qualifications of its own Members" was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership. The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to what these qualifications consisted of was not.

In the case before us, there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word "try" in the Impeachment Trial Clause. We agree with Nixon that

courts possess power to review either legislative or executive action that transgresses identifiable textual limits. As we have made clear, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, *supra*, at 211; accord, *Powell*, *supra*, at 521. But we conclude, after exercising that delicate responsibility, that the word "try" in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate.

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, concurring.

For me, the debate about the strength of the inferences to be drawn from the use of the words "sole" and "try" is far less significant than the central fact that the Framers decided to assign the impeachment power to the Legislative Branch. The disposition of the impeachment of Samuel Chase in 1805 demonstrated that the Senate is fully conscious of the profound importance of that assignment, and nothing in the subsequent history of the Senate's exercise of this extraordinary power suggests otherwise. See generally 3 A. Beveridge, The Life of John Marshall 169–222 (1919); W. Rehnquist, Grand Inquests 275–278 (1992). Respect for a coordinate branch of the Government forecloses any assumption that improbable hypotheticals like those mentioned by JUSTICE WHITE and JUSTICE SOUTER will ever occur. Accordingly, the wise policy of judicial restraint, coupled with the potential anomalies associated with a contrary view, see *ante*, at 234–236, provide a sufficient justification for my agreement with the views of THE CHIEF JUSTICE.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

Petitioner contends that the method by which the Senate convicted him on two articles of impeachment violates Art. I, § 3, cl. 6, of the Constitution, which mandates that the Senate "try" impeachments. The Court is of the view that the Constitution forbids us even to consider his contention. I find no such prohibition and would therefore reach the merits of the claim. I concur in the judgment because the Senate fulfilled its constitutional obligation to "try" petitioner.

I

It should be said at the outset that, as a practical matter, it will likely make little difference whether the Court's or my view controls this case. This is so because the Senate has very wide discretion in specifying impeachment trial procedures and because it is extremely unlikely that the Senate would abuse its discretion and insist on a procedure that could not be deemed a trial by reasonable judges. Even taking a wholly practical approach, I would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction to "try" impeachment cases. When asked at oral argument whether that direction would be satisfied if, after a House vote to impeach, the Senate, without any procedure whatsoever, unanimously found the accused guilty of being "a bad guy," counsel for the United States answered that the Government's theory "leads me to answer that question yes." Tr. of Oral Arg. 51. Especially in light of this advice from the Solicitor General, I would not issue an invitation to the Senate to find an excuse, in the name of other pressing business, to be dismissive of its critical role in the impeachment process.

Practicalities aside, however, since the meaning of a constitutional provision is at issue, my disagreement with the Court should be stated.

II

The majority states that the question raised in this case meets two of the criteria for political questions set out in *Baker* v. *Carr*, 369 U. S. 186 (1962). It concludes first that there is "'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" It also finds that the question cannot be resolved for "'a lack of judicially discoverable and manageable standards.'" *Ante*, at 228.

Of course the issue in the political question doctrine is *not* whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, *e. g.*, Art. I, § 8, and it is not thought that disputes implicating these provisions are nonjusticiable. Rather, the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.

Although *Baker* directs the Court to search for "a textually demonstrable constitutional commitment" of such responsibility, there are few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment. Conferral on Congress of the power to "Judge" qualifications of its Members by Art. I, § 5, may, for example, preclude judicial review of whether a prospective member in fact meets those qualifications. See *Powell* v. *McCormack*, 395 U. S. 486, 548 (1969). The courts therefore are usually left to infer the presence of a political question from the text and structure of the Constitution. In drawing the inference that the Constitution has committed final interpretive authority to one of the political branches, courts are sometimes aided by textual evidence that the Judiciary was not meant to exercise judicial review—a coordinate inquiry expressed in *Baker*'s "lack of judicially discoverable and manageable standards" criterion. See, *e. g.*, *Coleman* v. *Miller*, 307 U. S. 433, 452–454 (1939), where the Court refused to determine

the life span of a proposed constitutional amendment given Art. V's placement of the amendment process with Congress and the lack of any judicial standard for resolving the question. See also *id.*, at 457–460 (Black, J., concurring).

A

The majority finds a clear textual commitment in the Constitution's use of the word "sole" in the phrase "[t]he Senate shall have the sole Power to try all Impeachments." Art. I, § 3, cl. 6. It attributes "considerable significance" to the fact that this term appears in only one other passage in the Constitution. *Ante*, at 230. See Art. I, § 2, cl. 5 (the House of Representatives "shall have the sole Power of Impeachment"). The Framers' sparing use of "sole" is thought to indicate that its employment in the Impeachment Trial Clause demonstrates a concern to give the Senate exclusive interpretive authority over the Clause.

In disagreeing with the Court, I note that the Solicitor General stated at oral argument that "[w]e don't rest our submission on sole power to try." Tr. of Oral Arg. 32; see also *id.*, at 51. The Government was well advised in this respect. The significance of the Constitution's use of the term "sole" lies not in the infrequency with which the term appears, but in the fact that it appears exactly twice, in parallel provisions concerning impeachment. That the word "sole" is found only in the House and Senate Impeachment Clauses demonstrates that its purpose is to emphasize the distinct role of each in the impeachment process. As the majority notes, the Framers, following English practice, were very much concerned to separate the prosecutorial from the adjudicative aspects of impeachment. *Ante*, at 235–236 (citing The Federalist No. 66, p. 446 (J. Cooke ed. 1961)). Giving each House "sole" power with respect to its role in impeachments effected this division of labor. While the majority is thus right to interpret the term "sole" to indicate that the Senate ought to "'functio[n] independently

and without assistance or interference,'" *ante,* at 231, it wrongly identifies the Judiciary, rather than the House, as the source of potential interference with which the Framers were concerned when they employed the term "sole."

Even if the Impeachment Trial Clause is read without regard to its companion Clause, the Court's willingness to abandon its obligation to review the constitutionality of legislative acts merely on the strength of the word "sole" is perplexing. Consider, by comparison, the treatment of Art. I, § 1, which grants "All legislative powers" to the House and Senate. As used in that context "all" is nearly synonymous with "sole"—both connote entire and exclusive authority. Yet the Court has never thought it would unduly interfere with the operation of the Legislative Branch to entertain difficult and important questions as to the extent of the legislative power. Quite the opposite, we have stated that the proper interpretation of the Clause falls within the province of the Judiciary. Addressing the constitutionality of the legislative veto, for example, the Court found it necessary and proper to interpret Art. I, § 1, as one of the "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *INS* v. *Chadha,* 462 U. S. 919, 945 (1983).

The majority also claims support in the history and early interpretations of the Impeachment Clauses, noting the various arguments in support of the current system made at the Constitutional Convention and expressed powerfully by Hamilton in The Federalist Nos. 65 and 66. In light of these materials there can be little doubt that the Framers came to the view at the Convention that the trial of officials' public misdeeds should be conducted by representatives of the people; that the fledgling Judiciary lacked the wherewithal to adjudicate political intrigues; that the Judiciary ought not to try both impeachments and subsequent criminal cases emanating from them; and that the impeachment power must

reside in the Legislative Branch to provide a check on the largely unaccountable Judiciary.

The majority's review of the historical record thus explains why the power to try impeachments properly resides with the Senate. It does not explain, however, the sweeping statement that the Judiciary was "not chosen to have any role in impeachments."[1] *Ante,* at 234. Not a single word in the historical materials cited by the majority addresses judicial review of the Impeachment Trial Clause. And a glance at the arguments surrounding the Impeachment Clauses negates the majority's attempt to infer nonjusticiability from the Framers' arguments in support of the Senate's power to try impeachments.

What the relevant history mainly reveals is deep ambivalence among many of the Framers over the very institution of impeachment, which, by its nature, is not easily reconciled with our system of checks and balances. As they clearly recognized, the branch of the Federal Government which is possessed of the authority to try impeachments, by having final say over the membership of each branch, holds a potentially unanswerable power over the others. In addition, that branch, insofar as it is called upon to try not only members of other branches, but also its own, will have the advantage of being the judge of its own members' causes.

It is no surprise, then, that the question of impeachment greatly vexed the Framers. The pages of the Convention debates reveal diverse plans for resolving this exceedingly difficult issue. See P. Hoffer & N. Hull, Impeachment in America, 1635–1805, pp. 97–106 (1984) (discussing various proposals). Both before and during the Convention, Madison maintained that the Judiciary ought to try impeachments. *Id.*, at 74, 98, 100. Shortly thereafter, however, he devised a quite complicated scheme that involved the partici-

[1] This latter contention is belied by the Impeachment Trial Clause itself, which designates the Chief Justice to preside over impeachment trials of the President.

pation of each branch. *Id.*, at 74–75. Jefferson likewise had attempted to develop an interbranch system for impeachment trials in Virginia. *Id.*, at 71–72. Even Hamilton's eloquent defense of the scheme adopted by the Constitution was based on a pragmatic decision to further the cause of ratification rather than a strong belief in the superiority of a scheme vesting the Senate with the sole power to try impeachments. While at the Convention, Hamilton advocated that impeachment trials be conducted by a court made up of state-court judges. 1 Records of the Federal Convention of 1787, pp. 292–293 (M. Farrand ed. 1966). Four months after publishing The Federalist Nos. 65 and 66, however, he urged the New York Ratifying Convention to amend the Clause he had so ably defended to have the Senate, the Supreme Court, and judges from each State jointly try impeachments. 5 The Papers of Alexander Hamilton 167–168 (H. Syrett ed. 1962).

The historical evidence reveals above all else that the Framers were deeply concerned about placing in any branch the "awful discretion, which a court of impeachments must necessarily have." The Federalist No. 65, p. 441 (J. Cooke ed. 1961). Viewed against this history, the discord between the majority's position and the basic principles of checks and balances underlying the Constitution's separation of powers is clear. In essence, the majority suggests that the Framers' conferred upon Congress a potential tool of legislative dominance yet at the same time rendered Congress' exercise of that power one of the very few areas of legislative authority immune from any judicial review. While the majority rejects petitioner's justiciability argument as espousing a view "inconsistent with the Framers' insistence that our system be one of checks and balances," *ante*, at 234, it is the Court's finding of nonjusticiability that truly upsets the Framers' careful design. In a truly balanced system, impeachments tried by the Senate would serve as a means of

controlling the largely unaccountable Judiciary, even as judicial review would ensure that the Senate adhered to a minimal set of procedural standards in conducting impeachment trials.

B

The majority also contends that the term "try" does not present a judicially manageable standard. It notes that in 1787, as today, the word "try" may refer to an inquiry in the nature of a judicial proceeding, or, more generally, to experimentation or investigation. In light of the term's multiple senses, the Court finds itself unable to conclude that the Framers used the word "try" as "an implied limitation on the method by which the Senate might proceed in trying impeachments." *Ante*, at 230. Also according to the majority, comparison to the other more specific requirements listed in the Impeachment Trial Clause—that the senators must proceed under oath and vote by two-thirds to convict, and that the Chief Justice must preside over an impeachment trial of the President—indicates that the word "try" was not meant by the Framers to constitute a limitation on the Senate's conduct and further reveals the term's unmanageability.

It is apparently on this basis that the majority distinguishes *Powell* v. *McCormack*, 395 U. S. 486 (1969). In *Powell*, the House of Representatives argued that the grant to Congress of the power to "Judge" the qualifications of its members in Art. I, § 5, precluded the Court from reviewing the House's decision that Powell was not fit for membership. We held to the contrary, noting that, although the Constitution leaves the power to "Judge" in the hands of Congress, it also enumerates, in Art. I, § 2, the "qualifications" whose presence or absence Congress must adjudge. It is precisely the business of the courts, we concluded, to determine the nature and extent of these constitutionally specified qualifications. *Id.*, at 522. The majority finds this case different from *Powell* only on the grounds that, whereas the qualifi-

cations of Art. I, § 2, are readily susceptible to judicial interpretation, the term "try" does not provide an "identifiable textual limit on the authority which is committed to the Senate." *Ante*, at 238.

This argument comes in two variants. The first, which asserts that one simply cannot ascertain the sense of "try" which the Framers employed and hence cannot undertake judicial review, is clearly untenable. To begin with, one would intuitively expect that, in defining the power of a political body to conduct an inquiry into official wrongdoing, the Framers used "try" in its legal sense. That intuition is borne out by reflection on the alternatives. The third Clause of Art. I, § 3, cannot seriously be read to mean that the Senate shall "attempt" or "experiment with" impeachments. It is equally implausible to say that the Senate is charged with "investigating" impeachments given that this description would substantially overlap with the House of Representatives' "sole" power to draw up articles of impeachment. Art. I, § 2, cl. 5. That these alternatives are not realistic possibilities is finally evidenced by the use of "tried" in the third sentence of the Impeachment Trial Clause ("[w]hen the President of the United States is tried . . ."), and by Art. III, § 2, cl. 3 ("[t]he Trial of all Crimes, except in Cases of Impeachment . . .").

The other variant of the majority position focuses not on which sense of "try" is employed in the Impeachment Trial Clause, but on whether the legal sense of that term creates a judicially manageable standard. The majority concludes that the term provides no "identifiable textual limit." Yet, as the Government itself conceded at oral argument, the term "try" is hardly so elusive as the majority would have it. See Tr. of Oral Arg. 51–52. Were the Senate, for example, to adopt the practice of automatically entering a judgment of conviction whenever articles of impeachment were delivered from the House, it is quite clear that the Senate

will have failed to "try" impeachments.[2] See *id.*, at 52. Indeed in this respect, "try" presents no greater, and perhaps fewer, interpretive difficulties than some other constitutional standards that have been found amenable to familiar techniques of judicial construction, including, for example, "Commerce . . . among the several States," Art. I, § 8, cl. 3, and "due process of law," Amdt. 5. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 189 (1824) ("The subject to be regulated is commerce; and our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word"); *Mathews* v. *Eldridge*, 424 U. S. 319, 334 (1976) ("'"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances'") (quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961)).[3]

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[2] It is not a sufficient rejoinder to this example to say, with one of the Court of Appeals judges below, that it postulates a "monstrous hypothetical abuse." See 290 U. S. App. D. C. 420, 427, 938 F. 2d 239, 246 (1991). The unlikelihood of the example being realized does not undermine the point that "try" has a definable meaning and thus ought to be regarded as judicially manageable.

[3] The majority's *in terrorem* argument against justiciability—that judicial review of impeachments might cause national disruption and that the courts would be unable to fashion effective relief—merits only brief attention. In the typical instance, court review of impeachments would no more render the political system dysfunctional than has this litigation. Moreover, the same capacity for disruption was noted and rejected as a basis for not hearing *Powell*. *Powell* v. *McCormack*, 395 U. S. 486, 549 (1969). The relief granted for unconstitutional impeachment trials would presumably be similar to the relief granted to other unfairly tried public employee-litigants. Finally, as applied to the special case of the President, the majority's argument merely points out that, were the Senate to convict the President without any kind of a trial, a constitutional crisis might well result. It hardly follows that the Court ought to refrain from upholding the Constitution in all impeachment cases. Nor does it follow that, in cases of Presidential impeachment, the Justices ought to abandon their constitutional responsibilities because the Senate has precipitated a crisis.

III

The majority's conclusion that "try" is incapable of meaningful judicial construction is not without irony. One might think that if any class of concepts would fall within the definitional abilities of the Judiciary, it would be that class having to do with procedural justice. Examination of the remaining question—whether proceedings in accordance with Senate Rule XI are compatible with the Impeachment Trial Clause—confirms this intuition.

Petitioner bears the rather substantial burden of demonstrating that, simply by employing the word "try," the Constitution prohibits the Senate from relying on a factfinding committee. It is clear that the Framers were familiar with English impeachment practice and with that of the States employing a variant of the English model at the time of the Constitutional Convention. Hence there is little doubt that the term "try" as used in Art. I, § 3, cl. 6, meant that the Senate should conduct its proceedings in a manner somewhat resembling a judicial proceeding. Indeed, it is safe to assume that Senate trials were to follow the practice in England and the States, which contemplated a formal hearing on the charges, at which the accused would be represented by counsel, evidence would be presented, and the accused would have the opportunity to be heard.

Petitioner argues, however, that because committees were not used in state impeachment trials prior to the Convention, the word "try" cannot be interpreted to permit their use. It is, however, a substantial leap to infer from the absence of a particular device of parliamentary procedure that its use has been forever barred by the Constitution. And there is textual and historical evidence that undermines the inference sought to be drawn in this case.

The fact that Art. III, § 2, cl. 3, specifically exempts impeachment trials from the jury requirement provides some evidence that the Framers were anxious not to have additional specific procedural requirements read into the term

"try." Contemporaneous commentary further supports this view. Hamilton, for example, stressed that a trial by so large a body as the Senate (which at the time promised to boast 26 members) necessitated that the proceedings not "be tied down to . . . strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges . . . ." The Federalist No. 65, p. 441 (J. Cooke ed. 1961). In his extensive analysis of the Impeachment Trial Clause, Justice Story offered a nearly identical analysis, which is worth quoting at length.

> "[I]t is obvious, that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments; the rigid manner, in which the discretion of judges is limited, and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents; and the adherence to technical principles, which, perhaps, distinguishes this branch of the law, more than any other, are all ill adapted to the trial of political offences, in the broad course of impeachments. And it has been observed with great propriety, that a tribunal of a liberal and comprehensive character, confined, as little as possible, to strict forms, enabled to continue its session as long as the nature of the law may require, qualified to view the charge in all its bearings and dependencies, and to appropriate on sound principles of public policy the defence of the accused, seems indispensable to the value of the trial. The history of impeachments, both in England and America, justifies the remark. There is little technical in the mode of proceeding; the charges are sufficiently clear, and yet in a general form; there are few exceptions, which arise in the application of the evidence, which grow out of mere technical rules and quibbles. And it has repeatedly been seen, that the functions have been better understood, and more liberally and justly expounded by states-

men, then by mere lawyers." 1 J. Story, Commentaries on the Constitution of the United States § 765, p. 532 (3d ed. 1858).

It is also noteworthy that the delegation of factfinding by judicial and quasi-judicial bodies was hardly unknown to the Framers. Jefferson, at least, was aware that the House of Lords sometimes delegated factfinding in impeachment trials to committees and recommended use of the same to the Senate. T. Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States § LIII (2d ed. 1812) ("The practice is to swear the witnesses in open House, and then examine them there: or a committee may be named, who shall examine them in committee . . ."), reprinted in Jefferson's Parliamentary Writings, The Papers of Thomas Jefferson, Second Series 424 (W. Howell ed. 1988). The States also had on occasion employed legislative committees to investigate whether to draw up articles of impeachment. See Hoffer & Hull, Impeachment in America, at 29, 33. More generally, in colonial governments and state legislatures, contemnors appeared before committees to answer the charges against them. See *Groppi* v. *Leslie*, 404 U. S. 496, 501 (1972). Federal courts likewise had appointed special masters and other factfinders "[f]rom the commencement of our Government." *Ex parte Peterson*, 253 U. S. 300, 312 (1920). Particularly in light of the Constitution's grant to each House of the power to "determine the Rules of its Proceedings," see Art. I, § 5, cl. 2, the existence of legislative and judicial delegation strongly suggests that the Impeachment Trial Clause was not designed to prevent employment of a factfinding committee.

In short, textual and historical evidence reveals that the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures. Without identifying the exact contours of these procedures, it is sufficient to say that the Senate's use of a factfinding committee under Rule XI is entirely compatible with

the Constitution's command that the Senate "try all impeachments." Petitioner's challenge to his conviction must therefore fail.

IV

Petitioner has not asked the Court to conduct his impeachment trial; he has asked instead that it determine whether his impeachment was tried by the Senate. The majority refuses to reach this determination out of a laudable desire to respect the authority of the Legislature. Regrettably, this concern is manifested in a manner that does needless violence to the Constitution.[4] The deference that is owed can

[4] Although our views might well produce identical results in most cases, the same objection may be raised against the prudential version of political question doctrine presented by JUSTICE SOUTER. According to the prudential view, judicial determination of whether the Senate has conducted an impeachment trial would interfere unacceptably with the Senate's work and should be avoided except where necessitated by the threat of grave harm to the constitutional order. As articulated, this position is missing its premise: No explanation is offered as to why it would show disrespect or cause disruption or embarrassment to review the action of the Senate in this case as opposed to, say, the enactment of legislation under the Commerce Clause. The Constitution requires the courts to determine the validity of statutes passed by Congress when they are challenged, even though such laws are passed with the firm belief that they are constitutional. The exercise of judicial review of this kind, with all of its attendant risk of interference and disrespect, is not conditioned upon a showing in each case that without it the Republic would be at risk. Some account is therefore needed as to why prudence does not counsel against judicial review in the typical case, yet does so in this case.

In any event, the prudential view cannot achieve its stated purpose. The judgment it wishes to avoid—and the attendant disrespect and embarrassment—will inevitably be cast because the courts still will be required to distinguish cases on their merits. JUSTICE SOUTER states that the Court ought not to entertain petitioner's constitutional claim because "[i]t seems fair to conclude," *post*, at 253, that the Senate tried him. In other words, on the basis of a preliminary determination that the Senate has acted within the "broad boundaries" of the Impeachment Trial Clause, it is concluded that we must refrain from making that determination. At best, this approach offers only the illusion of deference and respect by substituting impressionistic assessment for constitutional analysis.

be found in the Constitution itself, which provides the Senate ample discretion to determine how best to try impeachments.

JUSTICE SOUTER, concurring in the judgment.

I agree with the Court that this case presents a nonjusticiable political question. Because my analysis differs somewhat from the Court's, however, I concur in its judgment by this separate opinion.

As we cautioned in *Baker* v. *Carr*, 369 U. S. 186, 210–211 (1962), "the 'political question' label" tends "to obscure the need for case-by-case inquiry." The need for such close examination is nevertheless clear from our precedents, which demonstrate that the functional nature of the political question doctrine requires analysis of "the precise facts and posture of the particular case," and precludes "resolution by any semantic cataloguing," *id.*, at 217:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Ibid.*

Whatever considerations feature most prominently in a particular case, the political question doctrine is "essentially a function of the separation of powers," *ibid.*, existing to restrain courts "from inappropriate interference in the business of the other branches of Government," *United States* v.

Munoz-Flores, 495 U. S. 385, 394 (1990), and deriving in large part from prudential concerns about the respect we owe the political departments, see *Goldwater* v. *Carter*, 444 U. S. 996, 1000 (1979) (Powell, J., concurring in judgment); A. Bickel, The Least Dangerous Branch 125–126 (2d ed. 1986); Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338, 344–345 (1924). Not all interference is inappropriate or disrespectful, however, and application of the doctrine ultimately turns, as Learned Hand put it, on "how importunately the occasion demands an answer." L. Hand, The Bill of Rights 15 (1958).

This occasion does not demand an answer. The Impeachment Trial Clause commits to the Senate "the sole Power to try all Impeachments," subject to three procedural requirements: the Senate shall be on oath or affirmation; the Chief Justice shall preside when the President is tried; and conviction shall be upon the concurrence of two-thirds of the Members present. U. S. Const., Art. I, § 3, cl. 6. It seems fair to conclude that the Clause contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to "try" impeachments. Other significant considerations confirm a conclusion that this case presents a nonjusticiable political question: the "unusual need for unquestioning adherence to a political decision already made," as well as "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, *supra*, at 217. As the Court observes, see *ante*, at 236, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government.

One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply " 'a bad

guy,'" *ante*, at 239 (WHITE, J., concurring in judgment), judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. "The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder." *Baker*, *supra*, at 215.

Syllabus

CROSBY *v.* UNITED STATES

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

No. 91–6194. Argued November 9, 1992—Decided January 13, 1993

Although petitioner Crosby attended various preliminary proceedings, he failed to appear at the beginning of his criminal trial. The Federal District Court permitted the proceedings to go forward in his absence, and he was convicted and subsequently arrested and sentenced. In affirming his convictions, the Court of Appeals rejected his argument that his trial was prohibited by Federal Rule of Criminal Procedure 43, which provides that a defendant must be present at every stage of trial "except as otherwise provided" by the Rule and which lists situations in which a right to be present may be waived, including when a defendant, initially present, "is voluntarily absent after the trial has commenced."

Held: Rule 43 prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial. The Rule's express use of the limiting phrase "except as otherwise provided" clearly indicates that the list of situations in which the trial may proceed without the defendant is exclusive. Moreover, the Rule is a restatement of the law that existed at the time it was adopted in 1944. Its distinction between flight before and during trial also is rational, as it marks a point at which the costs of delaying a trial are likely to increase; helps to assure that any waiver is knowing and voluntary; and deprives the defendant of the option of terminating the trial if it seems that the verdict will go against him. Because Rule 43 is dispositive, Crosby's claim that the Constitution also prohibited his trial *in absentia* is not reached. Pp. 258–262.

917 F. 2d 362, reversed and remanded.

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

Mark D. Nyvold, by appointment of the Court, 503 U. S. 934, argued the cause and filed a brief for petitioner.

Richard H. Seamon argued the cause for the United States. With him on the brief were *Solicitor General Starr*,

Assistant Attorney General Mueller, and *Deputy Solicitor General Bryson.**

JUSTICE BLACKMUN delivered the opinion of the Court.

This case requires us to decide whether Federal Rule of Criminal Procedure 43 permits the trial *in absentia* of a defendant who absconds prior to trial and is absent at its beginning. We hold that it does not.

I

In April 1988, a federal grand jury in the District of Minnesota indicted petitioner Michael Crosby and others on a number of counts of mail fraud. The indictment alleged that Crosby and his codefendants had devised a fraudulent scheme to sell military-veteran commemorative medallions supposedly to fund construction of a theme park honoring veterans. Crosby appeared before a federal magistrate on June 15, 1988, and, upon his plea of not guilty, was conditionally released from detention after agreeing to post a $100,000 bond and remain in the State. Subsequently, he attended pretrial conferences and hearings with his attorney and was advised that the trial was scheduled to begin on October 12.

Crosby did not appear on October 12, however, nor could he be found. United States deputy marshals reported that his house looked as though it had been "cleaned out," and a neighbor reported that petitioner's car had been backed halfway into his garage the previous evening, as if he were packing its trunk. As the day wore on, the court remarked several times that the pool of 54 potential jurors was being kept waiting, and that the delay in the proceedings would interfere with the court's calendar. The prosecutor noted that Crosby's attorney and his three codefendants were present, and commented on the difficulty she would have in resched-

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**Steven R. Shapiro* and *John A. Powell* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

uling the case, should Crosby later appear, because some of her many witnesses were elderly and had health problems.

When the District Court raised the subject of conducting the trial in Crosby's absence, Crosby's attorney objected. Nevertheless, after several days of delay and a fruitless search for Crosby, the court, upon a formal request from the Government, decided that trial would commence on October 17. The court ordered Crosby's $100,000 bond forfeited and stated for the record its findings that Crosby had been given adequate notice of the trial date, that his absence was knowing and deliberate, and that requiring the Government to try Crosby separately from his codefendants would present extreme difficulty for the Government, witnesses, counsel, and the court. It further concluded that Crosby voluntarily had waived his constitutional right to be present during the trial, and that the public interest in proceeding with the trial in his absence outweighed his interest in being present during the proceedings. Trial began on October 17, with petitioner's counsel actively participating, and continued in Crosby's absence until November 18, when the jury returned verdicts of guilty on charges against Crosby and two of his codefendants. See *United States* v. *Cheatham*, 899 F. 2d 747 (CA8 1990). One codefendant was acquitted.

Approximately six months later, Crosby was arrested in Florida and brought back to Minnesota, where he was sentenced to 20 years in prison followed by 5 years on probation with specified conditions. Crosby's convictions were upheld by the Court of Appeals, which rejected his argument that Federal Rule of Criminal Procedure 43 forbids the trial *in absentia* of a defendant who is not present at the beginning of trial. 917 F. 2d 362, 364–366 (CA8 1990). Noting that the other Courts of Appeals that considered the question had found trial *in absentia* permissible,* the court concluded that

*The court cited, among other authorities, *United States* v. *Peterson*, 524 F. 2d 167 (CA4 1975), cert. denied, 423 U. S. 1088 (1976); *Government of the Virgin Islands* v. *Brown*, 507 F. 2d 186, 189 (CA3 1975); and *United*

the District Court had acted within its discretion in electing to proceed. *Id.*, at 365–366. We granted certiorari. 503 U. S. 905 (1992).

II

Rule 43 provides in relevant part:

> "(a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> "(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> "(1) is voluntarily absent after the trial has commenced . . . ."

The Government concedes that the Rule does not specifically authorize the trial *in absentia* of a defendant who was not present at the beginning of his trial. The Government argues, nonetheless, that "Rule 43 does not purport to contain a comprehensive listing of the circumstances under which the right to be present may be waived." Brief for United States 16. Accordingly, the Government contends, Crosby's position rests not on the express provisions of Rule 43, but solely on the maxim *expressio unius est exclusio alterius. Ibid.* We disagree. It is not necessary to invoke that maxim in order to conclude that Rule 43 does not allow full trials *in absentia.* The Rule declares explicitly: "The de-

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States v. *Tortora*, 464 F. 2d 1202, 1208 (CA2), cert. denied *sub nom. Santoro* v. *United States*, 409 U. S. 1063 (1972). See also Boreman, Sufficiency of Showing Defendant's "Voluntary Absence" From Trial for Purposes of Criminal Procedure Rule 43, Authorizing Continuance of Trial Notwithstanding Such Absence, 21 A. L. R. Fed. 906, 915–918 (1974 and 1991 Supp.), and cases cited there.

fendant shall be present . . . at every stage of the trial . . . *except as otherwise provided* by this rule" (emphasis added). The list of situations in which the trial may proceed without the defendant is marked as exclusive not by the "expression of one" circumstance, but rather by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.

The Government, however, urges us to look for guidance at the existing law, which the Rule was meant to restate, at the time of its adoption in 1944. See Advisory Committee's Notes on Fed. Rule Crim. Proc. 43, 18 U. S. C. App., p. 821. That inquiry does not assist the Government. "It is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. . . . If he is absent, . . . a conviction will be set aside." W. Mikell, Clark's Criminal Procedure 492 (2d ed. 1918) (hereinafter Mikell). Accord, Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases, 16 Colum. L. Rev. 18, 20 (1916); F. Wharton, Criminal Pleading and Practice 388 (9th ed. 1889) (hereinafter Wharton); 1 J. Bishop, New Criminal Procedure 178–179 (4th ed. 1895) (hereinafter Bishop), and cases cited there. The right generally was considered unwaivable in felony cases. Mikell 492; 1 Bishop 175 and 178. This canon was premised on the notion that a fair trial could take place only if the jurors met the defendant face-to-face and only if those testifying against the defendant did so in his presence. See Wharton 392; 1 Bishop 178. It was thought "contrary to the dictates of humanity to let a prisoner 'waive that advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence.'" *Ibid.*, quoting *Prine* v. *Commonwealth*, 18 Pa. 103, 104 (1851).

In *Diaz* v. *United States*, 223 U. S. 442 (1912), a case that concerned a defendant who had absented himself voluntarily on two occasions from his ongoing trial in the Philippines, this Court authorized a limited exception to the general rule,

an exception that was codified eventually in Rule 43(b). Because it did "'not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced,'" *id.*, at 457, quoting *Falk* v. *United States*, 15 App. D. C. 446, 454 (1899), cert. denied, 181 U. S. 618 (1901), the Court held:

> "[W]here the offense is not capital and the accused is not in custody, . . . if, *after the trial has begun in his presence*, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." 223 U. S., at 455 (emphasis added).

Diaz was cited by the Advisory Committee that drafted Rule 43. The Committee explained: "The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence." Advisory Committee's Notes on Fed. Rule Crim. Proc. 43, 18 U. S. C. App., p. 821. There is no reason to believe that the drafters intended the Rule to go further. Commenting on a preliminary version of the Rule, Judge John B. Sanborn, a member of the Committee, stated:

> "I think it would be inadvisable to conduct criminal trials in the absence of the defendant. That has never been the practice, and, whether the defendant wants to attend the trial or not, I think he should be compelled to be present. If, during the trial, he disappears, there is, of course, no reason why the trial should not proceed without him." 2 M. Wilken & N. Triffin, Drafting His-

tory of the Federal Rules of Criminal Procedure 236 (1991).

The Court of Appeals in the present case recognized that this Court in *Diaz* had not addressed the situation of the defendant who fails to appear for the commencement of trial. Nevertheless, the court concluded: "It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial." 917 F. 2d, at 365. While it may be true that there are no "talismanic properties which differentiate the commencement of a trial from later stages," *Government of the Virgin Islands* v. *Brown*, 507 F. 2d 186, 189 (CA3 1975), we do not find the distinction between pretrial and midtrial flight so farfetched as to convince us that Rule 43 cannot mean what it says. As a general matter, the costs of suspending a proceeding already under way will be greater than the cost of postponing a trial not yet begun. If a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, the commencement of trial is at least a plausible place at which to draw that line. See *Hopt* v. *Territory of Utah*, 110 U. S. 574, 579 (1884) (discussing the public's interest in strict enforcement of statutory requirement that defendant be present at trial).

There are additional practical reasons for distinguishing between flight before and flight during a trial. As did *Diaz*, the Rule treats midtrial flight as a knowing and voluntary waiver of the right to be present. Whether or not the right constitutionally may be waived in other circumstances—and we express no opinion here on that subject—the defendant's initial presence serves to assure that any waiver is indeed knowing. "Since the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients." Starkey, Trial in Absentia, 54 N. Y. St.

B. J. 30, 34, n. 28 (1982). It is unlikely, on the other hand, "'that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence.'" *Taylor* v. *United States*, 414 U. S. 17, 20 (1973), quoting from Chief Judge Coffin's opinion, *United States* v. *Taylor*, 478 F. 2d 689, 691 (CA1 1973), for the Court of Appeals in that case. Moreover, a rule that allows an ongoing trial to continue when a defendant disappears deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems that the verdict will go against him—an option that might otherwise appear preferable to the costly, perhaps unnecessary, path of becoming a fugitive from the outset.

The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial. Because we find Rule 43 dispositive, we do not reach Crosby's claim that his trial *in absentia* was also prohibited by the Constitution.

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

BRAY ET AL. *v.* ALEXANDRIA WOMEN'S HEALTH CLINIC ET AL.

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

No. 90–985. Argued October 16, 1991—Reargued October 6, 1992—Decided January 13, 1993

Respondents, abortion clinics and supporting organizations, sued to enjoin petitioners, an association and individuals who organize and coordinate antiabortion demonstrations, from conducting demonstrations at clinics in the Washington, D. C., metropolitan area. The District Court held that, by conspiring to deprive women seeking abortions of their right to interstate travel, petitioners had violated the first clause of 42 U. S. C. § 1985(3), which prohibits conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"; ruled for respondents on their pendent state-law claims of trespass and public nuisance; as relief on these three claims, enjoined petitioners from trespassing on, or obstructing access to, specified clinics; and, pursuant to 42 U. S. C. § 1988, ordered petitioners to pay respondents attorney's fees and costs on the § 1985(3) claim. The Court of Appeals affirmed.

Held:

1. The first clause of § 1985(3) does not provide a federal cause of action against persons obstructing access to abortion clinics. Pp. 267–278.

(a) Respondents have not shown that opposition to abortion qualifies alongside race discrimination as an "otherwise class-based, invidiously discriminatory animus [underlying] the conspirators' action," as is required under *Griffin* v. *Breckenridge*, 403 U. S. 88, 102, in order to prove a private conspiracy in violation of § 1985(3)'s first clause. Respondents' claim that petitioners' opposition to abortion reflects an animus against women in general must be rejected. The "animus" requirement demands at least a purpose that focuses upon women *by reason of their sex*, whereas the record indicates that petitioners' demonstrations are not directed specifically at women, but are intended to protect the victims of abortion, stop its practice, and reverse its legalization. Opposition to abortion cannot reasonably be presumed to reflect a sex-based intent; there are common and respectable reasons for opposing abortion other than a derogatory view of women as a class. This Court's prior decisions indicate that the disfavoring of abortion, although only women

engage in the activity, is not *ipso facto* invidious discrimination against women as a class. Pp. 268–274.

(b) Respondents have also not shown that petitioners "aimed at interfering with rights" that are "protected against private, as well as official, encroachment," a second prerequisite to proving a private conspiracy in violation of § 1985(3)'s first clause. *Carpenters* v. *Scott*, 463 U. S. 825, 833. Although the right to interstate travel is constitutionally protected against private interference in at least some contexts, *Carpenters* makes clear that a § 1985(3) private conspiracy must be "aimed at" that right. *Ibid.* That was not established here. Although respondents showed that substantial numbers of women travel interstate to reach the clinics in question, it was irrelevant to petitioners' opposition whether or not such travel preceded the intended abortions. Moreover, as far as appears from the record, petitioners' proposed demonstrations would erect "actual barriers to . . . movement" only intrastate. *Zobel* v. *Williams*, 457 U. S. 55, 60, n. 6. Respondents have conceded that this intrastate restriction is not applied discriminatorily against interstate travelers, and the right to interstate travel is therefore not implicated. *Ibid.* Nor can respondents' § 1985(3) claim be based on the right to abortion, which is a right protected only against state interference and therefore cannot be the object of a purely private conspiracy. See *Carpenters*, *supra*, at 833. Pp. 274–278.

(c) The dissenters err in considering whether respondents have established a violation of § 1985(3)'s second, "hindrance" clause, which covers conspiracies "for the purpose of preventing or hindering . . . any State . . . from giving or securing to all persons . . . the equal protection of the laws." A "hindrance"-clause claim was not stated in the complaint, was not considered by either of the lower courts, was not contained in the questions presented on certiorari, and was not suggested by either party as a question for argument or decision here. Nor is it readily determinable that respondents have established a "hindrance"-clause violation. The language in the first clause of § 1985(3) that is the source of the *Griffin* animus requirement also appears in the "hindrance" clause. Second, respondents' "hindrance" "claim" would fail unless the "hindrance" clause applies to private conspiracies aimed at rights constitutionally protected only against official encroachment. Cf. *Carpenters.* Finally, the District Court did not find that petitioners' purpose was to prevent or hinder law enforcement. Pp. 279–285.

2. The award of attorney's fees and costs under § 1988 must be vacated because respondents were not entitled to relief under § 1985(3). However, respondents' § 1985(3) claims were not, prior to this decision, "wholly insubstantial and frivolous," *Bell* v. *Hood*, 327 U. S. 678, 682–683, so as to deprive the District Court of subject-matter jurisdiction

Syllabus

over the action. Consideration should be given on remand to the question whether the District Court's judgment on the state-law claims alone can support the injunction that was entered. P. 285.

914 F. 2d 582, reversed in part, vacated in part, and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 287. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, *post,* p. 288. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post,* p. 307. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post,* p. 345.

Jay Alan Sekulow reargued the cause for petitioners. With him on the briefs were *James M. Henderson, Sr.*, *Douglas W. Davis*, *Thomas Patrick Monaghan*, *Walter M. Weber*, and *James E. Murphy.*

Deputy Solicitor General Roberts reargued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Paul J. Larkin, Jr.*, *Barbara L. Herwig*, and *Lowell V. Sturgill, Jr.*

Deborah A. Ellis reargued the cause for respondents. With her on the brief were *Martha F. Davis*, *Sally F. Goldfarb*, *John H. Schafer*, and *Laurence J. Eisenstein.* Mr. Schafer argued the cause for respondents on the original argument. With him on the brief were *William H. Allen*, Mr. Eisenstein, *Alison Wetherfield*, and *Helen Neuborne.**

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*Briefs of *amici curiae* urging reversal were filed for American Victims of Abortion by *James Bopp, Jr.*, and *Richard E. Coleson;* for Concerned Women for America by *Andrew J. Ekonomou* and *Mark N. Troobnick;* for Feminists for Life of America et al. by *Christine Smith Torre* and *Edward R. Grant;* for the Free Congress Foundation by *Eric A. Daly* and *Jordan Lorence;* for The Rutherford Institute et al. by *John W. Whitehead*, *Joseph P. Secola*, and *George J. Mercer;* for the Southern Center for Law & Ethics by *Albert L. Jordan;* for Woman Exploited by Abortion et al. by *Samuel Brown Casey*, *Victor L. Smith*, and *David L. Llewellyn;* for Daniel Berri-

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the first clause of Rev. Stat. § 1980, 42 U. S. C. § 1985(3)—the surviving version of § 2 of the Civil Rights Act of 1871—provides a federal cause of action against persons obstructing access to abortion clinics. Respondents are clinics that perform abortions and organizations that support legalized abortion and that have members who may wish to use abortion clinics. Petitioners are Operation Rescue, an unincorporated association whose members oppose abortion, and six individuals. Among its activities, Operation Rescue organizes antiabortion demonstrations in which participants trespass on, and obstruct general access to, the premises of abortion clinics. The individual petitioners organize and coordinate these demonstrations.

Respondents sued to enjoin petitioners from conducting demonstrations at abortion clinics in the Washington, D. C., metropolitan area. Following an expedited trial, the District Court ruled that petitioners had violated § 1985(3) by

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gan et al. by *Wendall R. Bird* and *David J. Myers;* and for *James Joseph Lynch, Jr., pro se.*

Briefs of *amici curiae* urging affirmance were filed for the Attorney General of New York et al. by *Robert Abrams*, Attorney General of New York, *pro se*, *O. Peter Sherwood*, Solicitor General, *Sanford M. Cohen* and *Shelley B. Mayer*, Assistant Attorneys General, and *Mary Sue Terry*, Attorney General of Virginia, *pro se;* for the American Civil Liberties Union et al. by *Judith Levin*, *Steven R. Shapiro*, *John A. Powell*, *Burt Neuborne*, and *Elliot M. Mincberg;* for Falls Church, Virginia, by *David R. Lasso;* for the NAACP Legal Defense and Educational Fund, Inc., by *Julius L. Chambers*, *Charles Stephen Ralston*, and *Eric Schnapper;* for the National Abortion Federation et al. by *Elaine Metlin*, *Roger K. Evans*, and *Eve W. Paul;* and for 29 Organizations Committed to Women's Health and Women's Equality by *Dawn Johnsen*, *Lois Eisner Murphy*, and *Marcy J. Wilder.*

Briefs of *amici curiae* were filed for the National Right to Life Committee, Inc., et al. by *James Bopp, Jr.*, and *Barry A. Bostrom;* and for George Lucas et al. by *Lawrence J. Joyce* and *Craig H. Greenwood.*

conspiring to deprive women seeking abortions of their right to interstate travel. The court also ruled for respondents on their pendent state-law claims of trespass and public nuisance. As relief on these three claims, the court enjoined petitioners from trespassing on, or obstructing access to, abortion clinics in specified Virginia counties and cities in the Washington, D. C., metropolitan area. *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483 (ED Va. 1989). Based on its § 1985(3) ruling and pursuant to 42 U. S. C. § 1988, the court also ordered petitioners to pay respondents $27,687.55 in attorney's fees and costs.

The Court of Appeals for the Fourth Circuit affirmed, *National Organization for Women* v. *Operation Rescue*, 914 F. 2d 582 (1990), and we granted certiorari, 498 U. S. 1119 (1991). The case was argued in the October 1991 Term, and pursuant to our direction, see 504 U. S. 970 (1992), was reargued in the current Term.

I

Our precedents establish that in order to prove a private conspiracy in violation of the first clause of § 1985(3),[1] a plain-

[1] Section 1985(3) provides as follows:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United

tiff must show, *inter alia*, (1) that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action," *Griffin* v. *Breckenridge*, 403 U. S. 88, 102 (1971), and (2) that the conspiracy "aimed at interfering with rights" that are "protected against private, as well as official, encroachment," *Carpenters* v. *Scott*, 463 U. S. 825, 833 (1983). We think neither showing has been made in the present case.

A

In *Griffin* this Court held, reversing a 20-year-old precedent, see *Collins* v. *Hardyman*, 341 U. S. 651 (1951), that § 1985(3) reaches not only conspiracies under color of state law, but also purely private conspiracies. In finding that the text required that expanded scope, however, we recognized the "constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law." *Griffin*, 403 U. S., at 102. That was to be avoided, we said, "by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment," *ibid.*—citing specifically Representative Shellabarger's statement that the law was restricted "'to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies . . . ,'" *id.*, at 100 (emphasis in original), quoting Cong. Globe, 42d Cong., 1st Sess., App. 478 (1871). We said that "[t]he language [of § 1985(3)] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously

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States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U. S. C. § 1985(3).

discriminatory animus behind the conspirators' action." 403 U. S., at 102 (emphasis in original).

We have not yet had occasion to resolve the "perhaps"; only in *Griffin* itself have we addressed and upheld a claim under § 1985(3), and that case involved race discrimination. Respondents assert that there qualifies alongside race discrimination, as an "otherwise class-based, invidiously discriminatory animus" covered by the 1871 law, opposition to abortion. Neither common sense nor our precedents support this.

To begin with, we reject the apparent conclusion of the District Court (which respondents make no effort to defend) that opposition to abortion constitutes discrimination against the "class" of "women seeking abortion." Whatever may be the precise meaning of a "class" for purposes of *Griffin*'s speculative extension of § 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with. This definitional ploy would convert the statute into the "general federal tort law" it was the very purpose of the animus requirement to avoid. *Ibid.* As JUSTICE BLACKMUN has cogently put it, the class "cannot be defined simply as the group of victims of the tortious action." *Carpenters*, *supra*, at 850 (dissenting opinion). "Women seeking abortion" is not a qualifying class.

Respondents' contention, however, is that the alleged class-based discrimination is directed not at "women seeking abortion" but at women in general. We find it unnecessary to decide whether *that* is a qualifying class under § 1985(3), since the claim that petitioners' opposition to abortion reflects an animus against women in general must be rejected. We do not think that the "animus" requirement can be met

only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex*—for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law. The record in this case does not indicate that petitioners' demonstrations are motivated by a purpose (malevolent *or* benign) directed specifically at women as a class; to the contrary, the District Court found that petitioners define their "rescues" not with reference to women, but as physical intervention "'between abortionists and the innocent victims,'" and that "all [petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." 726 F. Supp., at 1488. Given this record, respondents' contention that a class-based animus has been established can be true only if one of two suggested propositions is true: (1) that opposition to abortion can reasonably be presumed to reflect a sex-based intent, or (2) that intent is irrelevant, and a class-based animus can be determined solely by effect. Neither proposition is supportable.

As to the first: Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations.

See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 850 (1992).

Respondents' case comes down, then, to the proposition that intent is legally irrelevant; that since voluntary abortion is an activity engaged in only by women,[2] to disfavor it is *ipso facto* to discriminate invidiously against women as a class. Our cases do not support that proposition. In *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), we rejected the claim that a state disability insurance system that denied coverage to certain disabilities resulting from pregnancy discriminated on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment. "While it is true," we said, "that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.*, at 496, n. 20. We reached a similar conclusion in *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979), sustaining against an Equal Protection Clause challenge a Massachusetts law giving employment preference to military veterans, a class which in Massachusetts was over 98% male, *id.*, at 270. "'Discriminatory purpose,'" we said, "implies more than intent as volition or intent as awareness of consequences. It

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[2] Petitioners and their *amici* argue that the intentional destruction of human fetuses, which is the target of their protests, is engaged in not merely by the women who seek and receive abortions, but by the medical and support personnel who provide abortions, and even by the friends and relatives who escort the women to and from the clinics. Many of those in the latter categories, petitioners point out, are men, and petitioners block their entry to the clinics no less than the entry of pregnant women. Respondents reply that the essential object of petitioners' conspiracy is to prevent women from intentionally aborting their fetuses. The fact that the physical obstruction targets some men, they say, does not render it any less "class based" against women—just as a racial conspiracy against blacks does not lose that character when it targets in addition white supporters of black rights, see *Carpenters* v. *Scott*, 463 U. S. 825, 836 (1983). We need not resolve this dispute, but assume for the sake of argument that respondents' characterization is correct.

implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*, at 279 (citation omitted).[3] The same principle applies to the "class-based, invidiously discriminatory animus" requirement of § 1985(3).[4] Moreover, two of our cases

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[3] JUSTICE STEVENS asserts that, irrespective of intent or motivation, a classification is sex based if it has a sexually discriminatory effect. *Post*, at 326–332. The cases he puts forward to confirm this revisionist reading of *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), in fact confirm the opposite. *Nashville Gas Co.* v. *Satty*, 434 U. S. 136 (1977), cited *Geduldig* only once, in *endorsement* of *Geduldig*'s ruling that a facially neutral benefit plan is not sex based unless it is shown that "'distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.'" 434 U. S., at 145 (quoting *Geduldig*, *supra*, at 496–497, n. 20) (internal quotation marks omitted). *Satty* said that the Court "need not decide" whether "it is necessary to prove intent to establish a prima facie violation of § 703(a)(1)," 434 U. S., at 144, because "[r]espondent failed to prove *even* a discriminatory *effect*," *id.*, at 145 (emphasis added). It is clear from this that sex-based discriminatory intent is something beyond sexually discriminatory effect. The Court found liability in *Satty* "[n]otwithstanding *Geduldig*," *post*, at 328, *not* (as JUSTICE STEVENS suggests) because *Geduldig* is compatible with the belief that effects alone constitute the requisite intent, but rather because § 703(a)(2) of Title VII *has no intent requirement*, 434 U. S., at 139–141. In his discussion of the (inapplicable) Pregnancy Discrimination Act, 92 Stat. 2076, JUSTICE STEVENS acknowledges that *Congress* understood *Geduldig* as we do, see *post*, at 330–331, and nn. 29–30. As for the cases JUSTICE STEVENS relegates to footnotes: *Turner* v. *Utah Dept. of Employment Security*, 423 U. S. 44 (1975), was not even a discrimination case; *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 135 (1976), describes the holding of *Geduldig* precisely as we do; and *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669 (1983), casts no doubt on the continuing vitality of *Geduldig*.

[4] We think this principle applicable to § 1985(3) *not* because we believe that Equal Protection Clause jurisprudence is automatically incorporated into § 1985(3), but rather because it is inherent in the requirement of a class-based animus, *i. e.*, an *animus based on class*. We do not dispute JUSTICE STEVENS' observation, *post*, at 326, that Congress "may offer relief from discriminatory effects," without evidence of intent. The question is

deal specifically with the disfavoring of abortion, and establish conclusively that it is not *ipso facto* sex discrimination. In *Maher* v. *Roe*, 432 U. S. 464 (1977), and *Harris* v. *McRae*, 448 U. S. 297 (1980), we held that the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, see *Craig* v. *Boren*, 429 U. S. 190, 197–199 (1976), but the ordinary rationality standard. See *Maher*, *supra*, at 470–471, 478; *Harris*, *supra*, at 322–324.

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whether it has done so, and if we are faithful to our precedents we must conclude that it has not.

JUSTICE STEVENS and JUSTICE O'CONNOR would replace discriminatory purpose with a requirement of intentionally class-specific (or perhaps merely disparate) impact. *Post*, at 322–332 (STEVENS, J., dissenting); *post*, at 350–354 (O'CONNOR, J., dissenting). It is enough for these dissenters that members of a protected class are "targeted" for unlawful action "by virtue of their class characteristics," *post*, at 352 (O'CONNOR, J., dissenting), see also *post*, at 354, regardless of what the motivation or animus underlying that unlawful action might be. Accord, *post*, at 322–323 (STEVENS, J., dissenting). This approach completely eradicates the distinction, apparent in the statute itself, between purpose and effect. Under JUSTICE STEVENS' approach, petitioners' admitted purpose of preserving fetal life (a "*legitimate and nondiscriminatory goal*," *post*, at 323 (emphasis added)) becomes the "*indirect consequence* of petitioners' blockade," while the discriminatory effect on women seeking abortions is now "the conspirators' *immediate purpose*," *ibid.* (emphasis added). JUSTICE O'CONNOR acknowledges that petitioners' "target[ing]" is motivated by "opposition to the practice of abortion." *Post*, at 351.

In any event, the characteristic that formed the basis of the targeting here was not womanhood, but the seeking of abortion—so that the class the dissenters identify is the one we have rejected earlier: women seeking abortion. The approach of equating opposition to an activity (abortion) that can be engaged in only by a certain class (women) with opposition to that class leads to absurd conclusions. On that analysis, men and women who regard rape with revulsion harbor an invidious antimale animus. Thus, if state law should provide that convicted rapists must be paroled so long as they attend weekly counseling sessions; and if persons opposed to such lenient treatment should demonstrate their opposition by impeding access to the counseling centers; those protesters would, on the dissenters' approach, be liable under § 1985(3) because of their antimale animus.

The nature of the "invidiously discriminatory animus" *Griffin* had in mind is suggested both by the language used in that phrase ("invidious . . . [t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating," Webster's Second International Dictionary 1306 (1954)) and by the company in which the phrase is found ("there must be *some racial, or perhaps otherwise class-based,* invidiously discriminatory animus," *Griffin,* 403 U. S., at 102 (emphasis added)). Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself (apart from the use of unlawful means to achieve it, which is not relevant to our discussion of animus) does not remotely qualify for such harsh description, and for such derogatory association with racism. To the contrary, we have said that "a value judgment favoring childbirth over abortion" is proper and reasonable enough to be implemented by the allocation of public funds, see *Maher, supra,* at 474, and Congress itself has, with our approval, discriminated against abortion in its provision of financial support for medical procedures, see *Harris, supra,* at 325. This is not the stuff out of which a § 1985(3) "invidiously discriminatory animus" is created.

B

Respondents' federal claim fails for a second, independent reason: A § 1985(3) private conspiracy "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," requires an intent to deprive persons of a right guaranteed against private impairment. See *Carpenters,* 463 U. S., at 833. No intent to deprive of such a right was established here.

Respondents, like the courts below, rely upon the right to interstate travel—which we have held to be, in at least some contexts, a right constitutionally protected against private interference. See *Griffin, supra,* at 105–106. But all that respondents can point to by way of connecting petitioners'

actions with that particular right is the District Court's finding that "[s]ubstantial numbers of women seeking the services of [abortion] clinics in the Washington Metropolitan area travel interstate to reach the clinics." 726 F. Supp., at 1489. That is not enough. As we said in a case involving 18 U. S. C. § 241, the criminal counterpart of § 1985(3):

> "[A] conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then . . . the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought." *United States* v. *Guest*, 383 U. S. 745, 760 (1966).[5]

Our discussion in *Carpenters* makes clear that it does not suffice for application of § 1985(3) that a protected right be incidentally affected. A conspiracy is not "for the purpose" of denying equal protection simply because it has an effect upon a protected right. The right must be "*aimed at*," 463 U. S., at 833 (emphasis added); its impairment must be a conscious objective of the enterprise. Just as the "invidiously discriminatory animus" requirement, discussed above, requires that the defendant have taken his action "at least in part 'because of,' not merely 'in spite of,' its adverse effects

[5] JUSTICE STEVENS finds "most significant . . . the dramatic difference between the language of 18 U. S. C. § 241" and that of § 1985(3), in that the former "includes an unequivocal 'intent' requirement." *Post*, at 335. He has it precisely backwards. The *second* paragraph of § 241 does contain an explicit "intent" requirement, but the *first* paragraph, which was the only one at issue in *Guest*, see 383 U. S., at 747, does not; whereas § 1985(3) does explicitly require a "purpose." As for JUSTICE STEVENS' emphasis upon the fact that § 1985(3), unlike § 241, embraces "a purpose to deprive another of a protected privilege 'either directly or indirectly,'" *post*, at 335: that in no way contradicts a specific intent requirement. The phrase "either directly or indirectly" modifies "depriving," not "purpose." The deprivation, whether direct or indirect, must still have been the *purpose* of the defendant's action.

upon an identifiable group," *Feeney*, 442 U. S., at 279, so also the "intent to deprive of a right" requirement demands that the defendant do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it.[6] That was not shown to be the case here, and is on its face implausible. Petitioners oppose abortion, and it is irrelevant to their opposition whether the abortion is performed after interstate travel.

Respondents have failed to show a conspiracy to violate the right of interstate travel for yet another reason: Petitioners' proposed demonstrations would not implicate that right. The federal guarantee of interstate travel does not transform state-law torts into federal offenses when they are intention-

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[6] To contradict the plain import of our cases on this point, JUSTICE STEVENS presses into service a footnote in *Griffin*. *Post*, at 335–336, n. 33. In addressing "[t]he motivation requirement introduced by the word 'equal' into . . . § 1985(3)," *Griffin* said that *this* was not to be confused with a test of "specific intent to deprive a person of a federal right made definite by decision or other rule of law"; § 1985(3) "contains no specific requirement of 'wilfulness,'" and its "motivation aspect . . . focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." *Griffin*, 403 U. S., at 102, n. 10. This is supremely irrelevant to the present discussion, since (1) we are not considering "the motivation requirement introduced by the word 'equal,'" but rather the intent requirement introduced by the word "purpose," and (2) we are not asserting that the right in question must have been "made definite by decision or other rule of law," but only that it must have been "*aimed at*," with or without knowledge that it is a federally protected right, cf. *Screws* v. *United States*, 325 U. S. 91, 103–107 (1945)—a requirement not of "wilfulness," in other words, but only of "purpose." The requisite "purpose" was of course pleaded in *Griffin*, as we specifically noted. See 403 U. S., at 103. JUSTICE STEVENS makes no response whatever to the plain language of *Carpenters*, except to contend that the same irrelevant footnote 10 reaches forward 12 years in time, to prevent *Carpenters* from meaning what it obviously says *("aimed at")*. Although a few lower courts at one time read the *Griffin* footnote as JUSTICE STEVENS does, see *post*, at 336–337, those cases were all decided years before this Court's opinion in *Carpenters*, which we follow.

ally committed against interstate travelers. Rather, it protects interstate travelers against two sets of burdens: "the erection of actual barriers to interstate movement" and "being treated differently" from intrastate travelers. *Zobel* v. *Williams*, 457 U. S. 55, 60, n. 6 (1982). See *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869) (Art. IV, § 2, "inhibits discriminating legislation against [citizens of other States and] gives them the right of free ingress into other States, and egress from them"); *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948) (Art. IV, § 2, "insure[s] to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy"). As far as appears from this record, the only "actual barriers to . . . movement" that would have resulted from petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another. Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them. That would not be the case here, as respondents conceded at oral argument.[7]

The other right alleged by respondents to have been intentionally infringed is the right to abortion. The District Court declined to rule on this contention, relying exclusively upon the right-of-interstate-travel theory; in our view it also

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[7] JUSTICE STEVENS expresses incredulity at the rule we have described. It is, he says, "unsupported by precedent or reason," *post*, at 333, both of which show, he claims, that the right of interstate travel is violated even by "conduct that evenhandedly disrupts both local and interstate travel," *post*, at 337. We cite right-to-travel cases for our position; he cites nothing but negative Commerce Clause cases for his. While it is always pleasant to greet such old Commerce Clause warhorses as *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951), and *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761 (1945), cited *post*, at 337, surely they are irrelevant to the individual right of interstate travel we are here discussing. That right does not derive from the negative Commerce Clause, or else it could be eliminated by Congress.

is an inadequate basis for respondents' § 1985(3) claim. Whereas, unlike the right of interstate travel, the asserted right to abortion was assuredly "aimed at" by the petitioners, deprivation of that federal right (whatever its contours) cannot be the object of a purely private conspiracy. In *Carpenters*, we rejected a claim that an alleged private conspiracy to infringe First Amendment rights violated § 1985(3). The statute does not apply, we said, to private conspiracies that are "aimed at a right that is by definition a right only against state interference," but applies only to such conspiracies as are "aimed at interfering with rights . . . protected against private, as well as official, encroachment." 463 U. S., at 833. There are few such rights (we have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude, *United States* v. *Kozminski*, 487 U. S. 931, 942 (1988), and, in the same Thirteenth Amendment context, the right of interstate travel, see *United States* v. *Guest*, 383 U. S., at 759, n. 17). The right to abortion is not among them. It would be most peculiar to accord it that preferred position, since it is much less explicitly protected by the Constitution than, for example, the right of free speech rejected for such status in *Carpenters*. Moreover, the right to abortion has been described in our opinions as one element of a more general right of privacy, see *Roe* v. *Wade*, 410 U. S. 113, 152–153 (1973), or of Fourteenth Amendment liberty, see *Planned Parenthood of Southeastern Pa.*, 505 U. S., at 846–851; and the other elements of those more general rights are obviously *not* protected against private infringement. (A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth.) Respondents' § 1985(3) "deprivation" claim must fail, then, because they have identified no right protected against private action that has been the object of the alleged conspiracy.

II

Two of the dissenters claim that respondents have established a violation of the second, "hindrance" clause of § 1985(3), which covers conspiracies "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." 42 U. S. C. § 1985(3).

This "claim" could hardly be presented in a posture less suitable for our review. As respondents frankly admitted at both argument and reargument, their complaint did not set forth a claim under the "hindrance" clause. Tr. of Oral Arg. 27 ("the complaint did not make a hinder or prevent claim"); Tr. of Reargument 33–34.[8] Not surprisingly, therefore, neither the District Court nor the Court of Appeals considered the application of that clause to the current facts. The "hindrance"-clause issue is not fairly included within the questions on which petitioners sought certiorari, see Pet. for Cert. i; this Court's Rule 14.1(a),[9] which is alone enough to exclude it from our consideration.[10] Nor is it true that "[t]he

[8] These admissions were accurate. The amended complaint alleged, in its two federal causes of action, that petitioners "have conspired to deprive women of their right to travel" and "have conspired . . . for the purpose of denying women seeking abortions . . . their rights to privacy." App. 15–16. These are both "deprivation" claims; neither one makes any allusion to hindrance or prevention of state authorities.

[9] JUSTICE SOUTER contends, *post*, at 290–291, that the "hindrance"-clause issue was embraced within question four, which asked: "Are respondents' claims under 42 U. S. C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?" Pet. for Cert. i. This argument founders on the hard (and admitted) reality that "respondents' claims" did not include a "hindrance" claim.

[10] Contrary to JUSTICE SOUTER's suggestion, *post*, at 290–291, the provision of our Rules giving respondents the right, in their brief in opposition, to restate the questions presented, Rule 24.2, does not give them the power *to expand* the questions presented, as the Rule itself makes clear. In any event, neither of the questions set forth in the Brief in Opposition fairly

issue was briefed, albeit sparingly, by the parties prior to the first oral argument in this case." *Post*, at 291 (SOUTER, J., concurring in judgment in part and dissenting in part). To the contrary, neither party initiated even the slightest suggestion that the "hindrance" question was an issue to be argued and decided here.[11] That possibility was suggested for the first time by questions from the bench during argument, and was reintroduced, again from the bench, during reargument. (Respondents sought to include a "hindrance"-clause section in their Supplemental Brief on Reargument, but the Court declined to accept that section for filing. See 505 U. S. 1240 (1992).) In sum, the Justices reaching the "hindrance"-clause issue in this case must find in the complaint claims that the respondents themselves have admitted are not there; must resolve a question not presented to, or ruled on by, any lower court; must revise the rule that it is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented; and must penalize the parties for not addressing an issue on

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raises the "hindrance" claim. And there is no support whatever for JUSTICE SOUTER's reliance upon the formulation of the question in respondents' brief on the merits, *post*, at 290, as the basis for deeming the question properly presented—though on the merits, once again, the question referred to by JUSTICE SOUTER is unhelpful.

[11] Respondents' brief asserted that, if the Court did not affirm the judgment on the basis of the "deprivation" clause, then a remand would be necessary, so that respondents could "present a number of contentions respecting [their right-to-privacy] claim" which had not been reached below, including the contention that "petitioners, by means of their blockades, had hindered the police in securing to women their right to privacy." Brief for Respondents 43. Petitioners' reply brief responded that the complaint did not contain such a "hindrance" claim, and that there was "no reason to believe" that the "hindrance" clause "would not entail the same statutory requirements of animus and independent rights which respondents have failed to satisfy under the first clause of the statute." Reply Brief for Petitioners 14–15. These were obviously *not* arguments for resolution of the "hindrance" claim here.

which the Court specifically denied supplemental briefing.[12] That is extraordinary. See, *e. g.*, *R. A. V.* v. *St. Paul*, 505 U. S. 377, 381–382, n. 3 (1992) (citing cases and treatises); *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 97, n. 4 (1991); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 277, and n. 23 (1989).

The dissenters' zeal to reach the question whether there was a "hindrance"-clause violation would be more understandable, perhaps, if the affirmative answer they provided were an easy one. It is far from that. Judging from the statutory text, a cause of action under the "hindrance" clause would seem to require the same "class-based, invidiously discriminatory animus" that the "deprivation" clause requires, and that we have found lacking here. We said in *Griffin* that the source of the animus requirement is "[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities," 403 U. S., at 102 (emphasis in original)—and such language appears in the "hindrance" clause as well.[13] At oral argument, respondents *conceded* applicability of the animus requirement, though they with-

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[12] We are unable to grasp the logic whereby JUSTICE SOUTER, who would have us *conclusively resolve* the "hindrance"-clause legal issue against petitioners (despite their lack of opportunity to address it, both here and below), criticizes our opinion, see *post,* at 291–292, for merely *suggesting* (without resolving the "hindrance"-clause issue) the difficulties that inhere in his approach.

[13] In straining to argue that the "hindrance" clause does not have the same animus requirement as the first clause of § 1985(3), JUSTICE STEVENS makes an argument extrapolating from the reasoning of *Kush* v. *Rutledge*, 460 U. S. 719 (1983), which held that the animus requirement expounded in *Griffin* did not apply to a claim under the first clause of § 1985(2). *Post*, at 340–342. But the heart of *Kush*—what the case itself considered "of greatest importance"—was the fact that *Griffin*'s animus requirement rested on "the 'equal protection' language" of § 1985(3), which the first clause of § 1985(2) did not contain. 460 U. S., at 726. Since the "hindrance" clause of § 1985(3) does contain that language, the straightforward application of *Kush* to this case is quite the opposite of what JUSTICE STEVENS asserts.

drew this concession on reargument. Without a race- or class-based animus requirement, the "hindrance" clause of this post-Civil War statute would have been an available weapon against the mass "sit-ins" that were conducted for purposes of promoting desegregation in the 1960's—a wildly improbable result.[14]

Even, moreover, if the "hindrance"-clause claim did not fail for lack of class-based animus, it would still fail unless the "hindrance" clause applies to a private conspiracy aimed at

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[14] JUSTICE SOUTER contends the sit-in example is inapposite because the sit-ins did not "depriv[e] the owners of the segregated lunch counter[s] of any independently protected constitutional right." *Post,* at 305, n. 10. In the very paragraph to which that footnote is appended, however, JUSTICE SOUTER purports to *leave open* the question whether the "hindrance" clause would apply when the conspiracy "amount[s] to a denial of police protection to individuals who are not attempting to exercise a constitutional right," *post,* at 304, n. 9—such as (presumably) the rights guaranteed by state trespass laws. Certainly the sit-ins violated such state-law rights, or else there would have been no convictions. It is not true, in any case, that the sit-ins did not invade constitutional rights, if one uses that term (as JUSTICE SOUTER does) to include rights constitutionally protected only against official (as opposed to private) encroachment. Surely property owners have a constitutional right not to have government physically occupy their property without due process and without just compensation.

JUSTICE SOUTER's citation of *Roberts* v. *United States Jaycees,* 468 U. S. 609 (1984), *post,* at 305, n. 10, and *Lane* v. *Cotton,* 12 Mod. 472 (K. B. 1701), *post,* at 305, n. 10, requires no response. He cites *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241 (1964), for the proposition that the 1964 Civil Rights Act's elimination of restaurant-owners' right to exclude blacks from their establishments did not violate the Due Process or Takings Clauses. Assuredly not. But government regulation of commercial use through valid legislation is hardly comparable to government action that would have been the equivalent of what those conducting the sit-ins did: physically occupy private property, against the consent of the owner, without legal warrant. JUSTICE SOUTER cites *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), *post,* at 306, n. 10, to establish (in effect) that there *was,* even before the Civil Rights Act, legal warrant for the physical occupation. Any argument driven to reliance upon an extension of that volatile case is obviously in serious trouble.

rights that are constitutionally protected only against official (as opposed to private) encroachment. JUSTICE STEVENS finds it "clear" that it does, see *post*, at 339, citing, surprisingly, *Carpenters*. To the extent that case illuminates this question at all, it is clearly contrary to the dissent's view, holding that the "deprivation" clause, at least, does *not* cover private conspiracies aimed at rights protected only against state encroachment. JUSTICE O'CONNOR simply asserts without analysis that the "hindrance" clause nonetheless applies to those rights, *post*, at 355–356—although the operative language of the two clauses ("equal protection of the laws") is identical. JUSTICE SOUTER disposes of the rights-guaranteed-against-private-encroachment requirement, and the class-based animus requirement as well, only by (1) undertaking a full-dress reconsideration of *Griffin* and *Carpenters*, (2) concluding that both those cases were wrongly decided, and (3) limiting the damage of those supposed errors by embracing an interpretation of the statute that concededly gives the same language in two successive clauses completely different meanings.[15] See *post*, at 292–303. This

[15] JUSTICE SOUTER contends that even without the animus and rights-guaranteed-against-private-encroachment requirements, the "hindrance" clause will still be "significantly limit[ed]" in scope, covering only "conspiracies to act with enough *force* . . . to *overwhelm* the capacity of legal authority to act evenhandedly in administering the law," *post*, at 300 (emphasis added). JUSTICE STEVENS discerns a similar limitation, see *post*, at 341–342. Only JUSTICE SOUTER attempts to find a statutory basis for it. He argues that since § 1985(1) prohibits a conspiracy to prevent "*any person*" (emphasis added) from "discharging any duties," § 1985(3)'s prohibition of a conspiracy directed against "*the constituted authorities*" (emphasis added) must be speaking of something that affects more than a single official, *post*, at 300. This seems to us a complete non sequitur. The difference between "any person" and "constituted authorities" would contain such a significant limitation (if at all) only if the remaining language of the two sections was roughly parallel. But it is not. Section 1985(1), for example, speaks of categorically "prevent[ing]" a person's exercise of his duties, whereas § 1985(3) speaks of "preventing *or hindering*" the constituted authorities. (Emphasis added.) Obviously, one can "hinder" the

formidable task has been undertaken and completed, we reiterate, uninvited by party or *amicus*, and with respect to a cause of action not presented in the pleadings, not asserted or ruled upon below, and not contained in the questions presented on certiorari.

Equally troubling as the dissenters' questionable resolution of a legal issue never presented is their conclusion that the lower court found (or, in the case of JUSTICE SOUTER, can reasonably be thought to have found) the facts necessary to support the (nonexistent) "hindrance" claim. They concede that this requires a finding that the protesters' *purpose* was to prevent or hinder law enforcement officers; but discern such a finding in the District Court's footnote recitation that "the rescuers outnumbered the . . . police officers" and that "the police were unable to prevent the closing of the clinic for more than six (6) hours." *National Organization for Women* v. *Operation Rescue*, 726 F. Supp., at 1489, n. 4. See *post*, at 339 (STEVENS, J., dissenting); *post*, at 356 (O'CONNOR, J., dissenting); *post*, at 306 (SOUTER, J., concurring in judgment in part and dissenting in part). This renders the distinction between "purpose" and "effect" utterly meaningless. Here again, the dissenters (other than JUSTICE SOUTER) would give respondents more than respondents themselves dared to ask. Respondents frankly admitted at the

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authorities by "preventing" an individual officer. If these dissenters' interpretation of § 1985(3) were adopted, conspiracies to prevent individual state officers from acting would be left entirely uncovered. (Section 1985(1) applies only to officers *of the United States*—which is, of course, the basic distinction between the two provisions.)

Neither dissent explains why the application of enough force to *impede* law enforcement, though not to "overwhelm" or "supplant" it, does not constitute a "hindering"; or, indeed, why only "force" and not bribery or misdirection must be the means of hindrance or prevention. Nothing in the text justifies these limitations. JUSTICE SOUTER's faith in the "severely limited" character of the hindrance clause also depends upon his taking no position on whether the clause protects federal statutory rights and state-protected rights, *post*, at 303–304, n. 9.

original argument, and even at reargument, that the District Court never concluded that impeding law enforcement was the *purpose* of petitioners' protests, and that the "hindrance" claim, if valid in law, required a remand. They were obviously correct.[16]

III

Because respondents were not entitled to relief under § 1985(3), they were also not entitled to attorney's fees and costs under 42 U. S. C. § 1988. We therefore vacate that award.

Petitioners seek even more. They contend that respondents' § 1985(3) claims were so insubstantial that the District Court lacked subject-matter jurisdiction over the action, including the pendent state claims; and that the injunction should therefore be vacated and the entire action dismissed. We do not agree. While respondents' § 1985(3) causes of action fail, they were not, prior to our deciding of this case, "wholly insubstantial and frivolous," *Bell* v. *Hood*, 327 U. S. 678, 682–683 (1946), so as to deprive the District Court of jurisdiction.

It may be, of course, that even though the District Court had jurisdiction over the state-law claims, judgment on those claims alone cannot support the injunction that was entered. We leave that question for consideration on remand.

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[16] Because of our disposition of this case, we need not address whether the District Court erred by issuing an injunction, despite the language in § 1985(3) authorizing only "an action for the recovery of damages occasioned by such injury or deprivation." It is curious, however, that the dissenters, though quick to reach and resolve the unpresented "hindrance" issue, assume without analysis the propriety of the injunctive relief that they approve—though the contrary was asserted by the United States as *amicus* in support of petitioners, and the issue was addressed by both parties in supplemental briefs on reargument. See Supplemental Brief for Petitioners on Reargument 4–9; Brief for Respondents on Reargument 9.

* * *

JUSTICE STEVENS' dissent observes that this is "a case about the exercise of federal power to control an interstate conspiracy to commit illegal acts," *post*, at 344, and involves "no ordinary trespass," or "picketing of a local retailer," but "the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Act in 1871 and gave it its name," *post*, at 313. Those are certainly evocative assertions, but as far as the point of law we have been asked to decide is concerned, they are irrelevant. We construe the statute, not the views of "most members of the citizenry." *Post*, at 344. By its terms, § 1985(3) covers concerted action by as few as two persons, and does not require even interstate (much less nationwide) scope. It applies no more and no less to completely local action by two part-time protesters than to nationwide action by a full-time force of thousands.[17] And under our precedents it simply does not apply to the sort of action at issue here.

Trespassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises. These offenses may be prosecuted criminally under state law, and may also be the basis for state civil damages. They do not, however, give rise to a federal cause of action simply because their objective is to prevent the performance of abortions, any more than they do so (as we have held) when their objective is to stifle free speech.

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[17] JUSTICE STEVENS chides us for invoking text here, whereas (he says) we rely instead upon "statutory purpose" for our class-based animus requirement—"selectively employ[ing] both approaches to give [§ 1985(3)] its narrowest possible construction." *Post*, at 343, n. 37. That is not so. For our class-based animus requirement we rely, plainly and simply, upon our holding in *Griffin*, *whatever* approach *Griffin* may have used. That holding is (though JUSTICE STEVENS might wish otherwise) an integral part of our jurisprudence extending § 1985(3) to purely private conspiracies.

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

It is so ordered.

JUSTICE KENNEDY, concurring.

In joining the opinion of the Court, I make these added observations.

The three separate dissenting opinions in this case offer differing interpretations of the statute in question, 42 U. S. C. § 1985(3). Given the difficulty of the question, this is understandable, but the dissenters' inability to agree on a single rationale confirms, in my view, the correctness of the Court's opinion. As all recognize, essential considerations of federalism are at stake here. The federal balance is a fragile one, and a false step in interpreting § 1985(3) risks making a whole catalog of ordinary state crimes a concurrent violation of a single congressional statute passed more than a century ago.

Of course, the wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, persistent, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens. Such actions are designed to inflame, not inform. They subvert the civility and mutual respect that are the essential preconditions for the orderly resolution of social conflict in a free society. For this reason, it is important to note that another federal statute offers the possibility of powerful federal assistance for persons who are injured or threatened by organized lawless conduct that falls within the primary jurisdiction of the States and their local governments.

Should state officials deem it necessary, law enforcement assistance is authorized upon request by the State to the Attorney General of the United States, pursuant to 42

U. S. C. § 10501. In the event of a law enforcement emergency as to which "State and local resources are inadequate to protect the lives and property of citizens or to enforce the criminal law," § 10502(3), the Attorney General is empowered to put the full range of federal law enforcement resources at the disposal of the State, including the resources of the United States Marshals Service, which was presumably the principal practical advantage to respondents of seeking a federal injunction under § 1985(3). See § 10502(2).

If this scheme were to be invoked, the nature and extent of a federal response would be a determination for the Executive. Its authority to act is less circumscribed than our own, but I have little doubt that such extraordinary intervention into local controversies would be ordered only after a careful assessment of the circumstances, including the need to preserve our essential liberties and traditions. Indeed, the statute itself explicitly directs the Attorney General to consider "the need to avoid unnecessary Federal involvement and intervention in matters primarily of State and local concern." § 10501(c)(5).

I do not suggest that this statute is the only remedy available. It does illustrate, however, that Congress has provided a federal mechanism for ensuring that adequate law enforcement resources are available to protect federally guaranteed rights and that Congress, too, attaches great significance to the federal decision to intervene. Thus, even if, after proceedings on remand, the ultimate result is dismissal of the action, local authorities retain the right and the ability to request federal assistance, should they deem it warranted.

JUSTICE SOUTER, concurring in the judgment in part and dissenting in part.

I

This case turns on the meaning of two clauses of 42 U. S. C. § 1985(3) which render certain conspiracies civilly actionable. The first clause (the deprivation clause) covers conspiracies

> "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws";

the second (the prevention clause), conspiracies

> "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . ."

For liability in either instance the statute requires an "act in furtherance of the . . . conspiracy, whereby [a person] is injured in his person or property, or deprived of . . . any right or privilege of a citizen of the United States . . . ."

Prior cases giving the words "equal protection of the laws" in the deprivation clause an authoritative construction have limited liability under that clause by imposing two conditions not found in the terms of the text. An actionable conspiracy must have some racial or perhaps other class-based motivation, *Griffin* v. *Breckenridge*, 403 U. S. 88, 102 (1971), and, if it is "aimed at" the deprivation of a constitutional right, the right must be one secured not only against official infringement, but against private action as well, *Carpenters* v. *Scott*, 463 U. S. 825, 833 (1983). The Court follows these cases in applying the deprivation clause today, and to this extent I take no exception to its conclusion. I know of no reason that would exempt us from the counsel of *stare decisis* in adhering to this settled statutory construction, see *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197 (1991), which Congress is free to change if it should think our prior reading unsound.

II

The meaning of the prevention clause is not thus settled, however, and starting in Part IV I will give my reasons for reading it without any importation of these extratextual conditions from the deprivation clause. First, however, a word

is in order to show that the prevention clause's construction is properly before us, and to explain why the Court is not in a position to cast doubt on that clause's arguable applicability to the facts indicated by the record, in light of the Court's refusal to allow respondents to address this very issue in the supplemental briefing that was otherwise permitted prior to the reargument of this case.

A

Respondents' complaint does not limit their theory of liability to the deprivation clause alone, for it alleges simply that petitioners "have conspired with each other and other parties presently unknown for the purpose of denying women seeking abortions at targeted facilities their right to privacy, in violation of 42 U. S. C. § 1985(3)." App. 16.[1] Evidence presented at a hearing before the District Court addressed the issue of prevention or hindrance, leading that court to note that the demonstrators so far outnumbered local police that "[e]ven though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for more than six (6) hours." *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483, 1489, n. 4 (ED Va. 1989). The applicability of the prevention clause is fairly included within the questions presented, especially as restated by respondents, see Brief for Respondents i (first question presented);[2] Brief in Opposition i; *Holmes* v. *Securities Investor Protection Corp.*, 503 U. S. 258, 267, n. 12 (1992) (respondent has the right under this Court's Rule 24.2 to

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[1] Contrary to the Court's interpretation, see *ante*, at 279, and n. 8, respondents made this very point at reargument:

"Q: And it wasn't—and it wasn't in the complaint, was it?

"Ms. Ellis: No, Your Honor. The complaint is *[sic]* alleged, though, a violation of section 1985(3) generally." Tr. of Reargument 33–34.

[2] "Whether a conspiracy to blockade medical clinics providing abortions and related services to women, substantial numbers of whom travel from other states, is a basis for a cause of action under 42 U. S. C. § 1985(3)."

restate the questions presented); see also Pet. for Cert. i (petitioners' fourth question presented).[3] The issue was briefed, albeit sparingly, by the parties prior to the first oral argument in this case, see Brief for Respondents 43–44; Reply Brief for Petitioners 14–15, and during that argument was the subject of a question from the bench. See Tr. of Oral Arg. 27–29.

B

Just as it is therefore proper for me to address the interpretation of the prevention clause and the merits of respondents' position under its terms, it was reasonable for respondents themselves to seek leave to file a supplemental brief addressing that interpretation and those merits prior to the reargument. Their request was nonetheless denied, see 505 U. S. 1240 (1992), though I voted to grant it, and three other Members of the Court dissented on the record from the Court's action to the contrary. Nonetheless, whatever may have been the better decision, denying respondents' request was at least consistent with leaving the consideration of the prevention clause for another day, and in no way barred respondents from pressing a claim under the clause at a later stage of this litigation. A vote to deny the request could, for example, simply have reflected a view that in the absence of more extensive trial court findings than those quoted above it was better to leave the prevention clause for further consideration on the remand that I agree is appropriate. Now, however, in expressing skepticism that the prevention clause could be a basis for relief, the Court begins to close the door that the earlier order left open, a move that is unfair to respondents after their request was denied. While the Court's opinion concentrates on the errors of my ways, it would be difficult not to read it as rejecting a construction of the prevention clause under which respondents might suc-

[3] "Are respondents' claims under 42 U. S. C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?"

ceed, and to that extent as barring their claim under a statutory provision on which they were not allowed to comment in the supplemental briefing that was otherwise permitted before reargument.

C

Because in my judgment the applicability of the prevention clause was raised, and because there is neither unfairness to respondents in putting forward a statutory interpretation that does not bar their claim, nor unfairness to petitioners who sought no leave to address the issue further, I turn to my own views on the meaning of the prevention clause's terms.

III

Because this Court has not previously faced a prevention clause claim, the difficult question that arises on this first occasion is whether to import the two conditions imposed on the deprivation clause as limitations on the scope of the prevention clause as well. If we do not, we will be construing the phrase "equal protection of the laws" differently in neighboring provisions of the same statute, and our interpretation will seemingly be at odds with the "natural presumption that identical words used in different parts of the same act [were] intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932). But the presumption is defeasible, and in this instance giving the common phrase an independent reading is exactly what ought to be done.

This is so because the two conditions at issue almost certainly run counter to the intention of Congress, and whatever may have been the strength of this Court's reasons for construing the deprivation clause to include them, those reasons have no application to the prevention clause now before us. To extend the conditions to shorten the prevention clause's reach would, moreover, render that clause inoperative against a conspiracy to which its terms in their plain

meaning clearly should apply, a conspiracy whose perpetrators plan to overwhelm available law enforcement officers, to the point of preventing them from providing a class of victims attempting to exercise a liberty guaranteed them by the Constitution with the police protection otherwise extended to all persons going about their lawful business on streets and private premises. Lest we embrace such an unintended and untoward result, we are obliged to reject any limiting constructions that *stare decisis* does not require.

A

The amalgam of concepts reflected in 42 U. S. C. § 1985(3) witness the statute's evolution, as § 2 of the Civil Rights Act of 1871, from a bill that would have criminalized conspiracies "to do any act in violation of the rights, privileges, or immunities of any person . . . ," Cong. Globe, 42d Cong., 1st Sess., App. 206 (1871) (statement of Rep. Blair), quoting H. R. 320, § 2, 42d Cong., 1st Sess. (1871), to a statute including a civil cause of action against conspirators and those who "go in disguise" to violate certain constitutional guarantees. See 17 Stat. 13. The amendment of the original bill that concerns us occurred in the House, to calm fears that the statute's breadth would extend it to cover a vast field of traditional state jurisdiction, exceeding what some Members of Congress took to be the scope of congressional power under the Fourteenth Amendment. See Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi. L. Rev. 402, 417 (1979). The principal curb placed on the statute's scope was the requirement that actionable conspiracies (not otherwise proscribed on the strength of their threats to voting rights, see § 1985(3)) be motivated by a purpose to deny equal protection of the laws. The sponsor of the amendment, Representative Shellabarger, put it this way: "The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which

shall attack the equality of rights of American citizens . . . ." Cong. Globe, 42d Cong., 1st Sess., 478 (1871).

The effect of the equal protection requirement in thus limiting the deprivation clause has received the Court's careful attention, first in *Collins* v. *Hardyman*, 341 U. S. 651 (1951), then in a series of more recent cases, *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366 (1979), and *Carpenters* v. *Scott*, 463 U. S. 825 (1983). For present purposes, *Griffin* and *Carpenters* stand out.

B

The *Griffin* Court sought to honor the restrictive intent of the 42d Congress by reading the "language requiring intent to deprive of equal protection, or equal privileges and immunities," *Griffin*, 403 U. S., at 102 (emphasis omitted), as demanding proof of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Ibid.* And while this treatment did, of course, effectively narrow the scope of the clause, it did so probably to the point of overkill, unsupported by any indication of an understanding on the part of Congress that the animus to deny equality of rights lying at the heart of an equal protection violation as the legislation's sponsors understood it would necessarily be an animus based on race or some like character. See *id.*, at 100; Cong. Globe, 42d Cong., 1st Sess., App. 188 (remarks of Rep. Willard); Cong. Globe, 42d Cong., 1st Sess., at 478 (remarks of Rep. Shellabarger).

While the Congress did not explain its understanding of statutory equal protection to any fine degree, I am not aware of (and the *Griffin* Court did not address) any evidence that in using the phrase "equal protection" in a statute passed only three years after the ratification of the Fourteenth Amendment Congress intended that phrase to mean anything different from what the identical language meant in the Amendment itself. That is not to say, of course, that all Members of Congress in 1871, or all jurists, would have

agreed on exactly what the phrase did mean, and certainly it is true that the conceptual development of equal protection could hardly have been outlined in advance by the Members of the 42d Congress. But equally is it true that we have no reason to suppose that they meant their statutory equal protection provision to be read any more narrowly than its obvious cognate in the Amendment. *Griffin*, however, gave it just such a reading.

To be sure, there is some resonance between *Griffin*'s animus requirement and those constitutional equal protection cases that deal with classifications calling for strict or heightened scrutiny, as when official discriminations employ such characteristics as race, national origin, alienage, gender, or illegitimacy. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440–441 (1985) (describing the jurisprudence).[4] But these categories of distinctions based on race or on qualities bearing a more or less close analogy to race do not by any means exhaust the scope of constitutional equal protection. All legislative classifications, whether or not they can be described as having "some racial or perhaps otherwise class-based invidiously discriminatory animus," are subject to review under the Equal Protection Clause, which contains no reference to race, and which has been understood to have this comprehensive scope since at least the late 19th century. See, *e. g.*, *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293–294 (1898) (citing cases). A routine legislative classification is, of course, subject only to deferential scrutiny, passing constitutional muster if it bears a rational relationship to some legitimate governmental purpose. *E. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, *supra* (describing the test); *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981).

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[4] Cf. *Carpenters* v. *Scott*, 463 U. S. 825, 835–839 (1983) (holding that animus against a class based upon its economic views, status, or activities is beyond the reach of the deprivation clause, and reserving the question whether it reaches animus against any class other than "Negroes and those who championed their cause").

But the point is that Fourteenth Amendment equal protection scrutiny is applied to such classifications, and if the scope of "equal protection" in the statute is to balance its constitutional counterpart, the statute ought to cover discriminations that would be impermissible under rational-basis scrutiny.

There is, indeed, even some extratextual evidence of a positive congressional intent to provide just such a statutory reach beyond what *Griffin* would allow. Some of the legislative history of § 2 of the 1871 Act suggests that the omission of any reference to race from the statutory text of equal protection was not the result of inadvertence, and that Congress understood that classifications infringing the statutory notion of equal protection were not to be limited to those based on race or some closely comparable personal quality. The most significant, and often quoted, evidence came from Senator Edmunds, who managed the bill on the Senate floor and remarked that if there were a conspiracy against a person "because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it." Cong. Globe, 42d Cong., 1st Sess., at 567.[5] These are not, of course, all examples of discrimination based on any class comparable to race, and the Senator's list counters any suggestion that the subject matter of statutory equal protection was meant to be so confined.[6]

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[5] *Carpenters* did leave open the question whether the deprivation clause might apply to a conspiracy "aimed at any class or organization on account of its political views or activities . . . ." See *Carpenters*, *supra*, at 837.

[6] Senator Edmunds' quoted language occurred in a discussion of both §§ 2 and 3 of the bill that became the Civil Rights Act of 1871. See Cong. Globe, 42d Cong., 1st Sess., at 567. That Senator Edmunds was referring to the statutory language at issue here is unmistakable because he stated that he was describing the conditions required before a conspiracy could be actionable "under the provisions of all this bill." See *ibid.*

C

Notwithstanding the *Griffin* Court's decision to read the deprivation clause's equal protection element as more restrictive than Fourteenth Amendment equal protection, the Court recognized that in a different respect the statute remained more expansive than its constitutional counterpart, in being aimed at deprivations of equal protection by purely private conspirators. 403 U. S., at 96–97. This very conclusion, in fact, prompted the further concern that the deprivation clause might by its terms apply to facts beyond Congress's constitutional reach. The Court nonetheless obviated the need to address the scope of congressional power at that time by confining itself to a holding that the statute was constitutional at least insofar as it implemented congressional power to enforce the Thirteenth Amendment and the right to travel freely, each of which was "assertable against private as well as governmental interference." *Id.*, at 105.[7]

The Court was then only one step away from putting the deprivation clause in its present shape, a step it took in *Carpenters*. Whereas *Griffin* had held that requiring a purpose to infringe a federal constitutional right guaranteed against private action was sufficient to allay any fear that the deprivation clause was being applied with unconstitutional breadth, *Carpenters* turned this sufficient condition into a necessity insofar as conspiracies to deprive any person or class of persons of federal constitutional rights were concerned, by holding that in the case of such a conspiracy no cause of action could be stated without alleging such an ultimate object of depriving the plaintiff of a right protected

[7] This prudential step was presumably unnecessary in light of *United States* v. *Guest*, 383 U. S. 745, 762 (1966) (Clark, J., concurring); *id.*, at 782 (Brennan, J., concurring in part and dissenting in part), in which a majority of the Court concluded that § 5 of the Fourteenth Amendment empowers Congress to enact laws punishing all conspiracies, with or without state action, that interfere with exercise of Fourteenth Amendment rights.

against private action by the Federal Constitution. 463 U. S., at 833.

It was a most significant step. In going no further than to affirm the deprivation clause's constitutionality insofar as it applied to conspiracies to infringe federal constitutional rights guaranteed against private action, the *Griffin* Court had arguably acted with prudent reticence in avoiding a needless ruling on Congress's power to outlaw conspiracies aimed at other rights.[8] But in converting this indisputably constitutional object, of giving relief against private conspiracies to violate federal constitutional rights guaranteed against private action, into the exclusive subject matter of the clause with respect to conspiracies to deprive people of federal constitutional rights, the *Carpenters* Court almost certainly narrowed that clause from the scope Congress had intended. If indeed Congress had meant to confine the statute that narrowly, its application to federal constitutional deprivations in 1871 would not have gone beyond violations of the Thirteenth Amendment, adopted in 1865. (The next clear example of a constitutional guarantee against individual action would not emerge until *United States* v. *Guest*, 383 U. S. 745, 759–760, n. 17 (1966), recognizing a right of interstate travel good against individuals as well as governments.) But if Congress had meant to protect no federal constitutional rights outside those protected by the Thirteenth Amendment, it is hard to see why the drafters would not simply have said so, just as in the third and fourth clauses of § 1985(3) they dealt expressly with infringements of voting rights, already guaranteed against abridgment by the Fifteenth Amendment adopted in 1870.

The *Carpenters* Court might have responded to this objection by suggesting that the textual breadth of the deprivation clause reflects its applicability to conspiracies aimed at violating rights guaranteed under state law or rights guar-

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[8] But see n. 7, *supra.*

anteed against individual infringement by federal statutory law, since such possible applications were left open by the Court's opinion. See *Carpenters*, *supra*, at 833–834. But this answer would prompt the even more fundamental objection that there is no textual basis in the deprivation clause (or in the portions of subsection (3) common to all clauses) suggesting that any such individual-infringement limitation was intended at all.

Whether or not the concerns with constitutionality that prompted both the *Griffin* and *Carpenters* holdings were well raised or wisely allayed by those decisions, the solution reached most probably left a lesser deprivation clause than Congress intended. Just as probably, if that solution were imported into the prevention clause, it would work an equally unintended contraction.

IV

The conclusion that the conditions placed on the deprivation clause narrow its intended scope prompts the question whether the reasons thought to argue in favor of placing such conditions on the deprivation clause apply to the prevention clause. They do not.

A

We may recall that in holding racial or other class-based animus a necessary element of the requisite purpose to deprive of equal protection, the *Griffin* Court was mindful of the congressional apprehension that the statute might otherwise turn out to be "a general federal tort law." *Griffin*, 403 U. S., at 102. While the Court did not dwell on why it chose a requirement of racial or comparable class-based animus to restrict statutory equal protection, its readiness to read the statutory category more narrowly than its Fourteenth Amendment counterpart is at least understandable when one sees that the scope of conspiracies actionable under the deprivation clause has virtually no textual limit beyond

the need to prove the equal protection element. Without the *Griffin* Court's self-imposed class-based animus requirement, any private conspiracy to deprive of equal protection would be actionable under § 1985(3) so long as the conspirators took some action that produced some harm.

The prevention clause carries no such premonition of liability, however. Its most distinctive requirement, to prove a conspiratorial purpose to "preven[t] or hinde[r] the constituted authorities of any State or Territory from giving or securing . . . the equal protection of the laws," is both an additional element unknown to the deprivation clause and a significantly limiting condition. Private conspiracies to injure according to class or classification are not enough here; they must be conspiracies to act with enough force, of whatever sort, to overwhelm the capacity of legal authority to act evenhandedly in administering the law.

The requirement that the very capacity of the law enforcement authorities must be affected is supported by a comparison of the statutory language of the prevention clause, which touches only those conspiracies with a purpose to "preven[t] or hinde[r] the constituted authorities" of any State or territory from giving or securing equal protection, with the text of § 1985(1), which (among other things) prohibits conspiracies to prevent "any person" from "discharging any duties" of an office under the United States. The contrast makes clear that the words of the prevention clause are not those that Congress used when it meant to deal with every situation in which a single government official was prevented from discharging his duties. To be sure, in an earlier day of scarce law enforcement personnel, rudimentary communication, and slow transportation, in some situations it might have been possible to overthrow the capacity of government by overthrowing one official alone. But a more ambitious conspiratorial object would be required under normal modern conditions, and in order to satisfy the requirement of affecting the law enforcement system sufficiently, such a con-

spiracy would need to envision action capable of countering numbers of officers or injuring their responsive capacity (as by disabling their communication system, for example).

The requirement of an object to thwart the capacity of law enforcement authority to provide equal protection of the laws thus narrows the scope of conspiracies actionable under the prevention clause. It does so to such a degree that no reason appears for narrowing it even more by a view of equal protection more restrictive than that of the Fourteenth Amendment.

B

Equally inapposite to the prevention clause is the second *Griffin-Carpenter* deprivation clause limitation that where a conspiracy to deny equal protection would interfere with exercise of a federal constitutional right, it be a right "protected against private, as well as official encroachment," *Carpenters*, 463 U. S., at 833. The justification for the Court's initial enquiry concerning rights protected by the Constitution against private action lay in its stated concern about the constitutional limits of congressional power to regulate purely private action. *Griffin*, *supra*, at 104. Once again, however, the reason that there is no arguable need to import the extratextual limitation from the deprivation clause into the prevention clause lies in the prevention clause's distinctive requirement that the purpose of a conspiracy actionable under its terms must include a purpose to accomplish its object by preventing or hindering officials in the discharge of their constitutional responsibilities. The conspirators' choice of this means to work their will on their victims would be significant here precisely because the act of frustrating or thwarting state officials in their exercise of the State's police power would amount simply to an extralegal way of determining how that state power would be exercised. It would, in real terms, be the exercise of state power itself. To the degree that private conspirators would arrogate the State's police power to themselves to thwart equal protection by

imposing what amounts to a policy of discrimination in place of the Constitution's mandate, their action would be tantamount to state action and be subject as such to undoubted congressional authority to penalize any exercise of state police power that would abridge the equal protection guaranteed by the Fourteenth Amendment. That is to say, Congress is no less able to legislate against unconstitutional exercises of state authority by conspiratorial usurpation than it is to counter unconstitutional action taken by those formally vested with state authority.

This equation of actionable conspiracies with state action is indeed central to the reading given to the prevention clause by the *Griffin* Court. In reasoning that the deprivation clause contained no state action requirement, the Court contrasted the text of that clause with the language of three other provisions indicating, respectively, "three possible forms for a state action limitation on § 1985(3)." *Griffin*, 403 U. S., at 98. One such limitation that might have been read into the deprivation clause was "that there must be interference with or influence upon state authorities." *Ibid.* The Court declined to tack that requirement onto the deprivation clause because its inclusion in the prevention clause indicated that Congress intended it to apply there and nowhere else. The relevant point here is that the whole basis of the *Griffin* Court's analysis was that "interference with or influence on state authorities" was state action, and it follows from *Griffin*'s own premises that no guarantee-against-private-encroachment condition would have been needed even then to allay any apprehension that in reaching the private conspiracies described by the prevention clause, Congress might be exceeding its authority under § 5 of the Fourteenth Amendment.

Accordingly, I conclude that the prevention clause may be applied to a conspiracy intended to hobble or overwhelm the capacity of duly constituted state police authorities to secure equal protection of the laws, even when the conspirators' ani-

mus is not based on race or a like class characteristic, and even when the ultimate object of the conspiracy is to violate a constitutional guarantee that applies solely against state action.

V

Turning now to the application of the prevention clause as I thus read it, I conclude that a conspiracy falls within the terms of the prevention clause when its purpose is to hinder or prevent law enforcement authorities from giving normal police protection to women attempting to exercise the right to abortion recognized in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), and *Roe* v. *Wade*, 410 U. S. 113 (1973). My reason for this is not a view that a State's frustration of an individual's choice to obtain an abortion would, without more, violate equal protection, but that a classification necessarily lacks any positive relationship to a legitimate state purpose, and consequently fails rational-basis scrutiny, when it withdraws a general public benefit on account of the exercise of a right otherwise guaranteed by the Constitution. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972) (applying the Equal Protection Clause and finding no "appropriate governmental interest suitably furthered" by a discrimination that would independently violate the First Amendment). While such a discrimination, were it wrought by the State, could be treated as a burden on the exercise of a right protected by a substantive due process guarantee, see *Casey*, *supra*, and forbidden as such, the denial of generally available civic benefits to one group solely because its members seek what the Constitution guarantees would just as clearly be a classification for a forbidden purpose, which is to say, independently a violation of equal protection. See *Mosley*, *supra; Carey* v. *Brown*, 447 U. S. 455 (1980).[9] When private individuals conspire for the pur-

[9] I emphasize the substantive due process guarantee at issue here because my analysis rests on the fact that, treating the conspirators as the State, the imposition of restrictions on abortion more strict than those

pose of arrogating and, in effect, exercising the State's power in a way that would thus violate equal protection if so exercised by state officials, the conspiracy becomes actionable when implemented by an act "whereby [a person] is injured in his person or property, or deprived of . . . any right or privilege of a citizen of the United States." § 1985(3).[10]

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permitted under the Constitution is not a legitimate public purpose. I do not reach the question whether and how the equal protection requirement in the prevention clause would be violated by a conspiracy which, if charged to the State, would amount to a denial of police protection to individuals who are not attempting to exercise a constitutional right.

[10] The scope of this construction of the prevention clause is limited. It certainly would not forbid any conduct, unlike that at issue here, protected by the First Amendment. Nor would it reach even demonstrations that have only the incidental effect of overwhelming local police authorities, for the statute by its terms requires a "purpose" to "preven[t] or hinde[r] the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." Indeed, it would not necessarily reach even most types of civil disobedience that may be intended to overwhelm police by inviting multiple arrests, because the purpose of these is not ordinarily to discriminate against individuals on the basis of their exercise of an independently protected constitutional right. See n. 9, *supra.*

As to the lunch counter sit-in protests of the early 1960's, to which the Court refers, see *ante,* at 282, and n. 14, if the cases that made it to this Court are representative, these normally were not "mass" demonstrations, but rather led to the arrests of small groups of orderly students who refused to leave segregated establishments when requested to do so. See, *e. g., Bouie* v. *City of Columbia,* 378 U. S. 347, 348 (1964) ("two Negro college students"); *Bell* v. *Maryland,* 378 U. S. 226, 227 (1964) ("12 Negro students"); *Robinson* v. *Florida,* 378 U. S. 153 (1964) (an integrated group of 18 blacks and whites); *Barr* v. *City of Columbia,* 378 U. S. 146, 147 (1964) ("five Negro college students"); *Griffin* v. *Maryland,* 378 U. S. 130, 132 (1964) ("five young Negroes"); *Lombard* v. *Louisiana,* 373 U. S. 267, 268 (1963) ("three Negro and one white college students" seeking service at a refreshment counter "designed to accommodate 24 persons"); *Peterson* v. *Greenville,* 373 U. S. 244, 245, 247 (1963) (10 "Negro boys and girls" seeking service at a lunch counter that "was designed to accommodate 59 persons").

In any event, under the construction I adopt today, a lunch counter sit-in would not have been actionable even if police had been overwhelmed

VI

The only remaining question is whether respondents have demonstrated, and the District Court has found, a conspiracy

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because, for example, protesters arrested for trespass were immediately replaced by others who prevented police from barring integration of the lunch counter, leading to mass arrests. This is so because the protesters would not have deprived the owner of the segregated lunch counter of any independently protected constitutional right. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 618–622 (1984) (no associational right on the part of individual members to exclude women from the Jaycees); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258–261 (1964) (Title II of the Civil Rights Act of 1964 prohibiting discrimination in places of public accommodation does not work a deprivation of liberty or property without due process of law, nor a taking of property without just compensation).

The Court correctly describes the holding of *Heart of Atlanta*, but then ignores the import of that holding in reaching its conclusion. It argues that government action that "would have been the equivalent of what those conducting the sit-ins did," *i. e.*, government action preventing restaurant owners from discriminating in provision of service against blacks, would have violated the Constitution by "physically occupy[ing the restaurant owners'] property without due process and without just compensation." See *ante*, at 282, n. 14. Whether the "property" to which the Court refers is the lunch counter itself, or the restaurant owners' "right to exclude blacks from their establishments" on the basis of race, *ibid.*, assuming that could even be described as one of that bundle of rights that made up such a restaurant owner's property (a dubious proposition, see, *e. g.*, *Lane* v. *Cotton*, 12 Mod. 472, 484 (K. B. 1701) (common-law duty of innkeepers to serve potential patrons equally, without regard to personal preference, so long as they can be accommodated)), the Court does not explain how, if such government action would violate the Constitution, Title II of the Civil Rights Act could provide "legal warrant for the physical occupation," *ante*, at 282, n. 14, without similarly offending the Takings and Due Process Clauses.

There is, additionally, an independent reason apart from the absence of any constitutional right on the restaurant owner's part, that a sit-in demonstration would not be actionable under my construction of the prevention clause. Although the question was left open in the sit-in cases decided by this Court in 1963 and 1964, see Paulsen, The Sit-In Cases of 1964: "But Answer Came There None," 1964 S. Ct. Rev. 137 (1964), and was then largely mooted by the adoption of the Civil Rights Act of 1964,

thus actionable under the prevention clause.[11] While I think that all of the requisite findings would be supportable on this record, one such finding has not been expressly made.

The District Court found that petitioners conspired to cause respondent clinics to cease operations by trespassing on their property and physically blocking entry into and exit from the clinics, see 726 F. Supp., at 1489, rendering existing and prospective patients, as well as physicians and medical staff, unable to enter the clinic to render or receive medical counseling or advice. *Ibid.* The District Court found that petitioners' actions were characteristically undertaken without notice and typically overwhelmed local police officials invested with the law enforcement component of the State's police power, rendering them unable for a substantial period to give or secure the police protection otherwise extended to all persons going about their lawful business on the streets and on private premises. *Id.*, at 1489, 1490, and n. 4. The victims were chosen because they would be making choices falling within the scope of recognized substantive due process protection, *id.*, at 1489, choices that may not be made the basis for discriminatory state classifications applied to deny state services routinely made available to all persons. The District Court found that the effects of thus replacing constituted authority with a lawless regime would create a substantial risk of physical harm, *ibid.*, and of damage to respondents' property, *id.*, at 1489–1490, a conclusion amply

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government enforcement of private segregation by use of a state trespass law, rather than "securing to all persons . . . the equal protection of the laws," itself amounted to an unconstitutional act in violation of the Equal Protection Clause of the Fourteenth Amendment. Cf. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

[11] As the Court observes, *ante*, at 285, n. 16, I do not address the propriety of injunctive relief in this case even though it was addressed by the parties in supplemental briefs on reargument. Unlike the prevention clause question, it is not "fairly included" within the questions upon which certiorari was granted, and therefore its consideration by the Court would be inappropriate. See this Court's Rule 14.1(a).

supported by the record evidence of personal assaults and tortious restrictions on lawful movement, as well as damage to property, at petitioners' previous demonstrations. See, *e. g.*, Tr. A–25 (Nov. 20, 1989).

These facts would support a conclusion that petitioners' conspiracy had a "purpose of preventing or hindering the constituted authorities of [Virginia] from giving or securing to all persons within [Virginia] the equal protection of the laws," and it might be fair to read such a finding between the lines of the District Court's express conclusions. But the finding was not express, and the better course is to err on the side of seeking express clarification. Certainly that is true here, when other Members of the Court think it appropriate to remand for further proceedings. I conclude therefore that the decision of the Court of Appeals should be vacated, and the case be remanded for consideration of purpose and for a final determination whether implementation of this conspiracy was actionable under the prevention clause of 42 U. S. C. § 1985(3).

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

After the Civil War, Congress enacted legislation imposing on the Federal Judiciary the responsibility to remedy both abuses of power by persons acting under color of state law and lawless conduct that state courts are neither fully competent, nor always certain, to prevent.[1] The Ku Klux Act of 1871, 17 Stat. 13, was a response to the massive, organized lawlessness that infected our Southern States during the post-Civil War era. When a question concerning this statute's coverage arises, it is appropriate to consider whether

[1] Thus, for example, the Sherman Act, 26 Stat. 209, was a response to a concern about concentrations of economic power that could not be effectively controlled by state enforcement of common-law doctrines of restraint of trade. See W. Letwin, Law and Economic Policy in America 77–85 (1980).

the controversy has a purely local character or the kind of federal dimension that gave rise to the legislation.

Based on detailed, undisputed findings of fact, the District Court concluded that the portion of § 2 of the Ku Klux Act now codified at 42 U. S. C. § 1985(3) provides a federal remedy for petitioners' violent concerted activities on the public streets and private property of law-abiding citizens. *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483 (ED Va. 1989). The Court of Appeals affirmed. *National Organization for Women* v. *Operation Rescue*, 914 F. 2d 582 (CA4 1990). The holdings of the courts below are supported by the text and the legislative history of the statute and are fully consistent with this Court's precedents. Admittedly, important questions concerning the meaning of § 1985(3) have been left open in our prior cases, including whether the statute covers gender-based discrimination and whether it provides a remedy for the kind of interference with a woman's right to travel to another State to obtain an abortion revealed by this record. Like the overwhelming majority of federal judges who have spoken to the issue,[2] I am persuaded that traditional princi-

[2] See *Volunteer Medical Clinic, Inc.* v. *Operation Rescue*, 948 F. 2d 218 (CA6 1991); *National Organization for Women* v. *Operation Rescue*, 914 F. 2d 582 (CA4 1990) (case below); *New York State National Organization for Women* v. *Terry*, 886 F. 2d 1339 (CA2 1989), cert. denied, 495 U. S. 947 (1990); *Women's Health Care Services* v. *Operation Rescue-National*, 773 F. Supp. 258 (Kan. 1991); *Planned Parenthood Assn. of San Mateo Cty.* v. *Holy Angels Catholic Church*, 765 F. Supp. 617 (ND Cal. 1991); *National Organization for Women* v. *Operation Rescue*, 747 F. Supp. 760 (DC 1990); *Southwestern Medical Clinics of Nevada, Inc.* v. *Operation Rescue*, 744 F. Supp. 230 (Nev. 1989); *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483 (ED Va. 1989) (case below); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. 165 (Ore. 1988); *Roe* v. *Operation Rescue*, 710 F. Supp. 577 (ED Pa. 1989); and *New York State National Organization for Women* v. *Terry*, 697 F. Supp. 1324 (SDNY 1988); but see *Lucero* v. *Operation Rescue of Birmingham*, 954 F. 2d 624 (CA11 1992); *National Abortion Federation* v. *Operation Rescue*, 721

ples of statutory construction readily provide affirmative answers to these questions.

It is unfortunate that the Court has analyzed this case as though it presented an abstract question of logical deduction rather than a question concerning the exercise and allocation of power in our federal system of government. The Court ignores the obvious (and entirely constitutional) congressional intent behind § 1985(3) to protect this Nation's citizens from what amounts to the theft of their constitutional rights by organized and violent mobs across the country.

The importance of the issue warrants a full statement of the facts found by the District Court before reaching the decisive questions in this case.

I

Petitioners are dedicated to a cause that they profoundly believe is far more important than mere obedience to the laws of the Commonwealth of Virginia or the police power of its cities. To achieve their goals, the individual petitioners "have agreed and combined with one another and with defendant Operation Rescue to organize, coordinate and participate in 'rescue' demonstrations at abortion clinics in various parts of the country, including the Washington metropolitan area. The purpose of these 'rescue' demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely."[3]

The scope of petitioners' conspiracy is nationwide; it far exceeds the bounds or jurisdiction of any one State. They have blockaded clinics across the country, and their activities have been enjoined in New York, Pennsylvania, Washington, Connecticut, California, Kansas, and Nevada, as well as the

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F. Supp. 1168 (CD Cal. 1989); and *Lucero* v. *Operation Rescue of Birmingham*, 772 F. Supp. 1193 (ND Ala. 1991).

[3] *National Organization for Women* v. *Operation Rescue*, 726 F. Supp., at 1488.

District of Columbia metropolitan area. They have carried out their "rescue" operations in the District of Columbia and Maryland in defiance of federal injunctions.[4]

Pursuant to their overall conspiracy, petitioners have repeatedly engaged in "rescue" operations that violate local law and harm innocent women. Petitioners trespass on clinic property and physically block access to the clinic, preventing patients, as well as physicians and medical staff, from entering the clinic to render or receive medical or counseling services. Uncontradicted trial testimony demonstrates that petitioners' conduct created a "substantial risk that existing or prospective patients may suffer physical or mental harm."[5] Petitioners make no claim that their conduct is a legitimate form of protected expression.

Petitioners' intent to engage in repeated violations of law is not contested. They trespass on private property, interfere with the ability of patients to obtain medical and coun-

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[4] *Id.*, at 1490.

[5] *Id.*, at 1489. The District Court's findings described the risk of serious physical and psychological injuries caused by petitioners' conduct:

"For example, for some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a 'rescue' demonstration closes a clinic, patients requiring the laminaria removal procedure or other vital medical services must either postpone the required treatment and assume the attendant risks or seek the services elsewhere. Uncontradicted trial testimony established that there were numerous economic and psychological barriers to obtaining these services elsewhere. Hence, a 'rescue' demonstration creates a substantial risk that a clinic's patients may suffer physical and mental harm.

". . . Uncontradicted trial testimony by Dickinson-Collins, a trained mental health professional, established that blockading clinics and preventing patient access could cause stress, anxiety and mental harm (i) to women with abortions scheduled for that time, (ii) to women with abortion procedures (i. e., laminaria insertion) already underway and (iii) to women seeking counselling concerning the abortion decision." *Ibid.* (footnote omitted).

seling services, and incite others to engage in similar unlawful activity. They also engage in malicious conduct, such as defacing clinic signs, damaging clinic property, and strewing nails in clinic parking lots and on nearby public streets.[6] This unlawful conduct is "vital to [petitioners'] avowed purposes and goals."[7] They show no signs of abandoning their chosen method for advancing their goals.[8]

Rescue operations effectively hinder and prevent the constituted authorities of the targeted community from providing local citizens with adequate protection.[9] The lack of advance warning of petitioners' activities, combined with limited police department resources, makes it difficult for the police to prevent petitioners' ambush by "rescue" from closing a clinic for many hours at a time. The trial record is replete with examples of petitioners overwhelming local law enforcement officials by sheer force of numbers. In one "rescue" in Falls Church, Virginia, the demonstrators vastly outnumbered the police department's complement of 30 deputized officers. The police arrested 240 rescuers, but were unable to prevent the blockade from closing the clinic for more than six hours. Because of the large-scale, highly organized nature of petitioners' activities, the local authorities are unable to protect the victims of petitioners' conspiracy.[10]

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[6] *Ibid.*

[7] *Id.*, at 1495.

[8] *Id.*, at 1490.

[9] Presumably this fact, as well as her understanding of the jurisdictional issue, contributed to the decision of the attorney general of Virginia to file a brief *amicus curiae* supporting federal jurisdiction in this case. The city attorney for Falls Church, Virginia, has also filed an *amicus curiae* brief supporting respondents.

[10] See *id.*, at 1489, n. 4. The District Court's findings contain several examples illustrating the character of petitioners' "rescue" operations: "For example, on almost a weekly basis for the last five (5) years, Commonwealth Women's Clinic has been the target of 'rescue' demonstrations by Operation Rescue. One of the largest of these occurred on October 29, 1988. That 'rescue' succeeded in closing the Clinic from 7:00 a.m. to 1:30 p.m., notwithstanding the efforts of the Falls Church Police Depart-

Petitioners' conspiracy had both the purpose and effect of interfering with interstate travel. The number of patients who cross state lines to obtain an abortion obviously depends, to some extent, on the location of the clinic and the quality of its services. In the Washington metropolitan area, where interstate travel is routine, 20 to 30 percent of the patients at some clinics were from out of State, while at least one clinic obtained over half its patients from other States. The District Court's conclusions in this regard bear repetition:

> "[Petitioners] engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling services, of the right to travel. The right to travel includes the right to unobstructed interstate travel to obtain an abortion and other medical services. . . . Testimony at trial establishes that clinics in Northern Virginia provide medical services to plaintiffs' members and patients who travel from out of state. Defendants' activities interfere with these persons' right to unimpeded interstate travel by blocking their access to abor-

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ment. 'Rescuers' did more than trespass on to the clinic's property and physically block all entrances and exits. They also defaced clinic signs, damaged fences and blocked ingress into and egress from the Clinic's parking lot by parking a car in the center of the parking lot entrance and deflating its tires. On this and other occasions, rescuers' have strewn nails on the parking lots and public streets abutting the clinics to prevent the passage of any cars. Less than a year later, in April 1989, a similar 'rescue' demonstration closed the Metropolitan Family Planning Institute in the District of Columbia for approximately four (4) hours.

". . . Clinics in Maryland and the District of Columbia were closed as a result of 'rescues' on November 10, 11 and 12, 1989. The following weekend, on November 18, 1989, the Hillcrest Women's Surgi-Center in the District of Columbia was closed for eleven (11) hours as a result of a 'rescue' demonstration. Five (5) women who had earlier commenced the abortion process at the clinic by having laminaria inserted were prevented by 'rescuers' from entering the clinic to undergo timely laminaria removal." *Id.*, at 1489–1490 (footnote omitted).

> tion clinics. And, the Court is not persuaded that clinic closings affect only intra-state travel, from the street to the doors of the clinics. Were the Court to hold otherwise, interference with the right to travel could occur only at state borders. This conspiracy, therefore, effectively deprives organizational plaintiffs' non-Virginia members of their right to interstate travel."[11]

To summarize briefly, the evidence establishes that petitioners engaged in a nationwide conspiracy; to achieve their goal they repeatedly occupied public streets and trespassed on the premises of private citizens in order to prevent or hinder the constituted authorities from protecting access to abortion clinics by women, a substantial number of whom traveled in interstate commerce to reach the destinations blockaded by petitioners. The case involves no ordinary trespass, nor anything remotely resembling the peaceful picketing of a local retailer. It presents a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Act in 1871 and gave it its name.

II

The text of the statute makes plain the reasons Congress considered a federal remedy for such conspiracies both necessary and appropriate. In relevant part the statute contains two independent clauses which I separately identify in the following quotation:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, *[first]* for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or *[second]* for the pur-

[11] *Id.*, at 1493.

> pose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U. S. C. § 1985(3).

The plain language of the statute is surely broad enough to cover petitioners' conspiracy. Their concerted activities took place on both the public "highway" and the private "premises of another." The women targeted by their blockade fit comfortably within the statutory category described as "any person or class of persons." Petitioners' interference with police protection of women seeking access to abortion clinics "directly or indirectly" deprived them of equal protection of the laws and of their privilege of engaging in lawful travel. Moreover, a literal reading of the second clause of the statute describes petitioners' proven "purpose of preventing or hindering the constituted authorities of any State or Territory" from securing "to all persons within such State or Territory the equal protection of the laws."

No one has suggested that there would be any constitutional objection to the application of this statute to petitioners' nationwide conspiracy; it is obvious that any such constitutional claim would be frivolous. Accordingly, if, as it sometimes does, the Court limited its analysis to the statutory text, it would certainly affirm the judgment of the Court of Appeals. For both the first clause and the second clause of § 1985(3) plainly describe petitioners' conspiracy.

III

The Court bypasses the statute's history, intent, and plain language in its misplaced reliance on prior precedent. Of course, the Court has never before had occasion to construe the second clause of § 1985(3). The first clause, however, has been narrowly construed in *Collins* v. *Hardyman*, 341 U. S. 651 (1951), *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), and *Carpenters* v. *Scott*, 463 U. S. 825 (1983). In the first of these decisions, the Court held that § 1985(3) did not apply to wholly private conspiracies.[12] In *Griffin* the Court rejected that view but limited the application of the statute's first clause to conspiracies motivated by discriminatory intent to deprive plaintiffs of rights constitutionally protected against private (and not just governmental) deprivation. Finally, *Carpenters* reemphasized that the first clause of § 1985(3) offers no relief from the violation of rights protected against only state interference. 463 U. S., at 830–834. To date, the Court has recognized as rights protected against private encroachment (and, hence, by § 1985(3)) only the constitutional right of interstate travel and rights granted by the Thirteenth Amendment.

For present purposes, it is important to note that in each of these cases the Court narrowly construed § 1985(3) to avoid what it perceived as serious constitutional problems with the statute itself. Because those problems are not at issue here, it is even more important to note a larger point about our precedent. In the course of applying Civil War era legislation to civil rights issues unforeseeable in 1871, the Court has adopted a flexible approach, interpreting the statute to reach current concerns without exceeding the bounds of its intended purposes or the constitutional powers

[12] The Court subsequently noted that the constitutional concerns that had supported the limiting construction adopted in *Collins* would not apply to "a private conspiracy so massive and effective that it supplants [state] authorities and thus satisfies the state action requirement." *Griffin*, 403 U. S., at 98, and n. 5.

of Congress.[13] We need not exceed those bounds to apply the statute to these facts.

The facts and decision in *Griffin* are especially instructive here. In overruling an important part of *Collins*, the Court found that the conduct the plaintiffs alleged—a Mississippi highway attack on a white man suspected of being a civil rights worker and the two black men who were passengers in his car—was emblematic of the antiabolitionist violence that § 1985(3) was intended to prevent. A review of the legislative history demonstrated, on the one hand, that Congress intended the coverage of § 1985(3) to reach purely private conspiracies, but on the other hand, that it wanted to avoid the "constitutional shoals" that would lie in the path of a general federal tort law punishing an ordinary assault and battery committed by two or more persons. The racial motivation for the battery committed by the defendants in the case before the Court placed their conduct "close to the core of the coverage intended by Congress." 403 U. S., at 103. It therefore satisfied the limiting construction that the Court placed on the reference to a deprivation of "equal" privileges and immunities in the first clause of the Act. The Court explained that construction:

> "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, [Cong. Globe, 42d Cong., 1st Sess., App. 100 (1871)]. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps other-

[13] The Court's caution in this regard echoes the recorded debates of the enacting Congress itself. See *id.*, at 99–102.

wise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.*, at 101–102.

A footnote carefully left open the question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable *under the portion of § 1985(3) before us.*" *Id.*, at 102, n. 9 (emphasis added). Neither of our two more recent opinions construing § 1985(3) has answered the question left open in *Griffin* or has involved the second clause of the statute.[14]

After holding that the statute did apply to such facts, and that requiring a discriminatory intent would prevent its overapplication, the *Griffin* Court held that § 1985(3) would be within the constitutional power of Congress if its coverage were limited to constitutional rights secured against private action. The facts in that case identified two such grounds.

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[14] In *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366 (1979), we held that § 1985(3) does not provide a remedy for a retaliatory discharge that violated Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* We had no occasion to agree or to disagree with the Court of Appeals' holding that conspiracies motivated by an invidious animus against women fall within § 1985(3) because we concluded that the deprivation of the subsequently created Title VII statutory right could not form the basis for a § 1985(3) claim.

Carpenters v. *Scott*, 463 U. S. 825 (1983), arose out of a labor dispute in which union organizers had assaulted two nonunion employees and vandalized equipment owned by the employer. We held that § 1985(3) did not provide a remedy for two reasons. First, the alleged violation of the First Amendment was insufficient because there was no claim that the State was involved in the conspiracy or that the aim of the conspiracy was to influence state action. Second, we concluded that group action resting on economic or commercial animus, such as animus in favor of or against unionization, did not constitute the kind of class-based discrimination discussed in our opinion in *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971). As the introductory paragraph to the opinion made clear, the case involved only the scope of the remedy made available by the first clause of § 1985(3). See 463 U. S., at 827.

One ground was § 2 of the Thirteenth Amendment. The other was the right to travel. The Court explained how the petitioners could show a violation of the latter. As with the class-based animus requirement, the Court was less concerned with the specifics of that showing than with the constitutionality of § 1985(3); it emphasized that whatever evidence they presented had to "make it clear that the petitioners had suffered from conduct that Congress may reach under its power to protect the right of interstate travel." *Id.*, at 106.

The concerns that persuaded the Court to adopt a narrow reading of the text of § 1985(3) in *Griffin* are not presented in this case. Giving effect to the plain language of § 1985(3) to provide a remedy against the violent interference with women exercising their privilege—indeed, their right—to engage in interstate travel to obtain an abortion presents no danger of turning the statute into a general tort law. Nor does anyone suggest that such relief calls into question the constitutional powers of Congress. When the *Griffin* Court rejected its earlier holding in *Collins*, it provided both an "authoritative construction" of § 1985(3), see *ante*, at 289 (SOUTER, J., concurring in part and dissenting in part), and a sufficient reason for rejecting the doctrine of *stare decisis* whenever it would result in an unnecessarily narrow construction of the statute's plain language. The Court wrote:

> "Whether or not *Collins* v. *Hardyman* was correctly decided on its own facts is a question with which we need not here be concerned. But it is clear, in the light of the evolution of decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived simply do not exist. Little reason remains, therefore, not to accord to the words of the statute their apparent meaning." 403 U. S., at 95–96.

Once concerns about the constitutionality of § 1985(3) are properly put aside, we can focus more appropriately on giving the statute its intended effect. On the facts disclosed by this record, I am convinced that both the text of the statute and its underlying purpose support the conclusion that petitioners' conspiracy was motivated by a discriminatory animus and violated respondents' protected right to engage in interstate travel.

IV

The question left open in *Griffin*—whether the coverage of § 1985(3) is limited to cases involving racial bias—is easily answered. The text of the statute provides no basis for excluding from its coverage any cognizable class of persons who are entitled to the equal protection of the laws. This Court has repeatedly and consistently held that gender-based classifications are subject to challenge on constitutional grounds, see, *e. g.*, *Reed* v. *Reed*, 404 U. S. 71 (1971); *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718 (1982). A parallel construction of post-Civil War legislation that, in the words of Justice Holmes, "dealt with Federal rights and with all Federal rights, and protected them in the lump," *United States* v. *Mosley*, 238 U. S. 383, 387 (1915), is obviously appropriate.

The legislative history of the Act confirms the conclusion that even though it was primarily motivated by the lawless conduct directed at the recently emancipated citizens, its protection extended to "all the thirty-eight millions of the citizens of this nation." Cong. Globe, 42d Cong., 1st Sess., 484 (1871). Given then prevailing attitudes about the respective roles of males and females in society, it is possible that the enacting legislators did not anticipate protection of women against class-based discrimination. That, however, is not a sufficient reason for refusing to construe the statutory text in accord with its plain meaning, particularly when that construction fulfills the central purpose of the legislation. See *Union Bank* v. *Wolas*, 502 U. S. 151, 155–156 (1991).

The gloss that Justice Stewart placed on the statute in *Griffin*, then, did not exclude gender-based discrimination from its coverage. But it does require us to resolve the question whether a conspiracy animated by the desire to deprive women of their right to obtain an abortion is "class based."

V

The terms "animus" and "invidious" are susceptible to different interpretations. The Court today announces that it could find class-based animus in petitioners' mob violence "only if one of two suggested propositions is true: (1) that opposition to abortion can reasonably be presumed to reflect a sex-based intent, or (2) that intent is irrelevant, and a class-based animus can be determined solely by effect." *Ante*, at 270.

The first proposition appears to describe a malevolent form of hatred or ill will. When such an animus defends itself as opposition to conduct that a given class engages in exclusively or predominantly, we can readily unmask it as the intent to discriminate against the class itself. See *ibid.* *Griffin*, for instance, involved behavior animated by the desire to keep African-American citizens from exercising their constitutional rights. The defendants were no less guilty of a class-based animus because they *also* opposed the cause of desegregation or rights of African-American suffrage, and the Court did not require the plaintiffs in *Griffin* to prove that their beatings were motivated by hatred for African-Americans. Similarly, a decision disfavoring female lawyers,[15] female owners of liquor estab-

[15] See *Bradwell* v. *State*, 16 Wall. 130 (1873). The reasoning of the concurring Justices surely evidenced invidious animus, even though it rested on traditional views about a woman's place in society, rather than on overt hostility toward women. These Justices wrote:

"[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and

lishments,[16] or pregnant women[17] may appropriately be characterized as "invidiously discriminatory" even if the decisionmakers have goals other than—or in addition to—discrimination against individual women.[18]

The second proposition deserves more than the Court's disdain. It plausibly describes an assumption that intent

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proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. . . .

". . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Id.*, at 141 (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment).

The Justices who subscribed to those views were certainly not misogynists, but their basic attitude—or animus—toward women is appropriately characterized as "invidiously discriminatory."

[16] See *Goesaert* v. *Cleary*, 335 U. S. 464 (1948). In a prescient dissenting opinion written in 1948 that accords with our current understanding of the idea of equality, Justice Rutledge appropriately selected the word "invidious" to characterize a statutory discrimination between male and female owners of liquor establishments. *Id.*, at 468.

[17] See *Nashville Gas Co.* v. *Satty*, 434 U. S. 136 (1977).

[18] Last Term in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. 353 (1992), we found that Michigan had discriminated against interstate commerce in garbage even though its statutory scheme discriminated against most of the landfill operators in Michigan as well as those located in other States.

lies behind the discriminatory effects from which Congress intended § 1985(3) to protect American citizens. Congress may obviously offer statutory protections against behavior that the Constitution does not forbid, including forms of discrimination that undermine § 1985(3)'s guarantee of equal treatment under the law. Regardless of whether the examples of paternalistic discrimination given above involve a constitutional violation, as a matter of statutory construction it is entirely appropriate to conclude that each would satisfy the class-based animus requirement because none of them poses any danger of converting § 1985(3) into a general tort law or creating concerns about the constitutionality of the statute.

Both forms of class-based animus that the Court proposes are present in this case.

Sex-Based Discrimination

It should be noted that a finding of class-based animus in this case does not require finding that to disfavor abortion is "*ipso facto*" to discriminate invidiously against women. See *ante,* at 271. Respondents do not take that position, and they do not rely on abstract propositions about "opposition to abortion" *per se.* See *ante,* at 269–270. Instead, they call our attention to a factual record showing a particular lawless conspiracy employing force to prevent women from exercising their constitutional rights. Such a conspiracy, in the terms of the Court's first proposition, may "reasonably be presumed to reflect a sex-based intent." See *ante,* at 270.

To satisfy the class-based animus requirement of § 1985(3), the conspirators' conduct need not be motivated by hostility toward individual women. As women are unquestionably a protected class, that requirement—as well as the central purpose of the statute—is satisfied if the conspiracy is aimed at conduct that only members of the protected class have the capacity to perform. It is not necessary that the intended effect upon women be the sole purpose of the conspiracy. It

is enough that the conspiracy be motivated "at least in part" by its adverse effects upon women. Cf. *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265–266 (1977). The immediate and intended effect of this conspiracy was to prevent women from obtaining abortions. Even assuming that the ultimate and indirect consequence of petitioners' blockade was the legitimate and nondiscriminatory goal of saving potential life, it is undeniable that the conspirators' immediate purpose was to affect the conduct of women.[19] Moreover, petitioners target women *because of* their sex, specifically, because of their capacity to become pregnant and to have an abortion.[20]

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[19] In *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979), we inquired whether the challenged conduct was undertaken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*, at 279. It would be nonsensical to say that petitioners blockaded clinics "in spite of" the effect of the blockades on women.

[20] The Court mischaracterizes this analysis by ignoring the distinction between a classification that is sex based and a classification that constitutes sexual discrimination prohibited by the Constitution or by statute. See *ante*, at 272, n. 3. A classification is sex based if it classifies on the basis of sex. As the capacity to become pregnant is a characteristic necessarily associated with one sex, a classification based on the capacity to become pregnant is a classification based on sex.

See Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 32–33 (1992) (footnotes omitted):

"The first point is that restrictions on abortion should be seen as a form of sex discrimination. The proper analogy here is to a law that is targeted solely at women, and thus contains a de jure distinction on the basis of sex. A statute that is explicitly addressed to women is of course a form of sex discrimination. A statute that involves a defining characteristic or a biological correlate of being female should be treated in precisely the same way. If a law said that 'no woman' may obtain an abortion, it should readily be seen as a sex-based classification. A law saying that 'no person' may obtain an abortion has the same meaning.

"The fact that some men may also be punished by abortion laws—for example, male doctors—does not mean that restrictions on abortion are

It is also obvious that petitioners' conduct was motivated "at least in part" by the invidious belief that individual women are not capable of deciding whether to terminate a pregnancy, or that they should not be allowed to act on such a decision. Petitioners' blanket refusal to allow any women access to an abortion clinic overrides the individual class member's choice, no matter whether she is the victim of rape or incest, whether the abortion may be necessary to save her life,[21] or even whether she is merely seeking advice or information about her options. Petitioners' conduct is designed to deny *every* woman the opportunity to exercise a constitutional right that *only* women possess. Petitioners' conspiracy, which combines massive defiance of the law with violent obstruction of the constitutional rights of their fellow citizens, represents a paradigm of the kind of conduct that the statute was intended to cover.[22]

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sex-neutral. Laws calling for racial segregation make it impermissible for whites as well as blacks to desegregate, and this does not make such laws race-neutral. Nor would it be correct to say that restrictions on abortion merely have a discriminatory impact on women, and that they should therefore be treated in the same way as neutral weight and height requirements having disproportionate effects on women. With such requirements, men and women are on both sides of the legal line; but abortion restrictions exclusively target women. A law that prohibited pregnant women, or pregnant people, from appearing on the streets during daylight would readily be seen as a form of de jure sex discrimination. A restriction on abortion has the same sex-based features."

[21] The Court refers to petitioners' opposition to "voluntary" abortion. *Ante*, at 270. It is not clear what the Court means by "voluntary" in this context, but petitioners' opposition is certainly not limited to "elective" abortions. Petitioners' conduct evidences a belief that it is better for a woman to die than for the fetus she carries to be aborted. See nn. 5, 10, *supra*.

[22] The Court's discussion of the record suggests that the District Court made a finding that petitioners were not motivated by a purpose directed at women as a class. See *ibid.* The District Court made no such finding, and such a finding would be inconsistent with the District Court's conclusion that petitioners' gender-based animus satisfied the class-based animus requirement of § 1985(3), see 726 F. Supp., at 1492.

The Court recognizes that the requisite animus may "readily be presumed" on the basis of the relationship between the targeted activity and membership in the targeted class. *Ante*, at 270. But the Court insists that opposition to an act engaged in exclusively by members of a protected class does not involve class-based animus unless the act itself is an "irrational object of disfavor." *Ibid.* The Court's view requires a subjective judicial interpretation inappropriate in the civil rights context, where what seems rational to an oppressor seems equally irrational to a victim. Opposition to desegregation, and opposition to the voting rights of both African-Americans and women, were certainly at one time considered "rational" propositions. But such propositions were never free of the class-based discrimination from which § 1985(3) protects the members of both classes.

The activity of traveling to a clinic to obtain an abortion is, of course, exclusively performed by women. Opposition to that activity may not be "irrational," but violent interference with it is unquestionably "aimed at" women. The Court offers no justification for its newly crafted suggestion that *deliberately* imposing a burden on an activity exclusively performed by women is not class-based discrimination unless opposition to the activity is also irrational. The Court is apparently willing to presume discrimination only when opposition to the targeted activity is—in its eyes—wholly pretextual: that is, when it thinks that no rational person would oppose the activity, except as a means of achieving a separate and distinct goal.[23] The Court's analysis makes sense only if every member of a protected class

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[23] The limitations of this analysis are apparent from the example the Court invokes: "A tax on wearing yarmulkes is a tax on Jews." *Ante*, at 270. The yarmulke tax would not become less of a tax on Jews if the taxing authorities really did wish to burden the wearing of yarmulkes. And the fact that many Jews do not wear yarmulkes—like the fact that many women do not seek abortions—would not prevent a finding that the tax—like petitioners' blockade—targeted a particular class.

exercises all of her constitutional rights, or if no rational excuse remains for otherwise invidious discrimination. Not every member of every protected class chooses to exercise all of his or her constitutional rights; not all of them want to. That many women do not obtain abortions—that many women *oppose* abortion—does not mean that those who violently prevent the exercise of that right by women who do exercise it are somehow cleansed of their discriminatory intent. In enacting a law such as § 1985(3) for federal courts to enforce, Congress asked us to see through the excuses—the "rational" motives—that will always disguise discrimination. Congress asked us to foresee, and speed, the day when such discrimination, no matter how well disguised, would be unmasked.

Statutory Relief from Discriminatory Effects

As for the second definition of class-based animus, disdainfully proposed by the Court, *ibid.*, there is no reason to insist that a statutory claim under § 1985(3) must satisfy the restrictions we impose on constitutional claims under the Fourteenth Amendment. A congressional statute may offer relief from discriminatory effects even if the Fourteenth Amendment prevents only discriminatory intent.

The Court attempts to refute the finding of class-based animus by relying on our cases holding that the governmental denial of either disability benefits for pregnant women or abortion funding does not violate the Constitution. That reliance is misplaced for several reasons. Cases involving constitutional challenges to governmental plans denying financial benefits to pregnant women, and cases involving equal protection challenges to facially neutral statutes with discriminatory effects, involve different concerns and reach justifiably different results than a case involving citizens' statutory protection against burdens imposed on their constitutional rights.

In *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), we faced the question whether a State's disability insurance system violated the Fourteenth Amendment by excluding benefits for normal pregnancy. A majority of the Court concluded that the system did not constitute discrimination on the basis of sex prohibited by the Equal Protection Clause. *Geduldig*, of course, did not purport to establish that, as a matter of logic, a classification based on pregnancy is gender neutral. As an abstract statement, that proposition is simply false; a classification based on pregnancy is a sex-based classification, just as, to use the Court's example, a classification based on the wearing of yarmulkes is a religion-based classification. Nor should *Geduldig* be understood as holding that, as a matter of law, pregnancy-based classifications never violate the Equal Protection Clause. In fact, as the language of the opinion makes clear, what *Geduldig* held was that not every legislative classification based on pregnancy was equivalent, for equal protection purposes, to the explicitly gender-based distinctions struck down in *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), and *Reed* v. *Reed*, 404 U. S. 71 (1971). That *Geduldig* must be understood in these narrower terms is apparent from the sentence which the Court quotes in part: "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification *like those considered in Reed, supra, and Frontiero, supra.*" *Geduldig*, 417 U. S., at 496, n. 20 (emphasis added).[24]

Central to the holding in *Geduldig* was the Court's belief that the disability insurance system before it was a plan that

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[24] To his argument quoted in n. 19, *supra*, Professor Sunstein adds: "It is by no means clear that *Geduldig* would be extended to a case in which pregnant people were (for example) forced to stay indoors in certain periods, or subjected to some other unique criminal or civil disability." 92 Colum. L. Rev., at 32, n. 122.

conferred benefits evenly on men and women.[25] Later cases confirmed that the holding in *Geduldig* depended on an analysis of the insurance plan as a benefit program with an overall nondiscriminatory effect.[26] *Nashville Gas Co.* v. *Satty*, 434 U. S. 136 (1977), applied a statute without an intent requirement to an employer's policy denying accumulated seniority to employees returning from pregnancy leave. Notwithstanding *Geduldig*, the Court found that the policy burdened only women, and therefore constituted discrimination on the basis of sex. The Court stated that "petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics." 434 U. S., at 142.[27] The distinction between

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[25] The Court emphasized that nothing in the record suggested that the actuarial value of the insurance package was greater for men than for women. See 417 U. S., at 496. Indeed, even the exclusion of coverage for pregnancy-related disability benefited both men and women. The Court noted that dual distribution of benefits in the now-famous lines: "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. . . . The fiscal and actuarial benefits of the program thus accrue to members of both sexes." *Id.*, at 497, n. 20.

[26] See, *e. g.*, *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 677, n. 12 (1983) (after quoting the footnote in *Geduldig* which includes the language on which the Court relies today, we stated: "The principal emphasis in the text of the *Geduldig* opinion, unlike the quoted footnote, was on the reasonableness of the State's cost justifications for the classification in its insurance program"); *Turner* v. *Utah Dept. of Employment Security*, 423 U. S. 44, 45, n. (1975) *(per curiam)* (observing that the opinion below "ma[de] no mention of coverage limitations or insurance principles central to [*Geduldig* v.] *Aiello*"); *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 137 (1976) (relying on the reasoning of *Geduldig*, the Court again emphasized that notwithstanding a pregnancy exclusion, the plan had not been shown to provide women, as a group, with a lower level of health benefits).

[27] The abortion-funding cases cited by the Court similarly turn on the distinction between the denial of monetary benefits and the imposition of a burden. See *Maher* v. *Roe*, 432 U. S. 464, 475 (1977) ("There is a basic

those who oppose abortion and those who physically threaten women and obstruct their access to abortion clinics is also more than semantic. Petitioners in this case form a mob that seeks to impose a burden on women by forcibly preventing the exercise of a right that only women possess. The discriminatory effect of petitioners' conduct is beyond doubt.

Geduldig is inapplicable for another reason. The issue of class-based animus in this case arises in a statutory, not a constitutional, context. There are powerful reasons for giving § 1985(3) a reading that is broader than the constitutional holdings on which the Court relies.[28] In our constitutional

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difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy"); see also *Harris* v. *McRae*, 448 U. S. 297, 313–318 (1980). In *Harris* and *Maher*, the "suspect classification" that the Court considered was indigency. Relying on *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973), and *Dandridge* v. *Williams*, 397 U. S. 471 (1970), the Court rejected the argument that "financial need alone identifies a suspect class." *Maher*, 432 U. S., at 471; *Harris*, 448 U. S., at 323 (citing *Maher*, 432 U. S., at 471).

[28] A failure to meet the intent standard imposed on the Fourteenth Amendment does not preclude a finding of class-based animus here. Much of this Court's Fourteenth Amendment jurisprudence concerns the permissibility of particular legislative distinctions. The case law that has evolved focuses on how impermissible discrimination may be inferred in the face of arguably "neutral" legislation or policy. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S., at 274; *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–266 (1977); *Washington* v. *Davis*, 426 U. S. 229, 242 (1976). We have recognized that even in constitutional cases disproportionate impact may provide powerful evidence of discrimination. See *Feeney*, 442 U. S., at 279, n. 25; *Arlington Heights*, 429 U. S., at 265–266; *Davis*, 426 U. S., at 242. In developing the intent standard, though, we expressed reluctance to subject facially neutral legislation to judicial invalidation based on effect alone. The question here is not whether a law "neutral on its face and serving ends otherwise within the power of government to pursue," *Davis*, 426 U. S., at 242, violates the Equal Protection Clause. It is indisputable that a governmental body would violate the Constitution if, for the purpose of burdening abortion, it infringed a person's federally protected right to travel. *Doe* v. *Bolton*, 410 U. S. 179, 200 (1973). This governmental conduct would be

cases, we apply the intent standard to determine whether a constitutional violation has occurred. In cases under § 1985(3), we apply the class-based animus test not to determine whether a constitutional violation has occurred—the violation is independently established—but to determine whether that violation can be remedied. Given the differing roles the intent standard and the class-based animus requirement play in our jurisprudence, there is no justification for applying the same stringent standards in the context of § 1985(3) as in our constitutional cases.

As a matter of statutory interpretation, I have always believed that rules that place special burdens on pregnant women discriminate on the basis of sex, for the capacity to become pregnant is the inherited and immutable characteristic that "primarily differentiates the female from the male." *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 162 (1976) (STEVENS, J., dissenting). I continue to believe that that view should inform our construction of civil rights legislation.

That view was also the one affirmed by Congress in the Pregnancy Discrimination Act, 92 Stat. 2076, which amended Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*[29] The Act categorically expressed Congress' view that

actionable under § 1 of the Ku Klux Act, now 42 U. S. C. § 1983. If private parties jointly participated in the conduct, they, too, would be liable under § 1983. See *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970). The class-based animus requirement determines whether a private conspiracy to violate the federal right to travel—a right protected against private interference—similarly gives rise to a federal cause of action.

[29] The Pregnancy Discrimination Act was passed in reaction to the Court's decision in *Gilbert*, which relied on *Geduldig* to uphold a pregnancy exclusion in a private employer's disability insurance plan, challenged under Title VII. In enacting the Pregnancy Discrimination Act, Congress directly repudiated the logic and the result of *Gilbert*. See *Newport News*, 462 U. S., at 678 ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision").

"discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 684 (1983). *Geduldig* had held that a pregnancy-based classification did not constitute forbidden sex discrimination if the classification related to benefits and did not have a discriminatory effect. In the Pregnancy Discrimination Act, Congress rejected *Geduldig*'s focus on benefits and overall impact, instead insisting that discrimination on the basis of pregnancy necessarily constitutes prohibited sex discrimination. See H. R. Rep. No. 95–948, pp. 2–3 (1978). The statements of the bill's proponents demonstrate their disapproval of the Court's reluctance in *Gilbert* and *Geduldig* to recognize that discrimination on the basis of pregnancy is *always* gender-based discrimination. See, *e. g.*, 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins) ("[I]t seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women . . .").[30]

Two Terms ago, in *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187 (1991), the Court again faced the question whether a classification based on childbearing capacity violated a statutory ban on discrimination. That case, arising under Title VII, concerned Johnson Controls' "fetal-protection policy," which excluded all women "capable of bearing children" from jobs requiring exposure to lead. Johnson Controls sought to justify the policy on the basis that maternal exposure to lead created health risks for a fetus. The first question the Court addressed was whether the policy was facially discriminatory or, alternatively, facially neutral with merely a discriminatory effect. The

[30] The House and Senate Reports both state that the Act adopts the position, held by the Justices who dissented in *Gilbert*, that discrimination on the basis of pregnancy is discrimination on account of sex. H. R. Rep. No. 95–948, p. 2 (1978); S. Rep. No. 95–331, pp. 2–3 (1977); see *Newport News*, 462 U. S., at 678–679.

Court concluded that the policy was facially discriminatory. The policy was not neutral, the Court held, "because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females." *Id.*, at 199. *Johnson Controls*, I had thought, signaled the Court's recognition that classifications based on ability to become pregnant are necessarily discriminatory.

VI

Respondents' right to engage in interstate travel is inseparable from the right they seek to exercise. That right, unduly burdened and frustrated by petitioners' conspiracy, is protected by the Federal Constitution, as we recently reaffirmed in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). Almost two decades ago, the Court squarely held that the right to enter another State for the purpose of seeking abortion services available there is protected by the Privileges and Immunities Clause, U. S. Const., Art. IV, § 2. *Doe* v. *Bolton*, 410 U. S. 179, 200 (1973).[31] A woman's right to engage in interstate travel for this purpose is either entitled to special respect because she is exercising a constitutional right, or because restrictive rules in her home State may make travel to another State imperative. Federal courts are uniquely situated to protect that right for the same reason they are well suited to protect the privileges and immunities of those who enter other States to ply their trade. See, *e. g.*, *Blake* v. *McClung*, 172 U. S. 239, 248–256 (1898).

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[31] Although two Justices dissented from other portions of the decision in *Doe* v. *Bolton*, see 410 U. S., at 221–223, no Member of the Court expressed disagreement with this proposition. Moreover, even if the view of the two Justices who dissented in *Roe* v. *Wade*, 410 U. S. 113, 171, 221 (1973), were the law, a woman's right to enter another State to obtain an abortion would deserve strong protection. For under the position espoused by those dissenters, the diversity among the States in their regulation of abortion procedures would magnify the importance of unimpeded access to out-of-state facilities.

The District Court's conclusion that petitioners intended to interfere with the right to engage in interstate travel is well supported by the record. Interference with a woman's ability to visit another State to obtain an abortion is essential to petitioners' achievement of their ultimate goal—the complete elimination of abortion services throughout the United States. No lesser purpose can explain their multistate "rescue" operations.

Even in a single locality, the effect of petitioners' blockade on interstate travel is substantial. Between 20 and 30 percent of the patients at a targeted clinic in Virginia were from out of State and over half of the patients at one of the Maryland clinics were interstate travelers. 726 F. Supp., at 1489. Making their destination inaccessible to women who have engaged in interstate travel for a single purpose is unquestionably a burden on that travel. That burden was not only a foreseeable and natural consequence of the blockades, but indeed was also one of the intended consequences of petitioners' conspiracy.

Today the Court advances two separate reasons for rejecting the District Court's conclusion that petitioners deliberately deprived women seeking abortions of their right to interstate travel. First, relying on an excerpt from our opinion in *United States* v. *Guest*, 383 U. S. 745, 760 (1966), the Court assumes that "'the predominant purpose'" or "the very purpose" of the conspiracy must be to impede interstate travel. *Ante*, at 275, 276. Second, the Court assumes that even an intentional restriction on out-of-state travel is permissible if it imposes an equal burden on intrastate travel. The first reason reflects a mistaken understanding of *Guest* and *Griffin*, and the second is unsupported by precedent or reason.

In the *Guest* case, the Court squarely held that the Federal Constitution protects the right to engage in interstate travel from private interference. Not a word in that opinion suggests that the constitutional protection is limited to impedi-

ments that discriminate against nonresidents. Instead, the Court broadly referred to the federal commerce power that "authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in interstate commerce." 383 U. S., at 759. It then held that the right of interstate travel was one of the federal rights protected from private interference by the criminal statute that had been enacted as § 6 of the Enforcement Act of 1870, 16 Stat. 141, later codified at 18 U. S. C. § 241. That statute had previously been construed to contain a "stringent scienter requirement" to save it from condemnation as a criminal statute failing to provide adequate notice of the proscribed conduct. 383 U. S., at 785 (Brennan, J., concurring in part and dissenting in part); see also *id.*, at 753–754. The *Guest* opinion then explained why this history would limit the coverage of 18 U. S. C. § 241:

> "This does not mean, of course, that every criminal conspiracy affecting an individual's right of free interstate passage is within the sanction of 18 U. S. C. § 241. A specific intent to interfere with the federal right must be proved, and at a trial the defendants are entitled to a jury instruction phrased in those terms. *Screws* v. *United States*, 325 U. S. 91, 106–107 [1945]. Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought." 383 U. S., at 760.

Today the Court assumes that the same sort of scienter requirement should apply to § 1985(3) because 18 U. S. C. § 241 is its "criminal counterpart." *Ante*, at 275.

The Court is mistaken. The criminal sanctions that were originally included in § 2 of the Ku Klux Act were held unconstitutional over a century ago. *United States* v. *Harris*, 106 U. S. 629 (1883); *Baldwin* v. *Franks*, 120 U. S. 678 (1887). The statute now codified at 18 U. S. C. § 241 was enacted in 1870, a year earlier than the Ku Klux Act. The texts of the two statutes are materially different. Even if that were not so, it would be inappropriate to assume that a strict scienter requirement in a criminal statute should be glibly incorporated in a civil statute.[32] But what is most significant is the dramatic difference between the language of 18 U. S. C. § 241, which includes an unequivocal "intent" requirement and the language of § 1985(3), which broadly describes a purpose to deprive another of a protected privilege "either directly or indirectly." An indirect interference with the right to travel may violate § 1985(3) even if it would not violate § 241.[33]

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[32] See, *e. g.*, *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436, and n. 13 (1978) (distinguishing intent requirement for civil and criminal violations of the Sherman Act).

[33] The Court's confusion of the intent element of § 1985(3) with the intent required in criminal civil rights statutes is particularly surprising in that *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), anticipated this mistake and explicitly warned against it. Indeed, *Griffin* expressly rejected the idea that § 1985(3) contained a specific intent requirement. In finding specific intent necessary for a violation of 18 U. S. C. § 241, *United States* v. *Guest*, 383 U. S. 745 (1966), relied on *Screws* v. *United States*, 325 U. S. 91, 106–107 (1945), which also construed a criminal statute, 18 U. S. C. § 241, to require specific intent. See *Guest*, 383 U. S., at 760. *Griffin* unmistakably distinguished that kind of specific intent requirement from the mental element required for a claim under § 1985(3). In *Griffin* the Court stated that the "motivation requirement" of § 1985(3) "must not be confused with the test of 'specific intent to deprive a person of a federal right made definite by decision or other rule of law' articulated by the plurality opinion in *Screws* v. *United States* . . . ." 403 U. S., at 102, n. 10. The language could hardly be more clear. *Griffin* took care to differentiate between "invidiously discriminatory animus," which § 1985(3) did require, and specific intent to violate a right, which § 1985(3) did not. Further, while distinguishing *Screws*, *Griffin* cited *Monroe* v. *Pape*, 365 U. S. 167 (1961), which declined

The Court interpreted the right to interstate travel more generously in *Griffin*. It wrote:

> "Under these allegations it is open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be dis-

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to find a specific intent requirement for actions under 42 U. S. C. § 1983. See *Monroe*, 365 U. S., at 187; see also *id.*, at 206–207 (Frankfurter, J., concurring in part and dissenting in part). Section 1983, like § 1985(3), was enacted as part of the Ku Klux Act of 1871 and provides for civil enforcement of federal rights. The pattern is clear: The criminal statutes, 18 U. S. C. § 241 and 18 U. S. C. § 242, require specific intent to violate a right; the civil statutes, 42 U. S. C. § 1983 and 42 U. S. C. § 1985(3), do not.

The Court's repeated invocation of the word "aim" simply does not support its attempt to manufacture a specific intent requirement out of whole cloth. As the Court observes, *Carpenters* v. *Scott*, 463 U. S. 825 (1983), uses the expression "aimed at," *id.*, at 833. *Carpenters* does not relate this phrase to a specific intent requirement, nor does it in any other way suggest that an action under § 1985(3) requires proof of specific intent. *Griffin* also uses the phrase "aim at"; there, the Court states: "The conspiracy, in other words, must *aim at* a deprivation of the equal enjoyment of rights secured by the law to all." 403 U. S., at 102 (emphasis added). Unlike *Carpenters*, *Griffin* does discuss whether § 1985(3) requires specific intent. In the footnote appended to the very sentence that contains the phrase "aim at," the Court explains: "The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." 403 U. S., at 102, n. 10. Today, in insisting that § 1985(3) requires specific intent to violate a right, the Court contradicts *Griffin* and finds that one of the mental elements of § 1985(3) *does* relate to "scienter in relation to deprivation of rights." In seeking to justify this departure from precedent, the Court describes the passage in *Griffin* that includes this Court's only discussion of specific intent in relation to § 1985(3) as "supremely" irrelevant, *ante*, at 276, n. 6. I gather this means that only the Supreme Court could find it irrelevant; lower courts have been more reluctant to ignore *Griffin*'s plain language, see *Fisher* v. *Shamburg*, 624 F. 2d 156, 158, n. 2 (CA10 1980); *Cameron* v. *Brock*, 473 F. 2d 608, 610 (CA6 1973); *Azar* v. *Conley*, 456 F. 2d 1382, 1385–1386 (CA6 1972); *Weiss* v. *Patrick*, 453 F. Supp. 717, 723 (R. I.), aff'd, 588 F. 2d 818 (CA1 1978), cert. denied, 442 U. S. 929 (1979).

> criminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons. This and other evidence could make it clear that the petitioners had suffered from conduct that Congress may reach under its power to protect the right of interstate travel." *Griffin*, 403 U. S., at 106.

In that paragraph the Court mentions that the plaintiffs' federal right to travel may have been "discriminatorily" impaired. The use of that word was appropriate because of the Court's earlier discussion of the importance of class-based discriminatory animus in interpreting the statute, but was entirely unnecessary in order to uphold the constitutionality of the statute as applied to conduct that "Congress may reach under its power to protect the right of interstate travel." *Ibid.* Moreover, "in the light of the evolution of decisional law," *id.*, at 95–96, in recent years, today no one could possibly question the power of Congress to prohibit private blockades of streets and highways used by interstate travelers, even if the conspirators indiscriminately interdicted both local and out-of-state travelers.

The implausibility of the Court's readings of *Griffin* and *Guest* is matched by its conclusion that a burden on interstate travel is permissible as long as an equal burden is imposed on local travelers. The Court has long recognized that a burden on interstate commerce may be invalid even if the same burden is imposed on local commerce. See *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970); *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354, n. 4 (1951); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761 (1945). The fact that an impermissible burden is most readily identified when it discriminates against nonresidents does not justify immunizing conduct that evenhandedly disrupts both local and interstate travel. The defendants in *Griffin*, for example,

could not have refuted the claim that they interfered with the right to travel by demonstrating that they indiscriminately attacked local civil rights activists as well as nonresidents.

In this case petitioners have deliberately blockaded access to the destinations sought by a class of women including both local and interstate travelers. Even though petitioners may not have known *which* of the travelers had crossed the state line, petitioners unquestionably knew that many of them had. The conclusion of the District Court that petitioners "engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical counselling services, of the right to travel," 726 F. Supp., at 1493, is abundantly supported by the record.

Discrimination is a necessary element of the class-based animus requirement, not of the abridgment of a woman's right to engage in interstate travel. Perhaps nowhere else in its opinion does the Court reject such obvious assumptions of the authors of § 1985(3). The Reconstruction Congress would have been startled, I think, to learn that § 1985(3) protected freed slaves and their supporters from Klan violence not covered by the Thirteenth Amendment only if the Klan members spared *local* African-Americans and abolitionists their wrath. And it would have been shocked to learn that its law offered relief from a Klan lynching of an out-of-state abolitionist only if the plaintiff could show that the Klan specifically intended to prevent his travel between the States. Yet these are the impossible requirements the Court imposes on a § 1985(3) plaintiff who has shown that her right to travel has been deliberately and significantly infringed. It is difficult to know whether the Court is waiting until only a few States have abortion clinics before it finds that petitioners' behavior violates the right to travel, or if it believes that petitioners could never violate that right as long as they oppose the abortion a woman seeks to obtain as well as the travel necessary to obtain it.

VII

Respondents have unquestionably established a claim under the second clause of § 1985(3), the state hindrance provision.[34] The record amply demonstrates petitioners' successful efforts to overpower local law enforcement officers. During the "rescue" operations, the duly constituted authorities are rendered ineffective, and mob violence prevails.[35] A conspiracy that seeks by force of numbers to prevent local officials from protecting the victims' constitutional rights presents exactly the kind of pernicious combination that the second clause of § 1985(3) was designed to counteract. As we recognized in *Griffin*, the second clause of § 1985(3) explicitly concerns such interference with state officials and for that reason does not duplicate the coverage of the first clause. *Griffin*, 403 U. S., at 99.

Petitioners' conspiracy hinders the lawful authorities from protecting women's constitutionally protected right to choose whether to end their pregnancies. Though this may be a right that is protected only against state infringement, it is clear that by preventing government officials from safeguarding the exercise of that right, petitioners' conspiracy effects a deprivation redressable under § 1985(3). See *Carpenters* v. *Scott*, 463 U. S., at 830; *id.*, at 840, n. 2 (BLACKMUN, J., dissenting); see also *Great American Fed. Sav. & Loan*

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[34] "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another . . . *for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;* . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U. S. C. § 1985(3) (emphasis added).

[35] See 726 F. Supp., at 1489–1490, and n. 4.

Assn. v. *Novotny*, 442 U. S., at 384 (STEVENS, J., concurring). A conspiracy that seeks to interfere with law enforcement officers' performance of their duties entails sufficient involvement with the State to implicate the federally protected right to choose an abortion and to give rise to a cause of action under § 1985(3).

We have not previously considered whether class-based animus is an element of a claim under the second clause of § 1985(3). We have, however, confronted the question whether the class-based animus requirement developed in *Griffin* should extend to another part of the Ku Klux Act, the portion now codified at § 1985(2). That provision, which generally proscribes conspiracies to interfere with federal proceedings, was enacted as part of the same paragraph of the Ku Klux Act that also contained what is now § 1985(3).[36] For that reason, in *Kush* v. *Rutledge*, 460 U. S. 719 (1983), the defendants contended that the plaintiffs had the burden of proving that the alleged conspiracy to intimidate witnesses had been motivated by the kind of class-based animus described in *Griffin*. The Court of Appeals rejected this contention. Its reasoning, which we briefly summarized in *Kush*, is highly relevant here: "Noting the Federal Government's unquestioned constitutional authority to protect the processes of its own courts, and the absence of any need to limit the first part of § 1985(2) to avoid creating a general federal tort law, the Court of Appeals declined to impose the limitation set forth in *Griffin* v. *Breckenridge*." 460 U. S., at 723.

Kush suggests that *Griffin*'s strictly construed class-based animus requirement, developed for the first clause of § 1985(3), should not limit the very different second clause. We explained:

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[36] The full text of § 2 of the 1871 Civil Rights Act, 17 Stat. 13, is quoted in the appendix to the Court's opinion in *Kush* v. *Rutledge*, 460 U. S. 719, 727–729 (1983).

> "Although *Griffin* itself arose under the first clause of § 1985(3), petitioners argue that its reasoning should be applied to the remaining portions of § 1985 as well. We cannot accept that argument for three reasons. First, the scope of the *Griffin* opinion is carefully confined to 'the portion of § 1985(3) now before us,' [*Griffin*, 403 U. S.,] at 99; see also *id.*, at 102, n. 9. There is no suggestion in the opinion that its reasoning applies to any other portion of § 1985. Second, the analysis in the *Griffin* opinion relied heavily on the fact that the sponsors of the 1871 bill added the 'equal protection' language in response to objections that the 'enormous sweep of the original language' vastly extended federal authority and displaced state control over private conduct. *Id.*, at 99–100. That legislative background does not apply to the portions of the statute that prohibit interference with federal officers, federal courts, or federal elections. Third, and of greatest importance, the statutory language that provides the textual basis for the 'class-based, invidiously discriminatory animus' requirement simply does not appear in the portion of the statute that applies to this case." 460 U. S., at 726.

It is true, of course, that the reference to "equal protection" appears in both the first and the second clauses of § 1985(3), but the potentially unlimited scope of the former is avoided by the language in the latter that confines its reach to conspiracies directed at the "constituted authorities of any State or Territory." The deliberate decision in *Griffin* that "carefully confined" its holding to "the portion of § 1985(3) now before us," coupled with the inapplicability of *Griffin*'s rationale to the second clause, makes it entirely appropriate to give that clause a different and more natural construction. Limited to conspiracies that are sufficiently massive to supplant local law enforcement authorities, the second clause requires no further restriction to honor the congressional purpose of creating an effective civil rights remedy without

federalizing all tort law. The justification for a narrow reading of *Griffin*'s judicially crafted requirement of class-based animus simply does not apply to the state hindrance clause. An action under that clause entails both a violation of the victims' constitutional rights and state involvement. This situation is so far removed from the question whether facially neutral legislation constitutes a violation of the Equal Protection Clause that the strict intent standards developed in that area can have no application.

In the context of a conspiracy that hinders state officials and violates respondents' constitutional rights, class-based animus can be inferred if the conspirators' conduct burdens an activity engaged in predominantly by members of the class. Indeed, it would be faithful both to *Griffin* and to the text of the state hindrance clause to hold that the clause proscribes conspiracies to prevent local law enforcement authorities from protecting activities that are performed exclusively by members of a protected class, even if the conspirators' animus were directed at the activity rather than at the class members. Thus, even if yarmulkes, rather than Jews, were the object of the conspirators' animus, the statute would prohibit a conspiracy to hinder the constituted authorities from protecting access to a synagogue or other place of worship for persons wearing yarmulkes. Like other civil rights legislation, this statute should be broadly construed to provide federal protection against the kind of disorder and anarchy that the States are unable to control effectively.

With class-based animus understood as I have suggested, the conduct covered by the state hindrance clause would be as follows: a large-scale conspiracy that violates the victims' constitutional rights by overwhelming the local authorities and that, by its nature, victimizes predominantly members of a particular class. I doubt whether it would be possible to describe conduct closer to the core of § 1985(3)'s coverage. This account would perfectly describe the conduct of the Ku Klux Klan, the group whose activities prompted the enact-

ment of the statute. This description also applies to petitioners, who have conspired to deprive women of their constitutional right to choose an abortion by overwhelming the local police and by blockading clinics with the intended effect of preventing women from exercising a right only they possess. The state hindrance clause thus provides an independent ground for affirmance.[37]

VIII

In sum, it is irrelevant whether the Court is correct in its assumption that "opposition to abortion" does not necessarily evidence an intent to disfavor women. Many opponents of

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[37] As part of its crabbed interpretation of the statute, the Court asserts that the scope of the conspiracy is irrelevant in determining whether its activities can be reached by § 1985(3). See *ante*, at 283–284. This suggestion is contradicted by our prior cases, which have recognized that the magnitude of the conspiratorial undertaking may indeed be relevant in ascertaining whether conduct is actionable under § 1985(3). See *Griffin*, 403 U. S., at 98; *Collins* v. *Hardyman*, 341 U. S. 651, 661–662 (1951).

More generally, the Court's comments evidence a renunciation of the effort to construe this civil rights statute in accordance with its intended purpose. In *Griffin*, *Novotny*, and *Carpenters*, our construction of the statute was guided by our understanding of Congress' goals in enacting the Ku Klux Act. Today, the Court departs from this practice and construes § 1985(3) without reference to the "purpose, history, and common understanding of this Civil War Era statute," *Novotny*, 442 U. S., at 381 (Powell, J., concurring). This represents a sad and unjustified abandonment of a valuable interpretive tradition.

Of course, the Court does not completely reject resort to statutory purpose: The Court does rely on legislative intent in limiting the reach of the statute. The requirement of class-based animus, for example, owes as much to *Griffin*'s analysis of congressional purpose as to the text of § 1985(3). Two Terms ago I noted: "In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 112 (1991) (dissenting opinion). Today, the Court selectively employs both approaches to give the statute its narrowest possible construction.

abortion respect both the law and the rights of others to make their own decisions on this important matter. Petitioners, however, are not mere opponents of abortion; they are defiant lawbreakers who have engaged in massive concerted conduct that is designed to prevent all women from making up their own minds about not only the issue of abortion in general, but also whether they should (or will) exercise a right that all women—and only women—possess.

Indeed, the error that infects the Court's entire opinion is the unstated and mistaken assumption that this is a case about opposition to abortion. It is not. It is a case about the exercise of federal power to control an interstate conspiracy to commit illegal acts. I have no doubt that most opponents of abortion, like most members of the citizenry at large, understand why the existence of federal jurisdiction is appropriate in a case of this kind.

The Court concludes its analysis of § 1985(3) by suggesting that a contrary interpretation would have condemned the massive "sit-ins" that were conducted to promote desegregation in the 1960's—a "wildly improbable result." See *ante*, at 282. This suggestion is profoundly misguided. It assumes that we must totally reject the class-based animus requirement to affirm the District Court, when, in fact, we need only construe that requirement to satisfy its purpose. Moreover, the demonstrations in the 1960's were motivated by a desire to extend the equal protection of the laws to all classes—not to impose burdens on any disadvantaged class. Those who engaged in the nonviolent "sit-ins" to which the Court refers were challenging "a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 918 (1982). The suggestion that there is an analogy between their struggle to achieve equality and these petitioners' concerted efforts to deny women equal access to a constitutionally protected privilege may have rhetorical appeal, but it is

insupportable on the record before us, and does not justify the majority's parsimonious construction of an important federal statute.[38]

I respectfully dissent.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioners act in organized groups to overwhelm local police forces and physically blockade the entrances to respondents' clinics with the purpose of preventing women from exercising their legal rights. Title 42 U. S. C. § 1985(3) provides a federal remedy against private conspiracies aimed at depriving any person or class of persons of the "equal protection of the laws," or of "equal privileges and immunities under the laws." In my view, respondents' injuries and petitioners' activities fall squarely within the ambit of this statute.

I

The Reconstruction Congress enacted the Civil Rights Act of 1871, also known as the Ku Klux Act (Act), 17 Stat. 13, to combat the chaos that paralyzed the post-War South. *Wilson* v. *Garcia*, 471 U. S. 261, 276–279 (1985); *Briscoe* v. *LaHue*, 460 U. S. 325, 336–339 (1983). Section 2 of the Act extended the protection of federal courts to those who effectively were prevented from exercising their civil rights by the threat of mob violence. Although the immediate purpose of § 1985(3) was to combat animosity against blacks and

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[38] JUSTICE KENNEDY's reminder that the Court's denial of any relief to individual respondents does not prevent their States from calling on the United States, through its Attorney General, for help, *ante*, at 287–288, is both puzzling and ironic, given the role this administration has played in this and related cases in support of Operation Rescue. See Brief for United States as *Amicus Curiae; Women's Health Care Services* v. *Operation Rescue-National*, 773 F. Supp., at 269–270; cf. Memorandum for United States as *Amicus Curiae* in *Griffin* v. *Breckenridge*, O. T. 1970, No. 144.

their supporters, *Carpenters* v. *Scott*, 463 U. S. 825, 836 (1983), the language of the Act, like that of many Reconstruction statutes, is more expansive than the historical circumstances that inspired it. The civil-remedy component of § 2, codified at 42 U. S. C. § 1985(3), speaks in general terms, and provides a federal cause of action to any person injured or deprived of a legal right by

> "two or more persons in any State or Territory [who] conspire or go in disguise on the highway or on the premises of another, [first] for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or [second] for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . ."

The Court's approach to Reconstruction Era civil rights statutes has been to "accord [them] a sweep as broad as [their] language." *United States* v. *Price*, 383 U. S. 787, 801 (1966); accord, *Griffin* v. *Breckenridge*, 403 U. S. 88, 97 (1971); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 437 (1968). Today, the Court does just the opposite, precluding application of the statute to a situation that its language clearly covers. There is no dispute that petitioners have "conspired" through their concerted and unlawful activities. The record shows that petitioners' "purpose" is "directly" to "depriv[e]" women of their ability to obtain the clinics' services, see *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483, 1488 (ED Va. 1989), as well as "indirectly" to infringe on their constitutional privilege to travel interstate in seeking those services, *id.*, at 1489. The record also shows that petitioners accomplish their goals by purposefully "preventing or hindering" local law enforcement authorities from maintaining open access to the clinics.

See *ibid.*, and n. 4. In sum, petitioners' activities fit precisely within the language of both clauses of § 1985(3).

Yet the Court holds otherwise, and it does so primarily on the basis of an "element" of the § 1985(3) cause of action that does not appear on the face of the statute. Adhering adamantly to our choice of words in *Griffin* v. *Breckenridge*, *supra*, the Court holds that petitioners did not exhibit a "class-based, invidiously discriminatory animus" against the clinics or the women they serve. I would not parse *Griffin* so finely as to focus on that phrase to the exclusion of our reasons for adopting it as an element of a § 1985(3) civil action.

A

As the Court explained in *Griffin*, § 1985(3)'s "class-based animus" requirement is derived from the statute's legislative history. That case recounted that § 2 of the original Civil Rights bill had proposed criminal punishment for private individuals who conspired "with intent 'to do any act in violation of the rights, privileges, or immunities of another person.'" 403 U. S., at 99–100 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)). The bill was amended to placate those who believed the proposed language was too sweeping. 403 U. S., at 100. Accordingly, the amendment narrowed the criminal provision to reach only conspiracies that deprived "any person or class of persons of the *equal* protection of the laws, or of *equal* privileges and immunities under the laws. . . ." Cong. Globe, 42d Cong., 1st Sess., at 477 (emphasis supplied). The amendment also added a civil remedy for those harmed by such conspiracies, which is now codified at § 1985(3). Looking to the "congressional purpose" the statute's legislative history exhibited, the Court concluded that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Griffin*, 403 U. S., at 102 (footnotes omitted).

Griffin's narrowing construction of § 1985(3) was a rational effort to honor the language of the statute without providing a federal cause of action for "all tortious, conspiratorial interferences with the rights of others." *Id.*, at 101. The "class-based animus" requirement avoids the constitutional difficulties of federalizing every crime or tort committed by two or more persons, while giving effect to the enacting Congress' condemnation of private action against individuals on account of their group affiliation. Perhaps the clearest expression of this intent is found in the statement of Senator Edmunds, who managed the bill on the floor of the Senate, when he explained to his colleagues that Congress did not "undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud . . . [but, if] it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it." Cong. Globe, 42d Cong., 1st Sess., at 567. Indeed, Senator Edmunds' comment on the scope of § 2 of the Act is illustrative of a more general concern in the 42d Congress for extending federal protection to diverse classes nationwide. See, *e. g.*, *id.*, at App. 153–154 (Rep. Garfield) (legislation protects "particular classes of citizens" and "certain classes of individuals"); *id.*, at App. 267 (Rep. Barry) ("white or black, native or adopted citizens"); *id.*, at App. 376 (Rep. Lowe) ("all classes in all States; to persons of every complexion and of whatever politics"); *id.*, at App. 190 (Rep. Buckley) ("yes, even women").

Griffin's requirement of class-based animus is a reasonable shorthand description of the type of actions the 42d Congress was attempting to address. Beginning with *Carpenters* v. *Scott*, 463 U. S. 825 (1983), however, that shorthand description began to take on a life of its own. In that case, a majority of the Court held that conspiracies motivated by bias toward others on account of their economic views or activities

did not constitute class-based discrimination within the reach of the statute. *Id.*, at 837–839. I agreed with the dissent, however, that "[i]nstead of contemplating a list of actionable class traits, . . . Congress had in mind a functional definition of the scope of [§ 1985(3)]," and intended to "provide a federal remedy for all classes that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence." *Id.*, at 851 (opinion of BLACKMUN, J.) (emphasis deleted). Accordingly, I would have found that § 1985(3) provided a remedy to nonunion employees injured by mob violence in a "self-professed union town" whose residents resented nonunion activities. *Id.*, at 854.

For the same reason, I would find in this case that the statute covers petitioners' conspiracy against the clinics and their clients. Like the Klan conspiracies Congress tried to reach in enacting § 1985(3), "[p]etitioners intended to hinder a particular group in the exercise of their legal rights because of their membership in a specific class." *Ibid.* The controversy associated with the exercise of those rights, although legitimate, makes the clinics and the women they serve especially vulnerable to the threat of mob violence. The women seeking the clinics' services are not simply "the group of victims of the tortious action," *id.*, at 850; as was the case in *Carpenters*, petitioners' intended targets are clearly identifiable—by virtue of their affiliation and activities—before any tortious action occurs.

B

Even if I had not dissented in *Carpenters*, I would still find in today's case that § 1985(3) reaches conspiracies targeted at a gender-based class and that petitioners' actions fall within that category. I agree with JUSTICE STEVENS that "[t]he text of the statute provides no basis for excluding from its coverage any cognizable class of persons who are entitled to the equal protection of the laws." *Ante*, at 319 (dissenting

opinion). At the very least, the classes protected by § 1985(3) must encompass those classifications that we have determined merit a heightened scrutiny of state action under the Equal Protection Clause of the Fourteenth Amendment. Classifications based on gender fall within that narrow category of protected classes. *E. g., Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 723–726 (1982); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976). Not surprisingly, the seven Federal Courts of Appeals to have addressed the question have all reached the conclusion that the class of "women" falls within the protection of the statute. *Stathos* v. *Bowden*, 728 F. 2d 15, 20 (CA1 1984); *New York State National Organization for Women* v. *Terry*, 886 F. 2d 1339, 1359 (CA2 1989), cert. denied, 495 U. S. 947 (1990); *Novotny* v. *Great American Fed. Sav. & Loan Assn.*, 584 F. 2d 1235, 1244 (CA3 1978) (en banc), vacated on other grounds, 442 U. S. 366 (1979); *National Organization for Women* v. *Operation Rescue*, 914 F. 2d 582, 585 (CA4 1990); *Volk* v. *Coler*, 845 F. 2d 1422, 1434 (CA7 1988); *Conroy* v. *Conroy*, 575 F. 2d 175, 177 (CA8 1978); *Life Ins. Co. of North America* v. *Reichardt*, 591 F. 2d 499, 505 (CA9 1979). As JUSTICE WHITE has observed: "It is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3)." *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 389, n. 6 (1979) (dissenting opinion).

If women are a protected class under § 1985(3), and I think they are, then the statute must reach conspiracies whose motivation is directly related to characteristics unique to that class. The victims of petitioners' tortious actions are linked by their ability to become pregnant and by their ability to terminate their pregnancies, characteristics unique to the class of women. Petitioners' activities are directly related to those class characteristics and therefore, I believe, are appropriately described as class based within the meaning of our holding in *Griffin*.

Petitioners assert that, even if their activities are class based, they are not motivated by any *discriminatory* animus but only by their profound opposition to the practice of abortion. I do not doubt the sincerity of that opposition. But in assessing the motivation behind petitioners' actions, the sincerity of their opposition cannot surmount the manner in which they have chosen to express it. Petitioners are free to express their views in a variety of ways, including lobbying, counseling, and disseminating information. Instead, they have chosen to target women seeking abortions and to prevent them from exercising their equal rights under law. Even without relying on the federally protected right to abortion, petitioners' activities infringe on a number of state-protected interests, including the state laws that make abortion legal, Va. Code Ann. §§ 18.2–72, 18.2–73 (1988), and the state laws that protect against force, intimidation, and violence, *e. g.*, Va. Code Ann. § 18.2–119 (Supp. 1992) (trespassing), § 18.2–120 (1988) (instigating trespass to prevent the rendering of services to persons lawfully on the premises), § 18.2–404 (obstructing free passage of others), § 18.2–499 (conspiring to injure another in his business or profession). It is undeniably petitioners' purpose to target a protected class, on account of their class characteristics, and to prevent them from the equal enjoyment of these personal and property rights under law. The element of class-based discrimination that *Griffin* read into § 1985(3) should require no further showing.

I cannot agree with the Court that the use of unlawful means to achieve one's goal "is not relevant to [the] discussion of animus." *Ante*, at 274. To the contrary, the deliberate decision to isolate members of a vulnerable group and physically prevent them from conducting legitimate activities cannot be irrelevant in assessing motivation. Cf. *Maher* v. *Roe*, 432 U. S. 464, 475 (1977) (noting the "basic difference," in constitutional equal protection analysis, between "direct . . . interference with a protected activity" and "encouragement

of an alternative activity"). The clinics at issue are lawful operations; the women who seek their services do so lawfully. In my opinion, petitioners' unlawful conspiracy to prevent the clinics from serving those women, who are targeted by petitioners by virtue of their class characteristics, is a group-based, private deprivation of the "equal protection of the laws" within the reach of § 1985(3).

The Court finds an absence of discriminatory animus by reference to our decisions construing the scope of the Equal Protection Clause, and reinforces its conclusion by recourse to the dictionary definition of the word "invidious." See *ante*, at 271–274. The first step would be fitting if respondents were challenging state action; they do not. The second would be proper if the word "invidious" appeared in the statute we are construing; it does not. As noted above, *Griffin*'s requirement of "class-based, invidiously discriminatory animus" was a shorthand description of the congressional purpose behind the legislation that became § 1985(3). Microscopic examination of the language we chose in *Griffin* should not now substitute for giving effect to Congress' intent in enacting the relevant legislative language, *i. e.*, that "any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he [or she] may not enjoy equality of rights as contrasted with . . . other citizens' rights, shall be within the scope of the remedies of this section." Cong. Globe, 42d Cong., 1st Sess., at 478 (Rep. Shellabarger).

Because § 1985(3) is a statute that was designed to address deprivations caused by *private* actors, the Court's invocation of our cases construing the reach of the Equal Protection Clause of the Fourteenth Amendment is misplaced. The Court relies on *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), in which we maintained that, for purposes of the Fourteenth Amendment, "not . . . every legislative classification concerning pregnancy is a sex-based classification." *Id.*, at 496, n. 20. But that case construed a constitutional provision

governing state action, which is far different than determining the scope of a statute aimed at rectifying harms inflicted by private actors. In fact, in stark contrast to our constitutional holding in *Geduldig*, Congress has declared that, for purposes of interpreting a more recent antidiscrimination statute, a classification based on pregnancy is considered a classification "on the basis of sex." See Pregnancy Discrimination Act, 92 Stat. 2076, 42 U. S. C. § 2000e(k); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983). Similarly, although we have determined that a successful constitutional challenge to a regulation that disproportionately affects women must show that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979), Congress recently has made clear its position that showing subjective intent to discriminate is not always necessary to prove statutory discrimination, see Civil Rights Act of 1991, § 105(a), 105 Stat. 1074.

In today's case, I see no reason to hold a § 1985(3) plaintiff to the constitutional standard of invidious discrimination that we have employed in our Fourteenth Amendment jurisprudence. To be sure, the language of that Amendment's Equal Protection Clause and § 1985(3) are similar, and "[a] century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons." *Griffin*, 403 U. S., at 97. The Court resolves that difficulty by construing the two provisions in tandem, although there surely is no requirement that we do so. Cf. *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 378–379 (1959) (explaining that statutory grant of "arising under" jurisdiction need not mirror the reach of Art. III "arising under" jurisdiction).

I would focus not on the similarities of the two provisions, but on their differences. The Equal Protection Clause guarantees that no State shall "*deny* to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1 (emphasis added). In my view, § 1985(3) does not simply repeat that guarantee, but provides a complement to it: No private actor may conspire with the purpose of "*depriving* . . . any person or class of persons of the equal protection of the laws." (Emphasis added.) Unlike "deny," which connotes a withholding, the word "deprive" indicates an intent to prevent private actors from taking away what the State has seen fit to bestow.

The distinction in choice of words is significant in light of the interrelated objectives of the two provisions. The Fourteenth Amendment protects against state action, but it "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948). Section 1985(3), by contrast, was "meant to reach private action." *Griffin*, *supra*, at 101. Given that difference in focus, I would not interpret "discriminatory animus" under the statute to establish the same high threshold that must be met before this Court will find that a State has engaged in invidious discrimination in violation of the Constitution. As the 42d Congress well appreciated, private actors acting in groups can be as devastating to the exercise of civil rights as hostile state actors, and they pose an even greater danger because they operate in an unregulated realm divorced from the responsibilities and checking functions of government. In recognition of that danger, I would hold that *Griffin*'s element of class-based discrimination is met whenever private conspirators target their actions at members of a protected class, by virtue of their class characteristics, and deprive them of their equal enjoyment of the rights accorded them under law.

This case is not about abortion. It most assuredly is not about "the disfavoring of abortions" by state legislatures.

Ante, at 273 (discussing *Maher* v. *Roe*, 432 U. S. 464 (1977); *Harris* v. *McRae*, 448 U. S. 297 (1980)). Rather, this case is about whether a private conspiracy to deprive members of a protected class of legally protected interests gives rise to a federal cause of action. In my view, it does, because that is precisely the sort of conduct that the 42d Congress sought to address in the legislation now codified at § 1985(3). Our precedents construing the scope of gender discrimination under the Fourteenth Amendment should not distract us from properly interpreting the scope of the statutory remedy.

II

The second reason the majority offers for reversing the decision below is that petitioners' activities did not intentionally deprive the clinics and their clients of a right guaranteed against private impairment, a requirement that the Court previously has grafted onto the *first* clause of § 1985(3). See *Carpenters*, 463 U. S., at 833. I find it unnecessary to address the merits of this argument, however, as I am content to rest my analysis solely on the basis that respondents are entitled to invoke the protections of a federal court under the *second* clause of § 1985(3). Whereas the first clause of the statute speaks of conspiracies whose purpose is to "depriv[e], either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," the second clause addresses conspiracies aimed at "preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws."

Respondents attempted to brief the issue for the Court in a supplemental brief on reargument, but the effort was rejected by a majority of the Court. See 505 U. S. 1240 (1992). Although the issue is open to be decided on remand, I agree with JUSTICE STEVENS that "[r]espondents have unquestionably established a claim under the second clause of § 1985(3),

the state hindrance provision." *Ante*, at 339 (dissenting opinion). We have not previously had occasion to consider the scope of the statute's "prevention or hindrance" provision, but it is clear that the second clause does not require that actionable conspiracies be "aimed at interfering with rights" that are "protected against private, as well as official, encroachment." *Carpenters*, *supra*, at 833. Rather, it covers conspiracies aimed at obstructing local law enforcement. See *Griffin*, 403 U. S., at 98–99 (second clause of § 1985(3) prohibits "interference with state officials"); *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S., at 384 (STEVENS, J., concurring). Like JUSTICE STEVENS, I am satisfied by my review of the record that the District Court made findings that adequately support a conclusion that petitioners' activities are class based and intentionally designed to impede local law enforcement from securing "the equal protection of the laws" to the clinics and the women they serve. See 726 F. Supp., at 1489, and n. 4, and 1496.

III

In *Griffin*, this Court "resurrect[ed]" § 1985(3) "from its interment under *Collins* v. *Hardyman*, 341 U. S. 651 (1951)," to hold that the statute provided a federal remedy for those injured by purely private conspiracies. *Novotny*, *supra*, at 395, n. 19 (WHITE, J., dissenting). That resurrection proved a false hope indeed. The statute was intended to provide a federal means of redress to the targets of private conspiracies seeking to accomplish their political and social goals through unlawful means. Today the Court takes yet another step in restricting the scope of the statute, to the point where it now cannot be applied to a modern-day paradigm of the situation the statute was meant to address. I respectfully dissent.

DOBBS *v.* ZANT, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92–5579. Decided January 19, 1993

A Georgia jury found petitioner guilty of murder and sentenced him to death. In his first federal habeas petition, the District Court rejected his claim that he received ineffective assistance of counsel at sentencing, relying on the testimony of petitioner's counsel about the content of his closing argument because a transcript, by the State's representation, was unavailable. After the Court of Appeals affirmed, also relying on counsel's testimony, petitioner located a transcript which flatly contradicted counsel's account. However, the Court of Appeals, now reviewing related proceedings from the District Court, denied his motion to supplement the record on appeal with the transcript. In affirming the District Court's denial of relief on other claims, the Court of Appeals held that the law of the case doctrine prevented it from revisiting its prior rejection of the ineffective-assistance claim, and refused to apply the manifest injustice exception because its denial of leave to supplement the record left petitioner unable to show injustice.

Held: The Court of Appeals erred by refusing to consider the sentencing hearing transcript. The transcript is no doubt relevant, for it calls into serious question the factual predicate on which the lower courts relied in deciding petitioner's ineffective-assistance claim. Moreover, the Court of Appeals acknowledged that its refusal to review the transcript left it unable to apply the manifest injustice exception to the law of the case doctrine and hence unable to determine whether it should reconsider its prior decision. Exclusion cannot be justified by the delay in the transcript's discovery, since the delay resulted substantially from the State's own erroneous assertions that no transcript existed.

Certiorari granted; 963 F. 2d 1403, reversed and remanded.

PER CURIAM.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

A Georgia jury found petitioner Wilburn Dobbs guilty of murder and sentenced him to death. In his first federal habeas petition, petitioner claimed, *inter alia*, that he received

ineffective assistance from his court-appointed counsel at sentencing. The District Court rejected this claim after holding an evidentiary hearing. Because a transcript of the closing arguments made at sentencing was, by the State's representation, unavailable, the District Court relied on the testimony of petitioner's counsel regarding the content of his closing argument to find that counsel had rendered effective assistance. Civ. Action No. 80–247 (ND Ga., Jan. 13, 1984), p. 24. The Court of Appeals for the Eleventh Circuit affirmed, also relying on counsel's testimony about his closing argument in mitigation. *Dobbs* v. *Kemp*, 790 F. 2d 1499, 1514, and n. 15 (1986).

Subsequently, petitioner located a transcript of the penalty phase closing arguments, which flatly contradicted the account given by counsel in key respects. Petitioner moved the Court of Appeals, now reviewing related proceedings from the District Court, to supplement the record on appeal with the sentencing transcript. The court denied this motion without explanation. No. 90–8352 (CA11, Nov. 1, 1990).

Affirming the District Court's denial of relief on other claims, the Eleventh Circuit held that the law of the case doctrine prevented it from revisiting its prior rejection of petitioner's ineffective-assistance claim. The court acknowledged the manifest injustice exception to law of the case, but refused to apply the exception, reasoning that its denial of leave to supplement the record left petitioner unable to show an injustice. 963 F. 2d 1403, 1409 (1991).

We hold that the Court of Appeals erred when it refused to consider the full sentencing transcript. We have emphasized before the importance of reviewing capital sentences on a complete record. *Gardner* v. *Florida*, 430 U. S. 349, 361 (1977) (plurality opinion). Cf. *Gregg* v. *Georgia*, 428 U. S. 153, 167, 198 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (Georgia capital sentencing provision requiring transmittal on appeal of complete transcript and record is important "safeguard against arbitrariness and ca-

price"). In this case, the Court of Appeals offered no justification for its decision to exclude the transcript from consideration. There can be no doubt as to the transcript's relevance, for it calls into serious question the factual predicate on which the District Court and Court of Appeals relied in deciding petitioner's ineffective-assistance claim. As the Court of Appeals itself acknowledged, its refusal to review the transcript left it unable to apply the manifest injustice exception to the law of the case doctrine, and hence unable to determine whether its prior decision should be reconsidered.*

On the facts of this case, exclusion of the transcript cannot be justified by the delay in its discovery. That delay resulted substantially from the State's own erroneous assertions that closing arguments had not been transcribed. As the District Court found: "[T]he entire transcript should have been made available for Dobbs' direct appeal, and the State represented to this Court that the sentencing phase closing arguments could not be transcribed. Dobbs' position that he legitimately relied on the State's representation is well taken." Civ. Action No. 80–247 (ND Ga., Mar. 6, 1990), p. 4.

We hold that, under the particular circumstances described above, the Court of Appeals erred by refusing to consider the sentencing hearing transcript. The judgment

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*The concurrence suggests, *post*, at 360–363, that the error in this case, limited in scope to closing arguments at the penalty phase, is likely insignificant. In fact, an inadequate or harmful closing argument, when combined, as here, with a failure to present mitigating evidence, may be highly relevant to the ineffective-assistance determination under Eleventh Circuit law. See *King* v. *Strickland*, 714 F. 2d 1481, 1491 (CA11 1983), vacated on other grounds, 467 U. S. 1211, adhered to on remand, 748 F. 2d 1462, 1463–1464 (CA11 1984), cert. denied, 471 U. S. 1016 (1985); *Mathis* v. *Zant*, 704 F. Supp. 1062, 1064 (ND Ga. 1989). In any event, we see no reason to depart here from our normal practice of allowing courts more familiar with a case to conduct their own harmless-error analyses.

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

So ordered.

THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari and give the case plenary consideration.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

Today's judgment reverses the decision below on the grounds that, in deciding not to apply the "manifest injustice" exception to the law of the case, the Court of Appeals wrongfully failed to consider a newly discovered transcript from petitioner's trial. The judgment is correct, but the judgment is also not worth making, serving no purpose but to extend the scandalous delay in the execution of a death sentence lawfully pronounced more than 18 years ago.

As a general matter, I agree with JUSTICE STEVENS' frequently recited view that "[i]t is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law." *Anderson* v. *Harless*, 459 U. S. 4, 12 (1982) (STEVENS, J., dissenting). "'To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.'" *Board of Ed. of Rogers* v. *McCluskey*, 458 U. S. 966, 971 (1982) (STEVENS, J., dissenting) (quoting address of Chief Justice Vinson before the American Bar Association (Sept. 7, 1949)). I am willing to make an exception from that rule in capital cases—but only where there is a realistic likelihood that the "technical error" affected the conviction or the sentence. Here that is fanciful.

To begin with, the rediscovered transcript covers only the closing statements in the case, and petitioner's claim goes

only to the fact that his trial counsel made one rather than two arguments in closing. It would be a rare case in which the omission of one particular argument from an attorney's closing statement would be dispositive of an ineffective-assistance claim. It is simply not true, moreover, that the transcript "flatly contradict[s]," *ante*, at 358, the testimony of petitioner's trial counsel in the initial habeas hearing—or at least not true in the sense that it shows trial counsel was lying. The transcript *confirms* that, as trial counsel recalled, he had argued that the death penalty was inappropriate in any circumstance. In fact, he read to the jury large portions of Justice Brennan's opinion in *Furman* v. *Georgia*, 408 U. S. 238 (1972), which is certainly an eloquent argument that the death penalty is improper in any case. The transcript does reveal that counsel had *not* argued in mitigation that the killing was impulsive—which, petitioner now claims, shows that counsel's prior testimony was "false," Pet. for Cert. 19. That is not so. Although counsel stated at one point that he was "sure" he had argued the impulsive-killing point, a few lines earlier in the transcript he had said that "I would *assume* that I argued [it]" (emphasis added), and had made clear that "a lot of this is really not from actual recollection." Tr. 70–71 (Nov. 10, 1982). Petitioner's habeas counsel understood the import of this, describing (in his posthearing brief) trial counsel's testimony to have been that "he *probably* argued that the killing was impulsive and not planned." Petitioner's Post-Hearing Brief in No. C80–247R (ND Ga., Dec. 2, 1982), p. 25, n. 6 (emphasis added); see also Objections to Magistrate's Report and Recommendation in No. C80–247R (ND Ga., Sept. 12, 1983), p. 8, n. 1.

There is absolutely zero likelihood that counsel's misrecollection (or misreconstruction) that he had made an "impulsiveness" argument to the jury made the difference in the 1986 finding that his assistance was not ineffective. Petitioner's ineffectiveness contention had not been directed to the inadequacy of counsel's closing argument, but rather to his

failure to introduce mitigating *evidence*—character witnesses and the like—during the sentencing phase. See Petition for Writ of Habeas Corpus (Dec. 3, 1980), ¶ 49, p. 12, Petitioner's Post-Hearing Brief (Dec. 2, 1982), pp. 17–30, Magistrate's Report and Recommendation (Aug. 26, 1983), pp. 8–18, and Objections to the Magistrate's Report and Recommendation (Sept. 12, 1983), pp. 2–12, in No. C80–247R (ND Ga.); *Dobbs* v. *Kemp*, 790 F. 2d 1499, 1513 (CA11 1986), modified in part, 809 F. 2d 750 (CA11 1987). In addressing that contention, neither the District Court nor the Court of Appeals relied on the content of the closing argument, for the obvious reason that it does not constitute evidence. The District Court described the closing argument in setting forth the events of the sentencing phase, but did not mention it in its legal analysis, ruling instead that counsel had made a "reasonably substantial investigation" in searching for witnesses to testify on petitioner's behalf and a "reasonable tactical decision not to present evidence based on the information before him." No. C80–247R (ND Ga., Jan. 13, 1984), p. 25. In affirming the District Court, the Court of Appeals elaborated on what it thought was the crucial "tactical decision" of the trial counsel (which was *not* a decision to omit evidence of mitigation in favor of a stunning closing argument): "Knowing of [petitioner's] poor reputation in the community, [counsel] testified in the district court that he did not want to put on any 'positive' character testimony for fear that it would not be persuasive and would prompt damaging counter evidence from the prosecution." *Dobbs* v. *Kemp*, 790 F. 2d, at 1513–1514. The closing argument was mentioned only in a footnote, which stated: "Although [counsel] did not present any mitigating evidence, his testimony in the district court reveals that he did make a closing argument in mitigation." *Id.*, at 1514, n. 15.

I think it unimaginable that, if this transcript had been available in 1986—showing that only Justice Brennan's moving *Furman* argument, and not also an "impulsiveness" ar-

gument had been made—the Court of Appeals would have found that there *was* ineffective assistance of counsel. (Indeed, if it were our practice to correct technical errors I would vote to reverse a finding that assistance otherwise effective was rendered ineffective by that omission.) But I think it soars beyond the unimaginable, into the wildly delirious, to believe that the Court of Appeals will find that the newly discovered transcript demonstrates such "manifest injustice" that it warrants making an exception to the law-of-the-case doctrine, so that the already-decided ineffectiveness question should be reopened. There was, in short, no reason to grant this petition and correct this (admittedly clear) technical error, except to place another obstacle in the way of a death penalty that has been suspended within this Court's "death is different" time warp since 1974.

Syllabus

LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* FRETWELL

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

No. 91–1393. Argued November 3, 1992—Decided January 25, 1993

An Arkansas jury convicted respondent Fretwell of capital felony murder and sentenced him to death, finding, *inter alia*, the aggravating factor that the murder, which occurred during a robbery, was committed for pecuniary gain. On direct appeal, Fretwell argued that his sentence was unconstitutional under the then-existing Eighth Circuit precedent of *Collins* v. *Lockhart*, 754 F. 2d 258, because it was based on an aggravating factor that duplicated an element of the underlying felony—murder in the course of a robbery. However, the State Supreme Court declined to consider whether to follow *Collins* because Fretwell had not objected to the aggravator's use during the sentencing phase, and that court later rejected a state habeas corpus challenge in which he raised an ineffective-assistance-of-counsel claim. The District Court conditionally vacated his sentence on federal habeas, holding that counsel's failure to raise the *Collins* objection amounted to prejudice under *Strickland* v. *Washington*, 466 U. S. 668, in which deficient performance and prejudice were identified as the two components of any ineffective-assistance claim. Although the Court of Appeals had overruled *Collins*, it affirmed, reasoning that the trial court would have sustained a *Collins* objection had it been made at Fretwell's trial and the jury would not have sentenced him to death.

Held: Counsel's failure to make the *Collins* objection during the sentencing proceeding did not constitute prejudice within the meaning of *Strickland* v. *Washington*, *supra*. To show prejudice under *Strickland*, a defendant must demonstrate that counsel's errors are so serious as to deprive him of a trial whose result is unfair or unreliable, *id.*, at 687, not merely that the outcome would have been different. Unfairness or unreliability does not result unless counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him. The sentencing proceeding's result in the present case was neither unfair nor unreliable, because the Court of Appeals, which had decided *Collins* in 1985, overruled it in *Perry* v. *Lockhart*, 871 F. 2d 1384, four years later. Thus, respondent suffered no prejudice from his counsel's deficient performance. Contrary to Fretwell's argument, prejudice is not determined under the laws existing at the

Syllabus

time of trial. Although contemporary assessment of counsel's conduct is used when determining the deficient performance component of the *Strickland* test, the prejudice component, with its focus on fairness and reliability, does not implicate the same concerns that motivated the former component's adoption: that a more rigid requirement could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. The instant holding is not inconsistent with the retroactivity rule announced in *Teague* v. *Lane*, 489 U. S. 288, 310. The circumstances that gave rise to that rule do not apply to claims raised by a federal habeas petitioner, who has no interest in the finality of the state-court judgment under which he was incarcerated and, unlike the States, ordinarily has no claim of reliance on past judicial precedent as a basis for his actions. Pp. 368–373.

946 F. 2d 571, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., *post*, p. 373, and THOMAS, J., *post*, p. 375, filed concurring opinions. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 376.

Winston Bryant, Attorney General of Arkansas, argued the cause for petitioner. With him on the briefs were *Clint Miller*, Senior Assistant Attorney General, and *J. Brent Standridge*, Assistant Attorney General.

Amy L. Wax argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Richard A. Friedman*.

Ricky R. Medlock, by appointment of the Court, 504 U. S. 984, argued the cause and filed a brief for respondent.*

*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, *Ward A. Campbell*, Deputy Attorney General, and *Mark L. Krotoski*, Special Assistant Attorney General, *James H. Evans*, Attorney General of Alabama, *Charles E. Cole*, Attorney General of Alaska, *Grant Woods*, Attorney General of Arizona, *Gale A. Norton*, Attorney General of Colorado, *Richard N. Palmer*, Chief

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we decide whether counsel's failure to make an objection in a state criminal sentencing proceeding—an objection that would have been supported by a decision which subsequently was overruled—constitutes "prejudice" within the meaning of our decision in *Strickland* v. *Washington*, 466 U. S. 668 (1984). Because the result of the sentencing proceeding in this case was rendered neither unreliable nor fundamentally unfair as a result of counsel's failure to make the objection, we answer the question in the negative. To hold otherwise would grant criminal defendants a windfall to which they are not entitled.

In August 1985, an Arkansas jury convicted respondent Bobby Ray Fretwell of capital felony murder. During the penalty phase, the State argued that the evidence presented during the guilt phase established two aggravating factors: (1) the murder was committed for pecuniary gain, and (2) the murder was committed to facilitate respondent's escape. Finding the existence of the first of these factors, and no mitigating factors, the jury sentenced respondent to death.

State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Larry EchoHawk*, Attorney General of Idaho, *Chris Gorman*, Attorney General of Kentucky, *Marc Racicot*, Attorney General of Montana, *Don Stenberg*, Attorney General of Nebraska, *Frankie Sue Del Papa*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Charles S. Crookham*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *Mark Barnett*, Attorney General of South Dakota, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Joseph B. Meyer*, Attorney General of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Michael Mello and *Martin McClain* filed a brief for the Office of the Capital Collateral Representative of Florida et al. as *amicus curiae*.

On direct appeal, respondent argued, *inter alia*, that his sentence should be reversed in light of *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8), cert. denied, 474 U. S. 1013 (1985). In that case the Court of Appeals for the Eighth Circuit held that a death sentence is unconstitutional if it is based on an aggravating factor that duplicates an element of the underlying felony, because such a factor does not genuinely narrow the class of persons eligible for the death penalty. Accordingly, respondent argued that his death sentence was unconstitutional because pecuniary gain is an element of the underlying felony in his capital felony-murder conviction—murder in the course of a robbery. The Arkansas Supreme Court declined to consider whether to follow *Collins* because respondent failed to object to the use of the pecuniary gain aggravator during the sentencing proceeding. Rejecting the remainder of respondent's claims, the Arkansas Supreme Court affirmed both the conviction and the death sentence. *Fretwell* v. *State*, 289 Ark. 91, 708 S. W. 2d 630 (1986). Respondent then filed a state habeas corpus challenge, arguing that trial counsel was ineffective for failing to raise the *Collins* objection. The Arkansas Supreme Court rejected the claim because the Arkansas courts had not passed on the *Collins* question at the time of respondent's trial. *Fretwell* v. *State*, 292 Ark. 96, 97, 728 S. W. 2d 180, 181 (1987).

Respondent filed a petition seeking federal habeas corpus relief under 28 U. S. C. § 2254 in the United States District Court for the Eastern District of Arkansas. Among other things, he argued that his trial counsel did not perform effectively because he failed to raise the *Collins* objection. The District Court held that counsel "had a duty to be aware of all law relevant to death penalty cases," and that failure to make the *Collins* objection amounted to prejudice under *Strickland* v. *Washington*, *supra*. 739 F. Supp. 1334, 1337 (ED Ark. 1990). The District Court granted habeas relief and conditionally vacated respondent's death sentence. *Id.*, at 1338.

The Court of Appeals affirmed by a divided vote, 946 F. 2d 571 (CA8 1991), even though it had two years earlier overruled its decision in *Collins* in light of our decision in *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988). See *Perry* v. *Lockhart*, 871 F. 2d 1384 (CA8), cert. denied, 493 U. S. 959 (1989). The majority believed that the Arkansas trial court was bound under the Supremacy Clause to obey the Eighth Circuit's interpretation of the Federal Constitution. Based on this belief, it reasoned that had counsel made the objection, the trial court would have sustained the objection and the jury would not have sentenced respondent to death. The court remanded, ordering the District Court to sentence respondent to life imprisonment without the possibility of parole. It held that since respondent was entitled to the benefit of *Collins* at the time of his original sentencing proceeding, it would only "perpetuate the prejudice caused by the original sixth amendment violation" to resentence him under current law. 946 F. 2d, at 578.

The dissenting judge argued that *Strickland* prejudice involves more than a determination that the outcome would have been different—it also involves the concepts of reliability and fairness. 946 F. 2d, at 579 ("By focusing only on the probable effect of counsel's error at the time of Fretwell's sentencing, the majority misses the broader and more important point that his sentencing proceeding reached neither an unreliable nor an unfair result"). We granted certiorari, 504 U. S. 908 (1992), and now reverse.

Our decisions have emphasized that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland* v. *Washington*, *supra*, at 684; *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *United States* v. *Cronic*, 466 U. S. 648, 653 (1984) ("Without counsel, the right to a trial itself would be of little avail") (internal quotation marks and footnote omitted); *United States* v. *Morrison*, 449

U. S. 361, 364 (1981) (the right to counsel "is meant to assure fairness in the adversary criminal process"). Thus, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States* v. *Cronic*, *supra*, at 658.

The test formulated in *Strickland* for determining whether counsel has rendered constitutionally ineffective assistance reflects this concern. In *Strickland*, we identified the two components to any ineffective-assistance claim: (1) deficient performance and (2) prejudice.[1] Under our decisions, a criminal defendant alleging prejudice must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U. S., at 687; see also *Kimmelman* v. *Morrison*, 477 U. S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect"); *Nix* v. *Whiteside*, *supra*, at 175. Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.[2] To set aside a conviction or sentence solely because the outcome

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[1] Petitioner concedes that counsel's performance was deficient. He therefore focuses his argument exclusively on the prejudice component.

[2] Contrary to the dissent's suggestion, today's decision does not involve or require a harmless-error inquiry. Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed. And under *Strickland* v. *Washington*, 466 U. S. 668 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice. Our opinion does nothing more than apply the case-by-case prejudice inquiry that has always been built into the *Strickland* test. Since we find no constitutional error, we need not, and do not, consider harmlessness.

would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him. *See Cronic*, *supra*, at 658.

Our decision in *Nix* v. *Whiteside*, *supra*, makes this very point. The respondent in that case argued that he received ineffective assistance because his counsel refused to cooperate in presenting perjured testimony. Obviously, had the respondent presented false testimony to the jury, there might have been a reasonable probability that the jury would not have returned a verdict of guilty. Sheer outcome determination, however, was not sufficient to make out a claim under the Sixth Amendment. We held that "as a matter of law, counsel's conduct . . . cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry." 475 U. S., at 175. The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding, and "in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'" *Ibid.* (quoting *Strickland*, *supra*, at 695); see also *Nix* v. *Whiteside*, *supra*, at 186–187 (BLACKMUN, J., concurring in judgment) ("To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. . . . Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice").[3]

[3] The dissent's attempt to distinguish *Nix* v. *Whiteside*, 475 U. S. 157 (1986), is unpersuasive because it ignores the reasoning employed by the Court. In *Nix*, we did not reject the respondent's claim of prejudice because perjury is "perhaps a paradigmatic example" of lawlessness. *Post*, at 382–383. Rather, we held that the respondent could not show *Strickland* prejudice merely by demonstrating that the outcome would have been different but for counsel's behavior. *Nix*, *supra*, at 175–176. Contrary to the dissent's suggestion, this reasoning was not invoked to resolve the factual oddity of one case, but rather represents a straightforward application of the rule of law announced in *Strickland*. *Nix*, *supra*, at 175–176.

The result of the sentencing proceeding in the present case was neither unfair nor unreliable. The Court of Appeals, which had decided *Collins* in 1985, overruled it in *Perry* four years later.[4] Had the trial court chosen to follow *Collins*, counsel's error would have "deprived respondent of the chance to have the state court make an error in his favor." Brief for United States as *Amicus Curiae* 10.[5]

Respondent argues that the use of hindsight is inappropriate in determining "prejudice" under *Strickland*, and that this element should be determined under the laws existing at the time of trial. For support, he relies upon language used in *Strickland* in discussing the first part of the necessary showing—deficient performance. We held that in order to determine whether counsel performed below the level expected from a reasonably competent attorney, it is necessary to "judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U. S., at 690.

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[4] Respondent argues that *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8), cert. denied, 474 U. S. 1013 (1985), is still good law despite our decision in *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988), and urges us to decide this question as a threshold matter. We decline the invitation. A premise underlying the question presented was that *Collins* had been properly overruled by the Eighth Circuit. Because respondent "failed to bring [his] objections to the premise underlying the questio[n] presented to our attention in [his] opposition to the petition for certiorari," we decide that question based on the Eighth Circuit's view that *Collins* is no longer good law. *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 465–466, n. 10 (1992).

[5] As an alternative argument, the Solicitor General relies upon the language of the habeas corpus statute, 28 U. S. C. § 2254(a), which provides that habeas relief may issue only if the applicant "is in custody in violation of the Constitution or laws or treaties of the United States." According to the Solicitor General, because *Lowenfield* was decided at the time respondent petitioned for federal habeas relief, he could not argue that he was currently in custody in violation of the Constitution. Because of our disposition of the case on the basis of *Strickland* v. *Washington*, *supra*, we do not address this contention.

Ineffective-assistance-of-counsel claims will be raised only in those cases where a defendant has been found guilty of the offense charged, and from the perspective of hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful. We adopted the rule of contemporary assessment of counsel's conduct because a more rigid requirement "could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Ibid.* But the "prejudice" component of the *Strickland* test does not implicate these concerns. It focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Id.*, at 687; see *Kimmelman*, 477 U. S., at 393 (Powell, J., concurring). Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. As we have noted, it was the premise of our grant in this case that *Perry* was correctly decided, *i. e.*, that respondent was not entitled to an objection based on "double counting." Respondent therefore suffered no prejudice from his counsel's deficient performance.

The dissent contends that this holding is inconsistent with the retroactivity rule announced in *Teague* v. *Lane*, 489 U. S. 288, 310 (1989), but we think otherwise. *Teague* stands for the proposition that new constitutional rules of criminal procedure will not be announced or applied on collateral review. *Id.*, at 310. As the dissent acknowledges, *post*, at 387, this retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on "the constitutional standards that prevailed at the time the original proceedings took place." *Teague*, *supra*, at 306 (plurality opinion) (internal citations omitted). "The 'new rule' principle therefore validates reasonable, good-faith in-

terpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990).

A federal habeas petitioner has no interest in the finality of the state-court judgment under which he is incarcerated: Indeed, the very purpose of his habeas petition is to overturn that judgment. Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions that corresponds to the State's interest described in the quotation from *Butler*, *supra*. The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it. *Cessante ratione legis, cessat et ipsa lex.*

The judgment of the Court of Appeals is

Reversed.

Justice O'Connor, concurring.

I join the Court's opinion and concur in its judgment. I write separately only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland* v. *Washington*, 466 U. S. 668 (1984). The determinative question—whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694—remains unchanged. This case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry. As we explained in *Strickland*, certain factors, real though they may be, simply cannot be taken into account:

> "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like.

> A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Id.*, at 695.

Since *Strickland*, we have recognized that neither the likely effect of perjured testimony nor the impact of a meritless Fourth Amendment objection is an appropriate consideration in the prejudice inquiry. *Nix* v. *Whiteside*, 475 U. S. 157 (1986) (failure to put on perjured testimony); *Kimmelman* v. *Morrison*, 477 U. S. 365, 382 (1986) (where the defendant claims that the deficient performance was failure to make a suppression motion, "a *meritorious* Fourth Amendment issue is necessary to the success of a Sixth Amendment claim" (emphasis added)).

Today the Court identifies another factor that ought not inform the prejudice inquiry. Specifically, today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission. That narrow holding, of course, precisely disposes of this case as it appeared before the Eighth Circuit. The omitted objection of which respondent complained very well may have been sustained had it been raised at trial. But by the time the Eighth Circuit reviewed respondent's ineffective assistance claim, on-point Circuit authority bound that court to hold the objection meritless; the Arkansas Supreme Court had rejected the objection as well. *Perry* v. *Lockhart*, 871 F. 2d 1384, 1392–1394 (CA8), cert. denied, 493 U. S. 959 (1989); *O'Rourke* v. *State*, 295 Ark. 57, 63–64, 746 S. W. 2d 52, 55–56 (1988). Consequently, respondent's claim of

prejudice was based not on the allegation that he was denied an advantage the law might permit him. It was predicated instead on the suggestion that he might have been denied "a right the law simply does not recognize," *Nix*, *supra*, at 186–187 (BLACKMUN, J., concurring in judgment), namely, the right to "have the state court make an error in his favor," *ante*, at 371 (opinion of the Court) (internal quotation marks omitted). It seems to me that the impact of advocating a decidedly incorrect point of law, like the influence of perjured testimony, is not a proper consideration when assessing "the likelihood of a result more favorable to the defendant." *Strickland*, *supra*, at 695. I therefore join the Court in holding that, in these somewhat unusual circumstances, the Court of Appeals should have concluded that respondent suffered no legally cognizable prejudice.

JUSTICE THOMAS, concurring.

I join the Court's opinion in its entirety. I write separately to call attention to what can only be described as a fundamental misunderstanding of the Supremacy Clause on the part of the Court of Appeals.

In concluding that respondent had been prejudiced by his attorney's failure to make an objection based upon *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8), cert. denied, 474 U. S. 1013 (1985), the Court of Appeals said the following: "[S]ince state courts are bound by the Supremacy Clause to obey federal constitutional law, we conclude that a reasonable state trial court would have sustained an objection based on *Collins* had Fretwell's attorney made one." 946 F. 2d 571, 577 (CA8 1991). I do not understand this statement to mean that there is a reasonable probability that the Arkansas trial court would have found *Collins* persuasive, and therefore would have chosen to follow it. Instead, the Court of Appeals appears to have been under the impression that the Arkansas trial court would have been compelled to follow *Collins* by the Supremacy Clause.

It was mistaken. The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. See *Steffel* v. *Thompson*, 415 U. S. 452, 482, n. 3 (1974) (REHNQUIST, J., concurring); *United States ex rel. Lawrence* v. *Woods*, 432 F. 2d 1072, 1075–1076 (CA7 1970), cert. denied, 402 U. S. 983 (1971); Shapiro, State Courts and Federal Declaratory Judgments, 74 Nw. U. L. Rev. 759, 771, 774 (1979). An Arkansas trial court is bound by this Court's (and by the Arkansas Supreme Court's and Arkansas Court of Appeals') interpretation of federal law, but if it follows the Eighth Circuit's interpretation of federal law, it does so only because it chooses to and not because it must.

I agree with the Court's holding that the Court of Appeals misinterpreted the Sixth Amendment. I wish to make it clear that it misinterpreted the Supremacy Clause as well.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Concerned that respondent Fretwell would otherwise receive the "windfall" of life imprisonment, see *ante*, at 366, 370, the Court today reaches the astonishing conclusion that deficient performance by counsel does not prejudice a defendant even when it results in the erroneous imposition of a death sentence. The Court's aversion to windfalls seems to disappear, however, when the State is the favored recipient. For the end result in this case is that the State, through the coincidence of inadequate representation and fortuitous timing, may carry out a death sentence that was invalid when imposed.

This extraordinary result rests entirely on the retrospective application of two changes in the law occurring after respondent's trial and sentencing. The first of these changes, on which the Court relies explicitly, affected the eligibility of defendants like Fretwell for the death penalty. The second change, never directly identified as such, is the Court's unprincipled transformation of the standards governing ineffective-assistance claims, through the introduction of an element of hindsight that has no place in our Sixth Amendment jurisprudence.

In my view, the Court of Appeals correctly determined that "fundamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment solely because of his attorney's error."[1] The Court's *post hoc* rationale for avoiding this conclusion, self-evident until today, is both unconvincing and unjust.

I

"Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Cuyler* v. *Sullivan*, 446 U. S. 335, 343 (1980). For that reason, we have held squarely that the right to counsel guaranteed by the Constitution is a right to the "effective assistance of counsel." See *United States* v. *Cronic*, 466 U. S. 648, 654 (1984). Absent competent counsel, ready and able to subject the prosecution's case to the "crucible of meaningful adversarial testing," there can be no guarantee that the adversarial system will function properly to produce just and reliable results. *Id.*, at 656. See *Strickland* v. *Washington*, 466 U. S. 668, 684–687 (1984).

In some cases, the circumstances surrounding a defendant's representation so strongly suggest abridgment of the

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[1] 946 F. 2d 571, 577 (CA8 1991).

right to effective assistance that prejudice is presumed. When, for instance, counsel is prevented from offering assistance during a critical phase of the proceedings,[2] or labors under a conflict of interest that affects her performance,[3] then we assume a breakdown in the adversarial process that renders the resulting verdict unreliable. See *United States* v. *Cronic*, 466 U. S., at 658–660. We need not, even if we could, inquire further into the precise nature of the prejudice sustained. See *Glasser* v. *United States*, 315 U. S. 60, 75–76 (1942). It is enough that the adversarial testing envisioned by the Sixth Amendment has been thwarted; the result is constitutionally unacceptable, and reversal is automatic. See *United States* v. *Cronic*, 466 U. S., at 656–657; *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978).[4]

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), the Court decided that certain errors by counsel will give rise to a similar presumption of adversarial breakdown. Because the consequences that attend such a presumption—the setting aside of a conviction or sentence—are so serious, the Court took pains to limit the class of errors that would support an ineffective-assistance claim. First, an error must be so egregious that it indicates "deficient performance" by counsel, falling outside the "wide range of reasonable profes-

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[2] See, *e. g.*, *Geders* v. *United States*, 425 U. S. 80 (1976) (attorney-client consultation prevented during overnight recess); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (assistance denied during arraignment).

[3] See, *e. g.*, *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980) (actual conflict adversely affecting performance constitutes reversible error); *Glasser* v. *United States*, 315 U. S. 60 (1942) (joint representation of codefendants with inconsistent interests, over objection, constitutes reversible error).

[4] "[T]his Court has concluded that the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." *Holloway* v. *Arkansas*, 435 U. S., at 489 (internal quotation marks and citation omitted).

sional assistance." *Id.*, at 687, 689. Second, the error must be so severe that it gives rise to prejudice, defined quite clearly in *Strickland* as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. Many significant errors, as the Court recognized in *Kimmelman* v. *Morrison*, 477 U. S. 365, 381–382 (1986), will not meet this "highly demanding" standard. But those that do will require reversal, not because they deprive a defendant of some discrete and independent trial right, but because, as *Strickland* held, they reflect performance by counsel that has "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U. S., at 686.

Under this well-established standard, as the District Court and Court of Appeals both determined, respondent is entitled to relief on his ineffective-assistance claim. That his counsel's performance was so wanting that it was "deficient" for *Strickland* purposes is not contested. Nor can it be seriously disputed that the decision reached would "reasonably likely have been different," *id.*, at 696, but for counsel's failure to make a double-counting objection supported by Eighth Circuit law.[5] Under *Strickland*, this is the end of the inquiry. Respondent has identified an error of such magnitude that it falls within the narrow class of attorney errors precluding reliance on the outcome of the proceeding. See *id.*, at 691–692. In Sixth Amendment terms, it is as though respondent had shown an actual conflict of interest, or the complete absence of counsel during some part of the sentencing proceeding: The adversary process has malfunctioned, and the resulting verdict is therefore, and without more, constitutionally unacceptable.

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[5] Neither petitioner nor the Court today directly challenges the District Court's unambiguous conclusion that "the trial court would have followed the ruling in *Collins* had trial counsel made an appropriate motion." 739 F. Supp. 1334, 1337 (ED Ark. 1990).

This is not, however, the standard that the Court applies today. Instead, the Court now demands that respondent point to some *additional* indicia of unreliability, some specific way in which the breakdown of the adversarial process affected respondent's discrete trial rights. *Ante*, at 369–370. But this is precisely the kind of harmless-error inquiry that the Court has rejected, time and again, in the Sixth Amendment context. When a criminal proceeding "loses its character as a confrontation between adversaries," *United States* v. *Cronic*, 466 U. S., at 656–657, the harm done a defendant is as certain as it is difficult to define. Accordingly, we consistently have declined to require that a defendant who faces the State without adequate assistance show how he is harmed as a result. See *Cuyler* v. *Sullivan*, 446 U. S., at 349; *Holloway* v. *Arkansas*, 435 U. S., at 489–491; *Hamilton* v. *Alabama*, 368 U. S. 52, 55 (1961); *Williams* v. *Kaiser*, 323 U. S. 471, 475–477 (1945). "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U. S., at 76.[6]

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[6] It is worth noting that *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986), is entirely consistent with this line of case law, rendering petitioner's reliance on that case misplaced. In *Kimmelman*, the Court held that although certain Fourth Amendment violations are themselves not cognizable on federal habeas review, see *Stone* v. *Powell*, 428 U. S. 465 (1976), counsel's failure to litigate such Fourth Amendment claims competently may still give rise to a cognizable ineffective-assistance claim. In other words, attorney error gives rise to an ineffective-assistance claim not because it is connected to some other, independent right to which a defendant is entitled, but because in itself it "upset[s] the adversarial balance between defense and prosecution," so that the trial is rendered unfair and the verdict suspect. 477 U. S., at 374.

That *Kimmelman* at one point refers to the necessity for a "meritorious" Fourth Amendment claim, *id.*, at 382, as emphasized by JUSTICE O'CONNOR in her concurrence, *ante*, at 374, represents no more than straightforward application of *Strickland*'s outcome-determinative test for

The Court compounds its error by insisting that respondent make his newly required showing from the vantage point of hindsight. Hindsight has no place in a Sixth Amendment jurisprudence that focuses, quite rightly, on protecting the adversarial balance at trial. Respondent was denied "the assistance necessary to justify reliance on the outcome of the proceeding," *Strickland* v. *Washington*, 466 U. S., at 692, because his counsel's performance was so far below professional standards that it satisfied *Strickland*'s first prong, and so severely lacking that the verdict "would reasonably likely have been different absent the errors," *id.*, at 696, under the second prong. It is simply irrelevant that we can now say, with hindsight, that had counsel failed to make a double-counting objection four years after the fact, his performance would have been neither deficient nor prejudicial. For as it happened, counsel's failure to object came at a time when it signified a breakdown in the adversarial process. A *post hoc* vision of what would have been the case years later has no bearing on the force of this showing.

Not surprisingly, the Court's reliance on hindsight finds no support in *Strickland* itself. *Strickland* makes clear that the merits of an ineffective-assistance claim must be "viewed as of the time of counsel's conduct." *Id.*, at 690. As the Court notes, this point is stated explicitly with respect to *Strickland*'s first prong, the quality of counsel's performance. *Ante*, at 371–372. What the Court ignores, however, is that the same point is implicit in *Strickland*'s entire discussion of the second prong. By defining prejudice in terms of the effect of counsel's errors on the outcome of the proceedings,

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prejudice. Simply put, an attorney's failure to make a Fourth Amendment objection will not alter the outcome of a proceeding if the objection is meritless, and hence would not be sustained. Nothing in *Kimmelman* suggests that failure to make an objection supported by current precedent, and hence likely to be sustained, would amount to anything less than ineffective assistance.

based on the "totality of the evidence before the judge or jury," 466 U. S., at 695, the *Strickland* Court establishes its point of reference firmly at the time of trial or sentencing.

To justify its revision of the *Strickland* standards for judging ineffective-assistance claims, the Court relies in large part on *Nix* v. *Whiteside*, 475 U. S. 157 (1986). *Ante*, at 370. *Nix* cannot, however, perform the heavy duty the Court assigns it. A rather unusual case, *Nix* involved a claim that counsel was ineffective because he refused to present a defense based on perjured testimony. It should suffice to say here that reliance on perjured testimony and reliance on current Court of Appeals case law are not remotely comparable, and that to suggest otherwise is simply disingenuous. But if further distinction is needed, we need not search far to find it.

First, the Court's decision in *Nix* rests in part on the conclusion that counsel's refusal to cooperate in presentation of perjury falls "well within . . . the range of reasonable professional conduct acceptable under *Strickland.*" *Nix* v. *Whiteside*, 475 U. S., at 171; cf. *United States* v. *Cronic*, 466 U. S., at 656, n. 19 ("Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one . . ."). In other words, ineffective-assistance claims predicated on failure to make wholly frivolous or unethical arguments will generally be dispensed with under *Strickland*'s first prong, without recourse to the second, and hence will not raise the questions at issue in this case.

To the extent that *Nix* does address *Strickland*'s second, or "prejudice," prong, it does so in a context quite different from that presented here. In *Strickland*, the Court cautioned that assessment of the likelihood of a different outcome should exclude the possibility of "a lawless decisionmaker," who fails to "reasonably, conscientiously, and impartially appl[y] the standards that govern the decision." 466 U. S., at 695. The *Nix* Court faced what is perhaps a

paradigmatic example of the "lawlessness" to which *Strickland* referred, in the suggestion that perjured testimony might have undermined the decisionmaker's judgment, and concluded quite correctly that the defendant could not rely on any outcome-determinative effects of perjury to make his claim. *Nix* v. *Whiteside*, 475 U. S., at 175; see also *id.*, at 186 (BLACKMUN, J., concurring in judgment). I do not read the Court's decision today as suggesting that a state trial court need fear the label "lawless" if it follows the decision of a United States Court of Appeals on a matter of federal constitutional law. Accordingly, *Nix*'s discussion of perjury and lawlessness is simply inapposite to the issues presented here.

II

It is not disputed in this case that the performance of respondent's counsel was so deficient that it met the *Strickland* standard. What deserves emphasis here is the proven connection between that deficiency and the outcome of respondent's sentencing proceeding, as well as the presumptive effect of counsel's performance on the adversarial process itself.

Respondent was convicted of committing murder in the course of a robbery. The Arkansas trial court then held a separate sentencing hearing, devoted exclusively to the question whether respondent was eligible for the death penalty, or would instead receive a life sentence without parole. The State relied on two aggravating circumstances to establish its right to execute respondent. The first—the alleged purpose of avoiding arrest—was found by the jury to be unsupported by the evidence. The second—that the felony was committed for purposes of pecuniary gain—was obviously supported by the evidence, as respondent had already been convicted of robbery in connection with the murder. Thus, the critical question on which respondent's death eligibility turned was whether it was permissible, as a matter of law, to "double count" by relying on pecuniary gain as an

aggravating circumstance and also on robbery as an element of the crime.

Counsel's duty at this stage of the proceedings was clear. In addition to general investigation and preparation for the penalty phase, counsel's primary obligation was to advise the trial judge about the correct answer to this crucial question of law. Had he handled this professional responsibility with anything approaching the "reasonableness" demanded by *Strickland*, 466 U. S., at 687–691, he would have found an Eighth Circuit case directly in point, addressing the same Arkansas statute under which respondent was sentenced and holding such double counting unconstitutional. *Collins* v. *Lockhart*, 754 F. 2d 258, 261–265, cert. denied, 474 U. S. 1013 (1985). The failure to find that critically important case constitutes irrefutable evidence of counsel's inadequate performance. The fact that *Collins* was later overruled does not minimize in the slightest the force of that evidence.

Moreover, had counsel made a *Collins* objection to the pecuniary gain aggravating circumstance, we must assume that the trial court would have sustained it. As the District Court stated: "Although *Collins* has since been overruled, it was the law in the Eighth Circuit at the time of [respondent's] trial and this Court has no reason to believe that the trial court would have chosen to disregard it." 739 F. Supp. 1334, 1337 (ED Ark. 1990). Neither petitioner nor the Court relies on disagreement with this finding. See n. 5, *supra*. Nor could they. As we explained in *Strickland*, it is not open to the State to argue that an idiosyncratic state trial judge might have refused to follow circuit precedent and overruled a *Collins* objection. 466 U. S., at 695.

Applying *Strickland* to these facts, the District Court correctly held that counsel's failure to call the trial judge's attention to *Collins* constituted ineffective assistance and "seriously undermined the proper functioning of the adversarial process." 739 F. Supp., at 1336. Because it granted relief on this basis, the District Court found it unnecessary to

reach additional ineffective-assistance claims predicated on counsel's alleged failure to investigate or prepare for the penalty phase. *Id.*, at 1337–1338.[7] By the time the case reached the Court of Appeals, deficient performance was conceded, and the Eighth Circuit had only to affirm the District Court conclusion that "a reasonable state trial court would have sustained an objection based on *Collins* had Fretwell's attorney made one." 946 F. 2d, at 577.[8]

Thus, counsel's deficient performance, in the form of his failure to discover *Collins* and bring it to the court's attention, is directly linked to the outcome of respondent's sentencing proceeding. Because of counsel's error, respondent received the death penalty rather than life imprisonment.

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[7] It should come as no surprise that counsel's conduct gave rise to additional ineffective-assistance claims, founded on other deficiencies. An attorney who makes one error of *Strickland* proportions is unlikely to have turned in a performance adequate in all other respects. For instance, it may well be more than coincidence that the same counsel who failed to discover United States Court of Appeals precedent holding application of the Arkansas capital sentencing statute to defendants like his client unconstitutional also failed to convince the jury of the existence of any mitigating circumstances in his client's favor. 739 F. Supp., at 1335. The connection in this case between counsel's failure to make a *Collins* objection and his overall preparation and investigation for the penalty phase seems perfectly clear. Nothing in the Court's opinion today would preclude the District Court, on remand, from considering the lack of an objection as evidence relevant to the larger question of the adequacy of counsel's penalty phase preparation and investigation.

[8] I cannot agree with the gloss put on the opinion below by the Court, *ante*, at 368, and by JUSTICE THOMAS in his concurrence, *ante*, at 375. There is nothing in the text of that opinion to suggest that the Court of Appeals believed the Arkansas trial court bound by the Supremacy Clause to obey Eighth Circuit precedent. The Court of Appeals simply noted that the trial court was "bound by the Supremacy Clause to obey *federal constitutional law*," 946 F. 2d, at 577 (emphasis added), which is why Eighth Circuit precedent giving content to that law would have been relevant to the trial court's decisionmaking. I see no reason to infer from its plain and correct statement of the law that the Eighth Circuit actually meant to express the view addressed by JUSTICE THOMAS.

946 F. 2d, at 577. Under *Strickland*, of course, respondent need not show quite so much; it is sufficient that "the decision reached would reasonably likely have been different absent the errors." 466 U. S., at 696. *A fortiori*, a showing of outcome determination as strong as that made here is enough to support a *Strickland* claim.

In my judgment, respondent might well be entitled to relief even if he could not show prejudice as defined by *Strickland*'s second prong. The fact that counsel's performance constituted an abject failure to address the most important legal question at issue in his client's death penalty hearing gives rise, without more, to a powerful presumption of breakdown in the entire adversarial system. That presumption is at least as strong, if not stronger, than the inferences of adversarial malfunction that required reversal in cases like *Holloway* and *Glasser*, see *supra*, at 377–378. In other words, there may be exceptional cases in which counsel's performance falls so grievously far below acceptable standards under *Strickland*'s first prong that it functions as the equivalent of an actual conflict of interest, generating a presumption of prejudice and automatic reversal. I think this may well be one of those cases in which, as we wrote in *Holloway*, reversal would be appropriate "even if no particular prejudice is shown and even if the defendant was clearly guilty." 435 U. S., at 489 (internal quotation marks and citation omitted).

Of course, we need not go nearly so far to resolve the case before us. Under the *Strickland* standard that prevailed until today, respondent is entitled to relief on his ineffective-assistance claim, having shown both deficient performance and a reasonable likelihood of a different outcome. The Court can avoid this result only by effecting a dramatic change in that standard, and then applying it retroactively to respondent's case. In my view, the Court's decision marks a startling and most unwise departure from our commitment

to a system that ensures fairness and reliability by subjecting the prosecution's case to meaningful adversarial testing.

III

Changes in the law are characteristic of constitutional adjudication. Prior to 1985, most of those changes were in the direction of increasing the protection afforded an individual accused of crime. To vindicate the legitimate reliance interests of state law enforcement authorities, however, and in recognition of the state interest in preserving the outcome of trials adhering to contemporaneous standards, the Court often refused to apply its new rules retroactively.[9] In *Teague* v. *Lane*, 489 U. S. 288, 310 (1989), the Court gave full expression to its general policy of allowing States "to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards," holding that the claims of federal habeas petitioners will, in all but exceptional cases, be judged under the standards prevailing at the time of trial.[10]

Since 1985, relevant changes in the law often have been in a different direction, affording less rather than more protec-

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[9] See, *e. g.*, *Stovall* v. *Denno*, 388 U. S. 293, 300 (1967) ("factors of reliance and burden on the administration of justice" mandate against retroactive application of *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), establishing right to counsel at pretrial identification); *Johnson* v. *New Jersey*, 384 U. S. 719 (1966) (declining to apply *Miranda* v. *Arizona*, 384 U. S. 436 (1966), retroactively); *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (1966) (*Griffin* v. *California*, 380 U. S. 609 (1965), prohibiting adverse comment on a defendant's silence, does not apply retroactively).

[10] See also *Engle* v. *Isaac*, 456 U. S. 107, 128–129, n. 33 (1982) (discussing "frustration" of state courts when they "faithfully apply existing constitutional law" only to have change in constitutional standards applied retroactively).

tion to individual defendants.[11] An evenhanded approach to retroactivity would seem to require that we continue to evaluate defendants' claims under the law as it stood at the time of trial. If, under *Teague*, a defendant may not take advantage of subsequent changes in the law when they are favorable to him, then there is no self-evident reason why a State should be able to take advantage of subsequent changes in the law when they are adverse to his interests.

The Court, however, takes a directly contrary approach here. Today's decision rests critically on the proposition that respondent's ineffective-assistance claim is to be judged under the law as it exists today, rather than the law as it existed at the time of trial and sentencing. *Ante*, at 372. In other words, respondent must make his case under *Perry* v. *Lockhart*, 871 F. 2d 1384 (CA8), cert. denied, 493 U. S. 959 (1989), decided four years after his sentencing; unlike the State, he is not entitled to rely on "then-existing constitutional standards," *Teague*, 489 U. S., at 310, which rendered him ineligible for the death penalty at the time that sentence was imposed.

I have already explained why the Court's reliance on hindsight is incompatible with our right to counsel jurisprudence. It is also, in my judgment, inconsistent with case law that insists on contemporaneous constitutional standards as the benchmark against which defendants' claims are to be measured. A rule that generally precludes defendants from taking advantage of postconviction changes in the law, but allows the State to do so, cannot be reconciled with this

[11] See, *e. g.*, *Payne* v. *Tennessee*, 501 U. S. 808 (1991) (Eighth Amendment does not preclude use of victim impact evidence against capital defendant at sentencing; overruling *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989)); *Arizona* v. *Fulminante*, 499 U. S. 279 (1991) (harmless-error rule applicable to admission of involuntary confessions); *Duckworth* v. *Eagan*, 492 U. S. 195 (1989) (*Miranda* warnings adequate despite suggestion that lawyer will not be appointed until after interrogation); *Florida* v. *Riley*, 488 U. S. 445 (1989) (police may search greenhouse from helicopter at altitude of 400 feet without warrant).

Court's duty to administer justice impartially. Elementary fairness dictates that the Court should evaluate respondent's ineffective-assistance claim under the law as it stood when he was convicted and sentenced—under *Collins*, and also under *Strickland* as it was understood until today.

As I see it, the only windfall at issue here is the one conferred upon the State by the Court's decision. Had respondent's counsel rendered effective assistance, the State would have been required to justify respondent's execution under a legal regime that included *Collins*. It is highly unlikely that it could have met this burden in the Arkansas courts, see *supra*, at 384–385, and it almost certainly could not have done so in the federal courts on habeas review. Now, however, the State is permitted to exploit the ineffective assistance of respondent's counsel, and the lapse in time it provided, by capitalizing on postsentencing changes in the law to justify an execution. Because this windfall is one the Sixth Amendment prevents us from bestowing, I respectfully dissent.

Syllabus

HERRERA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

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

No. 91–7328. Argued October 7, 1992—Decided January 25, 1993

On the basis of proof which included two eyewitness identifications, numerous pieces of circumstantial evidence, and petitioner Herrera's handwritten letter impliedly admitting his guilt, Herrera was convicted of the capital murder of Police Officer Carrisalez and sentenced to death in January 1982. After pleading guilty, in July 1982, to the related capital murder of Officer Rucker, Herrera unsuccessfully challenged the Carrisalez conviction on direct appeal and in two collateral proceedings in the Texas state courts, and in a federal habeas petition. Ten years after his conviction, he urged in a second federal habeas proceeding that newly discovered evidence demonstrated that he was "actually innocent" of the murders of Carrisalez and Rucker, and that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's due process guarantee therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother had committed the murders. The District Court, *inter alia*, granted his request for a stay of execution so that he could present his actual innocence claim and the supporting affidavits in state court. In vacating the stay, the Court of Appeals held that the claim was not cognizable on federal habeas absent an accompanying federal constitutional violation.

Held: Herrera's claim of actual innocence does not entitle him to federal habeas relief. Pp. 398–419.

(a) Herrera's constitutional claim for relief based upon his newly discovered evidence of innocence must be evaluated in light of the previous 10 years of proceedings in this case. In criminal cases, the trial is the paramount event for determining the defendant's guilt or innocence. Where, as here, a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the constitutional presumption of innocence disappears. Federal habeas courts do not sit to correct errors of fact, but to ensure that individuals are not imprisoned in violation of the Constitution. See, *e. g.*, *Moore* v. *Dempsey*, 261 U. S. 86, 87–88. Thus, claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief

absent an independent constitutional violation occurring in the course of the underlying state criminal proceedings. See *Townsend* v. *Sain*, 372 U. S. 293, 317. The rule that a petitioner subject to defenses of abusive or successive use of the habeas writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence, see, *e. g.*, *Sawyer* v. *Whitley*, 505 U. S. 333, is inapplicable in this case. For Herrera does not seek relief from a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues that he is entitled to habeas relief because new evidence shows that his conviction is factually incorrect. To allow a federal court to grant him typical habeas relief—a conditional order releasing him unless the State elects to retry him or vacating his death sentence—would in effect require a new trial 10 years after the first trial, not because of any constitutional violation at the first trial, but simply because of a belief that in light of his new found evidence a jury might find him not guilty at a second trial. It is far from clear that this would produce a more reliable determination of guilt or innocence, since the passage of time only diminishes the reliability of criminal adjudications. *Jackson* v. *Virginia*, 443 U. S. 307, *Ford* v. *Wainwright*, 477 U. S. 399, and *Johnson* v. *Mississippi*, 486 U. S. 578, distinguished. Pp. 398–407.

(b) Herrera's contention that the Fourteenth Amendment's due process guarantee supports his claim that his showing of innocence entitles him to a new trial, or at least to a vacation of his death sentence, is unpersuasive. Because state legislative judgments are entitled to substantial deference in the criminal procedure area, criminal process will be found lacking only where it offends some principle of justice so rooted in tradition and conscience as to be ranked as fundamental. See, *e. g.*, *Patterson* v. *New York*, 432 U. S. 197, 202. It cannot be said that the refusal of Texas—which requires a new trial motion based on newly discovered evidence to be made within 30 days of imposition or suspension of sentence—to entertain Herrera's new evidence eight years after his conviction transgresses a principle of fundamental fairness, in light of the Constitution's silence on the subject of new trials, the historical availability of new trials based on newly discovered evidence, this Court's amendments to Federal Rule of Criminal Procedure 33 to impose a time limit for filing new trial motions based on newly discovered evidence, and the contemporary practice in the States, only nine of which have no time limits for the filing of such motions. Pp. 407–412.

(c) Herrera is not left without a forum to raise his actual innocence claim. He may file a request for clemency under Texas law, which contains specific guidelines for pardons on the ground of innocence. History shows that executive clemency is the traditional "fail safe" remedy

Syllabus

for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion. Pp. 412–417.

(d) Even assuming, for the sake of argument, that in a capital case a truly persuasive post-trial demonstration of "actual innocence" would render a defendant's execution unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim, Herrera's showing of innocence falls far short of the threshold showing which would have to be made in order to trigger relief. That threshold would necessarily be extraordinarily high because of the very disruptive effect that entertaining such claims would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States. Although not without probative value, Herrera's affidavits are insufficient to meet such a standard, since they were obtained without the benefit of cross-examination and an opportunity to make credibility determinations; consist, with one exception, of hearsay; are likely to have been presented as a means of delaying Herrera's sentence; were produced not at the trial, but over eight years later and only after the death of the alleged perpetrator, without a satisfactory explanation for the delay or for why Herrera pleaded guilty to the Rucker murder; contain inconsistencies, and therefore fail to provide a convincing account of what took place on the night of the murders; and do not overcome the strong proof of Herrera's guilt that was presented at trial. Pp. 417–419.

954 F. 2d 1029, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 419. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 427. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 429. BLACKMUN, J., filed a dissenting opinion, in Parts I, II, III, and IV of which STEVENS and SOUTER, JJ., joined, *post*, p. 430.

Talbot D'Alemberte argued the cause for petitioner. With him on the brief were *Robert L. McGlasson*, *Phyllis L. Crocker*, and *Mark Evan Olive*.

Margaret Portman Griffey, Assistant Attorney General of Texas, argued the cause for respondent. With her on the brief were *Dan Morales*, Attorney General, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Michael P. Hodge*, *Dana E. Parker*, and *Joan C. Barton*, Assistant Attorneys General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, and *Deputy Solicitor General Roberts*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Leonel Torres Herrera was convicted of capital murder and sentenced to death in January 1982. He unsuccessfully challenged the conviction on direct appeal and state collateral proceedings in the Texas state courts, and in a federal habeas petition. In February 1992—10 years after his conviction—he urged in a second federal habeas petition that he was "actually innocent" of the murder for which he was sentenced to death, and that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother, rather than he, had been the perpetrator of the crime. Petitioner urges us to hold that this showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not.

Shortly before 11 p.m. on an evening in late September 1981, the body of Texas Department of Public Safety Officer David Rucker was found by a passer-by on a stretch of highway about six miles east of Los Fresnos, Texas, a few miles north of Brownsville in the Rio Grande Valley. Rucker's body was lying beside his patrol car. He had been shot in the head.

At about the same time, Los Fresnos Police Officer Enrique Carrisalez observed a speeding vehicle traveling west towards Los Fresnos, away from the place where Rucker's body had been found, along the same road. Carrisalez, who was accompanied in his patrol car by Enrique Hernandez, turned on his flashing red lights and pursued the speeding

vehicle. After the car had stopped briefly at a red light, it signaled that it would pull over and did so. The patrol car pulled up behind it. Carrisalez took a flashlight and walked toward the car of the speeder. The driver opened his door and exchanged a few words with Carrisalez before firing at least one shot at Carrisalez' chest. The officer died nine days later.

Petitioner Herrera was arrested a few days after the shootings and charged with the capital murder of both Carrisalez and Rucker. He was tried and found guilty of the capital murder of Carrisalez in January 1982, and sentenced to death. In July 1982, petitioner pleaded guilty to the murder of Rucker.

At petitioner's trial for the murder of Carrisalez, Hernandez, who had witnessed Carrisalez' slaying from the officer's patrol car, identified petitioner as the person who had wielded the gun. A declaration by Officer Carrisalez to the same effect, made while he was in the hospital, was also admitted. Through a license plate check, it was shown that the speeding car involved in Carrisalez' murder was registered to petitioner's "live-in" girlfriend. Petitioner was known to drive this car, and he had a set of keys to the car in his pants pocket when he was arrested. Hernandez identified the car as the vehicle from which the murderer had emerged to fire the fatal shot. He also testified that there had been only one person in the car that night.

The evidence showed that Herrera's Social Security card had been found alongside Rucker's patrol car on the night he was killed. Splatters of blood on the car identified as the vehicle involved in the shootings, and on petitioner's blue jeans and wallet were identified as type A blood—the same type which Rucker had. (Herrera has type O blood.) Similar evidence with respect to strands of hair found in the car indicated that the hair was Rucker's and not Herrera's. A handwritten letter was also found on the person of petitioner

when he was arrested, which strongly implied that he had killed Rucker.[1]

Petitioner appealed his conviction and sentence, arguing, among other things, that Hernandez' and Carrisalez' identifications were unreliable and improperly admitted. The Texas Court of Criminal Appeals affirmed, *Herrera* v. *State*, 682 S. W. 2d 313 (1984), and we denied certiorari, 471 U. S. 1131 (1985). Petitioner's application for state habeas relief was denied. *Ex parte Herrera*, No. 12,848–02 (Tex. Crim. App., Aug. 2, 1985). Petitioner then filed a federal habeas

[1] The letter read: "To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.

"I'm not a tormented person. . . . I believe in the law. What would it be without this *[sic]* men that risk their lives for others, and that's what they should be doing—protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.

"What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.

"My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this *[sic]*. He was out to do what he had to do, protect, but that's life. There's a lot of us that wear different faces in lives every day, and that is what causes problems for all. [Unintelligible word].

"You have wrote all you want of my life, but think about yours, also. [Signed Leonel Herrera].

"I have tapes and pictures to prove what I have said. I will prove my side if you accept to listen. You [unintelligible word] freedom of speech, even a criminal has that right. I will present myself if this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others—robbers, rapists, or burglars—are taking advantage of the law's time. Excuse my spelling and writing. It's hard at times like this." App. to Brief for United States as *Amicus Curiae* 3a–4a.

petition, again challenging the identifications offered against him at trial. This petition was denied, see 904 F. 2d 944 (CA5), and we again denied certiorari, 498 U. S. 925 (1990).

Petitioner next returned to state court and filed a second habeas petition, raising, among other things, a claim of "actual innocence" based on newly discovered evidence. In support of this claim petitioner presented the affidavits of Hector Villarreal, an attorney who had represented petitioner's brother, Raul Herrera, Sr., and of Juan Franco Palacious, one of Raul, Senior's former cellmates. Both individuals claimed that Raul, Senior, who died in 1984, had told them that he—and not petitioner—had killed Officers Rucker and Carrisalez.[2] The State District Court denied this application, finding that "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense." *Ex parte Herrera*, No. 81–CR–672–C (Tex. 197th Jud. Dist., Jan. 14, 1991), ¶ 35. The Texas Court of Criminal Appeals affirmed, *Ex parte Herrera*, 819 S. W. 2d 528 (1991), and we denied certiorari, *Herrera* v. *Texas*, 502 U. S. 1085 (1992).

In February 1992, petitioner lodged the instant habeas petition—his second—in federal court, alleging, among other things, that he is innocent of the murders of Rucker and Carrisalez, and that his execution would thus violate the Eighth

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[2] Villarreal's affidavit is dated December 11, 1990. He attested that while he was representing Raul, Senior, on a charge of attempted murder in 1984, Raul, Senior, had told him that he, petitioner, their father, Officer Rucker, and the Hidalgo County Sheriff were involved in a drug-trafficking scheme; that he was the one who had shot Officers Rucker and Carrisalez; that he did not tell anyone about this because he thought petitioner would be acquitted; and that after petitioner was convicted and sentenced to death, he began blackmailing the Hidalgo County Sheriff. According to Villarreal, Raul, Senior, was killed by Jose Lopez, who worked with the sheriff on drug-trafficking matters and was present when Raul, Senior, murdered Rucker and Carrisalez, to silence him.

Palacious' affidavit is dated December 10, 1990. He attested that while he and Raul, Senior, shared a cell together in the Hidalgo County jail in 1984, Raul, Senior, told him that he had shot Rucker and Carrisalez.

and Fourteenth Amendments. In addition to proffering the above affidavits, petitioner presented the affidavits of Raul Herrera, Jr., Raul, Senior's son, and Jose Ybarra, Jr., a schoolmate of the Herrera brothers. Raul, Junior, averred that he had witnessed his father shoot Officers Rucker and Carrisalez and petitioner was not present. Raul, Junior, was nine years old at the time of the killings. Ybarra alleged that Raul, Senior, told him one summer night in 1983 that he had shot the two police officers.[3] Petitioner alleged that law enforcement officials were aware of this evidence, and had withheld it in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963).

The District Court dismissed most of petitioner's claims as an abuse of the writ. No. M–92–30 (SD Tex., Feb. 17, 1992). However, "in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process," the District Court granted petitioner's request for a stay of execution so that he could present his claim of actual innocence, along with the Raul, Junior, and Ybarra affidavits, in state court. App. 38–39. Although it initially dismissed petitioner's *Brady* claim on the ground that petitioner had failed to present "any evidence of withholding exculpatory material by the prosecution," App. 37, the District Court also granted an evidentiary hearing on this claim after reconsideration, *id.*, at 54.

The Court of Appeals vacated the stay of execution. 954 F. 2d 1029 (CA5 1992). It agreed with the District Court's initial conclusion that there was no evidentiary basis for petitioner's *Brady* claim, and found disingenuous petitioner's attempt to couch his claim of actual innocence in *Brady* terms. 954 F. 2d, at 1032. Absent an accompanying constitutional violation, the Court of Appeals held that petitioner's claim

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[3] Raul, Junior's affidavit is dated January 29, 1992. Ybarra's affidavit is dated January 9, 1991. It was initially submitted with Petitioner's Reply to State's Brief in Response to Petitioner's Petition for Writ of Habeas Corpus filed January 18, 1991, in the Texas Court of Criminal Appeals.

of actual innocence was not cognizable because, under *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963), "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." See 954 F. 2d, at 1034.[4] We granted certiorari, 502 U. S. 1085 (1992), and the Texas Court of Criminal Appeals stayed petitioner's execution. We now affirm.

Petitioner asserts that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted. This proposition has an elemental appeal, as would the similar proposition that the Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted. After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent. See *United States* v. *Nobles*, 422 U. S. 225, 230 (1975). But the evidence upon which petitioner's claim of innocence rests was not produced at his trial, but rather eight years later. In any system of criminal justice, "innocence" or "guilt" must be determined in some sort of a judicial proceeding. Petitioner's showing of innocence, and indeed his constitutional claim for relief based upon that showing, must be evaluated in the light of the previous proceedings in this case, which have stretched over a span of 10 years.

A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. *In re Winship*, 397 U. S. 358 (1970). Other constitutional provisions also have the effect of ensuring against the risk of convicting an inno-

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[4] After the Court of Appeals vacated the stay of execution, petitioner attached a new affidavit by Raul, Junior, to his petition for rehearing, which was denied. The affidavit alleges that during petitioner's trial, various law enforcement officials and the Hidalgo County Sheriff told Raul, Junior, not to say what happened on the night of the shootings and threatened his family.

cent person. See, *e. g.*, *Coy* v. *Iowa*, 487 U. S. 1012 (1988) (right to confront adverse witnesses); *Taylor* v. *Illinois*, 484 U. S. 400 (1988) (right to compulsory process); *Strickland* v. *Washington*, 466 U. S. 668 (1984) (right to effective assistance of counsel); *Winship*, *supra* (prosecution must prove guilt beyond a reasonable doubt); *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) (right to jury trial); *Brady* v. *Maryland*, *supra* (prosecution must disclose exculpatory evidence); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to assistance of counsel); *In re Murchison*, 349 U. S. 133, 136 (1955) (right to "fair trial in a fair tribunal"). In capital cases, we have required additional protections because of the nature of the penalty at stake. See, *e. g.*, *Beck* v. *Alabama*, 447 U. S. 625 (1980) (jury must be given option of convicting the defendant of a lesser offense). All of these constitutional safeguards, of course, make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant. But we have also observed that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson* v. *New York*, 432 U. S. 197, 208 (1977). To conclude otherwise would all but paralyze our system for enforcement of the criminal law.

Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. Cf. *Ross* v. *Moffitt*, 417 U. S. 600, 610 (1974) ("The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt"). Here, it is not disputed that the State met its burden of proving at trial that petitioner was guilty of the capital murder of Officer Carrisalez beyond a reasonable doubt. Thus, in the eyes of the law, petitioner does not come before the Court as one who is "innocent," but, on the

contrary, as one who has been convicted by due process of law of two brutal murders.

Based on affidavits here filed, petitioner claims that evidence never presented to the trial court proves him innocent notwithstanding the verdict reached at his trial. Such a claim is not cognizable in the state courts of Texas. For to obtain a new trial based on newly discovered evidence, a defendant must file a motion within 30 days after imposition or suspension of sentence. Tex. Rule App. Proc. 31(a)(1) (1992). The Texas courts have construed this 30-day time limit as jurisdictional. See *Beathard* v. *State*, 767 S. W. 2d 423, 433 (Tex. Crim. App. 1989); *Drew* v. *State*, 743 S. W. 2d 207, 222–223 (Tex. Crim. App. 1987).

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Chief Justice Warren made this clear in *Townsend* v. *Sain*, *supra*, at 317 (emphasis added):

> "Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; *the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.*"

This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact. See, *e. g.*, *Moore* v. *Dempsey*, 261 U. S. 86, 87–88 (1923) (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been pre-

served"); *Hyde* v. *Shine*, 199 U. S. 62, 84 (1905) ("[I]t is well settled that upon *habeas corpus* the court will not weigh the evidence") (emphasis in original); *Ex parte Terry*, 128 U. S. 289, 305 (1888) ("As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding") (emphasis in original).

More recent authority construing federal habeas statutes speaks in a similar vein. "Federal courts are not forums in which to relitigate state trials." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). The guilt or innocence determination in state criminal trials is "a decisive and portentous event." *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Ibid.* Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.

Our decision in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), comes as close to authorizing evidentiary review of a state-court conviction on federal habeas as any of our cases. There, we held that a federal habeas court may review a claim that the evidence adduced at a state trial was not sufficient to convict a criminal defendant beyond a reasonable doubt. But in so holding, we emphasized:

> "[T]his inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable

> inferences from basic facts to ultimate facts." *Id.*, at 318–319 (citations omitted; emphasis in original).

We specifically noted that "the standard announced . . . does not permit a court to make its own subjective determination of guilt or innocence." *Id.*, at 320, n. 13.

The type of federal habeas review sought by petitioner here is different in critical respects than that authorized by *Jackson*. First, the *Jackson* inquiry is aimed at determining whether there has been an independent constitutional violation—*i. e.*, a conviction based on evidence that fails to meet the *Winship* standard. Thus, federal habeas courts act in their historic capacity—to assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights. Second, the sufficiency of the evidence review authorized by *Jackson* is limited to "record evidence." 443 U. S., at 318. *Jackson* does not extend to nonrecord evidence, including newly discovered evidence. Finally, the *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit.

Petitioner is understandably imprecise in describing the sort of federal relief to which a suitable showing of actual innocence would entitle him. In his brief he states that the federal habeas court should have "an important initial opportunity to hear the evidence and resolve the merits of Petitioner's claim." Brief for Petitioner 42. Acceptance of this view would presumably require the habeas court to hear testimony from the witnesses who testified at trial as well as those who made the statements in the affidavits which petitioner has presented, and to determine anew whether or not petitioner is guilty of the murder of Officer Carrisalez. Indeed, the dissent's approach differs little from that hypothesized here.

The dissent would place the burden on petitioner to show that he is "probably" innocent. *Post*, at 442. Although

petitioner would not be entitled to discovery "as a matter of right," the District Court would retain its "discretion to order discovery . . . when it would help the court make a reliable determination with respect to the prisoner's claim." *Post*, at 444. And although the District Court would not be required to hear testimony from the witnesses who testified at trial or the affiants upon whom petitioner relies, the dissent would allow the District Court to do so "if the petition warrants a hearing." *Ibid.* At the end of the day, the dissent would have the District Court "make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances," and then "weigh the evidence in favor of the prisoner against the evidence of his guilt." *Post*, at 443.

The dissent fails to articulate the relief that would be available if petitioner were to meets its "probable innocence" standard. Would it be commutation of petitioner's death sentence, new trial, or unconditional release from imprisonment? The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital case a similar conditional order vacating the death sentence. Were petitioner to satisfy the dissent's "probable innocence" standard, therefore, the District Court would presumably be required to grant a conditional order of relief, which would in effect require the State to retry petitioner 10 years after his first trial, not because of any constitutional violation which had occurred at the first trial, but simply because of a belief that in light of petitioner's new-found evidence a jury might find him not guilty at a second trial.

Yet there is no guarantee that the guilt or innocence determination would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications. See *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses

that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication") (quoting *Kuhlmann* v. *Wilson*, 477 U. S. 436, 453 (1986) (plurality opinion) (internal quotation marks omitted; citation omitted)); *United States* v. *Smith*, 331 U. S. 469, 476 (1947). Under the dissent's approach, the District Court would be placed in the even more difficult position of having to weigh the probative value of "hot" and "cold" evidence on petitioner's guilt or innocence.

This is not to say that our habeas jurisprudence casts a blind eye toward innocence. In a series of cases culminating with *Sawyer* v. *Whitley*, 505 U. S. 333 (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. See *McCleskey*, *supra*, at 502. But this body of our habeas jurisprudence makes clear that a claim of "actual innocence" is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

Petitioner in this case is simply not entitled to habeas relief based on the reasoning of this line of cases. For he does not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues that he is entitled to habeas relief because newly discovered evidence shows that his conviction is factually incorrect. The fundamental miscarriage of justice exception is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence." *Kuhlmann*, *supra*, at 454 (emphasis added). We have never held that it extends to

freestanding claims of actual innocence. Therefore, the exception is inapplicable here.

Petitioner asserts that this case is different because he has been sentenced to death. But we have "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." *Murray* v. *Giarratano*, 492 U. S. 1, 9 (1989) (plurality opinion). We have, of course, held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed. See, *e. g.*, *McKoy* v. *North Carolina*, 494 U. S. 433 (1990) (unanimity requirement impermissibly limits jurors' consideration of mitigating evidence); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) (jury must be allowed to consider all of a capital defendant's mitigating character evidence); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion) (same). But petitioner's claim does not fit well into the doctrine of these cases, since, as we have pointed out, it is far from clear that a second trial 10 years after the first trial would produce a more reliable result.

Perhaps mindful of this, petitioner urges not that he necessarily receive a new trial, but that his death sentence simply be vacated if a federal habeas court deems that a satisfactory showing of "actual innocence" has been made. Tr. of Oral Arg. 19–20. But such a result is scarcely logical; petitioner's claim is not that some error was made in imposing a capital sentence upon him, but that a fundamental error was made in finding him guilty of the underlying murder in the first place. It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison.

Petitioner argues that our decision in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), supports his position. The plurality in *Ford* held that, because the Eighth Amendment prohibits the execution of insane persons, certain procedural protections inhere in the sanity determination. "[I]f the Constitution

renders the fact or timing of his execution contingent upon establishment of a further fact," Justice Marshall wrote, "then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.*, at 411. Because the Florida scheme for determining the sanity of persons sentenced to death failed "to achieve even the minimal degree of reliability," *id.*, at 413, the plurality concluded that Ford was entitled to an evidentiary hearing on his sanity before the District Court.

Unlike petitioner here, Ford did not challenge the validity of his conviction. Rather, he challenged the constitutionality of his death sentence in view of his claim of insanity. Because Ford's claim went to a matter of punishment—not guilt—it was properly examined within the purview of the Eighth Amendment. Moreover, unlike the question of guilt or innocence, which becomes more uncertain with time for evidentiary reasons, the issue of sanity is properly considered in proximity to the execution. Finally, unlike the sanity determination under the Florida scheme at issue in *Ford*, the guilt or innocence determination in our system of criminal justice is made "with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.*, at 411.

Petitioner also relies on *Johnson* v. *Mississippi*, 486 U. S. 578 (1988), where we held that the Eighth Amendment requires reexamination of a death sentence based in part on a prior felony conviction which was set aside in the rendering State after the capital sentence was imposed. There, the State insisted that it was too late in the day to raise this point. But we pointed out that the Mississippi Supreme Court had previously considered similar claims by writ of error *coram nobis*. Thus, there was no need to override state law relating to newly discovered evidence in order to consider Johnson's claim on the merits. Here, there is no doubt that petitioner seeks additional process—an evidentiary hearing on his claim of "actual innocence" based on

newly discovered evidence—which is not available under Texas law more than 30 days after imposition or suspension of sentence. Tex. Rule App. Proc. 31(a)(1) (1992).[5]

Alternatively, petitioner invokes the Fourteenth Amendment's guarantee of due process of law in support of his claim that his showing of actual innocence entitles him to a new trial, or at least to a vacation of his death sentence.[6] "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition," we have "exercis[ed] substantial deference to legislative judgments in this area." *Medina* v. *California*, 505 U. S. 437, 445–446 (1992). Thus, we have found criminal process lacking only where it "'offends some principle of justice so rooted in the traditions and

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[5] The dissent relies on *Beck* v. *Alabama*, 447 U. S. 625 (1980), for the proposition that, "at least in capital cases, the Eighth Amendment requires more than reliability in sentencing. It also mandates a reliable determination of guilt." *Post*, at 434. To the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance. We have difficulty extending this principle to hold that a capital defendant who has been afforded a full and fair trial may challenge his conviction on federal habeas based on after-discovered evidence.

[6] The dissent takes us to task for examining petitioner's Fourteenth Amendment claim in terms of procedural, rather than substantive, due process. Because "[e]xecution of an innocent person is the ultimate 'arbitrary impositio[n],'" *post*, at 437, quoting *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 848 (1992) (internal quotation marks omitted), the dissent concludes that "petitioner may raise a substantive due process challenge to his punishment on the ground that he is actually innocent," *post*, at 437. But the dissent puts the cart before the horse. For its due process analysis rests on the assumption that petitioner is in fact innocent. However, as we have discussed, petitioner does not come before this Court as an innocent man, but rather as one who has been convicted by due process of law of two capital murders. The question before us, then, is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his "actual innocence" claim. This issue is properly analyzed only in terms of procedural due process.

conscience of our people as to be ranked as fundamental.'" *Ibid.* (quoting *Patterson* v. *New York*, 432 U. S. 197, 202 (1977)). "Historical practice is probative of whether a procedural rule can be characterized as fundamental." 505 U. S., at 446.

The Constitution itself, of course, makes no mention of new trials. New trials in criminal cases were not granted in England until the end of the 17th century. And even then, they were available only in misdemeanor cases, though the writ of error *coram nobis* was available for some errors of fact in felony cases. Orfield, New Trial in Federal Criminal Cases, 2 Vill. L. Rev. 293, 304 (1957). The First Congress provided for new trials for "reasons for which new trials have usually been granted in courts of law." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83. This rule was early held to extend to criminal cases. See *Sparf* v. *United States*, 156 U. S. 51, 175 (1895) (Gray, J., dissenting) (citing cases). One of the grounds upon which new trials were granted was newly discovered evidence. See F. Wharton, Criminal Pleading and Practice §§ 854–874, pp. 584–592 (8th ed. 1880).

The early federal cases adhere to the common-law rule that a new trial may be granted only during the term of court in which the final judgment was entered. See, *e. g.*, *United States* v. *Mayer*, 235 U. S. 55, 67 (1914); *United States* v. *Simmons*, 27 F. Cas. 1080 (No. 16,289) (CC EDNY 1878). Otherwise, "the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors." 235 U. S., at 67. In 1934, this Court departed from the common-law rule and adopted a time limit—60 days after final judgment—for filing new trial motions based on newly discovered evidence. Rule II(3), Criminal Rules of Practice and Procedure, 292 U. S. 659, 662. Four years later, we amended Rule II(3) to allow such motions in capital cases "at any time" before the execution took place. 304 U. S. 592 (1938) (codified at 18 U. S. C. § 688 (1940)).

There ensued a debate as to whether this Court should abolish the time limit for filing new trial motions based on newly discovered evidence to prevent a miscarriage of justice, or retain a time limit even in capital cases to promote finality. See Orfield, *supra*, at 299–304. In 1946, we set a 2-year time limit for filing new trial motions based on newly discovered evidence and abolished the exception for capital cases. Rule 33, Federal Rules of Criminal Procedure, 327 U. S. 821, 855–856 ("A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment").[7] We have strictly construed the Rule 33 time limits. Cf. *United States* v. *Smith*, 331 U. S. 469, 473 (1947). And the Rule's treatment of new trials based on newly discovered evidence has not changed since its adoption.

The American Colonies adopted the English common law on new trials. Riddell, New Trial in Present Practice, 27 Yale L. J. 353, 360 (1917). Thus, where new trials were available, motions for such relief typically had to be filed before the expiration of the term during which the trial was held. H. Underhill, Criminal Evidence 579, n. 1 (1898); J. Bassett, Criminal Pleading and Practice 313 (1885). Over time, many States enacted statutes providing for new trials

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[7] In response to the second preliminary draft of the Federal Rules of Criminal Procedure, Chief Justice Harlan Stone forwarded a memorandum on behalf of the Court to the Rules Advisory Committee with various comments and suggestions, including the following: "It is suggested that there should be a definite time limit within which motions for new trial based on newly discovered evidence should be made, unless the trial court in its discretion, for good cause shown, allows the motion to be filed. Is it not desirable that at some point of time further consideration of criminal cases by the court should be at an end, after which appeals should be made to Executive clemency alone?" 7 Drafting History of the Federal Rules of Criminal Procedure 3, 7 (M. Wilken & N. Triffin eds. 1991) (responding to proposed Rule 35). As noted above, we eventually rejected the adoption of a flexible time limit for new trial motions, opting instead for a strict 2-year time limit.

in all types of cases. Some States also extended the time period for filing new trial motions beyond the term of court, but most States required that such motions be made within a few days after the verdict was rendered or before the judgment was entered. See American Law Institute Code of Criminal Procedure 1040–1042 (Official Draft 1931) (reviewing contemporary new trials rules).

The practice in the States today, while of limited relevance to our historical inquiry, is divergent. Texas is one of 17 States that requires a new trial motion based on newly discovered evidence to be made within 60 days of judgment.[8] One State adheres to the common-law rule and requires that such a motion be filed during the term in which judgment was rendered.[9] Eighteen jurisdictions have time limits ranging between one and three years, with 10 States and the District of Columbia following the 2-year federal time limit.[10]

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[8] Ala. Code § 15–17–5 (1982) (30 days); Ariz. Rule Crim. Proc. 24.2(a) (1987) (60 days); Ark. Rule Crim. Proc. 36.22 (1992) (30 days); Fla. Rule Crim. Proc. 3.590 (1992) (10 days); Haw. Rule Penal Proc. 33 (1992) (10 days); Ill. Rev. Stat., ch. 38, ¶ 116–1 (1991) (30 days); Ind. Rule Crim. Proc. 16 (1992) (30 days); Mich. Ct. Rule Crim. Proc. 6.431(A)(1) (1992) (42 days); Minn. Rule Crim. Proc. 26.04(3) (1992) (15 days); Mo. Rule Crim. Proc. 29.11(b) (1992) (15–25 days); Mont. Code Ann. § 46–16–702(2) (1991) (30 days); S. D. Codified Laws § 23A–29–1 (1988) (10 days); Tenn. Rule Crim. Proc. 33(b) (1992) (30 days); Tex. Rule App. Proc. 31(a)(1) (1992) (30 days); Utah Rule Crim. Proc. 24(c) (1992) (10 days); Va. Sup. Ct. Rule 3A:15(b) (1992) (21 days); Wis. Stat. § 809.30(2)(b) (1989–1990) (20 days).

[9] Miss. Cir. Ct. Crim. Rule 5.16 (1992).

[10] Alaska Rule Ct., Crim. Rule 33 (1988) (two years); Conn. Gen. Stat. §§ 52–270, 52–582 (1991) (three years); Del. Ct. Crim. Rule 33 (1987) (two years); D. C. Super. Ct. Crim. Rule 33 (1992) (two years); Kan. Stat. Ann. § 22–3501 (1988) (two years); La. Code Crim. Proc. Ann., Art. 853 (West 1984) (one year); Maine Rule Crim. Proc. 33 (1992) (two years); Md. Rule Crim. Proc. 4–331(c) (1992) (one year); Neb. Rev. Stat. § 29–2103 (1989) (three years); Nev. Rev. Stat. § 176.515(3) (1991) (two years); N. H. Rev. Stat. Ann. § 526:4 (1974) (three years); N. M. Rule Crim. Proc. 5–614(c) (1992) (two years); N. D. Rule Crim. Proc. 33(b) (1992–1993) (two years); Okla. Ct. Rule Crim. Proc., ch. 15, § 953 (1992) (one year); R. I. Super. Ct.

Only 15 States allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction. Of these States, four have waivable time limits of less than 120 days, two have waivable time limits of more than 120 days, and nine States have no time limits.[11]

In light of the historical availability of new trials, our own amendments to Rule 33, and the contemporary practice in the States, we cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness "rooted in the traditions and conscience of our people." *Patterson* v. *New York*, 432 U. S., at 202 (internal quotation marks and citations omitted). This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency. See Tex. Const., Art. IV, § 11; Tex. Code Crim. Proc. Ann., Art. 48.01 (Vernon 1979). Clemency[12] is deeply rooted in our Anglo-American tradition

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Rule Crim. Proc. 33 (1991–1992) (two years); Vt. Rule Crim. Proc. 33 (1983) (two years); Wash. Crim. Rule 7.8(b) (1993) (one year); Wyo. Rule Crim. Proc. 33(c) (1992) (two years).

[11] Cal. Penal Code Ann. § 1181(8) (West 1985) (no time limit); Colo. Rule Crim. Proc. 33 (Supp. 1992) (no time limit); Ga. Code Ann. §§ 5–5–40, 5–5–41 (1982) (30 days, can be extended); Idaho Code § 19–2407 (Supp. 1992) (14 days, can be extended); Iowa Rule Crim. Proc. 23 (1993) (45 days, can be waived); Ky. Rule Crim. Proc. 10.06 (1983) (one year, can be waived); Mass. Rule Crim. Proc. 30 (1979) (no time limit); N. J. Rule Crim. Prac. 3:20–2 (1993) (no time limit); N. Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 1983) (no time limit); N. C. Gen. Stat. § 15A–1415(6) (1988) (no time limit); Ohio Rule Crim. Proc. 33A(6), B (1988) (120 days, can be waived); Ore. Rev. Stat. § 136.535 (1991) (five days, can be waived); Pa. Rule Crim. Proc. 1123(d) (1992) (no time limit); S. C. Rule Crim. Proc. 29(b) (Supp. 1991) (no time limit); W. Va. Rule Crim. Proc. 33 (1992) (no time limit).

[12] The term "clemency" refers not only to full or conditional pardons, but also commutations, remissions of fines, and reprieves. See Kobil, The Quality of Mercy Strained: Wresting the Pardoning Power from the King, 69 Texas L. Rev. 569, 575–578 (1991).

of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.[13]

In England, the clemency power was vested in the Crown and can be traced back to the 700's. W. Humbert, The Pardoning Power of the President 9 (1941). Blackstone thought this "one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment." 4 W. Blackstone, Commentaries *397. Clemency provided the principal avenue of relief for individuals convicted of criminal offenses—most of which were capital—because there was no right of appeal until 1907. 1 L. Radzinowicz, A History of English Criminal Law 122 (1948). It was the only means by which one could challenge his conviction on the ground of innocence. United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 73 (1939).

Our Constitution adopts the British model and gives to the President the "Power to grant Reprieves and Pardons for Offences against the United States." Art. II, § 2, cl. 1. In

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[13] The dissent relies on the plurality opinion in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), to support the proposition that "[t]he vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal." *Post*, at 440. But that case is inapposite insofar as it pertains to our discussion of clemency here. The *Ford* plurality held that Florida's procedures for entertaining post-trial claims of insanity, which vested the sanity determination entirely within the executive branch, were "inadequate to preclude federal redetermination of the constitutional issue [of Ford's sanity]." 477 U. S., at 416. Unlike Ford's claim of insanity, which had never been presented in a judicial proceeding, petitioner's claim of "actual innocence" comes 10 years after he was adjudged guilty beyond a reasonable doubt after a full and fair trial. As the following discussion indicates, it is clear that clemency has provided the historic mechanism for obtaining relief in such circumstances.

United States v. *Wilson*, 7 Pet. 150, 160–161 (1833), Chief Justice Marshall expounded on the President's pardon power:

> "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.
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> "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

See also *Ex parte Garland*, 4 Wall. 333, 380–381 (1867); The Federalist No. 74, pp. 447–449 (C. Rossiter ed. 1961) (A. Hamilton) ("The criminal code of every country partakes so much of necessary severity that without an easy access to excep-

tions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel").

Of course, although the Constitution vests in the President a pardon power, it does not require the States to enact a clemency mechanism. Yet since the British Colonies were founded, clemency has been available in America. C. Jensen, The Pardoning Power in the American States 3–4 (1922). The original States were reluctant to vest the clemency power in the executive. And although this power has gravitated toward the executive over time, several States have split the clemency power between the Governor and an advisory board selected by the legislature. See Survey of Release Procedures, *supra*, at 91–98. Today, all 36 States that authorize capital punishment have constitutional or statutory provisions for clemency.[14]

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[14] Ala. Const., Amdt. 38, Ala. Code § 15–18–100 (1982); Ariz. Const., Art. V, § 5, Ariz. Rev. Stat. Ann. §§ 31–443, 31–445 (1986 and Supp. 1992); Ark. Const., Art. VI, § 18, Ark. Code Ann. §§ 5–4–607, 16–93–204 (Supp. 1991); Cal. Const., Art. VII, § 1, Cal. Govt. Code Ann. § 12030(a) (West 1992); Colo. Const., Art. IV, § 7, Colo. Rev. Stat. §§ 16–17–101, 16–17–102 (1986); Conn. Const., Art. IV, § 13, Conn. Gen. Stat. § 18–26 (1988); Del. Const., Art. VII, § 1, Del. Code Ann., Tit. 29, § 2103 (1991); Fla. Const., Art. IV, § 8, Fla. Stat. § 940.01 (Supp. 1991); Ga. Const., Art. IV, § 2, ¶ 2, Ga. Code Ann. §§ 42–9–20, 42–9–42 (1991); Idaho Const., Art. IV, § 7, Idaho Code §§ 20–240 (Supp. 1992), 67–804 (1989); Ill. Const., Art. V, § 12, Ill. Rev. Stat., ch. 38, ¶ 1003–3–13 (1991); Ind. Const., Art. V, § 17, Ind. Code §§ 11–9–2–1 to 11–9–2–4, 35–38–6–8 (1988); Ky. Const., § 77; La. Const., Art. IV, § 5(E), La. Rev. Stat. Ann. § 15:572 (West 1992); Md. Const., Art. II, § 20, Md. Ann. Code, Art. 27, § 77 (1992), and Art. 41, § 4–513 (1990); Miss. Const., Art. V, § 124, Miss. Code Ann. § 47–5–115 (1981); Mo. Const., Art. IV, § 7, Mo. Rev. Stat. §§ 217.220 (Vernon Supp. 1992), 552.070 (Vernon 1987); Mont. Const., Art. VI, § 12, Mont. Code Ann. §§ 46–23–301 to 46–23–316 (1991); Neb. Const., Art. IV, § 13, Neb. Rev. Stat. §§ 83–1, 127 to 83–1, 132 (1987); Nev. Const., Art. V, § 13, Nev. Rev. Stat. § 213.080 (1991); N. H. Const., pt. 2, Art. 52, N. H. Rev. Stat. Ann. § 4:23 (1988); N. J. Const., Art. V, § 2, ¶ 1, N. J. Stat. Ann. §§ 2A:167–4, 2A:167–12 (West 1985); N. M. Const., Art. V, § 6, N. M. Stat. Ann. § 31–21–17 (1990); N. C. Const., Art. III, § 5(6), N. C. Gen. Stat. §§ 147–23 to 147–25 (1987); Ohio Const., Art. III, § 11, Ohio Rev. Code Ann. §§ 2967.1 to 2967.12 (1987 and Supp. 1991);

Executive clemency has provided the "fail safe" in our criminal justice system. K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. E. Borchard, Convicting the Innocent (1932). Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made. See M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282–356 (1992).[15]

Okla. Const., Art. VI, § 10, Okla. Stat., Tit. 21, § 701.11a (Supp. 1990); Ore. Const., Art. V, § 14, Ore. Rev. Stat. §§ 144.640 to 144.670 (1991); Pa. Const., Art. IV, § 9, Pa. Stat. Ann., Tit. 61, § 2130 (Purdon Supp. 1992); S. C. Const., Art. IV, § 14, S. C. Code Ann. §§ 24–21–910 to 24–21–1000 (1977 and Supp. 1991); S. D. Const., Art. IV, § 3, S. D. Codified Laws §§ 23A–27A–20 to 23A–27A–21, 24–14–1 (1988); Tenn. Const., Art. III, § 6, Tenn. Code Ann. §§ 40–27–101 to 40–27–109 (1990); Tex. Const., Art. IV, § 11, Tex. Code Crim. Proc. Ann., Art. 48.01 (Vernon 1979); Utah Const., Art. VII, § 12, Utah Code Ann. § 77–27–5.5 (Supp. 1992); Va. Const., Art. V, § 12, Va. Code Ann. § 53.1–230 (1991); Wash. Const., Art. III, § 9, Wash. Rev. Code § 10.01.120 (1992); Wyo. Const., Art. IV, § 5, Wyo. Stat. § 7–13–801 (1987).

[15] The dissent points to one study concluding that 23 innocent persons have been executed in the United States this century as support for the proposition that clemency requests by persons believed to be innocent are not always granted. See *post*, at 430–431, n. 1 (citing Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21 (1987)). Although we do not doubt that clemency—like the criminal justice system itself—is fallible, we note that scholars have taken issue with this study. See Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988).

In Texas, the Governor has the power, upon the recommendation of a majority of the Board of Pardons and Paroles, to grant clemency. Tex. Const., Art. IV, § 11; Tex. Code Crim. Proc. Ann., Art. 48.01 (Vernon 1979). The board's consideration is triggered upon request of the individual sentenced to death, his or her representative, or the Governor herself. In capital cases, a request may be made for a full pardon, Tex. Admin. Code, Tit. 37, § 143.1 (West Supp. 1992), a commutation of death sentence to life imprisonment or appropriate maximum penalty, § 143.57, or a reprieve of execution, § 143.43. The Governor has the sole authority to grant one reprieve in any capital case not exceeding 30 days. § 143.41(a).

The Texas clemency procedures contain specific guidelines for pardons on the ground of innocence. The board will entertain applications for a recommendation of full pardon because of innocence upon receipt of the following: "(1) a written unanimous recommendation of the current trial officials of the court of conviction; and/or (2) a certified order or judgment of a court having jurisdiction accompanied by certified copy of the findings of fact (if any); and (3) affidavits of witnesses upon which the finding of innocence is based." § 143.2. In this case, petitioner has apparently sought a 30-day reprieve from the Governor, but has yet to apply for a pardon, or even a commutation, on the ground of innocence or otherwise. Tr. of Oral Arg. 7, 34.

As the foregoing discussion illustrates, in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant. Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas

petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.

Petitioner's newly discovered evidence consists of affidavits. In the new trial context, motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations. See Orfield, 2 Vill. L. Rev., at 333. Petitioner's affidavits are particularly suspect in this regard because, with the exception of Raul Herrera, Jr.'s affidavit, they consist of hearsay. Likewise, in reviewing petitioner's new evidence, we are mindful that defendants often abuse new trial motions "as a method of delaying enforcement of just sentences." *United States* v. *Johnson*, 327 U. S. 106, 112 (1946). Although we are not presented with a new trial motion *per se*, we believe the likelihood of abuse is as great—or greater—here.

The affidavits filed in this habeas proceeding were given over eight years after petitioner's trial. No satisfactory explanation has been given as to why the affiants waited until the 11th hour—and, indeed, until after the alleged perpetra-

tor of the murders himself was dead—to make their statements. Cf. *Taylor* v. *Illinois*, 484 U. S., at 414 ("[I]t is . . . reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed"). Equally troubling, no explanation has been offered as to why petitioner, by hypothesis an innocent man, pleaded guilty to the murder of Rucker.

Moreover, the affidavits themselves contain inconsistencies, and therefore fail to provide a convincing account of what took place on the night Officers Rucker and Carrisalez were killed. For instance, the affidavit of Raul, Junior, who was nine years old at the time, indicates that there were three people in the speeding car from which the murderer emerged, whereas Hector Villarreal attested that Raul, Senior, told him that there were two people in the car that night. Of course, Hernandez testified at petitioner's trial that the murderer was the only occupant of the car. The affidavits also conflict as to the direction in which the vehicle was heading when the murders took place and petitioner's whereabouts on the night of the killings.

Finally, the affidavits must be considered in light of the proof of petitioner's guilt at trial—proof which included two eyewitness identifications, numerous pieces of circumstantial evidence, and a handwritten letter in which petitioner apologized for killing the officers and offered to turn himself in under certain conditions. See *supra*, at 393–395, and n. 1. That proof, even when considered alongside petitioner's belated affidavits, points strongly to petitioner's guilt.

This is not to say that petitioner's affidavits are without probative value. Had this sort of testimony been offered at trial, it could have been weighed by the jury, along with the evidence offered by the State and petitioner, in deliberating upon its verdict. Since the statements in the affidavits contradict the evidence received at trial, the jury would have had to decide important issues of credibility. But coming 10 years after petitioner's trial, this showing of innocence falls

far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist.

The judgment of the Court of Appeals is

Affirmed.

Justice O'Connor, with whom Justice Kennedy joins, concurring.

I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed—"contrary to contemporary standards of decency," *post*, at 430 (dissenting opinion) (relying on *Ford* v. *Wainwright*, 477 U. S. 399, 406 (1986)), "shocking to the conscience," *post*, at 430 (relying on *Rochin* v. *California*, 342 U. S. 165, 172 (1952)), or offensive to a "'"principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"'" *ante*, at 407–408 (opinion of the Court) (quoting *Medina* v. *California*, 505 U. S. 437, 445–446 (1992), in turn quoting *Patterson* v. *New York*, 432 U. S. 197, 202 (1977))—the execution of a legally and factually innocent person would be a constitutionally intolerable event. Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word.

As the Court explains, *ante*, at 398–400, petitioner is not innocent in the eyes of the law because, in our system of justice, "the trial is the paramount event for determining the guilt or innocence of the defendant," *ante*, at 416. Accord, *post*, at 441 (dissenting opinion). In petitioner's case, that paramount event occurred 10 years ago. He was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. At the conclusion of that trial, the jury found petitioner guilty beyond a reasonable doubt. Petitioner therefore does not appear before us as an innocent man on the verge of execution. He is instead a legally guilty one who, refusing to accept

the jury's verdict, demands a hearing in which to have his culpability determined once again. *Ante,* at 399–400.

Consequently, the issue before us is not whether a State can execute the innocent. It is, as the Court notes, whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial. *Ante,* at 407, n. 6; see *ante,* at 399–400. In most circumstances, that question would answer itself in the negative. Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent. *Ante,* at 398–399. The question similarly would be answered in the negative today, except for the disturbing nature of the claim before us. Petitioner contends not only that the Constitution's protections "sometimes fail," *post,* at 430 (dissenting opinion), but that their failure in his case will result in his execution—even though he is factually innocent and has evidence to prove it.

Exercising restraint, the Court and JUSTICE WHITE assume for the sake of argument that, if a prisoner were to make an exceptionally strong showing of actual innocence, the execution could not go forward. JUSTICE BLACKMUN, in contrast, would expressly so hold; he would also announce the precise burden of proof. Compare *ante,* at 417 (opinion of the Court) (We assume, "for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim"), and *ante,* at 429 (WHITE, J., concurring in judgment) (assuming that a persuasive showing of actual innocence would render a conviction unconstitutional but explaining that, even under such an assumption, "petitioner would at the very least be required to show that based

on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond reasonable doubt.' *Jackson* v. *Virginia*, 443 U. S. 307, 314 (1979)"), with *post*, at 442 (dissenting opinion) ("I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent"). Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations. Indeed, as the Court persuasively demonstrates, *ante*, at 398–417, throughout our history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial. The prisoner's sole remedy was a pardon or clemency.

Nonetheless, the proper disposition of this case is neither difficult nor troubling. No matter what the Court might say about claims of actual innocence today, petitioner could not obtain relief. The record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez the night of September 29, 1981; petitioner's new evidence is bereft of credibility. Indeed, despite its stinging criticism of the Court's decision, not even the dissent expresses a belief that petitioner might possibly be actually innocent. Nor could it: The record makes it abundantly clear that petitioner is not somehow the future victim of "simple murder," *post*, at 446 (dissenting opinion), but instead himself the established perpetrator of two brutal and tragic ones.

Petitioner's first victim was Texas Department of Public Safety Officer David Rucker, whose body was found lying beside his patrol car. The body's condition indicated that a struggle had taken place and that Rucker had been shot in the head at rather close range. Petitioner's Social Security

card was found nearby. Shortly after Rucker's body was discovered, petitioner's second victim, Los Fresnos Police Officer Enrique Carrisalez, stopped a car speeding away from the murder scene. When Carrisalez approached, the driver shot him. Carrisalez lived long enough to identify petitioner as his assailant. Enrique Hernandez, a civilian who was riding with Carrisalez, also identified petitioner as the culprit. Moreover, at the time of the stop, Carrisalez radioed a description of the car and its license plates to the police station. The license plates corresponded to a car that petitioner was known to drive. Although the car belonged to petitioner's girlfriend, she did not have a set of keys; petitioner did. He even had a set in his pocket at the time of his arrest.

When the police arrested petitioner, they found more than car keys; they also found evidence of the struggle between petitioner and Officer Rucker. Human blood was spattered across the hood, the left front fender, the grill, and the interior of petitioner's car. There were spots of blood on petitioner's jeans; blood had even managed to splash into his wallet. The blood was, like Rucker's and unlike petitioner's, type A. Blood samples also matched Rucker's enzyme profile. Only 6% of the Nation's population shares both Rucker's blood type and his enzyme profile.

But the most compelling piece of evidence was entirely of petitioner's own making. When the police arrested petitioner, he had in his possession a signed letter in which he acknowledged responsibility for the murders; at the end of the letter, petitioner offered to turn himself in:

> "'I am terribly sorry for those [to whom] I have brought grief . . . . What happened to Rucker was for a certain reason. . . . [H]e violated some of [the] laws [of my drug business] and suffered the penalty, like the one you have for me when the time comes. . . . The other officer [Carrisalez] . . . had not[hing] to do [with] this. He was out to do what he had to do, protect, but that's life. . . . [I]f

> this is read word for word over the media, I will turn myself in . . . .' " *Ante,* at 395, n. 1.

There can be no doubt about the letter's meaning. When the police attempted to interrogate petitioner about the killings, he told them " 'it was all in the letter' " and suggested that, if "they wanted to know what happened," they should read it. *Herrera* v. *State,* 682 S. W. 2d 313, 317 (Tex. Crim. App. 1984), cert. denied, 471 U. S. 1131 (1985).

Now, 10 years after being convicted on that seemingly dispositive evidence, petitioner has collected four affidavits that he claims prove his innocence. The affidavits allege that petitioner's brother, who died six years before the affidavits were executed, was the killer—and that petitioner was not. Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism.

These affidavits are no exception. They are suspect, produced as they were at the 11th hour with no reasonable explanation for the nearly decade-long delay. See *ante,* at 417–418. Worse, they conveniently blame a dead man—someone who will neither contest the allegations nor suffer punishment as a result of them. Moreover, they contradict each other on numerous points, including the number of people in the murderer's car and the direction it was heading when Officer Carrisalez stopped it. *Ante,* at 418. They do not even agree on when Officer Rucker was killed. According to one, Rucker was killed when he and the murderer met at a highway rest stop. Brief for Petitioner 30. In contrast, another asserts that there was an initial meeting, but that Rucker was not killed until afterward when he "pulled [the murderer's car] over" on the highway. *Id.,* at 27. And the affidavits are inconsistent with petitioner's own admission of guilt. The affidavits blame petitioner's deceased

brother for *both* the Rucker and Carrisalez homicides—even though petitioner pleaded guilty to murdering Rucker and contested only the Carrisalez slaying.

Most critical of all, however, the affidavits pale when compared to the proof at trial. While some bits of circumstantial evidence can be explained, petitioner offers no plausible excuse for the most damaging piece of evidence, the signed letter in which petitioner confessed and offered to turn himself in. One could hardly ask for more unimpeachable—or more unimpeached—evidence of guilt.

The conclusion seems inescapable: Petitioner is guilty. The dissent does not contend otherwise. Instead, it urges us to defer to the District Court's determination that petitioner's evidence was not "so insubstantial that it could be dismissed without any hearing at all." *Post*, at 444. I do not read the District Court's decision as making any such determination. Nowhere in its opinion did the District Court question the accuracy of the jury's verdict. Nor did it pass on the sufficiency of the affidavits. The District Court did not even suggest that it wished to hold an evidentiary hearing on petitioner's actual innocence claims. Indeed, the District Court apparently believed that a hearing would be futile because the court could offer no relief in any event. As the court explained, claims of "newly discovered evidence bearing directly upon guilt or innocence" are not cognizable on habeas corpus "unless the petition implicates a constitutional violation." App. 38.

As the dissent admits, *post*, at 444, the District Court had an altogether different reason for entering a stay of execution. It believed, from a "sense of fairness and due process," App. 38, that petitioner should have the chance to present his affidavits to the *state courts*. *Id.*, at 38–39; *ante*, at 397. But the District Court did not hold that the state courts should hold a hearing either; it instead ordered the habeas petition dismissed and the stay lifted once the state court action was filed, without further condition. App. 39. As

the Court of Appeals recognized, that rationale was insufficient to support the stay order. Texas courts do not recognize new evidence claims on collateral review. *Id.*, at 67–68. Nor would they entertain petitioner's claim as a motion for a new trial; under Texas law, such motions must be made within 30 days of trial. See *ante*, at 400, 410; App. 68. Because petitioner could not have obtained relief—or even a hearing—through the state courts, it was error for the District Court to enter a stay permitting him to try.

Of course, the Texas courts would not be free to turn petitioner away if the Constitution required otherwise. But the District Court did not hold that the Constitution required them to entertain petitioner's claim. On these facts, that would be an extraordinary holding. Petitioner did not raise his claim shortly after Texas' 30-day limit expired; he raised it eight years too late. Consequently, the District Court would have had to conclude not that Texas' 30-day limit for new evidence claims was too short to comport with due process, but that applying an 8-year limit to petitioner would be. As the Court demonstrates today, see *ante*, at 408–411, there is little in fairness or history to support such a conclusion.

But even if the District Court did hold that further federal proceedings were warranted, surely it abused its discretion. The affidavits do not reveal a likelihood of actual innocence. See *ante*, at 393–395, 417–419; *supra*, at 423–427. In-person repetition of the affiants' accounts at an evidentiary hearing could not alter that; the accounts are, on their face and when compared to the proof at trial, unconvincing. As a result, further proceedings were improper even under the rather lax standard the dissent urges, for "'it plainly appear[ed] from the face of the petition and [the] exhibits annexed to it that the petitioner [wa]s not entitled to relief.'" *Post*, at 445 (quoting 28 U. S. C. § 2254 Rule 4).

The abuse of discretion is particularly egregious given the procedural posture. The District Court actually entered an order staying the execution. Such stays on "second or suc-

cessive federal habeas petition[s] should be granted only when there are 'substantial grounds upon which relief might be granted,'" *Delo* v. *Stokes*, 495 U. S. 320, 321 (1990) (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983)), and only when the equities favor the petitioner, see *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (Whether a claim is framed "as a habeas petition or as a [42 U. S. C.] § 1983 action, [what is sought is] an equitable remedy. . . . A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief"). Petitioner's claim satisfied neither condition. The grounds petitioner offered in his habeas petition were anything but substantial. And the equities favored the State. Petitioner delayed presenting his new evidence until eight years after conviction—without offering a semblance of a reasonable excuse for the inordinate delay. At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation. In this case, that point was well short of eight years.

Unless federal proceedings and relief—if they are to be had at all—are reserved for "extraordinarily high" and "truly persuasive demonstration[s] of 'actual innocence'" that cannot be presented to state authorities, *ante*, at 417, the federal courts will be deluged with frivolous claims of actual innocence. Justice Jackson explained the dangers of such circumstances some 40 years ago:

> "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (concurring in result).

If the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved

for the truly extraordinary case; they ought not be forced to sort through the insubstantial and the incredible as well.

* * *

Ultimately, two things about this case are clear. First is what the Court does *not* hold. Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim. Second is what petitioner has not demonstrated. Petitioner has failed to make a persuasive showing of actual innocence. Not one judge—no state court judge, not the District Court Judge, none of the three judges of the Court of Appeals, and none of the Justices of this Court—has expressed doubt about petitioner's guilt. Accordingly, the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

We granted certiorari on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be "actually innocent." I would have preferred to decide that question, particularly since, as the Court's discussion shows, it is perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for find-

ing in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. In saying that such a right exists, the dissenters apply nothing but their personal opinions to invalidate the rules of more than two-thirds of the States, and a Federal Rule of Criminal Procedure for which this Court itself is responsible. If the system that has been in place for 200 years (and remains widely approved) "shock[s]" the dissenters' consciences, *post,* at 430, perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of "conscience shocking" as a legal test.

I nonetheless join the entirety of the Court's opinion, including the final portion, *ante,* at 417–419—because there is no legal error in deciding a case by assuming, *arguendo,* that an asserted constitutional right exists, and because I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution* lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate. With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.

My concern is that in making life easier for ourselves we not appear to make it harder for the lower federal courts, imposing upon them the burden of regularly analyzing newly-discovered-evidence-of-innocence claims in capital cases (in which event such federal claims, it can confidently be predicted, will become routine and even repetitive). A number of Courts of Appeals have hitherto held, largely in

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*My reference is to an article by Professor Monaghan, which discusses the unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be. See Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353 (1981).

reliance on our unelaborated statement in *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963), that newly discovered evidence relevant only to a state prisoner's guilt or innocence is not a basis for federal habeas corpus relief. See, *e. g.*, *Boyd* v. *Puckett*, 905 F. 2d 895, 896–897 (CA5), cert. denied, 498 U. S. 988 (1990); *Stockton* v. *Virginia*, 852 F. 2d 740, 749 (CA4 1988), cert. denied, 489 U. S. 1071 (1989); *Swindle* v. *Davis*, 846 F. 2d 706, 707 (CA11 1988) *(per curiam)*; *Byrd* v. *Armontrout*, 880 F. 2d 1, 8 (CA8 1989), cert. denied, 494 U. S. 1019 (1990); *Burks* v. *Egeler*, 512 F. 2d 221, 230 (CA6), cert. denied, 423 U. S. 937 (1975). I do not understand it to be the import of today's decision that those holdings are to be replaced with a strange regime that assumes permanently, though only "*arguendo*," that a constitutional right exists, and expends substantial judicial resources on that assumption. The Court's extensive and scholarly discussion of the question presented in the present case does nothing but support our statement in *Townsend* and strengthen the validity of the holdings based upon it.

JUSTICE WHITE, concurring in the judgment.

In voting to affirm, I assume that a persuasive showing of "actual innocence" made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case. To be entitled to relief, however, petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U. S. 307, 324 (1979). For the reasons stated in the Court's opinion, petitioner's showing falls far short of satisfying even that standard, and I therefore concur in the judgment.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE SOUTER join with respect to Parts I–IV, dissenting.

Nothing could be more contrary to contemporary standards of decency, see *Ford* v. *Wainwright*, 477 U. S. 399, 406 (1986), or more shocking to the conscience, see *Rochin* v. *California*, 342 U. S. 165, 172 (1952), than to execute a person who is actually innocent.

I therefore must disagree with the long and general discussion that precedes the Court's disposition of this case. See *ante*, at 398–417. That discussion, of course, is dictum because the Court assumes, "for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Ante*, at 417. Without articulating the standard it is applying, however, the Court then decides that this petitioner has not made a sufficiently persuasive case. Because I believe that in the first instance the District Court should decide whether petitioner is entitled to a hearing and whether he is entitled to relief on the merits of his claim, I would reverse the order of the Court of Appeals and remand this case for further proceedings in the District Court.

I

The Court's enumeration, *ante*, at 398–399, of the constitutional rights of criminal defendants surely is entirely beside the point. These protections sometimes fail.[1] We really

[1] One impressive study has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984. Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173–179 (1987); M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282–356 (1992). The majority cites this study to show that clemency has been exercised frequently in capital cases when showings of actual innocence have been made. See *ante*, at 415. But the study also shows that requests for clemency by persons the authors believe were innocent have been refused. See, *e. g.*, Bedau & Radelet, 40 Stan. L. Rev., at 91 (discussing James Adams who was executed in

are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, see Tr. of Oral Arg. 37, I do not see how the answer can be anything but "yes."

A

The Eighth Amendment prohibits "cruel and unusual punishments." This proscription is not static but rather reflects evolving standards of decency. *Ford* v. *Wainwright*, 477 U. S., at 406; *Gregg* v. *Georgia*, 428 U. S. 153, 171 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion); *Weems* v. *United States*, 217 U. S. 349, 373 (1910). I think it is crystal clear that the execution of an innocent person is "at odds with contemporary standards of fairness and decency." *Spaziano* v. *Florida*, 468 U. S. 447, 465 (1984). Indeed, it is at odds with any standard of decency that I can imagine.

This Court has ruled that punishment is excessive and unconstitutional if it is "nothing more than the purposeless and needless imposition of pain and suffering," or if it is "grossly out of proportion to the severity of the crime." *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S., at 173 (opinion of Stewart, Powell, and STEVENS, JJ.). It has held that death is an excessive punishment for rape, *Coker* v. *Georgia*, 433 U. S., at 592, and for mere participation in a robbery during which a killing takes place, *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982). If it is violative of the Eighth Amendment to execute someone who is guilty of those crimes, then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent. Executing an innocent person epitomizes "the

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Florida on May 10, 1984); Radelet, Bedau, & Putnam, In Spite of Innocence, at 5–10 (same).

purposeless and needless imposition of pain and suffering." *Coker* v. *Georgia*, 433 U. S., at 592.[2]

The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced. In *Johnson* v. *Mississippi*, 486 U. S. 578 (1988), the petitioner had been convicted of murder and sentenced to death on the basis of three aggravating circumstances. One of those circumstances was that he previously had been convicted of a violent felony in the State of New York. After Johnson had been sentenced to death, the New York Court of Appeals reversed his prior conviction. Although there was no question that the prior conviction was valid at the time of Johnson's sentencing, this Court held that the Eighth Amendment required review of the sentence because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.*, at 590.[3] In *Ford* v. *Wainwright*, the petitioner had been convicted of murder and sen-

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[2] It also may violate the Eighth Amendment to imprison someone who is actually innocent. See *Robinson* v. *California*, 370 U. S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"). On the other hand, this Court has noted that "'death is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality.'" *Beck* v. *Alabama*, 447 U. S. 625, 637 (1980), quoting *Gardner* v. *Florida*, 430 U. S. 349, 357 (1977) (opinion of STEVENS, J.). We are not asked to decide in this case whether petitioner's continued imprisonment would violate the Constitution if he actually is innocent, see Brief for Petitioner 39, n. 52; Tr. of Oral Arg. 3–5, and I do not address that question.

[3] The majority attempts to distinguish *Johnson* on the ground that Mississippi previously had considered claims like Johnson's by writ of error *coram nobis*. *Ante*, at 406–407. We considered Mississippi's past practice in entertaining such claims, however, to determine not whether an Eighth Amendment violation had occurred but whether there was an independent and adequate state ground preventing us from reaching the merits of Johnson's claim. See 486 U. S., at 587–589. Respondent does not argue that there is any independent and adequate state ground that would prevent us from reaching the merits in this case.

tenced to death. There was no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing, but subsequently he exhibited changes in behavior that raised doubts about his sanity. This Court held that Florida was required under the Eighth Amendment to provide an additional hearing to determine whether Ford was mentally competent, and that he could not be executed if he were incompetent. 477 U. S., at 410 (plurality opinion); *id.*, at 422–423 (Powell, J., concurring in part and concurring in judgment). Both *Johnson* and *Ford* recognize that capital defendants may be entitled to further proceedings because of an intervening development even though they have been validly convicted and sentenced to death.

Respondent and the United States as *amicus curiae* argue that the Eighth Amendment does not apply to petitioner because he is challenging his guilt, not his punishment. Brief for Respondent 21–23; Brief for United States as *Amicus Curiae* 9–12. The majority attempts to distinguish *Ford* on that basis. *Ante,* at 405–406.[4] Such reasoning, however, not only contradicts our decision in *Beck* v. *Alabama*, 447 U. S. 625 (1980), but also fundamentally misconceives the nature of petitioner's argument. Whether petitioner is viewed as challenging simply his death sentence or also his continued detention, he still is challenging the State's right to punish him. Respondent and the United States would impose a clear line between guilt and punishment, reasoning that every claim that concerns guilt necessarily does not involve punishment. Such a division is far too facile. What respondent and the United States fail to recognize is that the

[4] The Court also suggests that *Ford* is distinguishable because "unlike the question of guilt or innocence . . . the issue of sanity is properly considered in proximity to the execution." *Ante,* at 406. Like insanity, however, newly discovered evidence of innocence may not appear until long after the conviction and sentence. In *Johnson,* the New York Court of Appeals decision that required reconsideration of Johnson's sentence came five years after he had been sentenced to death. 486 U. S., at 580–582.

legitimacy of punishment is inextricably intertwined with guilt.

Beck makes this clear. In *Beck*, the petitioner was convicted of the capital crime of robbery-intentional killing. Under Alabama law, however, the trial court was prohibited from giving the jury the option of convicting him of the lesser included offense of felony murder. We held that precluding the instruction injected an impermissible element of uncertainty into the guilt phase of the trial.

> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option in a capital case." *Id.*, at 638 (footnote omitted).

The decision in *Beck* establishes that, at least in capital cases, the Eighth Amendment requires more than reliability in sentencing. It also mandates a reliable determination of guilt. See also *Spaziano* v. *Florida*, 468 U. S., at 456.

The Court also suggests that allowing petitioner to raise his claim of innocence would not serve society's interest in the reliable imposition of the death penalty because it might require a new trial that would be less accurate than the first. *Ante*, at 403–404. This suggestion misses the point entirely. The question is not whether a second trial would be more reliable than the first but whether, in light of new evidence, the result of the first trial is sufficiently reliable for the State to carry out a death sentence. Furthermore, it is far from clear that a State will seek to retry the rare prisoner who prevails on a claim of actual innocence. As explained in Part III, *infra*, I believe a prisoner must show not just that there

was probably a reasonable doubt about his guilt but that he is probably actually innocent. I find it difficult to believe that any State would choose to retry a person who meets this standard.

I believe it contrary to any standard of decency to execute someone who is actually innocent. Because the Eighth Amendment applies to questions of guilt or innocence, *Beck* v. *Alabama*, 447 U. S., at 638, and to persons upon whom a valid sentence of death has been imposed, *Johnson* v. *Mississippi*, 486 U. S., at 590, I also believe that petitioner may raise an Eighth Amendment challenge to his punishment on the ground that he is actually innocent.

B

Execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment. The majority's discussion misinterprets petitioner's Fourteenth Amendment claim as raising a procedural, rather than a substantive, due process challenge.[5]

> "The Due Process Clause of the Fifth Amendment provides that 'No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .' This Court has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the

[5] The majority's explanation for its failure to address petitioner's substantive due process argument is fatuous. The majority would deny petitioner the opportunity to bring a substantive due process claim of actual innocence because a jury has previously found that he is not actually innocent. See *ante*, at 407, n. 6. To borrow a phrase, this "puts the cart before the horse." *Ibid.*

Even under the procedural due process framework of *Medina* v. *California*, 505 U. S. 437 (1992), the majority's analysis is incomplete, for it fails to consider "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Id.*, at 448, quoting *Dowling* v. *United States*, 493 U. S. 342, 352 (1990).

> government from engaging in conduct that 'shocks the conscience,' *Rochin* v. *California*, 342 U. S. 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). This requirement has traditionally been referred to as 'procedural' due process." *United States* v. *Salerno*, 481 U. S. 739, 746 (1987).

Petitioner cites not *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), or *Medina* v. *California*, 505 U. S. 437 (1992), in support of his due process claim, but *Rochin*. Brief for Petitioner 32–33.

Just last Term, we had occasion to explain the role of substantive due process in our constitutional scheme. Quoting the second Justice Harlan, we said:

> "'[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .'" *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 848 (1992), quoting *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (opinion dissenting from dismissal on jurisdictional grounds).

Petitioner's claim falls within our due process precedents. In *Rochin*, deputy sheriffs investigating narcotics sales broke into Rochin's room and observed him put two capsules in his mouth. The deputies attempted to remove the capsules from his mouth and, having failed, took Rochin to a hospital and had his stomach pumped. The capsules were

found to contain morphine. The Court held that the deputies' conduct "shock[ed] the conscience" and violated due process. 342 U. S., at 172. "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." *Ibid.* The lethal injection that petitioner faces as an allegedly innocent person is certainly closer to the rack and the screw than the stomach pump condemned in *Rochin.* Execution of an innocent person is the ultimate "'arbitrary impositio[n].'" *Planned Parenthood,* 505 U. S., at 848. It is an imposition from which one never recovers and for which one can never be compensated. Thus, I also believe that petitioner may raise a substantive due process challenge to his punishment on the ground that he is actually innocent.

C

Given my conclusion that it violates the Eighth and Fourteenth Amendments to execute a person who is actually innocent, I find no bar in *Townsend* v. *Sain,* 372 U. S. 293 (1963), to consideration of an actual-innocence claim. Newly discovered evidence of petitioner's innocence does bear on the constitutionality of his execution. Of course, it could be argued this is in some tension with *Townsend*'s statement, *id.,* at 317, that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." That statement, however, is no more than distant dictum here, for we never had been asked to consider whether the execution of an innocent person violates the Constitution.

II

The majority's discussion of petitioner's constitutional claims is even more perverse when viewed in the light of this

Court's recent habeas jurisprudence. Beginning with a trio of decisions in 1986, this Court shifted the focus of federal habeas review of successive, abusive, or defaulted claims away from the preservation of constitutional rights to a fact-based inquiry into the habeas petitioner's guilt or innocence. See *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (plurality opinion); *Murray* v. *Carrier*, 477 U. S. 478, 496; *Smith* v. *Murray*, 477 U. S. 527, 537; see also *McCleskey* v. *Zant*, 499 U. S. 467, 493–494 (1991). The Court sought to strike a balance between the State's interest in the finality of its criminal judgments and the prisoner's interest in access to a forum to test the basic justice of his sentence. *Kuhlmann* v. *Wilson*, 477 U. S., at 452. In striking this balance, the Court adopted the view of Judge Friendly that there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

Justice Powell, writing for the plurality in *Wilson*, explained the reason for focusing on innocence:

> "The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain." 477 U. S., at 452.

In other words, even a prisoner who appears to have had a *constitutionally perfect* trial "retains a powerful and legitimate interest in obtaining his release from custody if he is

innocent of the charge for which he was incarcerated." It is obvious that this reasoning extends beyond the context of successive, abusive, or defaulted claims to substantive claims of actual innocence. Indeed, Judge Friendly recognized that substantive claims of actual innocence should be cognizable on federal habeas. 38 U. Chi. L. Rev., at 159–160, and n. 87.

Having adopted an "actual-innocence" requirement for review of abusive, successive, or defaulted claims, however, the majority would now take the position that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Ante*, at 404. In other words, having held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible.

III

The Eighth and Fourteenth Amendments, of course, are binding on the States, and one would normally expect the States to adopt procedures to consider claims of actual innocence based on newly discovered evidence. See *Ford* v. *Wainwright*, 477 U. S., at 411–417 (plurality opinion) (minimum requirements for state-court proceeding to determine competency to be executed). The majority's disposition of this case, however, leaves the States uncertain of their constitutional obligations.

A

Whatever procedures a State might adopt to hear actual-innocence claims, one thing is certain: The possibility of executive clemency is *not* sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments. The majority

correctly points out: "'A pardon is an act of grace.'" *Ante*, at 413. The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal. Indeed, in *Ford* v. *Wainwright*, we explicitly rejected the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane. 477 U. S., at 416. The possibility of executive clemency "exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless." *Solem* v. *Helm*, 463 U. S. 277, 303 (1983).

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). If the exercise of a legal right turns on "an act of grace," then we no longer live under a government of laws. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). It is understandable, therefore, that the majority does not say that the vindication of petitioner's constitutional rights may be left to executive clemency.

B

Like other constitutional claims, Eighth and Fourteenth Amendment claims of actual innocence advanced on behalf of a state prisoner can and should be heard in state court. If a State provides a judicial procedure for raising such claims, the prisoner may be required to exhaust that procedure before taking his claim of actual innocence to federal court. See 28 U. S. C. §§ 2254(b) and (c). Furthermore, state-court

determinations of factual issues relating to the claim would be entitled to a presumption of correctness in any subsequent federal habeas proceeding. See § 2254(d).

Texas provides no judicial procedure for hearing petitioner's claim of actual innocence and his habeas petition was properly filed in district court under § 2254. The district court is entitled to dismiss the petition summarily only if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." § 2254 Rule 4. If, as is the case here, the petition raises factual questions and the State has failed to provide a full and fair hearing, the district court is required to hold an evidentiary hearing. *Townsend* v. *Sain*, 372 U. S., at 313.

Because the present federal petition is petitioner's second, he must either show cause for, and prejudice from, failing to raise the claim in his first petition or show that he falls within the "actual-innocence" exception to the cause and prejudice requirement. *McCleskey* v. *Zant*, 499 U. S., at 494–495. If petitioner can show that he is entitled to relief on the merits of his actual-innocence claim, however, he certainly can show that he falls within the "actual-innocence" exception to the cause and prejudice requirement and *McCleskey* would not bar relief.

C

The question that remains is what showing should be required to obtain relief on the merits of an Eighth or Fourteenth Amendment claim of actual innocence. I agree with the majority that "in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." *Ante*, at 416. I also think that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Ante*, at 417. The question is what "a truly persuasive demonstration" entails, a question the majority's disposition of this case leaves open.

In articulating the "actual-innocence" exception in our habeas jurisprudence, this Court has adopted a standard requiring the petitioner to show a "'fair probability that, in light of all the evidence . . . , the trier of the facts would have entertained a reasonable doubt of his guilt.'" *Kuhlmann* v. *Wilson*, 477 U. S., at 455, n. 17. In other words, the habeas petitioner must show that there probably would be a reasonable doubt. See also *Murray* v. *Carrier*, 477 U. S., at 496 (exception applies when a constitutional violation has "probably resulted" in a mistaken conviction); *McCleskey* v. *Zant*, 499 U. S., at 494 (exception applies when a constitutional violation "probably has caused" a mistaken conviction).[6]

I think the standard for relief on the merits of an actual-innocence claim must be higher than the threshold standard for merely reaching that claim or any other claim that has been procedurally defaulted or is successive or abusive. I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent. This standard is supported by several considerations. First, new evidence of innocence may be discovered long after the defendant's conviction. Given the passage of time, it may

[6] Last Term in *Sawyer* v. *Whitley*, 505 U. S. 333 (1992), this Court adopted a different standard for determining whether a federal habeas petitioner bringing a successive, abusive, or defaulted claim has shown "actual innocence" of the death penalty. Under *Sawyer*, the petitioner must "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law." *Id.*, at 336. That standard would be inappropriate here. First, it requires a showing of constitutional error in the trial process, which, for reasons already explained, is inappropriate when petitioner makes a substantive claim of actual innocence. Second, it draws its "no reasonable juror" standard from the standard for sufficiency of the evidence set forth in *Jackson* v. *Virginia*, 443 U. S. 307 (1979). As I explain below, however, sufficiency of the evidence review differs in important ways from the question of actual innocence. Third, the Court developed this standard for prisoners who are concededly guilty of capital crimes. Here, petitioner claims that he is actually innocent of the capital crime.

be difficult for the State to retry a defendant who obtains relief from his conviction or sentence on an actual-innocence claim. The actual-innocence proceeding thus may constitute the final word on whether the defendant may be punished. In light of this fact, an otherwise constitutionally valid conviction or sentence should not be set aside lightly. Second, conviction after a constitutionally adequate trial strips the defendant of the presumption of innocence. The government bears the burden of proving the defendant's guilt beyond a reasonable doubt, *Jackson* v. *Virginia*, 443 U. S. 307, 315 (1979); *In re Winship*, 397 U. S. 358, 364 (1970), but once the government has done so, the burden of proving innocence must shift to the convicted defendant. The actual-innocence inquiry is therefore distinguishable from review for sufficiency of the evidence, where the question is not whether the defendant is innocent but whether the government has met its constitutional burden of proving the defendant's guilt beyond a reasonable doubt. When a defendant seeks to challenge the determination of guilt after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence, not just raising doubt about his guilt.

In considering whether a prisoner is entitled to relief on an actual-innocence claim, a court should take all the evidence into account, giving due regard to its reliability. See *Sawyer* v. *Whitley*, 505 U. S., at 339, n. 5 (1992); *Kuhlmann* v. *Wilson*, 477 U. S., at 455, n. 17; Friendly, 38 U. Chi. L. Rev., at 160. Because placing the burden on the prisoner to prove innocence creates a presumption that the conviction is valid, it is not necessary or appropriate to make further presumptions about the reliability of newly discovered evidence generally. Rather, the court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances. The court then should weigh the evidence in favor of the prisoner against the evidence of his guilt.

Obviously, the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence of innocence must be. A prisoner raising an actual-innocence claim in a federal habeas petition is not entitled to discovery as a matter of right. *Harris* v. *Nelson*, 394 U. S. 286, 295 (1969); 28 U. S. C. § 2254 Rule 6. The district court retains discretion to order discovery, however, when it would help the court make a reliable determination with respect to the prisoner's claim. *Harris* v. *Nelson*, 394 U. S., at 299–300; see Advisory Committee Note on Rule 6, 28 U. S. C., pp. 421–422.

It should be clear that the standard I would adopt would not convert the federal courts into " 'forums in which to relitigate state trials.' " *Ante*, at 401, quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). It would not "require the habeas court to hear testimony from the witnesses who testified at trial," *ante*, at 402, though, if the petition warrants a hearing, it may require the habeas court to hear the testimony of "those who made the statements in the affidavits which petitioner has presented." *Ibid.* I believe that if a prisoner can show that he is probably actually innocent, in light of all the evidence, then he has made "a truly persuasive demonstration," *ante*, at 417, and his execution would violate the Constitution. I would so hold.

IV

In this case, the District Court determined that petitioner's newly discovered evidence warranted further consideration. Because the District Court doubted its own authority to consider the new evidence, it thought that petitioner's claim of actual innocence should be brought in state court, see App. 38–39, but it clearly did not think that petitioner's evidence was so insubstantial that it could be dismissed without any hearing at all.[7] I would reverse the order of the

[7] JUSTICE O'CONNOR reads too much into the fact that the District Court failed to pass on the sufficiency of the affidavits, did not suggest that it wished to hold an evidentiary hearing, and did not retain jurisdiction after

Court of Appeals and remand the case to the District Court to consider whether petitioner has shown, in light of all the evidence, that he is probably actually innocent.

I think it is unwise for this Court to step into the shoes of a district court and rule on this petition in the first instance. If this Court wishes to act as a district court, however, it must also be bound by the rules that govern consideration of habeas petitions in district court. A district court may summarily dismiss a habeas petition only if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." 28 U. S. C. § 2254 Rule 4. In one of the affidavits, Hector Villarreal, a licensed attorney and former state court judge, swears under penalty of perjury that his client Raul Herrera, Sr., confessed that he, and not petitioner, committed the murders. No matter what the majority may think of the inconsistencies in the affidavits or the strength of the evidence presented at trial, this affidavit alone is sufficient to raise factual questions concerning petitioner's innocence that cannot be resolved simply by examining the affidavits and the petition.

I do not understand why the majority so severely faults petitioner for relying only on affidavits. *Ante*, at 417. It is common to rely on affidavits at the preliminary-consideration stage of a habeas proceeding. The opportunity for cross-examination and credibility determinations comes at the hearing, assuming that the petitioner is entitled to one. It makes no sense for this Court to impugn the reliability of petitioner's evidence on the ground that its credibility has not been tested when the reason its credibility has not been tested is that petitioner's habeas proceeding has been truncated by the Court of Appeals and now by this Court. In its haste to deny petitioner relief, the majority seems to confuse the question whether the petition may be dismissed

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the state-court action was filed. *Ante*, at 424. The explanation for each of these actions, as JUSTICE O'CONNOR notes, is that the District Court believed that it could offer no relief in any event. *Ibid.*

summarily with the question whether petitioner is entitled to relief on the merits of his claim.

V

I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please. See *Coleman* v. *Thompson*, 501 U. S. 722, 758–759 (1991) (dissenting opinion). See also *Coleman* v. *Thompson*, 504 U. S. 188, 189 (1992) (dissent from denial of stay of execution). I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all. *Sawyer* v. *Whitley*, 505 U. S., at 343–345 (opinion concurring in judgment). Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder.

Syllabus

SPECTRUM SPORTS, INC., ET AL. *v.* McQUILLAN ET VIR, DBA SORBOTURF ENTERPRISES

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

No. 91–10. Argued November 10, 1992—Decided January 25, 1993

Shortly after the manufacturer of sorbothane—a patented elastic polymer with shock-absorbing characteristics—informed respondents, distributors of medical, athletic, and equestrian products made with sorbothane, that it would no longer sell them the polymer, petitioner Spectrum Sports, Inc., became the national distributor of sorbothane athletic products. Respondents' business failed, and they filed suit in the District Court against petitioners and others, seeking damages for alleged violations of, *inter alia*, § 2 of the Sherman Act, which makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States." A jury found that the defendants violated § 2 by, in the words of the verdict sheet, "monopolizing, attempting to monopolize, and/or conspiring to monopolize." The Court of Appeals affirmed, noting that, although the jury had not specified which of the three possible § 2 violations had occurred, the verdict stood because the evidence established a case of attempted monopolization. Relying on its earlier rulings in *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459, and its progeny, the court held that the jury could have inferred two of the elements of that offense—a specific intent to achieve monopoly power and a dangerous probability of monopolization of a relevant market—from evidence showing the defendants' unfair or predatory conduct, without any proof of relevant market or the defendants' market power, and that the jury was properly instructed that it could make such inferences.

Held: Petitioners may not be liable for attempted monopolization under § 2 absent proof of a dangerous probability that they would monopolize a relevant market and specific intent to monopolize. The conduct of a single firm, governed by § 2, is unlawful "only when it threatens actual monopolization." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 767. Consistent with this approach, Courts of Appeals other than the court below have generally required a plaintiff in an attempted monopolization case to prove that (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Unfair or predatory conduct may be sufficient to prove the necessary intent to

monopolize. However, intent alone is insufficient to establish the dangerous probability of success, *Swift & Co.* v. *United States*, 196 U. S. 375, 402, which requires inquiry into the relevant product and geographic market and the defendant's economic power in that market. There is little if any support in the statute or case law for *Lessig*'s contrary interpretation of § 2. Moreover, *Lessig* and its progeny are inconsistent with the Sherman Act's purpose of protecting the public from the failure of the market. The law directs itself only against conduct that unfairly tends to destroy competition, and, thus, courts have been careful to avoid constructions of § 2 which might chill competition rather than foster it. The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics. Since the jury's instructions and the Court of Appeals' affirmance both misconstrued § 2, and since the jury's verdict did not negate the possibility that it rested on the attempt to monopolize ground alone, the case is remanded for further proceedings. Pp. 454–460.

907 F. 2d 154, reversed and remanded.

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

James D. Vail argued the cause and filed briefs for petitioners.

Robert A. Long, Jr., argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General James*, *Deputy Solicitor General Wallace*, and *Catherine G. O'Sullivan.*

Jeffrey M. Shohet argued the cause for respondents. With him on the brief was *Marcelle E. Mihaila.*

JUSTICE WHITE delivered the opinion of the Court.

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 2, makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . ." The jury in this case returned a verdict finding that petitioners had monopolized, attempted to monopolize, and/or conspired to monopolize. The District Court entered a judgment rul-

ing that petitioners had violated § 2, and the Court of Appeals affirmed on the ground that petitioners had attempted to monopolize. The issue we have before us is whether the District Court and the Court of Appeals correctly defined the elements of that offense.

I

Sorbothane is a patented elastic polymer whose shock-absorbing characteristics make it useful in a variety of medical, athletic, and equestrian products. BTR, Inc. (BTR), owns the patent rights to sorbothane, and its wholly owned subsidiaries manufacture the product in the United States and Britain. Hamilton-Kent Manufacturing Company (Hamilton-Kent) and Sorbothane, Inc. (S. I.), were at all relevant times owned by BTR. S. I. was formed in 1982 to take over Hamilton-Kent's sorbothane business.[1] App. to Pet. for Cert. A3. Respondents Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, were regional distributors of sorbothane products from 1981 to 1983. Petitioner Spectrum Sports, Inc. (Spectrum), was also a distributor of sorbothane products. Petitioner Kenneth B. Leighton, Jr., is a co-owner of Spectrum. *Ibid.* Kenneth Leighton, Jr., is the son of Kenneth Leighton, Sr., the president of Hamilton-Kent and S. I. at all relevant times.

In 1980, respondents Shirley and Larry McQuillan signed a letter of intent with Hamilton-Kent, which then owned all manufacturing and distribution rights to sorbothane. The letter of intent granted the McQuillans exclusive rights to purchase sorbothane for use in equestrian products. Respondents were designing a horseshoe pad using sorbothane.

In 1981, Hamilton-Kent decided to establish five regional distributorships for sorbothane. Respondents were selected to be distributors of all sorbothane products, including medical products and shoe inserts, in the Southwest. Spectrum

[1] Sorbothane, Inc., was formerly called Sorbo, Inc. App. 67.

was selected as distributor for another region. *Id.*, at A4–A5.

In January 1982, Hamilton-Kent shifted responsibility for selling medical products from five regional distributors to a single national distributor. In April 1982, Hamilton-Kent told respondents that it wanted them to relinquish their athletic shoe distributorship as a condition for retaining the right to develop and distribute equestrian products. As of May 1982, BTR had moved the sorbothane business from Hamilton-Kent to S. I. *Id.*, at A6. In May, the marketing manager of S. I. again made clear that respondents had to sell their athletic distributorship to keep their equestrian distribution rights. At a meeting scheduled to discuss the sale of respondents' athletic distributorship to petitioner Leighton, Jr., Leighton, Jr., informed Shirley McQuillan that if she did not come to agreement with him she would be "'looking for work.'" *Id.*, at A6. Respondents refused to sell and continued to distribute athletic shoe inserts.

In the fall of 1982, Leighton, Sr., informed respondents that another concern had been appointed as the national equestrian distributor, and that they were "no longer involved in equestrian products." *Id.*, at A7. In January 1983, S. I. began marketing through a national distributor a sorbothane horseshoe pad allegedly indistinguishable from the one designed by respondents. *Ibid.* In August 1983, S. I. informed respondents that it would no longer accept their orders. *Ibid.* Spectrum thereupon became national distributor of sorbothane athletic shoe inserts. Pet. for Cert. 6. Respondents sought to obtain sorbothane from the BTR's British subsidiary, but were informed by that subsidiary that it would not sell sorbothane in the United States. Respondents' business failed. App. to Pet. for Cert. A8.

Respondents sued petitioners seeking damages for alleged violations of §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1

and 2,[2] § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1962, and two provisions of California business law. Respondents also alleged fraud, breach of oral contract, interference with prospective business advantage, bad-faith denial of the existence of an oral contract, and conversion.

The case was tried to a jury, which returned a verdict against one or more of the defendants on each of the 11 alleged violations on which it was to return a verdict. All of the defendants were found to have violated § 2 by, in the words of the verdict sheet, "monopolizing, attempting to monopolize, and/or conspiring to monopolize." App. 410. Petitioners were also found to have violated civil RICO and the California unfair practices law, but not § 1 of the Sherman Act. The jury awarded $1,743,000 in compensatory damages on each of the violations found to have occurred.[3] This amount was trebled under § 4 of the Clayton Act. The District Court also awarded nearly $1 million in attorney's fees and denied motions for judgment notwithstanding the verdict and for a new trial.

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[2] Two violations of § 1 were alleged, resale price maintenance and division of territories. Attempted monopolization, monopolization, and conspiracy to monopolize were charged under § 2. All in all, four alleged violations of federal law and seven alleged violations of state law were sent to the jury.

[3] The special verdict form advised the jury as follows:

"The following pages identify the name of each defendant and the claims for which plaintiffs contend that the defendant is liable. If you find that any of the defendants are liable on any of the claims, you may award damages to the plaintiffs against those defendants. Should you decide to award damages, please assess damages for *each* defendant and *each* claim separately and without regard to whether you have already awarded the same damages on another claim or against another defendant. The court will insure that there is no double recovery. The verdict will *not* be totaled." App. 416.

The Court of Appeals for the Ninth Circuit affirmed the judgment in an unpublished opinion. Judgt. order reported at 907 F. 2d 154 (1990). The court expressly ruled that the trial court had properly instructed the jury on the Sherman Act claims and found that the evidence supported the liability verdicts as well as the damages awards on these claims. The court then affirmed the judgment of the District Court, finding it unnecessary to rule on challenges to other violations found by the jury. App. to Pet. for Cert. A28. On the § 2 issue that petitioners present here, the Court of Appeals, noting that the jury had found that petitioners had violated § 2 without specifying whether they had monopolized, attempted to monopolize, or conspired to monopolize, held that the verdict would stand if the evidence supported any one of the three possible violations of § 2. *Id.*, at A15. The court went on to conclude that a case of attempted monopolization had been established.[4] The court rejected petitioners' argument that attempted monopolization had not been established because respondents had failed to prove that petitioners had a specific intent to monopolize a relevant market. The court also held that in order to show that respondents'

[4] The District Court's jury instructions were transcribed as follows:

"In order to win on the claim of attempted monopoly, the Plaintiff must prove each of the following elements by a preponderance of the evidence: first, that the Defendants had a specific intent to achieve monopoly power in the relevant market; second, that the Defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent; third, that there was a dangerous probability that Defendants could sooner or later achieve [their] goal of monopoly power in the relevant market; fourth, that the Defendants' conduct occurred in or affected interstate commerce; and, fifth, that the Plaintiff was injured in the business or property by the Defendants' exclusionary or restrictive conduct.

. . . . .

"If the Plaintiff has shown that the Defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of the relevant market or the Defendants' marketing *[sic]* power." *Id.*, at 251–252. See also App. to Pet. for Cert. A16, A20.

attempt to monopolize was likely to succeed it was not necessary to present evidence of the relevant market or of the defendants' market power. In so doing, the Ninth Circuit relied on *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (CA9), cert. denied, 377 U. S. 993 (1964), and its progeny. App. to Pet. for Cert. A18–A19. The Court of Appeals noted that these cases, in dealing with attempt to monopolize claims, had ruled that "if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower *[sic]*." *Id.*, at A19. If, however, there is insufficient evidence of unfair or predatory conduct, there must be a showing of "relevant market or the defendant's marketpower *[sic]*." *Ibid.* The court went on to find:

> "There is sufficient evidence from which the jury could conclude that the S. I. Group and Spectrum Group engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power." *Id.*, at A21.

The decision below, and the *Lessig* line of decisions on which it relies, conflicts with holdings of courts in other Circuits. Every other Court of Appeals has indicated that proving an attempt to monopolize requires proof of a dangerous probability of monopolization of a relevant market.[5] We

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[5] See, *e. g.*, *CVD, Inc.* v. *Raytheon Co.*, 769 F. 2d 842, 851 (CA1 1985), cert. denied, 475 U. S. 1016 (1986); *Twin Laboratories, Inc.* v. *Weider Health & Fitness*, 900 F. 2d 566, 570 (CA2 1990); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F. 2d 1068, 1079 (CA3 1978); *Abcor Corp.* v. *AM Int'l, Inc.*, 916 F. 2d 924, 926, 931 (CA4 1990); *C. A. T. Industrial Disposal, Inc.* v. *Browning-Ferris Industries, Inc.*, 884 F. 2d 209, 210 (CA5 1989); *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 917 F. 2d 1413, 1431–1432 (CA6 1990), cert. denied, 502 U. S. 899 (1991); *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F. 2d 1409, 1413–1416 (CA7 1989); *General Indus-*

granted certiorari, 503 U. S. 958 (1992), to resolve this conflict among the Circuits.[6] We reverse.

II

While § 1 of the Sherman Act forbids contracts or conspiracies in restraint of trade or commerce, § 2 addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize. Section 2 does not define the elements of the offense of attempted monopolization. Nor is there much guidance to be had in the scant legislative history of that provision, which was added late in the legislative process. See 1 E. Kintner, Legislative History of the Federal Antitrust Laws and Related Statutes 23–25 (1978); 3 P. Areeda & D. Turner, Antitrust Law ¶ 617, pp. 39–41 (1978). The legislative history does indicate that much of the interpretation of the necessarily broad principles of the Act was to be left for the courts in particular cases. See, *e. g.*, 21 Cong. Rec. 2460 (1890) (statement of Sen. Sherman). See also 1 Kintner, *supra*, at 19; 3 Areeda & Turner, *supra*, ¶ 617, at 40.

This Court first addressed the meaning of attempt to monopolize under § 2 in *Swift & Co.* v. *United States*, 196 U. S. 375 (1905). The Court's opinion, written by Justice Holmes, contained the following passage:

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tries Corp. v. *Hartz Mountain Corp.*, 810 F. 2d 795, 804 (CA8 1987); *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, 885 F. 2d 683, 693 (CA10 1989), cert. denied, 498 U. S. 972 (1990); *Key Enterprises of Delaware, Inc.* v. *Venice Hospital*, 919 F. 2d 1550, 1565 (CA11 1990); *Neumann* v. *Reinforced Earth Co.*, 252 U. S. App. D. C. 11, 15–16, 786 F. 2d 424, 428–429, cert. denied, 479 U. S. 851 (1986); *Abbott Laboratories* v. *Brennan*, 952 F. 2d 1346, 1354 (CA Fed. 1991), cert. denied, 505 U. S. 1205 (1992).

[6] Our grant of certiorari was limited to the first question presented in the petition: "Whether a manufacturer's distributor expressly absolved of violating Section 1 of the Sherman Act can, without any evidence of market power or specific intent, be found liable for attempting to monopolize solely by virtue of a unique Ninth Circuit rule?" Pet. for Cert. i.

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts 267, 272 [59 N. E. 55, 56 (1901)]. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Id.*, at 396.

The Court went on to explain, however, that not every act done with intent to produce an unlawful result constitutes an attempt. "It is a question of proximity and degree." *Id.*, at 402. *Swift* thus indicated that intent is necessary, but alone is not sufficient, to establish the dangerous probability of success that is the object of § 2's prohibition of attempts.[7]

The Court's decisions since *Swift* have reflected the view that the plaintiff charging attempted monopolization must prove a dangerous probability of actual monopolization, which has generally required a definition of the relevant market and examination of market power. In *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965), we found that enforcement of a fraudulently obtained patent claim could violate the Sherman Act. We stated that, to establish monopolization or attempt to monopolize under § 2 of the Sherman Act, it would

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[7] Justice Holmes confirmed that this was his interpretation of *Swift* in *Hyde* v. *United States*, 225 U. S. 347 (1912). In dissenting in that case on other grounds, the Justice, citing *Swift*, stated that an attempt may be found where the danger of harm is very great; however, "combination, intention and overt act may all be present without amounting to a criminal attempt . . . . There must be dangerous proximity to success." 225 U. S., at 387–388.

be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. *Ibid.* The reason was that "[w]ithout a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Ibid.*

Similarly, this Court reaffirmed in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752 (1984), that "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Id.*, at 768. Thus, the conduct of a single firm, governed by § 2, "is unlawful only when it threatens actual monopolization." *Id.*, at 767. See also *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 154 (1951); *United States* v. *Griffith*, 334 U. S. 100, 105–106 (1948); *American Tobacco Co.* v. *United States*, 328 U. S. 781, 785 (1946).

The Courts of Appeals other than the Ninth Circuit have followed this approach. Consistent with our cases, it is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. See 3 Areeda & Turner, *supra*, ¶ 820, at 312. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.[8]

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[8] See, *e. g.*, *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 917 F. 2d, at 1431–1432; *Twin Laboratories, Inc.* v. *Weider Health & Fitness*, 900 F. 2d, at 570; *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, 885 F. 2d, at 693; *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F. 2d, at 1413–1416; *General Industries Corp.* v. *Hartz Mountain Corp.*, 810 F. 2d, at 804.

Notwithstanding the array of authority contrary to *Lessig*, the Court of Appeals in this case reaffirmed its prior holdings; indeed, it did not mention either this Court's decisions discussed above or the many decisions of other Courts of Appeals reaching contrary results. Respondents urge us to affirm the decision below. We are not at all inclined, however, to embrace *Lessig*'s interpretation of § 2, for there is little, if any, support for it in the statute or the case law, and the notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act.

The *Lessig* opinion claimed support from the language of § 2, which prohibits attempts to monopolize "any part" of commerce, and therefore forbids attempts to monopolize any appreciable segment of interstate sales of the relevant product. See *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 226 (1947). The "any part" clause, however, applies to charges of monopolization as well as to attempts to monopolize, and it is beyond doubt that the former requires proof of market power in a relevant market. *United States* v. *Grinnell Corp.*, 384 U. S. 563, 570–571 (1966); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 404 (1956).[9]

In support of its determination that an inference of dangerous probability was permissible from a showing of intent, the *Lessig* opinion cited, and added emphasis to, this Court's reference in its opinion in *Swift* to "'intent and the *consequent* dangerous probability.'" 327 F. 2d, at 474, n. 46, quoting 196 U. S., at 396. But any question whether dangerous

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[9] *Lessig* cited *United States* v. *Yellow Cab Co.*, 332 U. S., at 226, in support of its interpretation, but *Yellow Cab* relied on the "any part" language to support the proposition that it is immaterial how large an amount of interstate trade is affected, or how important that part of commerce is in relation to the entire amount of that type of commerce in the Nation.

probability of success requires proof of more than intent alone should have been removed by the subsequent passage in *Swift* which stated that "not every act that may be done with intent to produce an unlawful result . . . constitutes an attempt. It is a question of proximity and degree." *Id.*, at 402.

The *Lessig* court also relied on a footnote in *Du Pont & Co.*, *supra*, at 395, n. 23, for the proposition that when the charge is attempt to monopolize, the relevant market is "not in issue." That footnote, which appeared in analysis of the relevant market issue in *Du Pont*, rejected the Government's reliance on several cases, noting that "the scope of the market was not in issue" in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931). That reference merely reflected the fact that, in *Story Parchment*, which was not an attempt to monopolize case, the parties did not challenge the definition of the market adopted by the lower courts. Nor was *Du Pont* itself concerned with the issue in this case.

It is also our view that *Lessig* and later Ninth Circuit decisions refining and applying it are inconsistent with the policy of the Sherman Act. The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. See, *e. g.*, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488 (1977); *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104, 116–117 (1986); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962). Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. It is some-

times difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which "inherently is fraught with anticompetitive risk." *Copperweld*, 467 U. S., at 767–769. For these reasons, § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. *Id.*, at 767. The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market.

III

We hold that petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize. In this case, the trial instructions allowed the jury to infer specific intent and dangerous probability of success from the defendants' predatory conduct, without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market. In this respect, the instructions misconstrued § 2, as did the Court of Appeals in affirming the judgment of the District Court. Since the affirmance of the § 2 judgment against petitioners rested solely on the legally erroneous conclusion that petitioners had attempted to monopolize in violation of § 2 and since the jury's verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize ground alone, the judg-

ment of the Court of Appeals is reversed, *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19, 29–30 (1962), and the case is remanded for further proceedings consistent with this opinion.[10]

So ordered.

[10] Respondents conceded in their brief that the case should be remanded to the Court of Appeals if we found error in the instruction on attempt to monopolize. Brief for Respondents 45–46.

Syllabus

GRAHAM *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

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

No. 91–7580. Argued October 14, 1992—Decided January 25, 1993

Petitioner Graham's capital murder conviction and death sentence became final in 1984. After unsuccessfully seeking postconviction relief in the Texas state courts, he filed this habeas corpus action in Federal District Court, alleging, *inter alia*, that the three "special issues" his sentencing jury was required to answer under the state capital sentencing statute then in existence prevented the jury from giving effect, consistent with the Eighth and Fourteenth Amendments, to mitigating evidence of his youth, unstable family background, and positive character traits. In affirming the District Court's denial of relief, the Court of Appeals reviewed this Court's holdings on the constitutional requirement that a sentencer be permitted to consider and act upon any relevant mitigating evidence put forth by a capital defendant, and then ruled that Graham's jury could give adequate mitigating effect to the evidence in question by way of answering the special issues.

Held: Graham's claim is barred because the relief he seeks would require announcement of a new rule of constitutional law, in contravention of the principles set forth in *Teague* v. *Lane*, 489 U. S. 288, 301 (plurality opinion). Pp. 466–478.

(a) A holding that was not "*dictated* by precedent existing at the time the defendant's conviction became final" constitutes a "new rule," 489 U. S., at 301, which, absent the applicability of one of two exceptions, cannot be applied or announced in a case on collateral review, *Penry* v. *Lynaugh*, 492 U. S. 302, 313. Thus, the determinative question is whether reasonable jurists hearing Graham's claim in 1984 "would have felt compelled by existing precedent" to rule in his favor. See *Saffle* v. *Parks*, 494 U. S. 484, 488. Pp. 466–467.

(b) It cannot be said that reasonable jurists hearing Graham's claim in 1984 would have felt that existing precedent "*dictated*" vacatur of his death sentence within *Teague*'s meaning. To the contrary, the joint opinion of Justices Stewart, Powell, and STEVENS, in *Jurek* v. *Texas*, 428 U. S. 262, 270–276, could reasonably be read as having upheld the constitutionality of the very statutory scheme under which Graham was sentenced, including the so-called "special issues," only after being satis-

Syllabus

fied that petitioner's mitigating evidence, including his age, would be given constitutionally adequate consideration in the course of the jury's deliberation on the special issues. Moreover, *Lockett* v. *Ohio*, 438 U. S. 586, 605–606 (plurality opinion), expressly embraced the *Jurek* holding, and *Eddings* v. *Oklahoma*, 455 U. S. 104, signaled no retreat from that conclusion. Thus, it is likely that reasonable jurists in 1984 would have found that, under these cases, the Texas statute satisfied the commands of the Eighth Amendment: It permitted Graham to place before the jury whatever mitigating evidence he could show, including his age, while focusing the jury's attention upon what that evidence revealed about his capacity for deliberation and prospects for rehabilitation. Nothing in this Court's post-1984 cases, to the extent they are relevant, would undermine this analysis. Even if *Penry*, *supra*, upon which Graham chiefly relies, reasonably could be read to suggest that his mitigating evidence was not adequately considered under the Texas procedures, that does not answer the determinative question under *Teague*. Pp. 467–477.

(c) The new rule that Graham seeks would not fall within either of the *Teague* exceptions. The first exception plainly has no application here because Graham's rule would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons. See *Saffle*, *supra*, at 495. The second exception, for watershed rules implicating fundamental fairness and accuracy, is also inapplicable, since denying Graham special jury instructions concerning his mitigating evidence would not seriously diminish the likelihood of obtaining an accurate determination in his sentencing proceeding. See *Butler* v. *McKellar*, 494 U. S. 407, 416. Pp. 477–478.

950 F. 2d 1009, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 478. STEVENS, J., filed a dissenting opinion, *post*, p. 500. SOUTER, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 504.

Michael E. Tigar argued the cause for petitioner. With him on the briefs was *Jeffrey J. Pokorak*.

Charles A. Palmer, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Dan Morales*, Attorney General, *William C. Zapalac*, Assistant Attorney General, *Will Pryor*, First Assistant At-

torney General, *Mary F. Keller*, Deputy Attorney General, and *Michael P. Hodge*, Assistant Attorney General.*

JUSTICE WHITE delivered the opinion of the Court.

In this case, we are asked to decide whether the jury that sentenced petitioner, Gary Graham, to death was able to give effect, consistent with the Eighth and Fourteenth Amendments, to mitigating evidence of Graham's youth, family background, and positive character traits. Because this case comes to us on collateral review, however, we must first decide whether the relief that petitioner seeks would require announcement of a new rule of constitutional law, in contravention of the principles set forth in *Teague* v. *Lane*, 489 U. S. 288 (1989). Concluding that Graham's claim is barred by *Teague*, we affirm.

I

On the night of May 13, 1981, Graham accosted Bobby Grant Lambert in the parking lot of a Houston, Texas, grocery store and attempted to grab his wallet. When Lambert resisted, Graham drew a pistol and shot him to death. Five months later, a jury rejected Graham's defense of mistaken identity and convicted him of capital murder in violation of Tex. Penal Code Ann. § 19.03(a)(2) (1989).

At the sentencing phase of Graham's trial, the State offered evidence that Graham's murder of Lambert commenced a week of violent attacks during which the 17-year-old Graham committed a string of robberies, several assaults, and one rape. Graham did not contest this evidence. Rather, in mitigation, the defense offered testimony from Graham's stepfather and grandmother concerning his upbringing and positive character traits. The stepfather, Joe Samby, testified that Graham, who lived and worked with his natural father, typically visited his mother once or twice a

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**Steven B. Rosenfeld* and *Allen Cazier* filed a brief for Miguel A. Richardson as *amicus curiae* urging reversal.

week and was a "real nice, respectable" person. Samby further testified that Graham would pitch in on family chores and that Graham, himself a father of two young children, would "buy . . . clothes for his children and try to give them food."

Graham's grandmother, Emma Chron, testified that Graham had lived with her off and on throughout his childhood because his mother had been hospitalized periodically for a "nervous condition." Chron also stated that she had never known Graham to be violent or disrespectful, that he attended church regularly while growing up, and that "[h]e loved the Lord." In closing arguments to the jury, defense counsel depicted Graham's criminal behavior as aberrational and urged the jury to take Graham's youth into account in deciding his punishment.

In accord with the capital sentencing statute then in effect,[1] Graham's jury was instructed that it was to answer three "special issues":

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981).

The jury unanimously answered each of these questions in the affirmative, and the court, as required by the statute,

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[1] The Texas Legislature amended the statute in 1991. Those changes are set forth in the opinion of the Court of Appeals. 950 F. 2d 1009, 1012, n. 1 (CA5 1992) (en banc).

sentenced Graham to death. Art. 37.071(e). The Texas Court of Criminal Appeals affirmed Graham's conviction and sentence in an unpublished opinion.

In 1987, Graham unsuccessfully sought postconviction relief in the Texas state courts. The following year, Graham petitioned for a writ of habeas corpus in Federal District Court pursuant to 28 U. S. C. § 2254, contending, *inter alia*, that his sentencing jury had been unable to give effect to his mitigating evidence within the confines of the statutory "special issues." The District Court denied relief and the Court of Appeals for the Fifth Circuit denied Graham's petition for a certificate of probable cause to appeal. *Graham* v. *Lynaugh*, 854 F. 2d 715 (1988). The Court of Appeals found Graham's claim to be foreclosed by our recent decision in *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988), which held that a sentencing jury was fully able to consider and give effect to mitigating evidence of a defendant's clean prison disciplinary record by way of answering Texas' special issues. 854 F. 2d, at 719–720.

While Graham's petition for a writ of certiorari was pending here, the Court announced its decision in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), holding that evidence of a defendant's mental retardation and abused childhood could not be given mitigating effect by a jury within the framework of the special issues.[2] We then granted Graham's petition, vacated the judgment below, and remanded for reconsideration in light of *Penry*. *Graham* v. *Lynaugh*, 492 U. S. 915 (1989). On remand, a divided panel of the Court of Appeals reversed the District Court and vacated Graham's death sentence. 896 F. 2d 893 (CA5 1990).

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[2] *Penry* further held that its result was dictated by the Court's prior decisions in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion), within the sense required by *Teague* v. *Lane*, 489 U. S. 288 (1989), and thus that its rule applied to cases on collateral review. See *Penry*, 492 U. S., at 314–319.

On rehearing en banc, the Court of Appeals vacated the panel's decision and reinstated its prior mandate affirming the District Court. 950 F. 2d 1009 (1992). The court reviewed our holdings on the constitutional requirement that a sentencer be permitted to consider and act upon any relevant mitigating evidence put forward by a capital defendant, and then rejected Graham's claim on the merits. The court noted that this Court had upheld the Texas capital sentencing statute against a facial attack in *Jurek* v. *Texas*, 428 U. S. 262 (1976), after acknowledging that "'the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.'" 950 F. 2d, at 1019 (quoting *Jurek*, *supra*, at 272). Noting that the petitioner in *Jurek* had himself proffered mitigating evidence of his young age, employment history, and aid to his family, the Court of Appeals concluded that "[a]t the very least, *Jurek* must stand for the proposition that these mitigating factors—relative youth and evidence reflecting good character traits such as steady employment and helping others—are adequately covered by the second special issue" concerning the defendant's risk of future dangerousness. 950 F. 2d, at 1029. "*Penry* cannot hold otherwise," the court observed, "and at the same time not be a 'new rule' for *Teague* purposes." *Ibid.* Accordingly, the court ruled that the jury that sentenced Graham could give adequate mitigating effect to his evidence of youth, unstable childhood, and positive character traits by way of answering the Texas special issues.

We granted certiorari, 504 U. S. 972 (1992), and now affirm.

II

A

Because this case is before us on Graham's petition for a writ of federal habeas corpus, "we must determine, as a threshold matter, whether granting him the relief he seeks would create a 'new rule'" of constitutional law. *Penry* v.

Lynaugh, *supra*, at 313; see also *Teague* v. *Lane*, 489 U. S., at 301 (plurality opinion). "Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." *Penry*, *supra*, at 313. This restriction on our review applies to capital cases as it does to those not involving the death penalty. 492 U. S., at 314; *Stringer* v. *Black*, 503 U. S. 222 (1992); *Sawyer* v. *Smith*, 497 U. S. 227 (1990); *Saffle* v. *Parks*, 494 U. S. 484 (1990); *Butler* v. *McKellar*, 494 U. S. 407 (1990).

A holding constitutes a "new rule" within the meaning of *Teague* if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra*, at 301 (emphasis in original). While there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision, "it is more difficult . . . to determine whether we announce a new rule when a decision extends the reasoning of our prior cases." *Saffle* v. *Parks*, 494 U. S., at 488. Because the leading purpose of federal habeas review is to "ensur[e] that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of th[ose] proceedings," *ibid.*, we have held that "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts." *Butler* v. *McKellar*, 494 U. S., at 414. This principle adheres even if those good-faith interpretations "are shown to be contrary to later decisions." *Ibid.* Thus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final "would have felt compelled by existing precedent" to rule in his favor, we are barred from doing so now. *Saffle* v. *Parks*, *supra*, at 488.

B

Petitioner's conviction and sentence became final on September 10, 1984, when the time for filing a petition for certiorari from the judgment affirming his conviction expired.

See *Griffith* v. *Kentucky,* 479 U. S. 314, 321, n. 6 (1987). Surveying the legal landscape as it then existed, we conclude that it would have been anything but clear to reasonable jurists in 1984 that petitioner's sentencing proceeding did not comport with the Constitution.

1

In the years since *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Court has identified, and struggled to harmonize, two competing commandments of the Eighth Amendment. On one hand, as *Furman* itself emphasized, States must limit and channel the discretion of judges and juries to ensure that death sentences are not meted out "wantonly" or "freakishly." *Id.*, at 310 (Stewart, J., concurring). On the other, as we have emphasized in subsequent cases, States must confer on the sentencer sufficient discretion to take account of the "character and record of the individual offender and the circumstances of the particular offense" to ensure that "death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 304–305 (1976) (plurality opinion of Stewart, Powell, and STEVENS, JJ.).

Four years after *Furman*, and on the same day that *Woodson* was announced, the Court in *Jurek* v. *Texas*, *supra*, examined the very statutory scheme under which Graham was sentenced and concluded that it struck an appropriate balance between these constitutional concerns. The Court thus rejected an attack on the entire statutory scheme for imposing the death penalty and in particular an attack on the so-called "special issues." It is well to set out how the Court arrived at its judgment. The joint opinion of Justices Stewart, Powell, and STEVENS observed that while Texas had not adopted a list of aggravating circumstances that would justify the imposition of the death penalty, "its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose." *Id.*, at 270. The joint opinion went on to say

that because the constitutionality of a capital sentencing system also requires the sentencing authority to consider mitigating circumstances and since the Texas statute did not speak of mitigating circumstances and instead directs only that the jury answer three questions, "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.*, at 272.

The joint opinion then recognized that the Texas Court of Criminal Appeals had held:

> "'In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.' 522 S. W. 2d, at 939–940." *Id.*, at 272–273.

Based on this assurance, the opinion characterized the Texas sentencing procedure as follows:

> "Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual

> offender before it can impose a sentence of death." *Id.*, at 273–274.
>
> "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." *Id.*, at 276.

The joint opinion's ultimate conclusion was:

> "Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution. *Furman* v. *Georgia*, 408 U. S., at 310 (STEWART, J., concurring)." *Ibid.*

It is plain enough, we think, that the joint opinion could reasonably be read as having arrived at this conclusion only after being satisfied that the mitigating evidence introduced by the defendant, including his age, would be given constitutionally adequate consideration in the course of the jury's deliberation on the three special issues. Three other Justices concurred in the holding that the Texas procedures for

imposing the death penalty were constitutional. *Id.*, at 278–279 (WHITE, J., concurring in judgment).

Two years after *Jurek*, in another splintered decision, *Lockett* v. *Ohio*, 438 U. S. 586 (1978), the Court invalidated an Ohio death penalty statute that prevented the sentencer from considering certain categories of relevant mitigating evidence. In doing so, a plurality of the Court consisting of Chief Justice Burger and Justices Stewart, Powell, and STEVENS stated that the constitutional infirmities in the Ohio statute could "best be understood by comparing it with the statutes upheld in *Gregg*, *Proffitt*, and *Jurek*." *Id.*, at 606. This the plurality proceeded to do, recounting in the process that the Texas statute had been held constitutional in *Jurek* because it permitted the sentencer to consider whatever mitigating circumstances the defendant could show. Emphasizing that "an individualized [sentencing] decision is essential in capital cases," the plurality concluded:

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty." 438 U. S., at 605.

Obviously, the plurality did not believe the Texas statute suffered this infirmity.

The plurality's rule was embraced by a majority of the Court four years later in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). There, the Court overturned a death sentence on the ground that the judge who entered it had felt himself bound by state law to disregard mitigating evidence concerning the defendant's troubled youth and emotional disturbance. The Court held that, "[j]ust as the State may not by

statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.*, at 113–114 (emphasis omitted); see also *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987); *Skipper* v. *South Carolina*, 476 U. S. 1, 4–5 (1986). The *Eddings* opinion rested on *Lockett* and made no mention of *Jurek*.

We cannot say that reasonable jurists considering petitioner's claim in 1984 would have felt that these cases "*dictated*" vacatur of petitioner's death sentence. See *Teague*, 489 U. S., at 301. To the contrary, to most readers at least, these cases reasonably would have been read as upholding the constitutional *validity* of Texas' capital sentencing scheme with respect to mitigating evidence and otherwise. *Lockett* expressly embraced the *Jurek* holding, and *Eddings* signaled no retreat from that conclusion. It seems to us that reasonable jurists in 1984 would have found that, under our cases, the Texas statute satisfied the commands of the Eighth Amendment: It permitted petitioner to place before the jury whatever mitigating evidence he could show, including his age, while focusing the jury's attention upon what that evidence revealed about the defendant's capacity for deliberation and prospects for rehabilitation.

We find nothing in our more recent cases, to the extent they are relevant, that would undermine this analysis. In 1988, in *Franklin* v. *Lynaugh*, 487 U. S. 164, we rejected a claim that the Texas special issues provided an inadequate vehicle for jury consideration of evidence of a defendant's clean prison disciplinary record. There, a plurality of the Court observed that "[i]n resolving the second Texas Special Issue, the jury was surely free to weigh and evaluate petitioner's disciplinary record as it bore on his 'character'—that is, his 'character' as measured by his likely future behavior." *Id.*, at 178. Moreover, the plurality found

> "unavailing petitioner's reliance on this Court's statement in *Eddings*, 455 U. S., at 114, that the sentencing

> jury may not be precluded from considering 'any relevant, mitigating evidence.' This statement leaves unanswered the question: relevant to what? While *Lockett*, *supra*, at 604, answers this question at least in part—making it clear that a State cannot take out of the realm of relevant sentencing considerations the questions of the defendant's 'character,' 'record,' or the 'circumstances of the offense'—*Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." *Id.*, at 179 (citations omitted).

To be sure, JUSTICE O'CONNOR's opinion concurring in the judgment in *Franklin* expressed "doubts" about the validity of the Texas death penalty statute as that statute might be applied in future cases. *Id.*, at 183. The Justice agreed, however, that the special issues adequately accounted for the mitigating evidence presented in that case. *Ibid.*

This brings us to *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), upon which petitioner chiefly relies. In that case, the Court overturned a prisoner's death sentence, finding that the Texas special issues provided no genuine opportunity for the jury to give mitigating effect to evidence of his mental retardation and abused childhood. The Court considered these factors to be mitigating because they diminished the defendant's ability "to control his impulses or to evaluate the consequences of his conduct," and therefore reduced his moral culpability. *Id.*, at 322. The Texas special issues permitted the jury to consider this evidence, but not necessarily in a way that would benefit the defendant. Although Penry's evidence of mental impairment and childhood abuse indeed had relevance to the "future dangerousness" inquiry, its relevance was *aggravating* only. "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.*, at 324. Whatever relevance Penry's evidence

may have had to the other two special issues was too tenuous to overcome this aggravating potential. Because it was impossible to give meaningful mitigating effect to Penry's evidence by way of answering the special issues, the Court concluded that Penry was constitutionally entitled to further instructions "informing the jury that it could consider and give effect to [Penry's] evidence . . . by declining to impose the death penalty." *Id.*, at 328.

We do not read *Penry* as effecting a sea change in this Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issues framework.[3] Indeed, any such reading of *Penry* would be inconsistent with the Court's conclusion in that case that it was not announcing a "new rule" within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989). See *Penry, supra,* at 318–319. As we have explained in subsequent cases:

> "To the extent that Penry's claim was that the Texas system prevented the jury from giving any mitigating effect to the evidence of his mental retardation and abuse in childhood, the decision that the claim did not require the creation of a new rule is not surprising. *Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision; Penry's contention was that Texas barred the jury from so acting. Here, by contrast,

[3] To the contrary, the Court made clear in that case the limited nature of the question presented: "Penry does not challenge the facial validity of the Texas death penalty statute, which was upheld against an Eighth Amendment challenge in *Jurek* v. *Texas,* 428 U. S. 262 (1976). Nor does he dispute that some types of mitigating evidence can be fully considered by the sentencer in the absence of special jury instructions. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 175 (1988) (plurality opinion); *id.*, at 185–186 (O'Connor, J., concurring in judgment). Instead, Penry argues that, on the facts of this case, the jury was unable to fully consider and give effect to the mitigating evidence of his mental retardation and abused background in answering the three special issues." 492 U. S., at 315.

> there is no contention that the State altogether prevented Parks' jury from considering, weighing, and giving effect to all of the mitigating evidence that Parks put before them; rather, Parks' contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered. As we have concluded above, the former contention would come under the rule of *Lockett* and *Eddings;* the latter does not." *Saffle* v. *Parks*, 494 U. S., at 491.

In our view, the rule that Graham seeks is not commanded by the cases upon which *Penry* rested. In those cases, the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer. In *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*, the sentencer was precluded from even considering certain types of mitigating evidence. In *Penry*, the defendant's evidence was placed before the sentencer but the sentencer had no reliable means of giving mitigating effect to that evidence. In this case, however, Graham's mitigating evidence was not placed beyond the jury's effective reach. Graham indisputably was permitted to place all of his evidence before the jury and both of Graham's two defense lawyers vigorously urged the jury to answer "no" to the special issues based on this evidence. Most important, the jury plainly could have done so consistent with its instructions. The jury was not forbidden to accept the suggestion of Graham's lawyers that his brief spasm of criminal activity in May 1981 was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated. Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence—*unlike* Penry's—had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have

supported a negative answer. This distinction leads us to conclude that neither *Penry* nor any of its predecessors "*dictates*" the relief Graham seeks within the meaning required by *Teague*. See *Stringer* v. *Black*, 503 U. S., at 238 (SOUTER, J., dissenting): "The result in a given case is not dictated by precedent if it is 'susceptible to debate among reasonable minds,' or, put differently, if 'reasonable jurists may disagree'" (citations omitted).

Moreover, we are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin* v. *Lynaugh*. As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light. Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse. As the dissent in *Franklin* made clear, virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's "moral culpability" apart from its relevance to the particular concerns embodied in the Texas special issues. See *Franklin*, 487 U. S., at 190 (STEVENS, J., dissenting). It seems to us, however, that reading *Penry* as petitioner urges—and thereby holding that a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues—would be to require in all cases that a fourth "special issue" be put to the jury: "'Does any mitigating evidence before you, whether or not relevant to the above [three] questions, lead you to believe that the death penalty should not be imposed?'" The *Franklin* plurality rejected precisely this contention, finding it irreconcilable with the

Court's holding in *Jurek*, see *Franklin*, *supra*, at 180, n. 10, and we affirm that conclusion today. Accepting Graham's submission would unmistakably result in a new rule under *Teague*. See *Saffle* v. *Parks*, *supra*, at 488; *Butler* v. *McKellar*, 494 U. S., at 412.

In sum, even if *Penry* reasonably could be read to suggest that Graham's mitigating evidence was not adequately considered under the former Texas procedures, that is not the relevant inquiry under *Teague*. Rather, the determinative question is whether reasonable jurists reading the case law that existed in 1984 could have concluded that Graham's sentencing was *not* constitutionally infirm. We cannot say that all reasonable jurists would have deemed themselves compelled to accept Graham's claim in 1984. Nor can we say, even with the benefit of the Court's subsequent decision in *Penry*, that reasonable jurists would be of one mind in ruling on Graham's claim today. The ruling Graham seeks, therefore, would be a "new rule" under *Teague*.

2

Having decided that the relief Graham seeks would require announcement of a new rule under *Teague*, we next consider whether that rule nonetheless would fall within one of the two exceptions recognized in *Teague* to the "new rule" principle. "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*, *supra*, at 494 (quoting *Penry*, 492 U. S., at 329, 330). Plainly, this exception has no application here because the rule Graham seeks "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." 494 U. S., at 495.

The second exception permits federal courts on collateral review to announce "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Ibid.* Whatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring "observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" *Teague*, *supra*, at 311 (quoting *Mackey* v. *United States*, 401 U. S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (in turn quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937))); see also *Butler* v. *McKellar*, *supra*, at 416. As the plurality cautioned in *Teague*, "[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." 489 U. S., at 313. We do not believe that denying Graham special jury instructions concerning his mitigating evidence of youth, family background, and positive character traits "seriously diminish[ed] the likelihood of obtaining an accurate determination" in his sentencing proceeding. See *Butler* v. *McKellar*, *supra*, at 416. Accordingly, we find the second *Teague* exception to be inapplicable as well.

The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE THOMAS, concurring.

By deciding this case on the basis of *Teague* v. *Lane*, 489 U. S. 288 (1989), the Court has avoided a direct reconsideration of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). I join the Court's opinion because I agree that the holding sought by Graham is not compelled by the cases upon which *Penry* rests and would therefore, if adopted, be a new rule for *Teague* purposes. I write separately, however, to make clear that I believe *Penry* was wrongly decided.

Several Members of the Court have commented on the "tension" between our cases on the constitutional relevance of mitigating circumstances in capital sentencing and those decisions applying the principle, first articulated in *Furman* v. *Georgia*, 408 U. S. 238 (1972), that the Eighth and Fourteenth Amendments prohibit States from giving sentencers unguided discretion in imposing the death penalty. *E. g.*, *Franklin* v. *Lynaugh*, 487 U. S. 164, 182 (1988) (plurality opinion); *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'CONNOR, J., concurring); *McCleskey* v. *Kemp*, 481 U. S. 279, 363 (1987) (BLACKMUN, J., dissenting). In my view, Texas had largely resolved this tension through the use of the three special issues repeatedly approved by this Court. *Penry*, however, is at war with the former Texas scheme. As the most extreme statement in our "mitigating" line, *Penry* creates more than an unavoidable tension; it presents an evident danger.

I

A

It is important to recall what motivated Members of this Court at the genesis of our modern capital punishment case law. *Furman* v. *Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States, and most particularly in rape cases. The three petitioners were black.[1] Lucious Jackson was a 21-year-old black man sentenced to death by Georgia for raping a white woman. Elmer Branch was sentenced to death by Texas for the rape of a 65-year-old white widow. William Henry Furman faced the death penalty in Georgia for unintentionally killing a white homeowner during a burglary. See 408 U. S., at 252–

[1] The Court decided two cases together with *Furman* v. *Georgia*, 408 U. S. 238 (1972): *Jackson* v. *Georgia*, No. 69–5030, and *Branch* v. *Texas*, No. 69–5031. A fourth case, *Aikens* v. *California*, No. 68–5027, was argued with *Furman* but was dismissed as moot. 406 U. S. 813 (1972).

253 (Douglas, J., concurring).[2] In his opinion concurring in the Court's judgment that the death penalty in these cases was unconstitutional, Justice Douglas stressed the potential role of racial and other illegitimate prejudices in a system where sentencing juries have boundless discretion. He thought it cruel and unusual to apply the death penalty "selectively to minorities . . . whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." *Id.*, at 245. Citing studies and reports suggesting that "[t]he death sentence [was] disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups," especially in cases of rape, *id.*, at 249–250 (internal quotation marks omitted), Justice Douglas concluded that

> "the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Id.*, at 255.

Justice Marshall echoed these concerns. See *id.*, at 364–366 (concurring opinion). He wrote that "[r]acial or other discriminations [in sentencing] should not be surprising," because, in his view, the Court's earlier decision in *McGautha* v. *California*, 402 U. S. 183 (1971), upholding a procedure that had "committ[ed] to the untrammeled discretion of the jury the power to pronounce life or death," *id.*, at 207, was "an open invitation to discrimination," 408 U. S., at 365. Justice Stewart also agreed that "if any basis can be discerned

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[2] Furman was surprised to discover the victim at home and, while trying to escape, accidentally tripped over a wire, causing his pistol to fire a single shot through a closed door, thereby killing the victim. See 408 U. S., at 294–295, n. 48 (Brennan, J., concurring).

for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.*, at 310 (concurring opinion).

The unquestionable importance of race in *Furman* is reflected in the fact that three of the original four petitioners in the *Furman* cases were represented by the NAACP Legal Defense and Educational Fund, Inc. This representation was part of a concerted "national litigative campaign against the constitutionality of the death penalty" waged by a small number of ambitious lawyers and academics on the Fund's behalf. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1745 (1987). Although their efforts began rather modestly, assisting indigent black defendants in isolated criminal cases—usually rape cases—where racial discrimination was suspected, the lawyers at the Fund ultimately devised and implemented (not without some prompting from this Court) an all-out strategy of litigation against the death penalty. See generally M. Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (1973) (hereinafter Meltsner); Muller, The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death, 4 Yale L. & Pol'y Rev. 158 (1985).[3] This campaign was part of a larger movement carried on in the 1960's by "abolitionist lawyers" whose

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[3] According to the published account of one Legal Defense Fund lawyer who participated in the campaign, the Fund—though it had had experience with racial discrimination in rape cases in the South—did not seriously consider a broader offensive against the death penalty until three Members of this Court, in an opinion dissenting from a denial of certiorari, offered a "strong foundation" for such a strategy. Meltsner 27–35. See *Rudolph* v. *Alabama*, 375 U. S. 889 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting from denial of certiorari) (calling on the Court to decide "whether the Eighth and Fourteenth Amendments . . . permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life" and suggesting several lines of argument in the form of questions that "seem relevant and worthy of . . . consideration").

agenda for social and legal change depended on an activist judiciary; their "unmistakable preference for the courts, especially the federal courts," came as a direct "response to the Supreme Court's willingness to redraw America's ethical and legal map, a task state houses and executive mansions were slow to tackle." Meltsner 25, 71.[4]

In mustering every conceivable argument—"ethical, legal, polemical, theological, speculative, [and] statistical"—for abolishing capital punishment, *id.*, at 59, the Fund lawyers and other civil rights advocates supplied the empirical and rhetorical support for the observations of Justices Douglas, Marshall, and Stewart with respect to race bias. See Brief for Petitioner in *Aikens* v. *California*, O. T. 1971, No. 68–5027, pp. 50–54; Brief for Petitioner in *Jackson* v. *Georgia*, O. T. 1971, No. 69–5030, p. 15 ("The racial figures for all men executed in the United States for the crime of rape since 1930 are as follows: 48 white, 405 Negro, 2 other. In Georgia, the figures are: 3 white, 58 Negro") (footnotes omitted). See also Brief for NAACP et al. as *Amici Curiae* in *Aikens* v. *California*, *supra*, at 13–18, and App. A (discussing, in particular, history of South's use of death penalty in rape cases prior to Civil War, when it was typical for rapes or attempted rapes committed by black men upon white women to be punishable by mandatory death or castration, while rapes committed by whites were not punishable by death); Brief for Synagogue Council of America et al. as *Amici Curiae* in *Aikens* v. *California*, *supra*, at 31 ("The positive relationship between the death penalty and race is strong, but where the crime involved is rape and more particularly, as

[4] See also Meltsner 25: "[L]awyers attempting to thrust egalitarian or humanitarian reforms on a reluctant society prefer to use the courts because lifetime-appointed federal judges are somewhat more insulated from the ebb and flow of political power and public opinion than legislators or executives."

in two of the present cases, the rape of white women by Negroes, the relationship is almost uncontrovertible").[5]

In the end, Justice Douglas and the other Members of the Court concluded that "[w]e cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black." *Furman*, 408 U. S., at 253 (Douglas, J., concurring). See *id.*, at 310 (Stewart, J., concurring) ("racial discrimination has not been proved"). The Court focused more generally on the uncontrolled discretion placed in judges and juries. Such unbridled discretion, it was argued, practically invited sentencers to vent their personal prejudices in deciding the fate of the accused. See Brief for Petitioner in *Furman* v. *Georgia*, O. T. 1971, No. 69–5003, p. 12 ("The jury knew nothing else about the man they sentenced, except his age and race"). "Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12." 408 U. S., at 253 (Douglas, J., concurring). Justice Stewart observed that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," and concluded that the Eighth and Fourteenth Amendments cannot tolerate sentencing procedures that allow the penalty to be "so wantonly and so freakishly" inflicted. *Id.*, at 309–310 (concurring opinion). The practice of delegating unguided authority—a practice "largely motivated by the desire to mitigate the harshness

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[5] The Federal Government later acknowledged before this Court that in 11 Southern States between 1945 and 1965, "[t]he data revealed that among all those convicted of rape, blacks were selected disproportionately for the death sentence." App. to Brief for United States as *Amicus Curiae* in *Gregg* v. *Georgia*, O. T. 1975, No. 74–6257, p. 4a. Furthermore, the Government stated, "we do not question [the] conclusion that during the 20 years in question, in southern states, there was discrimination in rape cases." *Id.*, at 5a. We eventually struck down the death penalty for convicted rapists under the Eighth Amendment, not on the basis of discriminatory application, but as an excessive and disproportionate punishment. *Coker* v. *Georgia*, 433 U. S. 584 (1977).

of the law and to bring community judgment to bear on the sentence"—actually allowed a jury, "in its own discretion and without violating its trust or any statutory policy, [to] refuse to impose the death penalty no matter what the circumstances of the crime." *Id.*, at 313, 314 (WHITE, J., concurring).

In sum, the Court concluded that in a standardless sentencing scheme there was no "rational basis," as Justice Brennan put it, to distinguish "the few who die from the many who go to prison." *Id.*, at 294 (concurring opinion). See also *id.*, at 313 (WHITE, J., concurring) ("no meaningful basis for distinguishing"). It cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor.

B

At its inception, our "mitigating" line of cases sprang in part from the same concerns that underlay *Furman*. In response to *Furman*, 35 States enacted new death penalty statutes. See *Gregg* v. *Georgia*, 428 U. S. 153, 179–180 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). In five cases decided on a single day in 1976, we passed on the constitutionality of a representative sample of the new laws.[6] The principal opinion in each case was a joint opinion of Justices Stewart, Powell, and STEVENS. In the lead case, *Gregg* v. *Georgia*, these Justices squarely rejected the argument that the death penalty is cruel and unusual under all circumstances. *Id.*, at 176–187. Rather, they focused on the States' capital sentencing procedures, distilling from *Furman* two complementary rationalizing principles about sentencing discretion: The discretion given the sentencer must be "directed and limited" to avoid "wholly arbitrary

[6] *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976).

and capricious action," *Gregg,* 428 U. S., at 189, and this discretion must be exercised "in an informed manner," *ibid. Furman* was read as holding that "to minimize the risk that the death penalty [will] be imposed on a capriciously selected group of offenders, the decision to impose it ha[s] to be guided by standards so that the sentencing authority [will] focus on the particularized circumstances of the crime and the defendant." *Gregg,* 428 U. S., at 199. The jury should be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Id.,* at 192. "Otherwise, the system cannot function in a consistent and a rational manner." *Id.,* at 189 (internal quotation marks omitted).

Gregg's requirement that the sentencer be guided by information about the particular defendant and the particular circumstances of the crime—in other words, by traditionally accepted sentencing criteria, see *id.,* at 189–190—added a second dimension to *Furman*'s rule against open-ended discretion. The jury's discretion must be focused on rational factors, and its decision should be based on information about the circumstances of the crime and about the accused as an individual, not merely as a member of a group. In *Furman* itself, for example, the jury was given almost no particularized information about the accused: "About Furman himself, the jury knew only that he was black and that, according to his statement at trial, he was 26 years old and worked at 'Superior Upholstery.' It took the jury one hour and 35 minutes to return a verdict of guilt and a sentence of death." *Furman,* 408 U. S., at 295, n. 48 (Brennan, J., concurring) (citations omitted). Moreover, it was irrelevant to the jury's determination that the killing committed by Furman was accidental. *Ibid.* Without a focus on the characteristics of the defendant and the circumstances of his crime, an uninformed jury could be tempted to resort to irrational considerations, such as class or race animus.

Justices Stewart, Powell, and STEVENS applied these principles in upholding the guided discretion procedures of Georgia, Florida, and Texas, and in striking down the mandatory death penalty provisions of North Carolina and Louisiana. The Georgia, Florida, and Texas schemes were held constitutional because they "guide[d] and focuse[d] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender." *Jurek* v. *Texas*, 428 U. S. 262, 273–274 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). The "essential" factor was that "the jury ha[d] before it all possible relevant information about the individual defendant whose fate it must determine." *Id.*, at 276. Moreover, the Georgia statute featured "an important additional safeguard against arbitrariness and caprice": a provision for automatic appeal of a death sentence that required the State Supreme Court to determine, *inter alia*, whether the sentence was imposed under the influence of passion or prejudice and whether it was disproportionate to other sentences imposed in similar cases. *Gregg*, *supra*, at 198.

The mandatory death penalty statutes, on the other hand, were held to violate the Eighth and Fourteenth Amendments for three reasons. First, the Justices believed, a mandatory death penalty departed from "contemporary standards" of punishment. *Woodson* v. *North Carolina*, 428 U. S. 280, 301 (1976) (plurality opinion). Second, experience had suggested that such statutes "simply papered over the problem of unguided and unchecked jury discretion" by provoking arbitrary jury nullification. *Id.*, at 302–303. Thus, "[i]nstead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly." *Id.*, at 303; see *Roberts* v. *Louisiana*, 428 U. S. 325, 335 (1976) (plurality opinion). Third, the mandatory nature of the penalty prevented the sentencer from considering "the character and record of the individual

offender or the circumstances of the particular offense," and thus treated all convicted persons "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass." *Woodson*, *supra*, at 304. The latter concern echoed Justice Douglas' suggestion that sentences of death might have fallen disproportionately upon the "member[s] of a suspect or unpopular minority." *Furman*, *supra*, at 255.

One would think, however, that by eliminating explicit jury discretion and treating all defendants equally, a mandatory death penalty scheme was a perfectly reasonable legislative response to the concerns expressed in *Furman*. See *Roberts*, *supra*, at 346 (WHITE, J., dissenting). See also *Walton* v. *Arizona*, 497 U. S. 639, 662 (1990) (SCALIA, J., concurring in part and concurring in judgment). JUSTICE WHITE was surely correct in concluding that "a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death." *Roberts*, *supra*, at 358. See also *Roberts* v. *Louisiana*, 431 U. S. 633, 649 (1977) (REHNQUIST, J., dissenting); *Sumner* v. *Shuman*, 483 U. S. 66, 86 (1987) (WHITE, J., dissenting). I would also agree that the plurality in *Woodson* and *Roberts* erred in equating the "raw power of [jury] nullification" with the unlimited sentencing discretion condemned in *Furman*. *Roberts*, *supra*, at 347 (WHITE, J., dissenting). The curious and counterintuitive outcomes of our 1976 cases—upholding sentences of death imposed under statutes that explicitly preserved the sentencer's discretion while vacating those imposed under mandatory provisions precisely because of a perceived potential for arbitrary and uninformed discretion—might in some measure be attributable, once again, to the powerful influence of racial concerns.[7] Be that as it may,

[7] As in *Furman*, the NAACP Legal Defense Fund represented the three petitioners in *Woodson* and *Roberts*, who were black. In addition to contending that the death penalty was a cruel and unusual punishment, the Fund lawyers argued in these cases that despite the mandatory nature of

we are not now confronted with a mandatory sentencing provision, and I have no occasion here to flesh out my disagreement with the Court's prohibition of such schemes.

The significant point for present purposes is that *Woodson* and *Sumner*'s invalidation of the mandatory death penalty guaranteed that sentencers would exercise some degree of discretion in every capital case. And under our precedents, in turn, any such exercise of discretion is unavoidably bound up with the two requirements of *Furman*, as identified in *Gregg:* first and foremost, that the sentencing authority be "provided with standards to guide its use of the information" developed at sentencing, and second, in support of this principle, that the sentencer be "apprised of the information relevant to the imposition of sentence." *Gregg*, 428 U. S., at 195. By discovering these two requirements in the Constitution, and by ensuring in *Woodson* and its progeny that they would always be in play, the Court has put itself in the seemingly permanent business of supervising capital sentencing procedures. While the better view is that the Cruel and Unusual Punishments Clause was intended to place only substantive limitations on punishments, not procedural requirements on sentencing, see *Hudson* v. *McMillian*, 503 U. S. 1, 18–20 (1992) (THOMAS, J., dissenting); *Gardner* v. *Florida*, 430 U. S. 349, 371 (1977) (REHNQUIST, J., dissenting), *stare decisis* requires that we make efforts to adhere to the Court's Eighth Amendment precedents, see *Walton* v.

North Carolina's and Louisiana's statutes, the process of imposing the penalty on these petitioners was infected at key junctures with the potential for selective and discriminatory discretion, most importantly the possibility that sentencing juries in cases involving sympathetic defendants would acquit or convict on lesser charges. See Brief for Petitioners in *Woodson* v. *North Carolina*, O. T. 1975, No. 75–5491, pp. 22–39; Brief for Petitioner in *Roberts* v. *Louisiana*, O. T. 1975, No. 75–5844, pp. 30–65. The unsuccessful petitioners in *Gregg*, *Proffitt*, and *Jurek* were white. See Brief for United States as *Amicus Curiae* in *Gregg* v. *Georgia*, O. T. 1975, No. 74–6257, p. 68.

Arizona, *supra*, at 672 (SCALIA, J., concurring in part and concurring in judgment).

The mitigating branch of our death penalty jurisprudence began as an outgrowth of the second of the two *Furman*/*Gregg* requirements. The plurality's conclusion in *Lockett* v. *Ohio*, 438 U. S. 586 (1978)—that the sentencer in a capital case must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense," *id.*, at 604 (opinion of Burger, C. J.) (emphasis deleted)—effectively guarantees the sentencer's access to categories of information favorable to the defendant. Thus, *Lockett* was built on the premise, given credence in *Gregg*, that "where sentencing discretion is granted, it generally has been agreed that the sentencing judge's possession of the fullest information possible concerning the defendant's life and characteristics is [h]ighly relevant." 438 U. S., at 602–603 (internal quotation marks omitted). The sentencing statute at issue in *Lockett* failed to satisfy this requirement, in the plurality's view, because it eliminated from the jury's consideration significant facts about the defendant and her "comparatively minor role in the offense." *Id.*, at 608.[8] The Court's adoption in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), of the *Lockett* rule and its corollary—that the sentencer may not categorically refuse to consider relevant mitigating circumstances—again drew upon *Gregg*'s notion that capital sentencing is less likely to be arbitrary where the jury's exercise of discretion is focused on the particularized circumstances of the offender and the crime. See *Eddings*, *supra*, at 112 (relying on *Gregg*, *supra*, at 197).

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[8] Lockett aided and abetted an armed robbery that resulted in a murder. She drove the getaway car but did not carry out the robbery and did not intend to bring about the murder. See 438 U. S., at 589–591; *id.*, at 613–617 (BLACKMUN, J., concurring in part and concurring in judgment). Lockett was represented by the same lawyers from the Legal Defense Fund who had represented the petitioners in *Furman*, *Woodson*, and *Roberts*.

Therefore, although it is said that *Lockett* and *Eddings* represent an "about-face" and "a return to the pre-*Furman* days," *Lockett*, *supra*, at 622, 623 (WHITE, J., concurring in part, dissenting in part, and concurring in judgments), there was at root a logical—if by now attenuated—connection between the rationalizing principle of *Furman* and the prophylactic rule of *Eddings*. *Eddings* protects the accused's opportunity to "appris[e]" the jury of his version of the information relevant to the sentencing decision. Our early mitigating cases may thus be read as doing little more than safeguarding the adversary process in sentencing proceedings by conferring on the defendant an affirmative right to place his relevant evidence before the sentencer. See *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986). Cf. *id.*, at 5, n. 1 (comparing *Eddings* with "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977)").

Consistent with this (admittedly narrow) reading, I would describe *Eddings* as a kind of rule of evidence: It governs the admissibility of proffered evidence but does not purport to define the substantive standards or criteria that sentencers are to apply in considering the facts. By requiring that sentencers be allowed to "consider" all "relevant" mitigating circumstances, we cannot mean that the decision whether to impose the death penalty must be based upon all of the defendant's evidence, or that such evidence must be considered the way the defendant wishes. Nor can we mean to say that circumstances are necessarily relevant for constitutional purposes if they have any conceivable mitigating value. Such an application of *Eddings* would eclipse the primary imperative of *Furman*—that the State define the relevant sentencing criteria and provide rational "standards to guide [the sentencer's] use" of the evidence. That aspect of *Furman* must operate for the most part independently of the *Eddings* rule. This is essential to the effectiveness

of *Furman*, since providing all relevant information for the sentencer's consideration does nothing to avoid the central danger that sentencing discretion may be exercised irrationally.

I realize, of course, that *Eddings* is susceptible to more expansive interpretations. See, *e. g.*, *Walton*, 497 U. S., at 661, 667 (SCALIA, J., concurring in part and concurring in judgment) (*Eddings* rule "has completely exploded whatever coherence the notion of 'guided discretion' once had" by making "random mitigation" a constitutional requirement); *McCleskey* v. *Kemp*, 481 U. S., at 306 ("States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant"). And even under the narrow reading of *Eddings*, there is still a tension in our case law, because *Eddings* implies something of an outer boundary to the primary *Furman* principle: The sentencing standards chosen by the State may not be so stingy as to prevent altogether the consideration of constitutionally relevant mitigating evidence.

But with the exception of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), our most recent mitigating cases have been careful to read *Eddings* narrowly in an effort to accommodate the "competing commandments" of *Eddings* and *Furman*, *ante*, at 468. We have held that States must be free to channel and direct the sentencer's consideration of all evidence (whether mitigating or aggravating) that bears on sentencing, provided only that the State does not categorically preclude the sentencer from considering constitutionally relevant mitigating circumstances. See *Walton*, *supra*, at 652 ("[T]here is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the

death penalty") (internal quotation marks omitted); *Boyde* v. *California*, 494 U. S. 370, 377 (1990) (to the same effect); *Franklin* v. *Lynaugh*, 487 U. S., at 181 (plurality opinion) (same); see also *Walton*, *supra*, at 652 (requirement of individualized sentencing in capital cases satisfied as long as State does not altogether prevent sentencer from considering any type of relevant mitigating evidence); *Blystone* v. *Pennsylvania*, 494 U. S. 299, 307–308 (1990) (same); *Saffle* v. *Parks*, 494 U. S. 484, 490–491 (1990) (same).

This understanding preserves our original rationale for upholding the Texas sentencing statute—that it "guides and focuses the jury's objective consideration of the particularized circumstances" while allowing the defendant "to bring to the jury's attention whatever [relevant] mitigating circumstances he may be able to show." *Jurek*, 428 U. S., at 272, 274. Thus, in reaffirming the constitutionality of Texas' system of special issues, we have expressed satisfaction that the former Texas scheme successfully reconciled any tension that exists between *Eddings* and *Furman*. See *Franklin* v. *Lynaugh*, *supra*, at 182 (plurality opinion). In the context of the Texas system, therefore, I am unprepared at present to sweep away our entire mitigating line of precedent. By the same token, however, if the more expansive reading of *Eddings* were ultimately to prevail in this Court, I would be forced to conclude that the *Eddings* rule, as so construed, truly is "rationally irreconcilable with *Furman*" and, on that basis, deserving of rejection. See *Walton*, *supra*, at 673 (SCALIA, J., concurring in part and concurring in judgment).

II

Unfortunately, the narrow reading of *Eddings* is virtually impossible after *Penry*. Whatever contribution to rationality and consistency we made in *Furman*, we have taken back with *Penry*. In the process, we have upset the careful balance that Texas had achieved through the use of its special issues.

Penry held that the Texas special issues did not allow a jury to "consider and give effect to" mitigating evidence of mental retardation and childhood abuse, 492 U. S., at 328, because, even though the defendant had a full and unfettered opportunity to present such evidence to the jury, the evidence had "relevance to [Penry's] moral culpability *beyond the scope* of the special issues," *id.*, at 322 (emphasis added). Thus, the Court was persuaded that the jury might have been "unable to express its '*reasoned moral response*' to that evidence in determining whether death was the appropriate punishment." *Ibid.* (emphasis added). See *post*, at 518–519. Contrary to the dissent's view, see *post*, at 506–512, these notions—that a defendant may not be sentenced to death if there are mitigating circumstances whose relevance goes "beyond the scope" of the State's sentencing criteria, and that the jury must be able to express a "reasoned moral response" to all evidence presented—have no pedigree in our prior holdings. They originated entirely from whole cloth in two recent concurring opinions. See *Franklin*, *supra*, at 185 (O'CONNOR, J., concurring in judgment); *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring).

Together, these notions render meaningless any rational standards by which a State may channel or focus the jury's discretion and thus negate the central tenet of *Furman* and all our death penalty cases since 1972. *Penry* imposes as a constitutional imperative "a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance" whether the defendant deserves death. *Penry*, 492 U. S., at 359 (SCALIA, J., concurring in part and dissenting in part). "It is an unguided, emotional 'moral response' that the Court demands be allowed—an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy." *Ibid.* JUSTICE SOUTER's reading of *Penry* bears out these fears. His dis-

sent would require that the special issues be "construed with enough scope to allow the full consideration of mitigating potential," *post*, at 515, and that the jury be free to give full effect to the defendant's sympathetic evidence "for all purposes, including purposes not specifically permitted by the questions," *post*, at 511 (internal quotation marks and emphasis omitted).

Any determination that death is or is not the fitting punishment for a particular crime will necessarily be a moral one, whether made by a jury, a judge, or a legislature. But beware the word "moral" when used in an opinion of this Court. This word is a vessel of nearly infinite capacity—just as it may allow the sentencer to express benevolence, it may allow him to cloak latent animus. A judgment that some will consider a "moral response" may secretly be based on caprice or even outright prejudice. When our review of death penalty procedures turns on whether jurors can give "full mitigating effect" to the defendant's background and character, *post*, at 510, and on whether juries are free to disregard the State's chosen sentencing criteria and return a verdict that a majority of this Court will label "moral," we have thrown open the back door to arbitrary and irrational sentencing. See *Penry*, *supra*, at 360 (SCALIA, J., concurring in part and dissenting in part) ("The decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is unguided discretion to impose as well. In holding that the jury had to be free to deem Penry's mental retardation and sad childhood relevant for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what *Furman* once condemned").

The Court in *Penry* denied that its holding signaled a return to unbridled jury discretion because, it reasoned, "so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." 492 U. S.,

at 327 (citing *Gregg*, 428 U. S., at 197–199, 203 (joint opinion), and 222 (WHITE, J., concurring in judgment)). Cf. *McCleskey* v. *Kemp*, 481 U. S., at 311 (discussing the benefits to the defendant of discretionary leniency). Thus, the dissent suggests that once the State has sufficiently narrowed the class of death-eligible murderers, the jury's discretion to select those individuals favored to live must remain effectively unbounded. See *post*, at 513–515, 518–519. It turns reason on its head, however, to argue that just because we have approved sentencing systems that continue to permit juries to exercise a degree of discretionary leniency, the Eighth Amendment necessarily requires that that discretion be unguided and unlimited with respect to "the class of murderers subject to capital punishment." To withhold the death penalty out of sympathy for a defendant who is a member of a favored group is no different from a decision to impose the penalty on the basis of negative bias, and it matters not how narrow the class of death-eligible defendants or crimes. Surely that is exactly what the petitioners and the Legal Defense Fund argued in *Woodson* and *Roberts*. See n. 7, *supra*. It is manifest that " 'the power to be lenient [also] is the power to discriminate.' " *McCleskey* v. *Kemp*, *supra*, at 312 (quoting K. Davis, Discretionary Justice 170 (1973)). See also *Roberts*, 428 U. S., at 346 (WHITE, J., dissenting) ("It is undeniable that the unfettered discretion of the jury to save the defendant from death was a major contributing factor in the developments which led us to invalidate the death penalty in *Furman* v. *Georgia*").[9]

[9] The Texas special issues involved here did a considerably better job of rationalizing sentencing discretion than even the elaborate Georgia system approved in *Gregg*, where juries still retained power "to return a sentence of life, rather than death, for no reason whatever, simply based upon their own subjective notions of what is right and what is wrong." *Woodson*, 428 U. S., at 314–315 (REHNQUIST, J., dissenting). As a regrettable but predictable consequence of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), the Texas Legislature has since amended its sentencing statute, which now invites the jury to react subjectively to "all" circumstances, including "the

We have consistently recognized that the discretion to accord mercy—even if "largely motivated by the desire to mitigate"—is indistinguishable from the discretion to impose the death penalty. *Furman*, 408 U. S., at 313, 314 (WHITE, J., concurring) (condemning unguided discretion because it allows the jury to "*refuse* to impose the death penalty no matter what the circumstances of the crime") (emphasis added). See also *Jurek*, 428 U. S., at 279 (WHITE, J., concurring in judgment) (Texas' scheme is constitutional because it "does not extend to juries discretionary power to dispense mercy"); *Roberts*, *supra*, at 335 (joint opinion) (Louisiana's statute "plainly invites" jurors to "choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate"). For that reason, we have twice refused to disapprove instructions directing jurors " 'not [to] be swayed by mere . . . sympathy,' " because, we have emphasized, such instructions "foste[r] the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' " *California* v. *Brown*, 479 U. S., at 539, 543 (quoting *Woodson*, 428 U. S., at 305 (joint opinion)). Accord, *Saffle* v. *Parks*, 494 U. S., at 493 ("Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary").

Penry reintroduces the very risks that we had sought to eliminate through the simple directive that States in all events provide rational standards for capital sentencing. For 20 years, we have acknowledged the relationship be-

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personal moral culpability of the defendant." See Tex. Code Crim. Proc. Ann., Art. 37.0711(2)(e) (Vernon Supp. 1993) (applicable to offenses committed on or after September 1, 1991).

tween undirected jury discretion and the danger of discriminatory sentencing—a danger we have held to be inconsistent with the Eighth Amendment. When a single holding does so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, it cannot command the force of *stare decisis.* In my view, *Penry* should be overruled.[10]

III

The major emphasis throughout our Eighth Amendment jurisprudence has been on "reasoned" rather than "moral" sentencing. We have continually sought to verify that States' capital procedures provide a "rational basis" for predictably determining which defendants shall be sentenced to death. *Furman, supra,* at 294 (Brennan, J., concurring). See also *Spaziano* v. *Florida,* 468 U. S. 447, 460 (1984); *California* v. *Brown, supra,* at 541; *Barclay* v. *Florida,* 463 U. S. 939, 960 (1983) (STEVENS, J., concurring in judgment) ("A constant theme of our cases . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner"); *McCleskey* v. *Kemp,* 481 U. S., at 323 (Brennan, J., dissent-

[10] Indeed, it can be argued that we have already implicitly overruled *Penry* in significant respects. In *Saffle* v. *Parks,* 494 U. S. 484 (1990), we gave a dramatically narrow reading to *Penry,* reaffirming that under *Lockett* v. *Ohio,* 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma,* 455 U. S. 104 (1982), the State is free to "limi[t] the manner in which [a defendant's] mitigating evidence may be considered." 494 U. S., at 491. And in *Boyde* v. *California,* 494 U. S. 370 (1990), we expressly rejected the significance of *Penry*'s conclusion that "'a reasonable juror *could well have believed* that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.'" 494 U. S., at 379 (emphasis in original) (quoting *Penry, supra,* at 326). *Boyde* held instead that a jury instruction will run afoul of *Eddings* only if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," and the Court made it clear that "a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition." 494 U. S., at 380.

ing) ("[C]oncern for arbitrariness focuses on the rationality of the system as a whole, and . . . a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational"). And in the absence of mandatory sentencing, States have only one means of satisfying *Furman*'s demands—providing objective standards to ensure that the sentencer's discretion is "guided and channeled by . . . examination of specific factors." *Proffitt* v. *Florida*, 428 U. S. 242, 258 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.).

The rule of *Eddings* may be an important procedural safeguard that complements *Furman*, but *Eddings* cannot promote consistency, much less rationality. Quite the opposite, as *Penry* demonstrates. It is imperative, therefore, that we give full effect to the standards designed by state legislatures for focusing the sentencer's deliberations. This Court has long since settled the question of the constitutionality of the death penalty. We have recognized that "capital punishment is an expression of society's moral outrage at particularly offensive conduct" and that a process for "'channeling th[e] instinct [for retribution] in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.'" *Gregg*, 428 U. S., at 183 (joint opinion) (quoting *Furman*, *supra*, at 308 (Stewart, J., concurring)). If the death penalty is constitutional, States must surely be able to administer it pursuant to rational procedures that comport with the Eighth Amendment's most basic requirements.

In my view, we should enforce a permanent truce between *Eddings* and *Furman*. We need only conclude that it is consistent with the Eighth Amendment for States to channel the sentencer's consideration of a defendant's arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner, so long as the State does not deny

the defendant a full and fair opportunity to apprise the sentencer of all constitutionally relevant circumstances. The three Texas special issues easily satisfy this standard. "In providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, . . . Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence." *Penry*, 492 U. S., at 358–359 (SCALIA, J., concurring in part and dissenting in part).

As a predicate, moreover, I believe this Court should leave it to elected state legislators, "representing organized society," to decide which factors are "particularly relevant to the sentencing decision." *Gregg*, *supra*, at 192. Although *Lockett* and *Eddings* indicate that as a general matter, "a State cannot take out of the realm of relevant sentencing considerations the questions of the defendant's 'character,' 'record,' or the 'circumstances of the offense,' " they do "not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." *Franklin* v. *Lynaugh*, 487 U. S., at 179 (plurality opinion). Ultimately, we must come back to a recognition that "the States, and not this Court, retain 'the traditional authority' to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance," *Skipper* v. *South Carolina*, 476 U. S., at 11 (Powell, J., concurring in judgment) (quoting *Lockett*, 438 U. S., at 604, n. 12), since "[t]his Court has no special expertise in deciding whether particular categories of evidence are too speculative or insubstantial to merit consideration by the sentencer," 476 U. S., at 15.[11] Accordingly, I also propose

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[11] Under the Federal Sentencing Reform Act, for example, Congress has instructed the United States Sentencing Commission to study the difficult question whether certain specified offender characteristics "have any relevance" in sentencing. 28 U. S. C. § 994(d). In response to this directive, the Sentencing Commission has issued guidelines providing, among other

that the Court's appropriate role is to review only for *reasonableness* a State's determinations as to which specific circumstances—within the broad bounds of the general categories mandated under *Eddings*—are relevant to capital sentencing.

Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance "beyond the scope" of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even—astonishingly—evidence that the defendant suffers from chronic "antisocial personality disorder"—that is, that he is a sociopath. See Pet. for Cert. in *Demouchette* v. *Collins*, O. T. 1992, No. 92–5914, p. 4, cert. denied, 505 U. S. 1246 (1992). We cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman.*

For all these reasons, I would not disturb the effectiveness of Texas' former system.

JUSTICE STEVENS, dissenting.

Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence. As JUSTICE THOMAS points out, there is reason to believe that this imperative was routinely violated in the

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things, that race, sex, national origin, creed, religion, and socioeconomic status "are not relevant in the determination of a sentence." United States Sentencing Commission, Guidelines Manual § 5H1.10 (Nov. 1992). Congress has also concluded that a defendant's education, vocational skills, employment record, and family and community ties are inappropriate sentencing factors. 28 U. S. C. § 994(e). Thus, the Sentencing Guidelines declare that these and other factors "are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." See USSG ch. 5, pt. H, intro. comment. Similar guidelines, it seems to me, could be applied in capital sentencing consistent with the Eighth Amendment, as long as they contributed to the rationalization of the process.

years before the Court first held that capital punishment may violate the Eighth Amendment, when racial discrimination infected the administration of the death penalty "particularly in Southern States, and most particularly in rape cases." *Ante,* at 479 (concurring opinion). And JUSTICE THOMAS is surely correct that concern about racial discrimination played a significant role in the development of our modern capital sentencing jurisprudence. *Ante,* at 479–484. Where I cannot agree with JUSTICE THOMAS is in the remarkable suggestion that the Court's decision in *Penry* v. *Lynaugh,* 492 U. S. 302 (1989), somehow threatens what progress we have made in eliminating racial discrimination and other arbitrary considerations from the capital sentencing determination.

In recent years, the Court's capital punishment cases have erected four important safeguards against arbitrary imposition of the death penalty. First, notwithstanding a minority view that proportionality should play no part in our analysis,[1] we have concluded that death is an impermissible punishment for certain offenses. Specifically, neither the crime of rape nor the kind of unintentional homicide referred to by JUSTICE THOMAS, *ante,* at 485, may now support a death sentence. See *Enmund* v. *Florida,* 458 U. S. 782 (1982); *Coker* v. *Georgia,* 433 U. S. 584 (1977).

Second, as a corollary to the proportionality requirement, the Court has demanded that the States narrow the class of individuals eligible for the death penalty, either through statutory definitions of capital murder, or through statutory specification of aggravating circumstances. This narrowing requirement, like the categorical exclusion of the offense of rape, has significantly minimized the risk of racial bias in the sentencing process.[2] Indeed, as I pointed out in my dissent

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[1] See *Harmelin* v. *Michigan,* 501 U. S. 957 (1991).

[2] As an indication of the difference such narrowing can make, it is worthwhile to note that at the time we decided *Furman* v. *Georgia,* 408 U. S. 238 (1972), in addition to defendants convicted of first-degree murder, al-

in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), there is strong empirical evidence that an adequate narrowing of the class of death-eligible offenders would eradicate any significant risk of bias in the imposition of the death penalty.[3]

Third, the Court has condemned the use of aggravating factors so vague that they actually enhance the risk that unguided discretion will control the sentencing determination. See, *e. g.*, *Maynard* v. *Cartwright*, 486 U. S. 356 (1988) (invalidating "especially heinous, atrocious, or cruel" aggravating circumstance); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (invalidating "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance). An aggravating factor that invites a judgment as to whether a murder committed by a member of another race is especially "heinous" or "inhuman" may increase, rather than decrease, the chance of arbitrary decisionmaking, by creating room for the influence of personal prejudices. In my view, it is just such aggravating factors, which fail to cabin sentencer discretion

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most all defendants convicted of forcible rape, armed robbery, and kidnaping were eligible for the death penalty. See *Walton* v. *Arizona*, 497 U. S. 639, 715 (1990) (STEVENS, J., dissenting).

[3] "The Court's decision appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia. If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder 'for whites only') and no death penalty at all, the choice mandated by the Constitution would be plain. But the Court's fear is unfounded. One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated. As JUSTICE BRENNAN has demonstrated in his dissenting opinion, such a restructuring of the sentencing scheme is surely not too high a price to pay." *McCleskey* v. *Kemp*, 481 U. S. 279, 367 (1987) (STEVENS, J., dissenting) (internal citation omitted).

in the determination of death eligibility, that pose the "evident danger" of which JUSTICE THOMAS warns. See *ante*, at 479.

Finally, at the end of the process, when dealing with the narrow class of offenders deemed death eligible, we insist that the sentencer be permitted to give effect to all relevant mitigating evidence offered by the defendant, in making the final sentencing determination. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978). I have already explained my view that once the class of death-eligible offenders is sufficiently narrowed, consideration of relevant, individual mitigating circumstances in no way compromises the "rationalizing principle," *ante*, at 490 (THOMAS, J., concurring), of *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *Walton* v. *Arizona*, 497 U. S. 639, 715–719 (1990) (STEVENS, J., dissenting). To the contrary, the requirement that sentencing decisions be guided by consideration of relevant mitigating evidence reduces still further the chance that the decision will be based on irrelevant factors such as race. *Lockett* itself illustrates this point. A young black woman,[4] Lockett was sentenced to death because the Ohio statute "did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." 438 U. S., at 597. When such relevant facts are excluded from the sentencing determination, there is more, not less, reason to believe that the sentencer will be left to rely on irrational considerations like racial animus.

I remain committed to our "mitigating" line of precedent, as a critical protection against arbitrary and discriminatory capital sentencing that is fully consonant with the principles of *Furman*. Nothing in JUSTICE THOMAS' opinion explains

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[4] See Brief for Petitioner in *Lockett* v. *Ohio*, O. T. 1977, No. 76–6997, p. 10.

why the requirement that sentencing decisions be based on *relevant* mitigating evidence, as applied by *Penry*, increases the risk that those decisions will be based on the *irrelevant* factor of race. More specifically, I do not see how permitting full consideration of a defendant's mental retardation and history of childhood abuse, as in *Penry*, or of a defendant's youth, as in this case, in any way increases the risk of race-based or otherwise arbitrary decisionmaking.

JUSTICE SOUTER, in whose dissent I join, has demonstrated that the decision in *Penry* is completely consistent with our capital sentencing jurisprudence. In my view, it is also faithful to the goal of eradicating racial discrimination in capital sentencing, which I share with JUSTICE THOMAS.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), we concluded that a petitioner did not seek the benefit of a "new rule" in claiming that the Texas special issues did not permit the sentencing jury in his case to give full mitigating effect to certain mitigating evidence, and we therefore held that the retroactivity doctrine announced in *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality opinion), did not bar the claim. See 492 U. S., at 314–319. The only distinctions between the claim in *Penry* and those presented here go to the kind of mitigating evidence presented for the jury's consideration, and the distance by which the Texas scheme stops short of allowing full effect to be given to some of the evidence considered. Neither distinction makes a difference under *Penry* or the prior law on which *Penry* stands. Accordingly, I would find no bar to the present claims and would reach their merits: whether the mitigating force of petitioner's youth, unfortunate background, and traits of decent character could be considered adequately by a jury instructed only

on the three Texas special issues.[1] I conclude they could not be, and I would reverse the sentence of death and remand for resentencing. From the Court's contrary judgment, I respectfully dissent.

I

The doctrine of *Teague* v. *Lane*, *supra*, that a state prisoner seeking federal habeas relief may not receive retroactive benefit of a "new rule" of law, has proven hard to apply. We have explained its crucial term a number of ways. JUSTICE O'CONNOR wrote in *Teague* itself that "[i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent at the time the defendant's conviction became final." 489 U. S., at

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[1] After Texas' capital punishment statute was invalidated in *Branch* v. *Texas*, one of the cases decided with *Furman* v. *Georgia*, 408 U. S. 238 (1972), Texas enacted a new capital sentencing statute. This statute, under which petitioner Gary Graham was sentenced, provides that:

"(b) [o]n conclusion of the presentation of the evidence [at the sentencing phase of a capital murder trial], the court shall submit the following issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

. . . . . .

"(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death." Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 1981).

Following our decision in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), Texas adopted a new capital sentencing procedure which is not at issue here. See Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1992).

301 (plurality opinion) (emphasis in original). We have said that novelty turns on whether the rule would represent a "developmen[t] in the law over which reasonable jurists [could] disagree," *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990), and we have emphasized that reasonableness is not a wholly deferential standard, by making it clear that the existence of conflicting authority does not alone imply that any rule resolving that conflict is a new one, *Stringer* v. *Black*, 503 U. S. 222, 236–237 (1992).

One general rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will not amount to announcing a new rule. See *Wright* v. *West*, 505 U. S. 277, 304 (1992) (O'CONNOR, J., joined by BLACKMUN and STEVENS, JJ., concurring in judgment) ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable"); *id.*, at 309 (KENNEDY, J., concurring in judgment) ("Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent"); *id.*, at 313 (SOUTER, J., concurring in judgment) (*Teague* "does not mean, of course, that a habeas petitioner must be able to point to an old case decided on facts identical to the facts of his own").

That said, it can be a difficult question whether a particular holding presents simply a new setting for an old rule, or announces a new one. The question is not difficult in this case, however, for its answer is governed by *Penry*, *supra*, at 313, 329, the first case in which a majority of the Court adopted the approach to retroactivity put forward by the plurality in *Teague*. See 492 U. S., at 313. The circumstances in which petitioner Penry sought relief, and the rule that he sought to have applied, are virtually indistinguish-

able from the circumstances presented and the rule of decision sought by Graham in this case. We denied certiorari in Penry's direct appeal in 1986. *Penry* v. *Texas*, 474 U. S. 1073 (1986). The Texas Court of Criminal Appeals affirmed Graham's conviction and sentence of death in 1984, *Graham* v. *State*, No. 68,916, and Graham did not seek certiorari in this Court. In both cases, therefore, under the reasoning employed by the majority, see *ante*, at 467, "[t]his Court's decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), were rendered before [petitioners'] conviction[s] became final." *Penry*, 492 U. S., at 314–315. Because Penry was "entitled to the benefit of those decisions," *id.*, at 315, so, on a comparable claim, is Graham.

Our description of Penry's claim applies, indeed, almost precisely to Graham's claim in this case. Of Penry, we said:

> "[He] does not challenge the facial validity of the Texas death penalty statute, which was upheld against an Eighth Amendment challenge in *Jurek* v. *Texas*, 428 U. S. 262 (1976). Nor does he dispute that some types of mitigating evidence can be fully considered by the sentencer in the absence of special jury instructions. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 175 (1988) (plurality opinion); *id.*, at 185–186 (O'CONNOR, J., concurring in judgment). Instead, [he] argues that, on the facts of this case, the jury was unable to fully consider and give effect to the mitigating evidence . . . in answering the three special issues." *Ibid.*

In deciding whether he sought benefit of a "new rule," we went on to say:

> "*Lockett* underscored *Jurek*'s recognition that the constitutionality of the Texas scheme 'turns on whether the enumerated questions allow consideration of particularized mitigating factors.' *Jurek*, 428 U. S., at 272. The plurality opinion in *Lockett* indicated that the Texas

> death penalty statute had 'survived the petitioner's Eighth and Fourteenth Amendment attack [in *Jurek*] because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show.' 438 U. S., at 607." *Id.*, at 317.

We then reviewed the reaffirmation in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), of the principle that "a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." Thus, we said, "at the time Penry's conviction became final," as at the time Graham's did,

> "it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty. Moreover, the facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present." 492 U. S., at 318.

Graham contends that *Jurek* v. *Texas*, 428 U. S. 262 (1976), *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, *supra*, were not honored in the application of the Texas special issues on the facts of his case, and, in this respect, too, his position is identical to that of Penry, who argued that "those assurances [on which *Jurek* rests] were not fulfilled *in his particular case* because, without appropriate instructions, the jury could not fully consider and give effect

to [his] mitigating evidence . . . in rendering its sentencing decision." 492 U. S., at 318 (emphasis in original). In *Penry,* we held that nothing foreclosed such a claim:

> "The rule Penry seeks—that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed—is not a 'new rule' under *Teague* because it is dictated by *Eddings* and *Lockett.* Moreover, in light of the assurances upon which *Jurek* was based, we conclude that the relief Penry seeks does not 'impos[e] a new obligation' on the State of Texas. *Teague,* 489 U. S., at 301." *Id.*, at 318–319.

Thus in *Penry* we held that petitioner sought nothing but the application to his case of the rule announced in *Eddings* and *Lockett*, that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." 492 U. S., at 318.

The first distinction between Penry's claim and that of Graham is the type of mitigating evidence involved. Penry's went to "mental retardation and abused childhood"; Graham's involves youthfulness, unfortunate background, and traits of decent character. But any assertion that this should make any difference flies in the face of JUSTICE KENNEDY's opinion from last Term, quoted before, that "a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts [will only infrequently] yiel[d] a result so novel that it forges a new rule, one not dictated by precedent." *Wright* v. *West*, 505 U. S., at 309 (opinion concurring in judgment). Nor is the second distinction any more material, that Penry's evidence

of retardation could claim no mitigating effect under the second Texas issue, which asks the jury to assess a defendant's future dangerousness, whereas Graham's evidence of youth and decency could claim some.[2] The point under *Lockett*, *Eddings*, and *Penry* is that sentencing schemes must allow the sentencer to give full mitigating effect to evidence; Graham's claim that his evidence could receive only partial consideration is just as much a claim for application of the preexisting rule demanding the opportunity for full effect as was Penry's claim that his retardation could be given no effect under the second Texas special issue.

Thus, from our conclusion that the rule from which the petitioner sought to benefit in *Penry* was not "new," it necessarily follows that the rule petitioner Graham seeks here is not new either. Indeed, that is the conclusion reached even by respondent who concedes that "if Graham is asserting the existence of a constitutional defect that can be cured by supplemental instructions, his claim likewise is not barred." Brief for Respondent 29, n. 10.[3]

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[2] This distinction does not even apply to Graham's claim that the sentencing jury could not give full mitigating effect to the evidence of his unfortunate background. Of course, in this regard, despite their mitigating force, Penry's evidence of an abused childhood and Graham's evidence of an unfortunate background both have the same tendency to support only an affirmative answer to the future dangerousness special issue. The Court does not explain why, under its reasoning, Graham's claim concerning evidence of his background is barred by *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion). See *ante*, at 475 (undifferentiated references to all of "Graham's evidence").

[3] Respondent's only argument concerning the application of *Teague* is that petitioner's claim is *Teague*-barred if "his claim is so extensive as to constitute a facial challenge to the Texas statute." Brief for Respondent 13. In other words, "if sustaining Graham's claim would necessarily require that *Jurek* be overruled, it is barred by *Teague*." *Id.*, at 29, n. 10. However, petitioner does not ask that *Jurek* v. *Texas*, 428 U. S. 262 (1976), be overruled. Indeed, he concedes that the Texas statute has been applied constitutionally in those cases such as *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988), in which the mitigating evidence can be given "full" miti-

The Court's conclusion to the contrary rests on the assumption that an additional instruction is required under *Penry* only where there is mitigating evidence without any "mitigating relevance" to the second, future dangerousness special issue. See *ante*, at 475. But that was not the holding of *Penry*, which reiterates the Eighth Amendment requirement expressed in *Lockett* and *Eddings* that the jury be able "to consider fully [the defendant's] mitigating evidence," *Penry*, 492 U. S., at 323, and requires a separate instruction whenever such evidence "has relevance to . . . moral culpability beyond the scope of the special issues," *id.*, at 322. Indeed, JUSTICE SCALIA's dissent in *Penry* recognized that "[w]hat the Court means by 'fully consider' (what it must mean to distinguish *Jurek*) is to consider *for all purposes, including purposes not specifically permitted by the questions.*" *Id.*, at 355 (opinion dissenting in relevant part) (emphasis in original). That dissent argued that this was not what was required by the Constitution, see *id.*, at 358–360,[4] but it correctly described the holding in the Court's opinion in *Penry* itself. Nothing in *Penry* aside from JUSTICE SCALIA's dissent, and nothing in the controlling opinions in *Lockett* or *Eddings*, suggested that this Eighth Amendment requirement will be obviated by the happenstance that a defendant's particular mitigating evidence is relevant to one of the special issues, even though it may have mitigating force beyond the scope of that issue.

Penry plainly answered the *Teague* question that the majority answers differently today, a question that even re-

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gating weight under the special issues. See Brief for Petitioner 15, and n. 12. Thus, respondent's *Teague* argument has no application to this case.

[4] See also *Penry*, 492 U. S., at 356 (SCALIA, J., dissenting in part) (arguing, contrary to the holding of the Court, that after *Jurek* "there remains available, in an as-applied challenge to the Texas statute," only "the contention that a particular mitigating circumstance is in fact irrelevant to any of the three questions it poses, and hence could not be considered").

spondent did not see fit to raise again. *Penry* controls in this respect, and we should adhere to it.

II

I therefore turn to the merits of the claim,[5] which are properly before us.[6] *Penry* again controls, for reasons already anticipated in the *Teague* analysis, but bearing some expansion here.

A

Following the first grant of certiorari in this case, after we vacated the judgment and remanded for reconsideration in light of *Penry*, see *Graham* v. *Lynaugh*, 492 U. S. 915 (1989), a panel of the Court of Appeals for the Fifth Circuit decided to vacate Graham's death sentence and remand. *Graham* v. *Collins*, 896 F. 2d 893 (1990). The Court of Appeals then took the case en banc, however, and, by a vote of 7 to 6, construed *Penry* to require no additional instruction "in instances where no major mitigating thrust of the evidence is

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[5] The full Court may do the same in responding to several pending petitions for certiorari presenting the same question involved in this case, but on direct review. See, *e. g.*, *Johnson* v. *Texas*, cert. pending, No. 92–5653; *Jackson* v. *Texas*, cert. pending, No. 91–7399; *Boggess* v. *Texas*, cert. pending, No. 91–5862.

[6] At trial petitioner did not seek the additional *Penry* instruction that he now says is required. Whether the failure to request such an instruction is a bar to a subsequent challenge is a question of state procedure; if the conviction were affirmed by the state appellate courts on the ground that petitioner failed to raise his claim before the trial court, that affirmance could rest on an independent and adequate state-law ground. Here, the Texas Court of Criminal Appeals appears to have addressed petitioner's challenge on the merits in a state postconviction proceeding. See App. 37. In any event, under Texas law, a *Penry* claim is not procedurally barred even if no additional mitigating-evidence instruction is requested or there is no objection made at trial to the jury instructions. See *Selvage* v. *Collins*, 816 S. W. 2d 390, 392 (Tex. Crim. App. 1991); *Black* v. *State*, 816 S. W. 2d 350, 362–369 (Tex. Crim. App. 1991); *id.*, at 367–374 (Campbell, J., concurring). The adequacy of the Texas special issues in this case is therefore properly before us.

substantially beyond the scope of all the special issues." 950 F. 2d 1009, 1027 (CA5 1992) (en banc). It also limited the application of *Penry* to mitigating evidence of circumstances that were not "transitory," but were "uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own." See 950 F. 2d, at 1029. *Penry* lends no support for these limitations, however, and they are plainly at odds with other controlling Eighth Amendment precedents, which the Court does not purport to disturb.

B

Our cases have construed the Eighth Amendment to impose two limitations upon a state capital sentencing system. First, in determining who is eligible for the death penalty, the "State must 'narrow the class of murderers subject to capital punishment,' . . . by providing 'specific and detailed guidance' to the sentencer." *McCleskey* v. *Kemp*, 481 U. S. 279, 303 (1987) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 196 (1976), and *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976)). Second, "the Constitution [nonetheless] limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." 481 U. S., at 304 (emphasis in original). It is this latter limitation that concerns us today.

Our cases require that a sentencer in a capital case be permitted to give a "reasoned moral response" to the defendant's mitigating evidence. See *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring) (emphasis deleted). In so doing, "[t]he sentencer . . . [cannot] be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U. S., at 604 (plurality opinion) (emphasis in original; footnote omitted). This is understood to follow from our conclusion that "[a]ny exclusion of the 'compassionate or mitigating factors stem-

ming from the diverse frailties of humankind' that are relevant to the sentencer's decision would fail to treat all persons as 'uniquely individual human beings.'" *McCleskey*, *supra*, at 304 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976)).

As we first described it in *Jurek*, the Texas scheme to be measured against this obligation assesses mitigating (as well as aggravating) evidence by looking both backward to the defendant's moral culpability for the crime itself, as distinct from strictly legal guilt, and forward to his likely behavior if his life is not taken. Thus the first issue requires the sentencer to determine whether the defendant acted deliberately, and the third asks for assessment of any provocation as mitigating the fault of any response. Each issue demands an examination of past fact as bearing on the moral significance of a past act. The second issue, on the other hand, calls for a prediction of future behavior, prompting a judgment that is moral in the utilitarian sense that society may legitimately prefer to preserve the lives of murderers unlikely to endanger others in the future, as against the lives of the guilty who pose continuing threats.

While these issues do not exhaust the categories of mitigating fact,[7] at the time *Jurek* was decided the Court of Criminal Appeals of Texas had indicated that the second special issue would be given a wide enough compass to allow jury consideration of such diverse facts as prior record and the character of past crimes, duress, or emotional pressure

[7] Or, indeed, all the ways in which evidence may mitigate against imposition of a death sentence previously mentioned by Members of this Court. See *Franklin* v. *Lynaugh*, 487 U. S., at 186 (O'CONNOR, J., joined by BLACKMUN, J., concurring in judgment) (referring to "positive character traits that might mitigate against the death penalty"); *id.*, at 189 (STEVENS, J., joined by Brennan and Marshall, JJ., dissenting) (character evidence of "redeeming features" may reveal "virtues that can fairly be balanced against society's interest in killing [a defendant] in retribution for his violent crime"). My analysis today does not require extended consideration of the category suggested in *Franklin*. See *infra*, at 521.

associated with the instant crime, and the age of the defendant. *Jurek*, 428 U. S., at 272–273. Thus, we had a reasonable expectation that the sentencer would have authority to give comprehensive effect to each defendant's mitigating evidence. As *Penry* revealed, however, and as the facts of this case confirm, neither the second nor the other special issues have been construed with enough scope to allow the full consideration of mitigating potential that *Lockett* and *Eddings* confirmed are required, and challenges to the Texas statute as applied may be sustained despite the statute's capacity to withstand *Jurek*'s facial challenge. In its holding that a death sentence resulting from the application of the Texas special issues could not be upheld unless the jury was able "to consider fully [the defendant's] mitigating evidence," 492 U. S., at 323,[8] *Penry* is a perfectly straightforward application of the Eighth Amendment's requirement of individualized sentencing.[9]

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[8] See also *Jurek*, 428 U. S., at 272 (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[T]he constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors").

[9] JUSTICE THOMAS argues, *ante*, at 493, that the rule applied in *Penry* "originated entirely from whole cloth in two recent concurring opinions," *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring), and *Franklin* v. *Lynaugh*, *supra*, at 185 (O'CONNOR, J., concurring in judgment), and that it requires "unbridled" jury discretion, even to the point that the death penalty may be withheld on the basis of race, *ante*, at 494.

As to the first contention, *Lockett* v. *Ohio*, 438 U. S 586 (1978), was understood at the time it was handed down to require that constitutionally relevant mitigating evidence (the definition of which is given below) be given full consideration *and effect*. See, *e. g.*, *id.*, at 623 (WHITE, J., concurring in part, dissenting in part, and concurring in judgments) (emphasis added) (*Lockett* "requir[es] as a matter of constitutional law that sentencing authorities be permitted to consider *and in their discretion to act upon* any and all mitigating circumstances"). This is the understanding upon which *Lockett* and *Eddings* have consistently been applied by the Court. See *Skipper* v. *South Carolina*, 476 U. S. 1, 7 (1986) ("Assuming . . . that [a State Supreme Court] rule would in any case have the effect of precluding the defendant from introducing otherwise admissible evi-

The specific question in *Penry* itself was whether the mitigating evidence of Penry's mental retardation and history of abuse "as it bears on [Penry's] personal culpability" could be

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dence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment, the rule would not pass muster under *Eddings*"); *McCleskey* v. *Kemp*, 481 U. S. 279, 306 (1987) ("States cannot *limit the sentencer's consideration* of any relevant circumstance that could cause it to decline to impose the [death] penalty" (emphasis added)); *Franklin* v. *Lynaugh*, *supra*, at 184–185 (O'CONNOR, J., joined by BLACKMUN, J., concurring in judgment); *id.*, at 191–192 (STEVENS, J., joined by Brennan and Marshall, JJ., dissenting). While one may argue that this aspect of our Eighth Amendment jurisprudence is in tension with the sentence in *Gregg* that the State should give the jury guidance as to what factors it "'deems particularly relevant to the sentencing decision,'" *ante*, at 485 (THOMAS, J., concurring) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 192 (1976)), any such tension dates, at the latest, from *Eddings*, decided in 1982, not from *Penry* in 1989.

There was one novelty in the concurring opinions in *Brown* and *Franklin*, however, in the use of the phrase "reasoned moral response," see *supra*, at 513, to which JUSTICE THOMAS adverts in his concurring opinion. But as the concurring opinion explained in *Brown*, this is just a shorthand for the individual assessment of personal culpability that *Lockett* and *Eddings* mandate. See *Brown*, *supra*, at 545. It is, indeed, appropriate shorthand. JUSTICE THOMAS himself acknowledges, as I think everyone must, "that 'capital punishment is an expression of society's moral outrage at particularly offensive conduct,'" *ante*, at 498 (quoting *Gregg* v. *Georgia*, *supra*, at 183 (joint opinion of Stewart, Powell, and STEVENS, JJ.)), and he reminds us that "[a]ny determination that death is or is not the fitting punishment for a particular crime will necessarily be a moral one," *ante*, at 494.

JUSTICE THOMAS's second concern, about "sympathy for a defendant who is a member of a favored group," *ante*, at 495, involves an issue of very great seriousness. But the *Lockett-Eddings* rule is not one of "unbridled" or "unbounded" discretion. See *ante*, at 494–495. Constitutionally relevant mitigating evidence is limited to "any aspects of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, *supra*, at 604 (plurality opinion). A defendant's race as such is not mitigating as an aspect of his character or record, or as a circumstance of any offense he may have committed.

taken account of under the Texas special issues, *ibid.*, and in deciding that case, we examined each special issue in turn. We concluded first that the jury instruction barred full consideration of the evidence of retardation and personal abuse under the first, or "deliberate[ness]," special issue, see *ibid.*, and second that insofar as the evidence bore on personal culpability, it could not be given mitigating effect under the issue of "future dangerousness." As to the latter, indeed, it could have been considered only as an aggravating factor. Although we described Penry's evidence as a "two-edged sword . . . diminish[ing] his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future," *id.*, at 324, the dilemma thus presented was not essential to our conclusion that the second special issue failed to meet the State's constitutional obligations. The point was simply that the special issue did not allow the jury to give effect to the mitigating force of Penry's evidence as it bore on his personal culpability. Finally we concluded that "a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third ['provocation'] special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id.*, at 324–325. In sum, full consideration of the tendency of retardation and a history of abuse to mitigate moral culpability was impossible.

C

Graham's evidence falls into three distinct categories. As to each, our task is to take the same analytical steps we undertook in *Penry*, to see whether the sentencing jury could give it full mitigating effect.

1

First, there was the evidence of Graham's youth. He was 17 when he committed the murder for which he was convicted, and he was sentenced less than six months after the

crime. Youth may be understood to mitigate by reducing a defendant's moral culpability for the crime, for which emotional and cognitive immaturity and inexperience with life render him less responsible, see *Eddings* v. *Oklahoma*, 455 U. S., at 115–116, and youthfulness may also be seen as mitigating just because it is transitory, indicating that the defendant is less likely to be dangerous in the future.

As with Penry's evidence of mental retardation, the mitigating force of Graham's youth could not be fully accounted for under the first, "deliberateness" issue, given the trial judge's explanation of that issue to the jury. While no formal jury instruction explained what "deliberate" meant, the judge emphasized at *voir dire* that "deliberate" meant simply "intentional," see App. 90, 127, 169, 205–206, 246, 291, 319–320, 353, 420, a definition that hardly allowed exhaustion of the mitigating force of youth. A young person may perfectly well commit a crime "intentionally," but our prior cases hold that his youth may nonetheless be treated as limiting his moral culpability because he "'lack[s] the experience, perspective, and judgment' expected of adults." *Eddings*, *supra*, at 116 (quoting *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979)).

We have already noted that the Court of Appeals answered this difficulty by reasoning that the "major mitigating thrust" of the evidence could be given effect under the second special issue calling for assessment of future dangerousness. The errors of this view we have also seen. First, nothing in *Penry* suggests that partial consideration of the mitigating effect of the evidence satisfies the Constitution. *Penry*, like *Eddings* and the *Lockett* plurality before that, states an Eighth Amendment demand that the sentencer "consider and give effect to . . . mitigating evidence" "fully," 492 U. S., at 318, and when such evidence "has relevance to . . . moral culpability beyond the scope of the special issues," constitutional standards require a separate instruction au-

thorizing that complete effect be given, *id.*, at 322. See *McCleskey*, 481 U. S., at 304 ("[A]ny exclusion" of mitigating evidence is inconsistent with the Eighth Amendment's individualized sentencing requirements). Thus, even if the future dangerousness issue allowed the jury to recognize Graham's evanescent youth as tending to mitigate any danger if he were imprisoned for life, it would still fail the test of the Eighth Amendment because the jury could not give effect to youth as reducing Graham's moral culpability.[10] The Eighth Amendment requires more than some consideration of mitigating evidence.

The Court of Appeals also erred in thinking the second special issue adequate even to take account of the possibility that Graham may be less dangerous as he ages. The issue is stated in terms of the statutory question "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann., Art. 37.071(b)(2) (Vernon 1981). Because a boy who killed at 17 and was promptly tried (as Graham was) could well be held dangerous in the future by reason of continuing youth, it was error to limit *Penry* to cases in which a mitigating condition is permanent. See 950 F. 2d, at 1029. It is no answer to say youth is fleeting; it may not be fleeting enough, and a sufficiently young defendant may have his continuing youth considered under the second issue as aggravating, not mitigating. In this case, moreover, the possibility of taking youth as aggra-

[10] I note in this regard that the trial judge's remarks at *voir dire* may have inappropriately left the jury to consider whether Graham would have been dangerous in the future *if he were set free.* See Brief for Petitioner 8, n. 4. In light of my conclusion that Graham's death sentence should be vacated, I need not address here the propriety of a sentence imposed on the basis of future dangerousness to the public when there is no possibility that a defendant will be sentenced to a term less than life without the possibility of parole.

vating without any recognition of mitigating effect was vastly intensified by remarks of the trial judge permitting a finding of future dangerousness based even on the probability that petitioner might commit minor acts of criminal vandalism to property such as scratching someone's car or tearing up the lawn of a high school by riding a motorcycle over it. See App. 128–129, 172, 210, 247–248, 295, 321–322, 354–355, 389–390, 422, 455.

Finally, because Graham was convicted of shooting and killing a man during a robbery, the situation with respect to the third special issue in this case is the same as it was for petitioner in *Penry*. The evidence of youth was irrelevant to the reasonableness of any provocation by the deceased of which there was no evidence in any event.

A juror could thus have concluded that the responses to the special issues required imposition of the death penalty even though he believed that Graham, by reason of his youth, "lacked the moral culpability to be sentenced to death." *Penry*, 492 U. S., at 324. Without more, the case is controlled by *Penry*, and additional instruction was required.

2

The next category of evidence at issue is that of Graham's difficult upbringing, of his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another. We have specifically held that such circumstances may be considered in mitigation, particularly on the conduct of a defendant so young, see, *e. g.*, *Eddings*, *supra*, at 115, where upbringing might be deforming enough to affect the capacity for culpability. Where, as here, however, that is not obviously the case, and deliberateness is said to turn on intention, there is no assurance that the first issue allows the full scope of its mitigating effect to be considered. As with youth itself, upbringing could

be treated as aggravating under the future dangerousness issue, and it has no mitigating potential under the third issue of provocation. Again, as with youth, there is no room in the former Texas special issues as applied in this case to take full account of such mitigating relevance as the jury might find.

3

Finally, Graham argues that the jury was unable to take account of redeeming character traits revealed by evidence that growing up he had voluntarily helped his parents and grandparents with household chores, that he was a religious person who had attended church regularly with his grandmother, and that he had contributed to the support of his own children with money earned from a job with his father.

I do not accept petitioner's contention that the jury could not give adequate consideration to the testimony on these matters. Insofar as the evidence tended to paint Graham as a person unlikely to pose a future danger, the jury could consider it under the second special issue. Insofar as the jury was unable, as Graham alleges, to give the evidence further effect to diminish Graham's "moral culpability," Brief for Petitioner 36, 37, 39, it is enough to say that the relevance of the evidence to moral culpability was simply *de minimis*. Voluntary chores for and church attendance with a relative, and supplying some level of support for one's children have virtually no bearing on one's culpability for crime in the way that immaturity or permanent damage due to events in childhood may. Because I do not understand petitioner to be arguing that the jury should have been allowed to consider the evidence as revealing some element of value unrelated to the circumstances of the crime, see *Franklin*, 487 U. S., at 186 (O'CONNOR, J., concurring in judgment); *id.*, at 189 (STEVENS, J., dissenting), I do not address that issue.

III

I would hold that *Penry* and preceding Eighth Amendment cases of this Court require petitioner's death sentence to be vacated, and would remand the case for resentencing by the state courts.

Syllabus

BUFFERD *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 91–7804. Argued November 30, 1992—Decided January 25, 1993

Subchapter S of the Internal Revenue Code seeks to eliminate tax disadvantages that might dissuade small businesses from adopting the corporate form and to lessen the tax burden on such businesses by means of a pass-through system under which corporate income, losses, deductions, and credits are attributed to individual shareholders in a manner akin to the tax treatment of partnerships. Petitioner Bufferd, a shareholder in an S corporation, Compo Financial Services, Inc., claimed on his 1979 income tax return a pro rata share of a loss deduction and investment tax credit reported by Compo on its return for the 1978–1979 tax year. Code § 6501(a) establishes a generally applicable statute of limitations allowing the Internal Revenue Service to assess tax deficiencies "within 3 years after *the* return was filed." (Emphasis added.) As provided in § 6501(c)(4), Bufferd extended the limitations period on his return, but no extension was obtained from Compo with respect to its return. In 1987, the Commissioner determined that the loss deduction and credit reported by Compo were erroneous and sent a notice of deficiency to Bufferd based on the deduction and credit he had claimed on his return. The Tax Court found for the Commissioner, rejecting Bufferd's argument that the claim was time barred because the disallowance was based on an error in Compo's return, for which the 3-year period had lapsed. The Court of Appeals affirmed, holding that, where a tax deficiency is assessed against a shareholder, the filing date of the shareholder's return is the relevant date for purposes of § 6501(a).

Held: The limitations period for assessing the income tax liability of an S corporation shareholder runs from the date on which the shareholder's return is filed. Plainly, "the" return referred to in § 6501(a) is the return of the taxpayer against whom a deficiency is assessed, since the Commissioner can only determine whether the taxpayer understated his tax obligation and should be assessed a deficiency after examining his return. That Compo erroneously asserted a loss and credit to be passed through to its shareholders is of no consequence. The errors did not and could not affect Compo's tax liability, and hence the Commissioner could only assess a deficiency against the shareholder whose return claimed the benefit of the errors. By contrast, the S corporation's

return does not contain all of the information necessary to compute a shareholder's taxes and thus should not be regarded as triggering the period of assessment. Cf. *Automobile Club of Mich.* v. *Commissioner*, 353 U. S. 180, 188. The statutory evidence and policy considerations proffered by Bufferd offer no basis for questioning this conclusion. Pp. 526–533.

952 F. 2d 675, affirmed.

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

Stuart J. Filler, by appointment of the Court, 506 U. S. 809, argued the cause for petitioner. With him on the briefs were *Toni Robinson* and *Mary Ferrari.*

Kent L. Jones argued the cause for respondent. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Bruton*, *Deputy Solicitor General Wallace*, *Ann B. Durney*, and *Janet Kay Jones.**

JUSTICE WHITE delivered the opinion of the Court.

On his 1979 income tax return, petitioner, a shareholder in a Subchapter S corporation, claimed as "pass-through" items portions of a deduction and a tax credit reported on the corporation's return. The question presented is whether the 3-year period in which the Internal Revenue Service is permitted to assess petitioner's tax liability runs from the filing date of the individual return or the corporate return. We conclude with the Tax Court and the Court of Appeals for the Second Circuit that the relevant date is that on which petitioner's return was filed.

I

Subchapter S of the Internal Revenue Code, 26 U. S. C. §§ 1361–1379, was enacted in 1958 to eliminate tax disadvantages that might dissuade small businesses from adopting

*Briefs of *amici curiae* urging reversal were filed for *Arthur H. Boelter* and *John J. White, Jr., pro se;* and for Charles T. Green et al. by *Robert I. White.*

the corporate form and to lessen the tax burden on such businesses. The statute accomplishes these goals by means of a pass-through system under which corporate income, losses, deductions, and credits are attributed to individual shareholders in a manner akin to the tax treatment of partnerships. See §§ 1366–1368.[1] In addition, since 1966, "S corporations" have been liable for certain capital gains and other taxes. 80 Stat. 111, 113; 26 U. S. C. §§ 1374, 1378.

Petitioner was treasurer and a shareholder of Compo Financial Services, Inc., an S corporation. On February 1, 1980, Compo filed a return for the tax year of December 26, 1978, to November 30, 1979, as required by § 6037(a) of the Code.[2] On that return, Compo reported a loss deduction and an investment tax credit arising from its partnership interest in a venture known as Printers Associates. Petitioner and his wife filed a joint return for 1979 on April 15, 1980.[3] Their return claimed a pro rata share of the deduction and credit reported by Compo pursuant to the pass-through provisions of Subchapter S.

Code § 6501(a) establishes a generally applicable statute of limitations providing that the Internal Revenue Service may assess tax deficiencies within a 3-year period from the date

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[1] Subchapter S was substantially amended and recodified by the Subchapter S Revision Act of 1982, 96 Stat. 1669. The pass-through provisions in effect in the period relevant to this case, see 26 U. S. C. §§ 1373–1374 (1976 ed.), differ in certain respects from the present provisions. These differences do not affect the case.

[2] In relevant part, the statute reads:

"§ 6037. Return of S corporation

"(a) In general

"Every S corporation shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowable by subtitle A [and other information]. Any return filed pursuant to this section shall, for purposes of chapter 66 (relating to limitations), be treated as a return filed by the corporation under section 6012."

[3] Phyllis Bufferd settled separately with the Commissioner and is not a party to this action.

a return is filed.[4] That limitations period may be extended by written agreement. § 6501(c)(4). In March 1983, before three years had passed from the time the joint return was filed, petitioner agreed to extend the period in which deficiencies arising from certain claims on the return could be assessed against him. No extension was obtained from Compo with respect to its return for the 1978–1979 tax year.

In 1987, the Commissioner determined that the loss deduction and credit reported by Compo were erroneous and sent a notice of deficiency to petitioner based on the loss deduction and credit that he had claimed on his return. In the Tax Court, petitioner contended that the Commissioner's claim was time barred because the disallowance was based on an error in Compo's return, for which the 3-year assessment period had lapsed. The Tax Court found for the Commissioner, relying on its decision in *Fehlhaber* v. *Commissioner*, 94 T. C. 863 (1990), aff'd, 954 F. 2d 653 (CA11 1992). See App. 61. The Court of Appeals for the Second Circuit affirmed, holding that, where a tax deficiency is assessed against the shareholder, the filing date of the shareholder's return is the relevant date for purposes of § 6501(a). 952 F. 2d 675 (1992). Because another Court of Appeals has a contrary view, we granted certiorari. 505 U. S. 1203 (1992).[5]

II

Title 26 U. S. C. § 6501(a) states simply that "the amount of any tax imposed by this title shall be assessed within 3

[4] The statute reads in part:

"§ 6501. Limitations on assessment and collection

"(a) General rule

"Except as otherwise provided . . . the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . ."

[5] *Kelley* v. *Commissioner*, 877 F. 2d 756 (CA9 1989), held that the filing date of the corporation's return controls. The Fifth and Eleventh Circuits have joined the Second Circuit in declining to follow *Kelley*. See *Green* v. *Commissioner*, 963 F. 2d 783 (CA5 1992); *Fehlhaber* v. *Commissioner*, 954 F. 2d 653 (CA11 1992).

years after the return was filed . . . ." The issue before us is whether "the" return is that of petitioner or that of the corporation which was the source of the loss and credit claimed on petitioner's return. Petitioner's position is that the Commissioner had three years from the date his return was filed to object to that return in any respect except the loss and credit items passed through to him by the corporation. To disallow those items, petitioner argues, the Commissioner must have acted within three years of the filing of the corporate return. Under this approach, "the" return referred to in § 6501(a) becomes two returns, and petitioner claims that there is adequate statutory basis for his submission. We have no doubt that the courts below properly concluded, as the Commissioner argued, that it is the filing of petitioner's return that triggers the running of the statutory period.

The Commissioner can only determine whether the taxpayer understated his tax obligation and should be assessed a deficiency after examining that taxpayer's return. Plainly, then, "the" return referred to in § 6501(a) is the return of the taxpayer against whom a deficiency is assessed. Here, the Commissioner sought to assess taxes which petitioner owed under the Code because his return had erroneously reported a loss and credit to which he was not entitled. The fact that the corporation's return erroneously asserted a loss and credit to be passed through to its shareholders is of no consequence. In this case, the errors on the corporate return did not and could not affect the tax liability of the corporation, and hence the Commissioner could only assess a deficiency against the stockholder-taxpayer whose return claimed the benefit of the errors. Under the plain language of § 6501(a), the Commissioner's time to make the assessment ran from the filing date of petitioner's return.[6]

[6] Even if it could credibly be argued that § 6501(a) is ambiguous because it does not expressly indicate how it is to be applied to S corporations and their stockholders, the Commissioner's construction of the section is

By contrast, the S corporation's return, which petitioner asserts triggers the beginning of the limitations period, is deficient precisely because it does not contain all of the information necessary to compute a shareholder's taxes. If the Internal Revenue Service were required to rely on that return, it would be forced to conduct its assessment on the basis of incomplete information:

> "While [the corporate return] may show petitioner's distributive share of losses, it does not indicate his adjusted basis in his corporate stock, which is information necessary to determine if the loss is deductible. Nor does it show petitioner's income, losses, deductions, and credits from other sources. Moreover, the information return of the S corporation does not relate to the same taxable period as petitioner's return . . . ." *Fehlhaber*, *supra*, at 869 (citation omitted).

As noted in analogous cases, tax returns that "lack the data necessary for the computation and assessment of deficiencies" generally should not be regarded as triggering the period of assessment. *Automobile Club of Mich.* v. *Commissioner*, 353 U. S. 180, 188 (1957) (citing *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219 (1944)).[7]

Petitioner asserts that § 6501(a) supports a contrary view when read in light of two related Code provisions pertaining

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a reasonable one to say the least, and we should accept it absent convincing grounds for rejecting it. As noted in *Badaracco* v. *Commissioner*, 464 U. S. 386 (1984), "'limitations statutes barring the collection of taxes otherwise due and unpaid are strictly construed in favor of the Government.'" *Id.*, at 392 (quoting *Lucia* v. *United States*, 474 F. 2d 565, 570 (CA5 1973)).

[7] In these circumstances, the incompleteness of the corporate return provides a reason for doubting petitioner's understanding of the Code. We do not thereby suggest that, for cases in which a corporate return does supply all of the information necessary to process a shareholder's return, the mere fact of completeness is sufficient to establish the corporate return as "the" return of § 6501(a).

to S corporations. Section 6012(a)(2) requires both Subchapter C and Subchapter S corporations to file income tax returns.[8] Section 6037(a) specifies the information that each S corporation's return must provide (including "each shareholder's pro rata share of each item of the corporation") and further states that "[a]ny return filed pursuant to this section shall, for purposes of [26 U. S. C. §§ 6501–6531], be treated as a return filed by the corporation under section 6012."

We do not see that these provisions aid petitioner's cause. Read together, §§ 6012(a)(2), 6037(a), and 6501(a) establish only that each S corporation must file a tax return containing certain information and that a Commissioner desiring to make an assessment must act within three years of filing. Nothing on the face of these provisions demonstrates that an individual's income tax return is brought within the compass of § 6037(a)'s reference to "any return" simply because a portion of that return reports income and losses that have passed through from the return of an S corporation. If anything, the phrase "[a]ny return filed pursuant to this section," coupled with the fact that § 6037(a) is concerned with describing the contents of the corporation's return, indicates that the provision is *not* meant to determine when the assessment period for a shareholder's individual tax return begins.

Petitioner argues that this reading of the relevant provisions runs afoul of the fact that, prior to 1966, S corporations were not subject to taxation. According to petitioner, no purpose would have been served by establishing an assessment period that applied to returns reporting corporate income on which no taxes could be assessed but not to the

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[8] Section 6012(a)(2) reads:

"§ 6012. Persons required to make returns of income

"(a) General rule

"Returns with respect to income taxes under subtitle A shall be made by the following: . . .

"(2) Every corporation subject to taxation under subtitle A . . . ."

returns of corporate stockholders. This argument fails because even in the period when the S corporation could not be taxed, examination of a corporation's return was necessary to determine if it could lay valid claim to Subchapter S status. Section 6037(a) thus originally functioned to set the starting date of the 3-year period within which that determination had to be made. See *United States* v. *Adams Building Co.*, 531 F. 2d 342, 343, n. 2 (CA6 1976); see also 952 F. 2d, at 677 (citing *Fehlhaber* v. *Commissioner*, 94 T. C. 863 (1990)).[9] Petitioner maintains that such a function would be superfluous because, if the election of S corporation status were found invalid, the corporation's return would "automatically be subject to the existing rules for C corporations." Brief for Petitioner 38. But this proposition is hardly self-evident, and petitioner cites no authority to support it. In the absence of § 6037(a), the Internal Revenue Service could claim that a corporation which files a return containing an erroneous election of Subchapter S status has failed to file any return, which would allow the Service to issue a notice of deficiency with respect to the return "at any time." See § 6501(c)(3); cf. *Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304, 307 (1940); *Mason* v. *United States*, 801 F. Supp. 718, 721 (ND Ga. 1992).[10]

[9] Since S corporations are now subject to limited taxation, § 6037(a) serves the additional function of determining the assessment period for those taxes. See 952 F. 2d, at 678.

[10] Petitioner's reading of § 6037(a) is sufficiently lacking in textual support to obviate any need to examine legislative history. However, several courts have noted that the history of § 6037 contains evidence in support of the Commissioner's interpretation. See, *e. g.*, *Green* v. *Commissioner*, 963 F. 2d, at 788–790; *Fehlhaber* v. *Commissioner*, 954 F. 2d, at 656–657. Section 6037(a) was introduced in the Technical Amendments Act of 1958, 72 Stat. 1606, 1656. The Senate Report explaining the provision states:

"Notwithstanding the fact that an electing small-business corporation is not subject to the tax imposed by chapter 1 of the 1954 Code, such corporation must make a return for each taxable year in accordance with new section 6037 . . . . Such return will be considered as a return filed under section 6012 for purposes of the provisions of chapter 66, relating to limita-

The Ninth Circuit's rejection in *Kelley* v. *Commissioner*, 877 F. 2d 756 (1989), of the view adopted by the Commissioner was prompted in part by a concern to avoid unfairly

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tions. Thus, for example, the period of limitation on assessment and collection of any corporate tax found to be due upon a subsequent determination that the corporation was not entitled to the benefits of subchapter S, will run from the date of filing of the return required under the new section 6037." S. Rep. No. 1983, 85th Cong., 2d Sess., 226 (1958).

Although the passage would seem to support the Commissioner's view, petitioner, following the reasoning of the Ninth Circuit in *Kelley* v. *Commissioner*, 877 F. 2d 756 (1989), maintains that the phrase "for example" necessarily implies that the Senate also had in mind the present case. This implication is hardly necessary: The phrase just as easily could have been meant to avoid foreclosing other applications of § 6037(a) to corporate returns. Indeed, had "for example" been omitted, the Commissioner could now rely on this passage to argue that the period for assessing capital gains taxes under 26 U. S. C. § 1374 is not controlled by § 6037(a), but is instead governed by the filing date of a shareholder's return or some other triggering event. Likewise, in the absence of the phrase, it could be argued that, because the legislative history refers exclusively to a case in which *taxes* are assessed against a corporation that erroneously claims Subchapter S status, the period in which *penalties* may be assessed against the corporation should not be governed by § 6037(a).

The Commissioner claims additional support in the Senate Report accompanying the 1982 amendments to Subchapter S, which states in relevant part:

"Under present law, a taxpayer's individual tax liability is determined in proceedings between the Internal Revenue Service and the individual whose tax liability is in dispute. Thus, any issues involving the income or deductions of a subchapter S corporation are determined separately in . . . proceedings involving the individual shareholder whose tax liability is affected. Statutes of limitations apply at the individual level, based on the returns filed by the individual. The filing by the corporation of its return does not affect the statute of limitations applicable to the shareholders." S. Rep. No. 97–640, p. 25 (1982).

This passage is of little value to either side. While the views of a Congress engaged in the amendment of existing law as to the intent behind that law are "entitled to significant weight," *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 596 (1980), in this instance, the Report's account of "present law" may have been colored, if not wholly determined, by the Tax Court, which had already adopted the view espoused by the

burdening shareholders, who might find it difficult to obtain corporate records necessary to defend against a deficiency assessment based on an adjustment made to a corporation's return years after it was filed. The Fifth Circuit's opinion by Judge Goldberg in *Green* v. *Commissioner*, 963 F. 2d 783 (1992), neatly summarizes the appropriate response to that concern:

> "First, it is not unfamiliar in the world of tax to have 'an individual's income tax return . . . dependent on records maintained by another entity.' *Fehlhaber*, 954 F. 2d at 658 (citing partnership and trust taxation as examples). Second, the rule generally does not impose an undue burden on the corporation or the shareholder. . . . A shareholder can 'take the necessary steps to ensure that the corporation preserves the relevant records.' *Id.* Such protective steps simply do not constitute an overly oppressive task for the shareholder. *Bufferd*, 952 F. 2d at 678. . . . Finally, we reject any suggestion that we elevate the 'perceived unfairness to taxpayers' over our duty to strictly construe in favor of the government a statute of limitation when the petitioner seeks application of the statute so as to bar the rights of the government. *Fehlhaber*, 954 F. 2d at 658." *Id.*, at 789.[11]

Commissioner. See *Leonhart* v. *Commissioner*, 27 TCM 443 (1968), ¶ 68,098 P–H Memo TC, aff'd on other grounds, 414 F. 2d 749 (CA4 1969).

[11] Petitioner additionally asserts that the returns of shareholders of a Subchapter C corporation cannot be adjusted after the limitations period has run for assessing the corporation's return, and that therefore S corporation shareholders are entitled to identical treatment. Brief for Petitioner 11–12, 21–22. However, petitioner has not provided a single authority in support of the premise of this assertion. At oral argument, the Commissioner maintained that the opposite is the case, see Tr. of Oral Arg. 27–28, relying mainly on *Commissioner* v. *Munter*, 331 U. S. 210 (1947), which, without addressing the limitations issue, allowed an adjustment of shareholders' 1940 taxes based upon the Commissioner's finding that, at the time of its creation by merger in 1928, the corporation had acquired the accumulated earnings and profits of its predecessor corpora-

III

As found by the courts below, the plain language of § 6501(a) supports the Commissioner. The statutory evidence and policy considerations proffered by petitioner offer no basis for questioning this conclusion. We hold that the limitations period within which the Internal Revenue Service must assess the income tax liability of an S corporation shareholder runs from the date on which the shareholder's return is filed. The judgment of the Court of Appeals is affirmed.

It is so ordered.

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tions. A recent Tax Court decision also provides indirect support for the Commissioner's view:

"We have held that the relevant return for determining whether, at the time a deficiency notice was issued, the period for assessment had expired under section 6501(a) 'is that of petitioner against whom respondent has determined a deficiency.' [Citing *Fehlhaber*, 94 T. C., at 868.] We have maintained that position consistently, without regard to the nature of the source entity involved. See [cases involving partnerships, trusts, and S corporations]." *Lardas* v. *Commissioner*, 99 T. C. 490, 493 (1992).

In any event, it is doubtful that petitioner's conclusion follows from his premise, for the taxation of C corporations and their stockholders is so markedly different from that of S corporations.

Syllabus

ZAFIRO ET AL. *v.* UNITED STATES

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

No. 91–6824. Argued November 2, 1992—Decided January 25, 1993

Petitioners were indicted on federal drug charges and brought to trial together pursuant to Federal Rule of Criminal Procedure 8(b), which provides that defendants may be charged together "if they are alleged to have participated . . . in the same series of acts or transactions constituting . . . offenses." At various points during the proceeding, they each argued that their defenses were mutually antagonistic and moved for severance under Rule 14, which specifies that, "[i]f it appears that a defendant or the government is prejudiced by a joinder of . . . defendants . . . for trial . . . , the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires." The District Court denied the motions, and each petitioner was convicted of various offenses. Although acknowledging other lower court cases saying that a severance is required when defendants present "mutually antagonistic defenses," the Court of Appeals found that petitioners had not suffered prejudice and affirmed the denial of severance.

Held: Rule 14 does not require severance as a matter of law when codefendants present "mutually exclusive defenses." While the Rule recognizes that joinder, even when proper under Rule 8(b), may prejudice either a defendant or the Government, it does not make mutually exclusive defenses prejudicial *per se* or require severance whenever prejudice is shown. Rather, severance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence. The risk of prejudice will vary with the facts in each case, and the Rule leaves determination of the risk, and the tailoring of any necessary remedy, to the sound discretion of the district courts. Although separate trials will more likely be necessary when the risk is high, less drastic measures, such as limiting instructions, often will suffice. Because petitioners, who rely on an insupportable bright-line rule, have not shown that their joint trial subjected them to any legally cognizable prejudice, the District Court did not abuse its discretion in denying their motions to sever. Moreover, even if there were some risk of prejudice, here it is of the type that can

be cured with proper instructions, which the District Court gave. Pp. 537–541.

945 F. 2d 881, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post,* p. 541.

Kenneth L. Cunniff, by appointment of the Court, 504 U. S. 906, argued the cause and filed briefs for petitioners.

John F. Manning argued the cause for the United States. With him on the brief were *Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson,* and *Kristina L. Ament.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Rule 8(b) of the Federal Rules of Criminal Procedure provides that defendants may be charged together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Rule 14 of the Rules, in turn, permits a district court to grant a severance of defendants if "it appears that a defendant or the government is prejudiced by a joinder." In this case, we consider whether Rule 14 requires severance as a matter of law when codefendants present "mutually antagonistic defenses."

I

Gloria Zafiro, Jose Martinez, Salvador Garcia, and Alfonso Soto were accused of distributing illegal drugs in the Chicago area, operating primarily out of Soto's bungalow in Chicago and Zafiro's apartment in Cicero, a nearby suburb. One day, Government agents observed Garcia and Soto place a large box in Soto's car and drive from Soto's bungalow to Zafiro's apartment. The agents followed the two as they carried the box up the stairs. When the agents identified

themselves, Garcia and Soto dropped the box and ran into the apartment. The agents entered the apartment in pursuit and found the four petitioners in the living room. The dropped box contained 55 pounds of cocaine. After obtaining a search warrant for the apartment, agents found approximately 16 pounds of cocaine, 25 grams of heroin, and 4 pounds of marijuana inside a suitcase in a closet. Next to the suitcase was a sack containing $22,960 in cash. Police officers also discovered 7 pounds of cocaine in a car parked in Soto's garage.

The four petitioners were indicted and brought to trial together. At various points during the proceeding, Garcia and Soto moved for severance, arguing that their defenses were mutually antagonistic. Soto testified that he knew nothing about the drug conspiracy. He claimed that Garcia had asked him for a box, which he gave Garcia, and that he (Soto) did not know its contents until they were arrested. Garcia did not testify, but his lawyer argued that Garcia was innocent: The box belonged to Soto and Garcia was ignorant of its contents.

Zafiro and Martinez also repeatedly moved for severance on the ground that their defenses were mutually antagonistic. Zafiro testified that she was merely Martinez's girlfriend and knew nothing of the conspiracy. She claimed that Martinez stayed in her apartment occasionally, kept some clothes there, and gave her small amounts of money. Although she allowed Martinez to store a suitcase in her closet, she testified, she had no idea that the suitcase contained illegal drugs. Like Garcia, Martinez did not testify. But his lawyer argued that Martinez was only visiting his girlfriend and had no idea that she was involved in distributing drugs.

The District Court denied the motions for severance. The jury convicted all four petitioners of conspiring to possess cocaine, heroin, and marijuana with the intent to distribute. 21 U. S. C. § 846. In addition, Garcia and Soto were convicted of possessing cocaine with the intent to distribute,

§ 841(a)(1), and Martinez was convicted of possessing cocaine, heroin, and marijuana with the intent to distribute, *ibid.*

Petitioners appealed their convictions. Garcia, Soto, and Martinez claimed that the District Court abused its discretion in denying their motions to sever. (Zafiro did not appeal the denial of her severance motion, and thus, her claim is not properly before this Court.) The Court of Appeals for the Seventh Circuit acknowledged that "a vast number of cases say that a defendant is entitled to a severance when the 'defendants present mutually antagonistic defenses' in the sense that 'the acceptance of one party's defense precludes the acquittal of the other defendant.'" 945 F. 2d 881, 885 (1991) (quoting *United States* v. *Keck*, 773 F. 2d 759, 765 (CA7 1985)). Noting that "mutual antagonism . . . and other . . . characterizations of the effort of one defendant to shift the blame from himself to a codefendant neither control nor illuminate the question of severance," 945 F. 2d, at 886, the Court of Appeals found that the defendants had not suffered prejudice and affirmed the District Court's denial of severance. We granted the petition for certiorari, 503 U. S. 935 (1992), and now affirm the judgment of the Court of Appeals.

II

Rule 8(b) states that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials "play a vital role in the criminal justice system." *Richardson* v. *Marsh*, 481 U. S. 200, 209 (1987). They promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.*, at 210. For these reasons, we repeatedly have approved of joint trials. See *ibid.; Opper* v. *United States*, 348 U. S. 84, 95 (1954); *United States* v. *Marchant*, 12 Wheat.

480 (1827); cf. 1 C. Wright, Federal Practice and Procedure § 223 (2d ed. 1982) (citing lower court opinions to the same effect). But Rule 14 recognizes that joinder, even when proper under Rule 8(b), may prejudice either a defendant or the Government. Thus, the Rule provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of . . . defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

In interpreting Rule 14, the Courts of Appeals frequently have expressed the view that "mutually antagonistic" or "irreconcilable" defenses may be so prejudicial in some circumstances as to mandate severance. See, *e. g.*, *United States* v. *Benton*, 852 F. 2d 1456, 1469 (CA6), cert. denied, 488 U. S. 993 (1988); *United States* v. *Smith*, 788 F. 2d 663, 668 (CA10 1986); *Keck*, *supra*, at 765; *United States* v. *Magdaniel-Mora*, 746 F. 2d 715, 718 (CA11 1984); *United States* v. *Berkowitz*, 662 F. 2d 1127, 1133–1134 (CA5 1981); *United States* v. *Haldeman*, 181 U. S. App. D. C. 254, 294–295, 559 F. 2d 31, 71–72 (1976), cert. denied, 431 U. S. 933 (1977). Notwithstanding such assertions, the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses. See, *e. g.*, *United States* v. *Tootick*, 952 F. 2d 1078 (CA9 1991); *United States* v. *Rucker*, 915 F. 2d 1511, 1512–1513 (CA11 1990); *United States* v. *Romanello*, 726 F. 2d 173 (CA5 1984). The low rate of reversal may reflect the inability of defendants to prove a risk of prejudice in most cases involving conflicting defenses.

Nevertheless, petitioners urge us to adopt a bright-line rule, mandating severance whenever codefendants have conflicting defenses. See Brief for Petitioners i. We decline to do so. Mutually antagonistic defenses are not prejudicial *per se*. Moreover, Rule 14 does not require severance even

if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion. See, *e. g.*, *United States* v. *Lane*, 474 U. S. 438, 449, n. 12 (1986); *Opper*, *supra*, at 95.

We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. See *Kotteakos* v. *United States*, 328 U. S. 750, 774–775 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. See *Bruton* v. *United States*, 391 U. S. 123 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, *e. g.*, *Tifford* v. *Wainwright*, 588 F. 2d 954 (CA5 1979) *(per curiam)*. The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson* v. *Marsh*, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. See 481 U. S., at 211.

Turning to the facts of this case, we note that petitioners do not articulate any specific instances of prejudice. In-

stead they contend that the very nature of their defenses, without more, prejudiced them. Their theory is that when two defendants both claim they are innocent and each accuses the other of the crime, a jury will conclude (1) that both defendants are lying and convict them both on that basis, or (2) that at least one of the two must be guilty without regard to whether the Government has proved its case beyond a reasonable doubt.

As to the first contention, it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. See, *e. g.*, *United States* v. *Martinez*, 922 F. 2d 914, 922 (CA1 1991); *United States* v. *Manner*, 281 U. S. App. D. C. 89, 98, 887 F. 2d 317, 324 (1989), cert. denied, 493 U. S. 1062 (1990). Rules 8(b) and 14 are designed "to promote economy and efficiency and to avoid a multiplicity of trials, [so long as] these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial." *Bruton*, 391 U. S., at 131, n. 6 (internal quotation marks omitted). While "[a]n important element of a fair trial is that a jury consider *only* relevant and competent evidence bearing on the issue of guilt or innocence," *ibid.* (emphasis added), a fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant.

As to the second contention, the short answer is that petitioners' scenario simply did not occur here. The Government argued that all four petitioners were guilty and offered sufficient evidence as to all four petitioners; the jury in turn found all four petitioners guilty of various offenses. Moreover, even if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and "juries are presumed to follow their instructions." *Richard-*

son, supra, at 211. The District Court properly instructed the jury that the Government had "the burden of proving beyond a reasonable doubt" that each defendant committed the crimes with which he or she was charged. Tr. 864. The court then instructed the jury that it must "give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her." *Id.*, at 865. In addition, the District Court admonished the jury that opening and closing arguments are not evidence and that it should draw no inferences from a defendant's exercise of the right to silence. *Id.*, at 862–864. These instructions sufficed to cure any possibility of prejudice. See *Schaffer* v. *United States,* 362 U. S. 511, 516 (1960).

Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts. Because petitioners have not shown that their joint trial subjected them to any legally cognizable prejudice, we conclude that the District Court did not abuse its discretion in denying petitioners' motions to sever. The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, concurring in the judgment.

When two people are apprehended in possession of a container filled with narcotics, it is probable that they both know what is inside. The inference of knowledge is heightened when, as in this case, both people flee when confronted by police officers, or both people occupy the premises in which the container is found. See *ante,* at 535–536. At the same time, however, it remains entirely possible that one person did not have such knowledge. That, of course, is the argument made by each of the defendants in this case: that he or she did not know what was in the crucial box or suitcase. See *ante,* at 536.

Most important here, it is also possible that *both* persons lacked knowledge of the contents of the relevant container. Moreover, that hypothesis is compatible with individual defenses of lack of knowledge. There is no logical inconsistency between a version of events in which one person is ignorant, and a version in which the other is ignorant; unlikely as it may seem, it is at least theoretically possible that both versions are true, in that both persons are ignorant. In other words, dual ignorance defenses do not necessarily translate into "mutually antagonistic" defenses, as that term is used in reviewing severance motions, because acceptance of one defense does not necessarily preclude acceptance of the other and acquittal of the codefendant.[1]

In my view, the defenses presented in this case did not rise to the level of mutual antagonism. First, as to Garcia and Martinez, neither of whom testified, the only defense presented was that the Government had failed to carry its burden of proving guilt beyond a reasonable doubt. Nothing in the testimony presented by their codefendants, Soto and Zafiro, supplemented the Government's proof of their guilt in any way. Soto's testimony that he did not know the contents of the box he delivered with Garcia, as discussed above, could have been accepted *in toto* without precluding acquittal of his codefendant. Similarly, the jury could have accepted Zafiro's testimony that she did not know the contents of the suitcase found in her apartment, and also acquitted Martinez.

It is true, of course, that the jury was unlikely to believe that none of the defendants knew what was in the box or suitcase. Accordingly, it must be acknowledged that if the jury had believed that Soto and Zafiro were ignorant, then it would have been more likely to believe that Garcia and Martinez were not. That, however, is not the standard for

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[1] See *ante*, at 538, citing cases. See also *State* v. *Kinkade*, 140 Ariz. 91, 93, 680 P. 2d 801, 803 (1984) (defining "mutually exclusive" defenses).

mutually antagonistic defenses.[2] And in any event, the jury in this case obviously did not believe Soto and Zafiro, as it convicted both of them. Accordingly, there is no basis, in law or fact, for concluding that the testimony of Soto and Zafiro prejudiced their codefendants.

There is even less merit to the suggestion that Soto or Zafiro was prejudiced by the denial of their severance motions. Neither Garcia nor Martinez testified at all, of course, and the District Court explicitly cautioned the jury that the arguments made by their attorneys were not to be considered as evidence. *Ante*, at 541. Moreover, the assertion by his counsel that Garcia did not know the contents of the box is not inconsistent with Soto's ignorance or innocence; nor is the similar assertion by counsel for Martinez inconsistent with Zafiro's possible innocence. In my opinion, the District Court correctly determined that the defenses presented in this case were not "mutually antagonistic." See App. 88–89.

I would save for another day evaluation of the prejudice that may arise when the evidence or testimony offered by one defendant is truly irreconcilable with the innocence of a codefendant. Because the facts here do not present the issue squarely, I hesitate in this case to develop a rule that would govern the very different situation faced in cases like *People* v. *Braune*, 363 Ill. 551, 557, 2 N. E. 2d 839, 842 (1936), in which mutually exclusive defenses transform a trial into "more of a contest between the defendants than between the people and the defendants." Under such circumstances, joinder may well be highly prejudicial, particularly when the prosecutor's own case in chief is marginal and the decisive evidence of guilt is left to be provided by a codefendant.

The burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor. Joinder is problematic in cases involving mutually antagonistic

[2] Cf. *Kinkade*, 140 Ariz., at 93, 680 P. 2d, at 803 (distinguishing "competing" from mutually antagonistic defenses).

defenses because it may operate to reduce the burden on the prosecutor, in two general ways. First, joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary.[3] Second, joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant.[4] Though the Court is surely correct that this second risk may be minimized by careful instructions insisting on separate consideration of the evidence as to each codefendant, *ante*, at 540–541, the danger will remain relevant to the prejudice inquiry in some cases.[5]

Given these concerns, I cannot share the Court's enthusiastic and unqualified "preference" for the joint trial of defendants indicted together. See *ante*, at 537. The Court correctly notes that a similar preference was announced a few years ago in *Richardson* v. *Marsh*, 481 U. S. 200, 209 (1987), and that the Court had sustained the permissibility

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[3] "Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant. In order to zealously represent his client, each codefendant's counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor." *United States* v. *Tootick*, 952 F. 2d 1078, 1082 (CA9 1991). See also *United States* v. *Romanello*, 726 F. 2d 173, 179 (CA5 1984).

[4] See *State* v. *Vinal*, 198 Conn. 644, 652, 504 A. 2d 1364, 1368 (1986) (in joint trial with mutually antagonistic defenses, "where one defendant is found not guilty, it becomes likely under these circumstances that the conviction of the losing defendant is more a result of his codefendant's success in defending himself than it is a product of the state's satisfaction of its constitutional duty to prove the accused guilty beyond a reasonable doubt").

[5] *Tootick*, 952 F. 2d, at 1082. See also *People* v. *Braune*, 363 Ill. 551, 556, 2 N. E. 2d 839, 842 (1936) ("[N]o judge, however learned and skillful," could have prevented risk of prejudice in particularly aggravated case).

of joint trials on at least two prior occasions.[6] There will, however, almost certainly be multidefendant cases in which a series of separate trials would be not only more reliable, but also more efficient and manageable than some of the mammoth conspiracy cases which the Government often elects to prosecute. And in all cases, the Court should be mindful of the serious risks of prejudice and overreaching that are characteristic of joint trials, particularly when a conspiracy count is included in the indictment. Justice Jackson's eloquent description of these concerns in his separate opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 454 (1949), explains why there is much more at stake here than administrative convenience. See also *United States* v. *Romanello*, 726 F. 2d 173 (CA5 1984).

I agree with the Court that a "bright-line rule, mandating severance whenever codefendants have conflicting defenses" is unwarranted. See *ante*, at 538. For the reasons discussed above, however, I think district courts must retain their traditional discretion to consider severance whenever mutually antagonistic defenses are presented. Accordingly, I would refrain from announcing a preference for joint trials, or any general rule that might be construed as a limit on that discretion.

Because I believe the District Court correctly decided the severance motions in this case, I concur in the Court's judgment of affirmance.

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[6] In neither *Opper* v. *United States*, 348 U. S. 84 (1954), nor *United States* v. *Marchant*, 12 Wheat. 480 (1827), however, did the Court express a "preference" for joint trials.

Syllabus

UNITED STATES *v.* HILL ET UX.

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

No. 91–1421. Argued November 2, 1992—Decided January 25, 1993

Under § 57(a)(8) of the Internal Revenue Code of 1954, 26 U. S. C. § 57(a)(8) (1976 ed.), "the excess of the deduction for depletion . . . over the adjusted basis of" "property (as defined in [§]614)" is an "ite[m] of tax preference" on which a taxpayer must pay a "minimum tax" for the tax year in question. See § 56(a). In computing the minimum taxes due on their interests in oil and gas deposits for tax years 1981 and 1982, respondents Hill calculated their depletion allowances according to the "percentage depletion" method, and included in the interests' adjusted bases the unrecovered costs of certain depreciable tangible items used in drilling and development (machinery, tools, pipes, etc.), as identified in § 1.612–4(c)(1) of the applicable Treasury Department regulations. The Commissioner of Internal Revenue disputed that inclusion, and assessed larger minimum taxes based on the exclusion of the tangible costs from the mineral interests' adjusted bases. The Hills paid the resulting deficiencies and filed a refund claim, which the Commissioner denied. The Claims Court granted summary judgment for the Hills in their ensuing refund suit, and the Court of Appeals affirmed.

Held: The term "adjusted basis," as used in § 57(a)(8), does not include the depreciable drilling and development costs identified in Treas. Reg. § 1.612–4(c)(1). Pp. 553–564.

(a) The definitional scheme established by the Code and accompanying regulations suggests strongly that the "property" with which § 57(a)(8) is concerned excludes just those improvements that the Hills wish to include in adjusted basis. Section 614(a) defines "property" for § 57(a)(8)'s purposes as "each separate interest owned by the taxpayer in each mineral deposit." Treasury Reg. § 1.611–1(d)(4) defines "mineral deposit" as "minerals in place," while Treas. Reg. § 1.611–1(d)(3) defines "mineral enterprise" to include "the mineral deposit or deposits *and improvements, if any, used in . . . the production of oil and gas.*" (Emphasis added.) Because these regulatory definitions were well established when Congress passed § 57(a)(8), it is reasonable to assume that Congress relied on the accepted distinction between them in its reference to "mineral deposit" in § 614. This conclusion is confirmed by Treas. Reg. § 1.57–1(h)(3)'s incorporation into § 57(a)(8) of § 1016 of the Code, 26 U. S. C. § 1016 (1976 ed. and Supp. V), which provides the rules

for making "[a]djustments to basis" in determining the amount of gain or loss a taxpayer must recognize when he sells or otherwise disposes of property. To follow § 1016(a)(2)'s directive that the taxpayer subtract from his original basis in the property "not less than the amount allowable" for exhaustion, wear and tear, obsolescence, amortization, and depletion, a taxpayer must determine whether parts of the item sold are subject to different tax treatments, and must treat those parts as different properties under the section. Depletion and depreciation are two of the major categories of tax treatment, and a review of pertinent Code and regulation provisions reveals that the boundaries between the two are virtually impassable. Thus, if a depletable mineral deposit and depreciable associated equipment are sold together, § 1016 requires the seller to separate them. In light of the incorporation of this rule into § 57(a)(8), and the Hills' failure to identify any exception to the rule, it may be inferred that their tangible costs may not be included in the basis of their depletable mineral deposits. Pp. 553–560.

(b) This conclusion is confirmed by the astonishing results of reading § 57(a)(8) in the manner urged by the Hills, whereby the tangible costs at issue here would shelter, over the years a taxpayer owned the capital item they represented, an amount of percentage depletion many times that of the costs themselves. It is hard to believe that Congress would enact a minimum tax to limit the benefit that taxpayers could realize from "items of tax preference," only to define one of those items in a way that would create an even greater proportional tax benefit from investing in tangible items, and to do so in an oblique fashion that, as far as appears, has no precedent in federal income tax history. Pp. 560–561.

(c) Contrary to the Hills' contention, two other Treasury Department regulations do not foreclose the foregoing conclusion. First, Treas. Reg. § 1.612–1(b)(1)'s reference, in its title, to a "[s]pecial rul[e]" excluding amounts recoverable through depreciation deductions from the basis for "cost" depletion of mineral property cannot have been intended to indicate that such amounts should, as a general rule, be included in the calculation of basis for percentage depletion, since that would allow the title of one subsection of a regulation to defeat the entire Code framework for determining basis, and since § 1.612–1(b)(1) was issued long before the minimum tax was enacted. Second, excluding tangible costs from the adjusted basis of mineral deposit interests would not run counter to Treas. Reg. § 1.612–4(b)(1), which specifies that certain intangible drilling and development costs are recoverable through depletion, as adjustments to the bases of the mineral deposit interests to which they relate. There is no reason why this regulation's deviation from general

principles of basis allocation, if such it be, should force the Government, or this Court, to create another deviation. Pp. 561–564.

945 F. 2d 1529, reversed.

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

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Acting Assistant Attorney General Bruton*, *Deputy Solicitor General Wallace*, *Ann Belanger Durney*, and *Charles Bricken.*

Richard B. Robinson argued the cause for respondents. With him on the brief was *Robert A. Wherry, Jr.**

JUSTICE SOUTER delivered the opinion of the Court.

Under §§ 56 and 57(a)(8) of the Internal Revenue Code of 1954, 26 U. S. C. §§ 56, 57(a)(8) (1976 ed.), a taxpayer must pay a "minimum tax" on the excess of the allowable depletion deduction for an interest in a mineral deposit over the taxpayer's adjusted basis for that interest. The question presented here is whether the term "adjusted basis," as used in § 57(a)(8), includes certain depreciable drilling and development costs identified in § 1.612–4(c)(1) of the Treasury Department regulations. We hold that the term does not cover such costs.

I

In 1981 and 1982, respondents William F. and Lola E. Hill were in the oil and gas exploration and production business, and, on their federal income tax returns for those respective years, they deducted $439,884 and $371,636 for depletion with respect to their interests in oil and gas deposits. Under 26 U. S. C. § 57(a)(8) (1976 ed.), the excess of the allowable depletion deduction for each of the deposit interests over the interest's "adjusted basis" is an "ite[m] of tax prefer-

**Timothy B. Dyk* filed a brief for the National Coal Association et al. as *amicus curiae* urging affirmance.

ence" on which a taxpayer must pay a "minimum tax" for the tax year in question.[1] See § 56(a). In determining the adjusted bases of their deposit interests, the Hills included not only the unrecovered portions of the amounts they originally paid to purchase the interests, but also the unrecovered costs of depreciable tangible items (machinery, tools, pipes, and so forth) used to exploit the deposits. Having thus reduced the amount of each item of tax preference under § 57(a)(8), they calculated and paid minimum taxes on those items of $29,812 for 1981 and $26,736 for 1982.

The Commissioner of Internal Revenue disputed the inclusion of the tangible costs in the deposits' adjusted bases, and assessed a larger minimum tax based on their exclusion. The Hills paid the resulting respective deficiencies of $30,963 and $18,733, and filed a refund claim, which the Commissioner denied. The taxpayers then sued the United States, petitioner here, for a refund in the Claims Court, which granted summary judgment in their favor. 21 Cl. Ct. 713 (1990). The Court of Appeals for the Federal Circuit affirmed. 945 F. 2d 1529 (1991). Because of the importance of the issue to the federal fisc, we granted certiorari. 503 U. S. 1004 (1992). We now reverse.

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[1] All references to the Internal Revenue Code and related Treasury Regulations are to those that applied during the tax years at issue. The Treasury Regulations are cited as codified in the 1981 and 1982 editions of Title 26 of the Code of Federal Regulations. In the course of enacting the Internal Revenue Code of 1986, Congress redesignated § 57(a)(8) as § 57(a)(1) for taxable years beginning after 1986. See Tax Reform Act of 1986, Pub. L. 99–514, §§ 701(a) and 701(f)(1), 100 Stat. 2333, 2343. In October 1992, Congress enacted the Energy Policy Act of 1992, Pub. L. 102–486, 106 Stat. 2776. Section 1915(a) of that Act amends § 57(a)(1) of the Internal Revenue Code and provides that, for taxable years beginning after December 31, 1992, the depletion allowance permitted under § 613A(c) of the Code will not be treated as an item of tax preference subject to taxation as alternative minimum taxable income. See n. 3, *infra*.

II

An oil and gas producer cannot ordinarily depreciate or otherwise recover (before disposition) his investment in land on which he drills wells because the process of producing his taxable income does not wear out or use up the land. See, *e. g.*, Treas. Reg. § 1.167(a)–2 (disallowing a depreciation deduction for "land apart from the improvements or physical development added to it"). Part of the purchase price of a fee simple interest in the land, however, represents investment in the right to extract any oil and gas from subsurface deposits, which (unlike the land) are "wasting assets," gradually depleted as the minerals are removed. An owner of such wasting assets, according to basic income tax theory, should accordingly be allowed a "reasonable allowance for depletion," 26 U. S. C. § 611(a) (1976 ed.), "to compensate [him] for the part exhausted in production, so that when the minerals are gone, the owner's capital and his capital assets remain unimpaired." *Paragon Jewel Coal Co.* v. *Commissioner,* 380 U. S. 624, 631 (1965).

To a degree, however, practice and theory have drifted apart. The Code and associated Treasury Department regulations require taxpayers to calculate depletion allowances by whichever of two methods produces the larger deduction for the current taxable year. Treas. Reg. § 1.611–1(a)(1); see also 26 U. S. C. § 613(a) (1976 ed.) ("In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section [concerning percentage depletion]"). The first method, "cost depletion," remains firmly moored to the rationale articulated in *Paragon Jewel.* Under that method, the taxpayer estimates the number of recoverable units in his mineral deposit, and deducts an appropriate portion of the deposit's adjusted basis for each unit extracted and sold. See Treas. Reg. §§ 1.611–2, 1.612–1. When the sum of prior deductions equals the cost or other basis of the deposit, plus allowable capital addi-

tions,[2] "[n]o further deductions for cost depletion shall be allowed." Treas. Reg. § 1.611–2(b)(2). The second method, "percentage depletion," has no such ties. It generously allows the taxpayer extracting minerals from a deposit to deduct a specified percentage of his gross income, even when his prior depletion deductions have exceeded his investment in the deposit. See 26 U. S. C. § 613 (1976 ed. and Supp. V); Treas. Reg. § 1.613–1. For the tax years at issue, percentage depletion produced the larger deduction for the Hills, and they accordingly calculated their depletion allowance according to that method.

For those tax years, however, percentage depletion's gleam is dimmed by the minimum tax.[3] Section 57(a)(8) of

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[2] Allowable capital additions include intangible drilling and development costs that are "not represented by physical property," such as expenditures for clearing ground, draining, road making, surveying, geological work, grading, and the drilling, shooting, and cleaning of wells, to the extent that the taxpayer opts to capitalize these costs rather than deducting them as expenses. Treas. Reg. § 1.612–4(b)(1). For further discussion of these costs, see *infra*, at 563–564.

[3] The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248, § 201, 96 Stat. 411, repealed the "minimum tax" for noncorporate taxpayers for tax years beginning after December 31, 1982. See §§ 201(c)(1), 201(e)(1). At the same time, however, the Act also included items of tax preference, such as excess percentage depletion under § 57(a)(8), in the calculation of a taxpayer's "alternative minimum taxable income." § 201(a). While the "minimum tax" was simply added to the amount of income tax due under the normal provisions, the "alternative minimum tax" provision, 26 U. S. C. § 55 (1982 ed.), requires the recalculation of a taxpayer's income under a different set of rules. A tax is then imposed at a graduated rate on the taxpayer's "alternative minimum taxable income"; if the amount of alternative minimum tax so calculated is greater than the income tax calculated under the ordinary provisions, the taxpayer must pay both the normal tax and the amount by which his alternative minimum tax liability exceeds his ordinary tax liability. Because items of tax preference were added to "alternative minimum taxable income," the issue in this case continued to be relevant for tax years beginning after December 31, 1982. For the subsequent history of § 57(a)(8), see n. 1, *supra*.

the Code requires a taxpayer to calculate as a "tax preference" "[w]ith respect to each [interest in a mineral deposit],[4] the excess of the deduction for depletion allowable under section 611 for the taxable year over the adjusted basis of the [mineral deposit interest] at the end of the taxable year (determined without regard to the depletion deduction for the taxable year)." In turn, § 56 of the Code requires a taxpayer to pay an extra minimum tax of 15% on the amount by which the sum of the enumerated tax-preference items in § 57(a) exceeds the specific deductions permitted by § 56. Because the amount subject to the extra tax is reduced dollar for dollar by every outlay that can be added to the adjusted basis of the mineral deposit interest, a taxpayer would like as long a list of eligible outlays as possible.

In this case the dispute is about the inclusion in the adjusted basis of certain tangible drilling and development costs, as defined by the Treasury Regulations implementing §§ 263(c) and 612 of the Code. Section 263(c) grants taxpayers an option to deduct against current income certain "intangible drilling and development costs." The regulations limit the costs recoverable under that option by distinguishing "intangible costs" from costs for "capital items," which the parties refer to as "tangible costs":

> "The option with respect to intangible drilling and development costs does not apply to expenditures by which the taxpayer acquires tangible property ordi-

[4] Section 57(a)(8) applies to "each property (as defined in section 614)." Section 614(a) defines "property," "[f]or the purpose of computing the depletion allowance in the case of mines, wells, and other natural deposits," as "each separate interest owned by the taxpayer in each mineral deposit in each separate tract or parcel of land." (The remainder of § 614 provides detailed rules about when a taxpayer may, and sometimes must, combine separate interests and treat them as one "property.") Section 1.614–1(a) of the Treasury Department regulations makes the definition in § 614 applicable "[f]or purposes of subtitle A of the [Internal Revenue] Code."

> narily considered as having a salvage value. Examples of such items are the costs of the actual materials in those structures which are constructed in the wells and on the property, and the cost of drilling tools, pipe, casing, tubing, tanks, engines, boilers, machines, etc. . . . These are capital items and are returnable through depreciation." Treas. Reg. § 1.612–4(c)(1).[5]

It is the cost of such capital items as these, to the extent that they have not already been recovered through depreciation, that the Hills would like to add to the bases of their mineral deposit interests for purposes of calculating the amount of their percentage depletion deductions subject to the minimum tax.

III

The taxpayers enter the race with a handicap. As we have noted, see n. 4, *supra*, § 57(a)(8) defines the "property" with which it is concerned by reference to § 614, which speaks in terms of the adjusted basis of "each separate interest owned by the taxpayer in each mineral deposit." 26 U. S. C. § 614(a) (1976 ed). A regulation defines "mineral deposit" as "minerals in place," Treas. Reg. § 1.611–1(d)(4), while a neighboring regulation defines another term, "mineral enterprise," to include "the mineral deposit or deposits *and improvements, if any, used in mining or in the production of oil and gas,*" Treas. Reg. § 1.611–1(d)(3) (emphasis added). Because these regulatory definitions were well established at the time Congress passed § 57(a)(8), see 25 Fed. Reg. 11796 (1960); Pub. L. 91–172, § 301, 83 Stat. 580, 582, we think it reasonable to assume that Congress relied on the accepted distinction between them in its reference to

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[5] The regulations also foreclose the option with respect to the cost of "labor, fuel, repairs, hauling, supplies, etc., in connection with the operation of the wells and of other facilities on the property for the production of oil or gas." Treas. Reg. § 1.612–4(c)(2). These costs must be "charged off as expense." *Ibid.*

"mineral deposit" as contained in § 614. Thus the definitional scheme suggests strongly that the "property" we are concerned with in § 57(a)(8) excludes just those improvements that the Hills wish to treat as part of the property's adjusted basis.

They assert, however, (and the Government does not dispute) that the term "mineral enterprise" occurs in only that one operative provision in the regulations, Treas. Reg. § 1.611–1(d)(4), which concerns the allocation of a portion of the cost of a mineral enterprise to a mineral deposit or deposits. On that basis, the Hills argue that the term has the limited function of "assist[ing] in identifying depletable and depreciable costs when an operating mineral property is acquired as a unit." Brief for Respondents 18, n. 21. Consistently with that view, they note, a regulation implementing § 57(a)(8) directs us to "see section 1016 and the regulations thereunder . . . [f]or the determination of the adjusted basis of the property." Treas. Reg. § 1.57–1(h)(3). The computation of adjusted basis under 26 U. S. C. § 1016 (1976 ed. and Supp. V), they argue, is independent of the definition and function of "mineral enterprise" in the § 611 regulations; thus, the implications of this term's definition do not extend to the calculation at issue in this case.

We agree that § 1016 is the proper place to look for the rules concerning adjustment of basis; but we conclude that the computation of adjusted basis under § 1016 is wholly predicated on, rather than independent of, an understanding of "mineral deposit" as distinct from "improvements" within the meaning of the regulations under § 611.

Section 1016 is one of a number of general provisions that together determine the amount of gain or loss a taxpayer must recognize when he sells or otherwise disposes of any type of property. Section 1001(a) provides the basic rule: gain or loss is determined by subtracting "adjusted basis" from "amount realized." Section 1011(a) defines "adjusted basis" as "basis (determined under section 1012 [or other

parts of the Code]), adjusted as provided in section 1016." Section 1016 provides the rules for making "[a]djustments to basis."

The taxpayers, acknowledging the centrality of § 1016, seize on the last phrase of a regulation addressing that section:

> "The cost or other basis shall be properly adjusted for any expenditure . . . or other item, properly chargeable to capital account, including the cost of improvements and betterments made to the property." Treas. Reg. § 1.1016–2(a).

The ordinary meanings of the terms "improvements" and "betterments," the Hills say, include all valuable additions to property that are more than mere repairs; the tangible costs that they have incurred to exploit their mineral deposits increase the value of those deposits, and in any case are specifically referred to in the regulations implementing § 611 as "improvements," see Treas. Reg. § 1.611–5; therefore, those costs should be included in the adjusted basis of the mineral deposit for purposes of § 1016.

The Hills' chosen passage, however, cannot carry the weight they ask it to bear. The purpose of the phrase "including the cost of improvements and betterments made to the property" in Treas. Reg. § 1.1016–2(a) is not to provide guidance in particular cases as to whether, for tax accounting purposes, an expense should be added to the basis of an existing "property," or treated as a separate "property" of its own. Rather, it is to ensure coordination of § 1016 with § 263, the Code section from which the term "improvements and betterments" (which should probably be read as a unit) is borrowed. Section 263(a)(1) provides that an expenditure may not currently be deducted from income if it is "paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or es-

tate."[6] 26 U. S. C. § 263(a)(1) (1976 ed. and Supp. V). We have said that "[t]he purpose of § 263 is to reflect the basic principle that a capital expenditure may not be deducted from current income. It serves to prevent a taxpayer from utilizing currently a deduction properly attributable, through amortization, to later tax years when the capital asset becomes income producing." *Commissioner* v. *Idaho Power Co.*, 418 U. S. 1, 16 (1974). In turn, inclusion of the term "improvements and betterments" in Treas. Reg. § 1.1016–2(a) ensures the fulfillment of § 263's implicit promise: If a taxpayer cannot deduct an expenditure from current income because it has been deemed an "improvement or betterment" to property, he will be able to recover it later, either through a form of cost recovery such as depreciation or depletion, or upon sale as a deduction from the amount realized.[7]

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[6] Section 263(a)(1) has one of the longest lineages of any provision in the Internal Revenue Code. The Revenue Act of 1864 included a provision specifying that "no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate." § 117, 13 Stat. 282. The wording of this provision remained the same in § 28 of the Revenue Act of 1894, 28 Stat. 553, and in § 2(B) of the Revenue Act of 1913, 38 Stat. 167. The current wording of the provision was adopted in the Revenue Act of 1918. See § 215(b) of the Revenue Act of 1918, 40 Stat. 1069. The language of Treas. Reg. § 1.1016–2(a) apparently originated in a passage in a House Committee Report on the Revenue Act of 1924, discussing the progenitor of 26 U. S. C. § 1016. See H. R. Rep. No. 179, 68th Cong., 1st Sess., 50 (1924) ("Under this provision capital charges, such as improvements and betterments . . . are to be added to the cost of the property in determining the gain or loss from its subsequent sale"). The forerunner to Treas. Reg. § 1.1016–2(a) was issued that same year. See Treas. Regs. 65, Art. 581 (1924).

[7] After tracing the word "improvement" from the regulations implementing § 611 through the regulations implementing § 1016 to the text of § 263, one might hope that § 263 itself would provide some insight into whether tangible development costs should be treated as an "improvement" to the mineral deposit, or as a separate property. Two circumstances dash this hope. First, as we said above, the phrase "improve-

Thus it is not by deciphering particular terms in the regulations accompanying § 1016 that the question in this case is answered, but by relying on the basic principles embodied in § 1016's directives. For our purposes, the most important mandate is found in § 1016(a)(2), which requires a taxpayer to subtract from his original basis in the property sold or exchanged "not less than the amount allowable [for exhaustion, wear and tear, obsolescence, amortization, and depletion] under this subtitle or prior income tax laws." In other words, whether or not the taxpayer ever took a depreciation, amortization, or depletion deduction with respect to the item he is selling, he must, for purposes of § 1016, determine whether such deductions were allowable with respect to that item, and reduce his basis by at least that allowable amount.[8]

To follow this directive, the taxpayer must determine whether parts of the item sold are subject to different tax treatments, and must treat those parts as different properties for purposes of § 1016. Thus, a taxpayer who bought an apartment building and the land it sits on for a single price must determine how much of that price went to pay for each, and must treat each cost as a separate asset for purposes of

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ments and betterments," as used in the § 1016 regulations and in § 263, should probably be read as a single term unrelated to the term "improvements" in § 611 and the regulations thereunder. Second, § 263 is concerned only with identifying those payments that "serv[e] to create or enhance . . . what is essentially a separate and distinct additional asset." *Commissioner* v. *Lincoln Savings & Loan Assn.*, 403 U. S. 345, 354 (1971). So long as one can say that a payment must either be "creating" a separate asset or "enhancing" one that already exists, one need not, for purposes of § 263, identify which of these is the case. Here, we are presented with precisely that question.

[8] The directive is phrased "not less than the amount allowable" to account for the case in which a taxpayer has erroneously deducted *more* than that amount in a prior year. In that case, the taxpayer must reduce the basis by the greater amount actually deducted, to the extent that it resulted "(by reason of the deductions so allowed) in a reduction for any taxable year of [his] taxes." 26 U. S. C. § 1016(a)(2)(B) (1976 ed.); see § 1016(a)(2)(A).

§ 1016. This is so because the depreciation deduction allowable for the building (if the building is used to produce income) must, upon the sale or exchange of the property, be subtracted from the taxpayer's basis in the building whether the deduction was taken or not; but there is no subtraction from the land's basis since no such deduction is allowable for the land. See, *e. g.*, Treas. Reg. § 1.167(a)–5 (requiring an apportionment of basis when a taxpayer has acquired "a combination of depreciable and nondepreciable property for a lump sum, as for example, buildings and land").

Although the Code and regulations allow some flexibility within such major categories of tax treatment,[9] the boundaries between the major categories are almost completely impassable. When a taxpayer is dealing with associated items falling into two different major categories, he cannot, as a general matter, choose to treat those items as a single property falling into one category or the other; a taxpayer may not, for example, decide to treat some or all of his apartment building as more land. Nor may a taxpayer choose to add "improvement" costs to the basis of whichever item he pleases: some costs, say of a new roof, must be treated as adding to the value of the depreciable building (or as separate depreciable assets), whereas other costs, like that of grading a building site, must be treated as additions to the value of the nondepreciable land. See, *e. g.*, Rev. Rul. 74–265, 1974–1 Cum. Bull. 56 (distinguishing between depreciable and nondepreciable improvements to land).

Depletion and depreciation are two of these major categories of tax treatment. As this Court said almost a half-

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[9] For example, a taxpayer may set up a depreciation account for a new furnace separate from that of the account of the building in which it is installed; he may also, under some circumstances, set up a "composite" account which combines the cost of the building with the cost of "improvements," such as the furnace. See generally Treas. Reg. § 1.167(a)–7 (describing "group," "classified," "composite," and component accounts for depreciable property).

century ago, "[t]h[e] distinction between depletion and depreciation runs through the basis provisions of the [Internal Revenue Code]." *Choate* v. *Commissioner*, 324 U. S. 1, 3 (1945). Thus, the Code's depreciation allowance "does not apply to natural resources which are subject to the allowance for depletion provided in section 611." Treas. Reg. § 1.167(a)–2. Accordingly, § 611 itself carefully appends, to its provision for "a reasonable allowance for depletion" in the case of natural deposits and timber, the qualification "and for depreciation of improvements, according to the peculiar conditions in each case."[10] 26 U. S. C. § 611(a) (1976 ed.); see Treas. Reg. § 1.611–5(a). To implement this distinction, the regulations under § 611, mentioned above, separately define "mineral deposit" as "minerals in place," Treas. Reg. § 1.611–1(d)(4), and "mineral enterprise" as including "the mineral deposit or deposits and improvements," § 1.611–1(d)(3). The section defining "mineral deposit" then further provides that "[w]hen a mineral enterprise is acquired as a unit, the cost of any interest in the mineral deposit or deposits is that proportion of the total cost of the mineral enterprise which the value of the interest in the deposit or deposits bears to the value of the entire enterprise at the time of its acquisition." Treas. Reg. § 1.611–1(d)(4); see also § 1.611–2(g)(2)(vii) (requiring a statement to be attached to the taxpayer's return showing "[a]n allocation of the cost or value among the mineral property, improvements and the surface of the land for purposes other than mineral production"). These provisions are designed to isolate those portions of the cost of a "mineral enterprise" that are subject to recovery through depletion.

Thus, just as one generally cannot calculate an adjusted basis under § 1016 by treating an apartment building as "more land," one generally cannot treat tangible tools and

[10] As we have noted, see n. 7, *supra*, the word "improvements" carries a different meaning here than it does within the term "improvements or betterments" as used in § 263(a).

equipment as "more mineral deposit." If a mineral deposit and associated equipment are sold together, § 1016 requires the seller to separate them for the purpose of determining his gain or loss on the sale, just as §§ 167 and 611 required him to keep them separate for the purpose of calculating his depreciation and depletion deductions. Since, as the Hills point out, a regulation incorporates the § 1016 rule into § 57(a)(8), and since the Hills have identified no exception to this rule, we infer that the Hills' tangible costs may not be included in the basis of depletable mineral deposits for purposes of calculating the amount of percentage depletion subject to the minimum tax.

IV

Our conclusion is confirmed by the astonishing, circuitously achieved results of reading § 57(a)(8) as the taxpayers urge. A regulation that the Hills do not challenge provides that "[i]n no event shall percentage depletion in excess of cost or other basis of the property be credited to the improvements account or the depreciation reserve account." Treas. Reg. § 1.611–2(b)(2). The tangible costs at issue here are recorded in these accounts. Thus, under this regulation, a tangible cost is not itself adjusted for the amount of percentage depletion that on the Hills' theory it would shelter from the minimum tax each year. As a result, the tangible cost would shelter, over the years the taxpayer owned the capital item it represented, an amount of percentage depletion many times that of the cost itself. For example, a $21,000 capital item, subject to straight-line depreciation over 20 years with a salvage value of $1,000, would add $20,000 to the basis of the mineral deposit the first year,[11]

[11] Under § 57(a)(8), percentage depletion is offset by "the adjusted basis of the [mineral deposit interest] *at the end of the taxable year.*" (Emphasis added.) Assuming that the capital item was placed in service at the

$19,000 the second year, and so on for 20 years. At the end of the 20th year, the item would be fully depreciated, and the taxpayer's basis in the item would then remain at $1,000, the salvage value, for as many more years as he continued to own it. Thus, over the first 20 years, the capital item would shelter $210,000, or 10 times its cost, from the minimum tax; beginning in the 21st year, it would shelter $1,000 per year for as long as it remained in the taxpayer's hands. At a minimum tax rate of 15%, a taxpayer would realize a tax benefit, from his $21,000 investment, of $31,500 over the first 20 years from § 57(a)(8) alone, without regard to the additional tax benefit from ordinary depreciation of the item. It is hard to believe that Congress would enact a minimum tax to limit the benefit that taxpayers could realize from "items of tax preference," only to define one of those items in a way that would create an even greater proportional tax benefit from investing in tangible items, and to do so in an oblique fashion that, as far as we know, has no precedent in the history of the federal income tax.

V

The Hills contend that two Treasury Department regulations we have not yet discussed foreclose our conclusion. They point first to one of the cost depletion regulations under § 612, which, but for its title and one adjective, would independently reinforce our conclusion:

> "The basis for cost depletion of mineral or timber property does not include:

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beginning of a taxable year, by the end of the year the taxpayer's basis in it would be reduced by the first year's depreciation. Thus, in our example, the $21,000 capital item would add $20,000 to the taxpayer's basis in the mineral deposit, for purposes of § 57(a)(8), the first year it was placed in service.

> "(i) Amounts recoverable through depreciation deductions, through deferred expenses, and through deductions other than depletion, and
>
> "(ii) The residual value of land and improvements at the end of operations." Treas. Reg. § 1.612–1(b)(1).

This, of course, is exactly the conclusion in the case of percentage depletion that we have reached after a long detour through § 1016. Section 1.612–1(b)(1) applies by its terms, however, only to the determination of mineral deposit basis for the purpose of calculating *cost* depletion; and the title of § 1.612–1(b) is "*Special rules.*" Therefore, reason the Hills, the "general rule" for determining mineral deposit basis under § 1016 must include the items, such as "[a]mounts recoverable through depreciation deductions," excluded in the "special rule." But this argument proves too much. If the Hills stuck to their logic, they would have to claim that they could also add "[t]he residual value of land and improvements at the end of operations" to their bases in their mineral deposit interests, an absurdity that they cannot, and do not try to, support. The simple answer is that when an arguable suggestion of the title of one subsection of a regulation is pitted against the entire Code framework for determining basis, the Code wins, and the title is at most an infelicity.

The infelicity is understandable here. The calculation of percentage depletion is unconnected to the concept of basis; the annual percentage depletion deduction is not measured in relation to basis, nor are the cumulative deductions limited by basis. See 26 U. S. C. § 613 (1976 ed. and Supp. V). The concepts of basis and percentage depletion meet only in the minimum tax provisions, for the purpose of calculating the item of tax preference in § 57(a)(8). Since § 1.612–1(b)(1) was issued long before the minimum tax was enacted, see 25 Fed. Reg. 11801 (1960); Pub. L. 91–172, § 301, 83 Stat. 580, that regulation's reference to a "special rule" for "cost" depletion cannot have been intended to indicate that some

other rule applied to the calculation of basis for percentage depletion. After the minimum tax was enacted, the Treasury Department inserted a regulation about basis for percentage depletion where one would expect it: among the regulations implementing the minimum tax. That regulation, § 1.57–1(h)(3), directs us to § 1016, but unfortunately contains no correlative reference to the regulations under § 612.

Second, the Hills argue that excluding tangible costs from the adjusted basis of their mineral deposit interests would run counter to regulations specifying the inclusion of certain intangible costs. As we have already noted, 26 U. S. C. § 263(c) (1976 ed., Supp. V) grants taxpayers an option to deduct as expenses certain "intangible drilling and development costs." If a taxpayer chooses instead to capitalize those costs, the regulations require the taxpayer to sort the costs into two bins. Costs "represented by physical property" are recoverable through depreciation, either through adjustments to the bases of pre-existing items to which the costs relate, or through an initial entry in a new depreciation account. Treas. Reg. § 1.612–4(b)(2). Costs "not represented by physical property" are recoverable through depletion, as adjustments to the bases of the mineral deposit interests to which they relate. § 1.612–4(b)(1); see § 1.612–4(d) (if a taxpayer fails to elect to expense intangible costs correctly, "he shall be deemed to have elected to recover such costs through depletion to the extent that they are not represented by physical property, and through depreciation to the extent that they are represented by physical property"). Since these latter costs are added to depletable basis, the taxpayers argue, so should the tangible costs that are excluded altogether from the § 263(c) option. We fail to see the logic of this argument. To the extent that the regulation allowing intangible costs "not represented by physical property" to be added to a mineral deposit's basis deviates from general principles of basis allocation, we see no reason why

one deviation should force the Government, or this Court, to create another. Nor have the Hills explained why this regulation in fact represents a deviation.[12]

The judgment of the Court of Appeals is

Reversed.

[12] The taxpayers also cite Internal Revenue Service Technical Advice Memorandum 8314011 (Dec. 22, 1982), which holds that unamortized deferred development expenditures under § 616 of the Code are included in the basis of a mineral deposit for purposes of § 57(a)(8). As respondents acknowledge, the Code specifically provides that such memoranda "may not be used or cited as precedent." 26 U. S. C. § 6110(j)(3) (1976 ed.). In any case, § 616 sets up a system for the treatment of development expenditures entirely different from the system at issue here; in particular, § 616(c) specifically mandates that expenses deferred under § 616(b) "shall be taken into account in computing the adjusted basis of the mine or deposit." Thus, Technical Advice Memorandum 8314011 simply is not relevant to the question presented in this case.

Reporter's Note

The next page is purposely numbered 801. The numbers between 564 and 801 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 OCTOBER 5, 1992, THROUGH FEBRUARY 19, 1993

OCTOBER 5, 1992

Affirmed on Appeal

No. 91–1546. SLAGLE *v.* TERRAZAS ET AL. Affirmed on appeal from D. C. W. D. Tex. Reported below: 789 F. Supp. 828.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The Report of the Special Committee of the Fifth Circuit Judicial Council demonstrated that neither corruption nor improper motive affected the District Court's determination of the boundaries of Senate Districts 19 and 26. Nevertheless, the procedures that were followed in drawing the boundaries of those districts, as established in the order under review, represented such a serious departure from procedures that should be observed in fashioning relief in adversary litigation that I would vacate the judgment of the District Court with instructions to redraw the boundaries of those two Senate Districts after the parties have been given an adequate opportunity to be heard on issues that relate to those two districts.

No. 91–2038. POPE ET AL. *v.* BLUE ET AL. Affirmed on appeal from D. C. W. D. N. C. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 809 F. Supp. 392.

Vacated and Remanded on Appeal

No. 91–1862. GANTT ET AL. *v.* SKELOS ET AL. Appeal from D. C. E. D. N. Y. Judgment vacated and case remanded with instructions to dismiss the appeal as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 796 F. Supp. 677.

Certiorari Granted—Vacated and Remanded

No. 91–1493. GEORGIA *v.* CARR. Sup. Ct. Ga. Certiorari granted, judgment vacated, and case remanded for further consid-

eration in light of *Georgia* v. *McCollum*, 505 U. S. 42 (1992). Reported below: 261 Ga. 845, 413 S. E. 2d 192.

No. 91–1593. MUNOZ-ROMO *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed June 24, 1992. Reported below: 947 F. 2d 170.

No. 91–1793. COONES *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *Freeland & Kronz*, 503 U. S. 638 (1992). Reported below: 954 F. 2d 596.

No. 91–1925. CITY OF ROCKLIN ET AL. *v.* SIERRA LAKES RESERVE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Yee* v. *Escondido*, 503 U. S. 519 (1992). Reported below: 938 F. 2d 951.

No. 91–1938. YELLOW FREIGHT SYSTEM, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded with directions to dismiss as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 948 F. 2d 98.

No. 91–1988. LONGO *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burson* v. *Freeman*, 504 U. S. 191 (1992). Reported below: 953 F. 2d 790.

No. 91–7430. JACKSON *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Morgan* v. *Illinois*, 504 U. S. 719 (1992). Reported below: 145 Ill. 2d 43, 582 N. E. 2d 125.

No. 91–8445. BACIGALUPO *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stringer* v. *Black*, 503 U. S. 222 (1992). Reported below: 1 Cal. 4th 103, 820 P. 2d 559.

No. 91–8584. PONTICELLI *v.* FLORIDA. 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 *Espinosa* v. *Florida*, 505 U. S. 1079 (1992). Reported below: 593 So. 2d 483.

No. 92–249. AMERICAN AIRLINES, INC. *v.* WOLENS ET AL. Sup. Ct. Ill. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992). Reported below: 147 Ill. 2d 367, 589 N. E. 2d 533.

No. 92–5228. HODGES *v.* FLORIDA. 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 *Espinosa* v. *Florida*, 505 U. S. 1079 (1992). Reported below: 595 So. 2d 929.

Certiorari Dismissed

No. 91–8064. DAVIS *v.* OHIO. Sup. Ct. Ohio. Certiorari dismissed. Reported below: 62 Ohio St. 3d 326, 581 N. E. 2d 1362.

No. 91–8294. ALLBEE *v.* MAAS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari dismissed. Reported below: 953 F. 2d 1386.

Miscellaneous Orders

No. ——. MASON *v.* UNITED STATES DISTRICT COURT. Motion to direct the Clerk to file petition for writ of certiorari without paying the docket fee and/or without filing an affidavit in support of a motion for leave to proceed *in forma pauperis* denied.

No. ——. PROGRESS ENGINEERING & CONSULTING ENTERPRISE, INC. *v.* MASSONGILL. Motion of a nonattorney to direct the Clerk to file petition for writ of certiorari on behalf of a corporation and *in forma pauperis* denied.

No. ——. STOJANOWSKI *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE;

No. ——. HARVILL *v.* HARVILL; and

No. ——. CONDADO PLAZA & CASINO *v.* ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO CONCILIATION ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. ——-——. E. S. *v.* ILLINOIS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. A–154. THOM *v.* UNITED STATES ET AL. C. A. 8th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–157. HEUNG-KONG *v.* SEIFERT, WARDEN. D. C. C. D. Cal. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–174. SMALIS *v.* COURT OF COMMON PLEAS BAIL AGENCY. Application for certificate of probable cause, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–212. HEUNG-KONG *v.* SEIFERT, WARDEN. C. A. 9th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1121. IN RE DISBARMENT OF RAGANO. Frank Ragano, of Tampa, Fla., 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 practice before the Bar of this Court. The rule to show cause, heretofore issued on May 18, 1992 [504 U. S. 904], is hereby discharged.

No. D–1126. IN RE DISBARMENT OF MARTIN. Motion to defer consideration denied. Disbarment entered. [For earlier order herein, see 504 U. S. 938.]

No. D–1134. IN RE DISBARMENT OF KIMURA. Robert Yutaka Kimura, of Honolulu, Haw., 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 practice before the Bar of this Court. The rule to show cause, heretofore issued on June 8, 1992 [504 U. S. 970], is hereby discharged.

No. D–1143. IN RE DISBARMENT OF BYRD. Disbarment entered. [For earlier order herein, see 505 U. S. 1217.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Final Report of the River Master for Accounting Year 1991 received and ordered filed. [For earlier order herein, see, *e. g.*, 504 U. S. 954.]

No. 105, Orig. KANSAS *v.* COLORADO. Motion of the Special Master for award of interim fees and reimbursement of expenses granted, and the Special Master is awarded a total of $244,063.47 to be paid as follows: 40% by Kansas, 40% by Colorado, and 20% by the United States. [For earlier order herein, see, *e. g.*, 502 U. S. 1027.]

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of Wyoming for leave to file a reply brief granted. Exceptions to the Reports of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 504 U. S. 982.]

No. 111, Orig. DELAWARE *v.* NEW YORK. Motions of Midwest Securities Trust Co. et al. and Securities Industries Association et al. for leave to file briefs as *amici curiae* granted. Motion of Delaware for leave to file a brief in reply to briefs of the Texas Group Intervenors granted. Motion of New York for leave to file a reply brief granted. Motion of Massachusetts for leave to file a complaint in intervention granted. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 504 U. S. 939.]

No. 119, Orig. CONNECTICUT ET AL. *v.* NEW HAMPSHIRE. Answer of New Hampshire to the complaint of the utility intervenors referred to the Special Master. JUSTICE SOUTER took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 505 U. S. 1202.]

No. 90–114. CONSOLIDATION COAL CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL., 501 U. S. 680. Motion of respondent Albert C. Dayton for award of attorney's fees denied without prejudice to refiling in the United States Court of Appeals for the Fourth Circuit. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 91–155. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. *v.* LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE, 505 U. S. 672; and

No. 91–339. LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL., 505 U. S. 830. Motion of Walter Lee to retax costs denied.

No. 91–261. BUILDING & CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.; and No. 91–274. MASSACHUSETTS WATER RESOURCES AUTHORITY ET AL. *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 504 U. S. 908.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–1353. CONROY *v.* ANISKOFF ET AL. Sup. Jud. Ct. Me. [Certiorari granted, 505 U. S. 1203.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–1496. REITER ET AL. *v.* COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC., ET AL. C. A. 4th Cir. [Certiorari granted, 504 U. S. 907.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–1600. HAZEN PAPER CO. ET AL. *v.* BIGGINS. C. A. 1st Cir. [Certiorari granted, 505 U. S. 1203.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–1958. HELLING ET AL. *v.* MCKINNEY. C. A. 9th Cir. [Certiorari granted, 505 U. S. 1218.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–5397. NEGONSOTT *v.* SAMUELS, WARDEN, ET AL. C. A. 10th Cir. [Certiorari granted, 505 U. S. 1218.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–7358. BRECHT *v.* ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION. C. A. 7th Cir. [Certiorari granted, 504 U. S. 972.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–522. SAUDI ARABIA ET AL. *v.* NELSON ET UX. C. A. 11th Cir. [Certiorari granted, 504 U. S. 972.] Motion of the So-

licitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motions of Human Rights Watch and International Human Rights Law Group et al. for leave to file briefs as *amici curiae* granted.

No. 91–538. FORSYTH COUNTY, GEORGIA *v.* NATIONALIST MOVEMENT, 505 U. S. 123. Motion of petitioner to permit late filing or response to motion for attorney's fees granted. Motion of respondent for attorney's fees denied.

No. 91–610. LOCAL 144 NURSING HOME PENSION FUND ET AL. *v.* DEMISAY ET AL. C. A. 2d Cir. [Certiorari granted, 505 U. S. 1203.] Motion of petitioners to substitute Frank Russo et al., Trustees of the Local 144 Nursing Home Pension Fund and New York City Nursing Home—Local 144 Welfare Fund, in place of Peter Ottley, deceased, and John Kelley et al. granted. Motions of Western Conference of Teamsters Pension Trust Fund, National Coordinating Committee for Multiemployer Plans, and Central States, Southeast and Southwest Areas Health and Welfare Pension Funds et al. for leave to file briefs as *amici curiae* granted.

No. 91–687. MONTANA *v.* IMLAY. Sup. Ct. Mont. [Certiorari granted, 503 U. S. 905.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel *nunc pro tunc* granted, and it is ordered that Billy B. Miller, Esq., of Great Falls, Mont., be appointed to serve as counsel for respondent in this case. Motion of petitioner to strike supplemental brief of respondent denied.

No. 91–790. CSX TRANSPORTATION, INC. *v.* EASTERWOOD; and No. 91–1206. EASTERWOOD *v.* CSX TRANSPORTATION, INC. C. A. 11th Cir. [Certiorari granted, 505 U. S. 1217.] Motion of respondent/cross-petitioner to permit Tambra Pannell Colston, Esq., to present oral argument *pro hac vice* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BLACKMUN would deny this motion.

No. 91–794. HARPER ET AL. *v.* VIRGINIA DEPARTMENT OF TAXATION. Sup. Ct. Va. [Certiorari granted, 504 U. S. 907.] Motion of Tax Executives Institute, Inc., for leave to file a brief as *amicus curiae* denied.

No. 91–904. CONCRETE PIPE & PRODUCTS OF CALIFORNIA, INC. *v.* CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA. C. A. 9th Cir. [Certiorari granted, 504 U. S. 940.] Motion of Pension Benefit Guaranty Corporation for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motions of National Coordinating Committee for Multiemployer Plans and Central States, Southeast and Southwest Areas Pension Fund for leave to file briefs as *amici curiae* granted.

No. 91–1160. ARAVE, WARDEN *v.* CREECH. C. A. 9th Cir. [Certiorari granted, 504 U. S. 984.] Motion for appointment of counsel granted, and it is ordered that Cliff Gardner, Esq., of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 91–1188. ROWLAND, FORMER DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADVISORY COUNCIL. C. A. 9th Cir. [Certiorari granted, 503 U. S. 905.] Motion of respondent to direct the Clerk to print respondent's supplemental brief granted.

No. 91–1300. UNITED STATES *v.* DUNNIGAN. C. A. 4th Cir. [Certiorari granted, 504 U. S. 940.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Brent E. Beveridge, Esq., of Fairmont, W. Va., be appointed to serve as counsel for respondent in this case.

No. 91–1306. UNITED STATES *v.* OLANO ET AL. C. A. 9th Cir. [Certiorari granted, 504 U. S. 908.] Motion for appointment of counsel granted, and it is ordered that Carter G. Phillips, Esq., of Washington, D. C., be appointed to serve as counsel for respondent Guy W. Olano, Jr., in this case. Motion of the Solicitor General to permit William K. Kelley, Esq., to present oral argument *pro hac vice* granted.

No. 91–1526. ALEXANDER *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 505 U. S. 1217.] Motion of petitioner for leave to enlarge questions presented for review denied.

No. 91–1618. VOINOVICH, GOVERNOR OF OHIO, ET AL. *v.* QUILTER, SPEAKER PRO TEMPORE OF OHIO HOUSE OF REPRESENTATIVES, ET AL. D. C. N. D. Ohio. [Probable jurisdiction

noted, 504 U. S. 954.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General to permit Thomas G. Hungar, Esq., to present oral argument *pro hac vice* granted.

No. 91–1950. AMERICAN DREDGING CO. *v.* MILLER. Sup. Ct. La.;

No. 91–1970. KALITTA FLYING SERVICE, INC., ET AL. *v.* G. S. RASMUSSEN & ASSOCIATES, INC. C. A. 9th Cir.;

No. 91–1992. FIGURES ET AL. *v.* HUNT, GOVERNOR OF ALABAMA, ET AL. Appeal from D. C. S. D. Ala.; and

No. 92–97. NORTHWEST AIRLINES, INC., ET AL. *v.* COUNTY OF KENT, MICHIGAN, ET AL. C. A. 6th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 91–7328. HERRERA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. [Certiorari granted, 502 U. S. 1085.] Motion for appointment of counsel *nunc pro tunc* granted, and it is ordered that Mark Olive, Esq., of Tallahassee, Fla., be appointed to serve as counsel for petitioner in this case.

No. 91–7742. HUFFSMITH *v.* WYOMING COUNTY PRISON BOARD ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [504 U. S. 907] denied.

No. 91–7758. IN RE LANDES. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [504 U. S. 971] denied.

No. 91–8013. CLAMPITT *v.* INTERINSURANCE EXCHANGE ET AL. Ct. App. Cal., 2d App. Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [504 U. S. 971] denied.

No. 91–8173. MARTIN *v.* DELAWARE. Sup. Ct. Del. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [505 U. S. 1203] denied.

No. 91–7804. BUFFERD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. [Certiorari granted, 505 U. S. 1203.] Motion

for appointment of counsel granted, and it is ordered that Stuart Jay Filler, Esq., of Bridgeport, Conn., be appointed to serve as counsel for petitioner in this case.

No. 91–8258. MARTIN *v.* DELAWARE. Sup. Ct. Del.;

No. 91–8729. DEMPSEY *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 1st Cir.;

No. 92–5068. MARTIN *v.* SPARKS ET AL. C. A. 3d Cir.;

No. 92–5105. JONES *v.* WRIGHT, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, ET AL. C. A. 8th Cir.;

No. 92–5407. MARTIN *v.* SMITH ET AL. C. A. 3d Cir.; and

No. 92–5417. BRIGMAN *v.* UNITED STATES. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until October 26, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petitions for writs of certiorari.

No. 91–8428. IN RE JONES. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until October 26, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of mandamus and/or prohibition.

No. 91–8492. SAMPANG *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 26, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis.*

No. 91–8579. MEDINA *v.* KANSAS. Ct. App. Kan.;

No. 91–8581. MCDONALD *v.* YELLOW CAB METRO, INC. Sup. Ct. Tenn.;

No. 91–8773. QUINN *v.* FELTHAM ET AL. C. A. 2d Cir.;

No. 92–5047. OYEGBOLA *v.* UNITED STATES. C. A. 1st Cir.;
No. 92–5205. SCHULTZ ET UX. *v.* PARR ELEVATOR, INC. C. A. 7th Cir.; and
No. 92–5384. CARVER *v.* CARVER ET AL. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 26, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis.*

No. 92–74. DEPARTMENT OF REVENUE OF OREGON *v.* ACF INDUSTRIES, INC., ET AL. C. A. 9th Cir. Motion of Multistate Tax Commission for leave to file a brief as *amicus curiae* granted. Motion of Multistate Tax Commission for leave to file an amended brief as *amicus curiae* granted.

No. 92–402. NICHOLS ET AL. *v.* ROMBERG ET UX. C. A. 9th Cir. Motion of respondents for leave to participate in oral argument in No. 91–990, *Farrar et al., Coadministrators of Estate of Farrar, Deceased* v. *Hobby* [certiorari granted, 502 U. S. 1090], and for expedited consideration of this petition with that case denied.

No. 92–5282. IN RE FOWLER. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 26, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 92–5688. IN RE KALTENBACH. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until October 26, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of habeas corpus.

No. 91–8566. IN RE SCHIFF;
No. 91–8746. IN RE CHANEY;

No. 91–8762. IN RE L'AQUARIUS;
No. 92–5034. IN RE ESTES;
No. 92–5073. IN RE MILLER;
No. 92–5083. IN RE SEDIVY;
No. 92–5114. IN RE MILLER;
No. 92–5345. IN RE VEY; and
No. 92–5427. IN RE WILSON. Petitions for writs of habeas corpus denied.

No. 91–1858. IN RE DOLENZ;
No. 91–7975. IN RE LIFFITON;
No. 91–8254. IN RE RODRIGUEZ;
No. 91–8438. IN RE MASON;
No. 91–8471. IN RE GOUGE;
No. 91–8488. IN RE LAKE;
No. 91–8495. IN RE BAUER;
No. 91–8505. IN RE MILLER;
No. 91–8525. IN RE GAYDOS;
No. 91–8573. IN RE ELLIS;
No. 91–8619. IN RE ANDERSON;
No. 91–8653. IN RE MEYERS;
No. 91–8732. IN RE JACKSON;
No. 92–59. IN RE ANDERSON;
No. 92–154. IN RE RAITPORT;
No. 92–230. IN RE MOTHERSHED;
No. 92–5072. IN RE MILLER;
No. 92–5147. IN RE MILLER; and
No. 92–5629. IN RE JOHNSON. Petitions for writs of mandamus denied.

No. 91–8253. IN RE MACKENZIE;
No. 91–8255. IN RE MCCONE; and
No. 92–5300. IN RE HEAD. Petitions for writs of mandamus and/or prohibition denied.

No. 91–8552. IN RE WHITAKER. Petition for writ of prohibition denied.

Certiorari Granted

No. 91–1671. MERTENS ET AL. *v.* HEWITT ASSOCIATES. C. A. 9th Cir. Certiorari granted. Reported below: 948 F. 2d 607.

No. 91–1677. COMMISSIONER OF INTERNAL REVENUE *v.* KEYSTONE CONSOLIDATED INDUSTRIES, INC. C. A. 5th Cir. Certiorari granted. Reported below: 951 F. 2d 76.

No. 91–1721. NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA *v.* CITY OF JACKSONVILLE, FLORIDA, ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 951 F. 2d 1217.

No. 91–1729. UNITED STATES ET AL. *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 951 F. 2d 645.

No. 91–1833. RHOADES, DIRECTOR, INDIAN HEALTH SERVICE, ET AL. *v.* VIGIL ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 953 F. 2d 1225.

No. 91–2003. UNITED STATES *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 932 F. 2d 1346.

No. 91–2024. LAMB'S CHAPEL ET AL. *v.* CENTER MORICHES UNION FREE SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 959 F. 2d 381.

No. 91–2051. SOUTH DAKOTA *v.* BOURLAND, INDIVIDUALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE, ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 949 F. 2d 984.

No. 91–2054. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* LANDANO. C. A. 3d Cir. Certiorari granted. Reported below: 956 F. 2d 422.

No. 91–2086. GRANITE STATE INSURANCE CO. *v.* TANDY CORP. ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 986 F. 2d 94.

No. 92–1. MOREAU ET AL. *v.* KLEVENHAGEN, SHERIFF OF HARRIS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 956 F. 2d 516.

No. 92–94. ZOBREST ET AL. *v.* CATALINA FOOTHILLS SCHOOL DISTRICT. C. A. 9th Cir. Certiorari granted. Reported below: 963 F. 2d 1190.

No. 92–114. CARDINAL CHEMICAL CO. ET AL. *v.* MORTON INTERNATIONAL, INC. C. A. Fed. Cir. Certiorari granted. Reported below: 959 F. 2d 948.

No. 92–344. McNary, Commissioner, Immigration and Naturalization Service, et al. *v.* Haitian Centers Council, Inc., et al. C. A. 2d Cir. Certiorari granted. Reported below: 969 F. 2d 1350.

No. 91–1111. Hartford Fire Insurance Co. et al. *v.* California et al.; and

No. 91–1128. Merrett Underwriting Agency Management Ltd. et al. *v.* California et al. C. A. 9th Cir. Motion of Brokers & Reinsurance Markets Association for leave to file a brief as *amicus curiae* in No. 91–1111 granted. Certiorari granted in No. 91–1111 limited to Questions 1 and 2 presented by the petition. Certiorari granted in No. 91–1128. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 938 F. 2d 919.

No. 91–1738. Gilmore *v.* Taylor. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 954 F. 2d 441.

No. 91–2019. Minnesota *v.* Dickerson. Sup. Ct. Minn. Motion of Minnesota County Attorneys Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 481 N. W. 2d 840.

No. 91–8199. Deal *v.* United States. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 954 F. 2d 262.

No. 91–7849. Buckley *v.* Fitzsimmons et al. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 952 F. 2d 965.

No. 91–8674. Smith *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 957 F. 2d 835.

No. 92–34. Musick, Peeler & Garrett et al. *v.* Employers Insurance of Wausau et al. C. A. 9th Cir. Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 954 F. 2d 575.

Certiorari Denied

No. 91–1208. Drilake Farms, Inc., et al. *v.* Surrillo et al. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 186 W. Va. 105, 411 S. E. 2d 248.

No. 91–1554. Archdiocese of Portland in Oregon et al. *v.* Employment Division of Oregon et al. Ct. App. Ore. Certiorari denied. Reported below: 108 Ore. App. 495, 814 P. 2d 566.

No. 91–1570. Metro-North Commuter Railroad Co. *v.* Teahan. C. A. 2d Cir. Certiorari denied. Reported below: 951 F. 2d 511.

No. 91–1613. Hexamer *v.* First Gibraltar Savings Assn. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1158.

No. 91–1668. LaRaia *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 529 Pa. 640, 600 A. 2d 1258.

No. 91–1679. Illinois Council on Long Term Care et al. *v.* Bradley, in His Official Capacity as Director of the Illinois Department of Public Aid, et al. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 305.

No. 91–1680. Justice *v.* Martin, Secretary of Labor. C. A. 7th Cir. Certiorari denied. Reported below: 951 F. 2d 121.

No. 91–1682. Levin *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 29.

No. 91–1686. Bourhan *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–1693. California-Hawaiian Fund, Inc., et al. *v.* Honolulu Federal Savings & Loan Assn. et al. C. A. 9th Cir. Certiorari denied.

No. 91–1702. Cortez *v.* First City National Bank of Houston et al. C. A. 5th Cir. Certiorari denied.

No. 91–1716. Jerabek et al. *v.* American Federation of Labor and Congress of Industrial Organizations et al. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 2 Cal. App. 4th 1298, 4 Cal. Rptr. 2d 181.

No. 91–1718. HAMPTON TREE FARMS, INC., ET AL. *v.* MADIGAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 869.

No. 91–1728. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 567.

No. 91–1733. ALLNUTT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1162.

No. 91–1736. ENOCH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 146 Ill. 2d 44, 585 N. E. 2d 115.

No. 91–1743. UNITED MISSIONARY AVIATION, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 564.

No. 91–1744. GALAXY COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 124, 957 F. 2d 873.

No. 91–1753. STASKUS *v.* GENE WEISS PLACE FOR FITNESS, INC. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 91–1756. BAILEY *v.* KEEP ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 191, 580 N. E. 2d 1081.

No. 91–1759. SKY AD, INC., ET AL. *v.* MCCLURE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1146.

No. 91–1760. JOHNSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 952 F. 2d 565.

No. 91–1770. BEAVERS *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 265.

No. 91–1781. ALABAMA *v.* BROOKS. Ct. Crim. App. Ala. Certiorari denied. Reported below: 593 So. 2d 97.

No. 91–1784. PRINCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 906.

No. 91–1798. VILLAGE OF LOS RANCHOS DE ALBUQUERQUE ET AL. *v.* STONE, SECRETARY OF THE ARMY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 955 and 956 F. 2d 970.

No. 91–1799. PACYNA *v.* STONE, SECRETARY OF THE ARMY. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1160.

No. 91–1803. DAVIS, TRUSTEE *v.* DEPARTMENT OF ENERGY. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 950 F. 2d 733.

No. 91–1804. VELEZ ET AL. *v.* FELIX DE SANTANA. C. A. 1st Cir. Certiorari denied. Reported below: 956 F. 2d 16.

No. 91–1805. ACKERMAN, HOOD & MCQUEEN, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 944.

No. 91–1808. GENCOR INDUSTRIES, INC. *v.* STANDARD HAVENS PRODUCTS. C. A. Fed. Cir. Certiorari denied. Reported below: 953 F. 2d 1360.

No. 91–1817. HURLEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 957 F. 2d 1.

No. 91–1819. LAGRANGE TRADING CO., DBA AIRLINE BOOKSTORE *v.* NICOLOSI ET AL.; and

No. 91–1998. NICOLOSI ET AL. *v.* LAGRANGE TRADING CO., DBA AIRLINE BOOKSTORE. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 642.

No. 91–1820. PLUMBERS & PIPEFITTERS LOCAL UNION NO. 520 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 416, 955 F. 2d 744.

No. 91–1822. LA ISLA VIRGEN, INC. *v.* OLIVE, DIRECTOR, VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1393.

No. 91–1825. SHUSHAN ET AL. *v.* CARTERET SAVINGS BANK, F. A. C. A. 3d Cir. Certiorari denied. Reported below: 954 F. 2d 141.

No. 91–1829. EDWARD D. JONES & CO. *v.* CARTER ET AL. Ct. App. Ind. Certiorari denied. Reported below: 571 N. E. 2d 1329.

No. 91–1835. BIHLER ET AL. *v.* EISENBERG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 651.

No. 91–1836. CRAWFORD-EL *v.* BRITTON. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 47, 951 F. 2d 1314.

No. 91–1837. MANATT *v.* ARKANSAS BOARD OF ELECTION COMMISSIONERS. C. A. 8th Cir. Certiorari denied.

No. 91–1839. BAKER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 590 So. 2d 1197.

No. 91–1840. KUHN *v.* KUHN. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 221 Ill. App. 3d 1, 581 N. E. 2d 380.

No. 91–1843. NELSON *v.* UNIVERSITY OF ALABAMA SYSTEM ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 594 So. 2d 632.

No. 91–1844. SNOW, CHAIRMAN, GEORGIA STATE BOARD OF PARDONS AND PAROLES *v.* GRAHAM. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 729.

No. 91–1845. ARROW PACKING CO. ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 1st Cir. Certiorari denied.

No. 91–1846. ROPAK CORP. *v.* XYTEC PLASTICS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 954 F. 2d 733.

No. 91–1847. MILLER *v.* BRIGGS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 623.

No. 91–1848. KRAMER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1543.

No. 91–1850. JAMES *v.* MILWAUKEE COUNTY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 696.

No. 91–1851. BUENAVISTA ESMERALDA CO., LTD., ET AL. *v.* AEROVIAS NACIONALES DE COLOMBIA, S. A., DBA AVIANCA,

ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 358.

No. 91–1852. MCGOVERN ET AL. *v.* TOWN OF YORKTOWN ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 172 App. Div. 2d 594, 570 N. Y. S. 2d 946.

No. 91–1853. O'BRIEN *v.* UNITED STATES; and
No. 91–8218. TREANOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: No. 91–1853, 950 F. 2d 969; No. 91–8218, 950 F. 2d 972.

No. 91–1854. WALLACE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 759.

No. 91–1856. TRIPLE M DRILLING CO. ET AL. *v.* SEIDER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 265.

No. 91–1857. MCBRIDE ET UX. *v.* MADIGAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 955 F. 2d 571.

No. 91–1859. INDUSTRIAL HELICOPTERS, INC. *v.* GREEN ET AL. Sup. Ct. La. Certiorari denied. Reported below: 593 So. 2d 634.

No. 91–1860. MICKEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 54 Cal. 3d 612, 818 P. 2d 84.

No. 91–1861. CALDWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 954 F. 2d 496.

No. 91–1863. KLAGISS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 585 N. E. 2d 674.

No. 91–1864. LOEPER ET AL. *v.* PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT COMMISSION. Sup. Ct. Pa. Certiorari denied. Reported below: 530 Pa. 335, 609 A. 2d 132.

No. 91–1865. QUIROZ *v.* WINDHAM ET AL. C. A. 5th Cir. Certiorari denied.

No. 91–1866. WEISS *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 950 F. 2d 1525.

No. 91–1867. SPEAR ET AL. *v.* TOWN OF WEST HARTFORD. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 63.

No. 91–1868. BRIDGES *v.* SECRETARY OF THE AIR FORCE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 955 F. 2d 49.

No. 91–1869. PRODUCTION PLATED PLASTICS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 45.

No. 91–1870. HERSHFIELD *v.* TOWN OF COLONIAL BEACH. Sup. Ct. Va. Certiorari denied.

No. 91–1871. BURKE *v.* CONNECTICUT. C. A. 2d Cir. Certiorari denied.

No. 91–1873. VIRGIN ATLANTIC AIRWAYS, LTD., ET AL. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1245.

No. 91–1874. WELLMAN ET AL. *v.* FOX ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 83, 825 P. 2d 208.

No. 91–1875. SISTI *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–1879. ROSE ACRE FARMS, INC. *v.* MADIGAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 670.

No. 91–1880. OHIO DEPARTMENT OF LIQUOR CONTROL *v.* BROOKPARK ENTERTAINMENT, INC. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 710.

No. 91–1881. MOBIL OIL CORP. ET AL. *v.* CHRISTOPHER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 1209.

No. 91–1882. STEWART *v.* PARISH OF JEFFERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 681.

No. 91–1883. PEREZ NARANJO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 91–1887. STEINGOLD *v.* HARPER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1283.

No. 91–1888. PERSON *v.* MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 1.

No. 91–1889. BAIR, DIRECTOR, IOWA DEPARTMENT OF REVENUE AND FINANCE *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 599.

No. 91–1890. DUNWOODY ET AL. *v.* EDN CORP. Super. Ct. Pa. Certiorari denied. Reported below: 415 Pa. Super. 662, 601 A. 2d 375.

No. 91–1891. KING *v.* JAMES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1041.

No. 91–1892. RUBEN *v.* HOME PORT RENTALS, INC.; and
No. 92–25. ALLEN *v.* HOME PORT RENTALS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 957 F. 2d 126.

No. 91–1893. POLARIS INDUSTRIES PARTNERS L. P. ET AL. *v.* WESTERN POWER SPORTS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 365.

No. 91–1894. LIVELY *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR UNITEDBANK-HOUSTON. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 400.

No. 91–1897. CUTRIGHT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 953 F. 2d 619.

No. 91–1898. VOIT SPORTS, INC. *v.* REIMERS ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 954 F. 2d 734.

No. 91–1899. DAY *v.* MOSCOW ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 955 F. 2d 807.

No. 91–1900. ALEXANDER *v.* CITY OF MENLO PARK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 358.

No. 91–1901. GENERAL ELECTRIC CAPITAL CORP. *v.* NORTH COUNTY JEEP & RENAULT, INC. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 229.

No. 91–1902. GREYSTONE III JOINT VENTURE *v.* PHOENIX MUTUAL LIFE INSURANCE CO.; and

No. 92–58. PHOENIX MUTUAL LIFE INSURANCE CO. *v.* GREYSTONE III JOINT VENTURE. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 134.

No. 91–1904. FINZ *v.* SCHLESINGER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 957 F. 2d 78.

No. 91–1906. FERRELLGAS, INC. *v.* ASHWAY. C. A. 9th Cir. Certiorari denied. Reported below: 945 F. 2d 408.

No. 91–1907. RABIDA *v.* VAN ORDEN ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 91–1908. CRANDON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 957 F. 2d 1161.

No. 91–1909. MAGUIRE ET AL. *v.* THOMPSON, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 374.

No. 91–1910. BYKOWICZ ET AL. *v.* ICM MORTGAGE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 1046.

No. 91–1911. MOBILE MEDEX, INC. *v.* NEW JERSEY DEPARTMENT OF LABOR. Sup. Ct. N. J. Certiorari denied. Reported below: 126 N. J. 386, 599 A. 2d 163.

No. 91–1912. POWERS, INDIVIDUALLY AND AS EXECUTOR OF POWERS, DECEASED, ET AL. *v.* KING COTTON, LTD. Sup. Ct. Ga. Certiorari denied.

No. 91–1915. STEINGOLD *v.* STEINGOLD. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 91–1916. WESTERN SHOSHONE NATIONAL COUNCIL ET AL. *v.* MOLINI, DIRECTOR, NEVADA DEPARTMENT OF WILDLIFE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 200.

No. 91–1918. COLES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 217 Ill. App. 3d 1079, 578 N. E. 2d 86.

No. 91–1919. SOWERS *v.* FEDERAL EXPRESS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1388.

No. 91–1920. WEIMER ET AL. *v.* AMEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 569.

No. 91–1921. SHOLTIS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 127 N. J. 84, 602 A. 2d 728.

No. 91–1923. OAKWOOD PLAZA SHOPPING CENTER, INC., ET AL. *v.* FIORE ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 78 N. Y. 2d 572, 585 N. E. 2d 364.

No. 91–1926. OHIO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 957 F. 2d 231.

No. 91–1927. TEXAS WATER CONSERVATION ASSOCIATION *v.* DEPARTMENT OF THE INTERIOR ET AL.; and

No. 91–1929. SABINE RIVER AUTHORITY *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 669.

No. 91–1928. MERRIGAN ET UX. *v.* AFFILIATED BANKSHARES OF COLORADO, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 278.

No. 91–1931. LAWRENCE *v.* MARS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 902.

No. 91–1932. IRVIN H. WHITEHOUSE & SONS CO., INC. *v.* LOCAL UNION 118 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 953 F. 2d 1384.

No. 91–1933. WASHBURN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 91–1934. GROBEL *v.* LIQUID AIR CORP. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 91–1935. KOSTELLO ET AL. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 62 Wash. App. 1045.

No. 91–1936. SETTOON CONSTRUCTION, INC. *v.* DOMINGUE. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 966.

No. 91–1937. FINCHER *v.* B & D AIR CONDITIONING & HEATING CO. ET AL. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 816 S. W. 2d 509.

No. 91–1939. MILES ET UX. *v.* MADIGAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 275.

No. 91–1940. GREENING *v.* MORAN, INDIVIDUALLY AND AS FORMER CHIEF JUSTICE OF THE SUPREME COURT OF ILLINOIS, ET AL.; and

No. 91–1941. MALANY *v.* MORAN, INDIVIDUALLY AND AS FORMER CHIEF JUSTICE OF THE SUPREME COURT OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 953 F. 2d 301.

No. 91–1942. HOZELOCK, LTD. *v.* COX. Ct. App. N. C. Certiorari denied. Reported below: 105 N. C. App. 52, 411 S. E. 2d 640.

No. 91–1943. BRUNNER & LAY, INC., ET AL. *v.* PLEDGER, DIRECTOR, DEPARTMENT OF FINANCE AND ADMINISTRATION OF ARKANSAS, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 308 Ark. 512, 825 S. W. 2d 599.

No. 91–1945. TRIANGLE INDUSTRIES, INC., DBA ANC HOLDINGS, INC., ET AL. *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 957 F. 2d 1153.

No. 91–1947. FIRTION *v.* HEBERT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1160.

No. 91–1949. LESLIE *v.* DARMIENTO ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 91–1951. BASSLER, TEMPORARY ADMINISTRATOR OF ESTATE OF BENAVIDES, DECEASED, ET AL. *v.* COUNTY OF WILSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 968.

No. 91–1952. ZENNI *v.* KIRSNER ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 594 So. 2d 752.

No. 91–1953. MARKET/MEDIA RESEARCH, INC. *v.* UNION TRIBUNE PUBLISHING CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 102.

No. 91–1954. REILLY *v.* CALLAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1568.

No. 91–1955. HARRIS *v.* DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 960 F. 2d 155.

No. 91–1957. CHEMICAL SPECIALTIES MANUFACTURERS ASSN., INC. *v.* BOOK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 941.

No. 91–1959. ST. JOHN ET AL. *v.* NORTH CAROLINA PAROLE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 639.

No. 91–1960. HOPKINS *v.* SCHAUMBERG. C. A. 10th Cir. Certiorari denied. Reported below: 955 F. 2d 49.

No. 91–1961. CARPENTER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 221 Ill. App. 3d 58, 581 N. E. 2d 683.

No. 91–1963. DADE ET AL. *v.* CANNATELLA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 967.

No. 91–1964. FRIEDMAN *v.* SUPERVISOR OF ASSESSMENTS OF MONTGOMERY COUNTY. Ct. Sp. App. Md. Certiorari denied. Reported below: 89 Md. App. 785.

No. 91–1965. KENNA *v.* NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF CRIMINAL JUSTICE. Super. Ct. N. J., App. Div. Certiorari denied.

No. 91–1966. ANR FREIGHT SYSTEM, INC. *v.* PHILLIP. C. A. 8th Cir. Certiorari denied. Reported below: 945 F. 2d 1054.

No. 91–1967. DAMER *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–1968. BEAM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1166.

No. 91–1972. SPARKS *v.* CITY AND COUNTY OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1168.

No. 91–1973. TOPALIAN ET AL. *v.* EHRMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 1125.

No. 91–1974. FEATHERLITE PRECAST CORP. *v.* PLEDGER, DIRECTOR, DEPARTMENT OF FINANCE AND ADMINISTRATION OF ARKANSAS, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 308 Ark. 124, 823 S. W. 2d 852.

No. 91–1975. BETHLEHEM STEEL CORP. *v.* TYLER. C. A. 2d Cir. Certiorari denied. Reported below: 958 F. 2d 1176.

No. 91–1976. MCDERMOTT INC. ET AL. *v.* INTERNATIONAL INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 93.

No. 91–1979. SCARBOROUGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 903.

No. 91–1980. CARLSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 1401.

No. 91–1982. WINTERS *v.* UNITED STATES; and RAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 91–1983. KEENER *v.* HOECHST CELANESE CORP., AKA CELANESE PLASTICS CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1078.

No. 91–1985. MCCURDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1078.

No. 91–1986. TRUMP TAJ MAHAL ASSOCIATES ET AL. *v.* COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA S. P. A. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 91–1987. TURPIN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF TURPIN, A MINOR, ET AL. *v.* MERRELL DOW PHARMACEUTICALS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 1349.

No. 91–1989. MARKS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 91–1990. TIPCO, INC. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 639.

No. 91–1991. PRUDHOMME ET UX. *v.* TENNECO OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 390.

No. 91–1994. HARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 956 F. 2d 177.

No. 91–1995. GARNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 91–1996. MARENO ET UX. *v.* ANESTHESIA ASSOCIATES OF MT. KISCO. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 91–1997. BOGGS ET AL. *v.* JONES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1583.

No. 91–1999. HARWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 345.

No. 91–2000. MULLIKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 952 F. 2d 920.

No. 91–2001. VOGEL *v.* CITY OF CINCINNATI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 594.

No. 91–2002. U. E. ENTERPRISES, INC., ET AL. *v.* NEW YORK CHINESE TV PROGRAMS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 847.

No. 91–2005. SIMMONS *v.* GENERAL ELECTRIC CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 396.

No. 91–2007. PARRACK *v.* TEXAS A & M UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 264.

No. 91–2008. MURPHY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 596 So. 2d 42.

No. 91–2009. CONTINENTAL/AIR MICRONESIA ET AL. *v.* NATIONAL MEDIATION BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 162, 957 F. 2d 911.

No. 91–2010. BROWN-FORMAN CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 1037.

No. 91–2011. DIGIOVANNI *v.* TRAYLOR BROTHERS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 959 F. 2d 1119.

No. 91–2013. SANTMYER *v.* SANTMYER. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 91–2014. O'NEILL GROUP ET AL. *v.* CONTINENTAL AIRLINES CORP. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1259.

No. 91–2015. LOEPER ET AL. *v.* MITCHELL, SECRETARY OF COMMONWEALTH OF PENNSYLVANIA, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 530 Pa. 44, 607 A. 2d 204.

No. 91–2016. HADDOCK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 1534 and 961 F. 2d 933.

No. 91–2017. HARRIS *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 824 S. W. 2d 111.

No. 91–2018. BANKS *v.* DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 956 F. 2d 1172.

No. 91–2020. SAYLORS *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 91–2021. VAN SKIVER ET UX. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 1241.

No. 91–2022. ILLINOIS EMPLOYERS INSURANCE OF WAUSAU *v.* PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY. C. A. 9th Cir. Certiorari denied.

No. 91–2023. ALLEN *v.* SHRUM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 264.

No. 91–2025. MONK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 91–2026. FRUEHAUF CORP. *v.* HUDDY. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 955.

No. 91–2027. TOLLESON *v.* ARIZONA ET AL. Ct. App. Ariz. Certiorari denied.

No. 91–2028. JONES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JONES, DECEASED *v.* PETTY-RAY GEOPHYSICAL GEOSOURCE ET AL. C. A. 5th Cir. Certiorari denied.

No. 91–2029. JRR Realty et al. *v.* National Labor Relations Board. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 436, 955 F. 2d 764.

No. 91–2031. Joy Technologies, Inc. *v.* Manbeck, Commissioner of Patents and Trademarks. C. A. Fed. Cir. Certiorari denied. Reported below: 959 F. 2d 226.

No. 91–2032. Transoil (Jersey) Ltd. *v.* Belcher Oil Co. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 1115.

No. 91–2033. Alexander et al. *v.* Helms, Administrator of Estate of Jackson. Ct. App. N. C. Certiorari denied. Reported below: 104 N. C. App. 746, 411 S. E. 2d 184.

No. 91–2034. J. M. *v.* V. C.; and

No. 91–2040. J. M., Guardian ad Litem of His Unborn Child *v.* V. C. Sup. Ct. N. J. Certiorari denied.

No. 91–2035. Bradford *v.* Whitley, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 1008.

No. 91–2036. Whalen *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 959 F. 2d 924.

No. 91–2037. Wisconsin et al. *v.* Lac Du Flambeau Band of Lake Superior Chippewa Indians et al. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 515.

No. 91–2039. Mason et al. *v.* Judges, United States Court of Appeals for the District of Columbia Circuit, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 67, 952 F. 2d 423.

No. 91–2041. Harris *v.* First National Bank of Spencer et al. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 41.

No. 91–2042. Fagg *v.* United States. Ct. Mil. App. Certiorari denied. Reported below: 34 M. J. 179.

No. 91–2043. Priceless Sales & Service, Inc. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 959 F. 2d 231.

No. 91–2046. MORGAN *v.* AISPURO, SUPERINTENDENT, CALIFORNIA STATE PRISON AT CORCORAN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 946 F. 2d 1462.

No. 91–2048. TSAI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 954 F. 2d 155.

No. 91–2049. LE'MON *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 1203.

No. 91–2050. BESING ET AL. *v.* SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P. C., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 266.

No. 91–2052. FIRST NATIONAL BANK OF CHICAGO, TRUSTEE OF INSTITUTIONAL REAL ESTATE FUND F *v.* COMPTROLLER OF THE CURRENCY. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 1360.

No. 91–2053. SUMWALT ET AL. *v.* BOICE, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 275.

No. 91–2055. BENNETT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 91–2056. JACOBSON ET AL. *v.* CINCINNATI BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 100.

No. 91–2058. COLLINS ET AL. *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 359.

No. 91–2059. CEDARMINN BUILDING LIMITED PARTNERSHIP ET AL. *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MIDWEST ASSN., F. A. C. A. 8th Cir. Certiorari denied. Reported below: 956 F. 2d 1446.

No. 91–2060. TESTA ET AL. *v.* UNITED STATES;
No. 91–8645. MANGIALINO *v.* UNITED STATES;
No. 91–8646. PROFETA *v.* UNITED STATES; and
No. 91–8670. REGA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 839 and 956 F. 2d 1160.

No. 91–2061. JACOBS *v.* BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 367, 959 F. 2d 313.

No. 91–2062. GAVETTE *v.* INTERNAL REVENUE SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 349.

No. 91–2063. COMMODITIES EXPORT CO. *v.* UNITED STATES CUSTOMS SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 957 F. 2d 223.

No. 91–2064. GRAHAM *v.* GOLDSTEIN. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 811 S. W. 2d 510.

No. 91–2065. CALIFORNIA ET AL. *v.* MORRIS. C. A. 9th Cir. Certiorari denied. Reported below: 966 F. 2d 448.

No. 91–2066. CITY OF CHANUTE, KANSAS, ET AL. *v.* WILLIAMS NATURAL GAS CO. C. A. 10th Cir. Certiorari denied. Reported below: 955 F. 2d 641.

No. 91–2067. BRAYSHAW *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 91–2068. LAITRAM CORP. ET AL. *v.* CAMBRIDGE WIRE CLOTH CO. C. A. Fed. Cir. Certiorari denied. Reported below: 956 F. 2d 1172.

No. 91–2069. UNITED AIRLINES, INC. *v.* HART ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 999.

No. 91–2070. STEENBERGEN, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF STEENBERGEN, DECEASED, ET AL. *v.* FORD MOTOR CO. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 814 S. W. 2d 755.

No. 91–2071. CHILDREN'S HOUSE *v.* FISHER, ATTORNEY GENERAL OF OHIO. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 91–2073. WALKER *v.* FRITO-LAY, INC. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 410 and 411.

No. 91–2074. BAUMANN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 958 F. 2d 374.

No. 91–2076. CLARK *v.* HAAS GROUP, INC. C. A. 10th Cir. Certiorari denied. Reported below: 953 F. 2d 1235.

No. 91–2077. HAYES ET AL. *v.* BAILEY ET UX.; and
No. 92–3. BAILEY *v.* BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 956 F. 2d 1112.

No. 91–2080. SKOTAK ET AL. *v.* TENNECO RESINS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 909.

No. 91–2083. TAYLOR ET UX. *v.* FEDERAL LAND BANK OF OMAHA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 569.

No. 91–2084. VILD *v.* VISCONSI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 560.

No. 91–2085. DUNN *v.* MARCO. C. A. 3d Cir. Certiorari denied. Reported below: 953 F. 2d 1379.

No. 91–6263. WILES *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 59 Ohio St. 3d 71, 571 N. E. 2d 97.

No. 91–6962. FLEMING *v.* GRAND JURY FOREPERSON, SPECIAL GRAND JURY 89–2, DISTRICT OF COLORADO. C. A. 10th Cir. Certiorari denied.

No. 91–7386. SZABO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 144 Ill. 2d 525, 582 N. E. 2d 173.

No. 91–7408. RICH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 954.

No. 91–7426. KLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–7497. RUSSELL *v.* FRANK, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1290.

No. 91–7563. SHIIMI *v.* HARLANDALE INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied.

No. 91–7652. LACY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 350.

No. 91–7672. MULLER *v.* UNITED STATES; and
No. 91–7785. BARON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 523.

No. 91–7697. BROWN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 577 N. E. 2d 221.

No. 91–7703. SMERTNECK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 264.

No. 91–7760. CROWLEY *v.* PRINCE GEORGE'S COUNTY, MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 884.

No. 91–7780. GIBSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 780.

No. 91–7781. ROBERTSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 949 F. 2d 398.

No. 91–7784. SKELTON *v.* SMITH, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 1037.

No. 91–7797. BOYLES *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 91–7816. LEVY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 955 F. 2d 1098.

No. 91–7831. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 271.

No. 91–7846. MARGUGLIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1394.

No. 91–7861. YAGOW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 427.

No. 91–7872. MUHAMMAD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 899 F. 2d 16.

No. 91–7912. AUER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 1 Cal. App. 4th 1664, 2 Cal. Rptr. 2d 823.

No. 91–7917. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 952 F. 2d 403.

No. 91–7921. JAKOBETZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 955 F. 2d 786.

No. 91–7933. STODOLA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 953 F. 2d 266.

No. 91–7960. BOWDEN *v.* CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1159.

No. 91–7974. LOWERY *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 954 F. 2d 422.

No. 91–7980. WALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 91–7984. DUNN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 819 S. W. 2d 510.

No. 91–7995. AGUILAR-ARANCETA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 957 F. 2d 18.

No. 91–8000. CATALA FONFRIAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 951 F. 2d 423.

No. 91–8003. MARTINEZ GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–8005. RUIZ-BATISTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 956 F. 2d 351.

No. 91–8036. BANISTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1168.

No. 91–8043. STURDIVANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 651.

No. 91–8050. GIL-OSORIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1160.

No. 91–8052. JOHNSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 146 Ill. 2d 109, 585 N. E. 2d 78.

No. 91–8053. TOLES *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 95.

No. 91–8060. ABELLO-SILVA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1168.

No. 91–8076. NAZEMIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 948 F. 2d 522.

No. 91–8080. JACQUES-LOUIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 871.

No. 91–8084. HAYNES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–8096. BOWER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 823 S. W. 2d 284.

No. 91–8104. NICKENS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 955 F. 2d 112.

No. 91–8106. HAGMANN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 175.

No. 91–8108. MASAT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 923.

No. 91–8119. HOGLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1388.

No. 91–8121. HENDERSON *v.* ARMONTROUT, ASSISTANT DIRECTOR, MISSOURI DIVISION OF ADULT INSTITUTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–8123. STEPHENS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 871.

No. 91–8127. BASKIN *v.* FARLEY, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 142.

No. 91–8129. GRUBBS *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 948 F. 2d 1459.

No. 91–8132. GRIMM *v.* JACKSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 395.

No. 91–8150. MATHEWS ET AL. *v.* MOUTON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 91–8169. ANDERSON *v.* MISSISSIPPI COUNTY, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–8179. MUTHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–8182. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1388.

No. 91–8200. DRING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 930 F. 2d 687.

No. 91–8211. WILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1389.

No. 91–8212. PETTIT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 591 So. 2d 618.

No. 91–8221. WARREN *v.* FANNING ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 1370.

No. 91–8228. D'AGOSTINO, AKA CARUSO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 107 Nev. 1001, 823 P. 2d 283.

No. 91–8234. UNGAR *v.* GENERAL MOTORS CORP. ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 87 Md. App. 817.

No. 91–8235. WESLEY *v.* BORGEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 953 F. 2d 646.

No. 91–8237. HARVEY *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 91–8238. SHUMATE *v.* NCNB FINANCIAL SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 639.

No. 91–8240. BARNES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 91–8247. HUNT *v.* LEGURSKY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 638.

No. 91–8251. MARSHALL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 91–8257. LIGHTFOOT *v.* MATTHEWS. C. A. 1st Cir. Certiorari denied. Reported below: 971 F. 2d 744.

No. 91–8262. BLACKADDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 407.

No. 91–8265. PHILLIPS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 952 F. 2d 591.

No. 91–8266. LYLE *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Sup. Ct. Mich. Certiorari denied. Reported below: 437 Mich. 1057.

No. 91–8267. ROBINSON *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 396.

No. 91–8269. MANARITE *v.* CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 957 F. 2d 953.

No. 91–8272. TAYLOR *v.* VIRGINIA ET AL. Cir. Ct. Chesterfield County, Va. Certiorari denied.

No. 91–8278. HOLSEY *v.* MURRAY. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 41.

No. 91–8279. EASTON *v.* GOLDSTEIN ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 91–8282. REEVES *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 239 Neb. 419, 476 N. W. 2d 829.

No. 91–8283. MEDERS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 806, 411 S. E. 2d 491.

No. 91–8285. DAVENPORT *v.* ADLER. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–8295. REUSCHER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 827 S. W. 2d 710.

No. 91–8296. BROWN *v.* KELLY, MAYOR OF THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 162, 957 F. 2d 911.

No. 91–8297. ACOY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 179 App. Div. 2d 1023, 580 N. Y. S. 2d 913.

No. 91–8302. SMITH *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 264.

No. 91–8303. FANNY *v.* LEVY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 953 F. 2d 1379.

No. 91–8304. COLEMAN *v.* HOFBAUER ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–8307. DANIEL *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 582 N. E. 2d 364.

No. 91–8308. CARNEY *v.* JELSEMA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 44.

No. 91–8309. PATTERSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 146 Ill. 2d 445, 588 N. E. 2d 1175.

No. 91–8311. BEETS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 107 Nev. 957, 821 P. 2d 1044.

No. 91–8312. BROWNE *v.* DEMARINO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 362.

No. 91–8315. CLARK *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 851.

No. 91–8317. TODD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 766, 410 S. E. 2d 725.

No. 91–8319. MATTATALL *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 603 A. 2d 1098.

No. 91–8320. ZICHKO *v.* TAGGART. Sup. Ct. Idaho. Certiorari denied.

No. 91–8321. GREISS *v.* MAIN LINE AUTO WASH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1392.

No. 91–8322. FREEMAN *v.* IDAHO. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 406.

No. 91–8323. ABEL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 414 Pa. Super. 664, 599 A. 2d 698.

No. 91–8325. BLACK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 791, 410 S. E. 2d 740.

No. 91–8327. MOSHER *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 729.

No. 91–8329. LANG *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 463 N. W. 2d 648.

No. 91–8330. MCLEAN *v.* COMMONWEALTH COURT OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8332. WALKER *v.* JACKSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 370.

No. 91–8334. MOODY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 827 S. W. 2d 875.

No. 91–8335. CARTER *v.* HARFORD COUNTY CIRCUIT COURT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 954 F. 2d 720.

No. 91–8337. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 593 So. 2d 206.

No. 91–8338. HENTHORN *v.* HAHN, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–8340. ROSEN *v.* RAUM. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 2.

No. 91–8344. WINFIELD *v.* CARPENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 399.

No. 91–8348. SAGER *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied. Reported below: 110 Ore. App. 371, 821 P. 2d 1135.

No. 91–8350. SPENCER *v.* SPENCER. Sup. Ct. Iowa. Certiorari denied. Reported below: 479 N. W. 2d 293.

No. 91–8351. CARSON *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 406.

No. 91–8353. TUDOROV *v.* COLLAZO. C. A. 2d Cir. Certiorari denied.

No. 91–8356. AYARS ET UX. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 91–8358. HARRISON *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 269.

No. 91–8359. GEARHEART *v.* SULLIVAN. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 41.

No. 91–8360. HOLLINRAKE *v.* HOLLINRAKE. Sup. Ct. Iowa. Certiorari denied. Reported below: 476 N. W. 2d 367.

No. 91–8366. PRUNTY *v.* SOUTHERN OHIO CORRECTIONAL INSTITUTE. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 1415, 586 N. E. 2d 123.

No. 91–8367. PHILLIPS *v.* COUNTY OF MONTGOMERY, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 895.

No. 91–8368. ROBINSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 91–8369. BANKS *v.* SAN DIEGO COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 358.

No. 91–8374. ROBINSON *v.* UNITED STATES MAGISTRATE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 886.

No. 91–8375. ROBINSON *v.* GREGORY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–8376. JUNGBLUT *v.* CRIST, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 91–8378. JACOBS ET AL. *v.* DUJMOVIC ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 940 F. 2d 1392.

No. 91–8380. SOUZA *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 91–8381. SANCHEZ-ESCARENO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 193.

No. 91–8384. COUSINO *v.* REKUCKI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 234.

No. 91–8386. CONLOGUE *v.* SHINBAUM. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 378.

No. 91–8387. ASHMUS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 54 Cal. 3d 932, 820 P. 2d 214.

No. 91–8389. BERGET *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 824 P. 2d 364.

No. 91–8391. WARD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 308 Ark. 415, 827 S. W. 2d 110.

No. 91–8393. BRUTON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 91–8395. SLEDGE *v.* MEYERS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1400.

No. 91–8397. TEJADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1256.

No. 91–8400. CLINCY *v.* TOOMBS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 234.

No. 91–8401. GRIMES *v.* CHERNOVETZ, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 91–8404. JONES *v.* LEWIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 957 F. 2d 260.

No. 91–8405. EDWARDS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 54 Cal. 3d 787, 819 P. 2d 436.

No. 91–8411. MARTIN *v.* DELAWARE LAW SCHOOL OF WIDENER UNIVERSITY, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 209.

No. 91–8413. ORR *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 278.

No. 91–8414. BROWN *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–8415. BROWN *v.* EQUITABLE FINANCIAL COS. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 233.

No. 91–8417. BROWN *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–8418. STOGNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 752.

No. 91–8420. LASHLEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 1 Cal. App. 4th 938, 2 Cal. Rptr. 2d 629.

No. 91–8422. TEAGUE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 1525.

No. 91–8423. HUNG VAN TRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 288.

No. 91–8424. ALVAREZ-MENDEZ *v.* HENRY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 941 F. 2d 956.

No. 91–8425. LANE *v.* RICHARDS, SUPERINTENDENT, WESTVILLE CORRECTIONAL CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 363.

No. 91–8427. WHITAKER *v.* HILL. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 43.

No. 91–8429. JACKSON *v.* SOUTH TEXAS COLLEGE OF LAW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 266.

No. 91–8430. HARRIS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 91–8431. GARNER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 147 Ill. 2d 467, 590 N. E. 2d 470.

No. 91–8432. WILEY *v.* TANDY ET AL. Ct. App. Ind. Certiorari denied.

No. 91–8434. BAEZ *v.* HENRY COUNTY SUPERIOR COURT ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. XXVIII, 418 S. E. 2d 65.

No. 91–8440. WEAVER *v.* COURT OF COMMON PLEAS OF FRANKLIN COUNTY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 366.

No. 91–8441. TOSADO *v.* KLEIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 3.

No. 91–8443. BANDSTRA *v.* WEISENBURGER ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–8448. CATERINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 275 and 957 F. 2d 681.

No. 91–8455. DRIGGINS *v.* OKLAHOMA CITY. C. A. 10th Cir. Certiorari denied. Reported below: 954 F. 2d 1511.

No. 91–8456. DE LA CRUZ *v.* YLST, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–8458. LEWIS *v.* LYNN ET AL. C. A. 5th Cir. Certiorari denied.

No. 91–8459. VALDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 955 F. 2d 182.

No. 91–8460. VALENZUELA *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 590 So. 2d 89.

No. 91–8462. STOKES *v.* UNITED STATES;
No. 92–5017. JORDAN *v.* UNITED STATES; and
No. 92–5029. SIVILS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 960 F. 2d 587.

No. 91–8464. MARTENS *v.* KELSAY ET AL. C. A. 11th Cir. Certiorari denied.

No. 91–8466. FERDIK *v.* MCFADDEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–8467. GROVES *v.* RUNYON, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 565.

No. 91–8468. HUNES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 309 Ark. xx.

No. 91–8469. GIBBS *v.* JABE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 347.

No. 91–8470. HART *v.* THALACKER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 91–8472. MARIN *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 53, 956 F. 2d 339.

No. 91–8473. PRENZLER *v.* KLEINMAN. C. A. 9th Cir. Certiorari denied.

No. 91–8474. WRIGHT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 593 So. 2d 111.

No. 91–8476. HARRIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 91–8477. LUCIEN *v.* PETERS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 10.

No. 91–8479. COREY *v.* DEPARTMENT OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 724.

No. 91–8481. PRENZLER *v.* KLEINMAN. C. A. 9th Cir. Certiorari denied.

No. 91–8482. NITA *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 27 Conn. App. 103, 604 A. 2d 1322.

No. 91–8484. ANDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 866.

No. 91–8485. OVIEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 265.

No. 91–8486. MOUNT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 91–8487. FROST *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 77 Ohio App. 3d 644, 603 N. E. 2d 270.

No. 91–8489. WIELGOS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 220 Ill. App. 3d 812, 581 N. E. 2d 298.

No. 91–8491. SUDA *v.* HERZFELD & RUBIN, P. C. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 178 App. Div. 2d 194, 577 N. Y. S. 2d 51.

No. 91–8493. DAVIS *v.* COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–8496. NEAL *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 44.

No. 91–8497. SCONCE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–8499. ROACH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 679.

No. 91–8501. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 350.

No. 91–8502. PARKER *v.* CHAMPION, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 91–8504. PHILLIPE *v.* WILUSZ ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8506. COMEAUX, AKA COMO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 955 F. 2d 586.

No. 91–8507. CORTO *v.* JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 162, 957 F. 2d 911.

No. 91–8509. TRUJILLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 91–8510. ADETIBA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 887.

No. 91–8511. CHEW-BEY *v.* WEBSTER. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 568.

No. 91–8512. THURMAN *v.* SEARS, ROEBUCK & CO. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 128.

No. 91–8513. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 91–8514. Cook *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 170 Ariz. 40, 821 P. 2d 731.

No. 91–8515. Prunty *v.* Wilkenson et al. C. A. 6th Cir. Certiorari denied.

No. 91–8519. Wilson *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 306 S. C. 498, 413 S. E. 2d 19.

No. 91–8520. Lincoln *v.* Hawaii. Sup. Ct. Haw. Certiorari denied. Reported below: 72 Haw. 480, 825 P. 2d 64.

No. 91–8521. Wilson *v.* First Gibraltar Bank, FSB, et al. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 967.

No. 91–8522. Aziz *v.* Colorado et al. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 219.

No. 91–8523. Brown *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 870.

No. 91–8524. Antonie *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 496.

No. 91–8526. Ellison *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 91–8527. Glover *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 962 F. 2d 18.

No. 91–8528. Torres *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 961 F. 2d 322.

No. 91–8529. Blount *v.* Keane, Superintendent, Sing Sing Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1041.

No. 91–8530. Brown *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 1165.

No. 91–8531. Cooper et al. *v.* Frank. App. Ct. Conn. Certiorari denied.

No. 91–8532. Elder *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 270.

No. 91–8533. HENDRICKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 1164.

No. 91–8534. GARCIA, AKA CABILLA *v.* UNITED STATES; and No. 92–11. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 130.

No. 91–8535. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 730.

No. 91–8536. MENDOZA-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1078.

No. 91–8537. RAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1169.

No. 91–8538. RUSSELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 91–8539. MCNEAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 364.

No. 91–8540. TETER *v.* JONES, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 91–8541. LUTTRELL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 91–8542. QUARLES *v.* SAMPLES, REGIONAL DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8543. SMITH *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 91–8544. DANIELS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 91–8545. SUEING *v.* BROWN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–8546. BROTHERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 955 F. 2d 493.

No. 91–8547. REED *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 582 N. E. 2d 826.

No. 91–8548. CAMPBELL *v.* BURGESS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 358.

No. 91–8549. DELILEON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 4.

No. 91–8550. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 91–8551. STUBBS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 368.

No. 91–8553. JONES *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 91–8554. FAILE *v.* GEARY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 376.

No. 91–8555. HORR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 1124.

No. 91–8556. GEORGE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 91–8557. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 868.

No. 91–8558. PAVLICO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 440.

No. 91–8559. REYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–8560. PAYTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 213.

No. 91–8561. OWENS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 146.

No. 91–8562. PHILLIPS-EL *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–8563. LAWRENCE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 91–8564. CHANDLER *v.* JONES, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 91–8565. WORSTELL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 365.

No. 91–8567. WRIGHT *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 91–8568. MONTALVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1389.

No. 91–8569. RICE *v.* NORTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 368.

No. 91–8570. PREUSS *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 91–8571. MCGRUDER *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 313.

No. 91–8572. CALDWELL *v.* TOM MISTICK & SONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 207.

No. 91–8575. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 91–8576. FERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 48.

No. 91–8577. HOLTZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 91–8578. LASTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 958 F. 2d 315.

No. 91–8583. SLEDD *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 250 Kan. 15, 825 P. 2d 114.

No. 91–8585. JOHNS *v.* BOSTWICK, AKA MAYERSON. Int. Ct. App. Haw. Certiorari denied. Reported below: 9 Haw. App. 648, 826 P. 2d 445.

No. 91–8586. PAGINTON *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1167.

No. 91–8587. Coss *v.* Bunnell, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1386.

No. 91–8588. Stamey *v.* Stamey. Super. Ct. Douglas County, Ga. Certiorari denied.

No. 91–8589. Bustamante *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1296.

No. 91–8590. Vining *v.* Georgia Department of Corrections et al. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 91–8591. Williams *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 62, 952 F. 2d 418.

No. 91–8592. Bao Tran *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1209.

No. 91–8593. De La Cruz *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 91–8594. Finch *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 163, 957 F. 2d 912.

No. 91–8595. Tanson *v.* Glenn County Department of Social Services. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 91–8596. Washington *v.* Grayson, Warden. C. A. 6th Cir. Certiorari denied.

No. 91–8597. Woods *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 250 Kan. 109, 825 P. 2d 514.

No. 91–8598. Bahadar *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 821.

No. 91–8599. Durham *v.* Zenon, Superintendent, Oregon State Correctional Institution. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1386.

No. 91–8600. Bachynsky *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 722.

No. 91–8601. SCALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 370.

No. 91–8602. SEIFERT *v.* JONES. C. A. 8th Cir. Certiorari denied.

No. 91–8603. VILLICANA-PENA *v.* UNITED STATES; and
No. 91–8632. FIGUEROA-VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 378.

No. 91–8604. LEGRAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 91–8605. FREE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 91–8606. TRANSOU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 91–8608. DUBOIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 91–8609. RAYSOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 91–8610. CLARK *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 91–8611. PRICE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 4th 324, 821 P. 2d 610.

No. 91–8612. RONNING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 1.

No. 91–8613. LAWWILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 91–8614. PRUNTY *v.* VOINOVICH, GOVERNOR OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 91–8616. SMITH *v.* IEYOUB, ATTORNEY GENERAL OF LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 866.

No. 91–8617. STRATTON *v.* GEOFFREY, INC. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 359.

No. 91–8618. SAYLOR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 91–8620. CLAYTON *v.* BOARD OF REGENTS OF THE STATE OF FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–8621. COTTEN *v.* OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 234.

No. 91–8622. OGBUAGU *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 91–8623. CANTY *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 40.

No. 91–8624. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 91–8625. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–8626. EMBREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 751.

No. 91–8627. JACKSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 968.

No. 91–8629. HOFFMAN *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8630. HICKS *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–8631. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 603 A. 2d 451.

No. 91–8633. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 959 F. 2d 81.

No. 91–8634. ESPENSHADE *v.* DEPARTMENT OF THE ARMY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 56, 951 F. 2d 1323.

No. 91–8635. JOHNSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 584 N. E. 2d 1092.

No. 91–8636. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 951.

No. 91–8637. GRIFFIN *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–8638. HAWKINS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 1 Cal. App. 4th 880, 2 Cal. Rptr. 2d 321.

No. 91–8639. DELVECCHIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1084.

No. 91–8640. WALKER *v.* SECRETARY OF THE TREASURY, INTERNAL REVENUE SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–8641. GLEASON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 651.

No. 91–8642. FREEMAN *v.* LINDSEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 277.

No. 91–8644. KIM *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 3.

No. 91–8647. ROSENWALD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 91–8648. CALDWELL *v.* BLOCH. C. A. 3d Cir. Certiorari denied.

No. 91–8649. ALMAHDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1522.

No. 91–8651. GONZALES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 968.

No. 91–8652. SPALETTA *v.* WORKERS COMPENSATION APPEALS BOARD, COUNTY OF MENDOCINO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–8654. PARROTT *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 98, 959 F. 2d 1102.

No. 91–8655. LOUDERMILK *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 956 F. 2d 1174.

No. 91–8656. MENDACINO *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 949 F. 2d 399.

No. 91–8657. LOGGINS *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 91–8658. OVERTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1579.

No. 91–8659. BLACKBURN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 91–8660. BROWN *v.* KAUTZKY ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–8661. CLARK *v.* COLE ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–8662. BARRETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 971.

No. 91–8663. CANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1079.

No. 91–8664. BORDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 379.

No. 91–8665. CARTER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 966.

No. 91–8666. BENICH *v.* NEAL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8667. KINNELL *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 963 F. 2d 382.

No. 91–8668. HAS *v.* BUNNELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 954 F. 2d 727.

No. 91–8669. CHATFIELD *v.* CLERK OF THE DISTRICT COURT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 219.

No. 91–8671. LEVERETTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 91–8672. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 379.

No. 91–8673. LOVE *v.* UNITED STATES; and
No. 91–8757. HUFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 959 F. 2d 731.

No. 91–8675. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 91–8676. JIMENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1571.

No. 91–8677. JORDAN *v.* VERCOE. C. A. 6th Cir. Certiorari denied.

No. 91–8678. MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 91–8679. MALONE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 91–8680. WISE *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 91–8681. PLETKA *v.* NIX ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 1480.

No. 91–8682. LINDSEY *v.* STROH'S COS., INC., ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 830 S. W. 2d 899.

No. 91–8683. PENNINGTON ET AL. *v.* MISSOURI BOARD OF PROBATION AND PAROLE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 647.

No. 91–8684. BENNETT *v.* DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 91–8687. DOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 91–8688. ESCANDON *v.* BUNNELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 91–8689. ROTHSCHILD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 91–8690. LORD *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 117 Wash. 2d 829, 822 P. 2d 177.

No. 91–8691. CISNEROS-CALDERON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 242.

No. 91–8692. CONROD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 966.

No. 91–8693. WHITE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–8694. CLEMENTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 147.

No. 91–8695. MCCLOSKEY *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8696. VASSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 959 F. 2d 232.

No. 91–8697. LOVELACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 269.

No. 91–8698. OATESS *v.* CLEARFIELD COUNTY BAR ASSN. ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8699. CLAUSEN *v.* ANNICH ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8700. VILLAREAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 960 F. 2d 117.

No. 91–8701. BAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 14.

No. 91–8702. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 520.

No. 91–8703. SUAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 379.

No. 91–8704. ANCIRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1079.

No. 91–8705. PENROD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 91–8706. PENA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 4.

No. 91–8707. MOGEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 956 F. 2d 1555.

No. 91–8708. NUNEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 958 F. 2d 196.

No. 91–8709. PIERSON *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 959 F. 2d 1385.

No. 91–8710. BOSWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 970.

No. 91–8711. JUSTICE *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 234.

No. 91–8712. KENNEDY *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 959 F. 2d 112.

No. 91–8715. GARCIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 91–8716. GRAHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 959 F. 2d 232.

No. 91–8717. WHITE *v.* MCDADE, SUPERINTENDENT, HARNETT CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 148.

No. 91–8719. LOVETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 964 F. 2d 1029.

No. 91–8720. DAVIS *v.* WILKERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 370.

No. 91–8721. CURTIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 214.

No. 91–8722. BLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 123.

No. 91–8723. BANKOV *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 91–8726. GORDON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 1106.

No. 91–8727. ALEXANDER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 210, 961 F. 2d 964.

No. 91–8728. WARD *v.* MINICK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 45.

No. 91–8730. WILLIAMS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 313 Ore. 19, 828 P. 2d 1006.

No. 91–8731. WRIGHT *v.* BETTMANN ET AL.; and WRIGHT *v.* CROTTY ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–8733. BARDWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 91–8734. ALPAR *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 637.

No. 91–8735. SUTTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 476.

No. 91–8737. DEBROPHY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1209.

No. 91–8738. BAUER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 794.

No. 91–8739. BALAWAJDER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 266.

No. 91–8740. DAVIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 44, 584 N. E. 2d 1192.

No. 91–8741. EDWARDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 960 F. 2d 1053.

No. 91–8743. DESMOND *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 972 F. 2d 1355.

No. 91–8744. KNOTTS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 598 So. 2d 33.

No. 91–8747. STOKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 91–8748. PORTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 971.

No. 91–8749. LOPEZ-POLANCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 968.

No. 91–8750. LOPEZ QUINTERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 966.

No. 91–8751. DUARTE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 1255.

No. 91–8752. BERNARD *v.* CRIST, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 376.

No. 91–8753. ESTES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 236.

No. 91–8754. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 91–8755. HARDY *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–8756. FREEMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 970.

No. 91–8758. KNAPP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 955 F. 2d 566.

No. 91–8759. MILLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1296.

No. 91–8760. MUTH *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 312 Ore. 588, 824 P. 2d 417.

No. 91–8761. LEWIS *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 234.

No. 91–8763. O'CALLAGHAN *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 826 P. 2d 1132.

No. 91–8764. MARTINEZ *v.* LITTLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1574.

No. 91–8765. LOWN *v.* BRIMEYER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 956 F. 2d 780.

No. 91–8766. METCALF *v.* LANCASTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1572.

No. 91–8767. HEGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 8.

No. 91–8769. JONES *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–8771. EVANS *v.* RINALDI ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–8772. MANDRACHIO *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 4.

No. 91–8775. CRUZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 91–8776. JOHNSON *v.* MULTNOMAH COUNTY, OREGON. Sup. Ct. Ore. Certiorari denied.

No. 91–8777. DAVIS *v.* KOZAKIEWICZ. C. A. 3d Cir. Certiorari denied.

No. 91–8778. CUMBER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 91–8779. BUNTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1388.

No. 92–4. BRADLEY ET VIR *v.* ROBINSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 233.

No. 92–5. MACKENSWORTH *v.* SEA-LAND SERVICE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 276.

No. 92–7. JYOTHI *v.* APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY (SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, AKA SCRTD, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–10. TREVINO ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 276.

No. 92–13. GRIMES *v.* JOHN P. MCCARTHY PROFIT SHARING PLAN ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 610 A. 2d 725.

No. 92–15. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. *v.* LADY BALTIMORE FOODS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 960 F. 2d 1339.

No. 92–16. MDPHYSICIANS & ASSOCIATES, INC. *v.* TEXAS STATE BOARD OF INSURANCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 178.

No. 92–18. UNITED TECHNOLOGIES INTERNATIONAL, INC., P & W COMMERCIAL ENGINE BUSINESS *v.* MALEV HUNGARIAN AIRLINES. C. A. 2d Cir. Certiorari denied. Reported below: 964 F. 2d 97.

No. 92–20. WINER *v.* WINER ET AL. Super. Ct. Mass., Essex County. Certiorari denied.

No. 92–22. APEX OIL CO. ET AL. *v.* CLARK OIL & REFINING CORP. C. A. 8th Cir. Certiorari denied. Reported below: 958 F. 2d 243.

No. 92–23. HOLLAND ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 990.

No. 92–24. IN RE BELL. Sup. Ct. Ill. Certiorari denied. Reported below: 147 Ill. 2d 15, 588 N. E. 2d 1093.

No. 92–28. BROSTOFF *v.* BERKMAN, ACTING JUSTICE, SUPREME COURT OF NEW YORK, NEW YORK COUNTY. Ct. App.

N. Y. Certiorari denied. Reported below: 79 N. Y. 2d 938, 591 N. E. 2d 1175.

No. 92–29. Ford et al. *v.* United States et al. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 372.

No. 92–33. Rose Art Industries, Inc. *v.* Kenner Parker Toys, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 963 F. 2d 350.

No. 92–35. Scotch Whisky Assn. *v.* Majestic Distilling Co., Inc., dba Monumental Distilling Co. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 594.

No. 92–36. Neuhaus *v.* Metropolitan Life Insurance Co. Ct. App. Ky. Certiorari denied.

No. 92–37. Alexander *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1161.

No. 92–39. Love *v.* Kwitny et al. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1521.

No. 92–40. Terminal Railroad Association of St. Louis *v.* Odom. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 221 Ill. App. 3d 1129, 638 N. E. 2d 1227.

No. 92–41. Arby's, Inc., et al. *v.* Kitchens Foods, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 904.

No. 92–42. Ohio *v.* Brown. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 349, 588 N. E. 2d 113.

No. 92–43. Zamudio *v.* Card, Secretary of Transportation. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1078.

No. 92–44. Cable Holdings of Georgia, Inc., dba Smyrna Cable TV *v.* McNeil Real Estate Fund VI, Ltd., dba Lakes Apartments, et al. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 600.

No. 92–45. Stonehill et ux. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 243.

No. 92–46. SMITH (WIDOW OF SMITH) ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 725.

No. 92–48. FERMIN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 965 F. 2d 1063.

No. 92–49. HARRIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 414 Pa. Super. 668, 599 A. 2d 700.

No. 92–50. HOLLAND *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 41.

No. 92–51. ORTMAN *v.* ORTMAN BROS. ET AL. Ct. App. Mich. Certiorari denied.

No. 92–52. COLUMBIA GORGE UNITED-PROTECTING PEOPLE AND PROPERTY *v.* MADIGAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 110.

No. 92–53. KONRAD *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 439 Mich. 953, 482 N. W. 2d 718.

No. 92–54. DESOTO COUNTY BOARD OF SUPERVISORS ET AL. *v.* NORTH MISSISSIPPI COMMUNICATIONS INC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 652.

No. 92–55. FEDERAL PACIFIC ELECTRIC CO. *v.* NEWTON ET UX. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 220.

No. 92–56. S&M CONSTRUCTORS, INC. *v.* FOLEY CO. C. A. 8th Cir. Certiorari denied. Reported below: 959 F. 2d 97.

No. 92–57. CORNELL UNIVERSITY *v.* RUSK COUNTY. Ct. App. Wis. Certiorari denied. Reported below: 166 Wis. 2d 811, 481 N. W. 2d 485.

No. 92–60. SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1285.

No. 92–62. CHINN *v.* MCFARLAND. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 721.

No. 92–63. FRONTIER PILOTS LITIGATION STEERING COMMITTEE, INC. *v.* CONTINENTAL AIRLINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 364.

No. 92–66. CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA *v.* CMSH CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 238.

No. 92–68. STONECRAFTERS, LTD., ET AL. *v.* NORWEST EQUIPMENT FINANCE, INC. App. Ct. Conn. Certiorari denied. Reported below: 26 Conn. App. 946, 602 A. 2d 46.

No. 92–70. UNITED STATES STEEL CORP. *v.* CARTER, A MINOR, BY HIS PARENT AND NATURAL GUARDIAN, CARTER, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 529 Pa. 409, 604 A. 2d 1010.

No. 92–71. SHIROKEY *v.* CITY OF CLEVELAND HEIGHTS. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 113, 585 N. E. 2d 407.

No. 92–73. CONAWAY *v.* CONTROL DATA CORP. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 358.

No. 92–75. LUBRIZOL CORP. *v.* EXXON CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1302.

No. 92–77. DICKERSON ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 269.

No. 92–78. SULLIVAN COUNTY, TENNESSEE, ET AL. *v.* DOE. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 545.

No. 92–80. TOOKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1209.

No. 92–82. ROMANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1521.

No. 92–83. TURNER *v.* FINANCIAL CORPORATION OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 152.

No. 92–84. DICKSON WELDING, INC. *v.* ALEXANDER & ALEXANDER, INC. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1281.

No. 92–85. RAND *v.* PROSTKO, TRUSTEE. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 364.

No. 92–87. KOREAG, CONTROLE ET REVISION, S. A. *v.* REFCO F/X ASSOCIATES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 961 F. 2d 341.

No. 92–88. GOULDING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 929 F. 2d 329.

No. 92–89. CRUZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 92–91. DICKENS *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867 and 868.

No. 92–92. BRODERICK INVESTMENT CO. ET AL. *v.* HARTFORD ACCIDENT & INDEMNITY CO. C. A. 10th Cir. Certiorari denied. Reported below: 954 F. 2d 601.

No. 92–95. POCCHIARI *v.* BOARD OF REGENTS OF RHODE ISLAND ET AL. Sup. Ct. R. I. Certiorari denied.

No. 92–98. KOURI *v.* LIBERIAN SERVICES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 146.

No. 92–99. ACME RESIN CORP. *v.* ASHLAND OIL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 954 F. 2d 735.

No. 92–100. WOODS *v.* UNION PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 548.

No. 92–101. DESAI *v.* HERSH. C. A. 7th Cir. Certiorari denied. Reported below: 954 F. 2d 1408.

No. 92–103. MURRAY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATES OF HIS MINOR CHILDREN, MURRAY ET AL. *v.* ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 127.

No. 92–105. HOLT *v.* CASPARI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 961 F. 2d 1370.

No. 92–106. ASCHER *v.* VIRGINIA. Ct. App. Va. Certiorari denied. Reported below: 12 Va. App. 1105, 408 S. E. 2d 906.

No. 92–107. SCHROEDER *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 92–108. BRYSON PROPERTIES, XVIII *v.* TRAVELERS INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 496.

No. 92–112. TULL ET UX. *v.* VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–113. RAMIREZ *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 92–116. SOCIETY OF SEPARATIONISTS, INC., ET AL. *v.* HERMAN, JUDGE, TRAVIS COUNTY COURT OF LAW, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 1283.

No. 92–117. BLUE JEANS EQUITIES WEST *v.* CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 3 Cal. App. 4th 164, 4 Cal. Rptr. 2d 114.

No. 92–118. BOSCIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 959 F. 2d 1103.

No. 92–120. BANKS *v.* BANKS. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 92–121. HOFTYZER ET AL., CO-ADMINISTRATORS OF THE ESTATE OF FAIRCLOTH, DECEASED *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA. Sup. Ct. Va. Certiorari denied.

No. 92–125. SENKOW *v.* WEISS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 3.

No. 92–126. BBCA, INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 954 F. 2d 1429.

No. 92–127. EQUIBANK ET AL. *v.* LASH ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 529 Pa. 443, 604 A. 2d 1027.

No. 92–129. MOLZER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 15, 591 N. E. 2d 461.

No. 92–131. BATTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 378.

No. 92–132. JONES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JONES, DECEASED *v.* PETTY-RAY GEOPHYSICAL GEOSOURCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 1061.

No. 92–133. KOLBECK *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 722.

No. 92–134. GOAD *v.* ROLLINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1575.

No. 92–136. MCGIBONY ET AL. *v.* FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 595 So. 2d 943.

No. 92–138. A-ABART ELECTRIC SUPPLY, INC., ET AL. *v.* EMERSON ELECTRIC CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 1399.

No. 92–140. GREENMAN ET UX. *v.* CITY OF CORTLAND. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 92–142. SHARP ET AL. *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 250 Kan. 408, 827 P. 2d 12.

No. 92–143. NEARBURG *v.* BAMERILEASE CAPITAL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 150.

No. 92–145. STONE *v.* SHAW ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 92–146. CESARO *v.* LAKEVILLE COMMUNITY SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 953 F. 2d 252.

No. 92–147. PERE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 223.

No. 92–148. CALHOUN ET AL. *v.* SENK ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1578.

No. 92–152. KOSIK *v.* CLOUD COUNTY COMMUNITY COLLEGE. Sup. Ct. Kan. Certiorari denied. Reported below: 250 Kan. 507, 827 P. 2d 59.

No. 92–153. MAIO *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 34 M. J. 215.

No. 92–156. SCHOLAR *v.* PACIFIC BELL. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 264.

No. 92–157. BERNAL *v.* KOREAN AIR INC. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 393.

No. 92–158. TOWN SOUND & CUSTOM TOPS, INC., ET AL. *v.* CHRYSLER MOTORS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 959 F. 2d 468.

No. 92–159. MURPHY *v.* MURPHY. Super. Ct. Pa. Certiorari denied. Reported below: 410 Pa. Super. 146, 599 A. 2d 647.

No. 92–160. LEE ET UX., INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LEE, A MINOR *v.* RICHARDSON-MERRELL, INC. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1577.

No. 92–161. LANDANO *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 956 F. 2d 422.

No. 92–162. INTERNATIONAL INSURANCE CO. *v.* BRIDGESTONE/FIRESTONE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 966 F. 2d 470.

No. 92–163. DILEO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 959 F. 2d 16.

No. 92–164. HALL *v.* BETANCOURT LEBRON, SUPERINTENDENT OF POLICE DEPARTMENT OF PUERTO RICO. C. A. 1st Cir. Certiorari denied.

No. 92–167. FOWLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 385.

No. 92–170. BROWN *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 866.

No. 92–175. LOWRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1579.

No. 92–176. BOLLER ET AL. *v.* WESTERN LAW ASSOCIATES, P. C., ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 828 P. 2d 1184.

No. 92–178. BB ASSET MANAGEMENT, INC., DBA BROWN BAG SOFTWARE *v.* SYMANTEC CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 1465.

No. 92–179. WISHBONE, INC., ET AL. *v.* EPPINGER, PERSONAL REPRESENTATIVE OF THE ESTATE OF EPPINGER. Ct. App. Colo. Certiorari denied. Reported below: 829 P. 2d 434.

No. 92–181. HONEYWELL INC. *v.* COLLINCINI. Super. Ct. Pa. Certiorari denied. Reported below: 411 Pa. Super. 166, 601 A. 2d 292.

No. 92–182. WILLIAMS *v.* CITY OF OKOBOJI, IOWA, ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–183. KNAPP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 967.

No. 92–185. SUPERINTENDENT OF INSURANCE OF NEW YORK, AS ANCILLARY RECEIVER OF TRANSIT CASUALTY CO. *v.* DIGIROL. Ct. App. N. Y. Certiorari denied. Reported below: 79 N. Y. 2d 13, 588 N. E. 2d 38.

No. 92–186. BARBER *v.* SOMERVILLE HOSPITAL, INC., ET AL. App. Ct. Mass. Certiorari denied. Reported below: 31 Mass. App. 1116, 582 N. E. 2d 566.

No. 92–187. INSERRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 960 F. 2d 1099.

No. 92–188. CLAY *v.* BARRINGTON MOTOR SALES, INC., ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 832 S. W. 2d 33.

No. 92–189. BLAKE *v.* KAPLAN, JUDGE, ALLEGHENY COUNTY COURT OF COMMON PLEAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1566.

No. 92–191. INTERCONTINENTAL LIFE INSURANCE CO. *v.* LINDBLOM. Sup. Ct. Ala. Certiorari denied. Reported below: 598 So. 2d 886.

No. 92–192. PROVIDENT LIFE & ACCIDENT INSURANCE CO. *v.* AETNA LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 13.

No. 92–195. ROBBINS *v.* MURPHY. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 361.

No. 92–196. GARCIA *v.* TEXAS DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 214.

No. 92–197. SHAT-R-SHIELD, INC. *v.* TROJAN, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 968 F. 2d 1226.

No. 92–199. ROBBINS ET AL., TRUSTEES *v.* PAINEWEBBER INC. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 679.

No. 92–200. HUNTSMAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 959 F. 2d 1429.

No. 92–201. CONDADO PLAZA HOTEL & CASINO *v.* CASINO EMPLOYEES ASSN. ET AL. Sup. Ct. P. R. Certiorari denied.

No. 92–204. BANKERS TRUST NEW YORK CORP. ET AL. *v.* DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 79 N. Y. 2d 457, 593 N. E. 2d 275.

No. 92–206. D. L., AS GUARDIAN AD LITEM OF C. L. AND A. L., MINORS, ET AL. *v.* AMERICAN FAMILY MUTUAL INSURANCE CO. Sup. Ct. S. D. Certiorari denied. Reported below: 483 N. W. 2d 197.

No. 92–208. SIMAAN *v.* TEXACO REFINING & MARKETING INC. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 378.

No. 92–212. BARCLAYS BANK PLC *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 708, 829 P. 2d 279.

No. 92–213. CHUNN *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 821 S. W. 2d 718.

No. 92–218. ARKLA, INC. *v.* PLEDGER, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION. Sup. Ct. Ark. Certiorari denied. Reported below: 309 Ark. 10, 827 S. W. 2d 126.

No. 92–221. ROWAN COS., INC. *v.* PARKER; and ROWAN COS., INC. *v.* BRILEY. Sup. Ct. La. Certiorari denied. Reported below: 599 So. 2d 296 (first case) and 303 (second case).

No. 92–223. GLOBE LIFE & ACCIDENT INSURANCE CO. *v.* OKLAHOMA TAX COMMISSION. Sup. Ct. Okla. Certiorari denied. Reported below: 831 P. 2d 649.

No. 92–225. FIRST FIDELITY BANK, N. A., NEW JERSEY *v.* RUDBART ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 127 N. J. 344, 605 A. 2d 681.

No. 92–226. ADAMS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 1344.

No. 92–227. LONDONO-MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1082.

No. 92–228. ARMSTRONG ET AL. *v.* OWENS-ILLINOIS, INC. Ct. App. Md. Certiorari denied. Reported below: 326 Md. 107, 604 A. 2d 47.

No. 92–229. COOLEY *v.* SANCHEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 369.

No. 92–234. BANK OF CUMBERLAND *v.* AETNA CASUALTY & SURETY CO. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 595.

No. 92–236. PETERS ET AL. *v.* OHIO LOTTERY COMMISSION. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 296, 587 N. E. 2d 290.

No. 92–237. CITIZENS ELECTRIC CORP. *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 8th Cir. Certiorari denied.

No. 92–238. NATIONAL SALVAGE & SERVICE CORP. *v.* COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT. Ct. App. Ind. Certiorari denied. Reported below: 571 N. E. 2d 548.

No. 92–239. FRANCIS *v.* FRANCIS. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 581 So. 2d 408.

No. 92–240. MOORE *v.* STATE BAR OF TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 92–241. CRAWFORD ET VIR *v.* LEAHY ET AL. Ct. App. Md. Certiorari denied. Reported below: 326 Md. 160, 604 A. 2d 73.

No. 92–242. PODGURSKY *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 965 F. 2d 1064.

No. 92–243. BREWER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 170 Ariz. 486, 826 P. 2d 783.

No. 92–244. PIEKARSKI *v.* HOME OWNERS SAVING BANK, F. S. B., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 956 F. 2d 1484.

No. 92–245. ANHEUSER-BUSCH, INC. *v.* L&L WINGS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 316.

No. 92–246. SMA LIFE ASSURANCE CO. *v.* SANCHEZ PICA. C. A. 1st Cir. Certiorari denied. Reported below: 960 F. 2d 274.

No. 92–247. SIMS *v.* CITY OF SIDNEY. Ct. App. Ohio, Shelby County. Certiorari denied.

No. 92–248. MOZEE ET AL. *v.* AMERICAN COMMERCIAL MARINE SERVICE CO. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 2d 1036 and 963 F. 2d 929.

No. 92–250. GRAY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 221 Conn. 713, 607 A. 2d 391.

No. 92–251. MITCHELL *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 92–252. BLEDSOE *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 92–256. OOLEY ET AL. *v.* SCHWITZER DIVISION, HOUSEHOLD MANUFACTURING INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 961 F. 2d 1293.

No. 92–257. CLARKE *v.* BUTCHER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 207.

No. 92–258. CHENEVERT *v.* HESSE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 219.

No. 92–260. Conference of African Union First Colored Methodist Protestant Church et al. *v.* Mother African Union First Colored Methodist Protestant Church et al. Sup. Ct. Del. Certiorari denied. Reported below: 610 A. 2d 724.

No. 92–261. McGovern et ux. *v.* Town of Wilton. App. Ct. Conn. Certiorari denied.

No. 92–262. Luckett et al. *v.* Russell. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 372.

No. 92–266. O'Rear *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 168 Wis. 2d 357, 485 N. W. 2d 838.

No. 92–268. Boettner *v.* Committee on Legal Ethics of the West Virginia State Bar. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 188 W. Va. 1, 422 S. E. 2d 478.

No. 92–270. Pacific First Bank *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 800.

No. 92–272. Mroz *v.* Central Intelligence Agency. C. A. 3d Cir. Certiorari denied.

No. 92–274. San Vicente Medical Partners, Ltd. *v.* Orr, Receiver of American Principals Corp. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 1402.

No. 92–278. Branson *v.* County of Los Angeles et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–284. Stamos et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1168.

No. 92–286. Davis *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 820.

No. 92–294. Knight *v.* Washington Department of Social and Health Services. Ct. App. Wash. Certiorari denied.

No. 92–300. McGovern *v.* Chase Lincoln First Bank, N. A. Sup. Ct. Conn. Certiorari denied. Reported below: 221 Conn. 919, 608 A. 2d 685.

No. 92–322. WALTON *v.* BATRA. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1521.

No. 92–325. MATTINGLY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 89 Md. App. 187, 597 A. 2d 1027.

No. 92–332. BASALYGA ET AL. *v.* PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 529 Pa. 2, 600 A. 2d 949.

No. 92–340. RESALE MOBILE HOMES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 965 F. 2d 818.

No. 92–341. PORCELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 964 F. 2d 1306.

No. 92–346. CASTILLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 238.

No. 92–364. PLEMONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 273.

No. 92–367. HIERREZUELO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 971.

No. 92–5001. WORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 374.

No. 92–5002. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 92–5003. WINTERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 221.

No. 92–5004. WHITSITT *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 931 F. 2d 61.

No. 92–5005. TAGHAVI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 370.

No. 92–5007. BREAUX *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 4th 281, 821 P. 2d 585.

No. 92–5008. SCULLY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 379.

No. 92–5009. PALMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–5010. SORENS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–5011. NICHOLSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 934 F. 2d 320.

No. 92–5012. MALINDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 332.

No. 92–5013. MAYO *v.* JACKSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 7.

No. 92–5016. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 263.

No. 92–5018. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 973.

No. 92–5019. HOWARD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 147 Ill. 2d 103, 588 N. E. 2d 1044.

No. 92–5020. HINKLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 242.

No. 92–5021. TESTA *v.* TESTA. C. A. 6th Cir. Certiorari before judgment denied.

No. 92–5022. BOTTOM *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1521.

No. 92–5023. JACKSON *v.* BAILEY. Sup. Ct. Conn. Certiorari denied. Reported below: 221 Conn. 498, 605 A. 2d 1350.

No. 92–5026. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 972.

No. 92–5027. COUSIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1575.

No. 92–5030. ELLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 462.

No. 92–5031. ROSLYN W. *v.* SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. N. Y. Certiorari denied. Reported below: 79 N. Y. 2d 976, 592 N. E. 2d 802.

No. 92–5032. GAINER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 263.

No. 92–5035. BOWEN *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 223.

No. 92–5036. PRYCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 968.

No. 92–5037. PRINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 92–5038. RALSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 364.

No. 92–5039. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 147 Ill. 2d 173, 588 N. E. 2d 983.

No. 92–5041. WHIPPLE *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 418.

No. 92–5042. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 960 F. 2d 150.

No. 92–5043. STRIBLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 243.

No. 92–5044. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 92–5045. TINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 217.

No. 92–5046. TURNPAUGH *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5048. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 379.

No. 92–5050. LEE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1082.

No. 92–5052. SANTANA DIAZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 960 F. 2d 256.

No. 92–5053. THORNBRUGH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 962 F. 2d 1438.

No. 92–5054. SMITH *v.* RICHARDS, SUPERINTENDENT, WESTVILLE CORRECTIONAL CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 272.

No. 92–5055. FORDE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 299, 958 F. 2d 1157.

No. 92–5056. ENGELKING *v.* WATTERS. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 214.

No. 92–5057. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–5058. HURST *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1577.

No. 92–5059. DIAZ SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 221.

No. 92–5062. SOTO ALVAREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 958 F. 2d 473.

No. 92–5063. AL-HAKIM *v.* FREEDMAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 970.

No. 92–5064. MUNOZ-PATINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 92–5065. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 147.

No. 92–5066. MAYFIELD *v.* FRANCKS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 235.

No. 92–5069. MCCOLPIN *v.* DAVIES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 220.

No. 92–5070. MCMUYA *v.* MANAGEMENT SCIENCE AMERICA, INC. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1162.

No. 92–5071. MORRIS *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 92–5074. OSBURN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 1500.

No. 92–5075. LIZCANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92–5076. CRAVEIRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 958 F. 2d 361.

No. 92–5077. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 47.

No. 92–5078. SLAYBACK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 970 and 971.

No. 92–5079. SAUNDERS *v.* RILEY, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1521.

No. 92–5080. DUVALL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 825 P. 2d 621.

No. 92–5081. AMPARO SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 961 F. 2d 288.

No. 92–5082. BAILEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 570.

No. 92–5084. ROY-THOMISON ET AL. *v.* OAKLAND PROBATE COURT. Ct. App. Mich. Certiorari denied.

No. 92–5085. SMITH *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–5086. DOYLE *v.* MARTIN, SECRETARY OF LABOR, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161 and 1162.

No. 92–5087. ORTBERG *v.* MOODY, SUPERINTENDENT, WILDWOOD CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 135.

No. 92–5089. JORDAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 92–5090. HILDEBRANDT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 961 F. 2d 116.

No. 92–5091. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1167.

No. 92–5093. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 92–5094. BERROMILLA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 965 F. 2d 1064.

No. 92–5095. HUDSON *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 92–5096. FASSLER *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 92–5097. BANKS *v.* APPELBAUM. Sup. Ct. Cal. Certiorari denied.

No. 92–5098. BANKS *v.* KAYE. Sup. Ct. Cal. Certiorari denied.

No. 92–5099. THOMAS *v.* TENNEY ENGINEERING INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1568.

No. 92–5100. MEJIA *v.* BROWN. Sup. Ct. Cal. Certiorari denied.

No. 92–5101. BELAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–5102. KNOTTS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–5103. FREDERICK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 166 Wis. 2d 1050, 481 N. W. 2d 707.

No. 92–5104. GIBBS *v.* OKLAHOMA DEPARTMENT OF TRANSPORTATION. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 19.

No. 92–5106. GABALDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 370.

No. 92–5107. JONES-BEY *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 92–5108. HOUGH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1521.

No. 92–5110. W. S. *v.* R. W. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 224 Ill. App. 3d 475, 586 N. E. 2d 690.

No. 92–5111. RUB *v.* FEDERAL LAND BANK OF ST. PAUL. C. A. 8th Cir. Certiorari denied.

No. 92–5113. PITTMAN *v.* GRAMLEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 960 F. 2d 688.

No. 92–5115. REDMEN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 227, 828 P. 2d 395.

No. 92–5116. LEDET *v.* LYNN, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–5117. LINDQUIST *v.* DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 956 F. 2d 1173.

No. 92–5118. QAHDAFI *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–5119. GADSON *v.* COSTELLO, SUPERINTENDENT, MID-STATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 92–5120. BEAL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 960 F. 2d 629.

No. 92–5121. RUSSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1569.

No. 92–5122. SINES *v.* SINES. Cir. Ct. Lewis County, W. Va. Certiorari denied.

No. 92–5123. WILLE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 595 So. 2d 1149.

No. 92–5124. SCHURR *v.* CHASE HOME MORTGAGE. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 679.

No. 92–5125. DOMANTAY *v.* PIZZA HUT, INC. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 92–5126. ALLEN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 128, 960 F. 2d 1055.

No. 92–5127. DOLENC *v.* FULCOMER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–5128. ZIEGLER *v.* CHAMPION, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 22.

No. 92–5130. HOLLAND *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–5131. HOLMES ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 599.

No. 92–5132. KELLY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 4th 495, 822 P. 2d 385.

No. 92–5133. FULLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 959 F. 2d 245.

No. 92–5134. HAYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 92–5135. GROSS *v.* HEIKIEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 531.

No. 92–5136. BOYD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 434.

No. 92–5137. COPPOLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 688.

No. 92–5138. BULLOCK *v.* TOOMBS. C. A. 6th Cir. Certiorari denied. Reported below: 960 F. 2d 149.

No. 92–5139. MCCRAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 242.

No. 92–5140. MARTIN *v.* OHIO. Ct. App. Ohio, Wayne County. Certiorari denied.

No. 92–5141. MARTELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1043.

No. 92–5142. BAUER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 693.

No. 92–5143. BELDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 957 F. 2d 671.

No. 92–5145. RUTAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 565.

No. 92–5146. REDD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 163, 957 F. 2d 912.

No. 92–5148. GREER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 11.

No. 92–5149. JORDAN *v.* JONES. C. A. 6th Cir. Certiorari denied.

No. 92–5150. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–5151. KAPADIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1569.

No. 92–5154. HENDERSON *v.* UNITED STATES; and
No. 92–5171. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–5155. HOWARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 961 F. 2d 1265.

No. 92–5156. ANWILER *v.* PATCHETT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 925.

No. 92–5157. SORIA *v.* UNITED STATES; and TORRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 959 F. 2d 855 (first case) and 858 (second case).

No. 92–5158. WHITE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–5159. MECKLEY *v.* WOODRICH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 960 F. 2d 149.

No. 92–5160. MARUCA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 956 F. 2d 280.

No. 92–5162. TORRES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 303.

No. 92–5163. DE VEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 536.

No. 92–5164. ADKINS *v.* RATELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–5165. AMANDA T. *v.* NEW MEXICO HUMAN SERVICES DEPARTMENT. Ct. App. N. M. Certiorari denied.

No. 92–5168. JONES *v.* DEPARTMENT OF THE AIR FORCE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 92–5170. MCCANTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 960 F. 2d 150.

No. 92–5172. RASCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 132.

No. 92–5173. HARVEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 961 F. 2d 1361.

No. 92–5174. CARTER *v.* THORNBURGH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 19.

No. 92–5175. BURGESS *v.* ARLINGTON COUNTY SHERIFF'S DEPARTMENT. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 940.

No. 92–5176. STEWART *v.* PETERS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 958 F. 2d 1379.

No. 92–5177. HARRIS *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 962 F. 2d 17.

No. 92–5178. ALCORN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 559.

No. 92–5179. MORENO FELIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–5180. CAIN *v.* MORGAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1566.

No. 92–5181. BOSTIC ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 1344.

No. 92–5183. COCKERHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1078.

No. 92–5185. CENTENO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–5186. CIPRIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 223.

No. 92–5187. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 223.

No. 92–5189. SERRANO-ARRECHE ET AL. *v.* CORREA-FLORES. Sup. Ct. P. R. Certiorari denied.

No. 92–5190. BESHORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 961 F. 2d 1380.

No. 92–5191. BOGGAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 595 So. 2d 49.

No. 92–5192. RODRIGUEZ *v.* TOOMBS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 372.

No. 92–5193. DEMPSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 831.

No. 92–5195. MESTRE *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 92–5196. SCHROCK *v.* TURBOW. Ct. App. Ohio, Lake County. Certiorari denied.

No. 92–5197. TURNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 217.

No. 92–5198. THOMPSON *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 826 S. W. 2d 17.

No. 92–5201. WOODARD *v.* TOOMBS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5203. AGUILAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 871.

No. 92–5204. YATES *v.* GARNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 266.

No. 92–5206. FIELDS *v.* ATTORNEY GENERAL OF MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1290.

No. 92–5207. HAMILTON *v.* ROWLAND ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–5210. RUSSELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 961 F. 2d 1380.

No. 92–5211. MOHD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 275.

No. 92–5212. MAPLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1579.

No. 92–5213. MCCLURE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 147.

No. 92–5215. PRESTON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 960 F. 2d 150.

No. 92–5216. MERIT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 16 and 917.

No. 92–5217. PACE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 596 So. 2d 1034.

No. 92–5218. MINIEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 831 S. W. 2d 310.

No. 92–5219. PALMA *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 968.

No. 92–5220. MILLER *v.* PLANTIER, SUPERINTENDENT, ADULT DIAGNOSTIC AND TREATMENT CENTER. C. A. 3d Cir. Certiorari denied.

No. 92–5221. MARTIN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 609 A. 2d 669.

No. 92–5222. LAURIE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 135 N. H. 438, 606 A. 2d 1077.

No. 92–5223. NUNEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 866.

No. 92–5225. EVANS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 231, 586 N. E. 2d 1042.

No. 92–5227. HARRISON *v.* SKY CHEFS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1387.

No. 92–5229. RAUER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 963 F. 2d 1332.

No. 92–5230. CERVANTES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 92–5231. BURLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1582.

No. 92–5232. PERRY *v.* CITY OF OAKLAND, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 92–5233. LEACH *v.* CITY OF DES MOINES. Sup. Ct. Iowa. Certiorari denied.

No. 92–5234. OWENS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 959 F. 2d 231.

No. 92–5235. MCGREW *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1079.

No. 92–5236. MASON *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Sup. Ct. Cal. Certiorari denied.

No. 92–5237. CARTER *v.* CARPENTER, TARRANT COUNTY SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 92–5238. AUBIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 961 F. 2d 980.

No. 92–5240. ALLEN *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 47.

No. 92–5242. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 408.

No. 92–5243. RICHARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 969 F. 2d 849.

No. 92–5244. PURTELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–5245. BULLER *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 484 N. W. 2d 883.

No. 92–5246. JOHNSON *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. (two cases). C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1460.

No. 92–5249. VAUGHN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1579.

No. 92–5251. SIMONE *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 92–5252. STICH ET UX. *v.* ARIZONA BOARD OF PSYCHOLOGIST EXAMINERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 241.

No. 92–5253. WHATLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 147.

No. 92–5254. THONG VAN DANG *v.* ESTELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–5255. DELMAIN *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 92–5258. WIDENER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 92–5259. SILVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 157.

No. 92–5261. SAIZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 221.

No. 92–5262. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 2.

No. 92–5263. DAWN ET UX. *v.* MARGOLIS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1399.

No. 92–5264. DELGADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 92–5265. ABBOTT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 210, 961 F. 2d 964.

No. 92–5266. HARRIS *v.* HERNDON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 41.

No. 92–5267. LEGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 968.

No. 92–5268. LUCIEN *v.* MASCHING ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–5269. TILLMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 960 F. 2d 1054.

No. 92–5273. GRAY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–5274. GREENAWALT *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 943 F. 2d 1020.

No. 92–5275. HAWLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 8.

No. 92–5276. BARRAGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 217.

No. 92–5278. VIGO-CANCIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 931 F. 2d 902.

No. 92–5279. SINGLETON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 92–5281. AKBAR *v.* CAMPBELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 233.

No. 92–5285. STREET *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 32 Mass. App. 1101, 585 N. E. 2d 354.

No. 92–5286. WADE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 730.

No. 92–5287. VALENCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1189.

No. 92–5289. LAWRENCE *v.* BRADY, SECRETARY OF THE TREASURY. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1522.

No. 92–5290. MIERZEJEWSKI *v.* FAUVER, COMMISSIONER, DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1568.

No. 92–5291. THOMAS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1572.

No. 92–5292. VANDA *v.* O'LEARY, ASSISTANT DEPUTY DIRECTOR, ADULT INSTITUTIONS, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 583.

No. 92–5293. LONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–5294. MORGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 92–5297. KUPERSMIT *v.* CWA LOCAL 1033 ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–5298. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 954 F. 2d 727.

No. 92–5299. HARVEY *v.* HILL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 17.

No. 92–5301. KIRIENKO *v.* KIRIENKO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–5302. SAUNDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 1488.

No. 92–5303. McDonald *v.* Champion, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 962 F. 2d 1455.

No. 92–5304. Sanders *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1574.

No. 92–5305. Thompson *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 299, 958 F. 2d 1157.

No. 92–5306. Woods *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 596 So. 2d 156.

No. 92–5307. Jenkins *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 221 Ill. App. 3d 1112, 638 N. E. 2d 1217.

No. 92–5308. Jones *v.* Calhoun et al. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–5309. Johnson *v.* Arvonio, Administrator, East Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 92–5310. Gyore *v.* Krausz Precision Manufacturing Corp., Inc. C. A. 9th Cir. Certiorari denied. Reported below: 954 F. 2d 727.

No. 92–5311. Barksdale *v.* Peters, Director, Illinois Department of Corrections. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 379.

No. 92–5312. White *v.* Cody, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 22.

No. 92–5313. Turczyk *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1580.

No. 92–5315. Workman *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 824 P. 2d 378.

No. 92–5316. Gonzalez-Ramirez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 1184.

No. 92–5317. Cummings *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1388.

No. 92–5318. McNUTT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 960 F. 2d 144.

No. 92–5319. BRAKKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 12.

No. 92–5320. IBARRA-OLMEDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 92–5322. LINCOLN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 956 F. 2d 1465.

No. 92–5323. LEWIS *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 135 N. H. 490, 607 A. 2d 603.

No. 92–5324. SCOTT *v.* CHIEF MEDICAL EXAMINER, CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 179 App. Div. 2d 443, 577 N. Y. S. 2d 861.

No. 92–5325. WOOLDRIDGE *v.* WILDER, GOVERNOR OF VIRGINIA, ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–5327. SARDINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 956 F. 2d 280.

No. 92–5328. WILLIAMS *v.* DAHM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 216.

No. 92–5329. CASTILLO-ESPITIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1574.

No. 92–5330. HOLM *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 240.

No. 92–5331. GEISELMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 961 F. 2d 1.

No. 92–5332. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1575.

No. 92–5333. BULLS *v.* SHINBAUM ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–5334. LOBAINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 385.

No. 92–5335. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 967.

No. 92–5336. MINNIECHESKE *v.* VOCKE ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–5337. RICHARDS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 92–5338. WILSON *v.* UNITED STATES; and
No. 92–5595. STEWART ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 660.

No. 92–5341. BARTLETT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 92–5342. HARVEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92–5343. FERGUSON ET AL. *v.* WILDER, GOVERNOR OF VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–5346. DAVIS *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1451.

No. 92–5347. DOTSON *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 976.

No. 92–5348. AL-SABBAR *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–5349. SERPA *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 590.

No. 92–5350. WILLIAMSON *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 863.

No. 92–5351. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 962 F. 2d 1218.

No. 92–5352. BOWERMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 370.

No. 92–5353. WRIGHT *v.* VAN BOENING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 380.

No. 92–5355. BAGBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1168.

No. 92–5356. WHITE *v.* JAMISON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 237.

No. 92–5357. SMITH *v.* SCOTT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 951 F. 2d 352.

No. 92–5358. CORDERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1168.

No. 92–5361. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 964 F. 2d 836.

No. 92–5362. KANIOS *v.* BAKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1577.

No. 92–5363. JONES *v.* UNTHANK ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–5364. FITZGERALD *v.* ARMONTROUT. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 1062.

No. 92–5365. HARDIN ET UX. *v.* WEST VIRGINIA. Cir. Ct. Harrison County, W. Va. Certiorari denied.

No. 92–5369. MCMANN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 679.

No. 92–5370. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 217.

No. 92–5371. ROMANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1582.

No. 92–5372. RIOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 233.

No. 92–5373. MARTINEZ-VILLAREAL *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 92–5374. LUCIEN *v.* PREINER. C. A. 7th Cir. Certiorari denied. Reported below: 967 F. 2d 1166.

No. 92–5375. VISCIOTTI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 1, 825 P. 2d 388.

No. 92–5377. WASHINGTON *v.* ILLINOIS PRISONER REVIEW BOARD. C. A. 7th Cir. Certiorari denied.

No. 92–5378. WILEY *v.* CORRECTIONS CABINET OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 237.

No. 92–5379. COBB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 370.

No. 92–5380. BURROWS *v.* KAISER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 962 F. 2d 17.

No. 92–5381. SLATON *v.* CITY OF EVANSVILLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 960 F. 2d 151.

No. 92–5382. SPIVEY *v.* BRICE-WELLINGTON. Cir. Ct. Prince William County, Va. Certiorari denied.

No. 92–5383. BURNS *v.* SOUTHERLAND, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 729.

No. 92–5386. CLOVIS *v.* SYRACUSE NEWSPAPERS ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 79 N. Y. 2d 972, 592 N. E. 2d 796.

No. 92–5388. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1335.

No. 92–5389. WHITTLESEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 326 Md. 502, 606 A. 2d 225.

No. 92–5393. HUNTER *v.* NEWSOME ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1162.

No. 92–5394. GRAF *v.* WAUSHARA COUNTY, WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 166 Wis. 2d 442, 480 N. W. 2d 16.

No. 92–5396. BROWN *v.* PARKER ELECTRONICS. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 870.

No. 92–5397. NWOKEOCHA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1144.

No. 92–5398. LAZO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 379.

No. 92–5399. LUCAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 8.

No. 92–5400. PAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–5401. PADILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 92–5402. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–5403. RICKERSON *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 21.

No. 92–5404. LUFKINS *v.* LEAPLEY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 965 F. 2d 1477.

No. 92–5405. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 161.

No. 92–5406. OWENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 148.

No. 92–5408. EARLEY *v.* EARLEY. Sup. Ct. S. D. Certiorari denied. Reported below: 484 N. W. 2d 125.

No. 92–5409. GAMBRELL *v.* MARTIN. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 898.

No. 92–5410. KOETTING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1144.

No. 92–5411. JOHNSTONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 14.

No. 92–5412. MILES *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1041.

No. 92–5413. PLETTEN *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 960 F. 2d 156.

No. 92–5414. PAHNKE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 203 Ga. App. 88, 416 S. E. 2d 324.

No. 92–5415. ENCISO-MORALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 92–5416. BREWER *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 1111.

No. 92–5418. ANTOINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 592.

No. 92–5419. BROWN *v.* RIVERSIDE CORRECTIONAL FACILITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1576.

No. 92–5422. THOMAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 352.

No. 92–5423. VALDEZ *v.* OHIO. Ct. App. Ohio, Ottawa County. Certiorari denied.

No. 92–5424. SCHIFFBAUER *v.* UNITED STATES; and STOKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 201 (first case); 962 F. 2d 15 (second case).

No. 92–5425. GARCIA *v.* WARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 370.

No. 92–5426. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 960 F. 2d 48.

No. 92–5428. SMITH *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5429. GALLIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 3.

No. 92–5430. JOHNSON *v.* MORGAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 13.

No. 92–5431. MONROE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 972.

No. 92–5432. LIBERTO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 147.

No. 92–5434. MEADOWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 214.

No. 92–5435. ALONSO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 386.

No. 92–5436. DESMOND *v.* MASSACHUSETTS ATTORNEY GENERAL. App. Ct. Mass. Certiorari denied. Reported below: 32 Mass. App. 1122, 595 N. E. 2d 338.

No. 92–5437. MCGANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 846.

No. 92–5438. RODRIGUEZ *v.* BUENTELLO ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–5439. ROSE *v.* YLST, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–5440. TRUJILLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 959 F. 2d 1377.

No. 92–5442. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 221.

No. 92–5445. HIRJEE *v.* B & B OIL CO., INC. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 410.

No. 92–5446. HILL *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1577.

No. 92–5447. JOHNSON *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–5448. HANUS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 239 Neb. xxvi.

No. 92–5449. TRUEBLOOD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 587 N. E. 2d 105.

No. 92–5450. OMOIKE *v.* EXXON CO. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 747.

No. 92–5451. SHELL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 385.

No. 92–5452. SANDOVAL MEDINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 23.

No. 92–5453. RICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 211.

No. 92–5458. HAYNES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 12.

No. 92–5459. BONILLA *v.* HOKE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1042.

No. 92–5460. HERNANDEZ *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 577, 589 N. E. 2d 1310.

No. 92–5462. OWENS *v.* MCLEOD, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1571.

No. 92–5463. POOLE *v.* OHIO. Ct. App. Ohio, Allen County. Certiorari denied.

No. 92–5464. RAYMOND *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 968 F. 2d 1227.

No. 92–5465. MANWANI *v.* SCHONZEIT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 1521.

No. 92–5466. MULAZIM *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5467. WALKER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 826 P. 2d 1002.

No. 92–5468. RUSSELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 963 F. 2d 1320.

No. 92–5471. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1304.

No. 92–5472. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 147.

No. 92–5473. GRACE *v.* BARTON, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–5475. KOCH *v.* UNITED STATES NAVY PUBLIC WORKS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 216.

No. 92–5477. CADAVID *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 92–5479. CEA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 963 F. 2d 1027.

No. 92–5481. BROOKS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 79 N. Y. 2d 1043, 596 N. E. 2d 408.

No. 92–5482. ATOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1574.

No. 92–5483. DUNBAR *v.* TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1574.

No. 92–5486. RODGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 374.

No. 92–5487. WABEKE *v.* MAATMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 237.

No. 92–5492. FORERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 385.

No. 92–5494. GILES-EL *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5495. GASKINS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 92–5496. SOWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1084.

No. 92–5497. TAGHIPOUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 964 F. 2d 908.

No. 92–5498. STANFORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–5500. MOKOL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 1410.

No. 92–5504. COOPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–5507. BROWN *v.* UNITED STATES; and
No. 92–5508. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 1563.

No. 92–5509. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 660.

No. 92–5512. SUGUI *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 968 F. 2d 1227.

No. 92–5516. MAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–5517. LOMBARDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 272.

No. 92–5521. SULLIVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 370.

No. 92–5522. MCKNIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 11.

No. 92–5525. MEDRANO-ELIZONDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 384.

No. 92–5532. HOUSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–5535. GUERRERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1345.

No. 92–5536. HILLIARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1447.

No. 92–5547. BULL *v.* EUBANKS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 968.

No. 92–5550. BARSTEN *v.* DEPARTMENT OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 949.

No. 92–5551. COVINGTON *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTION. Sup. Ct. Va. Certiorari denied.

No. 92–5555. ROWLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 8.

No. 92–5558. LAM KWONG-WAH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 162, 966 F. 2d 682.

No. 92–5561. RENGIFO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 966 F. 2d 1440.

No. 92–5567. HAINES *v.* DEFENSE LOGISTICS AGENCY. C. A. Fed. Cir. Certiorari denied. Reported below: 960 F. 2d 155.

No. 92–5571. BLANKENSHIP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 1224.

No. 92–5574. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1163.

No. 92–5578. GARMAN *v.* ZULKE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 952 F. 2d 1398.

No. 92–5587. SEWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–5607. ELLIOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 386.

No. 92–5608. HALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 374.

No. 92–5609. AMOROS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 384.

No. 92–5610. VILLEGAS-MOLINA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 22.

No. 92–5611. THIELMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 675.

No. 92–5614. LEVINE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 970 F. 2d 681.

No. 92–5620. BOURGEOIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 964 F. 2d 935.

No. 92–5623. OSBURN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 1500.

No. 92–5628. FORTNEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 629.

No. 92–5632. PICQUET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 54.

No. 92–5633. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92–5637. GONZALEZ-SUAREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 966 F. 2d 1440.

No. 92–5646. WADE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 377.

No. 92–5647. ZAGNOJNY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–5649. BOSWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 7.

No. 92–5650. BEVERLY ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 972 F. 2d 1354.

No. 92–5655. HITCHCOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 379.

No. 92–5656. FALCONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 960 F. 2d 988.

No. 92–5657. MCINTYRE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–5664. VICTOR *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 76 Ohio App. 3d 372, 601 N. E. 2d 648.

No. 92–5665. SALANDRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–5667. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1251.

No. 92–5671. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 962 F. 2d 479.

No. 92–5673. HANEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 386.

No. 92–5675. MORALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 964 F. 2d 677.

No. 92–5678. NELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 970 F. 2d 439.

No. 92–5679. PAYTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 22.

No. 92–5682. BONNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 966.

No. 92–5683. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 676.

No. 92–5689. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 374.

No. 92–5691. JALIL *v.* AVDEL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 13.

No. 92–5693. JOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 220.

No. 92–5694. BOLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 378.

No. 92–5730. BARBELLA *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1042.

No. 92–5738. HOUSTON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 91–1108. DEKALB BOARD OF REALTORS, INC., ET AL. *v.* THOMPSON, DBA FLETCHER L. THOMPSON REALTY, ET AL. C. A. 11th Cir. Motion of American Society of Association Executives et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 934 F. 2d 1566.

No. 91–1195. CHINA EVERBRIGHT TRADING CO. *v.* TIMBER FALLING CONSULTANTS, INC. C. A. 9th Cir. Motion of petitioner to consider this case with No. 92–31, *China Everbright Trading Co.* v. *Timber Falling Consultants, Inc.*, denied. Motion

of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 937 F. 2d 1444.

No. 91–1503. MARYLAND *v.* OTT. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 325 Md. 206, 600 A. 2d 111.

No. 91–1634. FLORIDA *v.* JONES. Dist. Ct. App. Fla., 2d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 592 So. 2d 248.

No. 91–1782. DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* GRIFFIN. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 961 F. 2d 793.

No. 91–1785. PLUMMER, SHERIFF OF ALAMEDA COUNTY *v.* PETTAWAY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 943 F. 2d 1041.

No. 91–1878. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* COKELEY. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 951 F. 2d 916.

No. 91–1971. FARLEY, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. *v.* BASKIN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 956 F. 2d 142.

No. 91–1978. CONNECTICUT *v.* BUELL. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 221 Conn. 407, 605 A. 2d 539.

No. 91–2006. ESTELLE, WARDEN *v.* BOARDMAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 957 F. 2d 1523.

No. 92–47. MICHIGAN *v.* THOMAS. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 191 Mich. App. 576, 478 N. W. 2d 712.

No. 92–193. MORGAN, WARDEN *v.* JEFFERSON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 962 F. 2d 1185.

No. 92–198. TEXAS *v.* HILL. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 827 S. W. 2d 860.

No. 92–222. TENNESSEE *v.* CRUMP. Sup. Ct. Tenn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 834 S. W. 2d 265.

No. 91–1529. MICHIGAN *v.* POLIDORI. Ct. App. Mich. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 190 Mich. App. 673, 476 N. W. 2d 482.

No. 91–1748. MALCOLM PIRNIE, INC. *v.* MARTIN, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 949 F. 2d 611.

No. 91–1876. LONG ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 952 F. 2d 1520.

No. 91–2057. WOLPOFF & ABRAMSON *v.* CARROLL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 961 F. 2d 459.

No. 91–2082. RICE ET AL. *v.* MITCHELL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 954 F. 2d 187.

No. 92–32. ACEVEDO-RAMOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 961 F. 2d 305.

No. 92–5051. SCHERZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 961 F. 2d 217.

No. 91–1769. WILLIAMS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF SAUNDERS, DECEASED *v.* FEDERAL LAND BANK OF JACKSON ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 293 U. S. App. D. C. 343, 954 F. 2d 774.

No. 91–1895. BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 7th Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 957 F. 2d 424.

No. 91–8615. TOLBERT *v.* KEMP, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 954 F. 2d 725.

No. 92–12. TOOMEY *v.* WHELAN ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 293 U. S. App. D. C. 267, 953 F. 2d 663.

No. 92–215. BROOKS ET AL. *v.* HILTON CASINOS, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 959 F. 2d 757.

No. 91–1831. CARROLL ET AL. *v.* BLINKEN, CHAIRMAN OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, ET AL. C. A. 2d Cir. Motion of Pacific Legal Foundation et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 957 F. 2d 991.

No. 91–1946. OKLAHOMA DEPARTMENT OF HUMAN SERVICES *v.* TRUST COMPANY OF OKLAHOMA, GUARDIAN OF ESTATE OF BARKER, A MINOR. Sup. Ct. Okla. Motion of Missouri, Montana, and Nebraska for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 825 P. 2d 1295.

No. 91–1962. UNION MORTGAGE CO., INC. *v.* BARLOW ET AL. Sup. Ct. Ala. Motion of Republic of Finland for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 595 So. 2d 1335.

No. 91–1981. M/V TROPICANA ET AL. *v.* ESPIRITO SANTO BANK OF FLORIDA, FKA BANK ESPIRITO. C. A. 11th Cir. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 91–8274. RAMSEY *v.* COLORADO ET AL. Ct. App. Colo. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 91–8517. FONTENETTE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 91–8582. PREDHAM *v.* UNITED STATES ET AL. C. A. 3d Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 968 F. 2d 14.

No. 91–8774. RAMSEY *v.* CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 907 F. 2d 1004.

No. 91–2078. KAMISUGI *v.* KUHNERT ET UX. Sup. Ct. Haw. Motion of Hawaii Association of Realtors for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 73 Haw. 623, 827 P. 2d 1148.

No. 91–2081. GEORGIA POWER CO. *v.* PATAULA ELECTRIC MEMBERSHIP CORP. ET AL.; and

No. 92–19. WHITWORTH ET AL. *v.* PATAULA ELECTRIC MEMBERSHIP CORP. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions. Reported below: 951 F. 2d 1238.

No. 91–8426 (A–123). RICKMAN *v.* CITY OF OVERLAND PARK, KANSAS. Sup. Ct. Kan. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied. Certiorari denied. Reported below: 249 Kan. ix, 821 P. 2d 1018.

No. 91–8714. FIERRO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. JUSTICE BLACKMUN would grant the petition, vacate the judgment, and remand the case for further consideration in light of *Dawson* v. *Delaware*, 503 U. S. 159 (1992). Reported below: 1 Cal. 4th 173, 821 P. 2d 1302.

No. 92–8. BODINE'S, INC. *v.* GORDON ET AL. App. Ct. Ill., 1st Dist. Motion of Chicago Association of Commerce and Industry et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 224 Ill. App. 3d 195, 586 N. E. 2d 461.

No. 92–9. GENERAL MOTORS ACCEPTANCE CORP. *v.* MITCHELL ET UX. C. A. 9th Cir. Motion of American Financial Services Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 954 F. 2d 557.

No. 92–14. ROCHMAN ET AL. *v.* NORTHEAST UTILITIES SERVICE CO. ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 963 F. 2d 469.

No. 92–27. GOULD *v.* P. T. KRAKATAU STEEL. C. A. 8th Cir. Motion of Arkansas for leave to file a brief as *amicus curiae* denied. Certiorari denied. Reported below: 957 F. 2d 573.

No. 92–38. CHRYSLER CORP. *v.* INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 7th Cir. Motions of Equal Employment Advisory Council and Florida Association for Women Lawyers et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 959 F. 2d 685.

No. 92–76. INDUSTRIA PANIFICADORA, S. A., ET AL. *v.* UNITED STATES; and DISTRIBUIDORA COMERCIAL VICKY, S. A., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioners to consolidate these cases with No. 92–425, *Goldstar (Panama), S. A., et al.* v. *United States;* and *Mauricio Deportes, S. A., et al.* v. *United States,* and No. 92–399, *Lindo & Maduro, S. A., et al.* v. *United States,* denied. Certiorari denied. Reported below: 294 U. S. App. D. C. 137, 957 F. 2d 886 (first case); 297 U. S. App. D. C. 302, 971 F. 2d 765 (second case).

No. 92–110. CITY OF EL PASO *v.* WOODALL ET AL. C. A. 5th Cir. Motion of National Institute of Municipal Law Officers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 950 F. 2d 255 and 959 F. 2d 1305.

No. 92–122. CITY OF VERNON *v.* SOUTHERN CALIFORNIA EDISON CO. C. A. 9th Cir. Motion of American Public Power Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 955 F. 2d 1361.

No. 92–135. SAN FILIPPO *v.* BONGIOVANNI ET AL. C. A. 3d Cir. Motion of Rutgers Council of AAWP Chapters et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 961 F. 2d 1125.

No. 92–172. COLORADO *v.* JONES. Sup. Ct. Colo. Motion of Attorney General of Colorado et al. for leave to file a brief as *amici curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 828 P. 2d 797.

No. 92–254. BRIGHT *v.* RUTGERS, STATE UNIVERSITY OF NEW JERSEY, ET AL. C. A. 3d Cir. Motion of petitioner for leave to file subsequent pleadings on letter size paper and other relief denied. Certiorari denied. Reported below: 961 F. 2d 207.

No. 92–304. NEW YORK STATE SCHOOL BOARDS ASSN. *v.* SOBOL, COMMISSIONER OF EDUCATION, ET AL. Ct. App. N. Y. Motion of National School Boards Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 79 N. Y. 2d 333, 591 N. E. 2d 1146.

No. 92–5024. JACOBS *v.* SUPREME COURT OF MISSOURI. Sup. Ct. Mo. Motion of petitioner to expedite consideration of petition for writ of certiorari denied. Certiorari denied.

No. 92–5040. CASTRO *v.* NEW YORK CITY BOARD OF EDUCATION ET AL. C. A. 1st Cir. Certiorari before judgment denied.

No. 92–5385 (A–139). KING *v.* UNITED STATES. C. A. 6th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied. Certiorari denied. Reported below: 962 F. 2d 1228.

No. 92–5718. DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. Sup. Ct. N. Y., County of New York. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 91–6572. LOWRY *v.* W. R. GRACE & CO. ET AL., 502 U. S. 1065;

No. 91–7424. GIBBS *v.* CLEMENTS FOOD CO., 503 U. S. 991;

No. 91–8077. FIELDS *v.* TENNESSEE, 504 U. S. 977;

No. 91–8094. POTTS *v.* GEORGIA, 505 U. S. 1224;

No. 91–8147. WHITE *v.* TEMPLE UNIVERSITY, 505 U. S. 1224;

No. 91–8239. SWENSKY *v.* MERIT SYSTEMS PROTECTION BOARD, 505 U. S. 1210;

No. 91–8243. CHAPPELL *v.* UNITED STATES, 504 U. S. 990;

No. 91–8281. In re Kwoh Cheng Sun, 504 U. S. 971; and
No. 91–8377. Geraldo *v.* United States, 505 U. S. 1211. Petitions for rehearing denied.

No. 91–1585. Thompson et vir *v.* Peoples Liberty Bank et al., 504 U. S. 941; and
No. 91–1627. Mitchell et ux., as Next Friends for Mitchell, a Minor *v.* Metropolitan Life Insurance Co., 504 U. S. 941. Motions of petitioners for leave to proceed further herein *in forma pauperis* granted. Petitions for rehearing denied.

No. 91–1673. Connors *v.* Howard Johnson Co., 504 U. S. 916. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied.

No. 91–8421. Bush *v.* United States, 505 U. S. 1227. Motion of petitioner for leave to file petition for rehearing out of time denied.

October 13, 1992

Certiorari Granted—Vacated and Remanded

No. 91–7800. Chew-Villasana *v.* Immigration and Naturalization Service. C. A. 5th 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 the decision in *Texas* v. *Chew* (County Court of Duval County, Feb. 26, 1992). Reported below: 951 F. 2d 1256.

No. 92–26. Reed *v.* Drummond, Trustee. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Patterson* v. Shumate, 504 U. S. 753 (1992). Reported below: 951 F. 2d 1046.

No. 92–90. Virtual Maintenance, Inc. *v.* Prime Computer, Inc. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Eastman Kodak Co.* v. *Image Technical Services., Inc.*, 504 U. S. 451 (1992). Reported below: 957 F. 2d 1318.

No. 92–203. Arkansas-Platte & Gulf Partnership *v.* Dow Chemical Co. et al. C. A. 10th Cir. Certiorari granted,

judgment vacated, and case remanded for further consideration in light of *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504 (1992). Reported below: 959 F. 2d 158.

Miscellaneous Orders

No. — – —. PHILLIPS *v.* CITY OF THOMASTON ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–229. DEWITT *v.* FOLEY, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES. D. C. N. D. Cal. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A–244 (92–5794). COTTAM *v.* LUZERNE COUNTY CHILDREN AND YOUTH SERVICES. Sup. Ct. Pa. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–1119. IN RE DISBARMENT OF O'HARA. Disbarment entered. [For earlier order herein, see 504 U. S. 904.]

No. D–1130. IN RE DISBARMENT OF BANDY. Disbarment entered. [For earlier order herein, see 504 U. S. 954.]

No. D–1131. IN RE DISBARMENT OF BRITTON. Disbarment entered. [For earlier order herein, see 504 U. S. 969.]

No. D–1132. IN RE DISBARMENT OF KAISER. Disbarment entered. [For earlier order herein, see 504 U. S. 969.]

No. D–1133. IN RE DISBARMENT OF SNYDER. Disbarment entered. [For earlier order herein, see 504 U. S. 969.]

No. D–1142. IN RE DISBARMENT OF SHAUGHNESSY. Robert William Shaughnessy, of Miami, Fla., 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 practice before the Bar of this Court. The rule to show cause, heretofore issued on June 29, 1992 [505 U. S. 1217], is hereby discharged.

No. D–1148. IN RE DISBARMENT OF TREVASKIS. It having been reported to the Court by John Rogers Carroll, of Media, Pa., that John P. Trevaskis, Jr., has died, the rule to show cause, heretofore issued on August 18, 1992 [505 U. S. 1238], is hereby discharged.

No. D–1166. IN RE DISBARMENT OF BRODSKY. It is ordered that David L. Brodsky, of Clive, Iowa, be suspended from the practice of law in this Court and that a rule 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–1167. IN RE DISBARMENT OF BOETTNER. It is ordered that John L. Boettner, Jr., of Charleston, W. Va., be suspended from the practice of law in this Court and that a rule 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–1168. IN RE DISBARMENT OF MITCHELL. It is ordered that Carl M. Mitchell, of Hauppauge, N. Y., be suspended from the practice of law in this Court and that a rule 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–1169. IN RE DISBARMENT OF MULDERIG. It is ordered that William M. Mulderig, of Tallman, N. Y., be suspended from the practice of law in this Court and that a rule 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–1170. IN RE DISBARMENT OF SANDBERG. It is ordered that George Sandberg, of Patchogue, N. Y., be suspended from the practice of law in this Court and that a rule 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–1171. IN RE DISBARMENT OF SIMON. It is ordered that Richard Dennis Simon, of Hauppauge, N. Y., be suspended from the practice of law in this Court and that a rule 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–1172. IN RE DISBARMENT OF RAUCH. It is ordered that Allan Harold Rauch, of Des Moines, Iowa, be suspended from the practice of law in this Court and that a rule 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–1173. IN RE DISBARMENT OF ROMER. It is ordered that Steven J. Romer, of Fishkill, N. Y., be suspended from the

practice of law in this Court and that a rule 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–1174. IN RE DISBARMENT OF TATE. It is ordered that John T. Tate, Jr., of Pasadena, Cal., be suspended from the practice of law in this Court and that a rule 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–1175. IN RE DISBARMENT OF HICKEY. It is ordered that William James Hickey, of Bakersfield, Cal., be suspended from the practice of law in this Court and that a rule 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. 91–790. CSX TRANSPORTATION, INC. *v.* EASTERWOOD; and
No. 91–1206. EASTERWOOD *v.* CSX TRANSPORTATION, INC. C. A. 11th Cir. [Certiorari granted, 505 U. S. 1217.] Motion of the Solicitor General to permit William K. Kelley, Esq., to present oral argument *pro hac vice* granted.

No. 91–2012. HOLDER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNTY COMMISSIONER FOR BLECKLEY COUNTY, GEORGIA, ET AL. *v.* HALL ET AL. C. A. 11th Cir.; and
No. 92–74. DEPARTMENT OF REVENUE OF OREGON *v.* ACF INDUSTRIES, INC., ET AL. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 92–5505. DEAN *v.* SMITH ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 3, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis.*

No. 92–5542. HUDSON *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until

November 3, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis.*

No. 92–326. IN RE MCDONALD;
No. 92–5527. IN RE SMITH;
No. 92–5564. IN RE WALKER; and
No. 92–5596. IN RE ELLIS. Petitions for writs of mandamus denied.

No. 92–265. IN RE VASQUEZ, WARDEN, ET AL. Petition for writ of mandamus dismissed as moot.

Certiorari Granted

No. 91–2079. GOOD SAMARITAN HOSPITAL ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari granted. Reported below: 952 F. 2d 1017.

No. 92–102. DAUBERT ET UX., INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR DAUBERT, ET AL. *v.* MERRELL DOW PHARMACEUTICALS, INC. C. A. 9th Cir. Certiorari granted. Reported below: 951 F. 2d 1128.

No. 91–7604. ANTOINE *v.* BYERS & ANDERSON, INC., ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 950 F. 2d 1471.

Certiorari Denied

No. 91–7913. BROWN *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1386.

No. 91–8407. WHEELER *v.* SIMS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 951 F. 2d 796.

No. 91–8451. STARLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 725.

No. 91–8498. WALLACE *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 104 N. C. App. 498, 410 S. E. 2d 226.

No. 91–8518. CARPINO *v.* DEMOSTHENES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 406.

No. 91–8607. CARD *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 121 Idaho 425, 825 P. 2d 1081.

No. 91–8628. FERDIK *v.* BONZELET, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 1258.

No. 91–8713. JENKINS *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 1117.

No. 92–6. BOLADO *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 36 M. J. 2.

No. 92–17. POLLARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 7, 959 F. 2d 1011.

No. 92–64. TUCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 92–69. CLARK ET AL. *v.* JENKINS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 762.

No. 92–79. KAIMOWITZ *v.* FREDERICK, INDIVIDUALLY AND AS MAYOR OF CITY OF ORLANDO, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 410.

No. 92–123. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 372.

No. 92–128. BEDELL ET AL. *v.* MARTIN, SECRETARY OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 1029.

No. 92–130. BUILDING & CONSTRUCTION TRADES DEPARTMENT, AFL–CIO, ET AL. *v.* MARTIN, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 182, 961 F. 2d 269.

No. 92–141. PORTER *v.* UNITED STATES;
No. 92–5280. CHIARELLI *v.* UNITED STATES;
No. 92–5314. DURISH *v.* UNITED STATES;
No. 92–5367. RAUCCI *v.* UNITED STATES; and
No. 92–5368. PORTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1569.

No. 92–149. PULSAR DATA SYSTEMS, INC., AKA PULSAR CREDIT CORP. ET AL. *v.* FEDERAL MARKETING CONSULTANTS, INC. Sup. Ct. Va. Certiorari denied.

No. 92–151. CALIFORNIA HOUSING SECURITIES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 959 F. 2d 955.

No. 92–273. ALLEN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 34 M. J. 228.

No. 92–275. HAMILTON ET AL. *v.* KOMATSU-DRESSER, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 964 F. 2d 600.

No. 92–276. KRIETER, TRUSTEE *v.* CHILES, GOVERNOR OF FLORIDA, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 595 So. 2d 111.

No. 92–277. POPEOPLE, INC. *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 830 S. W. 2d 403.

No. 92–281. BERRY ET AL. *v.* PROFESSIONALS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 959 F. 2d 231.

No. 92–283. DIXON ET AL. *v.* OGDEN NEWSPAPERS, INC. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 187 W. Va. 120, 416 S. E. 2d 237.

No. 92–287. WALLER ET AL. *v.* OSBOURNE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1084.

No. 92–288. SAKER *v.* LUPER. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 373.

No. 92–290. FESTA *v.* NEW JERSEY BOARD OF PUBLIC UTILITIES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1566.

No. 92–291. INTERNATIONAL PAPER CO. *v.* GRASSI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 558.

No. 92–293. NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT ET AL. *v.* KRAEBEL, DBA BARKLEE REALTY CO. C. A. 2d Cir. Certiorari denied. Reported below: 959 F. 2d 395.

No. 92–295. LUFKIN *v.* MCCALLUM ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 956 F. 2d 1104.

No. 92–296. SCHMIER ET AL. *v.* KAPLAN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–299. GOTZL *v.* CANTRELL (GOTZL). C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1162.

No. 92–301. TEXAS *v.* JIMENEZ. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 828 S. W. 2d 455.

No. 92–303. SLATER *v.* OPTICAL RADIATION CORP. C. A. 7th Cir. Certiorari denied. Reported below: 961 F. 2d 1330.

No. 92–306. ROSENTHAL *v.* CONRAD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–309. AHAM-NEZE *v.* SOHIO SUPPLY CO. ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–310. O'QUINN *v.* WEDCO TECHNOLOGY, INC. C. A. 10th Cir. Certiorari denied. Reported below: 955 F. 2d 49.

No. 92–312. CROZIER, CHAPTER 11 TRUSTEE *v.* BRADFORD, TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 72.

No. 92–314. BIERDEMAN *v.* SHEARSON LEHMAN HUTTON INC. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 378.

No. 92–316. PFLUGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 949 F. 2d 398.

No. 92–318. GILMAN *v.* GILMAN. Sup. Ct. Conn. Certiorari denied. Reported below: 222 Conn. 909, 608 A. 2d 691.

No. 92–319. BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY *v.* LIBERTY GROUP ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 965 F. 2d 879.

No. 92–321. ELDRIDGE *v.* EZELL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–327. KELLY *v.* TREE FARM DEVELOPMENT CORP. ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 598 So. 2d 76.

No. 92–328. INGRAM ET AL. *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES. Commw. Ct. Pa. Certiorari denied. Reported below: 141 Pa. Commw. 324, 595 A. 2d 733.

No. 92–330. COLLINS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 92–331. HARPER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 594 So. 2d 1181.

No. 92–334. SOTELO SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1169.

No. 92–342. NEILSON *v.* SUPERIOR COURT OF CALIFORNIA (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 92–345. CAROLCO TELEVISION INC. *v.* NATIONAL BROADCASTING CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 1269.

No. 92–347. COX *v.* BOUDREAUX CIVIC ASSN., INC., ET AL. Sup. Ct. Tex. Certiorari denied.

No. 92–348. BIBLE TEMPLE ET AL. *v.* OREGON EMPLOYMENT DIVISION ET AL. Ct. App. Ore. Certiorari denied. Reported below: 110 Ore. App. 148, 820 P. 2d 468.

No. 92–349. LEAL ET AL. *v.* SUN OIL CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–353. GAMBOCZ *v.* MCCALLUM ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–354. DECARLO *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 599 So. 2d 1295.

No. 92–366. RUWITCH, TRUSTEE, IRREVOCABLE TRUST AGREEMENT OF WALLACE R. RUWITCH *v.* WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 1234.

No. 92–376. ANTZOULATOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 720.

No. 92–377. CARPENTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 824.

No. 92–405. M & M REFORESTATION LTD. ET AL. *v.* SAIF CORP. ET AL. Ct. App. Ore. Certiorari denied. Reported below: 110 Ore. App. 370, 821 P. 2d 1134.

No. 92–406. MELECHINSKY ET AL. *v.* ANDERSEN ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–411. SOCORRO MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 171.

No. 92–412. MITSUBISHI HEAVY INDUSTRIES, LTD., INDIVIDUALLY AND ON BEHALF OF MITSUBISHI AIRCRAFT INTERNATIONAL, INC. *v.* WILLIAMS AVIATION CO. ET AL. Sup. Ct. Tex. Certiorari denied.

No. 92–424. REILLY *v.* INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 899.

No. 92–429. MADSON *v.* MADSON. Ct. App. Wash. Certiorari denied.

No. 92–439. WEISS *v.* GRIEVANCE COMMITTEE, TENTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 171 App. Div. 2d 362, 576 N. Y. S. 2d 376.

No. 92–447. WILLIS *v.* SHERWIN-WILLIAMS CO. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 871.

No. 92–5161. NAGHDI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1389.

No. 92–5166. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 213.

No. 92–5200. CHESTNA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 962 F. 2d 103.

No. 92–5241. CABRERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1256.

No. 92–5250. SHANKLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 148.

No. 92–5283. HERNANDEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1110.

No. 92–5284. VANCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 217.

No. 92–5454. WANZER *v.* COLLINS. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1573.

No. 92–5455. WHITLEY *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–5456. ANDREWS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–5457. ALLEN *v.* DOWD, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 964 F. 2d 745.

No. 92–5469. RIVERA *v.* LANE. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 272.

No. 92–5478. TOSADO *v.* LACOBELLE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1042.

No. 92–5480. ANTONELLI *v.* BEELER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–5484. FUENTES MACIAS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–5490. BAKER *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–5491. JONES *v.* CHECKETT, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, DIVISION OF MEDICAL SERV-

ICES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 1458.

No. 92–5493. FAULK *v.* TEXAS DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 369.

No. 92–5501. WHORF *v.* DUBOIS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 966 F. 2d 1440.

No. 92–5502. SLATON *v.* CITY OF EVANSVILLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 960 F. 2d 151.

No. 92–5510. FOSTER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 827 S. W. 2d 670.

No. 92–5511. FISHER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 370.

No. 92–5513. TITUS *v.* BUGYI. Super. Ct. N. J., App. Div. Certiorari denied.

No. 92–5515. PINHOLSTER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 4th 865, 824 P. 2d 571.

No. 92–5523. PAPANIA *v.* 14TH JUDICIAL DISTRICT COURT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 866.

No. 92–5530. OWEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 596 So. 2d 985.

No. 92–5531. WADDY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 424, 588 N. E. 2d 819.

No. 92–5533. KINSLOW *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 1224.

No. 92–5537. HARRIS *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 960 F. 2d 738.

No. 92–5538. JOHNSON *v.* KAISER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 20.

No. 92–5540. BOSTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 224 Ill. App. 3d 218, 586 N. E. 2d 326.

No. 92–5541. WILLIAMS *v.* IDAHO STATE BAR. Sup. Ct. Idaho. Certiorari denied.

No. 92–5543. COTTEN *v.* COTTEN. Ct. App. Ohio, Marion County. Certiorari denied.

No. 92–5544. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1143.

No. 92–5546. ARIO *v.* GOMEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 376.

No. 92–5552. ARNOLD *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER FOR GERMANIA BANK, F. S. B. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 376.

No. 92–5553. WRIGHT *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 593 So. 2d 759.

No. 92–5559. MARTIN *v.* ROBERTS, DEPUTY SECRETARY, DIVISION OF FACILITY MANAGEMENT, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 20.

No. 92–5563. PEAVEY *v.* POLYTECHNIC INSTITUTE OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1042.

No. 92–5565. ROBINSON *v.* MONTANA DEPARTMENT OF FAMILY SERVICES ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 253 Mont. 434, 833 P. 2d 1063.

No. 92–5566. PEARCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 434.

No. 92–5572. SIMPSON *v.* SIMPSON. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 92–5575. TUCKER *v.* TUCKER ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 251 Kan. ix, 832 P. 2d 1205.

No. 92–5581. MITCHELL *v.* EBERHART, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5582. MITCHELL *v.* BASS. C. A. 6th Cir. Certiorari denied.

No. 92–5583. PETERS *v.* ARMONTROUT, ASSISTANT DIRECTOR/ZONE II, DIVISION OF ADULT INSTITUTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 376.

No. 92–5585. PICKARD *v.* COMMITTEES ON CHARACTER AND FITNESS FOR THE SECOND JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 92–5586. TWYMAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 602 So. 2d 1234.

No. 92–5588. HOWER *v.* OHIO. Ct. App. Ohio, Auglaize County. Certiorari denied.

No. 92–5589. HIGGASON *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 1456.

No. 92–5590. LEISURE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 828 S. W. 2d 872.

No. 92–5591. TAYLOR *v.* BARBER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–5598. TUCKER *v.* SHERATON CENTURY HOTEL. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–5600. YOUNG *v.* ZENON, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 380.

No. 92–5601. BOYD *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 221 Conn. 685, 607 A. 2d 376.

No. 92–5605. WINTERS *v.* IOWA STATE UNIVERSITY. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 11.

No. 92–5606. DIXON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 602 So. 2d 1225.

No. 92–5612. DELEGAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 351.

No. 92–5616. PIERCE *v.* TRIPPETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5617. LOYA *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–5619. DUNMORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 1459.

No. 92–5621. CASH *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 596 So. 2d 746.

No. 92–5625. JONES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–5626. JONES *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 92–5627. GUTHRIE *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied.

No. 92–5630. JONES, AKA ROULETTE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 965 F. 2d 1507.

No. 92–5631. GETZ *v.* DELAWARE ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–5634. LANGARICA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 107 Nev. 932, 822 P. 2d 1110.

No. 92–5638. GRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 593.

No. 92–5639. ABUSAYED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 963 F. 2d 368.

No. 92–5645. MIRANDA *v.* COOPER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 392.

No. 92–5659. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 1510.

No. 92–5670. JONES *v.* THOMPSON, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 92–5680. CRAWFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 381.

No. 92–5684. YARBROW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 381.

No. 92–5685. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1572.

No. 92–5686. SARDIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 966 F. 2d 564.

No. 92–5687. SHIPLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 56.

No. 92–5696. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–5698. TYREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92–5699. ALVARADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 378.

No. 92–5701. MITCHAM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 4th 1027, 824 P. 2d 1277.

No. 92–5702. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 964 F. 2d 1147.

No. 92–5703. LANE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 681.

No. 92–5704. LUSCHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 381.

No. 92–5705. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–5706. PEDRAZA-RUIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 594.

No. 92–5707. NELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–5713. COLEMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92–5716. DONALDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–5717. PLUMMER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 964 F. 2d 1251.

No. 92–5726. HORNICK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 546.

No. 92–5729. RODRIGUEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 971 F. 2d 1206.

No. 92–5731. MADRID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 381.

No. 92–5732. TROMBLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 675.

No. 92–5734. RUSHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 868.

No. 92–5736. DEBROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 675.

No. 92–5741. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–5742. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 679.

No. 92–5744. ORGERON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 675.

No. 92–5746. CASTRO-POUPART *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 971 F. 2d 745.

No. 92–5753. CASTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1447.

No. 92–5755. SUAREZ-BERMUDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 680.

No. 92–5756. SOSA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1569.

No. 92–5757. SAMBRANO VILLARREAL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 725.

No. 92–5759. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 703.

No. 92–5763. BARNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 7.

No. 92–5764. SHORES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1383.

No. 92–5767. FRAZIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 593.

No. 92–5773. GORDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 92–5776. HARVEY *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 954 F. 2d 733.

No. 92–5778. PATINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 263.

No. 92–5779. NIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 371.

No. 92–5780. REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 966 F. 2d 508.

No. 92–5781. MCGLYNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 1468.

No. 92–5782. MICHEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1571.

No. 92–5783. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 960 F. 2d 1301.

No. 92–5787. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 967.

No. 92–5799. CARPENTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 736.

No. 92–5806. GIRALDO-GIRALDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 680.

No. 92–5807. ELLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 355.

No. 92–5809. GOMEZ, AKA LNU *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 680.

No. 92–5811. CONTENT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 967 F. 2d 84.

No. 92–5819. FARMER *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1042.

No. 92–5820. HENRY *v.* UNITED STATES;
No. 92–5821. HATCH *v.* UNITED STATES; and
No. 92–5823. HAMMONDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 963 F. 2d 976.

No. 92–5825. HEALEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 972.

No. 92–5829. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 964 F. 2d 1147.

No. 92–5831. ALVAREZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 592.

No. 92–5834. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 1308.

No. 92–5835. ZULETA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 961 F. 2d 1565.

No. 92–5837. TSOSIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 966 F. 2d 1357.

No. 92–5838. ALEX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 591.

No. 92–5839. DE LOS ANGELES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 1.

No. 92–5853. SAVARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 964 F. 2d 1075.

No. 92–5860. GAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 322.

No. 92–5861. MEIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 677.

No. 92–5863. OKORO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1447.

No. 92–5875. JONES *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 473.

No. 91–1849. COSTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 919.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Petitioner Costa was convicted on various drug trafficking charges and sentenced to 60 years in prison. The District Court ordered that he would not be eligible for parole until he served one-third of his sentence (20 years). Before the Eleventh Circuit, petitioner argued that this latter provision violated 18 U. S. C. § 4205(a), which states that the maximum term of imprisonment prior to parole eligibility generally is (1) one-third of a sentence for a term of years, or (2) 10 years of a life sentence and of a sentence of more than 30 years.

The Court of Appeals rejected this argument, relying on § 4205(b)(1), which provides that a district court may "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." 947 F. 2d 919 (1991).

The Courts of Appeals have interpreted the interplay between subsections (a) and (b)(1) of the statute in conflicting ways. In holding that § 4205(b)(1) authorizes the sentencing court to disregard the 10-year ceiling for parole eligibility in § 4205(a), the Eleventh Circuit joined the Fifth, Ninth, Eighth, and Tenth Circuits. See *United States* v. *Varca*, 896 F. 2d 900, 905–906 (CA5), cert. denied, 498 U. S. 878 (1990); *United States* v. *Gwaltney*, 790 F. 2d 1378, 1388–1389 (CA9 1986), cert. denied, 479 U. S. 1104 (1987); *Rothgeb* v. *United States*, 789 F. 2d 647, 651–653 (CA8 1986); *United States* v. *O'Driscoll*, 761 F. 2d 589, 595–598 (CA10 1985),

cert. denied, 475 U. S. 1020 (1986); see also *United States* v. *Berry*, 839 F. 2d 1487 (CA11 1988), cert. denied, 488 U. S. 1040 (1989). Firmly to the contrary are the First, Third, Sixth, and Seventh Circuits, which have held that § 4205 imposes a 10-year maximum before parole eligibility. Under this view, the purpose of subsection (b) was to allow judges to *reduce*, not to *extend*, the preparole eligibility period. See *United States* v. *Castonguay*, 843 F. 2d 51, 56 (CA1 1988); *United States* v. *DiPasquale*, 859 F. 2d 9, 13 (CA3 1988); *United States* v. *Hagen*, 869 F. 2d 277 (CA6), cert. denied, 492 U. S. 911 (1989); *United States* v. *Fountain*, 840 F. 2d 509, 521 (CA7), cert. denied, 488 U. S. 982 (1988).

Although the statute was repealed as of November 1, 1987, by the Sentencing Reform Act of 1984, it remains applicable to crimes committed before that date. As this case and others illustrate, the issue continues to arise. See *United States* v. *Faulkenberry*, 1992 U. S. App. LEXIS 14580 (CA9) (unpublished); *Frierson* v. *United States*, 1991 U. S. App. LEXIS 10310 (CA6) (unpublished); *United States* v. *Beale*, 921 F. 2d 1412 (CA11), cert. denied, 502 U. S. 829 (1991); *United States* v. *Maravilla*, 907 F. 2d 216, 229 (CA1 1990). I would grant certiorari to resolve this split between the Circuits.

No. 91–6576. JOHNSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SOUTER would grant the petition, vacate the judgment, and remand the case for further consideration in light of *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). Reported below: 938 F. 2d 1166.

No. 91–7611. LANGSTON *v.* UNITED STATES. C. A. 5th Cir.; and

No. 91–7814. MUKES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: No. 91–7611, 949 F. 2d 770; No. 91–7814, 952 F. 2d 404.

JUSTICE WHITE, with whom JUSTICE THOMAS joins, dissenting.

In both of these cases, the petitioners contend that there was insufficient evidence to establish that they used a firearm during and in relation to a drug trafficking crime in violation of 18

U. S. C. § 924(c)(1).[1] In the course of searching Johnny Lee Mukes' house, officers found, in the top drawer of a nightstand in the bedroom, two plastic bags containing 32.9 grams of cocaine, a loaded .38-caliber derringer, and an unloaded .25-caliber automatic pistol. 1992 U. S. App. LEXIS 544 (CA6) (unpublished). When the police found James Edward Langston, he was standing at a table covered with cocaine base, six to eight feet from which was a loaded .38-caliber semiautomatic pistol hidden under a mattress. *United States* v. *Featherson*, 949 F. 2d 770 (CA5 1991).

The Courts of Appeals for the Fifth and Sixth Circuits, construing the term "uses" broadly, held that the jury could reasonably conclude that the presence of the firearms was connected to the trafficking in that they could protect the petitioners' merchandise. See also *United States* v. *Blake*, 941 F. 2d 334, 342–343 (CA5 1991); *United States* v. *Molinar-Apodaca*, 889 F. 2d 1417, 1424 (CA5 1989). Other courts have adopted the same approach. See, *e. g.*, *United States* v. *Wilkinson*, 926 F. 2d 22, 25–26 (CA1), cert. denied, 501 U. S. 1211 (1991); *United States* v. *Paz*, 927 F. 2d 176, 179 (CA4 1991); *United States* v. *Young-Bey*, 893 F. 2d 178, 181 (CA8 1990); *United States* v. *Martinez*, 967 F. 2d 1343, 1346–1347 (CA9 1992); *United States* v. *Handa*, 1991 U. S. App. LEXIS 21752 (CA9) (unpublished); *United States* v. *Poole*, 878 F. 2d 1389, 1393–1394 (CA11 1989).

The petitioners insist that § 924(c) does not contemplate presuming an intent to use a firearm in relation to drug trafficking from the fact that a gun was found in the same room as drugs and related paraphernalia. The Sixth Circuit remarked that Mukes' position "has some support in case law from other circuits," and, in particular, cited the Second Circuit's decision in *United States* v. *Feliz-Cordero*, 859 F. 2d 250, 254 (1988). See 1992 U. S. App. LEXIS 544, *2 ("*[Feliz-Cordero]* is difficult to reconcile with our circuit precedent. . . . Insofar as there is a conflict, of course, and unless the Supreme Court or Congress should instruct us

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[1] Title 18 U. S. C. § 924(c)(1) provides:

"Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . , be sentenced to imprisonment for five years . . . ."

These cases involve only the "use" prong of the statute.

otherwise, we must follow our own precedents"). *Id.*, at *6.[2] Petitioners also rely on cases from the Third and District of Columbia Circuits. See *United States* v. *Bruce*, 939 F. 2d 1053, 1054–1056 (CADC 1991); *United States* v. *Theodoropoulos*, 866 F. 2d 587, 597–598 (CA3 1989). But see *United States* v. *Jefferson*, 974 F. 2d 201 (CADC 1992).

Because this issue arises with some frequency, and in light of the conflict in the Circuits, which shows no signs of abating, I would grant certiorari to clarify the meaning and scope of § 924(c).

No. 91–8167. SMITH *v.* UNITED STATES; and

No. 91–8328. HARRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. JUSTICE THOMAS took no part in the consideration or decision of these petitions. Reported below: 294 U. S. App. D. C. 300, 959 F. 2d 246.

No. 91–8230. FRANK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 872.

Opinion of JUSTICE STEVENS, respecting the denial of the petition for writ of certiorari.

This case illustrates the important difference between an order denying a petition for certiorari and a ruling on the merits.

The Insanity Defense Reform Act of 1984 ensures that a federal criminal defendant found not guilty by reason of insanity will not be released onto the streets. It provides that "the Attorney General shall hospitalize the person [found not guilty by reason of insanity] in a suitable facility" until a State assumes responsibility for his care and treatment or the Attorney General finds that his release would not create a risk of harm to people or property. 18 U. S. C. § 4243(e). The question presented by the petition for certiorari is whether a defendant who has pleaded not guilty by reason of insanity is entitled to a jury instruction explaining the effect of this statute. If such an instruction is not given, there is a strong possibility that the jury will be reluctant to accept a

[2] In *United States* v. *Jackson*, 1991 U. S. App. LEXIS 1757, *170 (CA6) (unpublished), cert. denied, 502 U. S. 828 (1991), the Sixth Circuit noted that some courts had held that "the 'in relation to' language of section 924(c) requires more than 'mere availability': the circumstances must suggest that the defendant intend to and be able to use the firearms during the offense. This, however, has not been the law of the Sixth Circuit."

meritorious defense because of fear that a dangerous, mentally ill person will go free.

For reasons that I explained at some length 18 years ago, refusal to give such an instruction in an appropriate case can constitute plain error.[1] Until 1984 the refusal to give such an instruction was justified by the absence of a federal statute providing for mandatory commitment.[2] In the District of Columbia, however, where such a statute had been in place since 1955, the instruction was required.[3] Now that the reason for a different rule in different parts of the federal system has been eliminated, the wise rule adopted by then-Judge Warren Burger and his colleagues on the District of Columbia Circuit should be applied throughout the system.

Because the denial of a writ of certiorari is not a ruling on the merits, the Court's action today is not inconsistent with that conclusion.[4] Rather, the Court's action is supported by the fact that a square conflict between two Courts of Appeals has not arisen since the enactment of the 1984 statute, and by the Court's normal practice of awaiting such a conflict before considering the significance of new federal legislation.

No. 91–8333. PALMER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no part in the consider-

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[1] *United States* v. *Greene*, 497 F. 2d 1068, 1092 (CA7 1974) (dissenting opinion) ("[T]he failure of the trial judge to give any advice at all to the jury on a matter that must have loomed large in their deliberations constituted plain error. It is almost inconceivable to me that if the jury had put to one side any concern about the consequences of a not guilty verdict, they would not have entertained a reasonable doubt as to the defendant's sanity").

[2] See *Pope* v. *United States*, 372 F. 2d 710, 731–732 (CA8 1967) (en banc) (Blackmun, J.).

[3] *Lyles* v. *United States*, 103 U. S. App. D. C. 22, 25, 254 F. 2d 725, 728 (1957) (en banc) (opinion of Burger and Prettyman, JJ.) ("We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts"), cert. denied, 356 U. S. 961 (1958). Judges Burger and Prettyman found historical support in *Hadfield's Case*, 27 How. St. Tr. 1282, 1354–1355 (K. B. 1800), where the Lord Chief Justice instructed the jury that a defendant found not guilty by reason of insanity would be confined. *Lyles*, 103 U. S. App. D. C., at 26, n. 3, 254 F. 2d, at 729, n. 3.

[4] See *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (STEVENS, J., respecting denial of certiorari) and cases cited therein.

ation or decision of this petition. Reported below: 294 U. S. App. D. C. 300, 959 F. 2d 246.

No. 92–2. ASHLEY, WARDEN *v.* BYERLY. Ct. App. Ky. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 825 S. W. 2d 286.

No. 92–72. SABINE CONSOLIDATED, INC., ET AL. *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 816 S. W. 2d 784.

No. 92–5049. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.

No. 92–5214. RAMOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 961 F. 2d 1003.

No. 92–174. VAN CAMP *v.* AT&T INFORMATION SYSTEMS ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 963 F. 2d 119.

No. 92–267. UJB FINANCIAL CORP. ET AL. *v.* SHAPIRO ET AL. C. A. 3d Cir. Motions of Dean Witter Reynolds, Inc., et al., New York Clearing House Association, and American Bankers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 964 F. 2d 272.

No. 92–285. KEENE CORP. *v.* LINDSAY. Sup. Ct. Tex. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari.

No. 92–297. KOONS *v.* ROGERS ET AL. C. A. 2d Cir. Motion of National Artists Equity Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 960 F. 2d 301.

No. 92–5556. OMOIKE *v.* COCA-COLA BOTTLING CO. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 968 F. 2d 16.

No. 92–5800. GAMBLE *v.* EAU CLAIRE COUNTY, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari before judgment denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit on September 28 and 30, 1992, 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 *nunc pro tunc* pursuant to 28 U. S. C. § 295.

OCTOBER 19, 1992

Certiorari Granted—Vacated and Remanded

No. 91–1633. HATCHER, WARDEN, ET AL. *v.* DEUTSCHER. 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 *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). Reported below: 946 F. 2d 1443.

Miscellaneous Orders

No. ——. MORELAND ET UX. *v.* VELSICOL CHEMICAL CORP. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. ——. BARNARD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. D–1135. IN RE DISBARMENT OF PIKEN. Disbarment entered. [For earlier order herein, see 504 U. S. 970.]

No. D–1138. IN RE DISBARMENT OF JACOBO. Disbarment entered. [For earlier order herein, see 504 U. S. 981.]

No. D–1139. IN RE DISBARMENT OF FINE. Disbarment entered. [For earlier order herein, see 504 U. S. 981.]

No. D–1141. IN RE DISBARMENT OF ELLIS. Disbarment entered. [For earlier order herein, see 505 U. S. 1202.]

No. D–1144. IN RE DISBARMENT OF DRISCOLL. Disbarment entered. [For earlier order herein, see 505 U. S. 1237.]

No. D–1145. IN RE DISBARMENT OF VAN RYE. Disbarment entered. [For earlier order herein, see 505 U. S. 1237.]

No. D–1146. IN RE DISBARMENT OF HERZIG. Disbarment entered. [For earlier order herein, see 505 U. S. 1237.]

No. D–1149. IN RE DISBARMENT OF GREENWALD. Disbarment entered. [For earlier order herein, see 505 U. S. 1238.]

No. D–1165. IN RE DISBARMENT OF WATSON. Disbarment entered. [For earlier order herein, see 505 U. S. 1242.]

No. D–1176. IN RE DISBARMENT OF KEITH. It is ordered that Randy Wayne Keith, of Chatsworth, Cal., be suspended from the practice of law in this Court and that a rule 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–1177. IN RE DISBARMENT OF BIEGEN. It is ordered that Arnold I. Biegen, of New York, N. Y., be suspended from the practice of law in this Court and that a rule 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–1178. IN RE DISBARMENT OF EISEN. It is ordered that Morris Eisen, of New York, N. Y., be suspended from the practice of law in this Court and that a rule 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–1179. IN RE DISBARMENT OF FISHMAN. It is ordered that Harold Michael Fishman, of Great Neck, N. Y., be suspended from the practice of law in this Court and that a rule 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–1180. IN RE DISBARMENT OF LANDAU. It is ordered that Jay Howard Landau, of New York, N. Y., be suspended from the practice of law in this Court and that a rule 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–1181. IN RE DISBARMENT OF LEVITAS. It is ordered that Stuart Charles Levitas, of Walnut Creek, Cal., be suspended from the practice of law in this Court and that a rule 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–1182. IN RE DISBARMENT OF NAPOLI. It is ordered that Joseph P. Napoli, of New York, N. Y., be suspended from the practice of law in this Court and that a rule 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–1183. IN RE DISBARMENT OF ARTMAN. It is ordered that Jean D. Artman, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1184. IN RE DISBARMENT OF MCQUAIG. It is ordered that Dawson A. McQuaig, Sr., of Jacksonville, Fla., be suspended from the practice of law in this Court and that a rule 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–1185. IN RE DISBARMENT OF RICHARDSON. It is ordered that Theodore Carlton Richardson, of Washington, D. C., be suspended from the practice of law in this Court and that a rule 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–1186. IN RE DISBARMENT OF MCGRADY. It is ordered that Michael McGrady, of Seattle, Wash., be suspended from the practice of law in this Court and that a rule 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–1187. IN RE DISBARMENT OF O'LEARY. It is ordered that Timothy Francis O'Leary, of Melrose, Mass., be suspended from the practice of law in this Court and that a rule 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–1188. IN RE DISBARMENT OF LOMBARDI. It is ordered that Joseph A. Lombardi, of Scituate, Mass., be suspended from the practice of law in this Court and that a rule 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–1189. IN RE DISBARMENT OF HURLEY. It is ordered that Daniel G. Hurley, of Medford, Mass., be suspended from the

practice of law in this Court and that a rule 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–1190. IN RE DISBARMENT OF COLE. It is ordered that Howard Sy Cole, of Van Nuys, Cal., be suspended from the practice of law in this Court and that a rule 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. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $14,388.53 for the period April 1 through June 30, 1992, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, *ante*, p. 804.]

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of Nebraska for leave to file a surreply brief denied. [For earlier order herein, see, *e. g.*, *ante*, p. 805.]

No. 91–1160. ARAVE, WARDEN *v.* CREECH. C. A. 9th Cir. [Certiorari granted, 504 U. S. 984.] Motion of Thomas Gibson for leave to file a brief as *amicus curiae* granted.

No. 91–1677. COMMISSIONER OF INTERNAL REVENUE *v.* KEYSTONE CONSOLIDATED INDUSTRIES, INC. C. A. 5th Cir. [Certiorari granted, *ante*, p. 813.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 91–8674. SMITH *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, *ante*, p. 814.] Motion for appointment of counsel granted, and it is ordered that Gary Kollin, Esq., of Ft. Lauderdale, Fla., be appointed to serve as counsel for petitioner in this case.

No. 92–352. NOVAK ET AL. *v.* ANDERSEN CORP. ET AL. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–5569. IN RE ELLIS; and

No. 92–5642. IN RE BAUER. Petitions for writs of mandamus denied.

No. 92–5635. IN RE WHITAKER. Petition for writ of prohibition denied.

Certiorari Granted

No. 92–166. KEENE CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted. Reported below: 962 F. 2d 1013.

No. 92–351. HELLER, SECRETARY, KENTUCKY CABINET FOR HUMAN RESOURCES *v.* DOE, BY HIS MOTHER AND NEXT FRIEND, DOE, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 965 F. 2d 109.

No. 92–190. UNITED STATES *v.* IDAHO EX REL. DIRECTOR, IDAHO DEPARTMENT OF WATER RESOURCES. Sup. Ct. Idaho. Motion of Nez Perce Tribe et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 112 Idaho 116, 832 P. 2d 289.

No. 92–5129. SULLIVAN *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 596 So. 2d 177.

Certiorari Denied

No. 91–8345. DEUTSCHER *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 946 F. 2d 1443.

No. 91–8503. HAZEL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 599 A. 2d 38.

No. 91–8580. REDD *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 948 F. 2d 1293.

No. 92–21. STOCKSTILL ET AL. *v.* SHELL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 92–81. ELLIS *v.* CARD, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 961 F. 2d 912.

No. 92–93. SNEEDE ET AL. *v.* KIZER, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 362.

No. 92–168. WARREN *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 237.

No. 92–169. MITCHELL ET AL. *v.* UNITED TEACHERS-LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 258.

No. 92–171. RODRIGUEZ-MORALES, AKA HERNANDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 958 F. 2d 1441.

No. 92–173. EFAMOL, LTD. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 808.

No. 92–180. BTM CORP. *v.* LILLEY. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 746.

No. 92–269. GROSS *v.* UNITED STATES; and
No. 92–324. PATRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 965 F. 2d 1390.

No. 92–307. ELLIOTT ET AL. *v.* CITY OF ATHENS, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 960 F. 2d 975.

No. 92–343. SANTOS *v.* LINDSTROM ET AL. Ct. App. Colo. Certiorari denied.

No. 92–350. LANCASTER ET AL. *v.* MERCHANTS NATIONAL BANK OF FORT SMITH, ARKANSAS. C. A. 8th Cir. Certiorari denied. Reported below: 961 F. 2d 713.

No. 92–355. MIDCO PIPE & TUBE, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 962 F. 2d 465.

No. 92–356. MUMAW *v.* NURAD, INC. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 837.

No. 92–365. LUNDE *v.* IOWA BOARD OF REGENTS. Ct. App. Iowa. Certiorari denied. Reported below: 487 N. W. 2d 357.

No. 92–368. GUY *v.* BREEKO CORP. Sup. Ct. Ark. Certiorari denied. Reported below: 310 Ark. 187, 832 S. W. 2d 816.

No. 92–370. PENTER *v.* BALDWIN PIANO & ORGAN CO. Ct. App. Ark. Certiorari denied. Reported below: 37 Ark. App. xvii.

No. 92–374. STANDRING *v.* MCALLISTER. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1451.

No. 92–378. VORWALD *v.* RIVER FALLS SCHOOL DISTRICT ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 167 Wis. 2d 549, 482 N. W. 2d 93.

No. 92–381. KING ET UX. *v.* KING. Sup. Ct. Ky. Certiorari denied. Reported below: 828 S. W. 2d 630.

No. 92–388. ANDERSON ET AL. *v.* CONTINENTAL STEEL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 1456.

No. 92–394. WILLIAMS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 34 M. J. 250.

No. 92–404. SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND ET AL. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1043.

No. 92–431. SAFIR *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–437. LUGO *v.* BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–441. JENKINS ET AL. *v.* DAVIDON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 274.

No. 92–442. MICHELSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 288.

No. 92–455. KNOX COUNTY SCHOOL SYSTEM *v.* BABB ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 965 F. 2d 104.

No. 92–461. HANNER *v.* STONE, SECRETARY OF THE ARMY. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–473. MORRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 1391.

No. 92–491. BRISTER, INDIVIDUALLY AND AS NATURAL TUTOR AND ADMINISTRATOR OF THE ESTATE OF HIS MINOR CHILD, BRISTER, ET AL. *v.* UNION TEXAS PETROLEUM CORP. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 968.

No. 92–492. WATFORD ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 386.

No. 92–503. GUAGLIERI *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 92–5014. ST. PIERRE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 146 Ill. 2d 494, 588 N. E. 2d 1159.

No. 92–5202. CARDONA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 976.

No. 92–5260. WALLACE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 12.

No. 92–5272. HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 827 S. W. 2d 949.

No. 92–5340. FARMER *v.* COWAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 958 F. 2d 374.

No. 92–5366. MCCASLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 786.

No. 92–5518. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 1535.

No. 92–5519. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1167.

No. 92–5576. MAYET *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 3.

No. 92–5602. THARPE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 110, 416 S. E. 2d 78.

No. 92–5622. DOUGAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 595 So. 2d 1.

No. 92–5624. WILSON *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 817.

No. 92–5641. HOWARD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 4th 1132, 824 P. 2d 1315.

No. 92–5643. SMITH *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 222 Conn. 1, 608 A. 2d 63.

No. 92–5644. WATKINS *v.* HIGGINS, SUPERINTENDENT, CENTRAL MISSOURI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 752.

No. 92–5648. VIGNOLO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 1254, 872 P. 2d 837.

No. 92–5651. COLEMAN *v.* DELAWARE. C. A. 3d Cir. Certiorari denied.

No. 92–5652. PEREZ *v.* BLANKENSHIP, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 963 F. 2d 367.

No. 92–5661. MORRIS *v.* INDIANAPOLIS PUBLIC SCHOOLS. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 352.

No. 92–5662. MCCLAIN *v.* MCGINNIS, DIRECTOR, DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–5666. VEALE ET AL. *v.* NEW HAMPSHIRE. C. A. 1st Cir. Certiorari denied. Reported below: 966 F. 2d 1440.

No. 92–5668. VAN DER JAGT *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 926.

No. 92–5669. BRAKKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 92–5674. HARRIS *v.* BLANCHARD, GOVERNOR OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–5681. KOT *v.* PATERNOSTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 13.

No. 92–5697. SAWYER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 598 So. 2d 1035.

No. 92–5708. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 381.

No. 92–5709. MARTIN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 92–5710. MIKESELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 92–5711. NEESE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 963 F. 2d 383.

No. 92–5719. BETTS *v.* ROBINSON, ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 92–5721. ROBERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 955 F. 2d 586.

No. 92–5722. RILEY *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5723. ROBERTS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–5724. BROWNE *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 610 A. 2d 723.

No. 92–5725. CHARIF ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1444.

No. 92–5768. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 693.

No. 92–5770. FOSTER *v.* SCHUETZLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–5774. JIMISON *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–5775. KNIGHT *v.* KING ET AL. Sup. Ct. S. C. Certiorari denied.

No. 92–5813. MCMASTER *v.* CITY OF AKRON HOUSING APPEALS BOARD. Ct. App. Ohio, Summit County. Certiorari denied.

No. 92–5824. GARRETT *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–5844. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 98, 959 F. 2d 1102.

No. 92–5845. PACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–5849. MINES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–5852. UZAMERE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 895.

No. 92–5854. SEXSTONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 92–5857. FLANAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 676.

No. 92–5858. COOK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 24.

No. 92–5859. LAFRADEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 596.

No. 92–5868. SUTTON *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 7.

No. 92–5873. RAINES *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 326 Md. 582, 606 A. 2d 265.

No. 92–5877. YOUNG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 676.

No. 92–5878. BELTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 958 F. 2d 374.

No. 92–5884. COUSINO *v.* STENNETT ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–5889. MILES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 21.

No. 92–5891. ENCARNACION-GALVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 402.

No. 92–5892. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1447.

No. 92–5893. PEDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 517.

No. 92–5895. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–5900. BENJAMIN *v.* HAWLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5908. WEAVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 1224.

No. 92–5912. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 8.

No. 92–5913. USHERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 575.

No. 92–5924. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–5936. GEBOW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 897.

No. 92–5937. GARRISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 1462.

No. 92–5949. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–5952. GAETANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 385.

No. 92–5960. HOUSLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 622.

No. 92–5970. HOLGUIN *v.* HUGHES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 586.

No. 91–1740. LOCAL UNION NUMBER 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS *v.* WICKHAM CONTRACTING CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 955 F. 2d 831.

No. 92–339. BOWERS *v.* TAYLOR. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 966 F. 2d 417.

No. 92–363. 995 Fifth Avenue Associates, L. P. *v.* New York State Department of Taxation and Finance et al. C. A. 2d Cir. Motion of L. A. Cotton Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 963 F. 2d 503.

Rehearing Denied

No. 91–1737. Shiseido Cosmetics (America) Ltd. *v.* Franchise Tax Board of California, 505 U. S. 1205. Motion for leave to file petition for rehearing denied.

October 21, 1992

Certiorari Denied

No. 92–6303 (A–324). Grubbs *v.* Delo, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to Justice Blackmun, and by him referred to the Court, denied. Certiorari denied. The order heretofore entered by Justice Blackmun [*post,* p. 1301] is vacated.

Justice Blackmun, dissenting.

I would not vacate the existing stay. I would continue the stay so that the District Court may consider the merits of Grubbs' first claim for relief and the weight to be given Doctor A. E. Daniel's affidavit.

Justice Stevens, dissenting.

For me, the respondent's failure to file a motion to vacate the stay entered by Justice Blackmun is a sufficient reason for allowing that stay to remain in effect. Moreover, if such a motion were filed, I would vote to deny it because I do not believe the petition for certiorari should be acted upon before the Court decides the pending case of *Herrera* v. *Collins,* No. 91–7328.

Justice Souter, dissenting.

I would grant the petition for writ of certiorari, summarily vacate the order of the Court of Appeals, and remand with instructions to remand to the District Court for consideration of a claim under *Sawyer* v. *Whitley,* 505 U. S. 333 (1992).

October 22, 1992

Certiorari Denied

No. 92–6260 (A–318). Gardner *v.* Dixon, Warden. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied. Justice Blackmun and Justice Stevens would grant the application for stay. Reported below: 966 F. 2d 1442.

No. 92–6314 (A–328). Gardner *v.* Dixon, Warden. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied. Reported below: 979 F. 2d 847.

October 29, 1992

Dismissals Under Rule 46

No. 92–31. China Everbright Trading Co. *v.* Timber Falling Consultants, Inc.; and

No. 92–305. Timber Falling Consultants, Inc. *v.* China Everbright Trading Co. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 959 F. 2d 1468.

October 30, 1992

Dismissal Under Rule 46

No. 92–494. Casares et al. *v.* Spendthrift Farm, Inc., et al. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 968 F. 2d 810.

November 2, 1992

Affirmed on Appeal

No. 92–522. Gardner et al. *v.* Illinois Legislative Redistricting Commission et al. Affirmed on appeal from D. C. N. D. Ill. Reported below: 786 F. Supp. 704 and 792 F. Supp. 1110.

Certiorari Granted—Vacated and Remanded

No. 91–1993. Continental Casualty Co. *v.* Fibreboard Corp. C. A. 9th Cir. Certiorari granted, judgment vacated, and

case remanded to the Court of Appeals to consider the question of mootness. Reported below: 953 F. 2d 1386.

No. 92–5152. HAPP *v.* FLORIDA. 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 *Espinosa* v. *Florida*, 505 U. S. 1079 (1992). Reported below: 596 So. 2d 991.

Miscellaneous Orders. (See also Nos. 92–5584 and 92–5618, *ante*, p. 1.)

No. A–352. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* SCHIRMER ET AL. Application for stay of injunction entered by the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. D–1090. IN RE DISBARMENT OF GARNER. Motion to reconsider disbarment order [504 U. S. 938] denied.

No. D–1160. IN RE DISBARMENT OF WEIL. Disbarment entered. [For earlier order herein, see 505 U. S. 1242.]

No. D–1161. IN RE DISBARMENT OF JONES. Curtis Larenzo Jones, Jr., of Miami, Fla., 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 practice before the Bar of this Court. The rule to show cause, heretofore issued on September 4, 1992 [505 U. S. 1242], is hereby discharged.

No. D–1191. IN RE DISBARMENT OF SKRYD. It is ordered that Thomas J. Skryd, of Cicero, Ill., be suspended from the practice of law in this Court and that a rule 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–1192. IN RE DISBARMENT OF ALBAN. It is ordered that Bennett Alban, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule 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–1193. IN RE DISBARMENT OF MCGOWAN. It is ordered that Terrance Leon McGowan, of Santa Barbara, Cal., be sus-

pended from the practice of law in this Court and that a rule 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–1194. IN RE DISBARMENT OF CAPLAN. It is ordered that Walter Harry Caplan, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule 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–1195. IN RE DISBARMENT OF CASPER. It is ordered that Howard J. Casper, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule 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–1196. IN RE DISBARMENT OF HARLAN. It is ordered that James Irving Harlan, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule 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–1197. IN RE DISBARMENT OF HAWKINS. It is ordered that J. Dare Hawkins, of Houston, Tex., be suspended from the practice of law in this Court and that a rule 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–1198. IN RE DISBARMENT OF WATROUS. It is ordered that Ira Watrous, of Houston, Tex., be suspended from the practice of law in this Court and that a rule 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–1199. IN RE DISBARMENT OF KIRK. It is ordered that Mitchell Wayne Kirk, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule 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–1200. IN RE DISBARMENT OF SIMON. It is ordered that Dennis J. Simon, of Coral Springs, Fla., be suspended from the practice of law in this Court and that a rule 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. 91–1111. HARTFORD FIRE INSURANCE CO. ET AL. *v.* CALIFORNIA ET AL.; and

No. 91–1128. MERRETT UNDERWRITING AGENCY MANAGEMENT LTD. ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 814.] The time allotted for oral argument in these cases is expanded to a total of 90 minutes.

No. 91–1793. COONES *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, *ante,* p. 802. Motion of petitioner for clarification denied.

No. 92–155. STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE ET AL. *v.* THEODORE ET AL.; and

No. 92–219. CAMPBELL, GOVERNOR OF SOUTH CAROLINA *v.* THEODORE ET AL. Appeals from D. C. S. C. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 92–5796. BANKS *v.* PRIVONKA. Sup. Ct. Cal.; and

No. 92–5814. STASSEN *v.* TSCHIDA ET AL. Ct. App. Minn. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until November 23, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petitions for writs of certiorari.

No. 92–5828. MARTIN *v.* WIDENER UNIVERSITY SCHOOL OF LAW ET AL. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until November 23, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE STEVENS would deny the petition for writ of certiorari.

No. 92–5899. WADE ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until November 23, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari with-

out reaching the merits of the motion to proceed *in forma pauperis.*

No. 92–5762. IN RE ZIEGLER;
No. 92–6085. IN RE DAVIS; and
No. 92–6103. IN RE WASKO. Petitions for writs of habeas corpus denied.

No. 92–5271. IN RE HANSEN; and
No. 92–5978. IN RE LITZENBERG. Petitions for writs of mandamus denied.

Certiorari Granted

No. 91–2045. DARBY ET AL. *v.* KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 957 F. 2d 145.

No. 92–207. UNITED STATES *v.* PADILLA ET AL. C. A. 9th Cir. Motion of respondent Donald J. Simpson for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 960 F. 2d 854.

Certiorari Denied

No. 91–1797. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 572.

No. 91–2030. PACHULSKI *v.* TOPA THRIFT & LOAN ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 361.

No. 91–2072. AVIRGAN ET AL. *v.* HULL ET AL.; and
No. 92–119. SHEEHAN ET AL. *v.* HULL ET AL. C. A. 11th Cir. Certiorari denied.

No. 91–8075. RIECHMANN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 581 So. 2d 133.

No. 91–8650. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 826 P. 2d 615.

No. 91–8724. DOLENC *v.* FULCOMER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 91–8770. HILL *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–124. DCP FARMS ET AL. *v.* SECRETARY OF AGRICULTURE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1183.

No. 92–144. LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* NEW YORK SHIPPING ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 965 F. 2d 1224.

No. 92–150. CALHOON, COMMISSIONER OF THE DEPARTMENT OF LABOR OF OKLAHOMA, ET AL. *v.* NATIONAL ELEVATOR INDUSTRY, INC. C. A. 10th Cir. Certiorari denied. Reported below: 957 F. 2d 1555.

No. 92–165. RUSSELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 960 F. 2d 421.

No. 92–194. TUCKER ET AL. *v.* UNITED STATES DEPARTMENT OF COMMERCE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 958 F. 2d 1411.

No. 92–210. DUPNIK ET AL. *v.* COOPER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 1220.

No. 92–214. CURATORS, UNIVERSITY OF MISSOURI *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 220.

No. 92–220. BANKS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 936 F. 2d 572.

No. 92–231. COMMUNITIES, INC., ET AL. *v.* BUSEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 619.

No. 92–232. T. F. ET AL. *v.* H. F. ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 168 Wis. 2d 62, 483 N. W. 2d 803.

No. 92–263. ESSEX ELECTRO ENGINEERS, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 960 F. 2d 1576.

No. 92–313. HOFFER ET AL. *v.* CITY OF SEATTLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 1268.

No. 92–386. FISHER *v.* NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TAX APPEALS TRIBUNAL, ET

AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 177 App. Div. 2d 801, 576 N. Y. S. 2d 415.

No. 92–390. BROWN ET UX. *v.* BALDWIN CITY, KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 16 Kan. App. 2d xii, 827 P. 2d 1236.

No. 92–391. AMPRO FISHERIES, INC. *v.* YASKIN, COMMISSIONER OF ENVIRONMENTAL PROTECTION, ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 127 N. J. 602, 606 A. 2d 1099.

No. 92–392. NATIONAL BASKETBALL ASSN. *v.* CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 961 F. 2d 667.

No. 92–395. SCHERL *v.* FISHER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 296.

No. 92–397. OCCIDENTAL CHEMICAL CORP. *v.* CEMCOM CORP. C. A. 4th Cir. Certiorari denied. Reported below: 963 F. 2d 367.

No. 92–398. AMERICAN GENERAL LIFE INSURANCE CO. *v.* DESHURLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 376.

No. 92–401. MASSACHUSETTS *v.* OSES. C. A. 1st Cir. Certiorari denied. Reported below: 961 F. 2d 985.

No. 92–408. MENARD *v.* CITY OF BREAUX BRIDGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 675.

No. 92–413. BRAILEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 223 Ill. App. 3d 1107, 641 N. E. 2d 23.

No. 92–419. ADMINISTRATOR, NEW YORK CITY DEPARTMENT OF HUMAN RESOURCES, ET AL. *v.* ABBOTT HOUSE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 965 F. 2d 1196.

No. 92–422. FRENCH ET AL. *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 890.

No. 92–423. OWENS-ILLINOIS, INC. *v.* ROBY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1454.

No. 92–425. GOLDSTAR (PANAMA), S. A., ET AL. *v.* UNITED STATES; and MAURICIO DEPORTES, S. A., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 967 F. 2d 965 (first case).

No. 92–430. EL PASO NATURAL GAS CO. *v.* HARTFORD ACCIDENT & INDEMNITY CORP. C. A. 10th Cir. Certiorari denied. Reported below: 962 F. 2d 1484.

No. 92–434. HUDSON INSURANCE CO. *v.* AMERICAN ELECTRIC CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 826.

No. 92–435. ARCHVIEW INVESTMENTS, INC. *v.* CITY OF COLLINSVILLE, ILLINOIS, ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 223 Ill. App. 3d 24, 584 N. E. 2d 821.

No. 92–436. LANDANO *v.* RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 1230.

No. 92–440. SCRUGGS *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 92–445. CENTRAL BANK OF TAMPA *v.* TRANSAMERICA INSURANCE GROUP. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 971.

No. 92–446. SEARS, ROEBUCK & CO. *v.* FORBUS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1036.

No. 92–448. FRAZIER *v.* CALIFORNIA STATE BAR. Sup. Ct. Cal. Certiorari denied.

No. 92–450. CARPENTER *v.* UNIVERSAL STAR SHIPPING, S. A., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 924 F. 2d 1539.

No. 92–459. AQUAFAITH SHIPPING, LTD., ET AL. *v.* JARILLAS, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JARILLAS, AND AS NATURAL TUTRIX OF THEIR MINOR CHILDREN. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 806.

No. 92–472. HORNSBY *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 1130.

No. 92–476. ARRIBA, LTD. *v.* PETROLEOS MEXICANOS. C. A. 5th Cir. Certiorari denied. Reported below: 962 F. 2d 528.

No. 92–477. COLORADO INTERSTATE GAS CO. *v.* NATURAL GAS PIPELINE COMPANY OF AMERICA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 962 F. 2d 1528.

No. 92–480. LEVY ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–509. BENNING *v.* IOWA ET AL. Sup. Ct. Iowa. Certiorari denied.

No. 92–512. ASLANIAN ET AL. *v.* WILSON, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 593.

No. 92–525. CALIFORNIA *v.* OTTO ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 1088, 831 P. 2d 1178.

No. 92–527. BOERBOOM INTERNATIONAL, INC., ET AL. *v.* AMERICAN COMPUTER TRUST LEASING ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 967 F. 2d 1208.

No. 92–529. CLARK ET AL. *v.* THATCHER, FORMER PRIME MINISTER OF GREAT BRITAIN, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 133, 960 F. 2d 1060.

No. 92–541. MOORE *v.* VOLKSWAGEN OF AMERICA, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1443.

No. 92–542. CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE (NEWMAN ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–543. COTTON *v.* UNITED STATES; and
No. 92–5971. HAUSER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 309.

No. 92–562. CAMING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 232.

No. 92–567. BOUTROSS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 592.

No. 92–584. PEREZ *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 170 Wis. 2d 130, 487 N. W. 2d 630.

No. 92–604. HARTFORD ACCIDENT & INDEMNITY CO. *v.* WORKERS' COMPENSATION APPEALS BOARD OF STATE OF CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–5028. BENNETT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 149, 414 S. E. 2d 218.

No. 92–5067. LINCECUM *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1271.

No. 92–5109. WILLIAMS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 662 So. 2d 929.

No. 92–5169. KING *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 243 Va. 353, 416 S. E. 2d 669.

No. 92–5226. FANT *v.* ROCHESTER FEDERAL MEDICAL CENTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 752.

No. 92–5247. KUNKEL *v.* UNITED STATES; and
No. 92–5390. BARRERA-MORENO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1089.

No. 92–5296. JORDAN *v.* VERCOE. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–5326. AI-TI TING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 960 F. 2d 449.

No. 92–5354. WATERHOUSE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 596 So. 2d 1008.

No. 92–5391. GALLOWAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 963 F. 2d 1388.

No. 92–5395. BRUTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 1332.

No. 92–5420. BESERRA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 967 F. 2d 254.

No. 92–5433. CHARLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 1349.

No. 92–5441. SIMMONS *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 896.

No. 92–5443. HOLDEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 1114.

No. 92–5461. POYNER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 964 F. 2d 1404.

No. 92–5514. LYND *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 58, 414 S. E. 2d 5.

No. 92–5528. VELEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–5549. ALLISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–5557. ROJEM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 829 P. 2d 683.

No. 92–5562. MILLER *v.* MCRAE ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–5597. SANTOS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 960 F. 2d 156.

No. 92–5676. MILLER *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1167.

No. 92–5695. THOMAS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 244 Va. 1, 419 S. E. 2d 606.

No. 92–5728. BENNETT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–5740. HERROLD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 962 F. 2d 1131.

No. 92–5745. RICE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 118 Wash. 2d 876, 828 P. 2d 1086.

No. 92–5748. OLDERBAK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 961 F. 2d 756.

No. 92–5749. CHRISTIE *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5750. THOMAS *v.* LIGHTNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 147.

No. 92–5751. SANDERS *v.* CHERRY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 968 F. 2d 1218.

No. 92–5752. TRAYLOR *v.* ADMINISTRATOR OF VETERANS AFFAIRS. Sup. Ct. Ga. Certiorari denied.

No. 92–5754. STRICKLAND *v.* GOLDEN. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 600 So. 2d 1117.

No. 92–5758. WILES *v.* JONES, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 960 F. 2d 751.

No. 92–5761. DAVIDSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 244 Va. 129, 419 S. E. 2d 656.

No. 92–5765. SPEARMAN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–5766. SMITH *v.* CAMPBELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1578.

No. 92–5771. HACKNEY *v.* ARMONTROUT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 179.

No. 92–5772. JOYCE *v.* BUMGARNER, SUPERINTENDENT, SOUTHERN CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 211.

No. 92–5777. BINH VAN LE *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 5 Cal. App. 4th 194, 6 Cal. Rptr. 2d 678.

No. 92–5784. RAMIREZ-VILLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 680.

No. 92–5785. ROGERS *v.* ANDERSON. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 354.

No. 92–5788. POWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–5789. MARTIN *v.* KYNARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 386.

No. 92–5790. NUNLEY *v.* CODY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 20.

No. 92–5791. OROSCO *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 827 S. W. 2d 575.

No. 92–5792. COLLINS *v.* NORDSTROM, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1220.

No. 92–5793. LAFOUNTAIN *v.* BLANCHARD, GOVERNOR OF MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1577.

No. 92–5794. COTTAM *v.* LUZERNE COUNTY CHILDREN AND YOUTH SERVICES. Sup. Ct. Pa. Certiorari denied. Reported below: 530 Pa. 666, 610 A. 2d 45.

No. 92–5795. ANTONELLI *v.* TRUE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 92–5797. COUSINO *v.* ELLIOTT ET AL. Ct. App. Mich. Certiorari denied.

No. 92–5798. AZIZ *v.* ST. LOUIS COUNTY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 1458.

No. 92–5801. FIELDS *v.* COX ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–5802. KOLOCOTRONIS *v.* HOLCOMB, SUPERINTENDENT, FULTON STATE HOSPITAL. C. A. 8th Cir. Certiorari denied.

No. 92–5803. ESPARZA *v.* TOWN OF FLOWOOD, MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 92–5810. VAN DER JAGT *v.* SIB INTERNATIONAL BANCORP INC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 925.

No. 92–5812. NAUCKE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 829 S. W. 2d 445.

No. 92–5815. RAGSDALE *v.* RICHLAND COUNTY DETENTION CENTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 639.

No. 92–5816. MILLER *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–5817. MASON *v.* MUNICIPAL CORPORATION OF CALIFORNIA ET AL. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 92–5826. STANSBURY *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–5827. OLIVEROS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 965 F. 2d 1064.

No. 92–5830. HUFFSMITH *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 3d Cir. Certiorari denied.

No. 92–5832. BEASLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 21.

No. 92–5833. CARLISLE *v.* GRADICK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1084.

No. 92–5836. SANDERS *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–5840. ENNIS *v.* POWERS, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 376.

No. 92–5851. WOMBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 243.

No. 92–5856. HAWKINS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 92–5864. LUCE *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–5874. GALLOWAY *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–5880. BOUT *v.* DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 92–5881. CREEL *v.* CITY OF ABILENE, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 924.

No. 92–5882. BARSELLA *v.* WATERS ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–5883. CONERLY *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 949.

No. 92–5905. PHILLIPS *v.* PHILLIPS. Ct. App. Md. Certiorari denied. Reported below: 327 Md. 524, 610 A. 2d 796.

No. 92–5915. TIMBANCAYA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 976 F. 2d 748.

No. 92–5916. BROWN *v.* UNITED STATES; and
No. 92–5917. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–5918. TELLEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–5919. STREIT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 894.

No. 92–5926. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 92–5929. HAYE *v.* THORN CREEK CATTLE ASSN., INC. Sup. Ct. Idaho. Certiorari denied. Reported below: 122 Idaho 42, 830 P. 2d 1180.

No. 92–5930. JONES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 214.

No. 92–5931. HOPKINS *v.* ARMSTRONG & ARMSTRONG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1442.

No. 92–5932. FIELDS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 92–5942. MCDONALD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1447.

No. 92–5944. ROACH *v.* RONE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1454.

No. 92–5945. MALIK *v.* KUHLMANN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 897.

No. 92–5961. GILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 14.

No. 92–5967. SEABROOKS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 356, 968 F. 2d 92.

No. 92–5972. SPEARMAN *v.* GARNER. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 170.

No. 92–5976. NANCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–5979. MCEACHERN *v.* JONES. Sup. Ct. S. C. Certiorari denied.

No. 92–5981. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–5982. WYLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1217.

No. 92–5983. WOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 901.

No. 92–5984. HERNANDEZ-CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 242.

No. 92–5986. LANDT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1460.

No. 92–5994. CRAWFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 346.

No. 92–5995. WEAVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1462.

No. 92–5998. GREEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 459.

No. 92–6000. SINGLETON *v.* NORRIS, ACTING DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 1315.

No. 92–6008. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 208.

No. 92–6016. MARIN-HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 1467.

No. 92–6021. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1082.

No. 92–6026. AKINYOSOYE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1462.

No. 92–6028. ROBERTS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 271, 826 P. 2d 274.

No. 92–6034. ROBINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 1224.

No. 92–6040. MCNEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 21.

No. 92–6046. FLOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 505.

No. 92–6048. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333.

No. 92–6049. GEORGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 593.

No. 92–6051. HAGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 969 F. 2d 883.

No. 92–6053. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 967 F. 2d 226.

No. 92–6056. PRICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 271.

No. 92–6066. DAVILA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 964 F. 2d 778.

No. 92–6075. GREEN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 90 Md. App. 767.

No. 92–6083. CRIPPEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 882.

No. 92–6084. TRAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 965 F. 2d 1507.

No. 92–6097. FRANCIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 970 F. 2d 692.

No. 91–2075. ST. GELAIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 952 F. 2d 90.

No. 92–205. GROSS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 961 F. 2d 1097.

No. 92–209. STEEN *v.* THOMPSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR THOMPSON, A MINOR, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 959 F. 2d 241.

No. 92–433. SEARS, ROEBUCK & CO. *v.* BARATTINI. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 966 F. 2d 677.

No. 92–452. COMMISSIONER OF INTERNAL REVENUE *v.* POWELL ET UX. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 958 F. 2d 53.

No. 92–202. RANDOLPH CENTRAL SCHOOL DISTRICT *v.* ALDRICH. C. A. 2d Cir. Certiorari denied. Reported below: 963 F. 2d 520.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

This case presents the question whether, under the federal Equal Pay Act, an employer seeking to establish the factor-other-than-sex defense must prove that the factor is supported by a legitimate business-related reason.

In this case, the Court of Appeals for the Second Circuit held that an employer cannot meet the burden of proving this defense by asserting use of a gender-neutral classification system without more. 963 F. 2d 520, 525 (1992). Rather, the court below held, an employer bears the burden of proving that a bona fide

business-related reason exists for using a gender-neutral factor that results in a wage differential. *Id.*, at 526. The court below expressly disagreed with the en banc holding of the Eighth Circuit in *Strecker* v. *Grand Forks County Social Service Bd.*, 640 F. 2d 96, 100–103 (1980), adopted en banc, 640 F. 2d, at 109 (1981), and agreed instead with the dissent in that case. 963 F. 2d, at 526, n. 1.

In *Strecker*, the Eighth Circuit held that a compensation system that determined salaries on the basis of objective criteria related to duties, and salary differentials that result from the application of such criteria, are permissible under the Equal Pay Act. The Eighth Circuit did not require further proof that the classifications are bona fide. The Court of Appeals for the Seventh Circuit has also reached a holding contrary to the decision below. In *Fallon* v. *Illinois*, 882 F. 2d 1206, 1211 (1989), that court held that "[t]his circuit . . . does not require that the factor other than sex be related to the requirements of the particular position in question, or that it be a 'business-related reason[].'"

Other Courts of Appeals appear to agree with the holding below. The Ninth Circuit has interpreted the factor-other-than-sex defense as one enabling an employer to determine legitimate organizational needs and accomplish necessary organizational changes. *Maxwell* v. *Tucson*, 803 F. 2d 444, 447–448 (1986). Courts have reached similar holdings regarding the factor-other-than-sex defense under the Bennett Amendment to Title VII, 42 U. S. C. § 2000e–2(h). For example, the Court of Appeals for the Sixth Circuit has held that the defense includes factors that, at a minimum, were adopted for a legitimate business reason. See *EEOC* v. *J. C. Penney Co.*, 843 F. 2d 249, 253 (1988). See also *Kouba* v. *Allstate Ins. Co.*, 691 F. 2d 873, 876 (CA9 1982).

Respondent urges that we should not review this case because the decision of the Court of Appeals is not final. Respondent does not, and cannot, question this Court's jurisdiction to review a nonfinal judgment of a court of appeals under 28 U. S. C. § 1254(1). Rather, relying on cases cited in R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 224 (6th ed. 1986), respondent urges only that it is not the ordinary practice of this Court to exercise its discretion to review a decision which is in this posture. However, "[w]here there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and

that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review." *Michael* v. *United States*, 454 U. S. 950, 951 (1981) (WHITE, J., dissenting from denial of certiorari); see also *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 153 (1964); *Land* v. *Dollar*, 330 U. S. 731, 734, n. 2 (1947); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3 (1949); Stern, Gressman, & Shapiro, *supra*, at 225. This is such a case.

I would grant certiorari to resolve the acknowledged conflict among the Circuits regarding the interpretation of the federal Equal Pay Act.

No. 92–233. HASAN *v.* MARTIN, SECRETARY OF LABOR. C. A. 5th Cir. Motion of Nuclear Power Service et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 963 F. 2d 369.

No. 92–396. ASTRONICS CORP. ET AL. *v.* PATECELL ET AL. C. A. Fed. Cir. Motion of District of Columbia Chapter of the Federal Bar Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 968 F. 2d 1226.

No. 92–414. LINDSEY *v.* BAXTER HEALTHCARE CORP. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 962 F. 2d 586.

No. 92–416. WESTON *v.* FIRST INTERSTATE BANK OF CALIFORNIA ET AL. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 953 F. 2d 1390.

No. 92–421. RICHMOND MEMORIAL HOSPITAL *v.* SMITH, AN INFANT, BY SMITH, ET AL. Sup. Ct. Va. Motion of American Hospital Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 243 Va. 445, 416 S. E. 2d 689.

No. 92–5184. WALKER *v.* UNITED STATES;
No. 92–5188. GUERRA *v.* UNITED STATES; and

No. 92–5257. BOUVIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 960 F. 2d 409.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

These three petitions raise a single issue: Whether the weight of waste products that are the byproduct of a drug manufacturing process and that contain a detectable amount of a controlled substance should be used for sentencing purposes under § 2D1.1 of the United States Sentencing Commission's Guidelines Manual (1990). The product in question was a toxic liquid substance consisting of phenylacetone and a small percentage of methamphetamine. At Joe Guerra's and Wayne Walker's trial, a chemist testified that the liquid was probably a waste product left over from the methamphetamine manufacturing process. Robert Bouvier pleaded guilty and, at his sentencing hearing, the Government stipulated that over 95 percent of the weight of those liquids was solvents. Petitioners contend that their sentences should not have been based on the total weight of the liquid. The Fifth Circuit rejected their argument. 960 F. 2d 409 (1992).

As I noted in *Fowner* v. *United States*, 504 U. S. 933 (1992) (opinion, dissenting from denial of certiorari), the Courts of Appeals are in serious disagreement over this issue. Since that time, the Second, Third, and Ninth Circuits have joined the ranks of the Sixth and Eleventh Circuits in adopting the approach advocated by petitioners. See *United States* v. *Rodriguez*, 975 F. 2d 999 (CA3 1992); *United States* v. *Robins*, 967 F. 2d 1387 (CA9 1992); *United States* v. *Salgado-Molina*, 967 F. 2d 27 (CA2 1992); *United States* v. *Acosta*, 963 F. 2d 551 (CA2 1992). In contrast, this case confirms the Fifth Circuit's alignment with the First and Tenth Circuits' position. See *United States* v. *Lopez-Gil*, 965 F. 2d 1124 (CA1 1992); *United States* v. *Sherrod*, 964 F. 2d 1501 (CA5 1992); *United States* v. *Dorrough*, 927 F. 2d 498 (CA10 1991).

Respondent acknowledges the existence of this split, but points to the actions of this Court as evidence that plenary consideration is unwarranted. Indeed, in the last Term alone, we have declined to review this question on three separate occasions. See *Fowner*, *supra; Beltran-Felix* v. *United States*, 502 U. S. 1065 (1992); *Mahecha-Onofre* v. *United States*, 502 U. S. 1009 (1991).

I believe it is high time to resolve this enduring conflict that makes a defendant's sentence depend upon the circuit in which his or her case is tried. I therefore would grant certiorari.

NOVEMBER 6, 1992

Dismissal Under Rule 46

No. 92–583. FLORIDA HOUSE OF REPRESENTATIVES ET AL. *v.* UNITED STATES DEPARTMENT OF COMMERCE. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 961 F. 2d 941.

NOVEMBER 9, 1992

Affirmed on Appeal

No. 92–478. ARIZONA HISPANIC COMMUNITY FORUM *v.* SYMINGTON, GOVERNOR OF ARIZONA, ET AL. Affirmed on appeal from D. C. Ariz. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Certiorari Granted—Vacated and Remanded

No. 92–86. SIVLEY, WARDEN, ET AL. *v.* SOLER. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded with directions to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 942 F. 2d 597.

No. 92–485. O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL. *v.* SPECTER ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Franklin* v. *Massachusetts*, 505 U. S. 788 (1992). Reported below: 971 F. 2d 936.

Miscellaneous Orders

No. D–1152. IN RE DISBARMENT OF BACH. Disbarment entered. [For earlier order herein, see 505 U. S. 1241.]

No. D–1154. IN RE DISBARMENT OF LADNER. Disbarment entered. [For earlier order herein, see 505 U. S. 1241.]

No. D–1156. IN RE DISBARMENT OF ROBERTSON. Disbarment entered. [For earlier order herein, see 505 U. S. 1241.]

No. D–1162. IN RE DISBARMENT OF SALMEN. Disbarment entered. [For earlier order herein, see 505 U. S. 1242.]

No. D–1164. IN RE DISBARMENT OF FRASCINELLA. Disbarment entered. [For earlier order herein, see 505 U. S. 1242.]

No. D–1201. IN RE DISBARMENT OF NORRIS. It is ordered that Reginald L. Norris, of Grand Rapids, Mich., be suspended from the practice of law in this Court and that a rule 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–1202. IN RE DISBARMENT OF LEIGHTON. It is ordered that Leonard Leighton, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule 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–1203. IN RE DISBARMENT OF BAUCUM. It is ordered that Don Michael Baucum, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule 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–1204. IN RE DISBARMENT OF SEARS. It is ordered that Franklin R. Sears, of Fort Worth, Tex., be suspended from the practice of law in this Court and that a rule 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–1205. IN RE DISBARMENT OF ISAACKS. It is ordered that Hubert Phil Isaacks, of Odessa, Tex., be suspended from the practice of law in this Court and that a rule 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. 111, Orig. DELAWARE *v.* NEW YORK. Motions for additional time for oral argument and for divided argument granted in part and denied in part. An additional 10 minutes are allotted for oral argument. The time for oral argument is divided as follows: 20 minutes for Delaware; 20 minutes for New York; and 30 minutes for one attorney in support of the Report of the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 805.]

No. 91–10. SPECTRUM SPORTS, INC., ET AL. *v.* MCQUILLAN ET VIR, DBA SORBOTURF ENTERPRISES. C. A. 9th Cir. [Certiorari granted, 503 U. S. 958.] Motion of respondents for leave to file a supplemental joint appendix granted.

No. 91–719. PARKE, WARDEN *v.* RALEY. C. A. 6th Cir. [Certiorari granted, 503 U. S. 905.] Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 91–5397. NEGONSOTT *v.* SAMUELS, WARDEN, ET AL. C. A. 10th Cir. [Certiorari granted, 505 U. S. 1218.] Motion of Iowa Tribe of Kansas and Nebraska et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General to permit William K. Kelley, Esq., to present oral argument *pro hac vice* granted.

No. 91–8428. IN RE JONES. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 810] denied.

No. 92–5105. JONES *v.* WRIGHT, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, ET AL. C. A. 8th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 810] denied.

No. 92–5407. MARTIN *v.* SMITH ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 810] denied.

No. 92–190. UNITED STATES *v.* IDAHO EX REL. DIRECTOR, IDAHO DEPARTMENT OF WATER RESOURCES. Sup. Ct. Idaho. [Certiorari granted, *ante,* p. 939.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 92–443. ELFELT ET AL. *v.* COOPER. Sup. Ct. Wis. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–5988. ANDERSON *v.* WISCONSIN DEPARTMENT OF REVENUE. Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 30, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would grant certiorari.

No. 92–548. IN RE WHITCOMBE. Petition for writ of mandamus denied.

Certiorari Granted

No. 92–259. OKLAHOMA TAX COMMISSION *v.* SAC AND FOX NATION. C. A. 10th Cir. Certiorari granted. Reported below: 967 F. 2d 1425.

No. 92–621. RAKE ET AL. *v.* WADE, TRUSTEE. C. A. 10th Cir. Certiorari granted. Reported below: 968 F. 2d 1036.

No. 91–8685. STINSON *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under USSG § 4B1.1, see USSG § 4B1.2 comment., n. 2, constitutes an 'incorrect application of the sentencing guidelines' under 18 U. S. C. § 3742(f)(1)." Reported below: 943 F. 2d 1268.

Certiorari Denied

No. 91–1842. MCCRORY ET AL. *v.* RESOLUTION TRUST CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 68.

No. 91–2044. LEE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–8031. LEAVITT *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 121 Idaho 4, 822 P. 2d 523.

No. 91–8136. COCHRAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 955 F. 2d 1116.

No. 91–8292. MONTGOMERY *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 677.

No. 92–137. RIDGECREST POLICE ET AL. *v.* CURNOW, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, CURNOW, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 321.

No. 92–224. BASSETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 957 F. 2d 1309.

No. 92–315. PERALES, COMMISSIONER, NEW YORK STATE SOCIAL SERVICES *v.* NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 854.

No. 92–329. HEILPRIN *v.* WISCONSIN BOARD OF ATTORNEY'S PROFESSIONAL RESPONSIBILITY. Sup. Ct. Wis. Certiorari denied. Reported below: 168 Wis. 2d 1, 482 N. W. 2d 908.

No. 92–333. Detroit Auto Dealers Assn., Inc., et al. *v.* Federal Trade Commission; and

No. 92–510. Federal Trade Commission *v.* Detroit Auto Dealers Assn., Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 457.

No. 92–359. Keene Corp. *v.* Adams et al.; Keene Corp. *v.* Burton et al.; Keene Corp. *v.* Campbell et al.; Keene Corp. *v.* Carr et al.; Keene Corp. *v.* Dalton et al.; Keene Corp. *v.* Darrah et al.; Keene Corp. *v.* Dunn et al.; Keene Corp. *v.* Gabbert et al.; Keene Corp. *v.* Hoschar et al.; Keene Corp. *v.* Kirk et al.; Keene Corp. *v.* Kittle et al.; Keene Corp. *v.* Lipscomb et al.; Keene Corp. *v.* Lott et al.; Keene Corp. *v.* Mehalic et al.; Keene Corp. *v.* Root et al.; Keene Corp. *v.* Rowe et al.; Keene Corp. *v.* Seberna et al.; Keene Corp. *v.* Chapman et al.; Keene Corp. *v.* England; Keene Corp. *v.* Johnson et al.; Keene Corp. *v.* Shilot et al.; and

No. 92–360. Owens-Illinois, Inc. *v.* Bolyard et al.; Owens-Illinois, Inc. *v.* Friend; Owens-Illinois, Inc. *v.* Conrad et ux.; Owens-Illinois, Inc. *v.* Jadot et al.; Owens-Illinois, Inc. *v.* Moomaw; Owens-Illinois, Inc. *v.* Wilson et al.; Owens-Illinois, Inc. *v.* Conley et al.; Owens-Illinois, Inc. *v.* Rothermund et ux.; Owens-Illinois, Inc. *v.* Quince et al.; Owens-Illinois, Inc. *v.* Cross; Owens-Illinois, Inc. *v.* Crook et ux.; Owens-Illinois, Inc. *v.* Smigill; Owens-Illinois, Inc. *v.* Darrah et al.; Owens-Illinois, Inc. *v.* Eikleberry et al.; Owens-Illinois, Inc. *v.* Hoppers; Owens-Illinois, Inc. *v.* Lewis et al.; Owens-Illinois, Inc. *v.* Simmons; and Owens-Illinois, Inc. *v.* Rogers. Cir. Ct. Monongalia County, W. Va. Certiorari denied.

No. 92–371. Real Property and Premises Known as 4408 Hillside Court, Alexandria, Virginia 22306, et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–393. Fraire, Individually and as Next Friend for Fraire, et al. *v.* City of Arlington et al. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1268.

No. 92–399. Lindo & Maduro, S. A., et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 302, 971 F. 2d 765.

No. 92–407. MURPHY ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 968 F. 2d 1226.

No. 92–453. MAZUR ET AL. *v.* MERCK & CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 964 F. 2d 1348.

No. 92–465. LINDAMAN *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 487 N. W. 2d 373.

No. 92–468. PERRY *v.* EASTMAN KODAK CO. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 10.

No. 92–469. LOAGUE *v.* SUPER SAGLESS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1447.

No. 92–471. MALONE SERVICE CO. ET AL. *v.* TEXAS. Sup. Ct. Tex. Certiorari denied. Reported below: 829 S. W. 2d 763.

No. 92–474. SHARP ET AL. *v.* UNITED AIRLINES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 404.

No. 92–481. WILLIAMS *v.* EAGLE-PICHER INDUSTRIES, INC. C. A. 10th Cir. Certiorari denied. Reported below: 962 F. 2d 1492.

No. 92–483. ASAM *v.* CITY OF TUSCALOOSA ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 599 So. 2d 1192.

No. 92–488. SEEFELD *v.* OLSEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1448.

No. 92–489. SAKARIA *v.* ALLSTATE LIFE INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 146.

No. 92–490. ARIZONA *v.* PETERSON. Ct. App. Ariz. Certiorari denied. Reported below: 171 Ariz. 333, 830 P. 2d 854.

No. 92–493. LIPWORTH, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LIPWORTH *v.* KAWASAKI MOTORS CORP., U. S. A., ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 592 So. 2d 1151.

No. 92–497. BABCOCK & WILCOX CO. *v.* INTERNATIONAL INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–498. MERLING *v.* TRAVELERS INDEMNITY CO. ET AL. Ct. App. Md. Certiorari denied. Reported below: 326 Md. 329, 605 A. 2d 83.

No. 92–499. SAC AND FOX NATION *v.* OKLAHOMA TAX COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 1425.

No. 92–500. HENDRICKSON *v.* CITY OF SANTA ANA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 13.

No. 92–502. WAHRMAN *v.* WAHRMAN ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 250 Kan. 808.

No. 92–504. ANDERSEN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDERSEN *v.* SKY CRUISES, LTD., INC. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 592 So. 2d 756.

No. 92–513. BAGGS *v.* EAGLE-PICHER INDUSTRIES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 957 F. 2d 268.

No. 92–514. ST. TAMMANY PARISH POLICE JURY *v.* INSBROK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1448.

No. 92–520. BREMNER, BY AND THROUGH HIS GUARDIAN AD LITEM, BREMNER, ET AL. *v.* CHARLES ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 312 Ore. 274, 821 P. 2d 1080.

No. 92–534. LUNDBERG, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LUNDBERG, DECEASED *v.* OREGON, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION. Sup. Ct. Ore. Certiorari denied. Reported below: 312 Ore. 568, 825 P. 2d 641.

No. 92–537. GREAT LAKES DREDGE & DOCK CO. ET AL. *v.* LINTON ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1480.

No. 92–564. BOERER *v.* ZAKEN. C. A. 2d Cir. Certiorari denied. Reported below: 964 F. 2d 1319.

No. 92–573. WADE ET UX. *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied.

No. 92–598. ADAMSON *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 583.

No. 92–617. URWYLER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 945 F. 2d 410.

No. 92–624. PHELPS *v.* RISON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–630. ZAPATA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 596.

No. 92–5288. OLIVER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 961 F. 2d 1339.

No. 92–5295. FLORES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 959 F. 2d 83.

No. 92–5474. HARLEY *v.* KEOHANE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 209.

No. 92–5489. WARDLOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1115.

No. 92–5503. BAUER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 956 F. 2d 239.

No. 92–5520. SCHMIDT *v.* PETERSON, COMMISSIONER, INTERNAL REVENUE SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 21.

No. 92–5539. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 369.

No. 92–5545. BANKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 964 F. 2d 687.

No. 92–5548. SHOUPE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 355.

No. 92–5560. NEWMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 206.

No. 92–5592. VILLEGAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 896.

No. 92–5615. MAXWELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 116, 592 N. E. 2d 960.

No. 92–5640. FASSLER *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 964 F. 2d 877.

No. 92–5677. MINEFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 901.

No. 92–5712. MILLS ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 65, 964 F. 2d 1186.

No. 92–5866. CONDE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 900.

No. 92–5870. JONES *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 302.

No. 92–5879. BROWN *v.* BORGERT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–5886. GESCHWENDT *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 967 F. 2d 877.

No. 92–5888. MANNING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 182, 966 F. 2d 702.

No. 92–5902. ELLIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 834 P. 2d 985.

No. 92–5903. MEDLEY *v.* THOMAS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 20.

No. 92–5906. ELKIN *v.* FAUVER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 969 F. 2d 48.

No. 92–5909. YOUNG *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 241 Neb. xxii.

No. 92–5927. GROFF *v.* QUINN ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 419 Pa. Super. 664, 609 A. 2d 588.

No. 92–5928. JOHNSON *v.* HALE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 747.

No. 92–5941. ORTIZ *v.* ARIZONA. Super. Ct. Ariz., Pima County. Certiorari denied.

No. 92–5943. ROBY *v.* SKUPIEN. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 352.

No. 92–5947. RICO MERCHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–5948. BAGLEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–5951. DIX *v.* PENNSYLVANIA ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 417 Pa. Super. 652, 603 A. 2d 1078.

No. 92–5962. JOHNSON *v.* SPELLING-GOLDBERG PRODUCTIONS. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–5985. LEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 957 F. 2d 778.

No. 92–5989. CUOZZO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 945.

No. 92–5999. BLAIR *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 92–6006. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1340.

No. 92–6009. HAYS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 599 So. 2d 1230.

No. 92–6019. FARLEY *v.* LOVE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6029. POORMAN *v.* O'DEA, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–6039. NELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–6041. RANKEL *v.* TRACY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1041.

No. 92–6043. RHODES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1143.

No. 92–6045. FULCHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–6047. HUNT *v.* THOMPSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 373.

No. 92–6059. SNELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–6063. CORREA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 356, 968 F. 2d 92.

No. 92–6065. FASSLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 370.

No. 92–6074. JAVINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 960 F. 2d 1137.

No. 92–6079. GALLAGHER ET UX. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 385.

No. 92–6100. BLACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 7.

No. 92–6101. SOLTERA BETANCOURT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 16.

No. 92–6104. REGINO-DELGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1399.

No. 92–6110. JORDAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 964 F. 2d 944.

No. 92–6112. ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 947.

No. 92–6113. PRICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–6114. MCILROY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 970 F. 2d 692.

No. 92–6122. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 925.

No. 92–6123. CARTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 867.

No. 92–6124. FORERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–6127. HENDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 92–6131. DONAHUE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 216.

No. 92–6134. SHEROD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 148, 960 F. 2d 1075.

No. 92–6143. LUCUMI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–6146. BLEVINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1047.

No. 92–6147. HARRIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 1017.

No. 92–6149. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 936.

No. 92–6150. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 968 F. 2d 765.

No. 92–6151. SENTIBANEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 264.

No. 92–6163. HALL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 102, 969 F. 2d 1102.

No. 92–6174. MUNGUIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 594.

No. 92–6181. TEMPLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 965 F. 2d 617.

No. 92–6184. HALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–6185. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 242.

No. 92–6215. MATIAS *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 73 Haw. 147, 828 P. 2d 281.

No. 91–1283. GREENBERG, INDEPENDENT EXECUTOR OF ESTATE OF MCGANN, DECEASED *v.* H & H MUSIC CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 946 F. 2d 401.

No. 91–1877. PACHECO ET AL. *v.* DEFOOR ET AL.; and

No. 91–1922. DEFOOR ET AL. *v.* COLORADO ET AL. Sup. Ct. Colo. Motion of Colorado Intergovernmental Risk Sharing Agency for leave to file a brief as *amicus curiae* in No. 91–1922 granted. Certiorari denied. Reported below: 824 P. 2d 783.

No. 92–264. ARCADIA, OHIO, ET AL. *v.* OHIO POWER CO. ET AL.; and

No. 92–280. FEDERAL ENERGY REGULATORY COMMISSION *v.* OHIO POWER CO. ET AL. C. A. D. C. Cir. Motion of National Association of State Utility Consumers Advocate et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 293 U. S. App. D. C. 348, 954 F. 2d 779.

No. 92–506. CHEVRON TRANSPORT CORP. ET AL. *v.* GREAT LAKES DREDGE & DOCK CO. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 957 F. 2d 1575.

No. 92–5524. LOPEZ-GIL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 965 F. 2d 1124.

No. 92–523. HEIM *v.* REHNQUIST, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 92–635. WALSH *v.* BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM. Ct. App. Cal., 3d

App. Dist. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 4 Cal. App. 4th 682, 6 Cal. Rptr. 2d 118.

Rehearing Denied

No. 91–7237. MCFADDEN *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS, 503 U. S. 947;

No. 91–8106. HAGMANN *v.* UNITED STATES, *ante*, p. 835;

No. 91–8330. MCLEAN *v.* COMMONWEALTH COURT OF PENNSYLVANIA ET AL., *ante*, p. 839;

No. 91–8445. BACIGALUPO *v.* CALIFORNIA, *ante*, p. 802;

No. 91–8473. PRENZLER *v.* KLEINMAN, *ante*, p. 844;

No. 91–8481. PRENZLER *v.* KLEINMAN, *ante*, p. 844;

No. 92–140. GREENMAN ET UX. *v.* CITY OF CORTLAND, *ante*, p. 867;

No. 92–5464. RAYMOND *v.* DEPARTMENT OF VETERANS AFFAIRS, *ante*, p. 898; and

No. 92–5629. IN RE JOHNSON, *ante*, p. 812. Petitions for rehearing denied.

NOVEMBER 16, 1992

Certiorari Granted—Vacated and Remanded

No. 91–1328. CITY OF CHICAGO ET AL. *v.* ENVIRONMENTAL DEFENSE FUND ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the memorandum of the Administrator of the Environmental Protection Agency, dated September 18, 1992, regarding Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under § 3001(i) of the Resource Conservation and Recovery Act. Reported below: 948 F. 2d 345.

Miscellaneous Orders

No. ———. FLYNN *v.* MICHIGAN ET AL. Motion to direct the Clerk to file complaint denied.

No. D–1150. IN RE DISBARMENT OF DEUTSCH. Disbarment entered. [For earlier order herein, see 505 U. S. 1240.]

No. D–1153. IN RE DISBARMENT OF KIRKMAN. Disbarment entered. [For earlier order herein, see 505 U. S. 1241.]

No. D–1155. IN RE DISBARMENT OF UNPINGCO. Disbarment entered. [For earlier order herein, see 505 U. S. 1241.]

No. D–1159. IN RE DISBARMENT OF BRODO. Disbarment entered. [For earlier order herein, see 505 U. S. 1242.]

No. D–1163. IN RE DISBARMENT OF KNOLL. Disbarment entered. [For earlier order herein, see 505 U. S. 1242.]

No. D–1206. IN RE DISBARMENT OF BREIT. It is ordered that Calvin W. Breit, of Virginia Beach, Va., be suspended from the practice of law in this Court and that a rule 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–1207. IN RE DISBARMENT OF ZABRISKIE. It is ordered that Fred I. Zabriskie, of Larchmont, N. Y., be suspended from the practice of law in this Court and that a rule 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. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for award of compensation and reimbursement of expenses granted, and the River Master is awarded $8,082.13 for the period July 1 through September 30, 1992, to be paid equally by the parties. [For earlier order herein, see, *e. g., ante,* p. 938.]

No. 91–8258. MARTIN *v.* DELAWARE. Sup. Ct. Del. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 810] denied.

No. 91–8729. DEMPSEY *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 1st Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 810] denied.

No. 92–5068. MARTIN *v.* SPARKS ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 810] denied.

No. 92–479. TXO PRODUCTION CORP. *v.* ALLIANCE RESOURCES CORP. ET AL. Sup. Ct. App. W. Va. Motions of American Petroleum Institute et al. and West Virginia Chamber of Commerce for leave to file briefs as *amici curiae* granted.

No. 92–5938. IN RE WHITAKER. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until December 7, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition

in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of prohibition.

No. 92–6036. FORD *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 7, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis.*

Certiorari Granted

No. 92–466. BROOKE GROUP LTD. *v.* BROWN & WILLIAMSON TOBACCO CORP. C. A. 4th Cir. Certiorari granted. Reported below: 964 F. 2d 335.

No. 92–551. KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ALPINE RIDGE GROUP ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 955 F. 2d 1382.

No. 92–531. HATCHER *v.* VALCARCEL. C. A. 3d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 969 F. 2d 34.

Certiorari Denied

No. 91–1872. FEIST PUBLICATIONS, INC. *v.* RURAL TELEPHONE SERVICE CO., INC. C. A. 10th Cir. Certiorari denied. Reported below: 957 F. 2d 765.

No. 91–1885. WILSON, GOVERNOR OF CALIFORNIA, ET AL. *v.* DEL MONTE ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 4th 1009, 824 P. 2d 632.

No. 91–8574. HARRIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 971.

No. 91–8725. BELL *v.* BAKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 400.

No. 91–8745. ESPELITA *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 958 F. 2d 1052.

No. 92–30. ZYCH, DBA AMERICAN DIVING & SALVAGE CO., ET AL. *v.* ILLINOIS HISTORIC PRESERVATION AGENCY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 960 F. 2d 665.

No. 92–211. COMMISSIONER OF THE LAND OFFICE OF OKLAHOMA *v.* CROOK ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 966 F. 2d 539.

No. 92–338. COOPER TIRE & RUBBER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1245.

No. 92–384. CASH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 562.

No. 92–518. DOUGHTY *v.* ZOECON CORP. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1449.

No. 92–524. CRAM *v.* MAXWELL, EXECUTOR OF ESTATE OF MAXWELL, DECEASED. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–535. O'BRIEN ET AL. *v.* BANK ONE, COLUMBUS, N. A. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 92–536. DURHAM *v.* CORUM. Sup. Ct. N. C. Certiorari denied. Reported below: 330 N. C. 761, 413 S. E. 2d 276.

No. 92–538. PELFRESNE *v.* VILLAGE OF WILLIAMS BAY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 538.

No. 92–540. LABOR UNION OF PICO KOREA, LTD., ET AL. *v.* PICO PRODUCTS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 191.

No. 92–546. WASHINGTON WATER POWER CO. *v.* SPOKANE INDIAN TRIBE. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1168.

No. 92–549. ATER *v.* ARMSTRONG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1224.

No. 92–550. SAARI *v.* SMITH BARNEY, HARRIS UPHAM & CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 877.

No. 92–553. KAHN ET AL. *v.* KOHLBERG, KRAVIS, ROBERTS & CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 1030.

No. 92–559. DUVAL COUNTY, TEXAS, ET AL. *v.* PEREZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 16.

No. 92–570. SHARPTON *v.* TURNER, ALBANY COUNTY JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 964 F. 2d 1284.

No. 92–599. LINARES ET AL. *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 964 F. 2d 1295.

No. 92–618. MCCANN ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 968 F. 2d 635.

No. 92–619. PATRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–661. ROSS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 970 F. 2d 692.

No. 92–667. TENAX CORP. ET AL. *v.* TENSAR CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 975 F. 2d 868.

No. 92–5015. COOGAN *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 958 F. 2d 793.

No. 92–5199. BITTENBENDER *v.* TAYLOR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1162.

No. 92–5256. AGUIRRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1582.

No. 92–5376. CALIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 1332.

No. 92–5384. CARVER *v.* CARVER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 1573.

No. 92–5392. KIRSCH *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 92–5526. PHILLIPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 959 F. 2d 1187.

No. 92–5613. CARLINI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 92–5636. VIVES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 967 F. 2d 57.

No. 92–5654. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1462.

No. 92–5658. RAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 243.

No. 92–5672. KASSIM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 14.

No. 92–5847. HARDY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 86, 825 P. 2d 781.

No. 92–5867. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1579.

No. 92–5876. EARLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 968 F. 2d 1219.

No. 92–5920. DESMOND *v.* CITY OF QUINCY, MASSACHUSETTS, ET AL. App. Ct. Mass. Certiorari denied. Reported below: 33 Mass. App. 1103, 597 N. E. 2d 447.

No. 92–5921. CATELL *v.* SMYTHE, ADMINISTRATOR, HALAWA MEDIUM SECURITY FACILITY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–5922. TRUNDY *v.* MAGNUSSON, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 963 F. 2d 366.

No. 92–5923. BIGGS ET AL. *v.* LYNAUGH, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Sup. Ct. Tex. Certiorari denied.

No. 92–5933. WIGLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 925.

No. 92–5934. WIGLEY *v.* ALFRED HUGHES UNIT, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–5935. WRIGHT *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 92–5946. BAUTISTA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–5953. BOBO *v.* CONLIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1448.

No. 92–5958. SINDRAM *v.* SAXTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 341.

No. 92–5963. BOOTH *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 327 Md. 142, 608 A. 2d 162.

No. 92–5974. VEGA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–5997. ZIEBARTH *v.* FARM CREDIT BANK OF ST. PAUL. Sup. Ct. N. D. Certiorari denied. Reported below: 485 N. W. 2d 788.

No. 92–6018. BUCHANAN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–6020. SMITH *v.* ALAMEDA COUNTY SHERIFF DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 591.

No. 92–6042. RIDER *v.* DEEDS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–6067. AVANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1347.

No. 92–6078. SCHOOLEY *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–6096. EVANS *v.* UNITED STATES; and
No. 92–6208. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 398.

No. 92–6119. SPEARS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 262.

No. 92–6156. KERNICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333.

No. 92–6175. ROBLEDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 970.

No. 92–6183. HOLLEY *v.* UNITED STATES; and
No. 92–6250. HATLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 703.

No. 92–6188. PETE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 24.

No. 92–6190. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 171.

No. 92–6191. WOFFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1222.

No. 92–6194. CABEZAS-COLON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–6195. LOPEZ-ALVAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 970 F. 2d 583.

No. 92–6199. CUNNINGHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 24.

No. 92–6201. GARIBAY-BRAVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 593.

No. 92–6205. GREGORY *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 92–6207. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–6211. MENDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6212. QUIROZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 381.

No. 92–6213. LEVINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 260.

No. 92–6221. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92–6222. CASTILLO BAUTISTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 92–6223. ALZATE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1044.

No. 92–6225. ARIGBEDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 7.

No. 92–6226. SAVOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–6227. CASEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–6228. SABB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1551.

No. 92–6237. SALLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–6241. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6245. MONTOYA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 967 F. 2d 1.

No. 92–6251. HOLGUIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1044.

No. 92–6254. RILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 422.

No. 92–6257. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 703.

No. 92–6263. SONSHINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6268. STRICKLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1333.

No. 92–6269. WEAVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1048.

No. 92–6270. ABATE *v.* GOLDSMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 376.

No. 92–6272. TROUTMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1047.

No. 92–6273. SASSI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 283.

No. 92–6275. MICKENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1213.

No. 92–6279. HUNTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 606 A. 2d 139.

No. 92–6283. FRIEDMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1048.

No. 92–6284. KWASNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1345.

No. 92–6286. BYRD, AKA WARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1048.

No. 92–6295. LUERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1045.

No. 92–6300. EVANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 92–6301. HENNINGHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–111. DIXON, WARDEN, ET AL. *v.* WILLIAMS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 961 F. 2d 448.

No. 92–530. GEORGE BASCH CO., INC. *v.* BLUE CORAL, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 968 F. 2d 1532.

No. 92–533. ADAMS, A MINOR CHILD, BY AND THROUGH HER NEXT FRIEND, RIDGELL, ET AL. *v.* CHILDREN'S MERCY HOSPITAL ET AL. Sup. Ct. Mo. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 832 S. W. 2d 898.

No. 92–532. ARIZONA *v.* BARTLETT. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 171 Ariz. 302, 830 P. 2d 823.

No. 92–5270. DICKERSON *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari.

Rehearing Denied

No. 91–1891. KING *v.* JAMES ET AL., *ante*, p. 821;
No. 91–7872. MUHAMMAD *v.* UNITED STATES, *ante*, p. 833;
No. 91–7975. IN RE LIFFITON, *ante*, p. 812;
No. 91–8266. LYLE *v.* MICHIGAN DEPARTMENT OF CORRECTIONS, *ante*, p. 837;
No. 91–8414. BROWN *v.* BROWN ET AL., *ante*, p. 842;
No. 91–8545. SUEING *v.* BROWN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 847;
No. 91–8699. CLAUSEN *v.* ANNICH ET AL., *ante*, p. 856;
No. 92–45. STONEHILL ET UX. *v.* UNITED STATES, *ante*, p. 862;
No. 92–113. RAMIREZ *v.* TEXAS, *ante*, p. 866;
No. 92–364. PLEMONS *v.* UNITED STATES, *ante*, p. 874;
No. 92–5034. IN RE ESTES, *ante*, p. 812;
No. 92–5204. YATES *v.* GARNER ET AL., *ante*, p. 885;
No. 92–5388. WILLIAMS *v.* UNITED STATES, *ante*, p. 894;
No. 92–5465. MANWANI *v.* SCHONZEIT ET AL., *ante*, p. 898;
No. 92–5466. MULAZIM *v.* REDMAN, WARDEN, *ante*, p. 898; and
No. 92–5591. TAYLOR *v.* BARBER ET AL., *ante*, p. 923. Petitions for rehearing denied.

No. 92–353. GAMBOCZ *v.* MCCALLUM ET AL., *ante*, p. 918. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 92–5556. OMOIKE *v.* COCA-COLA BOTTLING CO., *ante*, p. 934. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

NOVEMBER 18, 1992

Certiorari Denied

No. 92–6391 (A–341). GRIFFIN *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.

NOVEMBER 19, 1992

Miscellaneous Order

No. A–400. SINGLETON *v.* THIGPEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER would grant the application for stay of execution.

Certiorari Denied

No. 92–6622 (A–398). GRIFFIN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution.

No. 92–6623 (A–399). GRIFFIN *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.

NOVEMBER 20, 1992

Miscellaneous Orders

No. A–381. SHAW *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A–391. JOHNSON *v.* BURTON. C. A. 10th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

NOVEMBER 24, 1992

Dismissal Under Rule 46

No. 92–454. CANFIELD ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 967 F. 2d 443.

NOVEMBER 27, 1992

Dismissal Under Rule 46

No. 92–742. CURTIS *v.* ALUMINUM ASSN., INC., ET AL. Ct. App. D. C. Certiorari dismissed as to respondent Aluminum Association, Inc., under this Court's Rule 46. Reported below: 607 A. 2d 509.

NOVEMBER 30, 1992

Certiorari Granted—Vacated and Remanded

No. 91–1766. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Church of Scientology of Cal.* v. *United States*, *ante*, p. 9.

Miscellaneous Orders

No. ——. ANGELETAKIS *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. ——. REED *v.* AMAX COAL CO.; and
No. ——. FOLEY *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D–1147. IN RE DISBARMENT OF LEBEN. Disbarment entered. [For earlier order herein, see 505 U. S. 1238.]

No. D–1151. IN RE DISBARMENT OF MOORE. Disbarment entered. [For earlier order herein, see 505 U. S. 1241.]

No. D–1157. IN RE DISBARMENT OF HORN. Disbarment entered. [For earlier order herein, see 505 U. S. 1241.]

No. D–1158. IN RE DISBARMENT OF SPECINER. Disbarment entered. [For earlier order herein, see 505 U. S. 1242.]

No. D–1173. IN RE DISBARMENT OF ROMER. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–1187. IN RE DISBARMENT OF O'LEARY. Disbarment entered. [For earlier order herein, see *ante*, p. 937.]

No. D–1208. IN RE DISBARMENT OF BEATY. It is ordered that Henry Murry Beaty, Jr., of Memphis, Tenn., be suspended from the practice of law in this Court and that a rule 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–1209. IN RE DISBARMENT OF WHITE. It is ordered that James Judson White III, of Chestertown, Md., be suspended from the practice of law in this Court and that a rule 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–1210. IN RE DISBARMENT OF WOLF. It is ordered that Barbara L. Wolf, of Fort Lauderdale, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1211. IN RE DISBARMENT OF MCCLEAN. It is ordered that Craig Alan McClean, of Coraopolis, Pa., be suspended from the practice of law in this Court and that a rule 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–1212. IN RE DISBARMENT OF AGUILAR. It is ordered that Humberto Juan Aguilar, of Miami, Fla., be suspended from the practice of law in this Court and that a rule 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–1213. IN RE DISBARMENT OF VERIZZO. It is ordered that David Mark Verizzo, of Miami, Fla., be suspended from the practice of law in this Court and that a rule 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–1214. IN RE DISBARMENT OF BODELL. It is ordered that Stephen Robert Bodell, of Wickliffe, Ky., be suspended from the practice of law in this Court and that a rule 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–1215. IN RE DISBARMENT OF MAYBLUM. It is ordered that Martin J. Mayblum, of Forest Hills, N. Y., be suspended from

the practice of law in this Court and that a rule 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. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of the Special Master for compensation and reimbursement of expenses granted, and it is ordered that the Special Master is awarded a total of $124,171.27 for the period March 1 through October 15, 1992, to be paid as follows: 20% by the United States and 40% each by Nebraska and Wyoming. [For earlier order herein, see, *e. g., ante,* p. 938.]

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Motion of the Special Master for compensation and reimbursement of expenses granted, and it is ordered that the Special Master is awarded a total of $64,112.96 for the period November 1, 1991, through September 23, 1992, to be paid equally by the parties. [For earlier order herein, see, *e. g.,* 502 U. S. 1027.]

No. 91–8581. MCDONALD *v.* YELLOW CAB METRO, INC. Sup. Ct. Tenn. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 810] denied.

No. 92–65. SUN CARRIERS, INC., ET AL. *v.* MILNE EMPLOYEES ASSN. ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–344. MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* HAITIAN CENTERS COUNCIL, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 814.] Motion of respondents to suspend briefing denied. JUSTICE BLACKMUN and JUSTICE SOUTER would grant this motion.

No. 92–5129. SULLIVAN *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, *ante,* p. 939.] Motion for appointment of counsel granted, and it is ordered that John W. Reed, Esq., of New Orleans, La., be appointed to serve as counsel for petitioner in this case.

No. 92–5205. SCHULTZ ET UX. *v.* PARR ELEVATOR, INC. C. A. 7th Cir. Motion of petitioners for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 811] denied.

No. 92–5769. HOWARD *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 6th Cir. Motion of petitioner for leave to

proceed *in forma pauperis* denied. Petitioner is allowed until December 21, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 92–5973. DEMOS *v.* KING COUNTY SUPERIOR COURT ET AL. Sup. Ct. Wash.; and

No. 92–6082. SINDRAM *v.* VIRGINIA. Ct. App. Va. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until December 21, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petitions for writs of certiorari.

No. 92–6393. IN RE BROWN; and

No. 92–6452. IN RE HUTCHINGS VON LUDWITZ. Petitions for writs of habeas corpus denied.

No. 92–6050. IN RE JOHNSTON;

No. 92–6080. IN RE LAKE;

No. 92–6138. IN RE LAVOLD;

No. 92–6166. IN RE ASCH;

No. 92–6179. IN RE SANDERS; and

No. 92–6192. IN RE WAITES. Petitions for writs of mandamus denied.

Certiorari Granted

No. 92–311. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* SCHAEFER. C. A. 8th Cir. Certiorari granted. Reported below: 960 F. 2d 1053.

No. 92–603. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* BEACH COMMUNICATIONS, INC., ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 296 U. S. App. D. C. 141, 965 F. 2d 1103.

No. 92–479. TXO PRODUCTION CORP. *v.* ALLIANCE RESOURCES CORP. ET AL. Sup. Ct. App. W. Va. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 187 W. Va. 457, 419 S. E. 2d 870.

Certiorari Denied

No. 91–8198. HAI HAI VUONG *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 830 S. W. 2d 929.

No. 91–8349. WILLIAMS *v.* CHRANS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 487.

No. 91–8643. KWEKU *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1573.

No. 92–115. FISCHER *v.* UNITED STATES;
No. 92–177. KRAMER ET AL. *v.* UNITED STATES; and
No. 92–235. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 955 F. 2d 479.

No. 92–279. MOBLEY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 36 M. J. 34.

No. 92–302. BLAKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 2d 334.

No. 92–308. DOE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 209.

No. 92–317. VICARIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 1412.

No. 92–336. LETKE *v.* VLACHOS ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 90 Md. App. 772.

No. 92–369. MILLBROOK *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied.

No. 92–380. ARKANSAS *v.* BUTLER. Sup. Ct. Ark. Certiorari denied. Reported below: 309 Ark. 211, 829 S. W. 2d 412.

No. 92–382. ARDITTI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 331.

No. 92–383. GORRELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 211.

No. 92–387. STEWART COUNTY, TENNESSEE, ET AL. *v.* HEFLIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 709 and 968 F. 2d 1.

No. 92–400. LINCOLN LOG HOMES, INC. *v.* ZONA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 374.

No. 92–415. GULF CONTRACTING, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 972 F. 2d 1353.

No. 92–420. RIVERBEND FARMS, INC., ET AL. *v.* MADIGAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 1479.

No. 92–432. GIFFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 586.

No. 92–438. DOW CHEMICAL CO. ET AL. *v.* BROWN ET AL. (two cases). C. A. 2d Cir. Certiorari denied.

No. 92–463. UNITED CEREBRAL PALSY ASSOCIATIONS OF NEW YORK STATE, INC. *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 966 F. 2d 743.

No. 92–554. FLEENOR ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 17.

No. 92–555. PAUL *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 1058.

No. 92–560. CITY OF MANHATTAN BEACH ET AL. *v.* BUCKEY; and

No. 92–628. CHILDREN'S INSTITUTE INTERNATIONAL ET AL. *v.* BUCKEY. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 791.

No. 92–565. BAGGEN TUG & BARGE CO., INC., ET AL. *v.* RAINIER NATIONAL BANK. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 14.

No. 92–566. BARNES *v.* WESTINGHOUSE ELECTRIC CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 962 F. 2d 513.

No. 92–572. SANTIKOS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 836 S. W. 2d 631.

No. 92–575. PARTINGTON ET AL. *v.* LUM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 852.

No. 92–576. TV COMMUNICATIONS NETWORK, INC. *v.* TURNER NETWORK TELEVISION, INC., AKA TNT. C. A. 10th Cir. Certiorari denied. Reported below: 964 F. 2d 1022.

No. 92–580. MARSHALL ET AL. *v.* BANKERS LIFE & CASUALTY CO. ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 1045, 832 P. 2d 573.

No. 92–582. PAUL *v.* MOORE ET UX. Ct. App. Ga. Certiorari denied.

No. 92–587. HARRISON *v.* MONTVERDE ACADEMY. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 596 So. 2d 1076.

No. 92–589. R. E. J. *v.* L. R. E. Ct. App. Wis. Certiorari denied. Reported below: 168 Wis. 2d 209, 483 N. W. 2d 588.

No. 92–594. PARTINGTON ET AL. *v.* KIBE, CHIEF DISCIPLINARY COUNSEL OF THE OFFICE OF DISCIPLINARY COUNSEL OF HAWAII, ET AL. Sup. Ct. Haw. Certiorari denied.

No. 92–596. LICHT *v.* TEXAS COMMERCE BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 962 F. 2d 543.

No. 92–605. AMIRAULT *v.* FAIR, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 968 F. 2d 1404.

No. 92–608. STANDRING *v.* XEROX CORP. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 92–611. OLD BRIDGE CHEMICALS, INC. *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. C. A. 3d Cir. Certiorari denied. Reported below: 965 F. 2d 1287.

No. 92–614. CSX TRANSPORTATION, INC. *v.* BARKER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 1361.

No. 92–615. PACIFIC TELESIS GROUP ET AL. *v.* TALKING YELLOW PAGES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1343.

No. 92–616. SHARP ET UX. *v.* HENNEPIN COUNTY BUREAU OF SOCIAL SERVICES ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 486 N. W. 2d 375.

No. 92–620. NELSON, REABE & SNYDER, INC. *v.* SELPH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 411.

No. 92–622. Robins Island Preservation Fund, Inc. *v.* Southold Development Corp. C. A. 2d Cir. Certiorari denied. Reported below: 959 F. 2d 409.

No. 92–623. RMI Titanium Co. *v.* Oil, Chemical & Atomic Workers International Union, Local 7–629, et al. Ct. App. Ohio, Ashtabula County. Certiorari denied.

No. 92–625. Plaisance et ux. *v.* Texaco Inc. et al. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 166.

No. 92–627. City Vending of Muskogee, Inc. *v.* Oklahoma Tax Commission. Sup. Ct. Okla. Certiorari denied. Reported below: 835 P. 2d 97.

No. 92–636. Dillner *v.* Soden. Sup. Ct. Kan. Certiorari denied. Reported below: 251 Kan. 225, 834 P. 2d 358.

No. 92–637. Mutual Reinsurance Bureau *v.* Great Plains Mutual Insurance Co., Inc. C. A. 10th Cir. Certiorari denied. Reported below: 969 F. 2d 931.

No. 92–638. International Funding Institute, Inc., et al. *v.* Federal Election Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 110, 969 F. 2d 1110.

No. 92–651. Wright *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 593 N. E. 2d 1192.

No. 92–655. Barron *v.* Ford Motor Company of Canada Ltd. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 195.

No. 92–657. Kauble et al. *v.* Continental Steel Corp. et al. C. A. 7th Cir. Certiorari denied. Reported below: 968 F. 2d 1218.

No. 92–660. Shotey *v.* Eales et al. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 876.

No. 92–670. Pazos-Santana *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 384.

No. 92–675. Harman *v.* Wetzel. Sup. Ct. Pa. Certiorari denied. Reported below: 530 Pa. 657, 608 A. 2d 32.

No. 92–680. WOERNER *v.* BRUNT. Sup. Ct. N. J. Certiorari denied.

No. 92–698. BAGLEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 408 Pa. Super. 188, 596 A. 2d 811.

No. 92–703. MACDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 854.

No. 92–716. KAMIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 384.

No. 92–721. SEARS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 972 F. 2d 1328.

No. 92–729. DOHERTY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 425.

No. 92–5033. FETTERLY *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 121 Idaho 417, 825 P. 2d 1073.

No. 92–5061. WEBB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 651.

No. 92–5470. JOHNSON *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–5485. PEREZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 168, 592 N. E. 2d 984.

No. 92–5505. DEAN *v.* SMITH ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–5529. SYROVATKA *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 92–5542. HUDSON *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 92–5593. RAGOSTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 1085.

No. 92–5692. JENKINS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 168 Wis. 2d 175, 483 N. W. 2d 262.

No. 92–5700. MEZA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 594.

No. 92–5720. LONDONO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 959 F. 2d 245.

No. 92–5733. SCHMELTZER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 960 F. 2d 405.

No. 92–5735. DROGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 961 F. 2d 1030.

No. 92–5737. AMARIGLIO *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 6.

No. 92–5940. ROSSI *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 171 Ariz. 276, 830 P. 2d 797.

No. 92–5955. GORE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 599 So. 2d 978.

No. 92–5957. TURNER *v.* SUMNER, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY, ET AL. Sup. Ct. Haw. Certiorari denied.

No. 92–5959. JOHNSON *v.* WHITLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 240.

No. 92–5964. BULLOCK *v.* THOMPSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1441.

No. 92–5966. PITTS *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 899.

No. 92–5968. WHITE *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 92–5975. MOORE *v.* LEE, SUPERINTENDENT, CALEDONIA CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1443.

No. 92–5977. LANCASTER *v.* VAN DER VEUR, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1345.

No. 92–5987. ROXAS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 968 F. 2d 1227.

No. 92–5990. STOCKTON *v.* VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–5996. SMITH *v.* MCCARTHY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 900.

No. 92–6003. STACKHOUSE *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 897.

No. 92–6004. JACKSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 599 So. 2d 103.

No. 92–6005. JACKSON *v.* LEONARDO, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1043.

No. 92–6011. VENTERS *v.* BASHELOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1447.

No. 92–6014. CHANCY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–6017. ATTWELL *v.* CLARK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 24.

No. 92–6022. WRIGHT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 149 Ill. 2d 36, 594 N. E. 2d 276.

No. 92–6023. SMITH *v.* CITIZENS BANK OF MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 90 Md. App. 780.

No. 92–6024. WRIGHT *v.* HOMESTAKE MINING CO. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 739.

No. 92–6030. MILNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 908.

No. 92–6038. HOLGUIN *v.* DOE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 924.

No. 92–6052. HARRISON *v.* ENRIGHT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 1224.

No. 92–6057. MEADOWS *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 235.

No. 92–6064. DEVINE *v.* SULLIVAN, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1042.

No. 92–6068. BUNDY *v.* VAUGHN, SUPERINTENDENT, PENNSYLVANIA STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6069. STEVE R. *v.* COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 178 App. Div. 2d 531, 577 N. Y. S. 2d 321.

No. 92–6070. SHEARD *v.* D'ALESSIO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 14.

No. 92–6071. WHITAKER *v.* LARSEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 943 F. 2d 50.

No. 92–6072. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 900.

No. 92–6076. GYORE *v.* O'CONNELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 379.

No. 92–6081. MALONE *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 968 F. 2d 1227.

No. 92–6086. BUTLER *v.* LOFTON, SUPERINTENDENT, SAMPSON CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 963 F. 2d 367.

No. 92–6087. BRAYTON *v.* CONTRIBUTORY RETIREMENT APPEAL BOARD ET AL. App. Ct. Mass. Certiorari denied. Reported below: 32 Mass. App. 1117, 593 N. E. 2d 1326.

No. 92–6088. VERDUGO *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–6090. KOYOMEJIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 970 F. 2d 536.

No. 92–6094. BOBO *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 92–6098. VAN NOTE *v.* RAFFERTY, DEPUTY DIRECTOR, DIVISION OF ADULT INSTITUTIONS, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6099. SINDRAM *v.* LORENZO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 705.

No. 92–6102. SMITH ET VIR *v.* ADOPTIVE PARENTS. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 602 So. 2d 144.

No. 92–6107. WHITTED *v.* ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 596.

No. 92–6108. VILVERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 942 F. 2d 796.

No. 92–6109. GLASS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 597 N. E. 2d 390.

No. 92–6118. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–6121. LEWIS *v.* RUSSE ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–6125. KENEALY *v.* FRUEHAUF CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1577.

No. 92–6126. HOWELL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 614 A. 2d 1275.

No. 92–6128. KUKES *v.* RAMSEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1340.

No. 92–6129. HUFFSMITH *v.* MUSTO ET AL.; and HUFFSMITH *v.* PENNSYLVANIA PROBATION DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6133. SAWYERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 157.

No. 92–6135. TANGWALL *v.* BOROCK. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 268.

No. 92–6136. ROBINSON *v.* NEW JERSEY TURNPIKE AUTHORITY ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 92–6140. PEREZ *v.* HUTCHERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 963 F. 2d 367.

No. 92–6142. BLAIR-BEY ET AL. *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 162.

No. 92–6144. BLAIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 900.

No. 92–6148. FERNANDEZ *v.* WELLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–6152. OWEN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–6153. YOUNG *v.* PASKETT, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1348.

No. 92–6154. BAKER *v.* BANCROFT & MARTIN, INC., ET AL. Sup. Jud. Ct. Me. Certiorari denied.

No. 92–6159. GARBETT *v.* MYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–6161. HENDERSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1309 and 968 F. 2d 1070.

No. 92–6162. ALEXANDER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–6164. PIERCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 1297.

No. 92–6165. WILLIAMSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1570.

No. 92–6167. MORAS-MORAQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 942 F. 2d 1543.

No. 92–6168. MCCLEARY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–6169. TYLER *v.* PERRIN ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6172. SINGLETON *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 92–6176. McCray *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 92–6177. Carbarcas-A *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6189. Ferguson *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333.

No. 92–6200. Kennedy *v.* Shillinger, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 971 F. 2d 558.

No. 92–6203. Gargallo *v.* Merrill Lynch, Pierce, Fenner & Smith, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1577.

No. 92–6206. Frizzel *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1449.

No. 92–6210. McKoy *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1350.

No. 92–6216. Lustgarden *v.* Gunter, Executive Director, Department of Corrections, et al. C. A. 10th Cir. Certiorari denied. Reported below: 966 F. 2d 552.

No. 92–6218. Atanasoff *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 92–6224. Callis *v.* Murray, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1211.

No. 92–6229. Kehne *v.* Rollins, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 7.

No. 92–6231. Dowtin *v.* Toombs, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1214.

No. 92–6233. Nicholson *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 600 So. 2d 1101.

No. 92–6238. Mathis *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 599 So. 2d 665.

No. 92–6240. MILLER ET AL. *v.* TUCKER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 968 F. 2d 1218.

No. 92–6255. MCCLUSKIE *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 611 A. 2d 975.

No. 92–6293. BUTLER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 614 A. 2d 875.

No. 92–6294. BUSH *v.* LEGURSKY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 897.

No. 92–6308. IMRAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 964 F. 2d 1313.

No. 92–6309. ENNIS *v.* SCHUETZLE, WARDEN. Sup. Ct. N. D. Certiorari denied. Reported below: 488 N. W. 2d 867.

No. 92–6310. SOMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1222.

No. 92–6311. PAYNE *v.* UNITED STATES; and
No. 92–6320. JACKSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6312. MOORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 1162.

No. 92–6319. ROUZARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1047.

No. 92–6322. KULKOVIT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 309.

No. 92–6324. PETERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1045.

No. 92–6329. LUACES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–6334. CONTI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6341. DOE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 964 F. 2d 157.

No. 92–6342. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 971 F. 2d 597.

No. 92–6344. SIMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6350. HAIRSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–6351. O'NEIL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–6354. MAKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1347.

No. 92–6356. TAPIA-FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 926.

No. 92–6359. AGIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–6361. WEDDERBURN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–6363. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6364. BLALOCK *v.* UNITED STATES;
No. 92–6365. BLALOCK *v.* UNITED STATES; and
No. 92–6384. BRAWLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–6367. JENKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1047.

No. 92–6368. LASTRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333.

No. 92–6369. MAXWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1045.

No. 92–6370. MCCORMICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1449.

No. 92–6372. MENDOZA-VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 153.

No. 92–6375. LANDRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 747.

No. 92–6380. HOLLINGSWORTH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6395. BARRERA-DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 598.

No. 92–6396. SIMMONS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 964 F. 2d 763.

No. 92–6408. CHATMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6413. SWINNEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 970 F. 2d 494.

No. 92–6414. BURLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 967 F. 2d 497.

No. 92–6416. MARTIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 605 A. 2d 934.

No. 92–6418. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 193.

No. 92–6435. LIND *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 79 N. Y. 2d 722, 598 N. E. 2d 1.

No. 91–1930. VASQUEZ, WARDEN, ET AL. *v.* THOMPSON. C. A. 9th Cir. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 956 F. 2d 1168.

No. 92–104. ADA, GOVERNOR OF GUAM *v.* GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 1366.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

I dissent from the denial of the petition for writ of certiorari. The Ninth Circuit held in this case that Guam Pub. L. 20–134, outlawing all abortions except in cases of medical emergency, is unconstitutional on its face. That seems to me wrong, since there are apparently some applications of the statute that are perfectly constitutional.

Statutes are ordinarily challenged, and their constitutionality evaluated, "as applied"—that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context, but not to render it utterly inoperative. To achieve the latter result, the plaintiff must succeed in challenging the statute "on its face." Our traditional rule has been, however, that a facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied. See, *e. g.*, *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (Bail Reform Act of 1984 not facially unconstitutional). "[C]ourts are not," we have said, "roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610–611 (1973). The only exception to this rule recognized in our jurisprudence is the facial challenge based upon First Amendment free-speech grounds. We have applied to statutes restricting speech a so-called "overbreadth" doctrine, rendering such a statute invalid in all its applications (*i. e.*, facially invalid) if it is invalid in any of them. See, *e. g.*, *Gooding* v. *Wilson*, 405 U. S. 518, 520–523 (1972).

The Court's first opinion in the abortion area, *Roe* v. *Wade*, 410 U. S. 113 (1973), seemingly employed an "overbreadth" approach—though without mentioning the term and without analysis. See *id.*, at 164. Later abortion decisions, however, have explicitly rejected application of an "overbreadth" doctrine. See *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) (citing *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 524 (1989) (O'CONNOR, J., concurring in part and concurring in judgment)). As JUSTICE O'CONNOR explained in *Webster*, this Court's previous decisions concerning state and federal funding of abortions "stand for the proposition that some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional." *Id.*, at 524. See also *Rust* v. *Sullivan*, 500 U. S. 173, 183 (1991) (facial challenge to federal regulations limiting the ability of recipients of federal funds to engage in abortion-related activities "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circum-

stances exists under which the Act would be valid" (internal quotation marks omitted; citation omitted)). The Court did not purport to change this well-established rule last Term, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992).

Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting—through judicial decision or enforcement discretion—statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional. Under this Court's current abortion case law, including *Casey*, I see no reason why the Guam law would not be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb. If that is so, the Ninth Circuit should have dismissed the present, across-the-board challenge. It is important for this Court to call attention to the point, since the course taken by the Ninth Circuit here was also followed by the Fifth Circuit in affirming the facial invalidation of Louisiana's abortion statute, see *Sojourner T.* v. *Edwards*, 974 F. 2d 27 (1992)—though it is possible that there, unlike here, the facial challenge point was not asserted by the State.

I would grant certiorari, vacate the decision of the Court of Appeals, and remand the case for the Ninth Circuit to consider, as the prevailing legal standard for facial challenges requires, whether Guam Pub. L. 20–134 has any constitutional applications.

No. 92–403. TEAMSTERS LOCAL UNION NO. 688 ET AL. *v.* COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 959 F. 2d 1438.

No. 92–581. THOMAS ET AL. *v.* WICHITA COCA-COLA BOTTLING CO. C. A. 10th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 968 F. 2d 1022.

No. 92–508. MISSOURI *v.* HANKINS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 964 F. 2d 853.

No. 92–702. MISSOURI *v.* PARKER. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 836 S. W. 2d 930.

No. 92–557. CLARK *v.* POULTON ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Certiorari denied. Reported below: 963 F. 2d 1361.

No. 92–558. VALENTEC KISCO, INC. *v.* WILLIAMS. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 964 F. 2d 723.

No. 92–577. DOPYERA ET AL. *v.* TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORATION. Sup. Ct. Tex. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 834 S. W. 2d 50.

No. 92–600. ADOPTIVE PARENTS OF M. N. M. *v.* M. J. L. Ct. App. D. C. Motion of National Council for Adoption et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 605 A. 2d 921.

No. 92–626. CATERPILLAR INC. *v.* MICHIGAN DEPARTMENT OF TREASURY, REVENUE DIVISION. Sup. Ct. Mich. Motion of Ashland Oil, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 440 Mich. 400, 488 N. W. 2d 182.

No. 92–656. HOLLYDAY *v.* RAINEY, CHAIRMAN OF THE BUNCOMBE COUNTY COMMISSIONERS, ET AL. C. A. 4th Cir. Motion of Southern States Police Benevolent Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 964 F. 2d 1441.

No. 92–6015. MINCEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 2 Cal. 4th 408, 827 P. 2d 388.

Rehearing Denied

No. 91–1702. CORTEZ *v.* FIRST CITY NATIONAL BANK OF HOUSTON ET AL., *ante,* p. 815;

No. 91–1784. PRINCE *v.* UNITED STATES, *ante,* p. 816;

No. 91–1799. PACYNA *v.* STONE, SECRETARY OF THE ARMY, *ante*, p. 817;

No. 91–1847. MILLER *v.* BRIGGS ET AL., *ante*, p. 818;

No. 91–2002. U. E. ENTERPRISES, INC., ET AL. *v.* NEW YORK CHINESE TV PROGRAMS, INC., *ante*, p. 827;

No. 91–7408. RICH ET AL. *v.* UNITED STATES, *ante*, p. 832;

No. 91–7563. SHIIMI *v.* HARLANDALE INDEPENDENT SCHOOL DISTRICT, *ante*, p. 832;

No. 91–7697. BROWN *v.* INDIANA, *ante*, p. 833;

No. 91–7760. CROWLEY *v.* PRINCE GEORGE'S COUNTY, MARYLAND, *ante*, p. 833;

No. 91–7797. BOYLES *v.* INDIANA, *ante*, p. 833;

No. 91–8108. MASAT *v.* UNITED STATES, *ante*, p. 835;

No. 91–8238. SHUMATE *v.* NCNB FINANCIAL SERVICES ET AL., *ante*, p. 836;

No. 91–8283. MEDERS *v.* GEORGIA, *ante*, p. 837;

No. 91–8303. FANNY *v.* LEVY ET AL., *ante*, p. 838;

No. 91–8317. TODD *v.* GEORGIA, *ante*, p. 838;

No. 91–8334. MOODY *v.* TEXAS, *ante*, p. 839;

No. 91–8335. CARTER *v.* HARFORD COUNTY CIRCUIT COURT ET AL., *ante*, p. 839;

No. 91–8353. TUDOROV *v.* COLLAZO, *ante*, p. 840;

No. 91–8376. JUNGBLUT *v.* CRIST, WARDEN, *ante*, p. 840;

No. 91–8378. JACOBS ET AL. *v.* DUJMOVIC ET AL., *ante*, p. 840;

No. 91–8387. ASHMUS *v.* CALIFORNIA, *ante*, p. 841;

No. 91–8395. SLEDGE *v.* MEYERS, WARDEN, *ante*, p. 841;

No. 91–8404. JONES *v.* LEWIS ET AL., *ante*, p. 841;

No. 91–8405. EDWARDS *v.* CALIFORNIA, *ante*, p. 841;

No. 91–8429. JACKSON *v.* SOUTH TEXAS COLLEGE OF LAW ET AL., *ante*, p. 842;

No. 91–8487. FROST *v.* OHIO, *ante*, p. 844;

No. 91–8572. CALDWELL *v.* TOM MISTICK & SONS ET AL., *ante*, p. 849;

No. 91–8618. SAYLOR *v.* VIRGINIA, *ante*, p. 852;

No. 91–8638. HAWKINS *v.* CALIFORNIA, *ante*, p. 853;

No. 91–8684. BENNETT *v.* DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 855;

No. 91–8726. GORDON *v.* UNITED STATES, *ante*, p. 858;

No. 91–8732. IN RE JACKSON, *ante*, p. 812;

No. 91–8738. BAUER *v.* UNITED STATES, *ante*, p. 858;

No. 92–38. CHRYSLER CORP. *v.* INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL–CIO, ET AL., *ante,* p. 908;

No. 92–48. FERMIN *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 863;

No. 92–59. IN RE ANDERSON, *ante,* p. 812;

No. 92–186. BARBER *v.* SOMERVILLE HOSPITAL, INC., ET AL., *ante,* p. 869;

No. 92–241. CRAWFORD ET VIR *v.* LEAHY ET AL., *ante,* p. 872;

No. 92–248. MOZEE ET AL. *v.* AMERICAN COMMERCIAL MARINE SERVICE CO., *ante,* p. 872;

No. 92–257. CLARKE *v.* BUTCHER ET AL., *ante,* p. 872;

No. 92–5052. SANTANA DIAZ *v.* UNITED STATES, *ante,* p. 876;

No. 92–5098. BANKS *v.* KAYE, *ante,* p. 879;

No. 92–5111. RUB *v.* FEDERAL LAND BANK OF ST. PAUL, *ante,* p. 880;

No. 92–5118. QAHDAFI *v.* VIRGINIA, *ante,* p. 880;

No. 92–5123. WILLE *v.* LOUISIANA, *ante,* p. 880;

No. 92–5246. JOHNSON *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. (two cases), *ante,* p. 887;

No. 92–5263. DAWN ET UX. *v.* MARGOLIS ET AL., *ante,* p. 888;

No. 92–5289. LAWRENCE *v.* BRADY, SECRETARY OF THE TREASURY, *ante,* p. 889;

No. 92–5301. KIRIENKO *v.* KIRIENKO, *ante,* p. 889;

No. 92–5375. VISCIOTTI *v.* CALIFORNIA, *ante,* p. 893;

No. 92–5378. WILEY *v.* CORRECTIONS CABINET OF KENTUCKY ET AL., *ante,* p. 894;

No. 92–5382. SPIVEY *v.* BRICE-WELLINGTON, *ante,* p. 894;

No. 92–5389. WHITTLESEY *v.* MARYLAND, *ante,* p. 894;

No. 92–5450. OMOIKE *v.* EXXON CO., *ante,* p. 897;

No. 92–5550. BARSTEN *v.* DEPARTMENT OF THE INTERIOR, *ante,* p. 900;

No. 92–5581. MITCHELL *v.* EBERHART, WARDEN, *ante,* p. 922;

No. 92–5586. TWYMAN *v.* ALABAMA, *ante,* p. 923;

No. 92–5605. WINTERS *v.* IOWA STATE UNIVERSITY, *ante,* p. 923;

No. 92–5650. BEVERLY ET UX. *v.* UNITED STATES, *ante,* p. 902; and

No. 92–5681. KOT *v.* PATERNOSTER ET AL., *ante,* p. 943. Petitions for rehearing denied.

No. 91–1843. NELSON *v.* UNIVERSITY OF ALABAMA SYSTEM ET AL., *ante*, p. 818. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 91–8615. TOLBERT *v.* KEMP, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *ante*, p. 906. Petition for rehearing denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

DECEMBER 7, 1992

Dismissal Under Rule 46

No. 92–531. HATCHER *v.* VALCARCEL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 984.] Writ of certiorari dismissed under this Court's Rule 46.1.

Affirmed on Appeal

No. 92–586. FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC., ET AL. *v.* WEPRIN ET AL. Affirmed on appeal from D. C. N. D. N. Y. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 796 F. Supp. 662.

Miscellaneous Orders

No. ——. NGENE-IGWE *v.* IOWA STATE UNIVERSITY ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–313. LOVETT *v.* UNITED STATES. C. A. 10th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–1170. IN RE DISBARMENT OF SANDBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–1171. IN RE DISBARMENT OF SIMON. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–1216. IN RE DISBARMENT OF HAYES. It is ordered that Fredric G. Hayes, of Lafayette, La., be suspended from the practice of law in this Court and that a rule 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. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motions of the parties respecting oral argument granted in part and denied in part, and the time and order allotted are: 20 minutes to Wyoming, 10 minutes to Colorado, 15 minutes to Nebraska, and 15 minutes to the United States. [For earlier order herein, see, *e. g.*, *ante*, p. 996.]

No. 91–261. BUILDING & CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.; and

No. 91–274. MASSACHUSETTS WATER RESOURCES AUTHORITY ET AL. *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 504 U. S. 908.] Motion of the Solicitor General for leave to file a supplemental brief as *amicus curiae* granted.

No. 91–1671. MERTENS ET AL. *v.* HEWITT ASSOCIATES. C. A. 9th Cir. [Certiorari granted, *ante,* p. 812.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–1738. GILMORE *v.* TAYLOR. C. A. 7th Cir. [Certiorari granted, *ante,* p. 814.] Motion for appointment of counsel granted, and it is ordered that Lawrence C. Marshall, Esq., of Chicago, Ill., be appointed to serve as counsel for respondent in this case.

No. 91–7604. ANTOINE *v.* BYERS & ANDERSON, INC., ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 914.] Motion of Jonathan and Karen Scott for leave to file a brief as *amici curiae* granted.

No. 92–94. ZOBREST ET AL. *v.* CATALINA FOOTHILLS SCHOOL DISTRICT. C. A. 9th Cir. [Certiorari granted, *ante,* p. 813.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–5618. MARTIN *v.* MCDERMOTT ET AL. Sup. Ct. Del. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1] denied.

No. 92–5828. MARTIN *v.* WIDENER UNIVERSITY SCHOOL OF LAW ET AL. Sup. Ct. Del. Motion of petitioner for reconsidera-

tion of order denying leave to proceed *in forma pauperis* [*ante*, p. 951] denied.

No. 92–6265. DOCK *v.* AMERICAN TELEPHONE & TELEGRAPH TECHNOLOGIES ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 28, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 92–6281. HAGEN *v.* UTAH. Sup. Ct. Utah. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–6378. MAHDAVI *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until December 28, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE STEVENS would deny the petition for writ of certiorari.

No. 92–6598. IN RE FERGUSON. Petition for writ of habeas corpus denied.

No. 92–6198. IN RE TODD. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 92–357. SHAW ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. Appeal from D. C. E. D. N. C. Probable jurisdiction noted. Argument shall be limited to the following question which all parties are directed to brief: "Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with in-

vidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own." Reported below: 808 F. Supp. 461.

Certiorari Granted

No. 92–641. NOBELMAN ET UX. *v.* AMERICAN SAVINGS BANK ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 968 F. 2d 483.

Certiorari Denied

No. 91–8718. WHITE *v.* UNITED STATES; and
No. 92–5092. KELLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 1344.

No. 92–184. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 1388.

No. 92–271. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 92–337. PERKINS ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 965 F. 2d 597.

No. 92–385. OSCAR ET AL. *v.* UNIVERSITY STUDENTS COOPERATIVE ASSN.; and
No. 92–561. SPINOSA *v.* UNIVERSITY STUDENTS COOPERATIVE ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 965 F. 2d 783.

No. 92–389. CHENEY, SECRETARY OF DEFENSE, ET AL. *v.* PRUITT. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 1160.

No. 92–426. LOEHR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 201.

No. 92–462. GANNON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 967 F. 2d 40.

No. 92–475. RESHA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–556. U. A. LOCAL 38 CONVALESCENT TRUST FUND ET AL. *v.* BRADEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 584.

No. 92–578. ZAL *v.* STEPPE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 924.

No. 92–588. BARNES ET AL. *v.* MOORE, ATTORNEY GENERAL OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 970 F. 2d 12.

No. 92–591. UNITED STATES *v.* POINDEXTER. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 389, 951 F. 2d 369.

No. 92–592. FARM FRESH, INC. *v.* SHAFFER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 142.

No. 92–629. AUL ET AL. *v.* ALLSTATE LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1386.

No. 92–643. CITY OF HENDERSON ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA (NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 92–647. TAFFETT ET AL. *v.* SOUTHERN CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 967 F. 2d 1483.

No. 92–648. KOTROSITS ET AL. *v.* GATX CORPORATION NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 1165.

No. 92–650. RIFFE *v.* BROWN ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 92–653. CITY OF ARLINGTON, TEXAS *v.* FIRST GIBRALTAR BANK, F. S. B. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 79.

No. 92–654. JOHNSON ET AL. *v.* RAYES. C. A. 8th Cir. Certiorari denied. Reported below: 969 F. 2d 700.

No. 92–664. RILEY *v.* KINGSLEY UNDERWRITING AGENCIES, LTD., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 969 F. 2d 953.

No. 92–666. LAIRD *v.* BLACKER, ADMINISTRATOR OF THE ESTATE OF WINNIKOFF, DECEASED, ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 606, 828 P. 2d 691.

No. 92–669. SMITH *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 588 N. E. 2d 1303.

No. 92–671. OWEN *v.* OWEN. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 170.

No. 92–672. NAVARRO, SHERIFF OF BROWARD COUNTY, FLORIDA *v.* LUKE RECORDS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 960 F. 2d 134.

No. 92–674. LUM *v.* CITY AND COUNTY OF HONOLULU. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 1167.

No. 92–679. COLUMBIA GAS TRANSMISSION CORP. *v.* AN EXCLUSIVE NATURAL GAS STORAGE EASEMENT IN THE CLINTON SUBTERRANEAN GEOLOGICAL FORMATION BENEATH A 264.12 ACRE PARCEL IN PLAIN TOWNSHIP, WAYNE COUNTY, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 962 F. 2d 1192.

No. 92–684. PAYMASTER CORP. *v.* AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 853.

No. 92–688. LOCAL 776, INTERNATIONAL BROTHERHOOD OF TEAMSTERS *v.* STROEHMANN BAKERIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 969 F. 2d 1436.

No. 92–691. ROBINSON ET AL. *v.* GEORGIA DEPARTMENT OF TRANSPORTATION. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 637.

No. 92–692. SHELLEDY *v.* LORE ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 836 P. 2d 786.

No. 92–693. HALL *v.* CITY OF STUART, FLORIDA, BUILDING AND ZONING DEPARTMENT. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–710. HARVEY *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 835 P. 2d 1074.

No. 92–732. GULF STATES STEEL, INC. OF ALABAMA *v.* LTV CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 50, 969 F. 2d 1050.

No. 92–750. WILLIAM L. COMER FAMILY EQUITY PURE TRUST ET AL. *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–753. MATHES *v.* RICE, SECRETARY OF THE AIR FORCE. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 356.

No. 92–766. AUCOIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1492.

No. 92–781. BAKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 10.

No. 92–5144. COFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 960 F. 2d 150.

No. 92–5359. DURHAM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 185.

No. 92–5360. MCKINNEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 954 F. 2d 471.

No. 92–5387. WARREN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 971.

No. 92–5573. BARRETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 592.

No. 92–5594. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–5660. PEREZ-BUSTAMANTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 48.

No. 92–5727. AVERY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 971.

No. 92–5739. FLORES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 130.

No. 92–5808. GONZALEZ-ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 933 F. 2d 1021.

No. 92–5842. MCGILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 964 F. 2d 222.

No. 92–5869. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 158.

No. 92–5872. ANTONELLI *v.* UNITED STATES PAROLE COMMISSION. C. A. 7th Cir. Certiorari denied.

No. 92–6116. MUWWAKKIL *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 284.

No. 92–6155. STOUT *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1448.

No. 92–6193. BAILEY *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 372.

No. 92–6197. WILLIAMS *v.* DUBOSE ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–6202. JACKSON *v.* PITCHER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–6214. WILSON *v.* CONSOLIDATED PUBLISHING CO., INC., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 601 So. 2d 423.

No. 92–6217. SAMUELS ET AL. *v.* RUNDA ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–6219. BELL *v.* DUNCAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–6230. HERMOSILLO *v.* HERMOSILLO. Sup. Ct. Alaska. Certiorari denied.

No. 92–6232. MILLER *v.* DUKAKIS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 961 F. 2d 7.

No. 92–6234. KENH QUANG PHAM *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied.

No. 92–6235. NORD *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–6242. BETKA *v.* OREGON ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–6247. FUENTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 593.

No. 92–6249. FROOM *v.* BARON. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1043.

No. 92–6285. GREENE *v.* ENRIGHT, CLERK, COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 729, 590 N. E. 2d 1257.

No. 92–6306. BATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1221.

No. 92–6317. MULVILLE *v.* NORWEST BANK DES MOINES, NA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 1459.

No. 92–6328. MOSEANKO *v.* FRIEDT ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 484 N. W. 2d 861.

No. 92–6349. WILKES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6381. HARRISON, AKA ABDAL MATIYN *v.* MCKASKLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 959 F. 2d 22.

No. 92–6399. KUNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–6400. ENGLAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 403.

No. 92–6402. HENDERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 153.

No. 92–6419. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 381.

No. 92–6422. O'NEAL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 512.

No. 92–6426. BUSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–6428. WHITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 972 F. 2d 16.

No. 92–6430. MILSAP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 757.

No. 92–6432. MAHLBERG *v.* MENTZER. C. A. 8th Cir. Certiorari denied. Reported below: 968 F. 2d 772.

No. 92–6440. MACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1168.

No. 92–6446. HART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 923.

No. 92–6450. MCCLINTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6453. WALLS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–6454. SWAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 348.

No. 92–6456. VALENZUELA-JASSO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1347.

No. 92–6457. TATE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6463. BUCHANAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1350.

No. 92–6466. BURROWES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–6468. NAHODIL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–6470. RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 384.

No. 92–6471. LEPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 738.

No. 92–6473. ROTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 357.

No. 92–6479. COLOMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1582.

No. 92–6486. VICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6487. WALLACE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1552.

No. 92–6490. RAMOS PARTIDA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 748.

No. 92–6498. BROOKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–6499. ASHERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 411.

No. 92–6501. HURST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333.

No. 92–6511. NICHOLSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6512. CANONICO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 592.

No. 92–6515. HAYES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92–6517. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1346.

No. 92–6520. PILATO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 748.

No. 92–6522. DELANEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 355.

No. 92–6529. FLEMING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–255. PHILIPPINE GOODS, INC., ET AL. *v.* WABOL ET AL. C. A. 9th Cir. Motion of InterPacific Resorts (Saipan) Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 958 F. 2d 1450.

No. 92–458. MORELAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 968 F. 2d 655.

No. 92–460. HONEY *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner to consolidate this case with No. 92–665, *Davis* v. *United States*, denied. Certiorari denied. Reported below: 963 F. 2d 1083.

No. 92–487. CITY OF SEATTLE ET AL. *v.* ROBINSON ET UX., INDIVIDUALLY AND AS PARTNERS DBA COMPUTER SLIDE CO.; CITY OF SEATTLE ET AL. *v.* SINTRA, INC., ET AL.; and

No. 92–695. ROBINSON ET UX., INDIVIDUALLY AND AS PARTNERS DBA COMPUTER SLIDE CO. *v.* CITY OF SEATTLE ET AL.; and SINTRA, INC., ET AL. *v.* CITY OF SEATTLE ET AL. Sup. Ct. Wash. Motion of National League of Cities et al. for leave to file a brief as *amici curiae* in No. 92–487 granted. Certiorari denied. Reported below: 119 Wash. 2d 34, 830 P. 2d 318 (first cases); 119 Wash. 2d 1, 829 P. 2d 765 (second cases).

No. 92–668. ERWIN & ERWIN *v.* BREWER. C. A. 9th Cir. Motion of petitioner to strike denied. Certiorari denied. Reported below: 959 F. 2d 800.

No. 92–685. ROGERS *v.* TAFT, OHIO SECRETARY OF STATE, ET AL. Sup. Ct. Ohio. Motion of petitioner to substitute Isadore Blakeny as petitioner denied. Certiorari denied. Reported below: 64 Ohio St. 3d 193, 594 N. E. 2d 576.

No. 92–686. COUNTY OF INYO ET AL. *v.* GUTIERREZ. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 92–760. SHANNON ET AL. *v.* UNITED SERVICES AUTOMOBILE ASSN. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 965 F. 2d 542.

No. 92–6382. HARRISON *v.* DEPARTMENT OF LABOR. C. A. D. C. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 297 U. S. App. D. C. 303, 971 F. 2d 766.

Rehearing Denied

No. 91–1668. LARAIA *v.* PENNSYLVANIA, *ante*, p. 815;

No. 91–1907. RABIDA *v.* VAN ORDEN ET AL., *ante*, p. 822;

No. 91–6962. Fleming *v.* Grand Jury Foreperson, Special Grand Jury 89–2, District of Colorado, *ante*, p. 832;

No. 91–7007. Khan *v.* Tanner et al., 503 U. S. 942;

No. 91–8240. Barnes *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division, *ante*, p. 836;

No. 91–8351. Carson *v.* Director, Office of Workers' Compensation Programs, et al., *ante*, p. 840;

No. 91–8525. In re Gaydos, *ante*, p. 812;

No. 91–8585. Johns *v.* Bostwick, aka Mayerson, *ante*, p. 849;

No. 91–8617. Stratton *v.* Geoffrey, Inc., *ante*, p. 851;

No. 91–8652. Spaletta *v.* Workers Compensation Appeals Board, County of Mendocino, *ante*, p. 853;

No. 91–8714. Fierro *v.* California, *ante*, p. 907;

No. 91–8758. Knapp *v.* United States, *ante*, p. 859;

No. 92–20. Winer *v.* Winer et al., *ante*, p. 861;

No. 92–327. Kelly *v.* Tree Farm Development Corp. et al., *ante*, p. 918;

No. 92–5142. Bauer *v.* United States, *ante*, p. 882;

No. 92–5196. Schrock *v.* Turbow, *ante*, p. 884;

No. 92–5340. Farmer *v.* Cowan et al., *ante*, p. 942;

No. 92–5490. Baker *v.* Michigan et al., *ante*, p. 920;

No. 92–5582. Mitchell *v.* Bass, *ante*, p. 923;

No. 92–5585. Pickard *v.* Committees on Character and Fitness for the Second Judicial Department, *ante*, p. 923;

No. 92–5666. Veale et al. *v.* New Hampshire, *ante*, p. 943;

No. 92–5691. Jalil *v.* Avdel Corp., *ante*, p. 903;

No. 92–5705. Robinson *v.* United States, *ante*, p. 925;

No. 92–5726. Hornick *v.* United States, *ante*, p. 926;

No. 92–5773. Gordon *v.* United States, *ante*, p. 927;

No. 92–5775. Knight *v.* King et al., *ante*, p. 944;

No. 92–5845. Pack *v.* United States, *ante*, p. 945;

No. 92–5873. Raines *v.* Maryland, *ante*, p. 945;

No. 92–5874. Galloway *v.* Borg, Warden, *ante*, p. 961;

No. 92–5905. Phillips *v.* Phillips, *ante*, p. 962; and

No. 92–5929. Haye *v.* Thorn Creek Cattle Assn., Inc., *ante*, p. 962. Petitions for rehearing denied.

DECEMBER 8, 1992

Dismissal Under Rule 46

No. 92–644. BAKER & SCHULTZ, INC. *v.* BOYER, TRUSTEE. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 966 F. 2d 1527.

DECEMBER 9, 1992

Certiorari Denied

No. 92–6873 (A–466). LINCECUM *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.

DECEMBER 10, 1992

Certiorari Denied

No. 92–6882 (A–468). BUNCH *v.* WRIGHT, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

DECEMBER 14, 1992

Miscellaneous Orders

No. A–443. R. D. ET AL. *v.* D. S. Sup. Ct. Iowa. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–1167. IN RE DISBARMENT OF BOETTNER. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–1169. IN RE DISBARMENT OF MULDERIG. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–1172. IN RE DISBARMENT OF RAUCH. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–1174. IN RE DISBARMENT OF TATE. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. D–1177. IN RE DISBARMENT OF BIEGEN. Disbarment entered. [For earlier order herein, see *ante*, p. 936.]

No. D–1182. IN RE DISBARMENT OF NAPOLI. Disbarment entered. [For earlier order herein, see *ante,* p. 937.]

No. D–1183. IN RE DISBARMENT OF ARTMAN. Disbarment entered. [For earlier order herein, see *ante,* p. 937.]

No. D–1217. IN RE DISBARMENT OF GLECIER. It is ordered that Daniel P. Glecier, of Lompoc, Cal., be suspended from the practice of law in this Court and that a rule 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–1218. IN RE DISBARMENT OF HAMMEL. It is ordered that Herman Arthur Hammel, of Joliet, Ill., be suspended from the practice of law in this Court and that a rule 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. 91–1111. HARTFORD FIRE INSURANCE CO. ET AL. *v.* CALIFORNIA ET AL.; and

No. 91–1128. MERRETT UNDERWRITING AGENCY MANAGEMENT LTD. ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of petitioners for divided argument granted to be divided as follows: 30 minutes for petitioners in No. 91–1111 and 15 minutes for petitioners in No. 91–1128.

No. 91–1721. NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA *v.* CITY OF JACKSONVILLE, FLORIDA, ET AL. C. A. 11th Cir. [Certiorari granted, *ante,* p. 813.] Motion of respondents to dismiss case as moot denied.

No. 91–2019. MINNESOTA *v.* DICKERSON. Sup. Ct. Minn. [Certiorari granted, *ante,* p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–2051. SOUTH DAKOTA *v.* BOURLAND, INDIVIDUALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE, ET AL. C. A. 8th Cir. [Certiorari granted, *ante,* p. 813.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–34. MUSICK, PEELER & GARRETT ET AL. *v.* EMPLOYERS INSURANCE OF WAUSAU ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–2024. LAMB'S CHAPEL ET AL. *v.* CENTER MORICHES UNION FREE SCHOOL DISTRICT ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 813.] Motion of respondents for divided argument denied.

No. 92–5584. MARTIN *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. C. A. D. C. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1] denied.

No. 92–6036. FORD *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 984] denied.

No. 92–6271. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until January 4, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of certiorari.

No. 92–739. IN RE WHITE; and

No. 92–6117. IN RE LIFFITON. Petitions for writs of mandamus denied.

No. 92–733. IN RE CHEEVES ET AL.; and

No. 92–5804. IN RE FLEMING. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 92–486. UNITED STATES ET AL. *v.* EDGE BROADCASTING CO., T/A POWER 94. C. A. 4th Cir. Certiorari granted. Reported below: 956 F. 2d 263.

No. 92–484. UNITED STATES NATIONAL BANK OF OREGON *v.* INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL.; and

No. 92–507. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, ET AL. *v.* INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 293 U. S. App. D. C. 403, 955 F. 2d 731.

No. 92–515. WISCONSIN *v.* MITCHELL. Sup. Ct. Wis. Motion of Chicago Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 169 Wis. 2d 153, 485 N. W. 2d 807.

No. 92–725. GODINEZ, WARDEN *v.* MORAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 972 F. 2d 263.

Certiorari Denied

No. 91–6929. BASKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 937.

No. 91–8686. SOTOLONGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 237.

No. 92–470. SCHEIDT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 1448.

No. 92–505. BARR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 963 F. 2d 641.

No. 92–517. PAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 962 F. 2d 1228.

No. 92–539. CLARK ET AL. *v.* JENKINS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 967 F. 2d 1245.

No. 92–547. CORCORAN ET AL. *v.* UNITED HEALTHCARE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 965 F. 2d 1321.

No. 92–632. LAUER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 968 F. 2d 1428.

No. 92–676. WILBURN *v.* CONSOLIDATED RAIL CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1553.

No. 92–677. CENTURY LIFE OF AMERICA *v.* CENTURY 21 REAL ESTATE CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 970 F. 2d 874.

No. 92–678. CALIFORNIA BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM ET AL. *v.* WILSON, GOVERNOR OF CALIFORNIA, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 4 Cal. App. 4th 646, 6 Cal. Rptr. 2d 77.

No. 92–682. NIYOGI *v.* EQUIBANK. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1568.

No. 92–683. ERATH *v.* XIDEX CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 378.

No. 92–696. CITY OF YOUNGSTOWN ET AL. *v.* MARTIN. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1578.

No. 92–701. PRINCE *v.* HOFFMAN-LA ROCHE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1144.

No. 92–704. COUNTY OF MONROE *v.* TRANELLO. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 244.

No. 92–708. SELOX, INC. *v.* FAUSEK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 965 F. 2d 126.

No. 92–712. STAUFFACHER ET AL. *v.* BENNETT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 455.

No. 92–719. GIERE ET AL. *v.* EATON CORP. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 136.

No. 92–723. PACIFIC EXPRESS, INC. *v.* UNITED AIR LINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 814.

No. 92–727. GOAD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 976 F. 2d 747.

No. 92–731. SMITH ET VIR *v.* WAL-MART STORES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 643.

No. 92–734. CHEEVES ET AL. *v.* SOUTHERN CLAYS, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–735. BLASCHKE *v.* CAUSEY. Ct. App. Okla. Certiorari denied.

No. 92–736. HOELZER *v.* CITY OF STAMFORD, CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 972 F. 2d 495.

No. 92–764. ERICKSON *v.* PIERCE COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 801.

No. 92–772. YOUNG *v.* STATE UNIVERSITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 170 App. Div. 2d 510, 566 N. Y. S. 2d 79.

No. 92–819. EVERETT ET AL. *v.* CONTINENTAL BANK, N. A. C. A. 7th Cir. Certiorari denied. Reported below: 964 F. 2d 701.

No. 92–838. BALIGAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1388.

No. 92–5006. SPENCER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 279.

No. 92–5167. STERLING *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 830 S. W. 2d 114.

No. 92–5488. BROWN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 92–5506. ANDERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 92–5604. SUSHANSKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 92–5714. SPELLMON *v.* 174TH JUDICIAL DISTRICT COURT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 92–5760. TAYLOR *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 676.

No. 92–5890. ROGERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 960 F. 2d 1501.

No. 92–5901. HOLMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 374.

No. 92–5904. MARKOWITZ ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 598 A. 2d 398.

No. 92–5911. HATHAWAY *v.* PUNG, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 1458.

No. 92–5969. MARSTON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–5980. BLUMBERG *v.* YLST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 584.

No. 92–5993. JAMESON ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–6012. LOCKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1449.

No. 92–6055. PALACIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 243.

No. 92–6060. BISARD *v.* SCOTT, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 92–6091. HERNANDEZ VASQUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 966 F. 2d 1440.

No. 92–6130. DANTONI *v.* VIRGINIA MILLS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 975 F. 2d 868.

No. 92–6139. PACKER *v.* GARRETT, SECRETARY OF THE NAVY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 98, 959 F. 2d 1102.

No. 92–6243. RAMSEY *v.* CALIFORNIA FIELD IRONWORKERS VACATION TRUST FUND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 589.

No. 92–6248. FAILE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 1233, 872 P. 2d 816.

No. 92–6252. BURDINE *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 92–6258. MONTOYA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 279.

No. 92–6261. SIMMONS *v.* HOWARD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 756.

No. 92–6262. HALL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–6266. CODY *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 92–6267. WILLIAMS *v.* RADER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–6280. JOHNSON *v.* BOWERS, ATTORNEY GENERAL OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–6288. ELGENDY *v.* GOLDMAN. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 895.

No. 92–6292. SUEING *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–6296. LUCERO *v.* MONDRAGON, SECRETARY, NEW MEXICO CORRECTIONS DEPARTMENT. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 1224.

No. 92–6297. O'BRIEN *v.* ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 152.

No. 92–6298. LUCIEN *v.* JONES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 976 F. 2d 735.

No. 92–6299. NICHOLSON *v.* HAWK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1332.

No. 92–6302. HARRISON *v.* ELGIN, JOLIET & EASTERN RAILWAY CO. ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–6304. CULLY *v.* GRACE HOSPITAL ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–6307. COLEMAN *v.* DELAWARE STATE HOUSING AUTHORITY ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 615 A. 2d 530.

No. 92–6313. MAKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1347.

No. 92–6315. MARTZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 964 F. 2d 787.

No. 92–6316. SUTTON *v.* ESTATE OF SUTTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1552.

No. 92–6321. HUDDLESTON *v.* PRUETT, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1442.

No. 92–6323. DOROTHY W. *v.* COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 79 N. Y. 2d 1040, 594 N. E. 2d 942.

No. 92–6325. MILTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 965 F. 2d 1037.

No. 92–6330. TAMBORRINO *v.* MYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 92–6333. BENTLEY *v.* WILLIS ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–6338. CODY *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 92–6348. SIMS *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–6352. SONGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6355. WITHERSPOON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 350.

No. 92–6366. FRANK *v.* JOHNSON, SUPERINTENDENT, ORLEANS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 298.

No. 92–6373. OLANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1047.

No. 92–6374. RESTREPPO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1222.

No. 92–6376. MUNOZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 493.

No. 92–6377. MAYS *v.* ANGELONE, DIRECTOR, NEVADA DEPARTMENT OF PRISONS. C. A. 9th Cir. Certiorari denied.

No. 92–6379. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 946 F. 2d 484.

No. 92–6404. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1044.

No. 92–6417. MAXWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 966 F. 2d 545.

No. 92–6429. PIMENTAL-REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–6431. RUFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92–6433. MARTENS *v.* BLACKWOOD. C. A. 11th Cir. Certiorari denied.

No. 92–6436. MARTENS *v.* NUGENT. C. A. 11th Cir. Certiorari denied.

No. 92–6438. BAILEY *v.* RUIZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 92–6451. MICHEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 415.

No. 92–6491. PALERMO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 226 Ill. App. 3d 1108, 645 N. E. 2d 1079.

No. 92–6496. SINKHORN *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 92–6506. LAW *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–6510. Ross *v.* Kelly, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 896.

No. 92–6526. Sinde *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1552.

No. 92–6527. Shope *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 584.

No. 92–6535. Norris *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–6536. McNaughton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 136.

No. 92–6544. Weaver *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 391.

No. 92–6553. Mason *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 207, 966 F. 2d 1488.

No. 92–6559. Flaherty et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333 and 1334.

No. 92–6564. Garcia-Patron *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 598.

No. 92–6573. McCormick *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–6578. Abeita *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1346.

No. 92–6583. Batista *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 923.

No. 92–6596. Edmonds *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 924.

No. 92–6604. Arthur *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 1457.

No. 92–6619. Clark *v.* McCaughtry, Warden. C. A. 7th Cir. Certiorari denied.

No. 92–690. MISSOURI PACIFIC RAILROAD CO. *v.* ANGLIM. Sup. Ct. Mo. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 832 S. W. 2d 298.

No. 92–700. KAUFFMAN *v.* ALLIED SIGNAL, INC., AUTOLITE DIVISION. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 970 F. 2d 178.

No. 92–714. HINKLEMAN *v.* SHELL OIL CO. C. A. 4th Cir. Motions of Virginia Gasoline Marketers & Automotive Repair Assn., Inc., and Service Station Dealers of America et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 962 F. 2d 372.

No. 92–5991. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 964 F. 2d 1501.

Rehearing Denied

No. 91–1743. UNITED MISSIONARY AVIATION, INC. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 816;

No. 91–1934. GROBEL *v.* LIQUID AIR CORP., *ante*, p. 823;

No. 91–6576. JOHNSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 930;

No. 91–7814. MUKES *v.* UNITED STATES, *ante*, p. 930;

No. 91–8495. IN RE BAUER, *ante*, p. 812;

No. 91–8648. CALDWELL *v.* BLOCH, *ante*, p. 853;

No. 92–322. WALTON *v.* BATRA, *ante*, p. 874;

No. 92–5538. JOHNSON *v.* KAISER, WARDEN, ET AL., *ante*, p. 921; and

No. 92–5792. COLLINS *v.* NORDSTROM, INC., ET AL., *ante*, p. 960. Petitions for rehearing denied.

DECEMBER 29, 1992

Dismissal Under Rule 46

No. 92–6291. SHERROD *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 964 F. 2d 1501.

DECEMBER 31, 1992

Dismissal Under Rule 46

No. 92–323. DOW CORNING CORP. *v.* TIGG CORP. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 962 F. 2d 1119.

JANUARY 4, 1993

Dismissal Under Rule 46

No. 92–807. IN RE STOWE. Petition for writ of mandamus dismissed under this Court's Rule 46.

JANUARY 8, 1993

Certiorari Granted

No. 92–602. ST. MARY'S HONOR CENTER ET AL. *v.* HICKS. C. A. 8th Cir. Certiorari granted. Brief for petitioners must be received by the Clerk and served upon opposing counsel on or before 3 p.m., February 22, 1993. Brief for respondent must be received by the Clerk and served upon opposing counsel on or before 3 p.m., March, 24, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3 p.m., April 12, 1993. This Court's Rule 29 does not apply. The case is set for oral argument during the session beginning April 19, 1993. Reported below: 970 F. 2d 487.

JANUARY 11, 1993

Dismissal Under Rule 46

No. 87–5461. HENSON *v.* EAST LINCOLN TOWNSHIP ET AL. C. A. 7th Cir. [Certiorari granted, 484 U. S. 923.] Writ of certiorari dismissed under this Court's Rule 46.1.

Affirmed on Appeal

No. 92–837. LOPEZ *v.* HALE COUNTY, TEXAS, ET AL. Affirmed on appeal from D. C. N. D. Tex. Reported below: 797 F. Supp. 547.

Certiorari Granted—Vacated and Remanded

No. 91–1141. PRICE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Republic Nat. Bank of Miami* v. *United States*, *ante*, p. 80.

No. 91–1720. CASTRO-VASQUEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic Nat. Bank of Miami* v. *United States*, *ante*, p. 80. Reported below: 946 F. 2d 899.

No. 91–1884. TANGONAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic Nat. Bank of Miami* v. *United States*, *ante*, p. 80.

No. 92–511. STEVEDORING SERVICES OF AMERICA *v.* ANCORA TRANSPORT, N. V., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic Nat. Bank of Miami* v. *United States*, *ante*, p. 80. Reported below: 941 F. 2d 1378.

No. 92–6031. MORRILL *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed November 25, 1992. Reported below: 963 F. 2d 386.

No. 92–6239. PRICE *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Morgan* v. *Illinois*, 504 U. S. 719 (1992). Reported below: 331 N. C. 620, 418 S. E. 2d 169.

Miscellaneous Orders

No. ——. JONES *v.* GAYDULA & KUTALEK. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. ——. REED *v.* AMAX COAL CO. Motion for reconsideration of order denying motion to direct the Clerk to file petition for writ of certiorari out of time [*ante*, p. 994] denied.

No. ——. PROGRESS ENGINEERING & CONSULTING ENTERPRISE, INC. *v.* MASSONGILL. Motion for reconsideration of

order denying nonattorney leave to file petition for writ of certiorari on behalf of a corporation and leave to proceed *in forma pauperis* [*ante*, p. 803] denied.

No. A–413. LEWIS *v.* UNITED STATES. Application for release on bond, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. A–445. SOLERWITZ *v.* JONES. Application for bail, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–534 (92–7213). BONHAM *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, granted pending 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 issuance of the mandate of this Court.

No. D–940. IN RE DISBARMENT OF MOORE. Disbarment entered. [For earlier order herein, see 498 U. S. 917.]

No. D–1166. IN RE DISBARMENT OF BRODSKY. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–1168. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–1176. IN RE DISBARMENT OF KEITH. Disbarment entered. [For earlier order herein, see *ante*, p. 936.]

No. D–1178. IN RE DISBARMENT OF EISEN. Disbarment entered. [For earlier order herein, see *ante*, p. 936.]

No. D–1179. IN RE DISBARMENT OF FISHMAN. Disbarment entered. [For earlier order herein, see *ante*, p. 936.]

No. D–1180. IN RE DISBARMENT OF LANDAU. Disbarment entered. [For earlier order herein, see *ante*, p. 936.]

No. D–1181. IN RE DISBARMENT OF LEVITAS. Disbarment entered. [For earlier order herein, see *ante*, p. 936.]

No. D–1184. IN RE DISBARMENT OF MCQUAIG. Disbarment entered. [For earlier order herein, see *ante*, p. 937.]

No. D–1185. IN RE DISBARMENT OF RICHARDSON. Disbarment entered. [For earlier order herein, see *ante*, p. 937.]

No. D–1186. IN RE DISBARMENT OF MCGRADY. Disbarment entered. [For earlier order herein, see *ante*, p. 937.]

No. D–1204. IN RE DISBARMENT OF SEARS. Disbarment entered. [For earlier order herein, see *ante*, p. 970.]

No. D–1210. IN RE DISBARMENT OF WOLF. Disbarment entered. [For earlier order herein, see *ante*, p. 995.]

No. D–1219. IN RE DISBARMENT OF BABIC. It is ordered that Edward William Babic, of Newport Beach, Cal., be suspended from the practice of law in this Court and that a rule 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–1220. IN RE DISBARMENT OF SUGARMAN. It is ordered that Alan C. Sugarman, of Boca Raton, Fla., be suspended from the practice of law in this Court and that a rule 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–1221. IN RE DISBARMENT OF TOY. It is ordered that David Brice Toy, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule 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–1222. IN RE DISBARMENT OF BAKER. It is ordered that Nancy Ann Baker, of Auburn, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1223. IN RE DISBARMENT OF THEOHAROUS. It is ordered that Alexander Theoharous, of West Palm Beach, Fla., be suspended from the practice of law in this Court and that a rule 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–1224. IN RE DISBARMENT OF LINN. It is ordered that Michael S. Linn, of Hartsdale, N. Y., be suspended from the practice of law in this Court and that a rule 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. 91–1600. HAZEN PAPER CO. ET AL. *v.* BIGGINS. C. A. 1st Cir. [Certiorari granted, 505 U. S. 1203.] Motion of respondent to strike supplemental brief denied.

No. 91–7604. ANTOINE *v.* BYERS & ANDERSON, INC., ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 914.] Motion of National Association of Criminal Defense Lawyers et al. for leave to file a brief as *amici curiae* granted.

No. 91–7849. BUCKLEY *v.* FITZSIMMONS ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–259. OKLAHOMA TAX COMMISSION *v.* SAC AND FOX NATION. C. A. 10th Cir. [Certiorari granted, *ante*, p. 971.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–207. UNITED STATES *v.* PADILLA ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 952.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 92–351. HELLER, SECRETARY, KENTUCKY CABINET FOR HUMAN RESOURCES *v.* DOE, BY HIS MOTHER AND NEXT FRIEND, DOE, ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 939.] Motion of Voice of the Retarded et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 92–357. SHAW ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. D. C. E. D. N. C. [Probable jurisdiction noted, *ante*, p. 1019.] Motion of appellants to dispense with printing the joint appendix granted.

No. 92–621. RAKE ET AL. *v.* WADE, TRUSTEE. C. A. 10th Cir. [Certiorari granted, *ante*, p. 972.] Motion of Consumer Education and Protective Association et al. for leave to file a brief as *amici curiae* granted.

No. 92–725. GODINEZ, WARDEN *v.* MORAN. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1033.] Motion for appointment of counsel granted, and it is ordered that Cal J. Potter III, Esq., of

Las Vegas, Nev., be appointed to serve as counsel for respondent in this case.

No. 92–6082. SINDRAM *v.* VIRGINIA. Ct. App. Va. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 997] denied.

No. 92–6171. JONES *v.* JACKSON, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL. C. A. 8th Cir.; and

No. 92–6493. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until February 1, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petitions for writs of certiorari.

No. 92–6443. IN RE FOWLER. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 1, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 92–6866. IN RE PUNCHARD; and

No. 92–6908. IN RE DICKERSON. Petitions for writs of habeas corpus denied.

No. 92–867. IN RE POLYAK; and

No. 92–6318. IN RE RUSSELL. Petitions for writs of mandamus denied.

No. 92–6442. IN RE VALENTINE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 91–8010. RHOADES *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 121 Idaho 63, 822 P. 2d 960.

No. 91–8331. MONTALVO *v.* STAMM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 359.

No. 91–8346. SAMMONS *v.* PHILLIPS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 270.

No. 92–372. TATARANOWICZ ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 322, 959 F. 2d 268.

No. 92–417. AXMEAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 964 F. 2d 792.

No. 92–427. DANNIS ET AL. *v.* RESOLUTION TRUST CORPORATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1313.

No. 92–428. GRAFF *v.* BANK ONE, TEXAS, N. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 371.

No. 92–449. JUNG YUL YU *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 954 F. 2d 951.

No. 92–456. BELL HELICOPTER TEXTRON, INC. *v.* UNITED STATES; and

No. 92–457. SEA AIRMOTIVE, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 307.

No. 92–467. GILLESPIE *v.* MANNES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 1310.

No. 92–516. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* DAKOTA GASIFICATION CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 964 F. 2d 732.

No. 92–526. ONE PARCEL OF REAL PROPERTY LOCATED AT 456 CAFFERTY ROAD, TINICUM TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 901.

No. 92–544. PETRUS ET AL. *v.* INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 675.

No. 92–545. UNITED STATES *v.* GRANITE CONSTRUCTION CO. C. A. Fed. Cir. Certiorari denied. Reported below: 962 F. 2d 998.

No. 92–552. BAKER *v.* GULF + WESTERN INDUSTRIES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–563. HELTON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–569. NATIONAL KIDNEY PATIENTS ASSN. ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 269, 958 F. 2d 1127.

No. 92–571. PAINEWEBBER INC. *v.* BANKATLANTIC; and
No. 92–765. BANKATLANTIC *v.* PAINEWEBBER INC. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 1467.

No. 92–574. TOBIAS *v.* UNIVERSITY OF TEXAS AT ARLINGTON ET AL. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 824 S. W. 2d 201.

No. 92–585. YEAGER ET AL. *v.* CAMP. Sup. Ct. Ala. Certiorari denied. Reported below: 601 So. 2d 924.

No. 92–590. MEYERLAND CO. ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND AS RECEIVER FOR CONTINENTAL SAVINGS ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 960 F. 2d 512.

No. 92–595. REID *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 972.

No. 92–607. GOODNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 380.

No. 92–633. ROBINSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–634. ALABAMA *v.* GINGO ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 605 So. 2d 1237.

No. 92–639. AGUIRRE, PERSONAL REPRESENTATIVE OF THE ESTATE OF AGUIRRE, DECEASED, ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1166.

No. 92–642. ADKINS ET AL. *v.* SAFEWAY, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 35, 968 F. 2d 1317.

No. 92–646. PULIDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 964.

No. 92–652. PAPENDICK *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 298.

No. 92–658. LATHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 15.

No. 92–659. EASLEY *v.* SOUTHERN SHIPBUILDING CORP. C. A. 5th Cir. Certiorari denied. Reported below: 965 F. 2d 1.

No. 92–662. CEDAR COAL CO. *v.* SHUFF, WIDOW OF SHUFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 967 F. 2d 977.

No. 92–665. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 867.

No. 92–689. MCMILLAN *v.* HUNT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1215.

No. 92–697. WANGURI *v.* PORT OF HOUSTON AUTHORITY. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1045.

No. 92–705. DAVIS *v.* TOWNSEND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1451.

No. 92–715. ULLOA ET AL. *v.* WESTERN SYSTEMS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 864.

No. 92–740. C. F. BEAN CORP. *v.* MID-VALLEY, INC. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1330.

No. 92–742. CURTIS *v.* WOLF-LENKIN LIMITED PARTNERSHIP. Ct. App. D. C. Certiorari denied. Reported below: 607 A. 2d 509.

No. 92–747. MCCOLLOUGH ET UX. *v.* A. G. EDWARDS & SONS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 1401.

No. 92–748. ALABAMA DRY DOCK & SHIPBUILDING CORP. *v.* HOLCOMBE. Sup. Ct. Ala. Certiorari denied. Reported below: 602 So. 2d 400.

No. 92–749. CAMPOS ET AL. *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 446.

No. 92–754. ANGEL ET UX. *v.* FROEHLICH, JUDGE, SUPERIOR COURT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 583.

No. 92–756. CITY OF RUTLAND, VERMONT, ET AL. *v.* INDUSTRIAL BANK OF JAPAN, LTD., NEW YORK BRANCH, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1552.

No. 92–759. JONES *v.* AMERICAN BROADCASTING COS., INC. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1546.

No. 92–761. LANKFORD *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 204 Ga. App. 405, 419 S. E. 2d 498.

No. 92–768. LIVADITIS, AKA D'OR *v.* ROSARIO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 963 F. 2d 1013.

No. 92–769. SOMMER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (SILZER, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–770. SCHIER *v.* GOLDBERG, DBA GOLDBERG DAIRY EQUIPMENT, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 11.

No. 92–771. HASENFUS ET AL. *v.* SECORD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 962 F. 2d 1556.

No. 92–776. ZIMMER *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 487 N. W. 2d 886.

No. 92–778. RUSSELL ET AL. *v.* BOARD OF APPEALS OF TRURO ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 413 Mass. 106, 595 N. E. 2d 766.

No. 92–782. WESTON *v.* RODRIGUEZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 596.

No. 92–783. DALLAS & MAVIS FORWARDING CO., INC. *v.* GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 129.

No. 92–786. STONE ET AL. *v.* PRINCE GEORGE'S COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 574.

No. 92–788. Cook County, Illinois, et al. *v.* Carston et al. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 749.

No. 92–790. Schoch *v.* Pennsylvania. Commw. Ct. Pa. Certiorari denied. Reported below: 143 Pa. Commw. 696, 599 A. 2d 1024.

No. 92–791. Zaharia et al. *v.* Municipal Court, City of Aurora, Colorado, et al. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 279.

No. 92–792. Puckett *v.* Alabama State Bar. Sup. Ct. Ala. Certiorari denied. Reported below: 603 So. 2d 908.

No. 92–794. Massachusetts et al. *v.* Greenwood Trust Co. C. A. 1st Cir. Certiorari denied. Reported below: 971 F. 2d 818.

No. 92–797. Gallegos et al. *v.* City of Espanola. Sup. Ct. N. M. Certiorari denied.

No. 92–802. O'Leary *v.* City of Sacramento et al. C. A. 9th Cir. Certiorari denied.

No. 92–803. Speacht *v.* Mobil Chemical Co. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 680.

No. 92–804. Wallenstein, Director, King County Jail *v.* Schwendeman. C. A. 9th Cir. Certiorari denied. Reported below: 971 F. 2d 313.

No. 92–806. Cossett et ux. *v.* Federal Judiciary et al. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 234.

No. 92–809. Fields *v.* Clark University. C. A. 1st Cir. Certiorari denied. Reported below: 966 F. 2d 49.

No. 92–810. Legg *v.* United Markets International, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 16.

No. 92–811. Deutcsh *v.* Birmingham Post Co. Sup. Ct. Ala. Certiorari denied. Reported below: 603 So. 2d 910.

No. 92–813. McGowan *v.* Mississippi State Oil & Gas Board. Sup. Ct. Miss. Certiorari denied. Reported below: 604 So. 2d 312.

No. 92–814. PEPPER BURNS INSULATION, INC. *v.* ARTCO CONTRACTING, INC. C. A. 4th Cir. Certiorari denied. Reported below: 970 F. 2d 1340.

No. 92–818. LEMELSON *v.* MATTEL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 968 F. 2d 1202.

No. 92–820. FERNANDEZ *v.* SCULLY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 92–821. BAYH, GOVERNOR OF INDIANA, ET AL. *v.* GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 975 F. 2d 1267.

No. 92–822. MCFARLAND ET AL. *v.* CHENEY, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 303, 971 F. 2d 766.

No. 92–823. WOODS *v.* DUNLOP TIRE CORP. C. A. 2d Cir. Certiorari denied. Reported below: 972 F. 2d 36.

No. 92–826. SNELLING *v.* WESTHOFF ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 199.

No. 92–829. MOUNTAIN WATER CO. *v.* MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 254 Mont. 76, 835 P. 2d 4.

No. 92–831. BETHLEHEM STEEL CORP. ET AL. *v.* GRANT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 973 F. 2d 96.

No. 92–832. GUZOWSKI ET AL. *v.* HARTMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 969 F. 2d 211.

No. 92–834. LEVASSEUR *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 32 Mass. App. 629, 592 N. E. 2d 1350.

No. 92–835. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–836. PELUSO *v.* ALLEN ET AL. Ct. App. Ky. Certiorari denied.

No. 92–839. FREIGHTCOR SERVICES, INC. *v.* VITRO PACKAGING, INC. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1563.

No. 92–842. EMORY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 924.

No. 92–845. KENNEALLY *v.* LUNGREN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 329.

No. 92–846. MARTIN ET AL. *v.* OHIO TURNPIKE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 606.

No. 92–847. HENSS *v.* MARTIN, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. Reported below: 965 F. 2d 660.

No. 92–852. BISHOP *v.* SOUTHRAIL CORP. ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 595 So. 2d 857.

No. 92–860. AVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 331.

No. 92–864. ALEXANDER *v.* RICE, SECRETARY OF THE AIR FORCE. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 19.

No. 92–870. O'BRIEN *v.* CONSOLIDATED RAIL CORPORATION. C. A. 1st Cir. Certiorari denied. Reported below: 972 F. 2d 1.

No. 92–871. WEICHERT *v.* ROBERTS. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 603 So. 2d 1286.

No. 92–891. DONESKI ET UX. *v.* MARYLAND COMPTROLLER OF THE TREASURY. Ct. Sp. App. Md. Certiorari denied. Reported below: 91 Md. App. 614, 605 A. 2d 649.

No. 92–892. CONSOLIDATION COAL CO. *v.* SNIDER. C. A. 7th Cir. Certiorari denied. Reported below: 973 F. 2d 555.

No. 92–897. REYNOLDS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 327 Md. 494, 610 A. 2d 782.

No. 92–911. PIPEFITTERS PENSION TRUST ET AL. *v.* WALDO. C. A. 8th Cir. Certiorari denied. Reported below: 969 F. 2d 718.

No. 92–915. DOFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1344.

No. 92–920. TANNER *v.* UNITED STATES; and
No. 92–6665. KOTVAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 941 F. 2d 1141.

No. 92–922. POLK ET AL. *v.* DIXIE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 83.

No. 92–946. WILKINS *v.* BURLINGTON NORTHERN RAILROAD CO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 600 So. 2d 1109.

No. 92–5209. VILARCHAO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 643.

No. 92–5277. CRANE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–5476. HUDSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 331 N. C. 122, 415 S. E. 2d 732.

No. 92–5554. MOSS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 44.

No. 92–5577. WAGSTAFF-EL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 962 F. 2d 8.

No. 92–5599. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–5663. TAYLOR *v.* SNIDER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 963 F. 2d 376.

No. 92–5715. WEBB *v.* ANGSTADT. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 212.

No. 92–5747. BURROWS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 196, 592 N. E. 2d 997.

No. 92–5805. HERNANDEZ *v.* WOOTEN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1045.

No. 92–5848. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 365.

No. 92–5871. RUIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1089.

No. 92–5885. DELGADO-PERU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1344.

No. 92–5887. BETANCOURT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–5894. PONCHO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 22.

No. 92–5898. BRANSON *v.* CARMOUCHE ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–5910. ANTONELLI *v.* TRUE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–5965. REDDICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–6010. JOHNSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 149 Ill. 2d 118, 594 N. E. 2d 253.

No. 92–6025. DECKARD *v.* OHIO. Ct. App. Ohio, Seneca County. Certiorari denied.

No. 92–6058. RILEY *v.* SPENCER ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6077. PROVOST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 969 F. 2d 617.

No. 92–6089. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 92–6092. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–6093. BOBADILLA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 954 F. 2d 519.

No. 92–6105. SANDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 1058.

No. 92–6115. REILLY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 86, 825 P. 2d 781.

No. 92–6120. LANGE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–6137. LABOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 92–6145. GRAY *v.* UNITED STATES; and
No. 92–6170. CALDWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333.

No. 92–6178. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–6204. JAMERSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 92–6209. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 1224.

No. 92–6220. CHAN *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1330.

No. 92–6244. ANDERSON *v.* DEPARTMENT OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 748.

No. 92–6253. GREEN *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 353.

No. 92–6282. EVANS *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 92–6289. JONES *v.* JUDICIARY BRANCH OF THE UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 356, 968 F. 2d 92.

No. 92–6290. CAPOSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1047.

No. 92–6305. BARNARD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 634.

No. 92–6326. PHILLIPS *v.* BRENNAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 384.

No. 92–6332. BARON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–6336. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6339. COOK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 218.

No. 92–6346. PRIEST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–6357. UTLEY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 589 N. E. 2d 232.

No. 92–6358. COLEMAN, AKA SAUNDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 957 F. 2d 1488.

No. 92–6360. BLUE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 223 Ill. App. 3d 594, 585 N. E. 2d 625.

No. 92–6362. WALLACE *v.* ARIZONA. Super. Ct. Ariz., Pima County. Certiorari denied.

No. 92–6383. FELAN *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1078.

No. 92–6385. SMITH *v.* BLODGETT. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1342.

No. 92–6387. WIGLEY *v.* ALFRED HUGHES UNIT ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–6388. WHITEHEAD *v.* GATES, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 92–6389. THORNTON *v.* QUINLAN, DIRECTOR, FEDERAL BUREAU OF PRISONS. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 303, 971 F. 2d 766.

No. 92–6390. VICK *v.* MAYNARD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 22.

No. 92–6397. JONES *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 897.

No. 92–6398. JACKSON *v.* SANDAHL, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 351.

No. 92–6403. HERRON *v.* WOODRUFF ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–6405. ESTREMERA *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 223.

No. 92–6406. JONES *v.* THOMPSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1331.

No. 92–6407. FORD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 92–6411. CARTA *v.* TOWN OF FAIRFIELD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 959 F. 2d 230.

No. 92–6412. CALLIS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 92–6420. MITAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 1165.

No. 92–6421. PADIOS *v.* CONTINENTAL GROUP, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1331.

No. 92–6424. WATSON *v.* TAYLOR, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 92–6434. ROE *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 594 N. E. 2d 534.

No. 92–6437. MESSAMORE *v.* FALK, DIRECTOR OF CORRECTIONS, HAWAII. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 588.

No. 92–6441. CASAS-ACEVEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 415.

No. 92–6444. FINOCCHI *v.* ARIZONA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1338.

No. 92–6445. JOHNSON *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–6447. JOHNSTON *v.* CHESNEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1331.

No. 92–6458. SANDERS *v.* SOUTHERN MANAGEMENT ET AL. C. A. D. C. Cir. Certiorari denied.

No. 92–6460. VALDIVIEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1044.

No. 92–6462. SAVENELLI *v.* MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied.

No. 92–6465. CHRISTENSEN *v.* ARMONTROUT ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–6467. REYES *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 92–6475. MALANEZ *v.* LYNN, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 171.

No. 92–6476. BATES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 600 So. 2d 411.

No. 92–6477. COOPER *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER (two cases). C. A. 8th Cir. Certiorari denied.

No. 92–6478. AYRES *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 92–6481. HARRISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 92–6482. DEMPSEY *v.* WTLK TV 14 ROME/ATLANTA ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–6483. WOLFE *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1348.

No. 92–6485. AMARIGLIO *v.* CENTURA BANK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 725.

No. 92–6488. CASTRO *v.* NEW YORK CITY BOARD OF EDUCATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 972 F. 2d 337.

No. 92–6489. MORGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–6492. MACGUIRE *v.* HENRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1443.

No. 92–6494. CARNEY *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 976 F. 2d 747.

No. 92–6495. AMMONS *v.* ALTERGOTT, NURSE, GREEN BAY CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 968 F. 2d 1218.

No. 92–6497. TURNER *v.* SUMNER, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY. Sup. Ct. Haw. Certiorari denied.

No. 92–6502. HENDERSON *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 92–6503. LEWIS *v.* COURT OF APPEALS OF TEXAS, TWELFTH DISTRICT. Ct. Crim. App. Tex. Certiorari denied.

No. 92–6504. RYAN *v.* SARGENT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 969 F. 2d 638.

No. 92–6505. MARTIN *v.* JONES, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–6507. REECE *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6508. WHITE *v.* MORRIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 350.

No. 92–6513. ALLEN *v.* MADIGAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 353.

No. 92–6514. JENSEN *v.* RAYL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 1458.

No. 92–6516. Ocasio Figueroa, aka Guaraguao *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 898 F. 2d 825.

No. 92–6519. Wint et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 974 F. 2d 961.

No. 92–6523. Schutterle *v.* Iowa County Board of Review et al. Sup. Ct. Iowa. Certiorari denied. Reported below: 495 N. W. 2d 784.

No. 92–6524. Camarena *v.* Superior Court of Long Beach. C. A. 9th Cir. Certiorari denied.

No. 92–6525. Thompson *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 92–6528. Sceifers *v.* Vail. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 594.

No. 92–6531. Jones *v.* National Super Markets, Inc., et al. C. A. 8th Cir. Certiorari denied.

No. 92–6533. MacFarlane *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1552.

No. 92–6537. McCarthy *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1460.

No. 92–6538. Lucien *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 229 Ill. App. 3d 1114, 648 N. E. 2d 638.

No. 92–6539. Moorehead *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 597 So. 2d 841.

No. 92–6540. Payne *v.* Thompson, Warden, et al. Sup. Ct. Va. Certiorari denied.

No. 92–6541. Murray et al. *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 92–6542. Rodriguez *v.* Blodgett, Superintendent, Washington State Penitentiary, et al. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1342.

No. 92–6543. CHANEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–6545. ARNETTE *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 338.

No. 92–6547. DEROCK *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 742.

No. 92–6548. KETCHUM *v.* GRIFFITH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 595.

No. 92–6549. GLASS *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 92–6550. ANGARITA-GARZON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 233.

No. 92–6552. ORTIZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 966 F. 2d 707.

No. 92–6555. ALEXANDER *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. Sup. Ct. Tex. Certiorari denied.

No. 92–6556. VU *v.* RUNYON, POSTMASTER GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 357.

No. 92–6557. ESTES *v.* MCCOTTER ET AL. C. A. 10th Cir. Certiorari denied.

No. 92–6560. GONZALES MENDOZA *v.* BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 1425.

No. 92–6561. THOMAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 489, 828 P. 2d 101.

No. 92–6562. CHINN *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 92–6563. CLAIR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 629, 828 P. 2d 705.

No. 92–6565. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 1148.

No. 92–6566. JONES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 418 Pa. Super. 649, 607 A. 2d 1123.

No. 92–6567. JONES ET AL. *v.* LASSEN ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–6568. JONES, AKA JANSON *v.* THOMAS, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1348.

No. 92–6569. USHER *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1344.

No. 92–6571. SAMM *v.* PLAZA WEST CO-OP ASSN., INC. Ct. App. D. C. Certiorari denied.

No. 92–6575. ROJAS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 131, 592 N. E. 2d 1376.

No. 92–6576. MASON ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (INTERNAL REVENUE SERVICE, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 92–6577. MORRIS *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–6579. GEE, AKA NANALOOK *v.* BALL ET AL. Sup. Ct. Mont. Certiorari denied.

No. 92–6580. STEVENSON *v.* ADA COUNTY SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1343.

No. 92–6581. KROUPA *v.* COBB COUNTY, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 451, 421 S. E. 2d 283.

No. 92–6582. ANGELO *v.* CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–6585. BUNKER *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 584.

No. 92–6586. CHURCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 970 F. 2d 401.

No. 92–6588. HENLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 969 F. 2d 849.

No. 92–6589. MOLANO-GARZA *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 965 F. 2d 20.

No. 92–6590. WHITEHEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6599. GILMAN *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–6600. GALFORD *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 413 Mass. 364, 597 N. E. 2d 410.

No. 92–6601. BROOKS *v.* BAILEY. Sup. Ct. Ala. Certiorari denied. Reported below: 601 So. 2d 987.

No. 92–6602. SIMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 602 So. 2d 1253.

No. 92–6606. GARCIA LUEVANOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1344.

No. 92–6607. MEGGERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 92–6608. LANE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1448.

No. 92–6610. ATANASOFF *v.* DOVICIO ET AL. Ct. App. Ariz. Certiorari denied.

No. 92–6613. VALENZUELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 596.

No. 92–6614. BRAGER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–6615. HURWITZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6616. LAYNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 973 F. 2d 1417.

No. 92–6618. FRENCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 687.

No. 92–6621. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 92–6625. BISHOP *v.* ANGELONE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 587.

No. 92–6626. DEEMER *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–6627. CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–6628. CORNILLOT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 756.

No. 92–6631. VALENCIA-MAZARIEGOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1347.

No. 92–6632. RUSSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 971 F. 2d 1098.

No. 92–6633. SOLIS-CANTU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–6634. SULLIVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 370.

No. 92–6635. DUNCAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1549.

No. 92–6637. DOE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 680.

No. 92–6638. DRAWDY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 756.

No. 92–6640. URIBE-SANTAMARIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1350.

No. 92–6642. QUICHOCHO *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 973 F. 2d 723.

No. 92–6643. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92–6644. LAWRENCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1580.

No. 92–6645. SMITH *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 964 F. 2d 630.

No. 92–6646. KETCHUM *v.* BURGESS. C. A. 10th Cir. Certiorari denied. Reported below: 930 F. 2d 33.

No. 92–6649. HANSEN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–6650. GERMANY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 379.

No. 92–6651. HALL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92–6652. JEFFERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 275.

No. 92–6655. CAMPBELL *v.* SALVIONE. C. A. 9th Cir. Certiorari denied.

No. 92–6657. BRIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 965 F. 2d 10.

No. 92–6658. BEEDE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 974 F. 2d 948.

No. 92–6660. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1350.

No. 92–6661. SOLOMON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6666. GAVIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 788.

No. 92–6667. HOCHSCHILD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 208.

No. 92–6670. RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 748.

No. 92–6673. PRADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 926.

No. 92–6674. VALENCIA PARRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1346.

No. 92–6676. WATKINS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–6678. STEPOLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1552.

No. 92–6683. KAADI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1345.

No. 92–6684. KNIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–6685. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6686. JOHNSTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 973 F. 2d 611.

No. 92–6689. KRESE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6690. HULL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 598.

No. 92–6692. BREWER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 609 A. 2d 1140.

No. 92–6693. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–6697. FORTENBERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 717.

No. 92–6700. LARCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–6701. MOATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6705. CRANE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 833 S. W. 2d 813.

No. 92–6706. SCHULTZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 970 F. 2d 960.

No. 92–6711. BARELA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 973 F. 2d 852.

No. 92–6719. HOFFMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 236.

No. 92–6722. EGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 328.

No. 92–6724. GROSS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 92–6726. HAWKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 969 F. 2d 169.

No. 92–6729. WILLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 962 F. 2d 11.

No. 92–6737. COLLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 734.

No. 92–6738. CHARLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1332.

No. 92–6742. HEIZER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 976 F. 2d 740.

No. 92–6744. HAYS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6746. WIDBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1344.

No. 92–6747. GINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 964 F. 2d 972.

No. 92–6754. NEWT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1350.

No. 92–6755. RUDOLPH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 970 F. 2d 467.

No. 92–6756. POGANY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–6760. NORMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 744.

No. 92–6777. BIVINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 174.

No. 92–6778. CORTES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1349.

No. 92–6780. BEHRENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 1360.

No. 92–6787. NESBITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1333.

No. 92–6792. JONES *v.* UNITED STATES PAROLE COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 995 F. 2d 226.

No. 92–6799. HARDING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 971 F. 2d 410.

No. 92–6800. FARYMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 852.

No. 92–6806. PRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1552.

No. 92–6807. CLIPPER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 372, 973 F. 2d 944.

No. 92–6821. CURRIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1343.

No. 92–6822. BLALOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–6823. SPARKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1349.

No. 92–6825. STIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 924.

No. 92–6827. SAUNDERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 973 F. 2d 1354.

No. 92–6830. FORBES, AKA LONG, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 92–6833. GEORGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 170.

No. 92–6835. HICKMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92–6836. FORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 71.

No. 92–6839. MORENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 856.

No. 92–373. ROCHE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Motion of petitioner to enlarge the record denied. Certiorari denied. Reported below: 589 So. 2d 978.

No. 92–579. BLODGETT, DEPUTY DIRECTOR, DIVISION OF PRISONS, WASHINGTON DEPARTMENT OF CORRECTIONS, ET AL. *v.* GONZALES MENDOZA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 960 F. 2d 1425.

No. 92–606. BURLINGTON NORTHERN RAILROAD CO. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. C. A. 5th Cir. Motion of Association of American Railroads et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 961 F. 2d 86.

No. 92–610. SHERMAN *v.* LUDINGTON ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 968 F. 2d 1216.

No. 92–6157. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 971 F. 2d 1076.

No. 92–784. OKLAHOMA COALITION TO RESTRICT ABORTION, INC., ET AL. *v.* FELDMAN ET AL. Sup. Ct. Okla. Motion of Oklahoma for leave to intervene granted. Certiorari denied. Reported below: 838 P. 2d 1.

No. 92–817. SOLDIER OF FORTUNE MAGAZINE, INC., ET AL. *v.* BRAUN ET AL. C. A. 11th Cir. Motions of National Associa-

tion for Information Services and National Rifle Association of America for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 968 F. 2d 1110.

No. 92–948. PHELPS *v.* CARLSON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 995 F. 2d 226.

No. 92–5850. MAHARAJ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. JUSTICE BLACKMUN would grant certiorari limited to Question 3 presented by the petition. Reported below: 597 So. 2d 786.

No. 92–5862. FAULKENBERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 967 F. 2d 593.

Rehearing Denied

No. 91–2044. LEE *v.* CALIFORNIA, *ante*, p. 972;

No. 91–8369. BANKS *v.* SAN DIEGO COUNTY ET AL., *ante*, p. 840;

No. 91–8640. WALKER *v.* SECRETARY OF THE TREASURY, INTERNAL REVENUE SERVICE, *ante*, p. 853;

No. 91–8725. BELL *v.* BAKER, WARDEN, *ante*, p. 984;

No. 92–5028. BENNETT *v.* GEORGIA, *ante*, p. 957;

No. 92–5049. THOMPSON *v.* UNITED STATES, *ante*, p. 934;

No. 92–5099. THOMAS *v.* TENNEY ENGINEERING INC. ET AL., *ante*, p. 879;

No. 92–5124. SCHURR *v.* CHASE HOME MORTGAGE, *ante*, p. 881;

No. 92–5168. JONES *v.* DEPARTMENT OF THE AIR FORCE ET AL., *ante*, p. 883;

No. 92–5216. MERIT *v.* UNITED STATES, *ante*, p. 885;

No. 92–5236. MASON *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, *ante*, p. 886;

No. 92–5295. FLORES *v.* UNITED STATES, *ante*, p. 976;

No. 92–5487. WABEKE *v.* MAATMAN ET AL., *ante*, p. 899;

No. 92–5517. LOMBARDO *v.* UNITED STATES, *ante*, p. 900;

No. 92–5519. LEWIS *v.* UNITED STATES, *ante*, p. 942;

No. 92–5728. BENNETT *v.* VIRGINIA, *ante*, p. 958;

No. 92–5765. SPEARMAN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante,* p. 959;

No. 92–5802. KOLOCOTRONIS *v.* HOLCOMB, SUPERINTENDENT, FULTON STATE HOSPITAL, *ante,* p. 960;

No. 92–5817. MASON *v.* MUNICIPAL CORPORATION OF CALIFORNIA ET AL., *ante,* p. 961;

No. 92–5933. WIGLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., *ante,* p. 987;

No. 92–5934. WIGLEY *v.* ALFRED HUGHES UNIT, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., *ante,* p. 988;

No. 92–5972. SPEARMAN *v.* GARNER, *ante,* p. 963;

No. 92–5978. IN RE LITZENBERG, *ante,* p. 952;

No. 92–5994. CRAWFORD *v.* UNITED STATES, *ante,* p. 963;

No. 92–6019. FARLEY *v.* LOVE, WARDEN, ET AL., *ante,* p. 978;

No. 92–6103. IN RE WASKO, *ante,* p. 952; and

No. 92–6181. TEMPLEMAN *v.* UNITED STATES, *ante,* p. 980. Petitions for rehearing denied.

No. 91–1935. KOSTELLO ET AL. *v.* WASHINGTON, *ante,* p. 823. Motion of petitioners for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit from November 30, 1992, through June 11, 1993, 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.

JANUARY 12, 1993

Dismissals Under Rule 46

No. 92–6246. BROWN *v.* POWELL, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 975 F. 2d 1.

No. 92–711. MELAHN *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari dismissed under this Court's Rule 46.1. Reported below: 605 So. 2d 73.

No. 92–713. MOTORS INSURANCE CORP. ET AL. *v.* GALLAGHER, FLORIDA COMMISSIONER OF INSURANCE, ET AL. Sup. Ct. Fla. Certiorari dismissed under this Court's Rule 46.1. Reported below: 605 So. 2d 62.

JANUARY 15, 1993

Miscellaneous Order

No. 119, Orig. CONNECTICUT ET AL. *v.* NEW HAMPSHIRE. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties. Such exceptions must be received by the Clerk and served upon opposing counsel on or before 3 p.m., March 1, 1993. Reply briefs, if any, must be received by the Clerk and served upon opposing counsel on or before 3 p.m., March 31, 1993. This Court's Rule 29 does not apply. The case is set for oral argument during the session beginning April 19, 1993. JUSTICE SOUTER took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, *ante*, p. 805.]

Certiorari Granted

No. 92–6033. MCNEIL *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner must be received by the Clerk and served upon opposing counsel on or before 3 p.m., March 1, 1993. Brief of respondent must be received by the Clerk and served upon opposing counsel on or before 3 p.m., March 31, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3 p.m., April 12, 1993. This Court's Rule 29 does not apply. The case is set for oral argument during the session beginning April 19, 1993. Reported below: 964 F. 2d 647.

No. 92–6073. AUSTIN *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner must be received by the Clerk and served upon opposing counsel on or before 3 p.m., March 1, 1993. Brief of respondent must be received by the Clerk and served upon opposing counsel on or before 3 p.m.,

March 31, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3 p.m., April 12, 1993. This Court's Rule 29 does not apply. The case is set for oral argument during the session beginning April 19, 1993. Reported below: 964 F. 2d 814.

JANUARY 19, 1993

Certiorari Granted—Reversed and Remanded. (See No. 92–5579, *ante,* p. 357.)

Certiorari Granted—Vacated and Remanded

No. 92–217. AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., ET AL. *v.* ROMER, GOVERNOR OF COLORADO, ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Farrar* v. *Hobby*, *ante,* p. 103. Reported below: 962 F. 2d 1501.

No. 92–292. KOLODZIECZAK ET AL. *v.* FRIEND ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Farrar* v. *Hobby*, *ante,* p. 103. Reported below: 965 F. 2d 682.

No. 92–402. NICHOLS ET AL. *v.* ROMBERG ET UX. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Farrar* v. *Hobby*, *ante,* p. 103. Reported below: 970 F. 2d 512.

Miscellaneous Orders

No. D–1188. IN RE DISBARMENT OF LOMBARDI. Disbarment entered. [For earlier order herein, see *ante,* p. 937.]

No. D–1189. IN RE DISBARMENT OF HURLEY. Disbarment entered. [For earlier order herein, see *ante,* p. 937.]

No. D–1190. IN RE DISBARMENT OF COLE. Disbarment entered. [For earlier order herein, see *ante,* p. 938.]

No. D–1191. IN RE DISBARMENT OF SKRYD. Disbarment entered. [For earlier order herein, see *ante,* p. 949.]

No. D–1192. IN RE DISBARMENT OF ALBAN. Disbarment entered. [For earlier order herein, see *ante,* p. 949.]

No. D–1194. IN RE DISBARMENT OF CAPLAN. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–1195. IN RE DISBARMENT OF CASPER. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–1196. IN RE DISBARMENT OF HARLAN. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–1197. IN RE DISBARMENT OF HAWKINS. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–1198. IN RE DISBARMENT OF WATROUS. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–1200. IN RE DISBARMENT OF SIMON. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–1201. IN RE DISBARMENT OF NORRIS. Disbarment entered. [For earlier order herein, see *ante*, p. 970.]

No. D–1207. IN RE DISBARMENT OF ZABRISKIE. Disbarment entered. [For earlier order herein, see *ante*, p. 983.]

No. D–1225. IN RE DISBARMENT OF GLADSON. It is ordered that Charles L. Gladson, of Washington, D. C., be suspended from the practice of law in this Court and that a rule 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–1226. IN RE DISBARMENT OF WADDELL. It is ordered that Thomas L. Waddell, of San Diego, Cal., be suspended from the practice of law in this Court and that a rule 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–1227. IN RE DISBARMENT OF ANSHEN. It is ordered that Charles W. Anshen, of Encino, Cal., be suspended from the practice of law in this Court and that a rule 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. 111, Orig. DELAWARE *v.* NEW YORK. Motion of New York for leave to file first amended answers and leave to file counterclaim denied without prejudice to renewal following the issuance

of the opinion of this Court on the Report of the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 970.]

No. 91–2054. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* LANDANO. C. A. 3d Cir. [Certiorari granted, *ante*, p. 813.] Motion of respondent to supplement the record granted.

No. 92–207. UNITED STATES *v.* PADILLA ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 952.] Motion of respondent Maria Simpson for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that David A. Bono, Esq., of Washington, D. C., be appointed to serve as counsel for respondents Donald Simpson et al. in this case.

No. 92–780. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* SCHEIDLER ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case limited to Question 1 presented by the petition for writ of certiorari expressing the views of the United States.

No. 92–854. CENTRAL BANK OF DENVER, N. A. *v.* FIRST INTERSTATE BANK OF DENVER, N. A., ET AL. C. A. 10th Cir.; and

No. 92–913. BANCO ESPANOL DE CREDITO ET AL. *v.* SECURITY PACIFIC NATIONAL BANK ET AL. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 92–910. STOWE *v.* DAVIS ET AL. Sup. Ct. Tenn. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 92–6027. SMITH *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 9, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 92–6449. DAVIS *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 9, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis.*

No. 92–6957. IN RE VALENTINE; and
No. 92–7026. IN RE FLEMING. Petitions for writs of habeas corpus denied.

No. 92–6681. IN RE SMITH;
No. 92–6694. IN RE SPRADLEY;
No. 92–6716. IN RE BAUER; and
No. 92–6816. IN RE STARLING. Petitions for writs of mandamus denied.

Certiorari Denied

No. 91–1794. WALKER *v.* ANDERSON ELECTRICAL CONNECTORS. C. A. 11th Cir. Certiorari denied. Reported below: 944 F. 2d 841.

No. 92–612. MACKIN ET AL. *v.* CITY OF BOSTON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 969 F. 2d 1273.

No. 92–663. BOARD OF TRUSTEES OF KNOX COUNTY (INDIANA) HOSPITAL, DBA GOOD SAMARITAN HOSPITAL *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 558.

No. 92–699. FISHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1217.

No. 92–706. YAMAHA CORPORATION OF AMERICA *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 158, 961 F. 2d 245.

No. 92–707. DUFFY ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND,

ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 960 F. 2d 1325.

No. 92–717. SISSLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1455.

No. 92–751. SNOHOMISH COUNTY ET AL. *v.* LUTHERAN DAY CARE. Sup. Ct. Wash. Certiorari denied. Reported below: 119 Wash. 2d 91, 829 P. 2d 746.

No. 92–752. VARAH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 357.

No. 92–755. FIRST NATIONAL LIFE INSURANCE CO. *v.* SUNSHINE-JR. FOOD STORES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 960 F. 2d 1546.

No. 92–796. ODOM *v.* LEWIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 348.

No. 92–816. D. R., A MINOR CHILD, BY HER PARENT AND NATURAL GUARDIAN, L. R., ET AL. *v.* MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1364.

No. 92–841. CITY OF EL MONTE, CALIFORNIA *v.* RHODES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 241.

No. 92–850. TEAGUE ET AL. *v.* EMPLOYERS REINSURANCE CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 339.

No. 92–853. SANDERS CONFECTIONERY PRODUCTS INC. ET AL. *v.* HELLER FINANCIAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 973 F. 2d 474.

No. 92–857. DILLARD *v.* SECURITY PACIFIC CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1148.

No. 92–858. MCLEOD *v.* MCLEOD. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–861. RIDER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 595 So. 2d 924.

No. 92–862. SMITH *v.* DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT. Ct. App. D. C. Certiorari denied.

No. 92–863. FRITO-LAY, INC., ET AL. *v.* WAITS. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 1093.

No. 92–865. O'BRIEN *v.* BANK ONE, COLUMBUS, N. A. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 92–866. O'BRIEN *v.* BANK ONE, COLUMBUS, N. A. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 92–873. ALLSTATE INSURANCE CO. *v.* MALESKI, ACTING INSURANCE COMMISSIONER OF PENNSYLVANIA, ET AL.; and

No. 92–937. RHINE REINSURANCE CO., LTD., ET AL. *v.* MUTUAL FIRE, MARINE & INLAND INSURANCE CO. ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 531 Pa. 598, 614 A. 2d 1086.

No. 92–874. SIEMER ET AL. *v.* LEARJET ACQUISITION CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 179.

No. 92–875. HONEYCUTT ET AL. *v.* NORBECK, TRUSTEE OF JANE NORBECK TRUST, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 254 Mont. 256, 836 P. 2d 1231.

No. 92–876. MACIARIELLO ET AL. *v.* CITY OF LANCASTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 973 F. 2d 295.

No. 92–878. AMERINET, INC., ET AL. *v.* XEROX CORP. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 1483.

No. 92–880. MIDBOE, SECRETARY, LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY *v.* CHEMICAL WASTE MANAGEMENT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 967 F. 2d 1058.

No. 92–881. MAXA, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAXA *v.* JOHN ALDEN LIFE INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 980.

No. 92–882. E. L. U. L. REALTY CORP. *v.* GREYHOUND EXHIBITGROUP, INC. C. A. 2d Cir. Certiorari denied. Reported below: 973 F. 2d 155.

No. 92–884. Moore *v.* Gwinnett County et al. C. A. 11th Cir. Certiorari denied. Reported below: 967 F. 2d 1495.

No. 92–885. Roberts, Individually and as Sheriff of Cambria County, et al. *v.* Mutsko et al. C. A. 3d Cir. Certiorari denied. Reported below: 971 F. 2d 1015.

No. 92–886. Azul Pacifico, Inc. *v.* City of Los Angeles, California. C. A. 9th Cir. Certiorari denied. Reported below: 973 F. 2d 704.

No. 92–887. Berger et al. *v.* Cuyahoga County Bar Assn. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 454, 597 N. E. 2d 81.

No. 92–890. Guinn *v.* Texas Christian University et al. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 818 S. W. 2d 930.

No. 92–894. Tinsley *v.* Kuhlmann, Warden. C. A. 2d Cir. Certiorari denied. Reported below: 973 F. 2d 163.

No. 92–898. Jatoi et ux. *v.* Aetna Insurance Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 16.

No. 92–899. City and County of San Francisco et al. *v.* Stone et al. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 850.

No. 92–904. McCoy et al. *v.* Seaward Marine Services, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 344.

No. 92–905. Mayflower International Co., dba Honsew, Inc., et al. *v.* Pauahi Associates. Sup. Ct. Haw. Certiorari denied. Reported below: 73 Haw. 623, 838 P. 2d 860.

No. 92–923. Gallagher et al. *v.* Indiana State Election Board et al. Sup. Ct. Ind. Certiorari denied. Reported below: 598 N. E. 2d 510.

No. 92–930. Quigley *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 601 So. 2d 556.

No. 92–953. Coleman *v.* Nationwide Life Insurance Co. C. A. 4th Cir. Certiorari denied. Reported below: 969 F. 2d 54.

No. 92–962. POLYAK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 92–975. GIBSON *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 339.

No. 92–976. LYNCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 1339.

No. 92–979. NAKELL ET AL. *v.* BRITT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1443.

No. 92–986. BUCK ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 967 F. 2d 1060.

No. 92–987. BASHA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 631.

No. 92–1020. DOWDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 490.

No. 92–5822. HOLLAND *v.* MCGINNIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 963 F. 2d 1044.

No. 92–5897. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 967 F. 2d 1431.

No. 92–5925. FELDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 593.

No. 92–5950. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–5954. HILL *v.* UNITED STATES;
No. 92–6182. AMUNDSEN *v.* UNITED STATES;
No. 92–6386. HILL *v.* UNITED STATES; and
No. 92–6532. AMUNDSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 592.

No. 92–6001. SMITH *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 968 F. 2d 1227.

No. 92–6007. EASLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 281, 592 N. E. 2d 1036.

No. 92–6044. GANUS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 466, 594 N. E. 2d 211.

No. 92–6062. COFFELT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 960 F. 2d 150.

No. 92–6095. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 973 F. 2d 459.

No. 92–6111. GENTRY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–6132. DRISCOLL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 970 F. 2d 1472.

No. 92–6187. KLEINSCHMIDT *v.* UNITED STATES FIDELITY & GUARANTY INSURANCE CO. ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 598 So. 2d 76.

No. 92–6236. SKIDMORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 970.

No. 92–6256. MCFARLAND *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 240.

No. 92–6274. KYE SOO LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 962 F. 2d 430.

No. 92–6335. CAULEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–6343. WILLMSCHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 596.

No. 92–6347. VALDEZ MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1045.

No. 92–6371. OBI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1346.

No. 92–6392. BARSKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 936 and 1221.

No. 92–6415. ROZO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 959 F. 2d 971.

No. 92–6464. BERKOWITZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 352.

No. 92–6534. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–6603. ATWOOD *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 171 Ariz. 576, 832 P. 2d 593.

No. 92–6636. YOUNGS *v.* TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–6648. FARRELL *v.* MCDONOUGH. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 279.

No. 92–6654. YORDAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–6656. BALLARD *v.* PASKETT, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1336.

No. 92–6662. SUDARSKY *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1041.

No. 92–6671. MEYERS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–6675. ROBERTS *v.* WESTERN MANAGEMENT SYSTEMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1341.

No. 92–6677. WIGLEY *v.* ALFRED HUGHES UNIT ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–6680. BRUNS *v.* THALACKER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 973 F. 2d 625.

No. 92–6682. BROWN *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 973 F. 2d 116.

No. 92–6691. BARKSDALE-CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 111.

No. 92–6695. WHITEHEAD *v.* JENIFER ET AL. C. A. D. C. Cir. Certiorari denied.

No. 92–6696. TAYLOR *v.* CITY OF NEW ALBANY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 979 F. 2d 87.

No. 92–6707. BROKENBROUGH *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6708. WARD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 293, 417 S. E. 2d 130.

No. 92–6712. JONES *v.* WRIGHT, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 92–6713. HAYS *v.* IDAHO. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 586.

No. 92–6717. DIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 926.

No. 92–6731. HUFF *v.* WILCOX COUNTY ADMINISTRATOR ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–6734. WIGLEY *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–6736. CROCKETT *v.* DUTTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1576.

No. 92–6740. CURIALE ET UX. *v.* HICKEL, GOVERNOR OF ALASKA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 92–6751. COUSINO *v.* REKUCKI ET AL. Ct. App. Mich. Certiorari denied.

No. 92–6757. MANN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 603 So. 2d 1141.

No. 92–6771. MARTINEZ *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 92–6815. SASSER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1544.

No. 92–6837. BRECHEEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 835 P. 2d 117.

No. 92–6847. BUCHANAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92–6850. ARMSTRONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 743.

No. 92–6853. SIERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 747.

No. 92–6854. DANIELS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 973 F. 2d 272.

No. 92–6877. CLARKE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92–6880. CAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 171.

No. 92–6888. PLEASANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 579.

No. 92–6890. BEGLEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 786.

No. 92–6894. HOOKER, AKA RIBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1347.

No. 92–6895. KIMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 965 F. 2d 1001.

No. 92–6899. COLEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 357.

No. 92–6945. CARDINE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 92–597. 1975 SALARIED RETIREMENT PLAN FOR ELIGIBLE EMPLOYEES OF CRUCIBLE, INC., ET AL. *v.* NOBERS ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 968 F. 2d 401.

No. 92–728. TWIN CITY FIRE INSURANCE CO. ET AL. *v.* FORTUNATO, COMMISSIONER, NEW JERSEY DEPARTMENT OF INSURANCE. Sup. Ct. N. J. Motions of Connecticut Business & Industry Association and Institute for Justice et al. for leave to file

briefs as *amici curiae* granted. Certiorari denied. Reported below: 129 N. J. 389, 609 A. 2d 1248.

No. 92–868. REPUBLIC INSURANCE GROUP ET AL. *v.* MALESKI, ACTING INSURANCE COMMISSIONER OF PENNSYLVANIA, ET AL. Sup. Ct. Pa. Motion of Reinsurance Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 531 Pa. 598, 614 A. 2d 1086.

No. 92–908. CAPLINGER ET AL. *v.* DOE. C. A. 5th Cir. Motion of National School Boards Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 975 F. 2d 137.

No. 92–951. GOINS *v.* LANG ET AL. C. A. 8th Cir. Motion of respondents Syndicated Communications, Inc., et al. for award of double costs and attorney's fees denied. Certiorari denied.

No. 92–1008. SUPPLE ET AL. *v.* HAYS COUNTY GUARDIAN ET AL. C. A. 5th Cir. Motion of American Council on Education for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 969 F. 2d 111.

No. 92–6287 (A–478). HIRSCHFELD *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner to strike brief in opposition denied. Application for bail, addressed to JUSTICE THOMAS and referred to the Court, denied. Certiorari denied. Reported below: 964 F. 2d 318.

No. 92–7300 (A–553). STAMPER *v.* WRIGHT, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 985 F. 2d 553.

Rehearing Denied

No. 91–719. PARKE, WARDEN *v.* RALEY, *ante*, p. 20;
No. 91–6646. HADLEY *v.* UNITED STATES, *ante*, p. 19;
No. 91–8060. ABELLO-SILVA *v.* UNITED STATES, *ante*, p. 835;
No. 92–5642. IN RE BAUER, *ante*, p. 938;
No. 92–5857. FLANAGAN *v.* UNITED STATES, *ante*, p. 945;
No. 92–5974. VEGA *v.* TEXAS, *ante*, p. 988;

No. 92–5997. ZIEBARTH *v.* FARM CREDIT BANK OF ST. PAUL, *ante,* p. 988; and

No. 92–6179. IN RE SANDERS, *ante,* p. 997. Petitions for rehearing denied.

JANUARY 21, 1993

Dismissal Under Rule 46

No. 92–61. ACKERMAN *v.* CITIBANK (ARIZONA). C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 958 F. 2d 376.

JANUARY 22, 1993

Dismissal Under Rule 46

No. 92–298. HART HOLDING CO. INC. ET AL. *v.* DREXEL BURNHAM LAMBERT GROUP, INC., ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 960 F. 2d 285.

JANUARY 25, 1993

Dismissal Under Rule 46

No. 90–1092. HUBER ET AL. *v.* CASABLANCA INDUSTRIES, INC. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 916 F. 2d 85.

JANUARY 26, 1993

Miscellaneous Order

No. A–563 (92–7351). MONTOYA *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, 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 issuance of the mandate of this Court.

Certiorari Denied

No. 92–7328 (A–554). BOLDER *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred

to the Court, denied. Certiorari denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER would grant the application for stay of execution. Reported below: 983 F. 2d 98.

No. 92–7380 (A–569). BOLDER *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. Reported below: 985 F. 2d 941.

JANUARY 29, 1993

Dismissal Under Rule 46

No. 92–1105. ISUZU MOTORS, LTD., ET AL. *v.* DORSETT. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 977 F. 2d 567.

FEBRUARY 3, 1993

Dismissal Under Rule 46

No. 92–5224. EVANS *v.* COURT OF COMMON PLEAS, DELAWARE COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 959 F. 2d 1227.

FEBRUARY 9, 1993

Miscellaneous Order

No. A–603 (92–7567). HAWKINS *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, 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 issuance of the mandate of this Court.

Certiorari Denied

No. 92–7545 (A–599). HAWKINS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of

death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 980 F. 2d 975.

FEBRUARY 18, 1993

Dismissal Under Rule 46

No. 92–1134. SOUTH EAST COAL CO. ET AL. *v.* KENTUCKY UTILITIES CO. Sup. Ct. Ky. Certiorari dismissed under this Court's Rule 46. Reported below: 836 S. W. 2d 392.

FEBRUARY 19, 1993

Miscellaneous Orders

No. 119, Orig. CONNECTICUT ET AL. *v.* NEW HAMPSHIRE. Supplement to the Final Report of the Special Master received and ordered filed. Exceptions to this Report, with supporting briefs, are to be included in the Exceptions referenced in the order of January 15, 1993 [*ante*, p. 1074]. Such Exceptions must be received by the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 15, 1993. Reply briefs, if any, are to be included in the reply briefs referenced in the order of January 15, 1993. Such reply briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 7, 1993. This Court's Rule 29 does not apply. The case is set for oral argument during the session beginning April 19, 1993. JUSTICE SOUTER took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, *ante*, p. 1074.]

No. 91–2086. GRANITE STATE INSURANCE CO. *v.* TANDY CORP. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 813.] Motion of the parties to defer oral argument denied.

Certiorari Granted

No. 92–5653. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 22, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1993. A reply brief, if any, is to be filed with the Clerk

and served upon opposing counsel on or before 3 p.m., Thursday, April 22, 1993. The case is set for oral argument on Monday, April 26, 1993. This Court's Rule 29 does not apply in this case. Reported below: 773 S. W. 2d 322.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1074 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE
IN CHAMBERS

GRUBBS *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER

ON APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

No. A–324. Decided October 20, 1992

Applicant's request to stay his execution is granted pending further order by the Circuit Justice or by the full Court. Since there is insufficient time to consider the application's merits, and with an execution so irrevocable, it is best to err on the applicant's side.

JUSTICE BLACKMUN, Circuit Justice.

This application for a stay of execution reaches me, as Circuit Justice, at approximately 11 p.m. eastern daylight time this Tuesday, October 20, 1992. Applicant's execution by the State of Missouri is scheduled two hours later, at 1 a.m. e.d.t., Wednesday, October 21. This afternoon, Judge Carol Jackson of the Eastern District of Missouri granted a stay. This evening, a panel of the United States Court of Appeals for the Eighth Circuit, by a 2-to-1 vote, with Judge Bright in dissent, vacated the District Court's stay. Then the Court of Appeals, by a vote of 9 to 1, still later this evening, denied a suggestion for rehearing en banc, and denied a motion for stay of execution.

The present application thus comes to me with the judges below apparently divided 9 to 3. The State, before me, relies on its brief filed with the Court of Appeals.

In this situation, there just is not sufficient time for me adequately to consider the merits of the stay application. (There is no suggestion of undue delay or procedural unfairness on the part of the applicant.) With an execution so

irrevocable, I therefore choose to err, if at all, on the side of the applicant. I have granted the stay pending further order by me as Circuit Justice or by the full Court.

INDEX