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In Memoriam

JUSTICE WILLIAM J. BRENNAN, JR.

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1997

MARCH 3 THROUGH MAY 26, 1998

FRANK D. WAGNER

REPORTER OF DECISIONS

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Erratum

518 U. S. 557, line 24: "*supra*, at 532, n. 6" should be "*supra*, at 546, n. 16".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

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

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

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

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

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

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

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

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

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

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

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

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

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

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

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

September 30, 1994.

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

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE BRENNAN*

FRIDAY, MAY 22, 1998

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, Justice William J. Brennan.

The Court recognizes the Solicitor General.

Mr. Solicitor General Waxman addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting today of the Bar of this Court, Resolutions memorializing our deep respect and affection for Justice Brennan were unanimously adopted. With the Court's leave, I shall summarize the Resolutions and ask that they be set forth in their entirety in the records of the Court.

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*Justice Brennan, who retired from the Court effective July 20, 1990 (498 U. S. VII), died in Arlington, Virginia, on July 24, 1997 (522 U. S. VII).

RESOLUTION

William Joseph Brennan, Jr., graced the Supreme Court of the United States for thirty-four extraordinary years. Appointed to the Court on October 15, 1956, by President Dwight D. Eisenhower, Justice Brennan's years of Supreme Court service spanned eight Presidencies, seventeen Congresses, and one hundred forty-six volumes of the United States Reports. Ill-health forced Justice Brennan to retire from the Court on July 20, 1990, but not before his unique qualities of mind and heart had touched the lives of twenty-two Supreme Court colleagues—one-fifth of the Justices to have served on the Supreme Court; one hundred-twelve law clerks, each of whom became part of Justice Brennan's extended family; the full complement of the Supreme Court's support personnel—from guards to gardeners—all of whom Justice Brennan regarded, and treated, as valued friends; and countless members of the Supreme Court bar who recall with pride and affection their interaction with Justice Brennan in the search for justice.

Although death stilled Justice Brennan's heart on July 24, 1997, it did not, and could not, still his magnificent voice. Justice Brennan continues to speak to us through his life and his work in the prophetic language of the American dream. Although unanimous agreement with every aspect of a legacy as varied and vast as Justice Brennan's is impossible, as members of the Supreme Court bar, we salute his monumental contribution to the cause of individual liberty.[1]

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[1] Individual members of the Resolutions Committee have expressed personal admiration for Justice Brennan's life and career. See Floyd Abrams, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 18 (1997); Norman Dorsen, *A Tribute to Justice William J. Brennan, Jr.*, 104 Harv. L. Rev. 15 (1990); Owen Fiss, *A Life Lived Twice*, 100 Yale L. J. 1117 (1991); Gerard E. Lynch, *William J. Brennan, Jr., American*, 97 Colum. L. Rev. 1603 (1997); Frank I. Michelman, *A Tribute to Justice Brennan*, 104 Harv. L. Rev. 22 (1990); Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.s Constitutional Thought*, 77 U. Va. L. Rev. 1261 (1991); Robert C. Post, *Remembering Justice Brennan: A Eulogy*, 37 Washburn L. J. xix (1997); Geoffrey R. Stone, *Justice Brennan and "The Freedom of Speech": A First Amend-*

The sweep and power of Justice Brennan's contribution to American law challenges our collective imaginations. As JUSTICE SOUTER has noted,[2] the sheer mass of the Brennan legal legacy exerts an intense gravitational pull on our jurisprudence. In the course of a remarkable tenure that fell short of Chief Justice John Marshall's by a matter of months, Justice Brennan authored 1,573 opinions: 533 opinions for the Court, 694 dissents, and 346 concurrences.[3] Justice Brennan's opinions shaped our Nation. Our ideal of democracy flows from Justice Brennan's historic opinion for the Court in *Baker* v. *Carr*, 369 U. S. 186 (1962). The ability of all Americans to participate equally in the democratic process was safeguarded and advanced by Justice Brennan's opinions in *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), and *Thornburg* v. *Gingles*, 478 U. S. 30 (1986). Our modern conception of free speech was articulated and defended by Justice Brennan's opinions in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), and *Texas* v. *Johnson*, 491 U. S. 397 (1989), and by his draftsmanship of the Court's *per curiam* opinion in *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969).[4] Our understanding of

ment Odyssey, 139 U. Pa. L. Rev. 5, 1333 (1991); Peter L. Strauss, *In Memoriam, William J. Brennan, Jr.*, 97 Colum. L. Rev. 1609 (1997).

[2] David H. Souter, *In Memoriam: William J. Brennan, Jr.*, eulogy delivered at the funeral mass for Justice Brennan at St. Matthew's Cathedral, Washington, D. C., on July 29, 1997, reprinted at 111 Harv. L. Rev. 1 (1997).

[3] Characteristically, Justice Brennan appears to have underestimated the volume of his judicial output. Justice Brennan's estimate of 1,360 opinions appears to be 213 short when measured against a search conducted by the marvels of modern technology.

[4] Justice Brennan's role in drafting the *Brandenburg* opinion is recounted in Morton J. Horwitz, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 23 (1997). The *Brandenburg* opinion had initially been assigned to Justice Fortas. Justice Brennan accepted responsibility for drafting it when Justice Fortas left the bench. See Bernard Schwartz, *Justice Brennan and the Brandenburg Decision—A Lawgiver in Action*, 79 Judicature 24, 27–28 (1995).

Throughout his career, Justice Brennan's intense devotion to the Court as an institution was manifested by his willingness to take on the task of drafting *per curiam* opinions in appropriate cases. He drafted well over sixty *per curiam* opinions, including the Court's *per curiam* opinion in

freedom of association was shaped by Justice Brennan's opinions in *NAACP* v. *Button*, 371 U. S. 415 (1963); *Elrod* v. *Burns*, 427 U. S. 347 (1976); and *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984). Our commitment to academic freedom was defined by Justice Brennan in *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). Our understanding of the limits placed on government's power to condition benefits on a waiver of First Amendment rights flows from Justice Brennan's opinions in *Speiser* v. *Randall*, 357 U. S. 513 (1958), and *FCC* v. *League of Women Voters*, 468 U. S. 364 (1984). Contemporary protection of the free exercise of religion begins with Justice Brennan's opinion in *Sherbert* v. *Verner*, 374 U. S. 398 (1963). Our modern understanding of the Establishment Clause, initially propounded in his separate opinion in *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (1963), was classically restated in Justice Brennan's opinion for the Court in *Edwards* v. *Aguillard*, 482 U. S. 578 (1987). Our commitment to equality before the law was deepened and advanced by *Cooper* v. *Aaron*, 358 U. S. 1 (1958) (opinion signed by all the Justices),[5] *Green* v. *County School Board*, 391 U. S. 430 (1968); *Keyes* v. *School Dist. No. 1*, 413 U. S. 189 (1973); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973); and *Craig* v. *Boren*, 429 U. S. 190 (1976). Our contemporary understanding of procedural fairness was shaped by Justice Brennan's opinions in *Jencks* v. *United States*, 353 U. S. 657 (1957); *Bruton* v. *United States*, 391 U. S. 123 (1968); *In re Winship*, 397 U. S. 358 (1970); and *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). Our approach to collective bargaining, and the rights of the individual employee

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New York Times v. *United States*, 403 U. S. 713 (1971) *(per curiam)*. See David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case*, 301-20 (describing Justice Brennan's role in drafting the *per curiam* opinion).

[5] Justice Brennan's central role in drafting the opinion in *Cooper* v. *Aaron* is described in Richard S. Arnold, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 5 (1997). See also Richard S. Arnold, *A Tribute to Justice William J. Brennan, Jr.*, 26 Harv. C. R.–C. L. L. Rev. 7 (1991).

in that process, was influenced by Justice Brennan's opinions in *Communications Workers of America* v. *Beck*, 487 U. S. 735 (1988), and *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235 (1970). The architecture of our contemporary federal court structure was shaped by Justice Brennan's opinions for the Court in *Byrd* v. *Blue Ridge Rural Electric Coop*, 356 U. S. 525 (1958), and *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), and our modern understanding of the preeminent role of federal courts as guarantors of individual liberty is based on Justice Brennan's opinions for the Court in *Fay* v. *Noia*, 372 U. S. 391 (1963); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978); *Bivens* v. *Six Unknown Agents*, 403 U. S. 388 (1971), and *Cooper* v. *Aaron*, *supra*.

When he wrote in dissent, Justice Brennan spoke to the future. His sustained and passionate efforts to persuade the Court that capital punishment cannot survive contemporary moral scrutiny;[6] his concern that non-textual fundamental personal rights inherent in human dignity be respected;[7] his defense of the writ of *habeas corpus;*[8] his efforts to preserve

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[6] *E. g., Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976); *McCleskey* v. *Kemp*, 481 U. S. 279, 320 (1987). Justice Brennan's belief that the death penalty violated the Constitution was so intense that, during the last fifteen years of his tenure, Justice Brennan, joined by Justice Marshall, expressed personal opposition to the death penalty in every death case, including denials of certiorari. Justice Brennan's last public statement, made to his colleagues, friends, family, and admirers at the celebration of his 90th birthday in the Supreme Court chamber, was a plea to continue fighting against the death penalty.

[7] *E. g., Michael H.* v. *Gerald D.*, 491 U. S. 110, 136 (1989); *Cruzan* v. *Missouri Dept. of Health*, 497 U. S. 261, 301 (1990). Justice Brennan was more successful in using the Equal Protection Clause to protect "fundamental" non-textual rights. See *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972) (invalidating ban on distribution of contraceptives to unmarried couples as violation of equal protection of the laws); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (invalidating durational residence requirement for welfare eligibility as a discriminatory interference with the right to travel).

[8] *E. g., Stone* v. *Powell*, 428 U. S. 465, 502 (1976); *Teague* v. *Lane*, 489 U. S. 288, 326 (1989).

the wall between church and state;[9] his defense of free speech in those relatively rare settings when he was unable to persuade a majority of the Court to embrace his vision of the First Amendment;[10] his endorsement of carefully targeted affirmative action;[11] his scholarly effort to reinterpret the Eleventh Amendment[12]—all stand as reminders of what seemed unfinished business to Justice Brennan.

But it would be shortsighted to purport to measure what Justice Brennan has meant, and will mean, to American law merely by cataloguing his immense substantive contribution. A fuller assessment of the Brennan legacy calls for a celebration of the happy confluence of intelligence, legal acumen, political sophistication, and empathy that combined in Justice Brennan to forge the archetype of a Supreme Court Justice intensely committed to the protection of constitutional rights. Justice Brennan's life was the embodiment of the American dream. His judicial career was a sustained effort to allow others to share in that dream.

Justice Brennan's Life: Living the American Dream

Justice Brennan lived the American dream.[13] Fittingly, his life spanned every decade of the American Century. He was born on April 25, 1906, to Irish immigrants, the second

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[9] *E. g., Marsh* v. *Chambers*, 463 U. S. 783, 795 (1983) (Justice Brennan's dissent in *Marsh* is of particular interest as a statement of his belief that the Bill of Rights must be read in the light of contemporary circumstances); *Lynch* v. *Donnelly*, 465 U. S. 668, 694 (1984).

[10] *E. g., Walker* v. *City of Birmingham*, 388 U. S. 307, 338 (1967); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 762 (1978); *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U. S. 94, 170 (1973); *United States* v. *Kokinda*, 497 U. S. 720, 740 (1990); *Hazelwood School District* v. *Kuhlmeier*, 484 U. S. 260, 277 (1988); *Paris Adult Theatre I* v. *Slayton*, 413 U. S. 49, 73 (1973).

[11] *E. g., Board of Regents* v. *Bakke*, 438 U. S. 265, 324 (1978) (concurring in judgment in part and dissenting in part).

[12] *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 247 (1985).

[13] Much of the biographical material in this tribute is drawn from an affectionate and informative biographical sketch of the Justice's life written by his grandson. William J. Brennan IV, *Remembering Justice Brennan: A Biographical Sketch*, 37 Washburn L. Rev. vii (1997).

of eight children. Both his parents, William J. Brennan, Sr., and Agnes McDermott, emigrated from County Roscommon to the United States because, as Justice Brennan recalled, they "saw a chance for a better life in America."[14] They met in Newark, New Jersey, at a time when the Irish were not a welcome presence. Job postings often warned, "No Irish Need Apply," and some shop doors bore signs reading, "No Dogs or Irish Allowed." The senior Brennan found work as a coal stoker in the Ballantine Brewery, and quickly became active in the nascent labor union movement. The Justice came of age as his father was organizing workers to fight for better wages and conditions, and rising to local prominence as a powerful and extraordinarily popular reform politician, becoming Newark's Director of Public Safety.

> "What got me interested in people's rights and liberties," Brennan would later recall, "was the kind of neighborhood I was brought up in. I saw all kinds of suffering—people had to struggle. I saw the suffering of my mother, even though we were never without. We always had something to eat, we always had something to wear. But others in the neighborhood had a harder time."[15] Reflecting on his legacy in his last public statement, Justice Brennan summarized his career by pointing out that "these rulings emerged out of everyday human dramas. . . . At the heart of each drama was a person who cried out for nothing more than common human dignity."[16]

"Everything I am," Justice Brennan once said, "I am because of my father."[17] "With my dad," Brennan said, "you

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[14] Sean O Murchu, "Lone Justice: An Interview with Justice William Brennan, Jr.," Irish America (June 1990), at 28.

[15] Nat Hentoff, "Profiles: The Constitutionalist," The New Yorker, Mar. 12, 1990, at 46.

[16] William J. Brennan, Jr., "My Life on the Court," in *Reason & Passion: Justice Brennan's Enduring Legacy* 19 (E. Joshua Rosenkranz & Bernard Schwartz eds. 1997).

[17] Jeffrey T. Leeds, "A Life on the Court," N. Y. Times Magazine, Oct. 5, 1986, at 26.

had to be doing something all the time, working at something."[18] It was the elder Brennan's idea that Bill Jr. go into law. "He was going to make a lawyer out of me, by golly," the Justice chuckled many years later.[19] Asked once whether his father would have been surprised by his appointment to the Supreme Court, Brennan earnestly replied, "No, he would have expected it."[20]

The Justice graduated from Barringer High School in 1924. A high school classmate recalled, "Bill took home so many academic prizes from school, none were left for the rest of us."[21] In 1928, Brennan graduated from the University of Pennsylvania's undergraduate Wharton School of Finance and Commerce, with honors in economics. Just before he graduated, he married Marjorie Leonard, whom he had met during his sophomore year at Wharton at the Cotillion of the East Orange Women's Club, and to whom he was deeply devoted for fifty-four years, until her death in 1982. Foreshadowing the complex man he was to become, Brennan rebelled against parental authority by secretly eloping with Marjorie, but he made certain that they were very properly married in Baltimore Cathedral.

Brennan went off to the Harvard Law School, while Marjorie stayed in Newark working to help pay his tuition. At Harvard, Bill Brennan was a workaholic. Quiet, unassuming, unknown to classmates who later rose to great prominence in academe, Brennan's academic performance earned him acceptance by Harvard's Legal Aid Society, where he represented the poor in a variety of civil cases, an experience that he recalled fondly over the years. It was at the Legal Aid Society that he experienced firsthand the power of the law to affect the lives of the weak.

During Brennan's second year of law school, in 1930, his father died suddenly of pneumonia. Brennan contemplated

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[18] O Murchu, *supra*, at 28.

[19] Leeds, *supra*, at 26.

[20] Leeds, *supra*, at 26.

[21] "An Experienced Judge for the Supreme Court," U. S. News & World Report, Oct. 12, 1956, at 71–72.

leaving law school, but Harvard awarded him a scholarship to allow him to finish his studies. He waited tables at a fraternity house and performed odd jobs to make ends meet. It was the height of the Great Depression when Brennan graduated from law school in 1931. His father's sudden death had left the family in financial straits. It fell to the Justice to help support his mother, his wife, and six siblings. Brennan contemplated hanging out a shingle as a union lawyer, but his economic responsibilities made that course impossible. Instead, he accepted an offer from Pitney, Hardin & Skinner, the most prestigious law firm in Newark, where he had clerked for a summer. Brennan was the first Catholic lawyer hired by the firm. He was assigned to practice labor law, cast in what must have initially seemed the incongruous role of representing management. As he had in law school, Brennan worked long hours, often into the early hours of the morning. He distinguished himself as a talented labor negotiator, and became the firm's first Catholic partner in 1937.

In July, 1942, at the advanced age of 36, Brennan volunteered for the army. Marjorie and his first two children, Bill III and Hugh, moved to the Washington, D. C., area where Brennan's expertise as a labor troubleshooter was needed by the Army's Ordnance Division. He was commissioned a major, but within a year was promoted to lieutenant colonel, and shortly thereafter was appointed chief of the Ordnance Department's Civilian Personnel Division. During 1943–1944, Brennan was assigned to Los Angeles, where he oversaw the massive influx of women into civilian defense jobs, organizing a complex support structure of day care, housing, health, and transportation. Despite significant housing shortages in the Los Angeles area, Col. Brennan refused to take the easy route of commandeering the homes of interned Japanese-Americans. In 1945, it was Brennan's responsibility to oversee the furlough of soldiers in Europe after the defeat of Hitler. Despite pressure from industry and from Congress, Brennan refused to favor workers in certain occupations over others. In one congressional hearing, Brennan

defended his decision, explaining that "to the extent you make an exception for a single soldier there is somebody eligible for discharge whose discharge is delayed."[22] Brennan left the Army in 1945 at the rank of full colonel after being awarded the Legion of Merit.

The Justice returned to his old law firm, continuing to build his labor law practice at a time when labor strife was mounting. To capitalize on Brennan's growing reputation as a consummate labor lawyer, the firm added his name to the firm's masthead, which became, Pitney, Hardin, Ward & Brennan. Throughout his rapid rise to prominence as a leader of the private bar, Brennan developed a reputation as impeccably fair and gracious. He once asked a judge to postpone a hearing upon learning that his opponent's father had died. "We'll have the hearing another day," Brennan told his flabbergasted opponent.[23] Morton Stavis recalled litigating one of his first cases against Brennan: "I . . . was guilty of a number of procedural oversights. Not only did he not take advantage of them, but he went out of his way to help me correct the record so that the case would be tried fairly on the merits."[24]

Brennan carried this fair-mindedness into the public arena. Though his livelihood depended upon his management-side labor work, he spoke out in support of the right to strike and in favor of legislation to prohibit employer intimidation of union members. But he also urged labor to "accep[t] its responsibilities not to invade or trample upon the rights of other groups" and vigorously condemned racial discrimination by unions.[25]

With his prestige within the bar growing, in 1946, Brennan championed the cause of court reform, a charge led by Arthur T. Vanderbilt, who was at the time a prominent Newark lawyer and the Dean of New York University School of Law.

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[22] Hunter R. Clark, *Justice Brennan: The Great Conciliator* 32 (1995).

[23] Kim Isaac Eisler, *A Justice For All: William J. Brennan, Jr., and the Decisions that Transformed American* 54 (1993).

[24] Hentoff, *supra,* at 48.

[25] Clark, *supra,* at 37.

Brennan fought hard to develop, and pass into law, a variety of reforms, including adaptation of federal procedural rules to the New Jersey courts, the development of an office to track court statistics, increased accountability of trial judges, and mandatory pretrial discovery and settlement conferences. The procedural reforms brought startling results, including a cleanup of the massive backlog of cases, an increase in settlements, and most importantly to Brennan, a system "assuring that right and justice shall have the most favorable opportunity of prevailing in cases that are tried."[26]

When Vanderbilt was appointed Chief Justice of the New Jersey Supreme Court, he set his mind to convincing Brennan to accept an appointment as a trial judge. After a year of cajoling, Brennan relented. In January 1949, Republican Governor Alfred E. Driscoll appointed Brennan, then 43, to the trial court. The appointment slashed Brennan's salary by two-thirds at a time when he was still helping to support his mother and numerous siblings, as well as Marjorie, his two sons, and a new infant, Nancy.

The Justice's rise through the New Jersey courts was meteoric. Shortly after Brennan took the bench, he was appointed assignment judge for Hudson County. Within a year and a half, he was elevated to the Appellate Division of the Superior Court, the state's intermediate court. Two years later, in March 1952, Governor Driscoll appointed Brennan to the New Jersey Supreme Court.

It was there that the Justice began to construct his judicial legacy. He dissented in one criminal case when a defendant was denied the right to review his written confession before trial: "To shackle counsel so that they cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seriously imperils our bedrock presumption of innocence."[27] He upheld the privilege against self-incrimination as a right that

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[26] Clark, *supra*, at 48 (quoting Brennan, "After Eight Years," *supra*, at 502).

[27] *State* v. *Tune*, 98 A. 2d 881, 897 (1953).

applied against the state, describing the privilege as "precious to free men as a restraint against high-handed and arrogant inquisitorial practices."[28]

Brennan's ardor in upholding the self-incrimination privilege was no doubt influenced by the activities of Senator Joseph McCarthy. In a 1954 St. Patrick's Day speech in Boston, Brennan attacked McCarthy, warning that " we cannot and must not doubt our strength to conserve, without sacrifice of any, all of the guarantees of justice and fair play and simple human dignity which have made our land what it is."[29] In a later speech, Brennan struck a theme that he would repeat many times. He warned that if we violate individual rights out of fear, we come "perilously close to destroying liberty in liberty's name."[30] In later years, Brennan was proud that the only Senate vote against his confirmation was cast by Senator McCarthy.

In one of the extraordinary strokes of fortune that shape our lives, Brennan attended a 1955 conference on court reform hosted by Attorney General Herbert Brownell. His lucid presentation so impressed Brownell that he marked Brennan for future high office. In 1956, upon the resignation of Justice Sherman Minton, President Dwight D. Eisenhower, influenced by Vanderbilt's strong endorsement, and Brownell's favorable assessment, appointed William J. Brennan, Jr., to the Supreme Court. Brennan himself often noted that the fact that his appointment would be extremely popular with Irish-Catholic voters in a Presidential year did not hurt. At the press conference announcing his recess appointment, Brennan gave a characteristically modest reply to a reporter's question about how he would fare as a Supreme Court Justice. Brennan predicted he would be like "the mule that was entered in the Kentucky Derby. I don't

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[28] *State* v. *Fary*, 117 A. 2d 499, 501 (1955).

[29] Clark, *supra*, at 68 (quoting William J. Brennan, Jr., Address Before the Charitable Irish Society, Boston, Massachusetts (Mar. 17, 1954)).

[30] Clark, *supra*, at 70 (quoting William J. Brennan, Jr., Address Before the Monmouth Rotary Club, Monmouth, New Jersey (Feb. 23, 1955)).

expect to distinguish myself, but I do expect to benefit from the association."

Marjorie and their daughter, Nancy, once more moved to Washington and settled into a routine that revolved around family and work. A devoted family man, the Justice would come home for dinner every night. But then, as Nancy recalled, he would "set up a green card table in the middle of the living room and spread all these piles of papers within arm's reach on the rug. He'd work until he was just too tired."[31] For the next twenty-five years, Brennan's life revolved around his family and his intense dedication to the Court.

So devoted was Brennan to his family that his legendary energy level waned only once in his tenure, when Marjorie lost a sustained battle with cancer in 1982. Brennan himself had conquered throat cancer, which almost cost him his voice, but it was Marjorie's death that sent his morale plummeting. The Justice loved Marjorie so deeply that her death was a terrible blow. His zest for life began to return in 1983 when, after wryly obtaining his daughter Nancy's consent, he married Mary Fowler, his secretary of twenty-six years. He had a new spring in his walk, renewed energy. Brennan and Mary shared a special love—and a lot of history.

Justice Brennan's years of retirement were enriched by the kindnesses of his colleagues. While his health permitted it, Justice Brennan visited the Court every day. Many of his colleagues, especially his successor, JUSTICE SOUTER, provided continuing personal warmth and friendship. JUSTICE SOUTER found time to visit with Brennan almost every day, an event that the retired-Justice often described as the high-point of his day. Justice Brennan particularly savored his 90th birthday celebration in the Supreme Court chamber, the first such celebration since Oliver Wendell Holmes, Jr., held a similar birthday celebration in 1931. In his parting conversations with friends and admirers that day Justice

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[31] Donna Haupt, "Justice William J. Brennan, Jr.," *Constitution* (Winter 1989), at 54–55.

Brennan recalled his love for the Court, and his gratitude for a life well lived. Justice Brennan died peacefully in his 92d year.

The Brennan personal traits that will be most remembered were the Justice's love of people and his ability to put himself into their shoes. Virtually everyone who encountered Justice Brennan has a story of his kindness. The bus driver who rear-ended Brennan's car in Georgetown on a drizzly day and did not realize that the gentle victim—who assured him that this kind of thing "happens every time there's a rain, and it's nobody's fault at all"[32]—was a Supreme Court Justice. The police officer who took Brennan and his son, Bill III, into custody when he found them in the pre-dawn hours, hopelessly lost, wandering on the streets, and was treated to a hearty breakfast of bacon and eggs when they finally convinced him they were who they said they were. Every law clerk, each of whom can tell countless stories of how Brennan could reassure with the characteristic grip on the arm, twinkling eyes, and the word, "Okay, pal"; and how Brennan always asked about the clerk's spouse or latest romance. Every colleague and friend who, in JUSTICE SOUTER's words, cherished "the man who made us out to be better than we were, and threw his arms around us in Brennan bear hugs, and who simply gave his love to us as the friends he'd chosen us to be."[33] Every Supreme Court employee who was amazed that Brennan would retain the details of their last conversation and stop in the halls to ask about this problem or that joyous event. As author David Halberstam has put it, "He has been in our lifetime, perhaps more than anyone else . . . , the common man as uncommon man. . . . He is a man defined by his own innate decency and kindness. . . . Bill Brennan has never forgotten the most elemental truth

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[32] Clark, *supra*, at 101 (quoting Jack Alexander, "Mr. Justice From Jersey," *Saturday Evening Post*, Sept. 28, 1957, at 133).

[33] David H. Souter, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 1, 2 (1997) (reprinted eulogy at St. Matthew's Cathedral, Washington, D. C.).

of social relations—in order to gain dignity it is important to bestow it on others."[34]

Justice Brennan's Work: Preserving the American Dream for Others

Justice Brennan loved this nation. His request that "America the Beautiful" be played at the ceremony of his interment at Arlington National Cemetery reflected the intensity of that love. The Justice understood the wonder of a democratic society that could lift the son of a penniless immigrant to the highest Court in the land, and not seem to notice that anything extraordinary had occurred. Because he believed that the essence of American democracy is its commitment to respect the equal, innate dignity of every human being, Justice Brennan dedicated his judicial career to building a legal system that reinforces true democracy by preserving its indispensable building blocks—individuals living in freedom, mutual toleration and respect.

One key to the power of the Brennan judicial legacy is the harmony between Justice Brennan's life and his work. Justice Brennan lived, and judged, as a man who loved deeply and well. He was blessed with a devoted and close-knit family. He treated every person he met, regardless of station or class, with heartfelt affection and genuine respect. Through the years of passionate advocacy, in times of heady ascendancy and in anguished dissent, there were rarely harsh words in the Brennan lexicon. He acknowledged his antagonists as he embraced his adherents, as fellow human beings worthy of love, toleration and respect.

His capacity for love shaped Justice Brennan's conception of law, and his vision of judicial role. Drawing upon his religious heritage, Justice Brennan believed that every human being is endowed with an inalienable dignity that no earthly power can diminish. He fervently believed in democracy, but distinguished between a true democracy that respects

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[34] David Halberstam, "The Common Man as Uncommon Man," in *Reason & Passion, supra,* at 25.

the dignity of the individual, and mere majoritarianism that subordinates individual dignity to group will. He believed that the United States Constitution, especially the Bill of Rights and the 13th, 14th, and 15th Amendments, was designed to assure that the American experiment in democracy does not erode into majoritarian tyranny by ignoring the kernel of individual dignity at the core of every human being. He believed that judges, especially federal judges, and above-all Supreme Court Justices, had, and have, a solemn and unavoidable duty to interpret the majestic generalities of the Constitution and the Bill of Rights in the light of contemporary circumstances. Finally, he believed that no real conflict exists between vigorous judicial protection of individual rights, and the American conception of democracy envisioned by the Founders, a democracy premised on individual dignity and mutual toleration. Indeed, in the absence of vigorous judicial protection of human rights, Justice Brennan feared that the true democracy envisioned by the Founders could not flourish.

A second key to the power of Justice Brennan's legal heritage was his mastery of the lawyer's art. He was a brilliant legal craftsman. The classic Brennan opinion speaks to us, not in the abstract language of moral philosophy or with the arrogance of government command, but in the logical and institutional cadences of a master lawyer seeking to find the angle of repose between two seemingly irreconcilable positions. Justice Brennan's great individual rights opinions are not assertions of absolute truth; rather, they are institutional blueprints for assuring that only the weightiest assertions of group need can ever restrict the enjoyment of fundamental individual rights. A mark of Justice Brennan's legal genius, and a source of his enduring influence, was his repeated ability to enunciate complex doctrinal formulations designed to establish an institutional balance weighted heavily in favor of individual freedom; a balance that preserves fundamental individual rights in most settings, without making it impossible for the majority to impose narrow restraints when absolutely necessary. The "thickness" of Justice Brennan's char-

acteristic constitutional analysis was designed to reflect the complexity of the tension between individual right and group need; to erect a sophisticated legal matrix for resolving that tension; and to explain why, in doubtful cases, the resolution should favor the right of the individual over the wishes of the group.

Yet another mark of Justice Brennan's mastery of the lawyer's craft was his ability to grasp the interrelationships within an entire body of law. There was no such thing as an *ad hoc* Brennan decision. He was able to conceive each opinion as part of an institutional whole. Justice Brennan's intense effort to understand the purpose of the statute or constitutional provision before him allowed him to view each case as an opportunity to advance the organic enterprise of which it was a part. The resulting jurisprudence is a work of remarkable coherence.

A third key to the power of Justice Brennan's voice was its candid acceptance of responsibility. He embraced the obligation of reading the Constitution in the context of our times. Justice Brennan acknowledged that hard choices existed in deciding the difficult cases before him, but he refused to obfuscate those choices by resort to legal fictions, or to deflect personal criticism by ascribing his decisions to others. He rejected what, to him, was the false comfort of delegating the Constitution's meaning to persons living in other times. He accepted responsibility for interpreting the Constitution in the context of the world in which he lived, and of giving the document's ambiguous words a meaning consistent with evolving notions of human dignity. But his great individual rights opinions were not exercises in subjectivism. They were disciplined efforts to read the Constitution purposively in an effort to advance the document's underlying values in a way that Justice Brennan believed was most faithful to the covenant between the Justices of today and the founding generation. Time and again, Justice Brennan plumbed the manifest purpose underlying a provision of the Bill of Rights, considered how best to advance that purpose in the context of the modern world, and forged brilliant constitutional doc-

trine making it possible for millions of contemporary Americans to find shelter under a tree of liberty planted over two hundred years ago.[35]

Justice Brennan and the First Amendment

When Justice Brennan joined the Court in 1956, the excesses of the McCarthy era were threatening to overwhelm the parchment barriers of the First and Fifth Amendments. Over the next thirty-four years, the Court, led by Justice Brennan, presided over a revolution in First Amendment doctrine, providing effective constitutional protection for the freest market in ideas the world has ever seen.

Justice Brennan's characteristic approach to First Amendment issues was to ask why the Founders wanted a Free Speech Clause in the Constitution in the first place. His answer was twofold. First, Justice Brennan believed that free speech was indispensable to democratic governance. He understood that democratic self-government is imperilled in the absence of robust and uninhibited discussion of issues

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[35] Justice Brennan left a rich non-judicial record of his judicial philosophy. A representative sampling includes William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N. Y. U. L. Rev. (1961); William J. Brennan, Jr., *The Supreme Court and the Meikeljohn Interpretation of the First Amendment*, the Alexander Meikeljohn Lecture at Brown University, reprinted in 79 Harv. L. Rev. 1 (1965); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); William J. Brennan, Jr., *Address at the Dedication of the Samuel I. Newhouse Law Center*, reprinted in 32 Rutgers L. Rev. 173 (1979); William J. Brennan, Jr., *Speech Delivered at the Text and Teaching Symposium, Georgetown University* (Oct. 12, 1985), reprinted in *The Great Debate: Interpreting Our Written Constitution*, 11 (Paul G. Cassell ed. 1986); William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L. J. 427 (1986); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N. Y. U. L. Rev. 535 (1986); William J. Brennan, Jr., *The Equality Principle: A Foundation of American Law*, 20 U. C. Davis L. Rev. 673 (1987); William J. Brennan, Jr., *Reason, Passion, and the "Progress of the Law,"* 10 Cardozo L. Rev. 3 (1988); William J. Brennan, Jr., *Foreword to the Symposium on Capital Punishment*, 8 Notre Dame J. of Law, Ethics & Pub. Policy (1994).

of public concern. Second, Justice Brennan recognized that self-expression is an integral element of human dignity. Respect for the equal dignity of each human being, Justice Brennan believed requires toleration of individual self-expression, even when the expression is deeply unpopular.

Armed with a purposive account of the Free Speech Clause, Justice Brennan proceeded to construct a sophisticated institutional structure dedicated to the preservation and advancement of its underlying values. He began haltingly in *Roth* v. *United States*, 354 U. S. 476 (1957). Rejecting arguments claiming either that sexually explicit speech had virtually no protection, or that it was absolutely protected, Justice Brennan attempted to broker an institutional compromise in *Roth* by positing a small category of unprotected speech—obscenity—that fails to advance any of the underlying purposes of the First Amendment, while providing full First Amendment protection to sexually explicit material like *Ulysses* and *Fanny Hill*. Justice Brennan, the great lawyer, ultimately rejected the attempt of Justice Brennan, the great statesman, to forge an institutional compromise because it proved impossible to define unprotected obscenity with sufficient precision.[36] But the analytic approach pioneered in *Roth*, an approach that rejects absolutes, that seeks to accommodate seemingly irreconcilable positions by building complex institutional structures designed to protect speech that advances underlying First Amendment values, while permitting narrow regulation when absolutely necessary, became the signature Brennan approach to the First Amendment.

The Brennan approach bore more enduring fruit in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), which tailored libel law to the underlying values of the First Amendment. Faced with an effort to use state libel laws to muzzle robust

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[36] Justice Brennan signaled the abandonment of his effort to define unprotected obscenity in his dissent in *Paris Adult Theatre I* v. *Slayton*, 413 U. S. 49, 73 (1973). He never was able to persuade a majority of his colleagues to join him in declaring an end to the experiment.

press coverage of the civil rights movement, Justice Brennan, writing for the Court, once again rejected arguments at the extremes claiming either that all libel laws violated the First Amendment, or that libel was a categorical exception to the First Amendment. Instead, the Justice elaborated a complex doctrinal model designed to insulate speech about public figures (and, he believed, public issues)[37] from liability in the absence of "actual malice," while permitting traditional libel law to govern private speech that did not implicate democratic governance. The power of the *New York Times* opinion is twofold. First, Justice Brennan's rejection of absolutist approaches led to the elaboration of a complex institutional structure that seeks to accommodate the competing positions, while providing effective First Amendment protection to speech relevant to democratic governance. Second, and more generally, Justice Brennan's lucid explanation of the deep purpose of the free speech guaranty persuaded a generation, providing the intellectual underpinnings for First Amendment analysis in the years to come. No opinion has been more influential in shaping the reality of our contemporary free speech world, nor more sophisticated in bringing the lawyer's art to bear on a First Amendment problem.

Justice Brennan's mastery of the interplay between First Amendment values and the institutional structures needed to protect them is at the core of *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*. *Brandenburg* reflects a classic Brennan effort to develop legal doctrine strongly weighted in favor of individual freedom, but sufficiently flexible to permit regulation when absolutely necessary. Government restriction of speech is possible, wrote Justice Brennan for the Court in *Brandenburg*, but only if the censor meets an extremely stringent burden of justification. *Bran-*

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[37] See *Curtis Publishing Company* v. *Butts*, 388 U. S. 130, 172 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971); and *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), for Justice Brennan's views on speech about "public" or "newsworthy" issues.

denburg made clear that casual justifications for censorship rooted in the old "bad tendency" test cannot survive First Amendment scrutiny. While *Roth* and *New York Times* provide institutional solutions for specific areas of speech, *Brandenburg* offers a general theory applicable across the spectrum of free speech analysis that protects speech unless the government can prove an overwhelming need for regulation. When in doubt, *Brandenburg* directs that we err on the side of free speech.

Justice Brennan's approach to free speech culminated in his historic opinions for the Court in *Texas* v. *Johnson*, 491 U. S. 397 (1989), and *United States* v. *Eichman*, 496 U. S. 310 (1990), upholding the right to burn the American flag as an act of protest. Expressive flag burning must be presumptively protected, reasoned Justice Brennan, both because it communicates ideas relevant to democratic self-governance, and because it is an act of individual self-expression. If, Justice Brennan continued, the majority wishes to suppress such communicative activity, it must demonstrate an overwhelming social need. Mere disagreement with the message, or anger at the boorishness or offensiveness of the messenger, can never suffice.

Justice Brennan's flag burning opinions do more than close a doctrinal cycle that began a half-century earlier in *Stromberg* v. *California*, 283 U. S. 359 (1931). The identities of the five Justices who formed the majority in the *Johnson* and *Eichman* cases—JUSTICES Brennan, Marshall, Blackmun, SCALIA, and KENNEDY—demonstrate that expansive free speech protection is neither a "liberal" idea, nor "conservative" idea. It is an American idea that is Justice Brennan's most enduring gift to the Nation.

Justice Brennan was not content with re-defining the substantive elements of free speech protection. As a superb lawyer, he understood that the real world value of free speech protection, however defined, largely depends on the procedural matrix within which the substantive norms are embedded. Like a general deploying troops for battle, Justice Brennan's opinions defend the core of free speech by

building a series of procedural ramparts designed to protect the citadel. He eliminated the threat of criminal libel in *Garrison* v. *Louisiana*, 379 U. S. 64 (1964). He pioneered the First Amendment overbreadth doctrine in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), and *Gooding* v. *Wilson*, 405 U. S. 518 (1972). He explained the special First Amendment dangers of standardless discretion in *City of Houston* v. *Hill*, 482 U. S. 451 (1987), and *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750 (1988). He warned about the real world consequences of "chilling effect" in *Bantam Books* v. *Sullivan*, 372 U. S. 58 (1963). He insisted on speedy judicial review procedures in *Freedman* v. *Maryland*, 380 U. S. 51 (1965). He required First Amendment due process in *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), and *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964). And, he inveighed against the danger of prior restraints in his separate opinion in *New York Times* v. *United States*, 403 U. S. 713, 724 (1971) (the Pentagon Papers case).

Nor was Justice Brennan content to protect speech without providing judicial support for the relationships and institutions central to a vibrant First Amendment community. As with his opinions protecting speech itself, Justice Brennan resisted the lure of absolutist positions, leaving open the possibility of regulating First Amendment institutions under a rigorous showing of extremely serious social need. Building on Justice Harlan's path-breaking decision in *NAACP* v. *Alabama*, 357 U. S. 449 (1958), Justice Brennan charted the modern contours of freedom of association. In *NAACP* v. *Button*, 371 U. S. 415 (1963), writing for the Court, he held that lawyers and clients have a First Amendment right to associate freely in order to pursue litigation to advance a client's interests. In *Elrod* v. *Burns*, 427 U. S. 347 (1976), and *Rutan* v. *Republican Party*, 497 U. S. 62 (1990), Justice Brennan wrote for the Court holding that government may not penalize employees for associating with the wrong political party by allocating non-policymaking jobs on the basis of political affiliation. But, in *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), he wrote a classic Brennan individ-

ual rights opinion that asked why we care about freedom to associate in the first place. In *Roberts,* Justice Brennan held that, properly understood, freedom of association was designed to protect close-knit individual or political relationships, and did not shield impersonal economic organizations like the Jaycees from laws banning gender discrimination.

Justice Brennan viewed the press as critical participants in a system of free expression, but he was reluctant to accord the press preferred legal status. For example, in his dissent in *Dun & Bradstreet* v. *Greenmoss Builders,* 472 U. S. 749, 774 (1985), Justice Brennan rejected the notion that media defendants are entitled to more favorable treatment than non-media defendants in libel cases. Rather than accord the press a preferred legal status, Justice Brennan argued that both the press and the public enjoy a broad First Amendment right of access to important public institutions in order to assure an informed public. In his concurrences in *Richmond Newspapers, Inc.* v. *Virginia,* 448 U. S. 555, 584 (1980), and *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 572 (1976), Justice Brennan argued that the "structural" role of the First Amendment justified a broad right of access to criminal trials for both the press and public. Similarly, in *Globe Newspaper Co.* v. *Superior Court,* 457 U. S. 596 (1982), Justice Brennan wrote for the Court in invalidating a law mandating the closure of criminal trials involving sex offenses against minors. Characteristically, however Justice Brennan declined to endorse an absolute right of access, holding open the possibility that, in an appropriate case, "countervailing" interests might be sufficiently compelling to reverse the presumption of openness created by the First Amendment. In the Justice's final opinion for the Court, *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547 (1990), he recognized the importance to a vibrant First Amendment of enhancing diversity in ownership and control of the electronic press.

Justice Brennan understood that freedom of academic inquiry is central to the underlying values of the First Amendment. In *Keyishian* v. *Board of Regents,* 385 U. S. 589

(1967), his opinion for the Court provided the modern rationale for intense First Amendment protection of academic freedom, establishing the constitutional precedent that shields higher education from undue government interference.

Justice Brennan recognized that government interference with free speech could take the form of the carrot as well as the stick. Writing for the Court in *Speiser* v. *Randall*, 357 U. S. 513 (1958), he pioneered the unconstitutional conditions doctrine, holding that California could not condition the grant of a property tax exemption on the execution of a loyalty oath. In *FCC* v. *League of Women Voters*, 468 U. S. 364 (1984), he applied the unconstitutional conditions doctrine to invalidate efforts to condition government aid to public television stations on a waiver of the stations' First Amendment rights to produce privately financed editorials.

Justice Brennan also recognized that a vibrant system of free speech must protect listeners as well as speakers. In his path-breaking concurrence in *Lamont* v. *Postmaster General*, 381 U. S. 301, 307 (1965), the first case to declare an act of Congress unconstitutional under the First Amendment, Justice Brennan explicitly recognized that listeners have a separately cognizable First Amendment right to receive information, even from foreign speakers who enjoy no First Amendment rights of their own. Similarly, in *Blount* v. *Rizzi*, 400 U. S. 410 (1971), Justice Brennan, relying on the hearer's independent First Amendment rights, invalidated an excessively broad restriction on receiving information through the mails.

Finally, Justice Brennan understood that a robust system of free expression depends on the ability to assemble funds needed for effective speech. In *Riley* v. *National Federation for the Blind*, 487 U. S. 781 (1988), Justice Brennan wrote for the Court invalidating an excessively broad regulation of charitable solicitation of funds. In a portion of the Court's *per curiam* in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), authored by Justice Brennan, he insisted that restrictions on campaign financing be analyzed as if they were restrictions

on speech itself. In *FEC* v. *Massachusetts Citizens for Life*, 479 U. S. 238 (1986), Justice Brennan wrote for the Court in striking down an effort to limit the campaign spending of a small, antiabortion advocacy group. But, in his concurring opinion in *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 669 (1990), the Justice supported the constitutionality of a state ban on election spending by profit-making corporations, arguing that a ban on election spending from the corporate treasury was justified to prevent organizations amassing great wealth in the economic marketplace from gaining an unfair advantage in the political marketplace.

Justice Brennan treated religious freedom as an integral aspect of his First Amendment vision. In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), he laid the foundation for modern protection of the free exercise of religion by requiring government to establish a compelling interest before interfering with religious conscience. Justice Brennan also sought to maintain the "wall" between church and state. In *Edwards* v. *Aguillard*, 482 U. S. 578 (1987), Justice Brennan wrote for the Court in holding that efforts to mandate the teaching of "Creation Science" in the Louisiana public schools violate the Establishment Clause. His concurring opinion in *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (1963), and his dissents in *Marsh* v. *Chambers*, 463 U. S. 783, 795 (1983), and *Lynch* v. *Donnelly*, 465 U. S. 668, 694 (1984), argue for strict separation of church and state in order to preserve a vibrant private religious life free from state interference.

Justice Brennan's contribution to contemporary First Amendment law is unparalleled.[38] He re-defined its substantive contours, built its procedural ramparts, preserved

[38] Justice Brennan's son estimates that his father wrote eighty-two majority opinions in free speech cases. William J. Brennan, III, *Brennan on Brennan: The Justice's Views on the Structural Role of the First Amendment*, New Jersey Lawyer, p. 6 (August/September 1994).

its nurturing institutions, and placed its future in densely argued, brilliantly crafted doctrinal formulations linked directly to the underlying values of the First Amendment. When one compares the anemic First Amendment law that Justice Brennan faced in 1956, with the fully-developed system of free expression that Justice Brennan's opinions bequeath to the nation, it becomes clear how lucky James Madison was to have had William Brennan as his lawyer.

Justice Brennan and Equality

At the heart of Justice Brennan's jurisprudence is a profound commitment to the law's obligation to treat each person equally. Although that commitment to equality suffuses Justice Brennan's entire judicial career, it finds particular voice in four sets of Brennan opinions: opinions that seek to achieve and defend equal participation in democracy; opinions seeking to enforce racial equality before the law, especially in an educational context; opinions defining and implementing gender equality; and opinions defending affirmative action.

Justice Brennan believed that democracy requires that each citizen be accorded equal political status. He understood that rational variants of majority rule exist that treat citizens unequally, but he rejected the notion that the American experiment in democracy would adopt such an unequal structure. Accordingly, after years of malapportionment had resulted in a political system where the votes of some counted far more than the votes of others, Justice Brennan viewed the resulting unequal distribution of political status as an affront to democracy. His intense belief in political equality as the organizing principle for a true democracy is the heart of his historic opinion in *Baker* v. *Carr*, 369 U. S. 186 (1962), paving the way to the "one-person one-vote" doctrine. Chief Justice Earl Warren believed that *Baker* v. *Carr* was the most influential decision handed down during

his tenure because it re-shaped the contours of American democracy.[39]

Justice Brennan was not content merely to define an abstract norm of political equality. He understood the need for institutional reinforcements that would make the equal participation principle a reality for millions of Americans who had been excluded by generations of discrimination from full participation in the democratic process. Unlike the First Amendment area, where Justice Brennan helped forge the supporting institutional structures from the provisions of the Constitution itself, Congress provided crucial institutional mechanisms for assuring equal participation in the democratic process by enacting the Voting Rights Acts of 1965 and 1982. In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), Justice Brennan's opinion upheld the constitutionality of portions of the 1965 Act that prohibited literacy tests as a bar to voting, recognizing the imperative of overcoming years of sophisticated resistance to the enfranchisement of racial minorities. The voting rights partnership between Congress and the Court was a brilliant success, leading, for the first time since Reconstruction, to the widespread political participation of African-Americans in the states of the old Confederacy, and to a resurgence of political participation by minority groups throughout the United States. In *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), Justice Brennan's opinion for the Court established the ground rules for judicial consideration of a claim for vote dilution added in the 1982 Act, beginning the difficult process, still unfinished, of assuring that minority groups enjoy an equal opportunity to elect candidates of their choice.

Justice Brennan believed deeply in racial equality. He fought vigorously to defend the majestic principle of equal-

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[39] Earl Warren, *Mr. Justice Brennan*, 80 Harv. L. Rev. 1, 2 (1966). The special relationship between Justice Brennan and Chief Justice Warren is described in Owen Fiss, *A Life Lived Twice*, 100 Yale L. J. 1117 (1991). See also Abner J. Mikva, *Mr. Justice Brennan and the Political Process: Assessing the Legacy of Baker* v. *Carr*, 1995 U. Ill. L. Rev. 683.

ity before the law underlying *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Justice Brennan viewed *Brown*, not merely as a narrow case involving school segregation, but as the enunciation of a broad principle assuring judicial protection to members of minority groups that had been the target of sustained prejudice. Although he joined the Court two years after *Brown*, he (along with Justices Harlan and Whittaker, who also joined the Court after the *Brown* decision) embraced the *Brown* opinion explicitly in *Cooper* v. *Aaron*, 358 U. S. 1 (1958) (signed by all of the Justices). In *Green* v. *County School Board*, 391 U. S. 430 (1968), Justice Brennan, writing for the Court, finally provided the institutional mechanism for enforcing *Brown*, directing the immediate cessation of legally-imposed public school segregation "root and branch." The firmness of Justice Brennan's opinion in *Green* is widely credited with the widespread elimination of *de jure* school segregation in the ensuing year. In *Keyes* v. *School District No. 1*, 413 U. S. 189 (1973), Justice Brennan demonstrated that the principle of *Brown* was applicable to Northern schools, as well, if patterns of government decisionmaking had abetted racial segregation. While Justice Brennan was unable to persuade a majority of his colleagues that systematic inequality in financing public education violated the Federal Constitution,[40] his talent as a lawyer enabled him to assemble a majority opinion in *Plyler* v. *Doe*, 457 U. S. 202 (1982), assuring the children of undocumented aliens the right to attend public school.

During his wartime service, then-Col. Brennan had organized and observed the extraordinary contribution of women to the nation's civilian defense production effort. Forty years later, he helped chart the Constitutional guaranty of gender equality. Building on Chief Justice Burger's decision in *Reed* v. *Reed*, 404 U. S. 71 (1971), Justice Brennan, aided in no small part, as he often observed, by the then-Director of the ACLU's Women's Rights Project, Ruth Bader Ginsburg, provided a coherent theoretical basis for the

[40] *San Antonio* v. *Rodriguez*, 411 U. S. 1, 62 (1973).

Court's ban on laws discriminating on the basis of gender.[41] In his plurality opinion in *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), Justice Brennan argued that laws discriminating on the basis of gender should be subjected to the same strict scrutiny standard governing challenges to racial discrimination. In *Craig* v. *Boren*, 429 U. S. 190 (1976), and *Califano* v. *Goldfarb*, 430 U. S. 199 (1977), Justice Brennan persuasively demonstrated why laws based on gender stereotyping were unconstitutional, and enunciated an intermediate standard of scrutiny to assist the lower courts in rooting out unfair gender discrimination. Although he did not assemble a majority for his "strict scrutiny" position in *Frontiero*, Justice Brennan's powerful defense of women's rights provided the intellectual blueprint for the systematic eradication of laws discriminating on the basis of gender, a process that culminated, fittingly, in JUSTICE GINSBURG's repeated citation of Justice Brennan in her opinion for the Court in *United States* v. *Virginia*, 518 U. S. 515 (1996), invalidating the male-only admissions policy at Virginia Military Institute. Justice Brennan extended the battle against gender stereotyping to the private sphere in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989), which held that gender stereotyping also violated Title VII. In *School Board of Nassau County* v. *Arline*, 480 U. S. 273 (1987), Justice Brennan's majority opinion extended his efforts to combat stereotyping to persons with contagious diseases, holding that a person with a history of infection with a contagious disease was entitled to protection against irrational discrimination under the Rehabilitation Act of 1973.

Justice Brennan's equality jurisprudence was rooted in the real world. He knew that despite heroic efforts by the Court to eradicate hundreds of years of racial and gender discrimination, the effects of generations of widespread discrimination could not be wiped out overnight. Accordingly, Justice Brennan supported narrowly tailored efforts at af-

[41] JUSTICE GINSBURG's affectionate appreciation of Justice Brennan's life appears at 111 Harv. L. Rev. 3 (1997).

firmative action designed either to redress past wrongs, or to assure the proper functioning of important contemporary institutions. In *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), his opinion for the Court upheld the use of broad equitable remedies to undo the consequences of past discrimination. In his partial dissent and partial concurrence in *California Board of Regents* v. *Bakke*, 438 U. S. 265, 324 (1978), Justice Brennan noted that educational quality is enhanced by diversity. Accordingly, he argued that voluntary affirmative action plans by public universities designed to achieve educational diversity are constitutional. In his opinion for the Court in *United Steelworkers* v. *Weber*, 443 U. S. 193 (1978), Justice Brennan argued that Title VII's ban on racial discrimination in employment did not preclude narrowly tailored voluntary affirmative action programs by private employers designed to redress the effects of identifiable past discrimination. In *Local 28, Sheet Metal Workers International Assoc.* v. *EEOC*, 478 U. S. 421 (1986), and *Local 93, International Association of Firefighters* v. *Cleveland*, 478 U. S. 501 (1986), Justice Brennan, who had inveighed against racial discrimination by labor unions in the 1940's, authored opinions upholding rigorous affirmative action remedies designed to redress the effects of past racial discrimination. In *United States* v. *Paradise*, 480 U. S. 149 (1987), Justice Brennan's opinion for the Court upheld rigid hiring quotas designed to redress years of blatant racial discrimination in hiring and promotion. In *Johnson* v. *Transportation Agency*, 480 U. S. 616 (1987), Justice Brennan's opinion for the Court upheld the use of voluntary affirmative action techniques by a government agency to redress the effects of clearly established past discrimination against women. In his last opinion for the Court, *Metro Broadcasting* v. *FCC*, 497 U. S. 547 (1990), Justice Brennan defended the constitutionality of FCC regulations designed to favor women and minority entrepreneurs seeking broadcast licenses.

Justice Brennan understood the complex moral and legal calculus that makes affirmative action such a difficult issue. Not surprisingly, Justice Brennan's affirmative action juris-

prudence remains controversial. But, whatever the short-term fate of Justice Brennan's efforts to defend affirmative action, his affirmative action opinions reflect his consistent concern that abstract constitutional principles like equality and free speech must be translated into the real world if our Constitution is to play its proper role in the American legal system.

Justice Brennan and Procedural Fairness

Justice Brennan's twin concerns with individual dignity and institutional structure led him to pay extremely close attention to procedural matters, especially in settings where the individual is ranged against the power of the state. He believed that strict adherence to procedural fairness is a precondition to the effective protection of individual rights. One of his early opinions for the Court, *Jencks* v. *United States*, 353 U. S. 657 (1957), made the criminal process fairer by requiring prosecutors to provide an accused with prior statements by witnesses. In *Bruton* v. *United States*, 391 U. S. 123 (1968), he authored an opinion ruling that the Confrontation Clause precludes the use of the confession of a co-defendant in settings where cross-examination is unavailable, and, in his dissents in *California* v. *Green*, 399 U. S. 149, 189 (1970), and *Ohio* v. *Roberts*, 448 U. S. 56, 77 (1980), the Justice argued that the Confrontation Clause broadly precludes the use in a criminal proceeding of testimony not subject to cross examination. In *In re Winship*, 397 U. S. 358 (1970), Justice Brennan's opinion for the Court held that proof of guilt beyond a reasonable doubt in a criminal case is a fundamental tenet of due process of law. Justice Brennan understood that the reasonable doubt standard is needed to prevent individual defendants from being overwhelmed by the power of the state.

Justice Brennan believed that the guaranty of procedural due process of law advances two basic values: accuracy and individual dignity. Providing a hearing to an individual before significant adverse government action, believed Justice Brennan, not only minimizes the chance of error, it recog-

nizes the innate dignity of the individual by requiring the state to humanize the bureaucratic process. Justice Brennan's respect for individual dignity underlies his most important procedural decision, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), finding significant due process requirements applicable prior to the suspension of statutory welfare benefits. *Goldberg* v. *Kelly* is a classic example of Justice Brennan's ability to knit understanding of statutory purpose, respect for constitutional principle, and empathy for the individual into a compelling opinion. He recognized, as did the parties, that a statutorily enacted welfare benefit constitutes constitutional property in some sense. The Justice's real concern was over the timing and nature of the hearing required in connection with its suspension. Evoking the program's purpose, and the shattering consequences for individuals on welfare of even a temporary suspension, Justice Brennan's opinion in *Goldberg* v. *Kelly*, requiring an extended due process inquiry before suspension of benefits, expanded the due process revolution into the civil arena, permitting millions of individuals, ranging from welfare recipients to applicants for a driver's license, to confront the bureaucratic state on more equal terms.

Justice Brennan and the Federal Courts

Justice Brennan's opinions helped shape the modern federal court system. In *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), his opinion for the Court developed the modern view of pendent jurisdiction, enabling federal courts to act as efficient fora for the resolution of actions involving state and federal claims. *Byrd* v. *Blue Ridge Rural Electric Coop.*, 356 U. S. 525 (1958), ruled that trial by jury must be available in virtually all damage actions in the federal courts. In *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462 (1985), and in his dissent in *World-Wide Volkswagen Corporation* v. *Woodson*, 444 U. S. 286, 299 (1980), and his concurrence in *Burnham* v. *Superior Court of California*, 495 U. S. 604, 628 (1990), Justice Brennan championed a broad, functional vision of federal *in personam* jurisdiction. And, in *Colorado*

River Water Conservation District v. *United States*, 424 U. S. 800 (1976), Justice Brennan's majority opinion clarified the duty of a federal court to resolve controversies within its subject matter jurisdiction. But it was in establishing federal courts as an instrument to enforce individual rights that Justice Brennan left his most enduring mark on the Article III courts. Justice Brennan believed that the institutional attributes of the federal courts—especially lifetime tenure—rendered federal judges the natural defenders of constitutional rights against majoritarian overreaching. In a series of opinions, Justice Brennan honed the federal courts as effective fora for the enforcement of federal rights. In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court, extending Justice Douglas' opinion in *Monroe* v. *Pape*, 365 U. S. 167 (1961), construed the Civil Rights Act of 1871 to permit damage actions in federal court to redress the deprivation of federal constitutional rights by both local officials and government entities. In *Fay* v. *Noia*, 372 U. S. 391 (1963), Justice Brennan established a similar federal court enforcement presence in the context of writs of habeas corpus. Justice Brennan's expansive conception of the Great Writ permitted the district courts to function effectively for three decades as decentralized arms of the Supreme Court, enforcing the Court's criminal procedure precedents against occasionally recalcitrant state courts.

It was in the Court's historic opinion in *Cooper* v. *Aaron*, 358 U. S. 1 (1958), that Justice Brennan's vision of the federal courts emerges most clearly. In the years immediately following *Brown* v. *Board of Education*, state and local officials swore "massive resistance" to public school integration. When mobs threatened to prevent the integration of Little Rock High School, the Supreme Court responded with a unprecedented opinion, largely drafted by Justice Brennan, and signed individually by each of the nine Justices, re-affirming the Court's adherence to *Brown*, and reasserting the primacy of the Supreme Court in interpreting the Constitution. Justice Brennan's passionate defense in *Cooper* of the critical role of the Supreme Court as ultimate interpreter of the

Constitution and protector of the rights of the weak remains among the most eloquent and expansive defenses of the judicial function in our legal heritage.

In recalling Justice Brennan's view of the role of federal courts, we should not overlook the heritage of his years on the New Jersey courts, and his strong belief in the importance of state courts as protectors of individual liberties. Justice Brennan believed that every American judge has a duty to protect human rights. Just as in *Bivens* v. *Six Unknown Agents*, 403 U. S. 388 (1971), where his opinion for the Court held that federal officials could be held liable, on common law principles, for damages resulting from violations of the Bill of Rights, so he strongly urged state judges to develop independent mechanisms for protecting rights guaranteed under state constitutions. His two forceful addresses on the subject[42] were among his best-known and influential extra-judicial statements. As the only Justice with state court experience for many of his years on the Court, Justice Brennan never forgot the crucial role of state courts in the federal system.

Justice Brennan and Labor Law

Justice Brennan, the consummate labor lawyer, played a significant role in the evolution of American labor law. His numerous opinions construing the National Labor Relations Act and related statutes reflect both Justice Brennan's intense commitment to the individual, and his sophisticated understanding of the collective-bargaining process.[43] As with his constitutional opinions, Justice Brennan sought to capture the "spirit" of the National Labor Relations Act, and to develop a coherent body of case law reinforcing its underly-

[42] See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N. Y. U. L. Rev. 535 (1986).

[43] For a survey of Justice Brennan's labor law decisions, see B. Glenn George, *Visions of a Labor Lawyer: The Legacy of Justice Brennan*, 33 Wm. & Mary L. Rev. 1123 (1992).

ing goals. In his opinions for the Court in *International Association of Machinists* v. *Street*, 367 U. S. 740 (1961), and *Communications Workers of America* v. *Beck*, 487 U. S. 735 (1988), Justice Brennan reinforced the individual by holding that objecting employees were entitled to pro-rata refunds of portions of their agency shop fees used for political causes they opposed, or for other purposes unconnected with collective bargaining. In *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251 (1975), Justice Brennan's opinion reinforced the individual by holding that an employee is entitled to the presence of a union representative at a disciplinary investigation conducted by the employer. And, in *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822 (1984), the Court reinforced the individual by holding that the activities of a single employee in asserting a right rooted in a collective-bargaining agreement were protected as a form of "concerted activity".

Justice Brennan believed that lasting labor peace could not be obtained by government-imposed solutions. Whether the issue was the right of members of a multi-employer bargaining unit to respond to a selective strike with a lock-out,[44] the right of union members to engage in slow-downs,[45] or the right of an employer to hire replacement workers,[46] Justice Brennan sought to allow the parties to reach a freely bargained economic solution that reflects their relative economic power by assuring that each is free to use its economic weapons without government interference. Where, however, an employer sought to by-pass the bargaining process by imposing unilateral conditions,[47] or a union sought to ignore no-strike obligations accepted as part of the bargaining process,[48] Justice Brennan wrote for the Court in defending the bargaining process. Justice Brennan believed that the collective-bargaining process would work best if it were shielded from state or federal judicial interference. He

[44] *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U. S. 87 (1957).
[45] *NLRB* v. *Insurance Agents Int'l Union*, 361 U. S. 477 (1960).
[46] *NLRB* v. *Brown*, 380 U. S. 278 (1965).
[47] *NLRB* v. *Katz*, 369 U. S. 736 (1962).
[48] *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235 (1970).

championed broad preemption of state efforts to regulate union activity which Congress had left to the free play of economic forces,[49] and sought to minimize federal judicial intervention which would delay the commencement of the bargaining process.[50]

Justice Brennan: Archetype

Justice Brennan's contribution to American legal thought transcends even his monumental substantive achievements. It is true that he shaped the First Amendment; sketched the contours of the "one-person one-vote" rule; deepened and defended our commitment to equality; enriched our ideas of procedural fairness; taught us about the special role of the federal courts; and profoundly influenced labor law. It is equally true that his mastery of the lawyers' craft repeatedly enabled him to place his substantive insights in complex doctrinal settings designed to persuade and to deflect error in favor of freedom. But Justice Brennan's contribution is deeper than substantive outcomes or doctrinal innovations. He joins Chief Justice John Marshall and Justice Oliver Wendell Holmes, Jr., as archetypes of a conception of judging in a constitutional democracy.

Chief Justice Marshall pioneered the use of judicial review. His insight that judges, interpreting the text of a written Constitution, could effectively defend against unconstitutional action by the majority establishes Chief Justice Marshall as the founding archetype of the modern constitutional judge. Long after his substantive rulings have succumbed to the inevitable erosion of time and change, we will continue to draw inspiration from Chief Justice Marshall's grasp of institutional possibility.

Justice Oliver Wendell Holmes, Jr., helped to chart the complex relationship between judicial review and respect for

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[49] *Int'l Assn. of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976).

[50] *Leedom* v. *Kyne*, 358 U. S. 184, 191 (1958).

the will of the majority. His lifetime of effort to develop a line between deference to the majority and respect for fundamental individual rights clarified the modern role of judicial review in a vibrant democracy. Long after Justice Holmes' substantive rulings have been amended by time, we will look to him as the archetype of an even-handed constitutional judge in a functioning democracy.

Justice William J. Brennan, Jr., adds a third judicial archetype to our constitutional heritage. Justice Brennan's lifetime of passionate effort to deploy a modern, purposive reading of the Bill of Rights in defense of the innate dignity of the individual, not as an alienated island, but as a participant in a democracy of equals, has immensely enriched our conception of judging. If Justice Holmes reminds us of our duty to democracy, Justice Brennan reminds us that true democracy requires us to fulfil our duty to the individual. Healthy debate will continue over the precise role of a constitutional judge in a vibrant democracy. But time and healthy debate can only enhance Justice Brennan's status as the archetype of a Justice passionately devoted to the enforcement of individual constitutional rights. He taught us that constitutional law, brilliantly conceived and courageously enforced, can lift the human spirit.

Wherefore, it is accordingly

RESOLVED, that we, as representative members of the Bar of the Supreme Court of the United States, express our deep sadness at the death of Justice Brennan, our condolences to the Brennan family, and our profound admiration for Justice Brennan's matchless contributions to the cause of human dignity; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court, and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. I recognize the Attorney General of the United States.

Attorney General Reno addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of the Court met today to honor the memory of William J. Brennan, Jr., Associate Justice of the Supreme Court from 1956 to 1990. While recognizing Justice Brennan's extraordinary contributions to this Court and impact on the legal world in a wide variety of areas, I will limit these remarks to just a few examples of Justice Brennan's contributions to constitutional jurisprudence.

Justice Brennan served on this Court for 34 years. His role was central in the Court's expansion during that era of the substance of the Constitution's protection of individual rights, as well as in the Court's strengthening of the remedies available for the enforcement of those rights.

Justice Brennan's contributions to the development of the law are perhaps most striking in the Court's free speech cases. In his opinion for the Court in *Speiser* v. *Randall*, for example, Justice Brennan introduced the concept of the chilling effect. Explaining that the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.

Six years later came *New York Times* v. *Sullivan*, one of the leading free speech cases of this century. Justice Brennan articulated the fundamental principle of the opinion, and one of the foundations of this Court's First Amendment jurisprudence.

In oft-quoted language, he stated that the Court considers this case against the background of a profound national commitment to the principle that debate on public issues should

be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on Government and public officials.

New York Times v. *Sullivan* is a characteristic example of Justice Brennan's recognition that the provisions of the Bill of Rights and the Civil War amendments embody core values and principles that remain valid even where their vindication requires significant alteration in hitherto accepted principles of State law.

In *NAACP* v. *Button*, the Court held that the State of Virginia could not prohibit NAACP lawyers from giving legal advice to citizens of Virginia. Modern conceptions of vagueness and over-breadth trace their roots to Justice Brennan's opinion for the Court in this case, which once again relied on the chilling effect rationale he had first elaborated in *Speiser*.

In the two flag-burning cases that came before the Court in Justice Brennan's last two Terms, *Texas* v. *Johnson*, and *United States* v. *Eichman*, Justice Brennan spoke for the Court in holding the statutes unconstitutional. As Justice Brennan explained in *Johnson:* Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticisms such as Johnson's is a sign and a source of our strength.

Justice Brennan was a leading exponent of the need to maintain separation of church and State under the Establishment Clause, as articulated in his influential concurring opinion in *Abington School District* v. *Schempp*.

As he explained in that opinion, it is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with, and dependent upon, the Government.

Justice Brennan also spoke for the Court in a major Free Exercise Clause case, *Sherbert* v. *Verner*, which eloquently set forth one side of the debate regarding whether strict gov-

ernmental neutrality is sufficient to satisfy the constitutional command of the Clause.

The same underlying philosophy provided the foundation for Justice Brennan's notable contribution to the jurisprudence of the Equal Protection Clause. As is by now well-known, he wrote most of the opinion, signed by all nine Members of the Court, in *Cooper* v. *Aaron.*

Justice Brennan's seminal opinion upholding the constitutionality of substantive provisions of the Voting Rights Act of 1965 in *Katzenbach* v. *Morgan* marked a crucial milestone in the struggle for equal voting rights, and in *Thornburg* v. *Gingles,* Justice Brennan again wrote for the Court in setting forth the basic analytical structure that would govern the interpretation of the amended § 2 of the Voting Rights Act.

Perhaps even more than in the area of race discrimination, Justice Brennan's application of the Equal Protection Clause in gender discrimination cases has had a lasting impact on the law. In *Frontiero* v. *Richardson,* Justice Brennan's plurality opinion recognized that statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Although he was writing only for a plurality in *Frontiero,* the Court adopted Justice Brennan's views in *Craig* v. *Boren,* as well as his further articulation of the standard governing gender discrimination under the Equal Protection Clause. Classifications by gender must serve important governmental objectives, and must be substantially related to the achievement of those objectives.

In his ground-breaking opinion for the Court in *Goldberg* v. *Kelly,* Justice Brennan first applied due process standards to a State's decision to terminate welfare payments.

In *Shapiro* v. *Thompson,* Justice Brennan spoke for the Court in striking down longstanding State residency requirements for welfare as a burden on the right to travel.

In *Eisenstadt* v. *Baird,* Justice Brennan wrote an important opinion that was a crucial stepping stone in the develop-

ment of the right to privacy, and in *Penn Central Transportation Company* v. *New York City*, Justice Brennan set forth for the Court the fundamental analysis that continues to govern the adjudication of claims that Government regulation of private property constitutes a taking.

Justice Brennan's contributions were not limited to civil cases. He wrote for the Court in *Malloy* v. *Hogan*, holding that the Fifth Amendment's protection against compelled self-incrimination applied to the States.

In *In re Winship*, Justice Brennan, again writing for the Court, articulated the central due process principle of proof beyond a reasonable doubt in criminal cases.

In *Bruton* v. *United States*, the Court applied the Confrontation Clause to defendants who were tried jointly.

An important element in Justice Brennan's jurisprudence was his belief that remedial avenues must be available to ensure that constitutional protections can be enforced. For example, in *Baker* v. *Carr*, Justice Brennan wrote for the Court, holding that claims of malapportionment in State legislatures were justiciable.

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, Justice Brennan set forth for the Court the principles permitting implication of a cause of action directly under the Constitution.

In *Monell* v. *Department of Social Services*, Justice Brennan wrote an opinion for the Court opening the door to damage actions under 42 U. S. C. § 1983 against municipal bodies for constitutional violations.

Of course, the Court has not always accepted Justice Brennan's views and, especially in his later years on the Court, he found himself frequently in dissent. In light of the numerous areas of which Justice Brennan's work proved seminal in the development of the law in the 20th Century, the fact that the Court has not always agreed with his views should come as no surprise, but it can be safely said that, as the Court continues to address new problems in these areas, it will continue to confront the challenges presented by Justice Brennan.

Justice Brennan's judicial philosophy was based on the need for constant vigilance to apply the principles of human liberty embodied in the Bill of Rights and the Fourteenth Amendment to ever new arrangements and new institutions. His vision of the Constitution as embodying a fundamental charter of human liberty will endure and will continue to be reflected in this Court's jurisprudence.

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the Resolutions presented to you in honor and celebration of the memory of Justice William J. Brennan, Jr., be accepted by the Court, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Attorney General Reno, thank you, General Waxman, for your presentations today in memory of our late colleague and friend, William J. Brennan.

We also extend to Chairman Burt Neuborne and the members of the Committee on Resolutions, Chairman Daniel Rezneck and members of the Arrangements Committee, Judge Abner Mikva, chairman of today's meeting of the Bar, our appreciation for the Resolutions you have read today.

Your motion that they be made part of the permanent record of the Court is hereby granted.

Bill Brennan's service on this Court and his contributions to American law are an imposing achievement. He took the oath of office as a Justice of this Court on October 16, 1956, at the age of 50. After fulfilling his responsibilities under three Chief Justices and alongside 19 Associate Justices, he retired on July 20, 1990, at the age of 84.

His period of service, just a couple of months short of 34 years, is one that has been exceeded by only five other Justices in the 208-year history of this Court's existence, but Justice Brennan's profound influence on American law can't

be measured simply by counting the number of years he sat in one of the chairs behind this bench.

An accurate assessment can only be made after one has studied many of the 1,000-plus opinions he authored during his long career, many of them landmark decisions by this Court. His majority opinions alone number well over 400. These opinions, filling thousands of pages of this Court's official reports, demonstrate Justice Brennan's scholarly expertise, as well as his keen reasoning abilities.

In *Baker* v. *Carr,* for example, which the Resolutions comment on, he wrote the opinion that for the first time subjected the apportionment of State legislatures to the requirements of the Fourteenth Amendment's Equal Protection Clause.

Before this decision, controversies regarding the radically unequal voting districts that existed at the time came to the Supreme Court under what is called the Republican Guarantee Clause. The Supreme Court had declined to decide such cases because the Guarantee Clause lacked judicially manageable standards which courts could utilize in cases brought before them.

Malapportionment of State legislatures therefore had been considered political questions outside the Federal judiciary's jurisdiction and, while the Federal courts thus declined to address the problem, State legislatures were also unwilling to act, because those who benefited from the existing electoral system were the ones who were making the law.

Justice Brennan cut this Gordian knot by shifting the issue of the constitutionality of malapportionment from the Guarantee Clause to the Equal Protection Clause. His opinion in *Baker* v. *Carr* took the first step in the direction of the now well-accepted practice and principle of one person, one vote, and in so doing changed the nature of American politics forever.

Justice Brennan's opinion for the Court in *New York Times* v. *Sullivan,* also commented on in the Resolutions, has a stature in our constitutional history equal to that of *Baker* v. *Carr,* and as the Resolutions indicate, prior to the *Sullivan*

decision, slander and libel law were left to the States, with few constitutional restrictions. These rules stifled criticism of public officials, and the result was a less-informed public.

The Court in *Sullivan*, relying on freedom of speech and on what Justice Brennan called our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, sharply changed these traditional rules of libel law. The Court's opinion held that any public official who was a plaintiff in a libel case had to prove that the statements in question were defamatory, false, and made with actual malice.

These developments in libel law altered the rules of the game of American politics, and speech, as a matter of fact, making American public officials more accountable, the American media more watchful, and the American people better informed.

I've mentioned just two opinions that Justice Brennan authored that have a special place in our Nation's history. There are others that have been mentioned in the Resolution, and I'm sure still others that have not been mentioned by anyone today, because there were so many of his opinions that played an important role in the development of our law.

There are dozens of other significant opinions he wrote for the Court, and yet the great body of law for which he was responsible may be only but half of the contribution he made to this Court.

Those of us who had the pleasure of serving with Bill Brennan know what a wonderful human being he was, combining a friendly spirit with a highly analytical mind dedicated to justice. Blessed with such attributes, Justice Brennan was a force for civility and good relationship among his colleagues.

During some periods in the Court's history, differences on constitutional questions have affected personal relationships among the Justices and complicated the work of the Court. In contrast, Justice Brennan was a unifying influence on the bench, often guiding the Court to a majority or unanimous opinion.

And when the divisions on the Court on constitutional issues were too deep and broad to be bridged, Justice Brennan never allowed such disagreements to affect the way he treated his colleagues. Warm-hearted, polite, courteous, Bill Brennan inspired these same qualities in his colleagues, even those who disagreed with him.

His career exemplifies the happy truth that a judge need not be a prima donna to have a lasting influence on our country's laws. He will have a high place in the annals of this Court and in its jurisprudence.

TABLE OF CASES REPORTED

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

Cases reported before page 1001 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1001 *et seq.* are those in which orders were entered.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1997

SPENCER *v.* KEMNA, SUPERINTENDENT, WESTERN MISSOURI CORRECTIONAL CENTER, ET AL.

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

No. 96–7171. Argued November 12, 1997—Decided March 3, 1998

On October 17, 1990, petitioner began serving concurrent 3-year sentences for convictions of felony stealing and burglary, due to expire on October 16, 1993. On April 16, 1992, he was released on parole, but on September 24, 1992, that parole was revoked and he was returned to prison. Thereafter, he sought to invalidate the parole revocation, first filing habeas petitions in state court, and then the present federal habeas petition. Before the District Court addressed the merits of the habeas petition, petitioner's sentence expired, and so the District Court dismissed the petition as moot. The Eighth Circuit affirmed.

Held: The expiration of petitioner's sentence has caused his petition to be moot because it no longer presents an Article III case or controversy. Pp. 7–18.

(a) An incarcerated convict's (or a parolee's) challenge to his conviction always satisfies the case-or-controversy requirement because the incarceration (or the restriction imposed by the terms of parole) constitutes a concrete injury caused by the conviction and redressable by the conviction's invalidation. Once the sentence has expired, however, the petitioner must show some concrete and continuing injury other than the now-ended incarceration (or parole)—some "collateral consequence" of the conviction—if the suit is to be maintained. In recent decades, this Court has presumed that a wrongful conviction has continuing col-

Syllabus

lateral consequences (or, what is effectively the same, has counted collateral consequences that are remote and unlikely to occur). *Sibron* v. *New York*, 392 U. S. 40, 55–56. However, in *Lane* v. *Williams*, 455 U. S. 624, the Court refused to extend this presumption of collateral consequences to the revocation of parole. The Court adheres to that refusal, which leaves only the question whether petitioner has demonstrated collateral consequences. Pp. 7–14.

(b) Petitioner's asserted injuries-in-fact do not establish collateral consequences sufficient to state an Article III case or controversy. That his parole revocation could be used to his detriment in a future parole proceeding is merely a possibility rather than a certainty or a probability. That the revocation could be used to increase his sentence in a future sentencing proceeding is, like a similar claim rejected in *Lane*, contingent on petitioner's violating the law, being caught and convicted. Likewise speculative are petitioner's other allegations of collateral consequence—that the parole revocation could be used to impeach him should he appear as a witness in future proceedings, and that it could be used directly against him should he appear as a defendant in a criminal proceeding. Pp. 14–16.

(c) The Court finds no merit in petitioner's remaining arguments—that since he is foreclosed from pursuing a damages action under 42 U. S. C. § 1983 unless he can establish his parole revocation's invalidity, see *Heck* v. *Humphrey*, 512 U. S. 477, his action to establish that invalidity cannot be moot; that this case falls within the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review"; and that the mootness of his case should be ignored because it was caused by the dilatory tactics of the state attorney general's office and by District Court delays. Pp. 17–18.

91 F. 3d 1114, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which O'CONNOR, GINSBURG, and BREYER, JJ., joined, *post*, p. 18. GINSBURG, J., filed a concurring opinion, *post*, p. 21. STEVENS, J., filed a dissenting opinion, *post*, p. 22.

John William Simon, by appointment of the Court, 520 U. S. 1227, argued the cause and filed briefs for petitioner.

James R. Layton, Chief Deputy Attorney General of Missouri, argued the cause for respondents. With him on the brief were *Jeremiah W. (Jay) Nixon*, Attorney General, *pro*

se, and *Stephen D. Hawke, Stacy L. Anderson,* and *Michael J. Spillane,* Assistant Attorneys General.*

JUSTICE SCALIA delivered the opinion of the Court.

In his petition for a writ of habeas corpus, Randy G. Spencer seeks to invalidate a September 24, 1992, order revoking his parole. Because Spencer has completed the entire term of imprisonment underlying the parole revocation, we must decide whether his petition is moot.

I

On October 17, 1990, petitioner began serving concurrent 3-year sentences in Missouri on convictions of felony stealing and burglary. On April 16, 1992, he was released on parole, but on September 24, 1992, the Missouri Board of Probation and Parole, after hearing, issued an Order of Revocation revoking the parole. The order concluded that petitioner had violated three of the conditions, set forth in Missouri's Code of Regulations, Title 14, § 80–3.010 (1992), that a Missouri inmate must comply with in order to remain on parole:

> "NOW, THEREFORE, after careful consideration of evidence presented, said charges which warrant revocation are sustained, to wit:

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*A brief of *amici curiae* was filed for the State of California et al. by *Daniel E. Lungren,* Attorney General of California, *George Williamson,* Chief Assistant Attorney General, *Ronald A. Bass,* Senior Assistant Attorney General, and *Morris Beatus* and *Peggy S. Ruffra,* Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Heidi Heitkamp* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, and *Jan Graham* of Utah.

> "#1–LAWS: I will obey all federal and state laws, municipal and county ordinances. I will report all arrests to my Probation and Parole Officer within 48 hours.
>
> "#6–DRUGS: I will not have in my possession or use any controlled substance except as prescribed for me by a licensed medical practitioner.
>
> "#7–WEAPONS: I will, if my probation or parole is based on a misdemeanor involving firearms or explosives, or any felony charge, not own, possess, purchase, receive, sell or transport any firearms, ammunition or explosive device or any dangerous weapon as defined by federal, state or municipal laws or ordinances." App. 55–56.

The specific conduct that violated these conditions was described only by citation of the parole violation report that the board used in making its determination: "Evidence relied upon for violation is from the Initial Violation Report dated 7–27–92." *Id.*, at 56.

That report, prepared by State Probation and Parole Officer Jonathan Tintinger, summarized a June 3, 1992, police report prepared by the Kansas City, Missouri Police Department, according to which a woman had alleged that petitioner, after smoking crack cocaine with her at a local crack house and later at his own home, pressed a screwdriver against her side and raped her. According to the Kansas City report, petitioner had admitted smoking crack cocaine with the woman, but claimed that the sexual intercourse between them had been consensual. Officer Tintinger's report then described his own interview with petitioner, at which petitioner again admitted smoking crack cocaine with the woman, denied that he had pressed a screwdriver to her side, and did not respond to the allegation of rape. Finally, after noting that "Spencer [was] a registered sex offender, having been given a five-year prison sentence for Sodomy in 1983," *id.*, at 75, Officer Tintinger's report tentatively recommended that petitioner's parole be continued, but that he be

placed in a drug treatment center. The report withheld making "an ultimate recommendation based on the alleged [rape and dangerous weapon] violations" until the prosecuting attorney's office had a chance to dispose of those charges. *Id.*, at 76. "In the event formal charges are ultimately filed," it said, "a separate recommendation will be forthcoming." *Ibid.* Petitioner was never charged, but a September 14, 1992, followup report prepared by Institutional Parole Officer Peggy McClure concluded that "there [did] appear to be significant evidence that Spencer ha[d] violated the conditions of his parole as stated," and recommended that petitioner's parole be revoked. *Id.*, at 64. Officer McClure's report is not mentioned in the Order of Revocation.

On being returned to prison, petitioner began his efforts to invalidate the Order of Revocation. He first sought relief in the Missouri courts, but was rejected by the Circuit Court of De Kalb County, the Missouri Court of Appeals, and, finally, the Missouri Supreme Court. Then, on April 1, 1993, just over six months before the expiration of his 3-year sentence, petitioner filed a petition for a writ of habeas corpus, see 28 U. S. C. § 2254, in the United States District Court for the Western District of Missouri, alleging that he had not received due process in the parole revocation proceedings.[1]

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[1] Specifically, according to petitioner's brief, he contended:

"1. The Board denied him his right to a preliminary revocation hearing on the armed criminal action accusation. . . .

"2. The Board denied him a hearing on the cancellation of his conditional release date.

"3. The Board . . . :

"a. . . . denied him the right to confront and cross-examine any of the witnesses against him. . . .

"b. . . . gave him no notice that the entire case for revoking his parole would be the out-of-court statements in the violation report.

"c. . . . denied him the right to representation by a person of his choice.

"4. The Board failed to apprise him of the fact of its decision to revoke his parole, and of the evidence it relied on in doing so, for four months, when its regulations required that . . . the parolee be provided [such a]

Over petitioner's objections, the District Court granted the State two requested extensions of time to respond to the petition, deferring the deadline from June 2, 1993, until July 7, 1993. On July 14, 1993, after receiving the State's response, petitioner filed a lengthy "Motion and Request for Final Disposition of this Matter," in which he requested that the District Court expedite decision on his case in order to prevent his claim from becoming moot. Before the District Court responded to this motion, however, on August 7, 1993, petitioner was re-released on parole, and, two months after that, on October 16, 1993, the term of his imprisonment expired. On February 3, 1994, the District Court "noted" petitioner's July motion, stating that "[t]he resolution of this case will not be delayed beyond the requirements of this Court's docket." App. 127. Then, on August 23, 1995, the District Court dismissed petitioner's habeas petition. "Because," it said, "the sentences at issue here have expired, petitioner is no longer 'in custody' within the meaning of 28 U. S. C. § 2254(a), and his claim for habeas corpus relief is moot." *Id.*, at 130.

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's judgment,[2] concluding that, under our decision in *Lane* v. *Williams*, 455 U. S. 624, 632 (1982), petitioner's claim had become moot because he suffered no "collateral consequences" of the revocation order. 91 F. 3d 1114 (1996). (It acknowledged that this interpretation of *Lane* did not accord with that of the Second and Ninth Circuits in *United States* v. *Parker*, 952 F. 2d 31 (CA2 1991),

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statement within ten working days from the date of the decision." See Brief for Petitioner 5–6.

[2] By the time the case reached the Eighth Circuit, petitioner was once again in prison, this time serving a 7-year sentence for attempted felony stealing. He is still there, and the State informs us that he is scheduled to be released on parole on January 24, 1999. See Brief for Respondents 8, n. 4.

and *Robbins* v. *Christianson*, 904 F. 2d 492 (CA9 1990).) We granted certiorari. 520 U. S. 1165 (1997).

II

The District Court's conclusion that Spencer's release from prison caused his petition to be moot because it no longer satisfied the "in custody" requirement of the habeas statute was in error. Spencer was incarcerated by reason of the parole revocation at the time the petition was filed, which is all the "in custody" provision of 28 U. S. C. § 2254 requires. See *Carafas* v. *LaVallee*, 391 U. S. 234, 238 (1968); *Maleng* v. *Cook*, 490 U. S. 488, 490–491 (1989) *(per curiam)*. The more substantial question, however, is whether petitioner's subsequent release caused the petition to be moot because it no longer presented a case or controversy under Article III, § 2, of the Constitution. "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 477–478 (1990). See also *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975). This means that, throughout the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis*, *supra*, at 477.

An incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction. Once the convict's sentence has expired, however, some concrete and continuing injury other than the now-ended incarceration or parole—some "collateral consequence" of the conviction—must exist if the suit is to be maintained. See, *e. g.*, *Carafas*, *supra*, at 237–

238. In recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or, what is effectively the same, to count collateral consequences that are remote and unlikely to occur). See *Sibron* v. *New York*, 392 U. S. 40, 55–56 (1968).

The present petitioner, however, does not attack his convictions for felony stealing and burglary, which he concedes were lawful; he asserts only the wrongful termination of his parole status. The reincarceration that he incurred as a result of that action is now over, and cannot be undone. Subsistence of the suit requires, therefore, that continuing "collateral consequences" of the parole revocation be either proved or presumed. And the first question we confront is whether the presumption of collateral consequences which is applied to criminal convictions will be extended as well to revocations of parole. To answer that question, it is helpful to review the origins of and basis for the presumption.

Originally, we required collateral consequences of conviction to be specifically identified, and we accepted as sufficient to satisfy the case-or-controversy requirement only concrete disadvantages or disabilities that had in fact occurred, that were imminently threatened, or that were imposed as a matter of law (such as deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses). Thus, in *St. Pierre* v. *United States*, 319 U. S. 41 (1943) *(per curiam)*, one of the first cases to recognize collateral consequences of conviction as a basis for avoiding mootness, we refused to allow St. Pierre's challenge to a contempt citation after he had completed his 5-month sentence, because "petitioner [has not] shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied," *id.*, at 43. We rejected St. Pierre's argument that the possibility that "the judgment [could] impair his credibility as [a] witness in any future legal proceeding" was such a penalty or disability, because "the moral stigma of a judgment which no

longer affects legal rights does not present a case or controversy for appellate review." *Ibid.* Similarly, in *Carafas* v. *LaVallee*, we permitted an individual to continue his challenge to a criminal conviction only after identifying specific, concrete collateral consequences that attached to the conviction as a matter of law:

> "It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror." 391 U. S., at 237 (footnotes and citation omitted).

See also *Fiswick* v. *United States*, 329 U. S. 211, 221–223 (1946) (conviction rendered petitioner liable to deportation and denial of naturalization, and ineligible to serve on a jury, vote, or hold office); *United States* v. *Morgan*, 346 U. S. 502 (1954) (conviction had been used to increase petitioner's current sentence under state recidivist law); *Parker* v. *Ellis*, 362 U. S. 574, 576 (1960) (Harlan, J., concurring) (since petitioner's other, unchallenged convictions took away the same civil rights as the conviction under challenge, the challenge was moot); *Ginsberg* v. *New York*, 390 U. S. 629, 633, n. 2 (1968) (conviction rendered petitioner liable to revocation of his license to operate luncheonette business). Cf. *Tannenbaum* v. *New York*, 388 U. S. 439 (1967) *(per curiam); Jacobs* v. *New York*, 388 U. S. 431 (1967) *(per curiam)*.

The gateway to abandonment of this fastidious approach to collateral consequences was *Pollard* v. *United States*, 352 U. S. 354 (1957). There, in allowing a convict who had already served his time to challenge the length of his sentence, we said, almost offhandedly, that "[t]he possibility of consequences collateral to the imposition of sentence [was] sufficiently substantial to justify our dealing with the merits," *id.*, at 358—citing for that possibility an earlier case involving consequences for an alien (which there is no reason to

believe Pollard was), see *Pino* v. *Landon*, 349 U. S. 901 (1955). In *Sibron* v. *New York*, we relied upon this opinion to support the conclusion that our jurisprudence had "abandoned all inquiry into the actual existence of collateral consequences and in effect presumed that they existed." 392 U. S., at 55 (citing *Pollard*, *supra*).[3] Thereafter, and in summary fashion, we proceeded to accept the most generalized and hypothetical of consequences as sufficient to avoid mootness in challenges to conviction. For example, in *Evitts* v. *Lucey*, 469 U. S. 387 (1985), we held that respondent's habeas challenge had not become moot despite the expiration of his sentence and despite the fact that "his civil rights, including suffrage and the right to hold public office, [had been] restored," *id.*, at 391, n. 4. Since he had not been pardoned, we said, "some collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony he might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future." *Ibid.* See also *Benton* v. *Maryland*, 395 U. S. 784, 790–791 (1969); *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108, n. 3 (1977) *(per curiam); Minnesota* v. *Dickerson*, 508 U. S. 366 (1993).

There are several relevant observations to be made regarding these developments: First, it must be acknowledged that the practice of presuming collateral consequences (or of accepting the remote possibility of collateral consequences as adequate to satisfy Article III) sits uncomfortably beside the "long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather

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[3] *Sibron* also purported to rely on *United States* v. *Morgan*, 346 U. S. 502 (1954), and *Fiswick* v. *United States*, 329 U. S. 211 (1946), as establishing that a "mere possibility" of collateral consequences suffices, see 392 U. S., at 54–55, but as we have described, those cases involved much more than that.

'must affirmatively appear in the record,'" and that "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 231 (1990) (citations omitted). The practice of presuming collateral consequences developed during an era in which it was thought that the only function of the constitutional requirement of standing was "to assure that concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). *Sibron* appears in the same volume of the United States Reports as *Flast* v. *Cohen*, 392 U. S. 83 (1968), which said:

> "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.*, at 100–101.

See *Benton* v. *Maryland*, *supra*, at 790–791 ("Although this possibility [of collateral consequences] may well be a remote one, it is enough to give this case an adversary cast and make it justiciable"). That parsimonious view of the function of Article III standing has since yielded to the acknowledgment that the constitutional requirement is a "means of 'defin[ing] the role assigned to the judiciary in a tripartite allocation of power,'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*,

454 U. S. 464, 474 (1982),[4] and "a part of the basic charter . . . provid[ing] for the interaction between [the federal] government and the governments of the several States," *id.*, at 476. See also *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–560 (1992). And finally, of particular relevance to the question whether the practice of presuming collateral consequences should be extended to challenges of parole termination: In the context of criminal conviction, the presumption of significant collateral consequences is likely to comport with reality. As we said in *Sibron*, it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." 392 U. S., at 55. The same cannot be said of parole revocation.

For these reasons, perhaps, we have hitherto refused to extend our presumption of collateral consequences (or our willingness to accept hypothetical consequences) to the area of parole revocation. In *Lane* v. *Williams*, 455 U. S. 624 (1982), we rejected the contention of convicted felons who had completed their sentences that their challenges to their sentences of three years' mandatory parole at the conclusion of their fixed terms of incarceration (which parole they had violated) were not moot because the revocations of parole could be used to their detriment in future parole proceedings should they ever be convicted of other crimes. We said:

> "The doctrine of *Carafas* and *Sibron* is not applicable in this case. No civil disabilities such as those present in *Carafas* result from a finding that an individual has violated his parole." *Id.*, at 632.
>
> "*[Carafas]* concerned existing civil disabilities; as a result of the petitioner's conviction, he was presently

[4] The internal quotation is from a portion of *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968), which recited this to be the second purpose of the case-or-controversy requirement in general. The opinion later said that the constitutionally required minimum of standing relates to the first purpose alone. *Id.*, at 100–101, quoted in text.

> barred from holding certain offices, voting in state elections, and serving as a juror. This case involves no such disability." *Id.*, at 632–633, n. 13.

It was not enough that the parole violations found by the revocation decision would enable the parole board to deny respondents parole in the future, see *id.*, at 639–640 (Marshall, J., dissenting) (quoting Illinois rules governing denial of parole). For such violations "[did] not render an individual ineligible for parole under Illinois law[,] [but were] simply one factor, among many, that may be considered by the parole authority . . . ." *Id.*, at 633, n. 13. And, in any event, "[t]he parole violations that remain a part of respondents' records cannot affect a subsequent parole determination unless respondents again violate state law, are returned to prison, and become eligible for parole. Respondents themselves are able—and indeed required by law—to prevent such a possibility from occurring." *Ibid.* In addition, we rejected as collateral consequences sufficient to keep the controversy alive the possibility that the parole revocations would affect the individuals' "employment prospects, or the sentence imposed [upon them] in a future criminal proceeding." *Id.*, at 632. These "nonstatutory consequences" were dependent upon "[t]he discretionary decisions . . . made by an employer or a sentencing judge," which are "not governed by the mere presence or absence of a recorded violation of parole," but can "take into consideration, and are more directly influenced by, the underlying conduct that formed the basis for the parole violation." *Id.*, at 632–633.[5]

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[5] The Court pointed out in *Lane* that respondents were attacking only their parole sentences, and not their convictions, see 455 U. S., at 631. That was evidently for the purpose of excluding direct application of *Sibron*. The Court also pointed out, near the conclusion of its opinion, that respondents were not attacking "the finding that they violated the terms of their parole." 455 U. S., at 633. This is not framed as an independent ground for the decision, and if it were such most of the opinion would have

We adhere to the principles announced in *Lane,* and decline to presume that collateral consequences adequate to meet Article III's injury-in-fact requirement resulted from petitioner's parole revocation. The question remains, then, whether petitioner demonstrated such consequences.

III

Petitioner asserts four concrete injuries-in-fact attributable to his parole revocation. First, he claims that the revocation could be used to his detriment in a future parole proceeding. This possibility is no longer contingent on petitioner's again violating the law; he has already done so, and is currently serving a 7-year term of imprisonment. But it is, nonetheless, still a possibility rather than a certainty or even a probability. Under Missouri law, as under the Illinois law addressed in *Lane,* a prior parole revocation "[does] not render an individual ineligible for parole[,] [but is] simply one factor, among many, that may be considered by the parole authority in determining whether there is a substantial risk that the parole candidate will not conform to reasonable conditions of parole." 455 U. S., at 633, n. 13. Under Missouri law, "[w]hen in its opinion there is reasonable probability that an offender . . . can be released without detriment to the community or himself, the board may in its discretion release or parole such person." Mo. Rev. Stat. § 217.690 (1996). The Missouri Supreme Court has said that this statute "giv[es] the Board 'almost unlimited discretion' in whether to grant parole release." *Shaw* v. *Missouri Board of Probation and Parole,* 937 S. W. 2d 771, 772 (1997).

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been unnecessary. The Court did not contest the dissenters' contention that "respondents . . . seek to have the parole term declared void, or expunged," *id.,* at 635 (Marshall, J., dissenting), which "would have the effect of removing respondents' parole-violation status and would relieve respondents of the collateral consequences flowing from this status," *id.,* at 636, n. 1.

Petitioner's second contention is that the Order of Revocation could be used to increase his sentence in a future sentencing proceeding. A similar claim was likewise considered and rejected in *Lane*, because it was contingent upon respondents' violating the law, getting caught, and being convicted. "Respondents themselves are able—and indeed required by law—to prevent such a possibility from occurring." *Lane*, *supra*, at 633, n. 13. We of course have rejected analogous claims to Article III standing in other contexts.

> "[W]e are . . . unable to conclude that the case-or-controversy requirement is satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws. We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction." *O'Shea* v. *Littleton*, 414 U. S. 488, 497 (1974).

See also *Los Angeles* v. *Lyons*, 461 U. S. 95, 102–103 (1983).

For similar reasons, we reject petitioner's third and fourth contentions, that the parole revocation (and, specifically, the "finding of a parole violation for forcible rape and armed criminal action," see Brief for Petitioner 34) could be used to impeach him should he appear as a witness or litigant in a future criminal or civil proceeding; or could be used against him directly, pursuant to Federal Rule of Evidence 405[6] (or Missouri's state-law equivalent, see *Durbin* v. *Cassalo*, 321 S. W. 2d 23, 26 (Mo. App. 1959)) or Federal Rule of Evidence 413,[7] should he appear as a defendant in a criminal proceed-

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[6] Federal Rule of Evidence 405 provides, in relevant part, that "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may . . . be made of specific instances of that person's conduct."

[7] Federal Rule of Evidence 413 provides, in relevant part, that "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or of-

ing. It is purely a matter of speculation whether such an appearance will ever occur. See *O'Shea*, *supra*, at 496–497. Moreover, as to the possibility that petitioner (or a witness appearing on his behalf) would be impeached with the parole revocation, it is far from certain that a prosecutor or examining counsel would decide to use the parole revocation (a "discretionary decision" similar to those of the sentencing judge and employer discussed in *Lane*, *supra*, at 632–633); and, if so, whether the presiding judge would admit it, particularly in light of the far more reliable evidence of two past criminal convictions that would achieve the same purpose of impeachment, see *State* v. *Comstock*, 647 S. W. 2d 163, 165 (Mo. App. 1983). Indeed, it is not even clear that a Missouri court could legally admit the parole revocation to impeach petitioner. See *State* v. *Newman*, 568 S. W. 2d 276, 278–282 (Mo. App. 1978). And as to the possibility that the parole revocation could be used directly against petitioner should he be the object of a criminal prosecution, it is at least as likely that the conduct underlying the revocation, rather than the revocation itself (which does not recite the specific conduct constituting the parole violation) would be used.[8]

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fenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

[8] The dissent asserts that "a finding that an individual has committed a serious felony" renders the "interest in vindicating . . . reputation . . . constitutionally [s]ufficient" to avoid mootness. *Post*, at 23, 24. We have obviously not regarded it as sufficient in the past—even when the finding was not that of a parole board, but the much more solemn condemnation of a full-dress criminal conviction. For that would have rendered entirely unnecessary the inquiry into concrete collateral consequences of conviction in many of our cases, see, *e. g.*, *Benton* v. *Maryland*, 395 U. S. 784, 790–791 (1969); *Carafas* v. *LaVallee*, 391 U. S. 234, 237–238 (1968); *Fiswick*, 329 U. S., at 220–222, and unnecessary as well (at least as to felony convictions) *Sibron*'s presumption of collateral consequences, see *supra*, at 8–10. Of course there is no reason in principle for limiting the dissent's novel theory to felonies: If constitutionally adequate damage to reputation is produced by a parole board's finding of one more felony by a current inmate who

IV

Petitioner raises three more arguments, none of which seems to us well taken. First, he contends that since our decision in *Heck* v. *Humphrey*, 512 U. S. 477 (1994), would foreclose him from pursuing a damages action under Rev. Stat. § 1979, 42 U. S. C. § 1983, unless he can establish the invalidity of his parole revocation, his action to establish that invalidity cannot be moot. This is a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available. It is not certain, in any event, that a § 1983 damages claim would be foreclosed. If, for example, petitioner were to seek damages "for using the wrong procedures, not for reaching the wrong result," see *Heck*, 512 U. S., at 482–483, and if that procedural defect did not "necessarily imply the invalidity of" the revocation, see *id.*, at 487, then *Heck* would have no application all. See also *Edwards* v. *Balisok*, 520 U. S. 641, 645–649 (1997); *id.*, at 649–650 (GINSBURG, J., concurring).

Secondly, petitioner argues in his reply brief that this case falls within the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." Reply Brief for Petitioner 5. "[T]he capable-of-repetition doctrine applies only in exceptional situations," *Lyons*, *supra*, at 109, "where the following two circumstances [are] simultaneously present: '"(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again,"'" *Lewis*, 494 U. S., at 481 (quoting *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982) *(per curiam)*, in turn quoting *Weinstein* v.

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has spent six of the last seven years in custody on three separate felony convictions, surely it is also produced by the criminal misdemeanor conviction of a model citizen. Perhaps for obvious reasons, the damage to reputation upon which the dissent would rest its judgment has not been asserted before us by petitioner himself.

Bradford, 423 U. S. 147, 149 (1975) *(per curiam)*); see also *Norman* v. *Reed*, 502 U. S. 279, 288 (1992). Petitioner's case satisfies neither of these conditions. He has not shown (and we doubt that he could) that the time between parole revocation and expiration of sentence is always so short as to evade review. Nor has he demonstrated a reasonable likelihood that he will once again be paroled and have that parole revoked.

Finally, petitioner argues that, even if his case is moot, that fact should be ignored because it was caused by the dilatory tactics of the state attorney general's office and the delay of the District Court. But mootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong. As for petitioner's concern that law enforcement officials and district judges will repeat with impunity the mootness-producing abuse that he alleges occurred here: We are confident that, as a general matter, district courts will prevent dilatory tactics by the litigants and will not unduly delay their own rulings; and that, where appropriate, corrective mandamus will issue from the courts of appeals.

* * *

For the foregoing reasons, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE O'CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring.

I join the Court's opinion as well as the judgment, though I do so for an added reason that the Court does not reach, but which I spoke to while concurring in a prior case. One of Spencer's arguments for finding his present interest ade-

quate to support continuing standing despite his release from custody is, as he says, that he may not now press his claims of constitutional injury by action against state officers under 42 U. S. C. § 1983. He assumes that *Heck* v. *Humphrey*, 512 U. S. 477 (1994), held or entails that conclusion, with the result that holding his habeas claim moot would leave him without any present access to a federal forum to show the unconstitutionality of his parole revocation. If Spencer were right on this point, his argument would provide a reason, whether or not dispositive, to recognize continuing standing to litigate his habeas claim. But he is wrong; *Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim, and for reasons explained in my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any such result. For all that appears here, then, Spencer is free to bring a § 1983 action, and his corresponding argument for continuing habeas standing falls accordingly.

The petitioner in *Heck* was an inmate with a direct appeal from his conviction pending, who brought a § 1983 action for damages against state officials who were said to have acted unconstitutionally in arresting and prosecuting him. Drawing an analogy to the tort of malicious prosecution, we ruled that an inmate's § 1983 claim for damages was unavailable because he could not demonstrate that the underlying criminal proceedings had terminated in his favor.

To be sure, the majority opinion in *Heck* can be read to suggest that this favorable-termination requirement is an element of any § 1983 action alleging unconstitutional conviction, whether or not leading to confinement and whether or not any confinement continued when the § 1983 action was filed. *Heck* v. *Humphrey*, 512 U. S., at 483–484, 486–487. Indeed, although *Heck* did not present such facts, the majority acknowledged the possibility that even a released prisoner might not be permitted to bring a § 1983 action implying

the invalidity of a conviction or confinement without first satisfying the favorable-termination requirement. *Id.*, at 490, n. 10.

Concurring in the judgment in *Heck*, I suggested a different rationale for blocking an inmate's suit with a requirement to show the favorable termination of the underlying proceedings. In the manner of *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), I read the "general" § 1983 statute in light of the "specific" federal habeas statute, which applies only to persons "in custody," 28 U. S. C. § 2254(a), and requires them to exhaust state remedies, § 2254(b). *Heck* v. *Humphrey*, 512 U. S., at 497. I agreed that "the statutory scheme must be read as precluding such attacks," *id.*, at 498, not because the favorable-termination requirement was necessarily an element of the § 1983 cause of action for unconstitutional conviction or custody, but because it was a "simple way to avoid collisions at the intersection of habeas and § 1983." *Ibid.*

I also thought we were bound to recognize the apparent scope of § 1983 when no limitation was required for the sake of honoring some other statute or weighty policy, as in the instance of habeas. Accordingly, I thought it important to read the Court's *Heck* opinion as subjecting only inmates seeking § 1983 damages for unconstitutional conviction or confinement to "a requirement analogous to the malicious-prosecution tort's favorable-termination requirement," *id.*, at 500, lest the plain breadth of § 1983 be unjustifiably limited at the expense of persons not "in custody" within the meaning of the habeas statute. The subsequent case of *Edwards* v. *Balisok*, 520 U. S. 641 (1997), was, like *Heck* itself, a suit by a prisoner and so for present purposes left the law where it was after *Heck*. Now, as then, we are forced to recognize that any application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of

§ 1983 if brought by a convict free of custody (as, in this case, following service of a full term of imprisonment), when exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.*

The better view, then, is that a former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy. Thus, the answer to Spencer's argument that his habeas claim cannot be moot because *Heck* bars him from relief under § 1983 is that *Heck* has no such effect. After a prisoner's release from custody, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief.

JUSTICE GINSBURG, concurring.

The Court held in *Heck* v. *Humphrey*, 512 U. S. 477 (1994), that a state prisoner may not maintain an action under 42 U. S. C. § 1983 if the direct or indirect effect of granting relief would be to invalidate the state sentence he is serving. I joined the Court's opinion in *Heck*. Mindful of "real-life example[s]," among them this case, cf. 512 U. S., at 490, n. 10, I have come to agree with JUSTICE SOUTER's reasoning: Individuals without recourse to the habeas statute because they are not "in custody" (people merely fined or whose sentences have been fully served, for example) fit within § 1983's "broad reach." See *id.*, at 503 (SOUTER, J., concurring in judgment); cf. *Henslee* v. *Union Planters Nat. Bank & Trust*

*The convict given a fine alone, however onerous, or sentenced to a term too short to permit even expeditious litigation without continuances before expiration of the sentence, would always be ineligible for § 1983 relief. See *Heck* v. *Humphrey*, 512 U. S. 477, 500 (1994) (SOUTER, J., concurring in judgment).

Co., 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late."). On that understanding of the state of the law, I join both the Court's opinion and JUSTICE SOUTER's concurring opinion in this case.

JUSTICE STEVENS, dissenting.

An official determination that a person has committed a crime may cause two different kinds of injury. It may result in tangible harms such as imprisonment, loss of the right to vote or to bear arms, and the risk of greater punishment if another crime is committed. It may also severely injure the person's reputation and good name.

In holding that petitioner's case is moot, the Court relies heavily on our opinion in *Lane* v. *Williams*, 455 U. S. 624 (1982) (opinion of STEVENS, J.). See *ante*, at 12–16. *Lane*, however, is inapposite. In *Lane*, the respondents did not seek to challenge the factual findings underlying their parole revocations. 455 U. S., at 633. Instead, they simply sought to challenge their sentences; yet because they had been released by the time the case reached us, the case was moot. *Id.*, at 631. "Through the mere passage of time, respondents ha[d] obtained all the relief that they sought." *Id.*, at 633.

In this case, petitioner challenges the factual findings on which his parole revocation was based. His parole was revoked based on an official determination that he committed the crime of forcible rape.[1] Assuming, as the Court does,

[1] Throughout the parole revocation proceedings, it was alleged that petitioner violated three parole conditions: Parole Condition #1, because he allegedly was guilty of rape; Parole Condition #6, because he allegedly used or possessed crack cocaine; and Parole Condition #7, because he allegedly used or possessed a dangerous weapon (*i. e.*, the screwdriver allegedly used during the rape). App. 60–64 (alleging violations of Conditions #1, #6, and #7); *id.*, at 72–76 (same); *id.*, at 112–114 (alleging violations of Conditions #1 and #6). Thus, when the parole revocation board declared, "after careful consideration of evidence presented," that petitioner vio-

that he had standing to bring that challenge while he remained in prison, the mootness question, as framed by the Court, is whether he continues to have "'a "personal stake in the outcome" of the lawsuit'" that is likely to be redressed by a favorable decision. *Ante*, at 7.[2]

Given the serious character of a finding that petitioner is guilty of forcible rape, that question must be answered affirmatively. It may well be true that many prisoners have already caused so many self-inflicted wounds to their good names that an additional finding of guilt may have only a *de minimis* impact on their reputations. I do not believe, however, that one can say that about a finding that an individual has committed a serious felony.[3] Moreover, even if one may question the wisdom of providing a statutory remedy to redress such an injury, I surely cannot accept the view

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lated Parole Conditions #1, #6, and #7, *id.*, at 55–56, it found that petitioner was guilty of forcible rape. See also Brief for Respondents 1 ("Spencer violated condition #1 by committing the crime of rape"). In addition, even apart from the rape finding, it is undisputed that the board found that petitioner used or possessed drugs, and that he used or possessed a dangerous weapon (which was only alleged to have been used during the rape). App. 55–56.

[2] The "personal stake in the outcome" formulation of the test, which has been repeatedly quoted in our cases, was first articulated in this excerpt from the Court opinion in *Baker* v. *Carr*, 369 U. S. 186, 204 (1962): "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."

[3] See, *e. g.*, *Liberty Lobby, Inc.* v. *Anderson*, 746 F. 2d 1563, 1568 (CADC 1984) (opinion of Scalia, J.) ("It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity. . . . Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential"), vacated and remanded, on other grounds, 477 U. S. 242 (1986).

that an interest in vindicating one's reputation is constitutionally insufficient[4] to qualify as a "personal stake in the outcome."[5] Indeed, in light of the fact that we have held

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[4] While an individual may not have a "property" or "liberty" interest in his or her reputation so as to trigger due process protections, *Paul* v. *Davis*, 424 U. S. 693, 712 (1976), that question is obviously distinct from whether an interest in one's reputation is sufficient to defeat a claim of mootness.

[5] As we have stated: "[T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974) (quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring)); see also *Milkovich* v. *Lorain Journal Co.*, 497 U. S. 1, 12 (1990) ("'[H]e that filches from me my good name/Robs me of that which not enriches him, And makes me poor indeed'" (quoting W. Shakespeare, Othello, act III, sc. 3)); *Paul* v. *Davis*, 424 U. S., at 706 ("The Court has recognized the serious damage that could be inflicted by branding a government employee as 'disloyal,' and thereby stigmatizing his good name"); *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437 (1971) (emphasizing the importance of "a person's good name, reputation, honor, [and] integrity"; holding that respondent was entitled to due process before notices were posted stating that he was prohibited from buying or receiving alcohol); *In re Winship*, 397 U. S. 358, 363–364 (1970) ("[B]ecause of the certainty that [one found guilty of criminal behavior] would be stigmatized by the conviction . . . , a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt"); *Wieman* v. *Updegraff*, 344 U. S. 183, 190–191 (1952) ("There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy").

Indeed, vindicating one's reputation is the main interest at stake in a defamation case, and that interest has always been held to constitute a sufficient "personal stake." See, *e. g.*, *Paul*, 424 U. S., at 697 ("[R]espondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State. Imputing criminal behavior to an individual is generally considered defamatory *per se*, and actionable without proof of special damages"); *Gertz*, 418 U. S., at 349–350 ("We need not define 'actual injury' . . . . Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary

that an interest in one's reputation is sufficient to confer standing,[6] it necessarily follows that such an interest is sufficient to defeat a claim of mootness.[7]

Accordingly, I respectfully dissent.[8]

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types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering"); L. Eldredge, Law of Defamation § 53, pp. 293–294 (1978) ("There is no doubt about the historical fact that the interest in one's good name was considered an important interest requiring legal protection more than a thousand years ago; and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection").

[6] *Meese* v. *Keene*, 481 U. S. 465, 472–477 (1987).

[7] There are compelling reasons for a court to consider petitioner's challenge to the parole board's findings sooner rather than later. As we stated in a related context:

"The question of the validity of a criminal conviction can arise in many contexts, and the sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover, litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action." *Sibron* v. *New York*, 392 U. S. 40, 56–57 (1968) (citation omitted).

I also believe that, on the facts of this case, there are sufficient tangible consequences to the parole board's findings so as to defeat a claim of mootness.

[8] Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as JUSTICE SOUTER explains, that he may bring an action under 42 U. S. C. § 1983.

Syllabus

LEXECON INC. ET AL. *v.* MILBERG WEISS BERSHAD HYNES & LERACH ET AL.

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

No. 96–1482. Argued November 10, 1997—Decided March 3, 1998

Petitioners, a law and economics consulting firm and one of its principals (collectively, Lexecon), were defendants in a class action brought against Charles Keating and the American Continental Corporation in connection with the failure of Lincoln Savings and Loan. It and other actions arising out of that failure were transferred for pretrial proceedings to the District of Arizona under 28 U. S. C. § 1407(a), which authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings," but provides that the Panel "shall" remand any such action to the original district "at or before the conclusion of such pretrial proceedings." Before the pretrial proceedings ended, the plaintiffs and Lexecon reached a "resolution," and the claims against Lexecon were dismissed. Subsequently, Lexecon brought this diversity action in the Northern District of Illinois against respondent law firms (hereinafter Milberg and Cotchett), claiming several torts, including defamation, arising from the firms' conduct as counsel for the class-action plaintiffs. Milberg and Cotchett moved for, and the Panel ordered, a § 1407(a) transfer to the District of Arizona. After the remaining parties to the Lincoln Savings litigation reached a final settlement, Lexecon moved the Arizona District Court to refer the case back to the Panel for remand to the Northern District of Illinois. The law firms filed a countermotion requesting the Arizona District Court to invoke § 1404(a) to "transfer" the case to itself for trial. With only the defamation claim against Milberg remaining after a summary judgment ruling, the court assigned the case to itself for trial and denied Lexecon's motion to request the Panel to remand. The Ninth Circuit then denied Lexecon's petition for mandamus, refusing to vacate the self-assignment order and require remand because Lexecon would have the opportunity to obtain relief from the transfer order on direct appeal. After Milberg won a judgment on the defamation claim, Lexecon again appealed the transfer order. The Ninth Circuit affirmed on the ground that permitting the transferee court to assign a case to itself upon completion of its pretrial work was not only consistent with the statutory language but conducive to efficiency.

Syllabus

Held: A district court conducting pretrial proceedings pursuant to § 1407(a) has no authority to invoke § 1404(a) to assign a transferred case to itself for trial. Pp. 32–43.

(a) Two sources of ostensible authority for Milberg's espousal of self-assignment authority are that the Panel has explicitly authorized such assignments in Panel Rule 14(b), which it issued in reliance on its rule-making authority; and that § 1407(a)'s limitations on a transferee court's authority to the conduct of "coordinated or consolidated" proceedings and to "pretrial proceedings" raise no obvious bar to a transferee's retention of a case under § 1404. Beyond this point, however, the textual pointers reverse direction, for § 1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings end. The Panel's remand instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion. *Anderson* v. *Yungkau*, 329 U. S. 482, 485. Reading the statute whole, this Court has to give effect to this plain command, see *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 476, even if that will reverse the longstanding practice under the statute and the rule, see *Metropolitan Stevedore Co.* v. *Rambo*, 515 U. S. 291, 300. Pp. 32–37.

(b) None of Milberg's additional arguments based on the statute's language and legislative history can unsettle § 1407's straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel's Rule 14(b). Pp. 37–41.

(c) Milberg errs in arguing that a remedy for Lexecon can be omitted under the harmless-error doctrine. That § 1407's strict remand requirement creates an interest too substantial to be left without a remedy is attested by a congressional judgment that no discretion is to be left to a court faced with an objection to a statutory violation. The § 1407 mandate would lose all meaning if a party who continuously objected to an uncorrected categorical violation of the mandate could obtain no relief at the end of the day. *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, distinguished. Pp. 41–43.

102 F. 3d 1524, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, which was unanimous except insofar as SCALIA, J., did not join Part II–C.

Michael K. Kellogg argued the cause for petitioners. With him on the briefs were *Mark C. Hansen*, *Sean A. Lev*,

Stephen M. Shapiro, *Michele L. Odorizzi*, and *Kenneth S. Geller*.

Jerold S. Solovy argued the cause for respondents. With him on the brief for respondents Milberg Weiss Bershad Hynes & Lerach et al. were *Ronald L. Marmer*, *C. John Koch*, *Jeffrey T. Shaw*, *Paul M. Smith*, *Thomas J. Perrelli*, *Arthur R. Miller*, and *Michael Meehan*. *Gerald Maltz* filed a brief for respondents Cotchett et al.*

JUSTICE SOUTER delivered the opinion of the Court.†

Title 28 U. S. C. § 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings," but imposes a duty on the Panel to remand any such action to the original district "at or before the conclusion of such pretrial proceedings." *Ibid.* The issue here is whether a district court conducting such "pretrial proceedings" may invoke § 1404(a) to assign a transferred case to itself for trial. We hold it has no such authority.

I

In 1992, petitioners, Lexecon Inc., a law and economics consulting firm, and one of its principals (collectively, Lexecon), brought this diversity action in the Northern District of

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*Briefs of *amici curiae* urging reversal were filed for the Regents of the University of California by *Shirley M. Hufstedler*, *Harold J. McElhinny*, and *P. Martin Simpson, Jr.;* and for the Washington Legal Foundation by *Daniel J. Popeo*.

Briefs of *amici curiae* urging affirmance were filed for the Aerospace Industries Association of America, Inc., by *Thomas J. McLaughlin* and *Mac S. Dunaway;* for the American Council of Life Insurance et al. by *Theodore B. Olson*, *Theodore J. Boutrous, Jr.*, *Phillip E. Stano*, *Craig Berrington*, and *Phillip Schwartz;* for Eli Lilly and Co. by *Charles E. Lipsey;* for Owens-Illinois, Inc., by *James D. Miller;* and for Credit Suisse First Boston Corp. et al. by *Joseph T. McLaughlin* and *Monroe Sonnenborn*.

†JUSTICE SCALIA joins this opinion, except as to Part II–C.

Illinois against respondents, the law firms of Milberg Weiss Bershad Hynes & Lerach (Milberg) and Cotchett, Illston & Pitre (Cotchett), claiming malicious prosecution, abuse of process, tortious interference, commercial disparagement, and defamation. The suit arose out of the firms' conduct as counsel in a prior class action brought against Charles Keating and the American Continental Corporation for violations of the securities and racketeering laws. Lexecon also was a defendant, charged with giving federal and state banking regulators inaccurate and misleading reports about the financial condition of the American Continental Corporation and its subsidiary Lincoln Savings and Loan. Along with other actions arising out of the failure of Lincoln Savings, the case against Lexecon was transferred under § 1407(a) for pretrial proceedings before Judge Bilby in the District of Arizona, where the matters so consolidated were known as the Lincoln Savings litigation. Before those proceedings were over, the class-action plaintiffs and Lexecon reached what they termed a "resolution," under which the claims against Lexecon were dismissed in August 1992.

Lexecon then filed this case in the Northern District of Illinois charging that the prior class action terminated in its favor when the respondent law firms' clients voluntarily dismissed their claims against Lexecon as meritless, amounting to nothing more, according to Lexecon, than a vendetta. When these allegations came to the attention of Judge Bilby, he issued an order stating his understanding of the terms of the resolution agreement between Lexecon and the class-action plaintiffs. 102 F. 3d 1524, 1529, and n. 2 (CA9 1996). Judge Bilby's characterization of the agreement being markedly at odds with the allegations in the instant action, Lexecon appealed his order to the Ninth Circuit.

Milberg, joined by Cotchett, then filed a motion under § 1407(a) with the Judicial Panel on Multidistrict Litigation seeking transfer of this case to Judge Bilby for consolidation with the Lincoln Savings litigation. Although the judge en-

tered a recusal because of the order he had taken it upon himself to issue, the law firms nonetheless renewed their motion for a § 1407(a) transfer.

The Panel ordered a transfer in early June 1993 and assigned the case to Judge Roll, noting that Lexecon's claims "share questions of fact with an as yet unapproved settlement involving Touche Ross, Lexecon, Inc. and the investor plaintiffs in the Lincoln Savings investor class actions in MDL–834." App. 18. The Panel observed that "i) a massive document depository is located in the District of Arizona and ii) the Ninth Circuit has before it an appeal of an order [describing the terms of Lexecon's dismissal from the Lincoln Savings litigation] in MDL–834 which may be relevant to the *Lexecon* claims." *Ibid.* Prior to any dispositive action on Lexecon's instant claims in the District of Arizona, the Ninth Circuit appeal mentioned by the Panel was dismissed, and the document depository was closed down.

In November 1993, Judge Roll dismissed Lexecon's state-law malicious prosecution and abuse of process claims, applying a "heightened pleading standard," 845 F. Supp. 1377, 1383 (Ariz. 1993). Although the law firms then moved for summary judgment on the claims remaining, the judge deferred action pending completion of discovery, during which time the remaining parties to the Lincoln Savings litigation reached a final settlement, on which judgment was entered in March 1994.

In August 1994, Lexecon moved that the District Court refer the case back to the Panel for remand to the Northern District of Illinois, thus heeding the point of Multidistrict Litigation Rule 14(d), which provides that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." The law firms opposed a remand because discovery was still incomplete and filed a countermotion under § 1404(a) requesting the District of Arizona to "transfer" the case to itself for trial. Judge Roll deferred decision on these motions as well.

In November 1994, Lexecon again asked the District Court to request the Panel to remand the case to the Northern District of Illinois. Again the law firms objected and requested a § 1404 transfer, and Judge Roll deferred ruling once more. On April 24, 1995, however, he granted summary judgment in favor of the law firms on all remaining claims except one in defamation brought against Milberg, and at the same time he dismissed Milberg's counterclaims. 884 F. Supp. 1388, 1397 (Ariz. 1995). Cotchett then made a request for judgment under Federal Rule of Civil Procedure 54(b). Lexecon objected to the exercise of Rule 54(b) discretion, but did not contest the authority of the District Court in Arizona to enter a final judgment in Cotchett's favor. On June 7, 1995, the court granted respondent Cotchett's Rule 54(b) request.

In the meantime, the Arizona court had granted the law firms' § 1404(a) motions to assign the case to itself for trial, and simultaneously had denied Lexecon's motions to request the Panel to remand under § 1407(a). Lexecon sought immediate review of these last two rulings by filing a petition for mandamus in the Ninth Circuit. After argument, a majority of the Circuit panel, over the dissent of Judge Kozinski, denied Lexecon's requests to vacate the self-assignment order and require remand to the Northern District of Illinois. The Circuit so ruled even though the majority was "not prepared to say that [Lexecon's] contentions lack merit" and went so far as to note the conflict between "what appears to be a clear statutory mandate [of § 1407 and § 1404]" and Multidistrict Litigation Rule 14(b), which explicitly authorizes a transferee court to assign an action to itself for trial. *Lexecon* v. *Milberg Weiss*, No. 95–70380 (CA9, July 21, 1995), p. 4. The majority simply left that issue for another day, relying on its assumption that Lexecon would have an opportunity to obtain relief from the transfer order on direct appeal: "[t]he transfer order can be appealed immediately along

with other issues in the event the petitioners lose on the merits [at trial]." *Id.*, at p. 3.

Trial on the surviving defamation claim then went forward in the District of Arizona, ending in judgment for Milberg, from which Lexecon appealed to the Ninth Circuit. It again appealed the denial of its motion for a suggestion that the Panel remand the matter to the Northern District of Illinois, and it challenged the dismissal of its claims for malicious prosecution and abuse of process, and the entry of final judgment in favor of Cotchett. Lexecon took no exception to the Arizona court's jurisdiction (as distinct from venue) and pursued no claim of error in the conduct of the trial.

A divided panel of the Ninth Circuit affirmed, relying on the Panel's Rule 14 and appellate and District Court decisions in support of the District Court's refusal to support remand under § 1407(a) and its decision to assign the case to itself under § 1404(a). 102 F. 3d, at 1532–1535. While the majority indicated that permitting the transferee court to assign a case to itself upon completion of its pretrial work was not only consistent with the statutory language but conducive to efficiency, Judge Kozinski again dissented, relying on the texts of §§ 1407(a) and 1404(a) and a presumption in favor of a plaintiff's choice of forum. We granted certiorari, 520 U. S. 1227 (1997), to decide whether § 1407(a) does permit a transferee court to entertain a § 1404(a) transfer motion to keep the case for trial.

II

A

In defending the Ninth Circuit majority, Milberg may claim ostensible support from two quarters. First, the Panel has itself sanctioned such assignments in a rule issued in reliance on its rulemaking authority under 28 U. S. C. § 1407(f). The Panel's Rule 14(b) provides that "[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the

transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U. S. C. § 1404(a) or 28 U. S. C. § 1406." Thus, out of the 39,228 cases transferred under § 1407 and terminated as of September 30, 1995, 279 of the 3,787 ultimately requiring trial were retained by the courts to which the Panel had transferred them. Administrative Office of the United States, L. Mecham, Judicial Business of the United States Courts: 1995 Report of the Director 32. Although the Panel's rule and the practice of self-assignment have not gone without challenge, see, *e. g.*, 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3866, p. 619 (2d ed. 1986) (hereinafter Wright, Miller, & Cooper); Trangsrud, Joinder Alternatives in Mass Tort Litigation, 70 Cornell L. Rev. 779, 809 (1985); Levy, Complex Multidistrict Litigation and the Federal Courts, 40 Ford. L. Rev. 41, 64–65 (1972), federal courts have treated such transfers with approval, beginning with the Second Circuit's decision in *Pfizer, Inc.* v. *Lord*, 447 F. 2d 122, 124–125 (1971) *(per curiam)* (upholding MDL Rule 15(d), the precursor to Rule 14(b)). See, *e. g.*, *In re Fine Paper Antitrust Litigation*, 685 F. 2d 810, 820, and n. 7 (CA3 1982); *In re Air Crash Disaster at Detroit Metro. Airport*, 737 F. Supp. 391, 393–394 (ED Mich. 1989); *In re Viatron Computer Sys. Corp.*, 86 F. R. D. 431, 432 (Mass. 1980).

The second source of ostensible authority for Milberg's espousal of the self-assignment power here is a portion of text of the multidistrict litigation statute itself:

> "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U. S. C. § 1407(a).

Although the statute limits a transferee court's authority to the conduct of "coordinated or consolidated" proceedings and

to those that are "pretrial," these limitations alone raise no obvious bar to a transferee's retention of a case under § 1404. If "consolidated" proceedings alone were authorized, there would be an argument that self-assignment of one or some cases out of many was not contemplated, but because the proceedings need only be "coordinated," no such narrow limitation is apparent. While it is certainly true that the instant case was not "consolidated" with any other for the purpose literally of litigating identical issues on common evidence, it is fair to say that proceedings to resolve pretrial matters were "coordinated" with the conduct of earlier cases sharing the common core of the Lincoln Savings debacle, if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered. Judge Bilby's recusal following his decision to respond to Lexecon's Illinois pleadings may have limited the prospects for coordination, but it surely did not eliminate them. Hence, the requirement that a transferee court conduct "coordinated or consolidated" proceedings did not preclude the transferee Arizona court from ruling on a motion (like the § 1404 request) that affects only one of the cases before it.

Likewise, at first blush, the statutory limitation to "pretrial" proceedings suggests no reason that a § 1407 transferor court could not entertain a § 1404(a) motion. Section 1404(a) authorizes a district court to transfer a case in the interest of justice and for the convenience of the parties and witnesses. See § 1404(a). Such transfer requests are typically resolved prior to discovery, see Wright, Miller, & Cooper § 3866, at 620, and thus are classic "pretrial" motions.

Beyond this point, however, the textual pointers reverse direction, for § 1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course.

> "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." § 1407(a) (proviso without application here omitted).

The Panel's instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion. *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947). In the absence of any indication that there might be circumstances in which a transferred case would be neither "terminated" nor subject to the remand obligation, then, the statutory instruction stands flatly at odds with reading the phrase "coordinated or consolidated pretrial proceedings" so broadly as to reach its literal limits, allowing a transferee court's self-assignment to trump the provision imposing the Panel's remand duty. If we do our job of reading the statute whole, we have to give effect to this plain command, see *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 476 (1992), even if doing that will reverse the longstanding practice under the statute and the rule, see *Metropolitan Stevedore Co.* v. *Rambo*, 515 U. S. 291, 300 (1995) ("'Age is no antidote to clear inconsistency with a statute'" (quoting *Brown* v. *Gardner*, 513 U. S. 115, 122 (1994))).

As the Ninth Circuit panel majority saw it, however, the inconsistency between an expansive view of "coordinated or consolidated pretrial" proceedings and the uncompromising terms of the Panel's remand obligation disappeared as merely an apparent conflict, not a real one. The "focus" of § 1407 was said to be constituting the Panel and defining its authority, not circumscribing the powers of district courts under § 1404(a). 102 F. 3d, at 1533. Milberg presses this point in observing that § 1407(a) does not, indeed, even apply to transferee courts, being concerned solely with the Panel's duties, whereas § 1407(b), addressed to the transferee courts, says nothing about the Panel's obligation to remand. But this analysis fails to persuade, for the very reason that it

rejects that central tenet of interpretation, that a statute is to be considered in all its parts when construing any one of them. To emphasize that § 1407(b) says nothing about the Panel's obligation when addressing a transferee court's powers is simply to ignore the necessary consequence of self-assignment by a transferee court: it conclusively thwarts the Panel's capacity to obey the unconditional command of § 1407(a).

A like use of blinders underlies the Circuit majority's conclusion that the Panel was not even authorized to remand the case under its Rule 14(c), the terms of which condition the remand responsibility on a suggestion of the transferee court, a motion filed directly with the Panel, or the Panel's *sua sponte* decision to remand. None of these conditions was fulfilled, according to the Court of Appeals, which particularly faulted Lexecon for failing to file a remand motion directly with the Panel, as distinct from the transferee court.[1] This analysis, too, is unpersuasive; it just ignores the fact that the statute places an obligation on the Panel to

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[1] The Ninth Circuit stopped short of expressly inferring a waiver from Lexecon's failure to file a motion for remand directly with the Panel, and any inference of waiver would surely have been unsound. Although the Panel's Rule 14(c)(i) does authorize a party to file such a motion, Rule 14(d) comes close to saying that only under extraordinary circumstances will such a motion be granted without a suggestion of remand by the transferee court. (The Rule reads: "The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court.") Therefore, even if a party may waive the § 1407 remand requirement by failing to request remand from the transferor court, see 28 U. S. C. § 1406(b), Rule 14(d) precludes an inference of waiver from mere failure to request remand from the Panel.

In this case, moreover, one can say categorically that a motion before the Panel would have failed; the transferee court denied Lexecon's motion for a remand suggestion simultaneously with an order assigning the case to itself for trial, thus exercising the authority that the Panel's Rule 14(b) expressly purported to recognize. Under the Panel's own rules, in sum, Lexecon never had a chance to waive a thing.

remand no later than the conclusion of pretrial proceedings in the transferee court, and no exercise in rulemaking can read that obligation out of the statute. See 28 U. S. C. § 1407(f) (express requirement that rules be consistent with statute).

B

Milberg proffers two further arguments for overlooking the tension between a broad reading of a court's pretrial authority and the Panel's remand obligation. First, it relies on a subtle reading of the provision of § 1407(a) limiting the Panel's remand obligation to cases not "previously terminated" during the pretrial period. To be sure, this exception to the Panel's remand obligation indicates that the Panel is not meant to issue ceremonial remand orders in cases already concluded by summary judgment, say, or dismissal. But according to Milberg, the imperative to remand is also inapplicable to cases self-assigned under § 1404, because the self-assignment "terminates" the case insofar as its venue depends on § 1407. When the § 1407 character of the action disappears, Milberg argues, the strictures of § 1407 fall away as well, relieving the Panel of any further duty in the case. The trouble with this creative argument, though, is that the statute manifests no such subtlety. Section 1407(a) speaks not in terms of imbuing transferred actions with some new and distinctive venue character, but simply in terms of "civil actions" or "actions." It says that such an action, not its acquired personality, must be terminated before the Panel is excused from ordering remand. The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical.

Second, Milberg tries to draw an inference in its favor from the one subsection of § 1407 that does authorize the Panel to transfer a case for trial as well as pretrial proceedings. Subsection (h) provides that,

> "[n]otwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act."

Milberg fastens on the introductory language explicitly overriding the "provisions of section 1404 or subsection (f)," which would otherwise, respectively, limit a district court to transferring a case "to any other district or division where it might have been brought," § 1404(a), and limit the Panel to prescribing rules "not inconsistent with Acts of Congress," § 1407(f). On Milberg's reasoning, these overrides are required because the cited provisions would otherwise conflict with the remainder of subsection (h) authorizing the Panel to order trial of certain Clayton Act cases in the transferee court. The argument then runs that since there is no override of subsection (a) of § 1407, subsection (a) must be consistent with a transfer for trial as well as pretrial matters. This reasoning is fallacious, however. Subsections (a) and (h) are independent sources of transfer authority in the Panel; each is apparently written to stand on its own feet. Subsection (h) need not exclude the application of subsection (a), because nothing in (a) would by its terms limit any provision of (h).

Subsection (h) is not merely valueless to Milberg, however; it is ammunition for Lexecon. For the one point that subsection (h) does demonstrate is that Congress knew how to distinguish between trial assignments and pretrial proceedings in cases subject to § 1407. Although the enactment of subsection (a), Act of Apr. 29, 1968, 82 Stat. 109, preceded the enactment of subsection (h), Act of Sept. 30, 1976, § 303, 90 Stat. 1394, 1396, the fact that the later section distinguishes trial assignments from pretrial proceedings generally is certainly some confirmation for our conclusion, on independent grounds, that the subjects of pretrial

proceedings in subsections (a) and (b) do not include self-assignment orders.[2]

C

There is, finally, nothing left of Milberg's position beyond an appeal to legislative history, some of which turns out to ignore the question before us, and some of which may support Lexecon. Milberg cites a House Report on the bill that became § 1407, which addresses the question of trial transfer in multidistrict litigation cases by saying that, "[o]f course, 28 U. S. C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." H. R. Rep. No. 1130, 90th Cong., 2d Sess., p. 4 (1968) (hereinafter H. R. Rep.), cited in Brief for Respondents Milberg et al. 25. But the question is not whether a change of venue may be ordered in a case consolidated under § 1407(a); on any view of § 1407(a), if an order may be made under § 1404(a),[3] it may be made after remand of the case to the originating district court. The relevant question for our purposes is whether a transferee court, and not a transferor court, may grant such a motion, and on this point, the language cited by Milberg provides no guidance.

If it has anything to say to us here, the legislative history tends to confirm that self-assignment is beyond the scope of the transferee court's authority. The same House Report that spoke of the continued vitality of § 1404 in § 1407 cases also said this:

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[2] It is well to note the limitations of a related argument. It may be tempting to say that the incompatibility of a self-assignment under § 1404(a) with the Panel's mandate is confirmed by the authority of a transferor court to assign a case to a § 1407(a) transferee district for trial if that would be appropriate following pretrial proceedings under § 1407(a). But there is one circumstance in which a transferor court would be unable to do that. As noted, transfers under § 1407 are not limited by general venue statutes; those under § 1404 are.

[3] See n. 2, *supra.*

> "The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes.
>
> . . . . .
>
> "The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings." H. R. Rep., at 3–4.

The comments of the bill's sponsors further suggest that application of § 1407 (before the addition of subsection (h)) would not affect the place of trial. See, *e. g.*, Multidistrict Litigation: Hearings on S. 3815 and S. 159 before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 2, p. 110 (1967) (Sen. Tydings) ("[W]hen the deposition and discovery is completed, then the original litigation is remanded to the transferor district for the trial"). Both the House and the Senate Reports stated that Congress would have to amend the statute if it determined that multidistrict litigation cases should be consolidated for trial. S. Rep. No. 454, 90th Cong., 1st Sess., p. 5 (1967).

D

In sum, none of the arguments raised can unsettle the straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel's Rule 14(b). See 28 U. S. C. § 1407(f). Milberg may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue (to the degree that § 1407(a) does so), but the proper venue for resolving that issue remains the floor of Congress. See *Am-*

chem Products, Inc. v. *Windsor*, 521 U. S. 591, 628–629 (1997); *Finley* v. *United States*, 490 U. S. 545, 556 (1989).[4]

III

The remaining question goes to the remedy, which Milberg argues may be omitted under the harmless-error doctrine. Milberg posits a distinction between a first category of cases erroneously litigated in a district in which (absent waiver) venue may never be laid under the governing statute, see *Olberding* v. *Illinois Central R. Co.*, 346 U. S. 338, 340 (1953), and a second category, in which the plaintiff might originally have chosen to litigate in the trial forum to which it was unwillingly and erroneously carried, as by a transfer under § 1404. In the first, reversal is necessary; in the second, affirmance is possible if no independent and substantial right was violated in a trial whose venue was determined by a discretionary decision. Since Lexecon could have brought suit in the Arizona district consistently with the general venue requirements of 28 U. S. C. § 1391, and since the transfer for trial was made on the authority of § 1404(a), Milberg argues, this case falls within the second category and should escape reversal because none of Lexecon's substantial rights was prejudicially affected, see § 2111. Assuming the distinction may be drawn, however, we think this case bears closer analogy to those in the first category, in which reversal with new trial is required because venue is precluded by the governing statute.

Milberg's argument assumes the only kind of statute entitled to respect in accordance with its uncompromising terms is a statute that categorically limits a plaintiff's initial choice of forum. But there is no apparent reason why courts

[4] Because we find that the statutory language of § 1407 precludes a transferee court from granting any § 1404(a) motion, we have no need to address the question whether § 1404(a) permits self-transfer given that the statute explicitly provides for transfer only "to any other district." 28 U. S. C. § 1404(a).

should not be equally bound by a venue statute that just as categorically limits the authority of courts (and special panels) to override a plaintiff's choice. If the former statute creates interests too substantial to be denied without a remedy, the latter statute ought to be recognized as creating interests equally substantial. In each instance the substantiality of the protected interest is attested by a congressional judgment that in the circumstances described in the statute no discretion is to be left to a court faced with an objection to a statutory violation. To render relief discretionary in either instance would be to allow uncorrected defiance of a categorical congressional judgment to become its own justification. Accordingly, just as we agree with Milberg that the strict limitation on venue under, say, § 1391(a) (diversity action "may . . . be brought only . . .") is sufficient to establish the substantial character of any violation, Brief for Respondents Milberg et al. 43 (citing *Olberding*, *supra*), the equally strict remand requirement contained in § 1407 should suffice to establish the substantial significance of any denial of a plaintiff's right to a remand once the pretrial stage has been completed.

Nor is Milberg correct that our recent decision in *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61 (1996), is to the contrary.[5] In

[5] In its brief to this Court, Milberg suggests that any decision rejecting multidistrict litigation courts' practice of ruling on § 1404 transfer motions should be applied only prospectively under *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971). Because this argument was not presented below, see Brief for Milberg Defendants in No. 95–16403 et al. (CA9), or to this Court when Milberg opposed petitioners' petition for certiorari, see Brief in Opposition for Respondents Milberg et al., it is unnecessary for us to consider it here.

Milberg's brief also argues that petitioners are not entitled to relief because the only claim that survived for trial should have been dismissed during pretrial proceedings. We do not address the propriety of the District Court's decision to allow this claim to go forward; the issue falls outside the question on which we granted certiorari. See this Court's Rule 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court").

that case, which got no new trial, the jurisdictional defect (a lack of complete diversity) had been cured by subsequent events. While the statutory error (failure to comply with the § 1441(a) requirement that the case be fit for federal adjudication when the removal petition is filed) "remained in the unerasable history of the case," *id.*, at 73, in the sense that it had not been cured within the statutory period, it had otherwise been cured by the time judgment was entered. The instant case is different from that one, inasmuch as there was no continuing defiance of the congressional condition in *Caterpillar*, but merely an untimely compliance. It was on this understanding that we held that considerations of "finality, efficiency, and economy" trumped the error, *id.*, at 75. After *Caterpillar*, therefore, since removal is permissible only where original jurisdiction exists at the time of removal or at the time of the entry of final judgment, the condition contained in the removal statute retains significance. But the § 1407(a) mandate would lose all meaning if a party who continuously objected to an uncorrected categorical violation of the mandate could obtain no relief at the end of the day.[6]

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

So ordered.

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[6] Although Cotchett's request for an order of dismissal under Rule 54(b) was not granted until after the Arizona court had assigned the case to itself for trial, there is no reason to reconsider that dismissal order. It was perfectly proper as a pretrial order and, for that matter, was merely the formal reflection of the Arizona court's decision on the merits of the claims that had been resolved prior to that court's decision on the § 1404 transfer.

Syllabus

BOGAN ET AL. *v.* SCOTT-HARRIS

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

No. 96–1569. Argued December 3, 1997—Decided March 3, 1998

Respondent Scott-Harris filed suit under 42 U. S. C. § 1983 against the city of Fall River, Massachusetts, petitioners Bogan (the city's mayor) and Roderick (the vice president of the city council), and other officials, alleging that the elimination of the city department in which Scott-Harris was the sole employee was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights in filing a complaint against another city employee. The District Court twice denied petitioners' motions to dismiss on the ground of absolute immunity from suit. The jury returned a verdict in favor of all defendants on the racial discrimination charge, but found the city and petitioners liable on respondent's First Amendment claim. The First Circuit set aside the verdict against the city but affirmed the judgments against Roderick and Bogan. Although concluding that petitioners have absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities, that court held that their conduct in introducing, voting for, and signing the ordinance that eliminated respondent's office was not "legislative." Relying on the jury's finding that respondent's constitutionally sheltered speech was a substantial or motivating factor underlying petitioners' conduct, the court reasoned that the conduct was administrative, rather than legislative, because Roderick and Bogan relied on facts relating to a particular individual, respondent, in the decisionmaking calculus.

Held:

1. Local legislators are entitled to the same absolute immunity from civil liability under § 1983 for their legislative activities as has long been accorded to federal, state, and regional legislators. See, *e. g.*, *Tenney* v. *Brandhove*, 341 U. S. 367, 372, 372–376; *Amy* v. *Supervisors*, 11 Wall. 136, 138, distinguished. Such immunity finds pervasive support not only in common-law cases and older treatises, but also in reason. See *Tenney*, 341 U. S., at 376. The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. See, *e. g.*, *id.*, at 377. Furthermore, the time and energy required to defend against a lawsuit are

of particular concern at the local level, where the part-time citizen-legislator remains commonplace. See *ibid.* And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 827 (Burger, C. J., dissenting). Moreover, certain deterrents to legislative abuse may be greater at the local level than at other levels of government, including the availability of municipal liability for constitutional violations, *e. g.*, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 405, n. 29, and the ultimate check on legislative abuse, the electoral process, cf. *Tenney*, *supra*, at 378. Indeed, any argument that the rationale for absolute immunity does not extend to local legislators is implicitly foreclosed by *Lake Country Estates*, *supra*, at 401–402. Pp. 48–54.

2. Petitioners' actions in this case were protected by absolute immunity, which attaches to all acts taken "in the sphere of legitimate legislative activity." *Tenney*, 341 U. S., at 376. The First Circuit erroneously relied on petitioners' subjective intent in resolving whether their acts so qualified. Whether an act is legislative turns on the nature of the act itself, rather than on the motive or intent of the official performing it. *Id.*, at 370, 377. This Court has little trouble concluding that, stripped of all considerations of intent and motive, petitioners' actions were legislative. Most evidently, petitioner Roderick's acts of voting for the ordinance eliminating respondent's office were, in form, quintessentially legislative. Petitioner Bogan's introduction of a budget that proposed the elimination of city jobs and his signing the ordinance into law also were formally legislative, even though he was an executive official. Officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions, see *Supreme Court of Va.* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 731–334; Bogan's actions were legislative because they were integral steps in the legislative process. Cf., *e. g.*, *Edwards* v. *United States*, 286 U. S. 482, 490. Furthermore, this particular ordinance, in substance, bore all the hallmarks of traditional legislation: It reflected a discretionary, policymaking decision implicating the city's budgetary priorities and its services to constituents; it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office; and, in eliminating respondent's office, it governed in a field where legislators traditionally have power to act, *Tenney*, *supra*, at 379. Pp. 54–56.

134 F. 3d 427, reversed.

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

Charles Rothfeld argued the cause for petitioners. On the briefs were *Thomas E. Shirley*, *Bruce A. Assad*, and *Robert J. Marchand.*

Harvey A. Schwartz argued the cause for respondent. With him on the brief were *Siobhan M. Sweeney* and *Eric Schnapper.**

JUSTICE THOMAS delivered the opinion of the Court.

It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities. In this case, petitioners argue that they, as local officials performing legislative functions, are entitled to the same protection. They further argue that their acts of introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities. We agree on both counts and therefore reverse the judgment below.

I

Respondent Janet Scott-Harris was administrator of the Department of Health and Human Services (DHHS) for the city of Fall River, Massachusetts, from 1987 to 1991. In 1990, respondent received a complaint that Dorothy Biltcliffe, an employee serving temporarily under her supervision, had made repeated racial and ethnic slurs about her colleagues. After respondent prepared termination charges against Biltcliffe, Biltcliffe used her political connections to press her case with several state and local officials, including

*Briefs of *amici curiae* urging reversal were filed for the City of Fall River, Massachusetts, by *Thomas F. McGuire, Jr.*, and *Mary E. O'Neil;* for the Massachusetts Municipal Association et al. by *George J. Leontire;* and for the National League of Cities et al. by *Richard Ruda* and *Charles Rothfeld.*

petitioner Marilyn Roderick, the vice president of the Fall River City Council. The city council held a hearing on the charges against Biltcliffe and ultimately accepted a settlement proposal under which Biltcliffe would be suspended without pay for 60 days. Petitioner Daniel Bogan, the mayor of Fall River, thereafter substantially reduced the punishment.

While the charges against Biltcliffe were pending, Mayor Bogan prepared his budget proposal for the 1992 fiscal year. Anticipating a 5 to 10 percent reduction in state aid, Bogan proposed freezing the salaries of all municipal employees and eliminating 135 city positions. As part of this package, Bogan called for the elimination of DHHS, of which respondent was the sole employee. The city council ordinance committee, which was chaired by Roderick, approved an ordinance eliminating DHHS. The city council thereafter adopted the ordinance by a vote of 6 to 2, with petitioner Roderick among those voting in favor. Bogan signed the ordinance into law.

Respondent then filed suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, against the city, Bogan, Roderick, and several other city officials. She alleged that the elimination of her position was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights in filing the complaint against Biltcliffe. The District Court denied Bogan's and Roderick's motions to dismiss on the ground of legislative immunity, and the case proceeded to trial. *Scott-Harris* v. *City of Fall River, et al.*, Civ. 91–12057–PBS (Mass., Jan. 27, 1995), App. to Pet. for Cert. 1.

The jury returned a verdict in favor of all defendants on the racial discrimination charge, but found the city, Bogan, and Roderick liable on respondent's First Amendment claim, concluding that respondent's constitutionally protected speech was a substantial or motivating factor in the elimina-

tion of her position.[1] On a motion for judgment notwithstanding the verdict, the District Court again denied Bogan's and Roderick's claims of absolute legislative immunity, reasoning that "the ordinance amendment passed by the city council was an individually-targeted administrative act, rather than a neutral, legislative elimination of a position which incidentally resulted in the termination of plaintiff." *Id.*, at 20.

The United States Court of Appeals for the First Circuit set aside the verdict against the city but affirmed the judgments against Roderick and Bogan. *Scott-Harris* v. *Fall River*, 134 F. 3d 427 (1997).[2] Although the court concluded that petitioners have "absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities," *id.*, at 440, it held that their challenged conduct was not "legislative," *id.*, at 441. Relying on the jury's finding that "constitutionally sheltered speech was a substantial or motivating factor" underlying petitioners' conduct, the court reasoned that the conduct was administrative, rather than legislative, because Roderick and Bogan "relied on facts relating to a particular individual [respondent] in the decisionmaking calculus." *Ibid.* We granted certiorari. 520 U. S. 1263 (1997).

II

The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law. This privilege "has taproots

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[1] Respondent dropped several other defendants from the suit, and the District Court directed a verdict in favor of defendant Robert Connors, the Fall River City Administrator. Only the city, Bogan, and Roderick were appellants in the Court of Appeals, and only the latter two are petitioners in this Court.

[2] The court held that the city was not liable because the jury could reasonably infer unlawful intent only as to two of the city council members, and municipal liability could not rest "on so frail a foundation." 134 F. 3d, at 440.

in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries" and was "taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney* v. *Brandhove*, 341 U. S. 367, 372 (1951). The Federal Constitution, the Constitutions of many of the newly independent States, and the common law thus protected legislators from liability for their legislative activities. See U. S. Const., Art. I, § 6; *Tenney*, *supra*, at 372–375.

Recognizing this venerable tradition, we have held that state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities. See *Tenney*, *supra* (state legislators); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391 (1979) (regional legislators);[3] see also *Kilbourn* v. *Thompson*, 103 U. S. 168, 202–204 (1881) (interpreting the federal Speech and Debate Clause, U. S. Const., Art. I, § 6, to provide similar immunity to Members of Congress). We explained that legislators were entitled to absolute immunity from suit at common law and that Congress did not intend the general language of § 1983 to "impinge on a tradition so well grounded in history and reason." *Tenney*, *supra*, at 376. Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities.

The common law at the time § 1983 was enacted deemed local legislators to be absolutely immune from suit for their legislative activities. New York's highest court, for example, held that municipal aldermen were immune from suit for

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[3] The "regional" legislature in *Lake Country Estates* was the governing body of an agency created by a compact between two States to coordinate and regulate development in a region encompassing portions of both States. *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U. S., at 394.

their discretionary decisions. *Wilson* v. *New York*, 1 Denio 595 (1845). The court explained that when a local legislator exercises discretionary powers, he "is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done." *Id.*, at 599.[4] These principles, according to the court, were "too familiar and well settled to require illustration or authority." *Id.*, at 599–600.

Shortly after § 1983 was enacted, the Mississippi Supreme Court reached a similar conclusion, holding that town aldermen could not be held liable under state law for their role in the adoption of an allegedly unlawful ordinance. *Jones* v. *Loving*, 55 Miss. 109, 30 Am. Rep. 508 (1877). The court explained that "[i]t certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law." *Id.*, at 111, 30 Am. Rep., at 509. The court thus concluded that "[w]henever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with

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[4] The court distinguished "discretionary" duties, which were protected absolutely, and "ministerial" duties, which were not. Although the court described the former as "judicial" in nature, it was merely using the term broadly to encompass the "discretionary" acts of officials. See 1 Denio, at 599 ("[I]f his powers are discretionary, to be exerted or withheld, according to his own view of what is necessary and proper, they are in their nature judicial"). The legislators' actions in *Wilson* were unquestionably legislative in both form and substance. Thus, *Wilson* was widely, and correctly, cited as a leading case regarding *legislative* immunity. See, *e. g.,* T. Cooley, Law of Torts 377, n. 1 (1880) (hereinafter Cooley); F. Mechem, Law of Public Offices and Officers § 644, p. 431, n. 1 (1890) (hereinafter Mechem); M. Throop, Law Relating to Public Officers § 709, p. 671, n. 1 (1892).

all the immunities of government, and are exempt from all liability for their mistaken use." *Ibid.*

Treatises of that era confirm that this was the pervasive view. A leading treatise on municipal corporations explained that "[w]here the *officers of a municipal corporation* are invested with legislative powers, they *are exempt from individual liability* for the passage of any ordinance within their authority, and their motives in reference thereto will not be inquired into." 1 J. Dillon, Law of Municipal Corporations § 313, pp. 326–327 (3d ed. 1881) (emphasis in original). Thomas Cooley likewise noted in his influential treatise on the law of torts that the "rightful exemption" of legislators from liability was "very plain" and applied to members of "inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like." Cooley 376; see also J. Bishop, Commentaries on the Non-Contract Law § 744 (1889) (noting that municipal legislators were immune for their legislative functions); Mechem §§ 644–646 (same); Throop, *supra* n. 4, § 709, at 671 (same).

Even the authorities cited by respondent are consistent with the view that local legislators were absolutely immune for their legislative, as distinct from ministerial, duties. In the few cases in which liability did attach, the courts emphasized that the defendant officials lacked discretion, and the duties were thus ministerial. See, *e. g.*, *Morris* v. *The People*, 3 Denio 381, 395 (N. Y. 1846) (noting that the duty was "of a ministerial character only"); *Caswell* v. *Allen*, 7 Johns. 63, 68 (N. Y. 1810) (holding supervisors liable because the act was "mandatory" and "[n]o discretion appear[ed] to [have been] given to the supervisors"). Respondent's heavy reliance on our decision in *Amy* v. *Supervisors*, 11 Wall. 136 (1871), is misguided for this very reason. In that case, we held that local legislators could be held liable for violating a court order to levy a tax sufficient to pay a judgment, but only because the court order had created a ministerial duty. *Id.*, at 138 ("The rule is well settled, that where the law re-

quires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct"). The treatises cited by respondent confirm that this distinction between legislative and ministerial duties was dispositive of the right to absolute immunity. See, *e. g.*, Cooley 377 (stating that local legislators may be held liable only for their "ministerial" duties); Mechem § 647 (same).

Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason. See *Tenney* v. *Brandhove*, 341 U. S., at 376 (stating that Congress did not intend for § 1983 to "impinge on a tradition so well grounded in history and reason"). The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. See *Spallone* v. *United States*, 493 U. S. 265, 279 (1990) (noting, in the context of addressing local legislative action, that "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"); see also *Kilbourn* v. *Thompson*, 103 U. S., at 201–204 (federal legislators); *Tenney*, *supra*, at 377 (state legislators); *Lake Country Estates*, 440 U. S., at 405 (regional legislators). Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. See *Tenney*, *supra*, at 377 (citing "the cost and inconvenience and distractions of a trial"). And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 816 (1982).

Moreover, certain deterrents to legislative abuse may be greater at the local level than at other levels of government. Municipalities themselves can be held liable for constitutional violations, whereas States and the Federal Government are often protected by sovereign immunity. *Lake Country Estates*, *supra*, at 405, n. 29 (citing *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978)). And, of course, the ultimate check on legislative abuse—the electoral process—applies with equal force at the local level, where legislators are often more closely responsible to the electorate. Cf. *Tenney*, *supra*, at 378 (stating that "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses").

Any argument that the rationale for absolute immunity does not extend to local legislators is implicitly foreclosed by our opinion in *Lake Country Estates*. There, we held that members of an interstate regional planning agency were entitled to absolute legislative immunity. Bereft of any historical antecedent to the regional agency, we relied almost exclusively on *Tenney*'s description of the purposes of legislative immunity and the importance of such immunity in advancing the "public good." Although we expressly noted that local legislators were not at issue in that case, see *Lake Country Estates*, 440 U. S., at 404, n. 26, we considered the regional legislators at issue to be the functional equivalents of local legislators, noting that the regional agency was "comparable to a county or municipality" and that the function of the regional agency, regulation of land use, was "traditionally a function performed by local governments." *Id.*, at 401–402.[5] Thus, we now make explicit what was implicit

[5] It is thus not surprising that several Members of this Court have recognized that the rationale of *Lake Country Estates* essentially settled the question of immunity for local legislators. See *Owen* v. *Independence*, 445 U. S. 622, 664, n. 6 (1980) (Powell, J., dissenting); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 407–408 (1979) (Marshall, J., dissenting in part); see also *Spallone* v. *United States*, 493

in our precedents: Local legislators are entitled to absolute immunity from § 1983 liability for their legislative activities.

III

Absolute legislative immunity attaches to all actions taken "in the sphere of legitimate legislative activity." *Tenney*, *supra*, at 376. The Court of Appeals held that petitioners' conduct in this case was not legislative because their actions were specifically targeted at respondent. Relying on the jury's finding that respondent's constitutionally protected speech was a substantial or motivating factor behind petitioners' conduct, the court concluded that petitioners necessarily "relied on facts relating to a particular individual" and "devised an ordinance that targeted [respondent] and treated her differently from other managers employed by the City." 134 F. 3d, at 441. Although the Court of Appeals did not suggest that intent or motive can overcome an immunity defense for activities that are, in fact, legislative, the court erroneously relied on petitioners' subjective intent in resolving the logically prior question of whether their acts were legislative.

Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. The privilege of absolute immunity "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Ten-*

U. S. 265, 278 (1990) (explaining that the same considerations underlying *Tenney* and *Lake Country Estates* applied to contempt sanctions against local legislators). In fact, the argument for absolute immunity for local legislators may be stronger than for the regional legislators in *Lake Country Estates*, because immunity was historically granted to local legislators and because the legislators in *Lake Country Estates* were unelected and thus less directly accountable to the public. See *Lake Country Estates*, *supra*, at 407 (Marshall, J., dissenting in part).

ney, 341 U. S., at 377 (internal quotation marks omitted). Furthermore, it simply is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Ibid.* We therefore held that the defendant in *Tenney* had acted in a legislative capacity even though he allegedly singled out the plaintiff for investigation in order "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights." *Id.*, at 371 (internal quotation marks omitted).

This leaves us with the question whether, stripped of all considerations of intent and motive, petitioners' actions were legislative. We have little trouble concluding that they were. Most evidently, petitioner Roderick's acts of voting for an ordinance were, in form, quintessentially legislative. Petitioner Bogan's introduction of a budget and signing into law an ordinance also were formally legislative, even though he was an executive official. We have recognized that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions, see *Supreme Court of Va.* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 731–734 (1980); Bogan's actions were legislative because they were integral steps in the legislative process. Cf. *Edwards* v. *United States*, 286 U. S. 482, 490 (1932) (noting "the legislative character of the President's function in approving or disapproving bills"); *Smiley* v. *Holm*, 285 U. S. 355, 372–373 (1932) (recognizing that a Governor's signing or vetoing of a bill constitutes part of the legislative process).

Respondent, however, asks us to look beyond petitioners' formal actions to consider whether the ordinance was legislative in *substance*. We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary pri-

orities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office. And the city council, in eliminating DHHS, certainly governed "in a field where legislators traditionally have power to act." *Tenney*, *supra*, at 379. Thus, petitioners' activities were undoubtedly legislative.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is reversed.[6]

It is so ordered.

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[6] Because of our conclusion that petitioners are entitled to absolute legislative immunity, we need not address the third question on which we granted certiorari: whether petitioners proximately caused an injury cognizable under § 1983.

Syllabus

KAWAAUHAU ET VIR *v.* GEIGER

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

No. 97–115. Argued January 21, 1998—Decided March 3, 1998

When petitioner Kawaauhau sought treatment for her injured foot, respondent Dr. Geiger examined and hospitalized her to attend to the risk of infection. Although Geiger knew that intravenous penicillin would have been more effective, he prescribed oral penicillin, explaining in his testimony that he understood his patient wished to minimize treatment costs. Geiger then departed on a business trip, leaving Kawaauhau in the care of other physicians, who decided she should be transferred to an infectious disease specialist. When Geiger returned, he canceled the transfer and discontinued all antibiotics because he believed the infection had subsided. Kawaauhau's condition deteriorated, requiring amputation of her leg below the knee. After trial in the malpractice suit brought by Kawaauhau and her husband, the jury found Geiger liable and awarded the Kawaauhaus approximately $355,000 in damages. Geiger, who carried no malpractice insurance, moved to Missouri, where his wages were garnished by the Kawaauhaus. Geiger then petitioned for bankruptcy. The Kawaauhaus requested the Bankruptcy Court to hold the malpractice judgment nondischargeable under 11 U. S. C. § 523(a)(6), which provides that a "discharge [in bankruptcy] . . . does not discharge an individual debtor from any debt . . . for willful and malicious injury . . . to another." Concluding that Geiger's treatment fell far below the appropriate standard of care and therefore ranked as "willful and malicious," that court held the debt nondischargeable. The District Court affirmed, but the Eighth Circuit reversed, holding that § 523(a)(6)'s exemption from discharge is confined to debts for an intentional tort, so that a debt for malpractice remains dischargeable because it is based on negligent or reckless conduct.

Held: Because a debt arising from a medical malpractice judgment attributable to negligent or reckless conduct does not fall within the § 523(a)(6) exception, the debt is dischargeable in bankruptcy. Section 523(a)(6)'s words strongly support the Eighth Circuit's reading that only acts done with the actual intent to cause injury fall within the exception's scope. The section's word "willful" modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely, as the Kawaauhaus urge, a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts

Syllabus

resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury" or selected an additional word or words, *i. e.*, "reckless" or "negligent," to modify "injury." Moreover, § 523(a)(6)'s formulation triggers in the lawyer's mind the category "intentional torts," which generally require that the actor intend the *consequences* of an act, not simply the act itself. The Kawaauhaus' more encompassing interpretation could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, *i. e.*, neither desired nor in fact anticipated by the debtor. A construction so broad would be incompatible with the well-known guide that exceptions to discharge should be confined to those plainly expressed, and would render superfluous the exemptions from discharge set forth in §§ 523(a)(9) and 523(a)(12). The Kawaauhaus rely on *Tinker* v. *Colwell*, 193 U. S. 473, which held that a damages award for the tort of "criminal conversation" survived bankruptcy under the 1898 Bankruptcy Act's exception from discharge for judgments in civil actions for "'willful and malicious injuries.'" The *Tinker* opinion repeatedly recognized that at common law the tort in question ranked as trespass *vi et armis*, akin to a master's "'action of trespass and assault . . . for the battery of his servant.'" *Tinker* placed criminal conversation solidly within the traditional intentional tort category, and this Court so confines its holding; that decision provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment debt must be "for willful and malicious *injury*." See, *e. g.*, *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, 332. The Kawaauhaus' argument that, as a policy matter, malpractice judgments should be excepted from discharge, at least when the debtor acted recklessly or carried no malpractice insurance, should be addressed to Congress. Debts arising from reckless or negligently inflicted injuries do not fall within § 523(a)(6)'s compass. Pp. 60–64.

113 F. 3d 848, affirmed.

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

Norman W. Pressman argued the cause for petitioners. With him on the briefs were *Teresa A. Generous*, *Ronald J. Mann*, and *Edward B. Greensfelder*.

Laura K. Grandy argued the cause and filed a brief for respondent.*

**Gary Klein* filed a brief for the National Association of Consumer Bankruptcy Attorneys as *amicus curiae* urging affirmance.

JUSTICE GINSBURG delivered the opinion of the Court.

Section 523(a)(6) of the Bankruptcy Code provides that a debt "for willful and malicious injury by the debtor to another" is not dischargeable. 11 U. S. C. § 523(a)(6). The question before us is whether a debt arising from a medical malpractice judgment, attributable to negligent or reckless conduct, falls within this statutory exception. We hold that it does not and that the debt is dischargeable.

I

In January 1983, petitioner Margaret Kawaauhau sought treatment from respondent Dr. Paul Geiger for a foot injury. Geiger examined Kawaauhau and admitted her to the hospital to attend to the risk of infection resulting from the injury. Although Geiger knew that intravenous penicillin would have been more effective, he prescribed oral penicillin, explaining in his testimony that he understood his patient wished to minimize the cost of her treatment.

Geiger then departed on a business trip, leaving Kawaauhau in the care of other physicians, who decided she should be transferred to an infectious disease specialist. When Geiger returned, he canceled the transfer and discontinued all antibiotics because he believed the infection had subsided. Kawaauhau's condition deteriorated over the next few days, requiring the amputation of her right leg below the knee.

Kawaauhau, joined by her husband Solomon, sued Geiger for malpractice. After a trial, the jury found Geiger liable and awarded the Kawaauhaus approximately $355,000 in damages.[1] Geiger, who carried no malpractice insurance,[2]

[1] The jury awarded Margaret Kawaauhau $203,040 in special damages and $99,000 in general damages. *In re Geiger*, 172 B. R. 916, 919 (Bkrtcy. Ct. ED Mo. 1994). In addition, the jury awarded Solomon Kawaauhau $18,000 in general damages for loss of consortium and $35,000 for emotional distress. *Ibid.*

[2] Although the record is not clear on this point, it appears that Dr. Geiger was not required by state law to carry medical malpractice insurance. See Tr. of Oral Arg. 19.

moved to Missouri, where his wages were garnished by the Kawaauhaus. Geiger then petitioned for bankruptcy. The Kawaauhaus requested the Bankruptcy Court to hold the malpractice judgment nondischargeable on the ground that it was a debt "for willful and malicious injury" excepted from discharge by 11 U. S. C. § 523(a)(6). The Bankruptcy Court concluded that Geiger's treatment fell far below the appropriate standard of care and therefore ranked as "willful and malicious." Accordingly, the Bankruptcy Court held the debt nondischargeable. *In re Geiger*, 172 B. R. 916, 922–923 (Bkrtcy. Ct. ED Mo. 1994). In an unpublished order, the District Court affirmed. App. to Pet. for Cert. A–18 to A–22.

A three-judge panel of the Court of Appeals for the Eighth Circuit reversed, 93 F. 3d 443 (1996), and a divided en banc court adhered to the panel's position, 113 F. 3d 848 (1997) (en banc). Section 523(a)(6)'s exemption from discharge, the en banc court held, is confined to debts "based on what the law has for generations called an intentional tort." *Id.*, at 852. On this view, a debt for malpractice, because it is based on conduct that is negligent or reckless, rather than intentional, remains dischargeable.

The Eighth Circuit acknowledged that its interpretation of § 523(a)(6) diverged from previous holdings of the Sixth and Tenth Circuits. See *id.*, at 853 (citing *Perkins* v. *Scharffe*, 817 F. 2d 392, 394 (CA6), cert. denied, 484 U. S. 853 (1987), and *In re Franklin*, 726 F. 2d 606, 610 (CA10 1984)). We granted certiorari to resolve this conflict, 521 U. S. 1153 (1997), and now affirm the Eighth Circuit's judgment.

II

Section 523(a)(6) of the Bankruptcy Code provides:

> "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

. . . . .

"(6) for willful and malicious injury by the debtor to another entity or to the property of another entity."

The Kawaauhaus urge that the malpractice award fits within this exception because Dr. Geiger intentionally rendered inadequate medical care to Margaret Kawaauhau that necessarily led to her injury. According to the Kawaauhaus, Geiger deliberately chose less effective treatment because he wanted to cut costs, all the while knowing that he was providing substandard care. Such conduct, the Kawaauhaus assert, meets the "willful and malicious" specification of § 523(a)(6).

We confront this pivotal question concerning the scope of the "willful and malicious injury" exception: Does § 523(a)(6)'s compass cover acts, done intentionally,[3] that cause injury (as the Kawaauhaus urge), or only acts done with the actual intent to cause injury (as the Eighth Circuit ruled)? The words of the statute strongly support the Eighth Circuit's reading.

The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, *i. e.*, "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *conse-*

[3] The word "willful" is defined in Black's Law Dictionary as "voluntary" or "intentional." Black's Law Dictionary 1434 (5th ed. 1979). Consistently, legislative reports note that the word "willful" in § 523(a)(6) means "deliberate or intentional." See S. Rep. No. 95–989, p. 79 (1978); H. R. Rep. No. 95–595, p. 365 (1977).

quences of an act," not simply "the act itself." Restatement (Second) of Torts § 8A, Comment *a*, p. 15 (1964) (emphasis added).

The Kawaauhaus' more encompassing interpretation could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, *i. e.*, neither desired nor in fact anticipated by the debtor. Every traffic accident stemming from an initial intentional act—for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic—could fit the description. See 113 F. 3d, at 852. A "knowing breach of contract" could also qualify. See *ibid.* A construction so broad would be incompatible with the "well-known" guide that exceptions to discharge "should be confined to those plainly expressed." *Gleason* v. *Thaw*, 236 U. S. 558, 562 (1915).

Furthermore, "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988). Reading § 523(a)(6) as the Kawaauhaus urge would obviate the need for § 523(a)(9), which specifically exempts debts "for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance." 11 U. S. C. § 523(a)(9); see also § 523(a)(12) (exempting debts for "malicious or reckless failure" to fulfill certain commitments owed to a federal depository institutions regulatory agency).[4]

The Kawaauhaus heavily rely on *Tinker* v. *Colwell*, 193 U. S. 473 (1904), which presented this question: Does an award of damages for "criminal conversation" survive bankruptcy under the 1898 Bankruptcy Act's exception from

[4] Sections 523(a)(9) and (12) were added to the Bankruptcy Code in 1984 and 1990 respectively. See Pub. L. 98–353, 98 Stat. 364 (1984), and Pub. L. 101–647, 104 Stat. 4865 (1990).

discharge for judgments in civil actions for "'willful and malicious injuries to the person or property of another'"? *Id.*, at 480. The *Tinker* Court held such an award a nondischargeable debt. The Kawaauhaus feature certain statements in the *Tinker* opinion, in particular: "[An] act is willful . . . in the sense that it is intentional and voluntary" even if performed "without any particular malice," *id.*, at 485; an act that "necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the [bankruptcy discharge] exception," *id.*, at 487. See also *id.*, at 486 (the statute exempts from discharge liability for "'a wrongful act, done intentionally, without just cause or excuse'") (quoting from definition of malice in *Bromage* v. *Prosser*, 4 Barn. & Cress. 247, 107 Eng. Rep. 1051 (K. B. 1825)).

The exposition in the *Tinker* opinion is less than crystalline. Counterbalancing the portions the Kawaauhaus emphasize, the *Tinker* Court repeatedly observed that the tort in question qualified in the common law as trespassory. Indeed, it ranked as "trespass *vi et armis.*" 193 U. S., at 482, 483. Criminal conversation, the Court noted, was an action akin to a master's "action of trespass and assault . . . for the battery of his servant," *id.*, at 482. *Tinker* thus placed criminal conversation solidly within the traditional intentional tort category, and we so confine its holding. That decision, we clarify, provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment debt must be "for willful and malicious *injury.*"

Subsequent decisions of this Court are in accord with our construction. In *McIntyre* v. *Kavanaugh*, 242 U. S. 138 (1916), a broker "deprive[d] another of his property forever by deliberately disposing of it without semblance of authority." *Id.*, at 141. The Court held that this act constituted an intentional injury to property of another, bringing it within the discharge exception. But in *Davis* v. *Aetna Ac-*

ceptance Co., 293 U. S. 328 (1934), the Court explained that not every tort judgment for conversion is exempt from discharge. Negligent or reckless acts, the Court held, do not suffice to establish that a resulting injury is "wilful and malicious." See *id.*, at 332.

Finally, the Kawaauhaus maintain that, as a policy matter, malpractice judgments should be excepted from discharge, at least when the debtor acted recklessly or carried no malpractice insurance. Congress, of course, may so decide. But unless and until Congress makes such a decision, we must follow the current direction § 523(a)(6) provides.

* * *

We hold that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6). For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is

Affirmed.

Syllabus

UNITED STATES *v.* RAMIREZ

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

No. 96–1469. Argued January 13, 1998—Decided March 4, 1998

Based on a reliable confidential informant's statement that he had seen a person he believed to be Alan Shelby, a dangerous escaped prisoner, at respondent's home, and on a federal agent's subsequent observation of a man resembling Shelby outside that home, the Government obtained a "no-knock" warrant to enter and search the home. Having gathered in the early morning hours to execute the warrant, officers announced over a loud speaker system that they had a search warrant. Simultaneously, they broke a single window in respondent's garage and pointed a gun through the opening, hoping thereby to dissuade occupants from rushing to the weapons stash the informant had told them was in the garage. Awakened by the noise and fearful that his house was being burglarized, respondent grabbed a pistol and fired it into the garage ceiling. When the officers shouted "police," respondent surrendered and was taken into custody. After he admitted that he had fired the weapon, that he owned both that gun and another in the house, and that he was a convicted felon, respondent was indicted on federal charges of being a felon in possession of firearms. The District Court granted his motion to suppress evidence regarding weapons possession, ruling that the officers had violated both the Fourth Amendment and 18 U. S. C. § 3109 because there were "insufficient exigent circumstances" to justify their destruction of property in executing the warrant. The Ninth Circuit affirmed.

Held:

1. The Fourth Amendment does not hold officers to a higher standard when a "no-knock" entry results in the destruction of property. It is obvious from the holdings in *Wilson* v. *Arkansas*, 514 U. S. 927, 934, 936, and *Richards* v. *Wisconsin*, 520 U. S. 385, that such an entry's lawfulness does not depend on whether property is damaged in the course of the entry. Under *Richards*, a no-knock entry is justified if police have a "reasonable suspicion" that knocking and announcing their presence before entering would "be dangerous or futile, or . . . inhibit the effective investigation of the crime." *Id.*, at 394. Whether such a reasonable suspicion exists does not depend on whether police must destroy property in order to enter. This is not to say that the Fourth Amendment does not speak to the manner of executing a warrant.

Such execution is governed by the general touchstone of reasonableness that applies to all Fourth Amendment analysis. See *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108–109. Excessive or unnecessary property destruction during a search may violate the Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression. Applying these principles to the facts at hand demonstrates that no Fourth Amendment violation occurred. The police certainly had a "reasonable suspicion" that knocking and announcing their presence might be dangerous to themselves or others, in that a reliable informant had told them that Alan Shelby might be in respondent's home, an officer had confirmed this possibility, and Shelby had a violent past and possible access to a large supply of weapons and had vowed that he "would not do federal time." Moreover, the manner in which the entry was accomplished was clearly reasonable, in that the police broke but a single window in the garage to discourage Shelby, or anyone else, from rushing to the weapons that the informant had told them were there. Pp. 70–72.

2. The officers executing the warrant did not violate § 3109, which provides: "The officer may break open any . . . window . . . to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance . . . ." Contrary to respondent's contention, that statute does not specify the only circumstances under which an officer executing a warrant may damage property. By its terms § 3109 prohibits nothing, but merely authorizes officers to damage property in certain instances. Even accepting, *arguendo*, that it implicitly forbids some of what it does not expressly permit, it is of no help to respondent. In both *Miller* v. *United States*, 357 U. S. 301, 313, and *Sabbath* v. *United States*, 391 U. S. 585, 591, n. 8, this Court noted that § 3109's prior notice requirement codified a common-law tradition. The Court now makes clear that § 3109 also codified the exceptions to the common-law requirement of notice before entry. Because that is the case, and because the common law informs the Fourth Amendment, *Wilson* and *Richards* serve as guideposts in construing the statute. In *Wilson*, the Court concluded that the common-law announcement principle is an element of the Fourth Amendment reasonableness inquiry, but noted that the principle was never stated as an inflexible rule requiring announcement under all circumstances. 514 U. S., at 934. In *Richards*, the Court articulated the test used to determine whether exigent circumstances justify a particular no-knock entry. 520 U. S., at 394. Thus, § 3109 includes an exigent circumstances exception and that exception's applicability in a given instance is measured by the same standard articulated in *Richards*. The police met that standard here. Pp. 72–74.

91 F. 3d 1297, reversed and remanded.

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

David C. Frederick argued the cause for the United States. With him on the briefs were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, and *J. Douglas Wilson*.

Michael R. Levine argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Richards* v. *Wisconsin*, 520 U. S. 385, 394 (1997), we held that so-called "no-knock" entries are justified when police officers have a "reasonable suspicion" that knocking and announcing their presence before entering would "be dangerous or futile, or . . . inhibit the effective investigation of

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*Briefs of *amici curiae* urging reversal were filed for Americans for Effective Law Enforcement, Inc., et al. by *Richard M. Weintraub*, *Bernard J. Farber*, *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak;* and for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Jeffrey S. Sutton*, State Solicitor, and *Elise Porter*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *William H. Pryor, Jr.*, of Alabama, *Bruce M. Botelho* of Alaska, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *M. Jane Brady* of Delaware, *Robert Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Jose Fuentes Agostini* of Puerto Rico, *Jeffrey B. Pine* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Richard Cullen* of Virginia, and *Christine O. Gregoire* of Washington.

John Wesley Hall, Jr., and *Lisa Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

the crime." In this case, we must decide whether the Fourth Amendment holds officers to a higher standard than this when a "no-knock" entry results in the destruction of property. We hold that it does not.

Alan Shelby was a prisoner serving concurrent state and federal sentences in the Oregon state prison system. On November 1, 1994, the Tillamook County Sheriff's Office took temporary custody of Shelby, expecting to transport him to the Tillamook County Courthouse, where he was scheduled to testify. On the way to the courthouse, Shelby slipped his handcuffs, knocked over a deputy sheriff, and escaped from custody.

It was not the first time Shelby had attempted escape. In 1991 he struck an officer, kicked out a jail door, assaulted a woman, stole her vehicle, and used it to ram a police vehicle. Another time he attempted escape by using a rope made from torn bedsheets. He was reported to have made threats to kill witnesses and police officers, to have tortured people with a hammer, and to have said that he would "'not do federal time.'" App. to Pet. for Cert. 38a. It was also thought that Shelby had had access to large supplies of weapons.

Shortly after learning of Shelby's escape, the authorities sent out a press release, seeking information that would lead to his recapture. On November 3, a reliable confidential informant told Bureau of Alcohol, Tobacco, and Firearms Agent George Kim that on the previous day he had seen a person he believed to be Shelby at respondent Hernan Ramirez's home in Boring, Oregon. Kim and the informant then drove to an area near respondent's home, from where Kim observed a man working outside who resembled Shelby.

Based on this information, a Deputy United States Marshal sought and received a "no-knock" warrant granting permission to enter and search Ramirez's home. Around this time, the confidential informant also told authorities that respondent might have a stash of guns and drugs hidden in

his garage. In the early morning of November 5, approximately 45 officers gathered to execute the warrant. The officers set up a portable loudspeaker system and began announcing that they had a search warrant. Simultaneously, they broke a single window in the garage and pointed a gun through the opening, hoping thereby to dissuade any of the occupants from rushing to the weapons the officers believed might be in the garage.

Respondent and his family were asleep inside the house at the time this activity began. Awakened by the noise, respondent believed that they were being burglarized. He ran to his utility closet, grabbed a pistol, and fired it into the ceiling of his garage. The officers fired back and shouted "police." At that point respondent realized that it was law enforcement officers who were trying to enter his home. He ran to the living room, threw his pistol away, and threw himself onto the floor. Shortly thereafter, he, his wife, and their child left the house and were taken into police custody. Respondent waived his *Miranda* rights, and then admitted that he had fired the weapon, that he owned both that gun and another gun that was inside the house, and that he was a convicted felon. Officers soon obtained another search warrant, which they used to return to the house and retrieve the two guns. Shelby was not found.

Respondent was subsequently indicted for being a felon in possession of firearms. 18 U. S. C. § 922(g)(1). The District Court granted his motion to suppress evidence regarding his possession of the weapons, ruling that the police officers had violated both the Fourth Amendment and 18 U. S. C. § 3109 because there were "insufficient exigent circumstances" to justify the police officers' destruction of property in their execution of the warrant. App. to Pet. for Cert. 34a.

The Court of Appeals for the Ninth Circuit affirmed. 91 F. 3d 1297 (1996). Applying Circuit precedent, that court concluded that while a "mild exigency" is sufficient to justify a no-knock entry that can be accomplished without the de-

struction of property, "'more specific inferences of exigency are necessary'" when property is destroyed. *Id.*, at 1301. It held that this heightened standard had not been met on the facts of this case. We granted certiorari and now reverse. 521 U. S. 1103 (1997).

In two recent cases we have considered whether and to what extent "no-knock" entries implicate the protections of the Fourth Amendment. In *Wilson* v. *Arkansas*, 514 U. S. 927 (1995), we reviewed the Arkansas Supreme Court's holding that the common-law requirement that police officers knock and announce their presence before entering played no role in Fourth Amendment analysis. We rejected that conclusion, and held instead that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." *Id.*, at 934. We were careful to note, however, that there was no rigid rule requiring announcement in all instances, and left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." *Id.*, at 934, 936.

In *Richards* v. *Wisconsin*, 520 U. S. 385 (1997),[1] the Wisconsin Supreme Court held that police officers executing search warrants in felony drug investigations were never required to knock and announce their presence. We concluded that this blanket rule was overly broad and held instead that "[i]n order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.*, at 394.

Neither of these cases explicitly addressed the question whether the lawfulness of a no-knock entry depends on whether property is damaged in the course of the entry. It

[1] It should be noted that our opinion in *Richards* came down after the Court of Appeals issued its opinion in this case.

is obvious from their holdings, however, that it does not. Under *Richards*, a no-knock entry is justified if police have a "reasonable suspicion" that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a "reasonable suspicion" exists depends in no way on whether police must destroy property in order to enter.

This is not to say that the Fourth Amendment speaks not at all to the manner of executing a search warrant. The general touchstone of reasonableness which governs Fourth Amendment analysis, see *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108–109 (1977) *(per curiam)*, governs the method of execution of the warrant. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression.

Applying these principles to the facts at hand, we conclude that no Fourth Amendment violation occurred. A reliable confidential informant had notified the police that Alan Shelby might be inside respondent's home, and an officer had confirmed this possibility. Shelby was a prison escapee with a violent past who reportedly had access to a large supply of weapons. He had vowed that he would "'not do federal time.'" The police certainly had a "reasonable suspicion" that knocking and announcing their presence might be dangerous to themselves or to others.[2]

As for the manner in which the entry was accomplished, the police here broke a single window in respondent's garage. They did so because they wished to discourage Shelby, or any other occupant of the house, from rushing to the weapons that the informant had told them respondent might have

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[2] It is of no consequence that Shelby was not found. "[I]n determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe *at the time of their entry.*" *Ker* v. *California*, 374 U. S. 23, 40–41, n. 12 (1963) (opinion of Clark, J.) (emphasis in original).

kept there. Their conduct was clearly reasonable and we conclude that there was no Fourth Amendment violation.[3]

Respondent also argues, however, that suppression is appropriate because the officers executing the warrant violated 18 U. S. C. § 3109. This statutory argument fares no better. Section 3109 provides:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Respondent contends that the statute specifies the only circumstances under which an officer may damage property in executing a search warrant, and that it therefore forbids all other property-damaging entries.

But by its terms § 3109 prohibits nothing. It merely authorizes officers to damage property in certain instances. Even accepting, *arguendo*, that the statute implicitly forbids some of what it does not expressly permit, it is of no help to respondent. In *Miller* v. *United States*, 357 U. S. 301, 313 (1958), we noted that § 3109's "requirement of prior notice . . . before forcing entry . . . codif[ied] a tradition embedded in Anglo-American law." We repeated this point in *Sabbath* v. *United States*, 391 U. S. 585, 591, n. 8 (1968) (referring to § 3109 as "codification" of the common law). In neither of

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[3] After concluding that the Fourth Amendment had been violated in this case, the Ninth Circuit further concluded that the guns should be excluded from evidence. Because we conclude that there was no Fourth Amendment violation, we need not decide whether, for example, there was sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence. Cf. *Nix* v. *Williams*, 467 U. S. 431 (1984); *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

these cases, however, did we expressly hold that § 3109 also codified the exceptions to the common-law requirement of notice before entry. In *Miller* the Government made "no claim . . . of the existence of circumstances excusing compliance" and the question was accordingly not before us. 357 U. S., at 309. In *Sabbath* the Government did make such a claim, but because the record did "not reveal any substantial basis for the failure of the agents . . . to announce their authority" we did not decide the question. We did note, however, that "[e]xceptions to any possible constitutional rule relating to announcement and entry have been recognized . . . and there is little reason why those limited exceptions might not also apply to § 3109, since they existed at common law, of which the statute is a codification." 391 U. S., at 591, n. 8.

In this case the question is squarely presented. We remove whatever doubt may remain on the subject and hold that § 3109 codifies the exceptions to the common-law announcement requirement. If § 3109 codifies the common law in this area, and the common law in turn informs the Fourth Amendment, our decisions in *Wilson* and *Richards* serve as guideposts in construing the statute. In *Wilson* v. *Arkansas*, 514 U. S. 927 (1995), we concluded that the common-law principle of announcement is "an element of the reasonableness inquiry under the Fourth Amendment," but noted that the principle "was never stated as an inflexible rule requiring announcement under all circumstances." *Id.*, at 934. In *Richards* v. *Wisconsin*, 520 U. S. 385 (1997), we articulated the test used to determine whether exigent circumstances justify a particular no-knock entry. *Id.*, at 394. We therefore hold that § 3109 includes an exigent circumstances exception and that the exception's applicability in a given instance is measured by the same standard we articulated in *Richards*. The police met that standard here and § 3109 was therefore not violated.

We accordingly reverse the judgment of the Court of Appeals and remand this case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

ONCALE *v.* SUNDOWNER OFFSHORE SERVICES, INC., ET AL.

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

No. 96–568. Argued December 3, 1997—Decided March 4, 1998

Petitioner Oncale filed a complaint against his employer, respondent Sundowner Offshore Services, Inc., claiming that sexual harassment directed against him by respondent co-workers in their workplace constituted "discriminat[ion] . . . because of . . . sex" prohibited by Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a)(1). Relying on Fifth Circuit precedent, the District Court held that Oncale, a male, had no Title VII cause of action for harassment by male co-workers. The Fifth Circuit affirmed.

Held: Sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women, *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 682, and in the related context of racial discrimination in the workplace this Court has rejected any conclusive presumption that an employer will not discriminate against members of his own race, *Castaneda* v. *Partida*, 430 U. S. 482, 499. There is no justification in Title VII's language or the Court's precedents for a categorical rule barring a claim of discrimination "because of . . . sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex. Recognizing liability for same-sex harassment will not transform Title VII into a general civility code for the American workplace, since Title VII is directed at discrimination because of sex, not merely conduct tinged with offensive sexual connotations; since the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same, and the opposite, sex; and since the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. Pp. 78–82.

83 F. 3d 118, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 82.

Nicholas Canaday III argued the cause for petitioner. With him on the briefs were *Andre P. LaPlace* and *Eric Schnapper.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Acting Solicitor General Dellinger*, *Acting Assistant Attorney General Pinzler*, *Deputy Solicitor General Waxman*, *Beth S. Brinkmann*, *C. Gregory Stewart*, *J. Ray Terry, Jr.*, *Gwendolyn Young Reams*, and *Carolyn L. Wheeler.*

Harry M. Reasoner argued the cause for respondents. With him on the brief were *John H. Smither*, *Marie R. Yeates*, *Thomas H. Wilson*, and *Samuel Issacharoff.**

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether workplace harassment can violate Title VII's prohibition against "discriminat[ion] . . . because of . . . sex," 42 U. S. C. § 2000e–2(a)(1), when the harasser and the harassed employee are of the same sex.

I

The District Court having granted summary judgment for respondents, we must assume the facts to be as alleged by petitioner Joseph Oncale. The precise details are irrelevant

*Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *Ellen Simon Sacks* and *Christopher P. Thorman;* for the Lambda Legal Defense and Education Fund et al. by *Beatrice Dohrn*, *John Davidson*, *Ruth Harlow*, *Steven R. Shapiro*, *Sara L. Mandelbaum*, and *Minna J. Kotkin;* for the National Employment Lawyers Association by *Margaret A. Harris* and *Anne Golden;* for the National Organization on Male Sexual Victimization, Inc., by *Catharine A. MacKinnon;* and for Law Professors by *Nan D. Hunter.*

Briefs of *amici curiae* urging affirmance were filed for the Equal Employment Advisory Council by *Robert E. Williams* and *Ann Elizabeth Reesman;* and for the Texas Association of Business & Chambers of Commerce by *Jeffrey C. Londa* and *Linda Ottinger Headley.*

to the legal point we must decide, and in the interest of both brevity and dignity we shall describe them only generally. In late October 1991, Oncale was working for respondent Sundowner Offshore Services, Inc., on a Chevron U. S. A., Inc., oil platform in the Gulf of Mexico. He was employed as a roustabout on an eight-man crew which included respondents John Lyons, Danny Pippen, and Brandon Johnson. Lyons, the crane operator, and Pippen, the driller, had supervisory authority, App. 41, 77, 43. On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by Lyons, Pippen, and Johnson in the presence of the rest of the crew. Pippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape.

Oncale's complaints to supervisory personnel produced no remedial action; in fact, the company's Safety Compliance Clerk, Valent Hohen, told Oncale that Lyons and Pippen "picked [on] him all the time too," and called him a name suggesting homosexuality. *Id.*, at 77. Oncale eventually quit—asking that his pink slip reflect that he "voluntarily left due to sexual harassment and verbal abuse." *Id.*, at 79. When asked at his deposition why he left Sundowner, Oncale stated: "I felt that if I didn't leave my job, that I would be raped or forced to have sex." *Id.*, at 71.

Oncale filed a complaint against Sundowner in the United States District Court for the Eastern District of Louisiana, alleging that he was discriminated against in his employment because of his sex. Relying on the Fifth Circuit's decision in *Garcia* v. *Elf Atochem North America*, 28 F. 3d 446, 451–452 (1994), the District Court held that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." App. 106. On appeal, a panel of the Fifth Circuit concluded that *Garcia* was binding Circuit precedent, and affirmed. 83 F. 3d 118 (1996). We granted certiorari. 520 U. S. 1263 (1997).

II

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a)(1). We have held that this not only covers "terms" and "conditions" in the narrow contractual sense, but "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986) (citations and internal quotation marks omitted). "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (citations and internal quotation marks omitted).

Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women, *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 682 (1983), and in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race. "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda* v. *Partida*, 430 U. S. 482, 499 (1977). See also *id.*, at 515–516, n. 6 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., dissenting). In *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616 (1987), a male employee claimed that his employer discriminated against him because of his sex when it preferred a female employee for promotion. Al-

though we ultimately rejected the claim on other grounds, we did not consider it significant that the supervisor who made that decision was also a man. See *id.*, at 624–625. If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination "because of . . . sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.

Courts have had little trouble with that principle in cases like *Johnson*, where an employee claims to have been passed over for a job or promotion. But when the issue arises in the context of a "hostile environment" sexual harassment claim, the state and federal courts have taken a bewildering variety of stances. Some, like the Fifth Circuit in this case, have held that same-sex sexual harassment claims are never cognizable under Title VII. See also, *e. g.*, *Goluszek* v. *H. P. Smith*, 697 F. Supp. 1452 (ND Ill. 1988). Other decisions say that such claims are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire). Compare *McWilliams* v. *Fairfax County Board of Supervisors*, 72 F. 3d 1191 (CA4 1996), with *Wrightson* v. *Pizza Hut of America*, 99 F. 3d 138 (CA4 1996). Still others suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations. See *Doe* v. *Belleville*, 119 F. 3d 563 (CA7 1997).

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discrimina-

t[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Respondents and their *amici* contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace. But that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discriminat[ion]* . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, *supra*, at 25 (GINSBURG, J., concurring).

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer di-

rect comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "*discrimina[tion]* . . . because of . . . sex."

And there is another requirement that prevents Title VII from expanding into a general civility code: As we emphasized in *Meritor* and *Harris*, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris*, 510 U. S., at 21, citing *Meritor*, 477 U. S., at 67. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory "conditions of employment."

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Harris, supra*, at 23. In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The

real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

III

Because we conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII, the judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination "because of . . . sex."

Syllabus

STEEL CO., aka CHICAGO STEEL & PICKLING CO. *v.* CITIZENS FOR A BETTER ENVIRONMENT

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

No. 96–643. Argued October 6, 1997—Decided March 4, 1998

Alleging that petitioner manufacturer had violated the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) by failing to file timely toxic- and hazardous-chemical storage and emission reports for past years, respondent environmental protection organization filed this private enforcement action for declaratory and injunctive relief under EPCRA's citizen-suit provision, 42 U. S. C. § 11046(a)(1). The District Court held that, because petitioner had brought its filings up to date by the time the complaint was filed, the court lacked jurisdiction to entertain a suit for a present violation; and that, because EPCRA does not allow suit for a purely historical violation, respondent's allegation of untimely filing was not a claim upon which relief could be granted. The Seventh Circuit reversed, concluding that EPCRA authorizes citizen suits for purely past violations.

Held: Because none of the relief sought would likely remedy respondent's alleged injury in fact, respondent lacks standing to maintain this suit, and this Court and the lower courts lack jurisdiction to entertain it. Pp. 88–110.

(a) The merits issue in this case—whether § 11046(a) permits citizen suits for purely past violations—is not also "jurisdictional," and so does not occupy the same status as standing to sue as a question that must be resolved first. It is firmly established that a district court's subject-matter jurisdiction is not defeated by the absence of a valid (as opposed to arguable) cause of action, see, *e. g.*, *Bell* v. *Hood*, 327 U. S. 678, 682. Subject-matter jurisdiction exists if the right to recover will be sustained under one reading of the Constitution and laws and defeated under another, *id.*, at 685, unless the claim clearly appears to be immaterial, wholly insubstantial and frivolous, or otherwise so devoid of merit as not to involve a federal controversy, see, *e. g.*, *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 666. Here, respondent wins under one construction of EPCRA and loses under another, and its claim is not frivolous or immaterial. It is unreasonable to read § 11046(c)—which provides that "[t]he district court shall have jurisdiction in actions brought under subsection (a) . . . to enforce [an EPCRA] requirement . . . and to impose any civil penalty provided for violation of that requirement"—as making all the elements of the § 11046(a) cause of ac-

tion jurisdictional, rather than as merely specifying the remedial *powers* of the court. *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, as well as cases deciding a statutory standing question before a constitutional standing question, distinguished. In no case has this Court called the existence of a cause of action "jurisdictional," and decided that question before resolving a dispute concerning the existence of an Article III case or controversy. Such a principle would turn every statutory question in an EPCRA citizen suit into a question of jurisdiction that this Court would have to consider—indeed, raise *sua sponte*—even if not raised below. Pp. 88–93.

(b) This Court declines to endorse the "doctrine of hypothetical jurisdiction," under which several Courts of Appeals have found it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. That doctrine carries the courts beyond the bounds of authorized judicial action and thus offends fundamental separation-of-powers principles. In a long and venerable line of cases, this Court has held that, without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit. See, *e. g.*, *Capron* v. *Van Noorden*, 2 Cranch 126; *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 73. *Bell* v. *Hood, supra; National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 465, n. 13; *Norton* v. *Mathews*, 427 U. S. 524, 531; *Secretary of Navy* v. *Avrech*, 418 U. S. 676, 678 *(per curiam); United States* v. *Augenblick*, 393 U. S. 348; *Philbrook* v. *Glodgett*, 421 U. S. 707, 721; and *Chandler* v. *Judicial Council of Tenth Circuit*, 398 U. S. 74, 86–88, distinguished. For a court to pronounce upon a law's meaning or constitutionality when it has no jurisdiction to do so is, by very definition, an ultra vires act. Pp. 93–102.

(c) Respondent lacks standing to sue. Standing is the "irreducible constitutional minimum" necessary to make a justiciable "case" or "controversy" under Article III, § 2. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560. It contains three requirements: injury in fact to the plaintiff, causation of that injury by the defendant's complained-of conduct, and a likelihood that the requested relief will redress that injury. *E. g.*, *ibid.* Even assuming, as respondent asserts, that petitioner's failure to report EPCRA information in a timely manner, and the lingering effects of that failure, constitute a concrete injury in fact to respondent and its members that satisfies Article III, cf. *id.*, at 578, the complaint nevertheless fails the redressability test: None of the specific items of relief sought—a declaratory judgment that petitioner violated EPCRA;

injunctive relief authorizing respondent to make periodic inspections of petitioner's facility and records and requiring petitioner to give respondent copies of its compliance reports; and orders requiring petitioner to pay EPCRA civil penalties to the Treasury and to reimburse respondent's litigation expenses—and no conceivable relief under the complaint's final, general request, would serve to reimburse respondent for losses caused by petitioner's late reporting, or to eliminate any effects of that late reporting upon respondent. Pp. 102–109.

90 F. 3d 1237, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined, and in which BREYER, J., joined as to Parts I and IV. O'CONNOR, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 110. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 111. STEVENS, J., filed an opinion concurring in the judgment, in which SOUTER, J., joined as to Parts I, III, and IV, and GINSBURG, J., joined as to Part III, *post*, p. 112. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 134.

Sanford M. Stein argued the cause for petitioner. With him on the briefs was *Leo P. Dombrowski.*

David A. Strauss argued the cause for respondent. With him on the brief were *James D. Brusslan* and *Stefan A. Noe.*

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Wallace*, *James A. Feldman*, *Edward J. Shawaker*, and *Mark R. Haag.**

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*Briefs of *amici curiae* urging reversal were filed for the American Forest & Paper Association, Inc., et al. by *Jan S. Amundson* and *Quentin Riegel;* for the American Iron & Steel Institute et al. by *Scott M. DuBoff*, *Valerie J. Ughetta*, *Robin S. Conrad*, and *J. Walker Henry;* for the Chemical Manufacturers Association by *James W. Conrad*, *Christina Franz*, and *Carter G. Phillips;* for the Clean Air Implementation Project by *William H. Lewis, Jr.*, and *Michael A. McCord;* for the Mid-America Legal Foundation et al. by *James T. Harrington*, *William F. Moran III*, and *Gregory*

JUSTICE SCALIA delivered the opinion of the Court.

This is a private enforcement action under the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 100 Stat. 1755, 42 U. S. C. § 11046(a)(1). The case presents the merits question, answered in the affirmative by the United States Court of Appeals for the Seventh Circuit, whether EPCRA authorizes suits for purely past violations. It also presents the jurisdictional question whether respondent, plaintiff below, has standing to bring this action.

I

Respondent, an association of individuals interested in environmental protection, sued petitioner, a small manufacturing company in Chicago, for past violations of EPCRA. EPCRA establishes a framework of state, regional, and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health-threatening release. Central to its operation are reporting requirements compelling users of specified toxic and hazardous chemicals to file annual

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R. McClintock; for the Pacific Legal Foundation by *Robin L. Rivett* and *M. Reed Hopper;* and for the Washington Legal Foundation by *Barry M. Hartman*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Dennis C. Vacco*, Attorney General of New York, *Barbara G. Billet*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *Maureen F. Leary*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Calvin E. Holloway, Sr.*, of Guam, *Margery S. Bronster* of Hawaii, *Pamela Fanning Carter* of Indiana, *Scott Harshbarger* of Massachusetts, *Jeremiah W. Nixon* of Missouri, *Philip T. McLaughlin* of New Hampshire, *Michael F. Easley* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *William H. Sorrell* of Vermont, *James S. Gilmore III* of Virginia, and *Darrell V. McGraw, Jr.*, of West Virginia; and for the Natural Resources Defense Council, Inc., et al. by *James M. Hecker*.

"emergency and hazardous chemical inventory forms" and "toxic chemical release forms," which contain, *inter alia,* the name and location of the facility, the name and quantity of the chemical on hand, and, in the case of toxic chemicals, the waste-disposal method employed and the annual quantity released into each environmental medium. 42 U. S. C. §§ 11022 and 11023. The hazardous-chemical inventory forms for any given calendar year are due the following March 1st, and the toxic-chemical release forms the following July 1st. §§ 11022(a)(2) and 11023(a).

Enforcement of EPCRA can take place on many fronts. The Environmental Protection Agency (EPA) has the most powerful enforcement arsenal: it may seek criminal, civil, or administrative penalties. § 11045. State and local governments can also seek civil penalties, as well as injunctive relief. §§ 11046(a)(2) and (c). For purposes of this case, however, the crucial enforcement mechanism is the citizen-suit provision, § 11046(a)(1), which likewise authorizes civil penalties and injunctive relief, see § 11046(c). This provides that "any person may commence a civil action on his own behalf against . . . [a]n owner or operator of a facility for failure," among other things, to "[c]omplete and submit an inventory form under section 11022(a) of this title . . . [and] section 11023(a) of this title." § 11046(a)(1). As a prerequisite to bringing such a suit, the plaintiff must, 60 days prior to filing his complaint, give notice to the Administrator of the EPA, the State in which the alleged violation occurs, and the alleged violator. § 11046(d). The citizen suit may not go forward if the Administrator "has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty." § 11046(e).

In 1995 respondent sent a notice to petitioner, the Administrator, and the relevant Illinois authorities, alleging—accurately, as it turns out—that petitioner had failed since 1988, the first year of EPCRA's filing deadlines, to complete and

to submit the requisite hazardous-chemical inventory and toxic-chemical release forms under §§ 11022 and 11023. Upon receiving the notice, petitioner filed all of the overdue forms with the relevant agencies. The EPA chose not to bring an action against petitioner, and when the 60-day waiting period expired, respondent filed suit in Federal District Court. Petitioner promptly filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (6), contending that, because its filings were up to date when the complaint was filed, the court had no jurisdiction to entertain a suit for a present violation; and that, because EPCRA does not allow suit for a purely historical violation, respondent's allegation of untimeliness in filing was not a claim upon which relief could be granted.

The District Court agreed with petitioner on both points. App. to Pet. for Cert. A24–A26. The Court of Appeals reversed, concluding that citizens may seek penalties against EPCRA violators who file after the statutory deadline and after receiving notice. 90 F. 3d 1237 (CA7 1996). We granted certiorari, 519 U. S. 1147 (1997).

II

We granted certiorari in this case to resolve a conflict between the interpretation of EPCRA adopted by the Seventh Circuit and the interpretation previously adopted by the Sixth Circuit in *Atlantic States Legal Foundation, Inc.* v. *United Musical Instruments, U. S. A., Inc.*, 61 F. 3d 473 (1995)—a case relied on by the District Court, and acknowledged by the Seventh Circuit to be "factually indistinguishable," 90 F. 3d, at 1241–1242. Petitioner, however, both in its petition for certiorari and in its briefs on the merits, has raised the issue of respondent's standing to maintain the suit, and hence this Court's jurisdiction to entertain it. Though there is some dispute on this point, see Part III, *infra*, this would normally be considered a threshold question that must be resolved in respondent's favor before proceeding to the

merits. JUSTICE STEVENS' opinion concurring in the judgment, however, claims that the question whether § 11046(a) permits this cause of action is *also* "jurisdictional," and so has equivalent claim to being resolved first. Whether that is so has significant implications for this case and for many others, and so the point warrants extended discussion.

It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i. e.*, the courts' statutory or constitutional *power* to adjudicate the case. See generally 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, p. 196, n. 8 and cases cited (2d ed. 1990). As we stated in *Bell* v. *Hood*, 327 U. S. 678, 682 (1946), "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Rather, the district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," *id.*, at 685, unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.*, at 682–683; see also *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 285 (1993); *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913). Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 666 (1974); see also *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 359 (1959). Here, respondent wins under one construction of EPCRA and loses under another, and JUSTICE STEVENS does not argue that respondent's claim is frivolous or immaterial—

in fact, acknowledges that the language of the citizen-suit provision is ambiguous. *Post*, at 131.

JUSTICE STEVENS relies on our treatment of a similar issue as jurisdictional in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49 (1987). *Post*, at 114. The statute at issue in that case, however, after creating the cause of action, went on to say that "[t]he district courts shall have jurisdiction, *without regard to the amount in controversy or the citizenship of the parties*," to provide various forms of relief. 33 U. S. C. § 1365(a) (emphasis added). The italicized phrase strongly suggested (perhaps misleadingly) that the provision was addressing genuine subject-matter jurisdiction. The corresponding provision in the present case, however, reads as follows:

> "The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." 42 U. S. C. § 11046(c).

It is unreasonable to read this as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, viz., to enforce the violated requirement and to impose civil penalties. "Jurisdiction," it has been observed, "is a word of many, too many, meanings," *United States* v. *Vanness*, 85 F. 3d 661, 663, n. 2 (CADC 1996), and it is commonplace for the term to be used as it evidently was here. See, *e. g.*, 7 U. S. C. § 13a–1(d) ("In any action brought under this section, the Commission may seek and the court shall have jurisdiction to impose . . . a civil penalty in the amount of not more than the higher of $100,000 or triple the monetary gain to the person for each violation"); 15 U. S. C. § 2622(d) ("In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief,

including injunctive relief and compensatory and exemplary damages"); 42 U. S. C. § 7622(d) ("In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages").

It is also the case that the *Gwaltney* opinion does not display the slightest awareness that anything *turned upon* whether the existence of a cause of action for past violations was technically jurisdictional—as indeed nothing of substance did. The District Court had statutory jurisdiction over the suit in any event, since continuing violations were also alleged. See 484 U. S., at 64. It is true, as JUSTICE STEVENS points out, that the issue of Article III standing which is addressed at the end of the opinion should technically have been addressed at the outset if the statutory question was not jurisdictional. But that also did not really matter, since Article III standing was in any event found. The short of the matter is that the jurisdictional character of the elements of the cause of action in *Gwaltney* made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by jurisdictional rulings of this sort (if *Gwaltney* can even be called a ruling on the point rather than a dictum) have no precedential effect. See *Lewis* v. *Casey*, 518 U. S. 343, 352, n. 2 (1996); *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U. S. 88, 97 (1994); *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952). But even if it is authoritative on the point as to the distinctive statute there at issue, it is fanciful to think that *Gwaltney* revised our established jurisprudence that the failure of a cause of action does not automatically produce a failure of jurisdiction, or adopted the expansive principle that a statute saying "the district court shall have jurisdiction to remedy violations [in specified ways]"

renders the existence of a violation necessary for subject-matter jurisdiction.

JUSTICE STEVENS' concurrence devotes a large portion of its discussion to cases in which a statutory standing question was decided before a question of constitutional standing. See *post*, at 115–117. They also are irrelevant here, because it is not a statutory *standing* question that JUSTICE STEVENS would have us decide first. He wishes to resolve, not whether EPCRA authorizes this plaintiff to sue (it assuredly does), but whether the scope of the EPCRA right of action includes past violations. Such a question, we have held, goes to the merits and not to statutory standing. See *Northwest Airlines, Inc.* v. *County of Kent*, 510 U. S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional"); *Romero* v. *International Terminal Operating Co.*, *supra*, at 359; *Montana-Dakota Util. Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 249 (1951).

Though it is replete with extensive case discussions, case citations, rationalizations, and syllogoids, see *post*, at 120, n. 12, and n. 2, *infra*, JUSTICE STEVENS' opinion conspicuously lacks one central feature: a single case in which this Court has done what he proposes, to wit, call the existence of a cause of action "jurisdictional," and decide that question before resolving a dispute concerning the existence of an Article III case or controversy. Of course, even if there were not solid precedent contradicting JUSTICE STEVENS' position, the consequences are alone enough to condemn it. It would turn every statutory question in an EPCRA citizen suit into a question of jurisdiction. Under JUSTICE STEVENS' analysis, § 11046(c)'s grant of "jurisdiction in actions brought *under* [§ 11046(a)]" withholds jurisdiction over claims involving purely past violations if past violations are not in fact *covered* by § 11046(a). By parity of reasoning, if there is a dispute as to whether the omission of a particular item constituted a failure to "complete" the form; or as to

whether a particular manner of delivery complied in time with the requirement to "submit" the form; and if the court agreed with the defendant on the point; the action would not be "brought under [§ 11046(a)]," and would be dismissed for lack of jurisdiction rather than decided on the merits. Moreover, those statutory arguments, since they are "jurisdictional," would have to be considered by this Court even though not raised earlier in the litigation—indeed, this Court would have to raise them *sua sponte*. See *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 278–279 (1977); *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453 (1900). Congress of course did not create such a strange scheme. In referring to actions "brought under" § 11046(a), § 11046(c) means suits *contending* that § 11046(a) contains a certain requirement. If JUSTICE STEVENS is correct that all cause-of-action questions may be regarded as jurisdictional questions, and thus capable of being decided where there is no genuine case or controversy, it is hard to see what is left of that limitation in Article III.

III

In addition to its attempt to convert the merits issue in this case into a jurisdictional one, JUSTICE STEVENS' concurrence proceeds, *post*, at 117–124, to argue the bolder point that jurisdiction need not be addressed first anyway. Even if the statutory question is not "fram[ed] . . . in terms of 'jurisdiction,' " but is simply "characterize[d] . . . as whether respondent's complaint states a 'cause of action,' " "it is also clear that we have the power to decide the statutory question first." *Post*, at 117–118. This is essentially the position embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. See, *e. g.*, *SEC* v. *American*

Capital Investments, Inc., 98 F. 3d 1133, 1139–1142 (CA9 1996), cert. denied *sub nom. Shelton* v. *Barnes*, 520 U. S. 1185 (1997); *Smith* v. *Avino*, 91 F. 3d 105, 108 (CA11 1996); *Clow* v. *Department of Housing and Urban Development*, 948 F. 2d 614, 616, n. 2 (CA9 1991); *Cross-Sound Ferry Services, Inc.* v. *ICC*, 934 F. 2d 327, 333 (CADC 1991); *United States* v. *Parcel of Land*, 928 F. 2d 1, 4 (CA1 1991); *Browning-Ferris Industries* v. *Muszynski*, 899 F. 2d 151, 154–159 (CA2 1990). The Ninth Circuit has denominated this practice—which it characterizes as "assuming" jurisdiction for the purpose of deciding the merits—the "doctrine of hypothetical jurisdiction." See, *e. g.*, *United States* v. *Troescher*, 99 F. 3d 933, 934, n. 1 (1996).[1]

We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co.* v. *Jones*, *supra*, at 453. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of

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[1] Our disposition makes it appropriate to address the approach taken by this substantial body of Court of Appeals precedent. The fact that JUSTICE STEVENS' concurrence takes essentially the same approach makes his contention that this discussion is an "excursion," and "unnecessary to an explanation" of our decision, *post*, at 121, particularly puzzling.

the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

This Court's insistence that proper jurisdiction appear begins at least as early as 1804, when we set aside a judgment for the defendant at the instance of the losing plaintiff *who had himself* failed to allege the basis for federal jurisdiction. *Capron* v. *Van Noorden*, 2 Cranch 126 (1804). Just last Term, we restated this principle in the clearest fashion, unanimously setting aside the Ninth Circuit's merits decision in a case that had lost the elements of a justiciable controversy:

> " '[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). See *Juidice* v. *Vail*, 430 U. S. 327, 331–332 (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *United States* v. *Corrick*, 298 U. S. 435, 440 (1936) (footnotes omitted).' " *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 73 (1997), quoting *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986) (brackets in original).

JUSTICE STEVENS' arguments contradicting all this jurisprudence—and asserting that a court *may* decide the cause of action before resolving Article III jurisdiction—are readily refuted. First, his concurrence seeks to convert *Bell* v. *Hood*, 327 U. S. 678 (1946), into a case in which the cause-of-action question was decided before an Article III stand-

ing question. *Post*, at 118–119, n. 8. *"Bell,"* JUSTICE STEVENS asserts, "held that we have jurisdiction to decide [whether the plaintiff has stated a cause of action] *even when it is unclear whether the plaintiff's injuries can be redressed.*" *Post*, at 118. The italicized phrase (the italics are his own) invites the reader to believe that Article III redressability was at issue. Not only is this not true, but the whole *point* of *Bell* was that it is not true. In *Bell*, which was decided before *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), the District Court had dismissed the case on *jurisdictional* grounds because it believed that (what we would now call) a *Bivens* action would not lie. This Court held that the nonexistence of a cause of action was no proper basis for a jurisdictional dismissal. Thus, the uncertainty about "whether the plaintiff's injuries can be redressed" to which JUSTICE STEVENS refers is simply the uncertainty about whether a cause of action existed—which is precisely what *Bell* holds *not* to be an Article III "redressability" question. It would have been a different matter if the relief *requested* by the plaintiffs in *Bell* (money damages) would not have remedied their injury in fact; but it of course would. JUSTICE STEVENS used to understand the fundamental distinction between arguing no cause of action and arguing no Article III redressability, having written for the Court that the former argument is "not squarely directed at jurisdiction itself, but rather at the existence of a remedy for the alleged violation of . . . federal rights," which issue is "'not of the jurisdictional sort which the Court raises on its own motion.'" *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 398 (1979) (STEVENS, J.), (quoting *Mt. Healthy Bd. of Ed.* v. *Doyle*, 429 U. S., at 279).

JUSTICE STEVENS also relies on *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453 (1974). *Post*, at 119–120. But in that case, we did not determine whether a cause of action existed before de-

termining that the plaintiff had Article III standing; there was no question of injury in fact or effectiveness of the requested remedy. Rather, *National Railroad Passenger Corp.* determined whether a statutory cause of action existed before determining whether (if so) the plaintiff came within the "zone of interests" for which the cause of action was available. 414 U. S., at 465, n. 13. The latter question is an issue of *statutory* standing. It has nothing to do with whether there is case or controversy under Article III. [2]

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[2] JUSTICE STEVENS thinks it illogical that a merits question can be given priority over a statutory standing question *(National Railroad Passenger Corp.)* and a statutory standing question can be given priority over an Article III question (the cases discussed *post*, at 115–117), but a merits question cannot be given priority over an Article III question. See *post*, at 120, n. 12. It seems to us no more illogical than many other "broken circles" that appear in life and the law: that Executive agreements may displace state law, for example, see *United States* v. *Belmont*, 301 U. S. 324, 330–331 (1937), and that unilateral Presidential action (renunciation) may displace Executive agreements, does not produce the "logical" conclusion that unilateral Presidential action may displace state law. The reasons for allowing merits questions to be decided before statutory standing questions do not support allowing merits questions to be decided before Article III questions. As *National Railroad Passenger Corp.* points out, the merits inquiry and the statutory standing inquiry often "overlap," 414 U. S., at 456. The question whether *this* plaintiff has a cause of action under the statute, and the question whether *any* plaintiff has a cause of action under the statute are closely connected—indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two. The same cannot be said of the Article III requirement of remediable injury in fact, which (except with regard to entirely frivolous claims) has nothing to do with the text of the statute relied upon. Moreover, deciding whether any cause of action exists under a particular statute, rather than whether the particular plaintiff can sue, does not take the court into vast, uncharted realms of judicial opinion giving; whereas the proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of "generalized grievances," *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 217 (1974), that the Constitution leaves for resolution through the political process.

Much more extensive defenses of the practice of deciding the cause of action before resolving Article III jurisdiction have been offered by the Courts of Appeals. They rely principally upon two cases of ours, *Norton* v. *Mathews*, 427 U. S. 524 (1976), and *Secretary of Navy* v. *Avrech*, 418 U. S. 676 (1974) *(per curiam)*. Both are readily explained, we think, by their extraordinary procedural postures. In *Norton*, the case came to us on direct appeal from a three-judge District Court, and the jurisdictional question was whether the action was properly brought in that forum rather than in an ordinary district court. We declined to decide that jurisdictional question, because the merits question was decided *in a companion case*, *Mathews* v. *Lucas*, 427 U. S. 495 (1976), with the consequence that the jurisdictional question could have no effect on the outcome: If the three-judge court had been properly convened, we would have affirmed, and if not, we would have vacated and remanded for a fresh decree from which an appeal could be taken to the Court of Appeals, the outcome of which was foreordained by *Lucas*. *Norton* v. *Mathews*, *supra*, at 531. Thus, *Norton* did not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed. Moreover, the Court seems to have regarded the merits judgment that it entered on the basis of *Lucas* as equivalent to a jurisdictional dismissal for failure to present a substantial federal question. The Court said: "This disposition *[Lucas]* renders the merits in the present case a decided issue and thus one no longer substantial in the jurisdictional sense." 427 U. S., at 530–531. We think it clear that this peculiar case, involving a merits issue dispositively resolved in a companion case, was not meant to overrule, *sub silentio*, two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits. See *Clow*, 948 F. 2d, at 627 (O'Scannlain, J., dissenting).

Avrech also involved an instance in which an intervening Supreme Court decision definitively answered the merits

question. The jurisdictional question in the case had been raised by the Court *sua sponte* after oral argument, and supplemental briefing had been ordered. *Secretary of Navy* v. *Avrech*, *supra*, at 677. Before the Court came to a decision, however, the merits issue in the case had been conclusively resolved in *Parker* v. *Levy*, 417 U. S. 733 (1974), a case argued the same day as *Avrech*. The Court was unwilling to decide the jurisdictional question without oral argument, 418 U. S., at 677, but acknowledged (with some understatement) that "even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is . . . foreordained," *id.*, at 678. Accordingly, the Court disposed of the case on the basis of the intervening decision in *Parker*, in a minimalist two-page *per curiam* opinion. The first thing to be observed about *Avrech* is that the supposed jurisdictional issue was technically not that. The issue was whether a court-martial judgment could be attacked collaterally by a suit for backpay. Although *Avrech*, like the earlier case of *United States* v. *Augenblick*, 393 U. S. 348 (1969), characterized this question as jurisdictional, we later held squarely that it was not. See *Schlesinger* v. *Councilman*, 420 U. S. 738, 753 (1975). In any event, the peculiar circumstances of *Avrech* hardly permit it to be cited for the precedent-shattering general proposition that an "easy" merits question may be decided *on the assumption* of jurisdiction. To the contrary, the fact that the Court ordered briefing on the jurisdictional question *sua sponte* demonstrates its adherence to traditional and constitutionally dictated requirements. See *Cross-Sound Ferry Services, Inc.* v. *ICC*, 934 F. 2d, at 344–345, and n. 10 (Thomas, J., concurring in part and concurring in denial of petition for review).

Other cases sometimes cited by the lower courts to support "hypothetical jurisdiction" are similarly distinguishable. *United States* v. *Augenblick*, as we have discussed, did not involve a jurisdictional issue. In *Philbrook* v. *Glodgett*, 421 U. S. 707, 721 (1975), the jurisdictional question was whether,

in a suit under 28 U. S. C. § 1343(3) against the Commissioner of the Vermont Department of Social Welfare for deprivation of federal rights under color of state law by denying payments under a federally funded welfare program, the plaintiff could join a similar claim against the Secretary of Health, Education, and Welfare. The merits issue of statutory construction involved in the claim against the Secretary was precisely the same as that involved in the claim against the Commissioner, and the Secretary (while challenging jurisdiction) assured the Court that he would comply with any judgment entered against the Commissioner. The Court's disposition of the case was to dismiss the Secretary's appeal under what was then this Court's Rule 40(g), for failure to brief the jurisdictional question adequately. Normally, the Court acknowledged, its obligation to inquire into the jurisdiction of the District Court might prevent this disposition. But here, the Court concluded, "the substantive issue decided by the District Court would have been decided by that court even if it had concluded that the Secretary was not properly a party," and "the only practical difference that resulted . . . was that its injunction was directed against him as well as against [the Commissioner]," which the Secretary "has [not] properly contended to be wrongful before this Court." 421 U. S., at 721–722. And finally, in *Chandler* v. *Judicial Council of Tenth Circuit*, 398 U. S. 74 (1970), we reserved the question whether we had jurisdiction to issue a writ of prohibition or mandamus because the petitioner had not exhausted all available avenues before seeking relief under the All Writs Act, 28 U. S. C. § 1651, and because there was no record to review. 398 U. S., at 86–88. The exhaustion question *itself* was at least arguably jurisdictional, and was clearly treated as such. *Id.*, at 86.[3]

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[3] JUSTICE STEVENS adds three cases to the list of those that might support "hypothetical jurisdiction." *Post*, at 121–122, and n. 15. They are all inapposite. In *Moor* v. *County of Alameda*, 411 U. S. 693 (1973), we declined to decide whether a federal court's pendent jurisdiction extended

While some of the above cases must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of "hypothetical jurisdiction" that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat* v. *United States*, 219 U. S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. See *United States* v. *Richardson*, 418 U. S. 166, 179 (1974); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 227 (1974). For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no ju-

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to state-law claims against a new party, because we agreed with the District Court's discretionary declination of pendent jurisdiction. *Id.*, at 715–716. Thus, the case decided not a merits question before a jurisdictional question, but a discretionary jurisdictional question before a nondiscretionary jurisdictional question. Similarly in *Ellis* v. *Dyson*, 421 U. S. 426, 436 (1975), the "authoritative ground of decision" upon which the District Court relied in lieu of determining whether there was a case or controversy was *Younger* abstention, which we have treated as jurisdictional. And finally, the issue pretermitted in *Neese* v. *Southern R. Co.*, 350 U. S. 77 (1955) *(per curiam)*, was not Article III jurisdiction at all, but the substantive question whether the Seventh Amendment permits an appellate court to review the district court's denial of a motion for new trial on the ground that the verdict was excessive. We declined to consider that question because we agreed with the District Court's decision to deny the motion on the facts in the record. The more numerous the look-alike-but-inapposite cases JUSTICE STEVENS cites, the more strikingly clear it becomes: His concurrence cannot identify a single opinion of ours deciding the merits before a disputed question of Article III jurisdiction.

risdiction to do so is, by very definition, for a court to act ultra vires.

IV

Having reached the end of what seems like a long front walk, we finally arrive at the threshold jurisdictional question: whether respondent, the plaintiff below, has standing to sue. Article III, § 2, of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." We have always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process. *Muskrat* v. *United States*, *supra*, at 356–357. Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all. Every criminal investigation conducted by the Executive is a "case," and every policy issue resolved by congressional legislation involves a "controversy." These are not, however, the sort of cases and controversies that Article III, § 2, refers to, since "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–560 (1992). Standing to sue is part of the common understanding of what it takes to make a justiciable case. *Whitmore* v. *Arkansas*, 495 U. S. 149, 155 (1990).[4]

The "irreducible constitutional minimum of standing" contains three requirements. *Lujan* v. *Defenders of Wildlife*,

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[4] Our opinion is not motivated, as JUSTICE STEVENS suggests, by the more specific separation-of-powers concern that this citizen's suit "somehow interferes with the Executive's power to 'take Care that the Laws be faithfully executed,' Art. II, § 3," *post*, at 129. The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches. This case calls for nothing more than a straightforward application of our standing jurisprudence, which, though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.

supra, at 560. First and foremost, there must be alleged (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore* v. *Arkansas*, *supra*, at 149, 155 (quoting *Los Angeles* v. *Lyons*, 461 U. S. 95, 101–102 (1983)). Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 41–42 (1976). And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. *Id.*, at 45–46; see also *Warth* v. *Seldin*, 422 U. S. 490, 505 (1975). This triad of injury in fact, causation, and redressability[5] constitutes the core of Article III's case-or-

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[5] Contrary to JUSTICE STEVENS' belief that redressability "is a judicial creation of the past 25 years," *post*, at 124, the concept has been ingrained in our jurisprudence from the beginning. Although we have packaged the requirements of constitutional "case" or "controversy" somewhat differently in the past 25 years—an era rich in three-part tests—the point has always been the same: whether a plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U. S., at 508. For example, in *Marye* v. *Parsons*, 114 U. S. 325, 328–329 (1885), we held that a bill in equity should have been dismissed because it was a clear case of "*damnum absque injuriâ.*" Although the complainant alleged a breach of contract by the State, the complainant "asks no relief as to that, for there is no remedy by suit to compel the State to pay its debts. . . . The bill as framed, therefore, calls for a declaration of an abstract character." Because courts do not "si[t] to determine questions of law *in thesi*," we remanded with directions to dismiss the bill. *Id.*, at 328–330.

Also contrary to JUSTICE STEVENS' unprecedented suggestion, *post*, at 125, redressability—like the other prongs of the standing inquiry—does not depend on the defendant's status as a governmental entity. There is no conceivable reason why it should. If it is true, as JUSTICE STEVENS claims, that all of the cases in which the Court has denied standing because of a lack of redressability happened to involve government action or inaction, that would be unsurprising. Suits that promise no concrete benefit to the plaintiff, and that are brought to have us "determine questions of law *in thesi*," *Marye*, *supra*, at 330, are most often inspired by the psychological smart of perceived official injustice, or by the government-policy

controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. See *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 231 (1990).

We turn now to the particulars of respondent's complaint to see how it measures up to Article III's requirements. This case is on appeal from a Rule 12(b) motion to dismiss on the pleadings, so we must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations. *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 889 (1990). The complaint contains claims "on behalf of both [respondent] itself and its members."[6] App. 4. It describes respondent as an organization that seeks, uses, and acquires data reported under EPCRA. It says that respondent "reports to its members and the public about storage and releases of toxic chemicals into the environment, advocates changes in environmental regulations and statutes, prepares reports for its members and the public, seeks the reduction of toxic chemicals and further seeks to promote the effective enforcement of environmental laws." *Id.*, at 5. The complaint asserts that respondent's "right to know about [toxic-chemical] releases and its interests in protecting and improving the environment and the health of its members have been, are being, and will be adversely affected by [petitioner's] actions in failing to provide timely and required information under EPCRA." *Ibid.* The complaint also alleges that respondent's members, who live in or frequent the area near petitioner's facility, use the EPCRA-reported information "to learn about

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preferences of political activists. But the principle of redressability has broader application than that.

[6] EPCRA states that "any person may commence a civil action *on his own behalf* . . . ." 42 U. S. C. § 11046(a)(1) (emphasis added). "[P]erson" includes an association, see § 11049(7), so it is arguable that the statute permits respondent to vindicate only its own interests as an organization, and not the interests of its individual members. Since it makes no difference to our disposition of the case, we assume without deciding that the interests of individual members may be the basis of suit.

toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit." *Ibid.* The members' "safety, health, recreational, economic, aesthetic and environmental interests" in the information, it is claimed, "have been, are being, and will be adversely affected by [petitioner's] actions in failing to file timely and required reports under EPCRA." *Ibid.*

As appears from the above, respondent asserts petitioner's failure to provide EPCRA information in a timely fashion, and the lingering effects of that failure, as the injury in fact to itself and its members. We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA—or at least being deprived of it when one has a particular plan for its use—is a concrete injury in fact that satisfies Article III. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U. S., at 578. And we need not reach that question in the present case because, assuming injury in fact, the complaint fails the third test of standing, redressability.

The complaint asks for (1) a declaratory judgment that petitioner violated EPCRA; (2) authorization to inspect periodically petitioner's facility and records (with costs borne by petitioner); (3) an order requiring petitioner to provide respondent copies of all compliance reports submitted to the EPA; (4) an order requiring petitioner to pay civil penalties of $25,000 per day for each violation of §§ 11022 and 11023; (5) an award of all respondent's "costs, in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees, as authorized by Section 326(f) of [EPCRA]"; and (6) any such further relief as the court deems appropriate. App. 11. None of the specific items of relief sought, and none that we can envision as "appropriate" under the general request, would serve to reimburse respondent for losses caused by the late re-

porting, or to eliminate any effects of that late reporting upon respondent.[7]

The first item, the request for a declaratory judgment that petitioner violated EPCRA, can be disposed of summarily. There being no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world. See *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 479 (1990).

Item (4), the civil penalties authorized by the statute, see § 11045(c), might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties—the only damages authorized by EPCRA—are payable to the United States Treasury. In requesting them, therefore, respondent seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the "undifferentiated public interest" in faithful execution of EPCRA. *Lujan* v. *Defenders of Wildlife*, *supra*, at 577; see also *Fairchild* v. *Hughes*, 258 U. S. 126, 129–130 (1922). This does not suffice. JUSTICE STEVENS thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that the

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[7] JUSTICE STEVENS claims that redressability was found lacking in our prior cases because the relief required action by a party not before the Court. *Post*, at 125–126. Even if that were so, it would not prove that redressability is lacking *only* when relief depends on the actions of a third party. But in any event, JUSTICE STEVENS has overlooked decisions that destroy his premise. See *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (1983); *O'Shea* v. *Littleton*, 414 U. S. 488, 495–496 (1974). He also seems to suggest that redressability always exists when the defendant has directly injured the plaintiff. If that were so, the redressability requirement would be entirely superfluous, since the causation requirement asks whether the injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] resul[t] [of] the independent action of some third party not before the court." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 41–42 (1976).

punishment will deter the risk of future harm. *Post*, at 127–128. If that were so, our holdings in *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973), and *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26 (1976), are inexplicable. Obviously, such a principle would make the redressability requirement vanish. By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. See, *e. g.*, *Allen* v. *Wright*, 468 U. S. 737, 754–755 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 482–483 (1982). Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

Item (5), the "investigation and prosecution" costs "as authorized by Section 326(f)," would assuredly benefit respondent as opposed to the citizenry at large. Obviously, however, a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis* v. *Continental Bank Corp.*, *supra*, at 480 (citing *Diamond* v. *Charles*, 476 U. S. 54, 70–71 (1986)). Respondent asserts that the "investigation costs" it seeks were incurred prior to the litigation, in digging up the emissions and storage information that petitioner should have filed, and that respondent needed for its own purposes. See Brief for Respondent 37–38. The recovery of such expenses unrelated

to litigation would assuredly support Article III standing, but the problem is that § 326(f), which is the entitlement to monetary relief that the complaint invokes, covers only the "costs of litigation."[8] § 11046(f). Respondent finds itself, in other words, impaled upon the horns of a dilemma: For the expenses to be reimbursable under the statute, they must be costs of litigation; but reimbursement of the costs of litigation cannot alone support standing.[9]

The remaining relief respondent seeks (item (2), giving respondent authority to inspect petitioner's facility and records, and item (3), compelling petitioner to provide respondent copies of EPA compliance reports) is injunctive in nature. It cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating EPCRA in the future. See Brief for Respondent 36. The latter objective can of course be "remedial" for Article III purposes, when threatened injury is one of the gravamens of the complaint. If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm. But there is no such allegation here—and on the facts of the case, there seems no basis for it. Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence,

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[8] Section 326(f) reads: "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." 42 U. S. C. § 11046(f).

[9] JUSTICE STEVENS contends, *post,* at 123–124, n. 16, that this argument involves us in a construction of the statute, and thus belies our insistence that jurisdictional issues be resolved first. It involves us in a construction of the statute only to the extent of rejecting as frivolous the contention that costs incurred for respondent's own purposes, *not* in preparation for litigation (and hence sufficient to support Article III standing), are nonetheless "costs of litigation" under the statute. As we have described earlier, our cases make clear that frivolous claims are themselves a jurisdictional defect. See *supra,* at 89.

which is insufficient for purposes of Article III. See *Los Angeles* v. *Lyons*, 461 U. S., at 111.

The United States, as *amicus curiae*, argues that the injunctive relief does constitute remediation because "there is a presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation," even if that occurs before a complaint is filed. Brief for United States as *Amicus Curiae* 27–28, and n. 11. This makes a sword out of a shield. The "presumption" the Government refers to has been applied to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. See, *e. g.*, *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based. See *Los Angeles* v. *Lyons*, *supra*, at 109. To accept the Government's view would be to overrule our clear precedent requiring that the allegations of future injury be particular and concrete. *O'Shea* v. *Littleton*, 414 U. S. 488, 496–497 (1974). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.*, at 495–496; see also *Renne* v. *Geary*, 501 U. S. 312, 320 (1991) ("[T]he mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced"). Because respondent alleges only past infractions of EPCRA, and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury.

* * *

Having found that none of the relief sought by respondent would likely remedy its alleged injury in fact, we must conclude that respondent lacks standing to maintain this suit,

and that we and the lower courts lack jurisdiction to entertain it. However desirable prompt resolution of the merits EPCRA question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers. EPCRA will have to await another day.

The judgment is vacated, and the case is remanded with instructions to direct that the complaint be dismissed.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY joins, concurring.

I join the Court's opinion. I agree that our precedent supports the Court's holding that respondent lacks Article III standing because its injuries cannot be redressed by a judgment that would, in effect, require only the payment of penalties to the United States Treasury. As the Court notes, *ante,* at 108, had respondent alleged a continuing or imminent violation of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U. S. C. § 11046, the requested injunctive relief may well have redressed the asserted injury.

I also agree with the Court's statement that federal courts should be certain of their jurisdiction before reaching the merits of a case. As the Court acknowledges, however, several of our decisions "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Ante,* at 101. The opinion of the Court adequately describes why the assumption of jurisdiction was defensible in those cases, see *ante,* at 98–100, and why it is not in this case, see *ante,* at 92–93. I write separately to note that, in my view, the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in "reserv[ing] difficult questions of . . . jurisdiction when the case alternatively

could be resolved on the merits in favor of the same party," *Norton* v. *Mathews*, 427 U. S. 524, 532 (1976).

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

I agree with the Court that the respondent in this case lacks Article III standing. I further agree that federal courts often, and typically should, decide standing questions at the outset of a case. That order of decision (first jurisdiction then the merits) helps better to restrict the use of the federal courts to those adversarial disputes that Article III defines as the federal judiciary's business. But my qualifying words "often" and "typically" are important. The Constitution, in my view, does not require us to replace those words with the word "always." The Constitution does not impose a rigid judicial "order of operations," when doing so would cause serious practical problems.

This Court has previously made clear that courts may "reserv[e] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." *Norton* v. *Mathews*, 427 U. S. 524, 532 (1976). That rule makes theoretical sense, for the difficulty of the jurisdictional question makes reasonable the court's jurisdictional assumption. And that rule makes enormous practical sense. Whom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when (assuming an easy answer on the substantive merits) the same party would win or lose regardless? More importantly, to insist upon a rigid "order of operations" in today's world of federal-court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost. See L. Mecham, Judicial Business of the United States Courts: 1996 Report of the Director 16, 18, 23; Report of the Proceedings of the Judicial Conference of the United States

106, 115, 143 (1971) (indicating that between 1971 and 1996, annual appellate court caseloads increased from 132 to 311 cases filed per judgeship, and district court caseloads increased from 341 to 490 cases filed per judgeship). It means a more cumbersome system. It thereby increases, to at least a small degree, the risk of the "justice delayed" that means "justice denied."

For this reason, I would not make the ordinary sequence an absolute requirement. Nor, even though the case before us is ordinary, not exceptional, would I simply reserve judgment about the matter. *Ante*, at 110–111 (O'CONNOR, J., concurring). I therefore join only Parts I and IV of the Court's opinion.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins as to Parts I, III, and IV, and with whom JUSTICE GINSBURG joins as to Part III, concurring in the judgment.

This case presents two questions: (1) whether the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U. S. C. § 11001 *et seq.*, confers federal jurisdiction over citizen suits for wholly past violations; and (2) if so, whether respondent has standing under Article III of the Constitution. The Court has elected to decide the constitutional question first and, in doing so, has created new constitutional law. Because it is always prudent to avoid passing unnecessarily on an undecided constitutional question, see *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring), the Court should answer the statutory question first. Moreover, because EPCRA, properly construed, does not confer jurisdiction over citizen suits for wholly past violations, the Court should leave the constitutional question for another day.

I

The statutory issue in this case can be viewed in one of two ways: whether EPCRA confers "jurisdiction" over citizen suits for wholly past violations, or whether the statute

creates such a "cause of action." Under either analysis, the Court has the power to answer the statutory question first.

EPCRA frames the question in terms of "jurisdiction." Section 326(c) states:

> "The district court shall have jurisdiction in actions brought under [§ 326(a)] against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." 42 U. S. C. § 11046(c).

Thus, if § 326(a) authorizes citizen suits for wholly past violations, the district court has jurisdiction over these actions; if it does not, the court lacks jurisdiction.

Given the text of the statute, it is not surprising that the parties and the District Court framed the question in jurisdictional terms. Respondent's complaint alleged that the District Court had "subject matter jurisdiction under Section 326(a) of EPCRA, 42 U. S. C. § 11046(a)." App. 3. The merits questions that were raised by respondent's complaint were whether Steel Company violated EPCRA and, if so, what relief should be granted. The District Court, however, made no ruling on the merits when it granted Steel Company's motion to dismiss. It held that dismissal was required because respondent had merely alleged "a failure to timely file the required reports, a violation of the Act for which there is no jurisdiction for a citizen suit." App. to Pet. for Cert. A26.[1] Steel Company has also framed the

[1] See also *Don't Waste Arizona, Inc.* v. *McLane Foods, Inc.*, 950 F. Supp. 972, 977–978 (Ariz. 1997) ("[T]his Court has jurisdiction to hear this citizen suit brought pursuant to 42 U. S. C. § 11046(a) for a wholly past violation of the EPCRA"); *Delaware Valley Toxics Coalition* v. *Kurz-Hastings*, 813 F. Supp. 1132, 1141 (ED Pa. 1993) ("This court concludes that 42 U. S. C. § 11046(a)(1) does provide the federal courts with jurisdiction for wholly past violations of the EPCRA"); *Atlantic States Legal Foundation* v. *Whiting Roll-Up Door Manufacturing Corp.*, 772 F. Supp. 745, 750 (WDNY 1991) ("The plain language of EPCRA's reporting, enforcement and civil penalty provisions, when logically viewed together, compel a con-

question as a jurisdictional one in its briefs before this Court.[2]

The threshold issue concerning the meaning of § 326 is virtually identical to the question that we decided in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49 (1987). In that case, we considered whether § 505(a) of the Clean Water Act allows suits for wholly past violations.[3] We unanimously characterized that question as a matter of "jurisdiction":

> "In this case, we must decide whether § 505(a) of the Clean Water Act, also known as the Federal Water Pollution Control Act, 33 U. S. C. § 1365(a), confers federal jurisdiction over citizen suits for wholly past violations." *Id.*, at 52.

See also *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 353, n. 4 (1984) (citing *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 456, 465, n. 13 (1974)). If we resolve the comparable statutory issue in the same way in this case, federal courts will have no jurisdiction to address the merits in future similar cases. Thus, this is not a case in which the choice between resolving the statutory question or the standing question first is a choice between a merits issue and a juris-

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clusion that EPCRA confers federal jurisdiction over citizen lawsuits for past violations").

[2] Brief for Petitioner 12 ("A statute conferring jurisdiction on the federal courts should . . . be strictly construed, and any doubts resolved against jurisdiction. Here there are serious doubts that Congress intended citizens to sue for past EPCRA violations, and all citizen plaintiffs can highlight is a slight difference in language and attempt to stretch that difference into federal jurisdiction"); see also *id.*, at 26, 30.

[3] Gwaltney contended that "because its last recorded violation occurred several weeks before respondents filed their complaint, the District Court lacked subject-matter jurisdiction over respondents' action." *Gwaltney*, 484 U. S., at 55.

dictional issue; rather, it is a choice between two jurisdictional issues.

We have routinely held that when presented with two jurisdictional questions, the Court may choose which one to answer first. In *Sierra Club* v. *Morton*, 405 U. S. 727 (1972), for example, we were presented with a choice between a statutory jurisdictional question and a question of Article III standing. In that case, the United States, as respondent, argued that petitioner lacked standing under the Administrative Procedure Act and under the Constitution.[4] Rather than taking up the constitutional issue, the Court stated:

> "Where . . . Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, *the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.*" *Id.*, at 732 (emphasis added).

The Court concluded that petitioner lacked standing under the statute, *id.*, at 732–741, and, therefore, did not need to

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[4] 405 U. S., at 753–755 (App. to opinion of Douglas, J., dissenting) (Extract from Oral Argument of the Solicitor General); Brief for Respondent in *Sierra Club* v. *Morton*, O. T. 1970, No. 70–34, p. 18 ("The irreducible minimum requirement of standing reflects the constitutional limitation of judicial power to 'Cases' and 'Controversies'—'whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy" . . . and whether the dispute touches upon the "legal relations of parties having adverse legal interests."' *Flast* v. *Cohen*, 392 U. S. 83, 101 [(1968)]"); see also Brief for County of Tulare as *Amicus Curiae* in *Sierra Club* v. *Morton*, O. T. 1970, No. 70–34, pp. 13–14 ("This Court long ago held that to have standing . . . a party must show he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally. This is an outgrowth of Article III of the Constitution which limits the jurisdiction of federal courts to cases and controversies. U. S. Const., art. III, § 2" (citation and internal quotation marks omitted)).

decide whether petitioner had suffered a sufficient injury under Article III.

Similarly, in *Block* v. *Community Nutrition Institute*, 467 U. S. 340 (1984), the Court was faced with a choice between a statutory jurisdictional issue and a question of Article III standing. The Court of Appeals had held that the respondents had standing under both the statute and the Constitution. 698 F. 2d 1239, 1244–1252 (CADC 1983). On writ of certiorari to this Court, the United States, as petitioner, argued both issues: that the respondents did not come within the "zone of interests" of the statute, and that they did not have standing under Article III of the Constitution.[5] A unanimous Court bypassed the constitutional standing question in order to decide the statutory question. It therefore construed the statute, and concluded that respondents could not bring suit under the statute. The only mention of the constitutional question came in a footnote at the end of the opinion: "Since congressional preclusion of judicial review is in effect jurisdictional, we need not address the standing issue decided by the Court of Appeals in this case." *Block*, 467 U. S., at 353, n. 4 (citing *National Railroad Passenger Corp.*, 414 U. S., at 456, 465, and n. 13).

Finally, in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91 (1979), we were also faced with a choice between a statutory and constitutional jurisdictional question. *Id.*, at 93 ("This case presents both statutory and constitutional questions concerning standing to sue under Title VIII"). The statutory question was whether respondents had standing to sue under § 812 of the Fair Housing Act. The Court,

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[5] Brief for Petitioners in *Block* v. *Community Nutrition Institute*, O. T. 1983, No. 83–458, pp. 32–50 (arguing that respondents failed to meet the injury-in-fact and redressability requirements of Article III); see also Brief for Respondents in *Block* v. *Community Nutrition Institute*, O. T. 1983, No. 83–458, pp. 17–28; Reply Brief for Petitioners in *Block* v. *Community Nutrition Institute*, O. T. 1983, No. 83–458, pp. 15–17.

reluctant to address the constitutional question, opted to decide the statutory question first so as to avoid the constitutional question if possible:

> "The issue [of the meaning of § 812] is a critical one, for if the District Court correctly understood and applied § 812 [in denying respondents standing under the statute], we do not reach the question whether the minimum requirements of Art. III have been satisfied. If the Court of Appeals is correct [in holding that respondents have statutory standing], however, then the constitutional question is squarely presented." *Id.*, at 101.

See also *Bennett* v. *Spear*, 520 U. S. 154, 164 (1997) (footnote omitted) (opinion of SCALIA, J.) (stating that "[t]he first question in the present case is whether the [Endangered Species Act's] citizen-suit provision . . . negates the zone-of-interests test," and turning to the constitutional standing question only after determining that standing existed under the statute); *Food and Commercial Workers* v. *Brown Group, Inc.*, 517 U. S. 544, 548–550 (1996) (analyzing the statutory question before turning to the constitutional standing question); *Cross-Sound Ferry Services, Inc.* v. *ICC*, 934 F. 2d 327, 341 (CADC 1991) (Thomas, J., concurring in part and concurring in denial of petition for review) (courts exceed the scope of their power "only if the ground passed over is jurisdictional and the ground rested upon is non-jurisdictional, for courts properly rest on one jurisdictional ground instead of another"). Thus, our precedents clearly support the proposition that, given a choice between two jurisdictional questions—one statutory and the other constitutional—the Court has the power to answer the statutory question first.

Rather than framing the question in terms of "jurisdiction," it is also possible to characterize the statutory issue in this case as whether respondent's complaint states a "cause

of action."[6] Framed this way, it is also clear that we have the power to decide the statutory question first. As our holding in *Bell* v. *Hood*, 327 U. S. 678, 681–685 (1946), demonstrates, just as a court always has jurisdiction to determine its own jurisdiction, *United States* v. *Mine Workers*, 330 U. S. 258, 290 (1947), a federal court also has jurisdiction to decide whether a plaintiff who alleges that she has been injured by a violation of federal law has stated a cause of action.[7] Indeed, *Bell* held that we have jurisdiction to decide this question *even when it is unclear whether the plaintiff's injuries can be redressed.*[8] Thus, *Bell* demonstrates that the Court

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[6] As Justice Cardozo stated, "'"cause of action" may mean one thing for one purpose and something different for another.'" *Davis* v. *Passman*, 442 U. S. 228, 237 (1979) (quoting *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67–68 (1933)). Under one meaning of the term, it is clear that citizens have a "cause of action" to sue under the statute. Under that meaning, "cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis*, 442 U. S., at 240, and n. 18 (emphasis deleted); see also *id.*, at 239 ("The concept of a 'cause of action' is employed specifically to determine *who* may judicially enforce the statutory rights or obligations" (emphasis added)). Since EPCRA expressly gives citizens the right to sue, 42 U. S. C. § 11046(a)(1), there is no question that citizens are "member[s] of the class of litigants that may, as a matter of law, appropriately invoke the power of the court," *Davis*, 442 U. S., at 240, and n. 18.

[7] "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell*, 327 U. S., at 682.

[8] In *Bell*, a precursor to *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), petitioners brought suit in federal court "to recover damages in excess of $3,000 from . . . agents of the Federal Bureau of Investigation" for allegedly violating their Fourth and Fifth Amendment rights. 327 U. S., at 679. The question whether petitioners' injuries were redressable—"whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments"—was an open one, *id.*, at 684 (which the Court did not decide until *Bivens*, 403 U. S., at 389). Nonetheless,

has the power to decide whether a cause of action exists even when it is unclear whether the plaintiff has standing.[9]

National Railroad Passenger Corp. also makes it clear that we have the power to decide this question before addressing other threshold issues. In that case, we were faced with the interrelated questions of "whether the Amtrak Act can be read to create a private right of action to enforce compliance with its provisions; whether a federal district court has jurisdiction under the terms of the Act to entertain such a suit [under 28 U. S. C. § 1337[10]]; and whether respondent has [statutory] standing to bring such a suit." 414 U. S., at 455–456. In choosing its method of analysis, the Court stated:

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even though it was unclear whether there was a remedy, the Court held that federal courts have jurisdiction to determine whether a cause of action exists. 327 U. S., at 685.

[9] The Court incorrectly states that I "used to understand the fundamental distinction between arguing no cause of action and arguing no Article III redressability," *ante,* at 96. The Court gives me too much credit. I have never understood any fundamental difference between arguing: (1) plaintiff's complaint does not allege a cause of action because the law does "not provide a remedy" for the plaintiff's injury; and (2) plaintiff's injury is "not redressable." In *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U. S. 391, 398 (1979), we stated that the absence of a remedy, *i. e.,* the lack of redressability, was not the sort of jurisdictional issue that the Court raises on its own motion. That was the law when that case was decided, and it would still be the law today if the Court had not supplemented the standing analysis set forth in *Baker* v. *Carr,* 369 U. S. 186, 204 (1962), with its current fascination with "redressability." What has changed is not the admittedly imperfect state of my understanding, but rather the state of the Court's standing doctrine.

[10] Section 1337 states, in relevant part: "[D]istrict courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U. S. C. § 1337(a); see also *Potomac Passengers Assn.* v. *Chesapeake & Ohio R. Co.,* 475 F. 2d 325, 339 (CADC 1973), rev'd on other grounds, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U. S. 453 (1974).

> "[H]owever phrased, the *threshold question* clearly is whether the Amtrak Act or any other provision of law *creates a cause of action* whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it." *Id.*, at 456 (emphasis added).[11]

After determining that there was no cause of action under the statute, the Court concluded: "Since we hold that no right of action exists, questions of standing and jurisdiction become immaterial." *Id.*, at 465, n. 13.[12]

Thus, regardless of whether we characterize this issue in terms of "jurisdiction" or "causes of action," the Court clearly has the power to address the statutory question first. *Gwaltney* itself powerfully demonstrates this point. As noted, that case involved a statutory question virtually identical to the one presented here—whether the statute permitted citizens to sue for wholly past violations. While the Court framed the question as one of "jurisdiction," *supra*, at 114, it could also be said that the case presented the question whether the plaintiffs had a "cause of action." Regardless of the label, the Court resolved the statutory question without pausing to consider whether the plaintiffs had standing

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[11] The Court distinguished this "threshold question" from respondent's claim "on the merits," *id.*, at 455, n. 3.

[12] In insisting that the Article III standing question must be answered first, the Court finds itself in a logical dilemma. For if "A" (whether a cause of action exists) can be decided before "B" (whether there is statutory standing), *id.*, at 456, 465, n. 13; and if "B" (whether there is statutory standing) can be decided before "C" (whether there is Article III standing), *e. g.*, *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 353, n. 4 (1984); then logic dictates that "A" (whether a cause of action exists) can be decided before "C" (whether there is Article III standing)—precisely the issue of this case.

to sue for wholly past violations.[13] Of course, the fact that we did not discuss standing in *Gwaltney* does not establish that the plaintiffs had standing there. Nonetheless, it supports the proposition that—regardless of how the issue is characterized—the Court has the power to address the virtually identical statutory question in this case as well.

The Court disagrees, arguing that the standing question must be addressed first. Ironically, however, before "first" addressing standing, the Court takes a long excursion that entirely loses sight of the basic reason why standing is a matter of such importance to the proper functioning of the judicial process. The "gist of the question of standing" is whether plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[14] The Court completely disregards this core purpose of standing in its discussion of "hypothetical jurisdiction." Not only is that portion of the Court's opinion pure dictum because it is entirely unnecessary to an explanation of the Court's decision; it is also not informed by any adversary submission by either party. Neither the topic of "hypothetical jurisdiction," nor any of the cases analyzed, distinguished, and criticized in Part III, was the subject of any comment in any of the briefs submitted by the parties or their *amici.* It therefore did not benefit from the "concrete adverseness" that the standing doctrine is meant to ensure. The discussion, in short, "comes

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[13] In *Gwaltney,* in addition to answering the question whether the statute confers jurisdiction over citizen suits for wholly past violations, we considered whether the allegation of ongoing injury sufficed to support jurisdiction. The fact that we discussed "standing" in connection with that secondary issue, 484 U. S., at 65–66, adds significance to the omission of even a passing reference to any standing issue in connection with the principal holding.

[14] *Baker* v. *Carr,* 369 U. S., at 204.

to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Ante*, at 101; see also *Muskrat* v. *United States*, 219 U. S. 346, 362 (1911) (stressing that Article III limits federal courts to "deciding cases or controversies arising between opposing parties").[15]

[15] The Court boldly distinguishes away no fewer than five of our precedents. In each of these five cases, the Court avoided deciding a jurisdictional issue by assuming that jurisdiction existed for the purpose of that case. In *Norton* v. *Mathews*, 427 U. S. 524, 532 (1976), for example, we stated:

"It . . . is evident that, whichever disposition we undertake, the effect is the same. It follows that there is no need to decide the theoretical question of jurisdiction in this case. In the past, we similarly have reserved difficult questions of our jurisdiction when the case alternatively could be resolved on the merits in favor of the same party. See *Secretary of the Navy* v. *Avrech*, 418 U. S. 676 (1974). The Court has done this even when the original reason for granting certiorari was to resolve the jurisdictional issue. See *United States* v. *Augenblick*, 393 U. S. 348, 349–352 (1969). . . . Making the assumption, then, without deciding, that our jurisdiction in this cause is established, we affirm the judgment in favor of the Secretary . . . ."

See also *Philbrook* v. *Glodgett*, 421 U. S. 707, 720–722 (1975) (opinion of REHNQUIST, J.) (declining to reach "subtle and complex" jurisdictional issue and assuming that jurisdiction existed); *Secretary of Navy* v. *Avrech*, 418 U. S. 676, 677–678 (1974) *(per curiam)* ("[a]ssuming, *arguendo*, that the District Court had jurisdiction"; leaving "to a future case the resolution of the jurisdictional issue"); *Chandler* v. *Judicial Council of Tenth Circuit*, 398 U. S. 74, 89 (1970) ("Whether the Council's action was administrative action not reviewable in this Court, or whether it is reviewable here, plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition"); *United States* v. *Augenblick*, 393 U. S. 348, 351–352 (1969) (assuming, *arguendo*, that jurisdiction existed).

Moreover, in addition to the five cases that the Court distinguishes, there are other cases that support the notion that a court can assume jurisdiction. See, *e. g.*, *Moor* v. *County of Alameda*, 411 U. S. 693, 715 (1973) ("Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far-reaching implications. But we do not consider it appropriate to resolve this difficult issue in the present case, for we have concluded that even assuming, *arguendo*, the existence of power to hear the claim, the District Court [did not err]"); *Neese* v. *Southern R. Co.*, 350 U. S. 77 (1955) *(per*

The doctrine of "hypothetical jurisdiction" is irrelevant because this case presents us with a choice between two threshold questions that are intricately interrelated—as there is only a standing problem if the statute confers jurisdiction over suits for wholly past violations. The Court's opinion reflects this fact, as its analysis of the standing issue is predicated on the hypothesis that § 326 may be read to confer jurisdiction over citizen suits for wholly past violations. If, as I think it should, the Court were to reject that hypothesis and construe § 326,[16] the standing discussion

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curiam) ("We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction . . . . Even assuming such appellate power to exist . . . , [the Court of Appeals erred]"); see also *Ellis* v. *Dyson*, 421 U. S. 426, 436 (1975) (REHNQUIST, J., concurring) ("While it would have been more in keeping with conventional adjudication had [the District Court] first inquired as to the existence of a case or controversy, . . . I cannot fault the District Court for disposing of the case on what it quite properly regarded at that time as an authoritative ground of decision. Indeed, this Court has on occasion followed essentially the same practice").

Because this case involves a choice between two threshold questions that are intricately interrelated, I do not take a position on the propriety of courts assuming jurisdiction. Nonetheless, I strongly disagree with the Court's decision to reach out and decide this question, especially in light of the fact that we have not had the benefit of briefing and argument. See *Philbrook*, 421 U. S., at 721 (opinion of REHNQUIST, J.) (declining to answer a "complex question of federal jurisdiction" because of "the absence of substantial aid from the briefs of either of the parties"); *Avrech*, 418 U. S., at 677 ("Without the benefit of further oral argument, we are unwilling to decide the difficult jurisdictional issue which the parties have briefed"); *ante*, at 99 (noting that the *Avrech* Court "was unwilling to decide the jurisdictional question without oral argument" and emphasizing the importance of zealous advocacy to sharpen issues).

[16] Indeed, the Court acknowledges—as it must—that the Court has the power to construe the statute, as it is impossible to resolve the standing issue without construing some provisions of EPCRA. Thus, in order to determine whether respondent's investigation and prosecution costs are sufficient to confer standing, the Court construes § 326(f) of EPCRA, which authorizes the district court to "award costs of litigation" to the prevailing party. *Ante*, at 107–108. Yet if § 326(f) were construed to

would be entirely unnecessary. Thus, ironically, the Court is engaged in a version of the "hypothetical jurisdiction" that it has taken pains to condemn at some length.

II

There is an important reason for addressing the statutory question first: to avoid unnecessarily passing on an undecided constitutional question. *New York Transit Authority* v. *Beazer*, 440 U. S. 568, 582–583 (1979); *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring).[17] Whether correct or incorrect, the Court's constitutional holding represents a significant extension of prior case law.

The Court's conclusion that respondent does not have standing comes from a mechanistic application of the "redressability" aspect of our standing doctrine. "Redressability," of course, does not appear anywhere in the text of the Constitution. Instead, it is a judicial creation of the past 25 years, see *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 38, 41–46 (1976); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617–618 (1973)—a judicial interpretation of the "Case" requirement of Article III, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–561 (1992).[18]

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cover the cost of the investigation that preceded the filing of respondent's complaint, even under the Court's reasoning respondent would have alleged a "redressable" injury and would have standing. See *ibid.*

[17] There are two other reasons that counsel in favor of answering the statutory question first. First, it is the statutory question that has divided the courts of appeals and that we granted certiorari to resolve. See Pet. for Cert. i. Second, the meaning of the statute is a matter of general and national importance, whereas the Court's answer to the constitutional question depends largely on a construction of the allegations of this particular complaint, *ante*, at 104 ("We turn now to the particulars of respondent's complaint to see how it measures up to Article III's requirements").

[18] In an attempt to demonstrate that redressability has always been a component of the standing doctrine, the Court cites our decision in *Marye* v. *Parsons*, 114 U. S. 325 (1885), a case in which neither the word "standing" nor the word "redressability" appears.

In every previous case in which the Court has denied standing because of a lack of redressability, the plaintiff was challenging some governmental action or inaction. *Leeke* v. *Timmerman*, 454 U. S. 83, 85–87 (1981) *(per curiam)* (suit against Director of the Department of Corrections and another prison official); *Simon*, 426 U. S., at 28 (suit against the Secretary of the Treasury and the Commissioner of Internal Revenue); *Warth* v. *Seldin*, 422 U. S. 490, 493 (1975) (suit against the town of Penfield and members of Penfield's Zoning, Planning, and Town Boards); *Linda R. S.*, 410 U. S., at 615–616, 619 (suit against prosecutor); see also *Renne* v. *Geary*, 501 U. S. 312, 314 (1991) (suit against the city and County of San Francisco, its board of supervisors, and other local officials).[19] None of these cases involved an attempt by one private party to impose a statutory sanction on another private party.[20]

In addition, in every other case in which this Court has held that there is no standing because of a lack of redressability, the injury to the plaintiff by the defendant was *indirect* (*e. g.*, dependent on the action of a third party). This is true in the two cases that the Court cites for the "redressability" prong, *ante*, at 103; see also *Simon*, 426 U. S., at 40–46 ("[T]he 'case or controversy' limitation of Art. III . . . requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant,

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[19] Although the Court discussed redressability, *Renne* did not in fact turn on that issue. While the Court stated that "[t]here is reason to doubt . . . that the injury alleged . . . can be redressed" by the relief sought, 501 U. S., at 319, it then went on to hold that the claims were nonjusticiable because "respondents have not demonstrated a live controversy ripe for resolution by the federal courts," *id.*, at 315, 320–324.

[20] This distinction is significant, as our standing doctrine is rooted in separation-of-powers concerns. *E. g.*, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 573–578 (1992); *Allen* v. *Wright*, 468 U. S. 737, 750 (1984); see also *infra*, at 129–130.

and not injury that results from the independent action of some third party not before the court" (emphasis added)); *Warth*, 422 U. S., at 504–508 (stating that "the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III," and holding that the injury at issue was too indirect to be redressable), as well as in every other case in which the Court denied standing because of a lack of redressability, *Leeke*, 454 U. S., at 86–87 (injury indirect because it turned on the action of a prosecutor, a party not before the Court); *Linda R. S.*, 410 U. S., at 617–618 (stating that "[t]he party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury" (emphasis in original) (internal quotation marks omitted); injury indirect because it turned on the action of the father, a party not before the Court); see also 3 K. Davis & R. Pierce, Administrative Law Treatise 30 (3d ed. 1994).[21] Thus, as far as I am aware, the Court has never held—until today—that a plaintiff who is *directly injured*[22] by a defendant lacks standing to sue because of a lack of redressability.[23]

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[21] "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action . . . ." *Ex parte Lévitt*, 302 U. S. 633, 634 (1937).

[22] Assuming that EPCRA authorizes suits for wholly past violations, then Congress has created a legal right in having EPCRA reports filed on time. Although this is not a traditional injury:

"[W]e must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ." *Lujan* v. *Defenders of Wildlife*, 504 U. S., at 580 (KENNEDY, J., concurring in part and concurring in judgment); see also *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 373–374 (1982); *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975).

[23] In another context, the Court has specified that there is a critical distinction between whether a defendant is directly or indirectly harmed. In *Lujan* v. *Defenders of Wildlife*, a case involving a challenge to Executive action, the Court stated:

The Court acknowledges that respondent would have had standing if Congress had authorized some payment to respondent. *Ante,* at 106 ("[T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent"). Yet the Court fails to specify why payment to respondent—even if only a peppercorn—would redress respondent's injuries, while payment to the Treasury does not. Respondent clearly believes that the punishment of Steel Company, along with future deterrence of Steel Company and others, redresses its injury, and there is no basis in our previous standing holdings to suggest otherwise.

When one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated. Thus, in some cases a tort is redressed by an award of punitive damages; even when such damages are payable to the sovereign, they provide a form of redress for the individual as well.

History supports the proposition that punishment or deterrence can redress an injury. In past centuries in England,[24] in the American Colonies, and in the United

"When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." 504 U. S., at 561–562 (emphasis in original).

[24] "Several scholars have attempted to trace the historical origins of private prosecution in the United States. Without exception, these scholars have determined that the notion of private prosecutions originated in

States,[25] private persons regularly prosecuted criminal cases. The interest in punishing the defendant and deterring violations of law by the defendant and others was sufficient to support the "standing" of the private prosecutor even if the only remedy was the sentencing of the defendant to jail or to the gallows. Given this history, the Framers of Article III surely would have considered such proceedings to be "Cases" that would "redress" an injury even though the party bringing suit did not receive any monetary compensation.[26]

The Court's expanded interpretation of the redressability requirement has another consequence. Under EPCRA,

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early common law England, where the legal system primarily relied upon the victim or the victim's relatives or friends to bring a criminal to justice. According to these historians, private prosecutions developed in England as a means of facilitating private vengeance." Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, 47 Ark. L. Rev. 511, 515 (1994) (footnotes omitted).

[25] "American citizens continued to privately prosecute criminal cases in many locales during the nineteenth century. In Philadelphia, for example, all types of cases were privately prosecuted, with assault and battery prosecutions being the most common. However, domestic disputes short of assault also came before the court. Thus, 'parents of young women prosecuted men for seduction; husbands prosecuted their wives' paramours for adultery; wives prosecuted their husbands for desertion.' Although many state courts continued to sanction the practice of private prosecutions without significant scrutiny during the nineteenth century, a few state courts outlawed the practice." *Id.*, at 518–519 (footnotes omitted); A. Steinberg, The Transformation of Criminal Justice: Philadelphia, 1800–1880, p. 5 (1989) ("Private prosecution and the minor judiciary were firmly rooted in Philadelphia's colonial past. Both were examples of the creative American adaptation of the English common law. By the 17th century, private prosecution was a fundamental part of English common law"); see also F. Goodnow, Principles of the Administrative Law of the United States 412–413 (1905).

[26] When such a party obtains a judgment that imposes sanctions on the wrongdoer, it is proper to presume that the wrongdoer will be less likely to repeat the injurious conduct that prompted the litigation. The lessening of the risk of future harm is a concrete benefit.

Congress gave enforcement power to state and local governments. 42 U. S. C. § 11046(a)(2). Under the Court's reasoning, however, state and local governments would not have standing to sue for past violations, as a payment to the Treasury would no more "redress" the injury of these governments than it would redress respondent's injury. This would be true *even if Congress explicitly granted state and local governments this power.* Such a conclusion is unprecedented.

It could be argued that the Court's decision is rooted in another separation-of-powers concern: that this citizen suit somehow interferes with the Executive's power to "take Care that the Laws be faithfully executed," Art. II, § 3. It is hard to see, however, how EPCRA's citizen-suit provision impinges on the power of the Executive. As an initial matter, this is not a case in which respondent merely possesses the " 'undifferentiated public interest' " in seeing EPCRA enforced. *Ante,* at 106; see also *Lujan* v. *Defenders of Wildlife,* 504 U. S., at 577. Here, respondent—whose members live near Steel Company—has alleged a sufficiently particularized injury under our precedents. App. 5 (complaint alleges that respondent's members "reside, own property, engage in recreational activities, breathe the air, and/or use areas near [Steel Company's] facility").

Moreover, under the Court's own reasoning, respondent would have had standing if Congress had authorized some payment to respondent. *Ante,* at 106 ("[T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent"). This conclusion is unexceptional given that respondent has a more particularized interest than a plaintiff in a *qui tam* suit, an action that is deeply rooted in our history. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 541, n. 4 (1943) (" 'Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in

existence for hundreds of years in England, and in this country ever since the foundation of our Government' " (quoting *Marvin* v. *Trout*, 199 U. S. 212, 225 (1905)); *Adams* v. *Woods*, 2 Cranch 336, 341 (1805) (opinion of Marshall, C. J.) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt *[qui tam]* as well as by information [by a public prosecutor]"); 3 W. Blackstone, Commentaries 160 (1768); Caminker, The Constitutionality of *Qui Tam* Actions, 99 Yale L. J. 341, 342, and n. 3 (1989) (describing *qui tam* actions authorized by First Congress); see also *Lujan* v. *Defenders of Wildlife*, 504 U. S., at 572–573.

Yet it is unclear why the separation-of-powers question should turn on whether the plaintiff receives monetary compensation. In either instance, a private citizen is enforcing the law. If separation of powers does not preclude standing when Congress creates a legal right that authorizes compensation to the plaintiff, it is unclear why separation of powers should dictate a contrary result when Congress has created a legal right but has directed that payment be made to the Federal Treasury.

Indeed, in this case (assuming for present purposes that respondent correctly reads the statute) not only has Congress authorized standing, but the Executive Branch has also endorsed its interpretation of Article III. Brief for United States as *Amicus Curiae* 7–30. It is this Court's decision, not anything that Congress or the Executive has done, that encroaches on the domain of other branches of the Federal Government.[27]

[27] Ironically, although the Court insists that the standing question must be answered first, it relies on the merits when it answers the standing question. Proof that Steel Company repeatedly violated the law by failing to file EPCRA reports for eight years should suffice to establish the District Court's power to impose sanctions, or at least to decide what sanction, if any, is appropriate. Evidence that Steel Company was ignorant of the law and has taken steps to avoid future violations is highly relevant to the merits of the question whether any remedy is necessary, but surely does not deprive the District Court of the power to decide the

It is thus quite clear that the Court's holding today represents a significant new development in our constitutional jurisprudence. Moreover, it is equally clear that the Court has the power to answer the statutory question first. It is, therefore, not necessary to reject the Court's resolution of the standing issue in order to conclude that it would be prudent to answer the question of statutory construction before announcing new constitutional doctrine.

III

EPCRA's citizen-suit provision states, in relevant part:

> "[A]ny person may commence a civil action on his own behalf against . . . [a]n owner or operator of a facility for failure to do any of the following: . . . Complete and submit an inventory form under section 11022(a) of this title . . . [or] [c]omplete and submit a toxic chemical release form under section 11023(a) of this title." 42 U. S. C. §§ 11046(a)(1)(A)(iii)–(iv).

Unfortunately, this language is ambiguous. It could mean, as the Sixth Circuit has held, that a citizen only has the right to sue for a "failure . . . to complete and submit" the required forms. Under this reading, once the owner or operator has filed the forms, the district court no longer has jurisdiction. *Atlantic States Legal Foundation* v. *United Musical*, 61 F. 3d 473, 475 (1995). Alternatively, it could be, as the Seventh Circuit held, that the phrases "under section 11022(a)" and "under section 11023(a)" incorporate the requirements of those sections, including the requirement that the reports be filed by particular dates. 90 F. 3d 1237, 1243 (1996).

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remedy issue. Cf. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953) ("Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts").

Although the language of the citizen-suit provision is ambiguous, other sections of EPCRA indicate that Congress did not intend to confer jurisdiction over citizen suits for wholly past violations. First, EPCRA requires the private litigant to give the alleged violator notice at least 60 days before bringing suit. 42 U. S. C. § 11046(d)(1).[28] In *Gwaltney*, we considered the import of a substantially identical notice requirement, and concluded that it indicated a congressional intent to allow suit only for ongoing and future violations:

> "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous. Indeed, respondents, in propounding their interpretation of the Act, can think of no reason for Congress to require such notice other than that 'it seemed right' to inform an alleged violator that it was about to be sued. Brief for Respondents 14." 484 U. S., at 60.

Second, EPCRA places a ban on citizen suits once EPA has commenced an enforcement action. 42 U. S C. § 11046(e).[29] In *Gwaltney*, we considered a similar provision and concluded that it indicated a congressional intent to prohibit citizen suits for wholly past violations:

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[28] "No action may be commenced under subsection (a)(1)(A) of this section prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation."

[29] "No action may be commenced under subsection (a) of this section against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act with respect to the violation of the requirement."

> "The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant governmental action. . . . Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit. This danger is best illustrated by an example. Suppose that the Administrator identified a violator of the Act and issued a compliance order . . . . Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive." 484 U. S., at 60–61.

Finally, even if these two provisions did not resolve the issue, our settled policy of adopting acceptable constructions of statutory provisions in order to avoid the unnecessary adjudication of constitutional questions—here, the unresolved standing question—strongly supports a construction of the statute that does not authorize suits for wholly past violations. As we stated in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988): "This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate." See also *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490,

500–501 (1979); *Machinists* v. *Street*, 367 U. S. 740, 749–750 (1961); *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); *Lucas* v. *Alexander*, 279 U. S. 573, 577 (1929); *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 390 (1924); *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408 (1909); *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830) (opinion of Story, J.).

IV

For these reasons, I concur in the Court's judgment, but do not join its opinion.

JUSTICE GINSBURG, concurring in the judgment.

Congress has authorized citizen suits to enforce the Emergency Planning and Community Right-To-Know Act of 1986, 42 U. S. C. § 11001 *et seq.* Does that authorization, as Congress designed it, permit citizen suits for wholly past violations? For the reasons stated by JUSTICE STEVENS in Part III of his opinion, I agree that the answer is "No." I would follow the path this Court marked in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 60–61 (1987), and resist expounding or offering advice on the constitutionality of what Congress might have done, but did not do.

Syllabus

QUALITY KING DISTRIBUTORS, INC. *v.* L'ANZA RESEARCH INTERNATIONAL, INC.

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

No. 96–1470. Argued December 8, 1997—Decided March 9, 1998

Respondent L'anza, a California manufacturer, sells its hair care products in this country exclusively to distributors who have agreed to resell within limited geographic areas and only to authorized retailers. L'anza promotes its domestic sales with extensive advertising and special retailer training. In foreign markets, however, it does not engage in comparable advertising or promotion; its foreign prices are substantially lower than its domestic prices. It appears that after L'anza's United Kingdom distributor arranged for the sale of several tons of L'anza products, affixed with copyrighted labels, to a distributor in Malta, that distributor sold the goods to petitioner, which imported them back into this country without L'anza's permission and then resold them at discounted prices to unauthorized retailers. L'anza filed suit, alleging that petitioner's actions violated L'anza's exclusive rights under the Copyright Act of 1976 (Act), 17 U. S. C. §§ 106, 501, and 602, to reproduce and distribute the copyrighted material in the United States. The District Court rejected petitioner's "first sale" defense under § 109(a) and entered summary judgment for L'anza. Concluding that § 602(a), which gives copyright owners the right to prohibit the unauthorized importation of copies, would be "meaningless" if § 109(a) provided a defense, the Ninth Circuit affirmed.

Held: The first sale doctrine endorsed in § 109(a) is applicable to imported copies. Pp. 140–154.

(a) In *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 349–350, this Court held that the exclusive right to "vend" under the copyright statute then in force applied only to the first sale of a copyrighted work. Congress subsequently codified *Bobbs-Merrill*'s first sale doctrine in the Act. Section 106(3) gives the copyright holder the exclusive right "to distribute copies . . . by sale or other transfer of ownership," but § 109(a) provides: "Notwithstanding . . . [§]106(3), the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . ." Although the first sale doctrine prevents L'anza from treating unauthorized resales by its domestic distributors as an infringement of the exclusive right to distribute, L'anza claims that § 602(a), properly construed, prohibits its foreign distributors from reselling

its products to American vendors unable to buy from its domestic distributors. Pp. 140–143.

(b) The statutory language clearly demonstrates that the right granted by § 602(a) is subject to § 109(a). Significantly, § 602(a) does not categorically prohibit the unauthorized importation of copyrighted materials, but provides that, with three exceptions, such "[i]mportation . . . is an infringement of the exclusive right to distribute . . . under [§]106 . . . ." Section 106 in turn expressly states that all of the exclusive rights therein granted—including the distribution right granted by subsection (3)—are limited by §§ 107 through 120. One of those limitations is provided by § 109(a), which expressly permits the owner of a lawfully made copy to sell that copy "[n]otwithstanding the provisions of [§]106(3)." After the first sale of a copyrighted item "lawfully made under this title," any subsequent purchaser, whether from a domestic or a foreign reseller, is obviously an "owner" of that item. Read literally, § 109(a) unambiguously states that such an owner "is entitled, without the authority of the copyright owner, to sell" that item. Moreover, since § 602(a) merely provides that unauthorized importation is an infringement of an exclusive right "under [§]106," and since that limited right does not encompass resales by lawful owners, § 602(a)'s literal text is simply inapplicable to both domestic and foreign owners of L'anza's products who decide to import and resell them here. Pp. 143–145.

(c) The Court rejects L'anza's argument that § 602(a), and particularly its exceptions, are superfluous if limited by the first sale doctrine. The short answer is that this argument does not adequately explain why the words "under [§]106" appear in § 602(a). Moreover, there are several flaws in L'anza's reasoning that, because § 602(b) already prohibits the importation of unauthorized or "piratical" copies, § 602(a) must cover nonpiratical ("lawfully made") copies sold by the copyright owner. First, even if § 602(a) applied only to piratical copies, it at least would provide a private remedy against the importer, whereas § 602(b)'s enforcement is vested in the Customs Service. Second, because § 109(a)'s protection is available only to the "owner" of a lawfully made copy, the first sale doctrine would not provide a defense to a § 602(a) action against a nonowner such as a bailee. Third, § 602(a) applies to a category of copies that are neither piratical nor "lawfully made under this title": those that are "lawfully made" under another country's law. Pp. 145–149.

(d) Also rejected is L'anza's argument that because § 501(a) defines an "infringer" as one "who violates . . . [§]106 . . . , or who imports . . . in violation of [§]602," a violation of the latter type is distinct from one of the former, and thus not subject to § 109(a). This argument's force is outweighed by other statutory considerations, including the fact that

Syllabus

§ 602(a) unambiguously states that the prohibited importation is an infringement "under [§]106," thereby identifying § 602 violations as a species of § 106 violations. More important is the fact that the § 106 rights are subject to all of the provisions of "[§§]107 through 120." If § 602(a) functioned independently, none of those sections would limit its coverage. Pp. 149–151.

(e) The Court finds unpersuasive the Solicitor General's argument that "importation" describes an act that is not protected by § 109(a)'s authorization to a subsequent owner "to sell or otherwise dispose of the possession of" a copy. An ordinary interpretation of that language includes the right to ship the copy to another person in another country. More important, the Solicitor General's cramped reading is at odds with § 109(a)'s necessarily broad reach. The whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution. There is no reason to assume that Congress intended § 109(a) to limit the doctrine's scope. Pp. 151–152.

(f) The wisdom of protecting domestic copyright owners from the unauthorized importation of validly copyrighted copies of their works, and the fact that the Executive Branch has recently entered into at least five international trade agreements apparently intended to do just that, are irrelevant to a proper interpretation of the Act. Pp. 153–154.

98 F. 3d 1109, reversed.

STEVENS, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, *post*, p. 154.

Allen R. Snyder argued the cause for petitioner. With him on the briefs were *Jonathan S. Franklin*, *William T. Rintala*, and *J. Larson Jaenicke.*

Raymond H. Goettsch argued the cause and filed a brief for respondent.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Waxman*, *Assistant Attorneys General Hunger* and *Klein*, *Patricia A. Millett*, *Michael Jay Singer*, and *Irene M. Solet.**

*Briefs of *amici curiae* urging reversal were filed for the American Free Trade Association by *Gilbert Lee Sandler* and *Jorge Espinosa;* for Cosco Companies, Inc., et al. by *Michael D. Sandler*, *Peter J. Kadzik*, *Rich-*

JUSTICE STEVENS delivered the opinion of the Court.

Section 106(3) of the Copyright Act of 1976 (Act), 17 U. S. C. § 106(3), gives the owner of a copyright the exclusive right to distribute copies of a copyrighted work. That exclusive right is expressly limited, however, by the provisions of §§ 107 through 120. Section 602(a) gives the copyright owner the right to prohibit the unauthorized importation of copies. The question presented by this case is whether the right granted by § 602(a) is also limited by §§ 107 through 120. More narrowly, the question is whether the "first sale" doctrine endorsed in § 109(a) is applicable to imported copies.

I

Respondent, L'anza Research International, Inc. (L'anza), is a California corporation engaged in the business of manufacturing and selling shampoos, conditioners, and other hair care products. L'anza has copyrighted the labels that are affixed to those products. In the United States, L'anza sells exclusively to domestic distributors who have agreed to resell within limited geographic areas and then only to authorized retailers such as barber shops, beauty salons, and professional hair care colleges. L'anza has found that the American "public is generally unwilling to pay the price charged for high quality products, such as L'anza's products, when they are sold along with the less expensive lower quality products that are generally carried by supermarkets and

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ard Kelly, and *Robert J. Verdisco;* and for Jan-Bell Marketing, Inc., by *Michael J. Gaertner.*

Briefs of *amici curiae* urging affirmance were filed for the American Intellectual Property Law Association by *Arthur J. Levine* and *John N. O'Shea;* for the Beauty and Barber Supply Institute Inc. et al. by *Deborah M. Lodge;* for the National Consumers League et al. by *Charles E. Buffon*, *Caroline M. Brown*, *Jan S. Amundson*, *Quentin Riegel*, and *Daniel F. O'Keefe, Jr.;* for the Recording Industry Association of America et al. by *Theodore B. Olson* and *Preeta D. Bansal;* and for Swarovski America Limited by *Werner Kronstein.*

drug stores." App. 54 (declaration of Robert Hall). L'anza promotes the domestic sales of its products with extensive advertising in various trade magazines and at point of sale, and by providing special training to authorized retailers.

L'anza also sells its products in foreign markets. In those markets, however, it does not engage in comparable advertising or promotion; its prices to foreign distributors are 35% to 40% lower than the prices charged to domestic distributors. In 1992 and 1993, L'anza's distributor in the United Kingdom arranged the sale of three shipments to a distributor in Malta;[1] each shipment contained several tons of L'anza products with copyrighted labels affixed.[2] The record does not establish whether the initial purchaser was the distributor in the United Kingdom or the distributor in Malta, or whether title passed when the goods were delivered to the carrier or when they arrived at their destination, but it is undisputed that the goods were manufactured by L'anza and first sold by L'anza to a foreign purchaser.

It is also undisputed that the goods found their way back to the United States without the permission of L'anza and were sold in California by unauthorized retailers who had purchased them at discounted prices from Quality King Distributors, Inc. (petitioner). There is some uncertainty about the identity of the actual importer, but for the purpose of our decision we assume that petitioner bought all three shipments from the Malta distributor, imported them, and then resold them to retailers who were not in L'anza's authorized chain of distribution.

After determining the source of the unauthorized sales, L'anza brought suit against petitioner and several other defendants.[3] The complaint alleged that the importation and

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[1] See App. 64 (declaration of Robert De Lanza).

[2] See *id.*, at 70–83.

[3] L'anza's claims against the retailer defendants were settled. The Malta distributor apparently never appeared in this action and a default judgment was entered against it.

subsequent distribution of those products bearing copyrighted labels violated L'anza's "exclusive rights under 17 U. S. C. §§ 106, 501 and 602 to reproduce and distribute the copyrighted material in the United States." App. 32. The District Court rejected petitioner's defense based on the "first sale" doctrine recognized by § 109 and entered summary judgment in favor of L'anza. Based largely on its conclusion that § 602 would be "meaningless" if § 109 provided a defense in a case of this kind, the Court of Appeals affirmed. 98 F. 3d 1109, 1114 (CA9 1996). Because its decision created a conflict with the Third Circuit, see *Sebastian Int'l, Inc.* v. *Consumer Contacts (PTY) Ltd.*, 847 F. 2d 1093 (1988), we granted the petition for certiorari. 520 U. S. 1250 (1997).

II

This is an unusual copyright case because L'anza does not claim that anyone has made unauthorized copies of its copyrighted labels. Instead, L'anza is primarily interested in protecting the integrity of its method of marketing the products to which the labels are affixed. Although the labels themselves have only a limited creative component, our interpretation of the relevant statutory provisions would apply equally to a case involving more familiar copyrighted materials such as sound recordings or books. Indeed, we first endorsed the first sale doctrine in a case involving a claim by a publisher that the resale of its books at discounted prices infringed its copyright on the books. *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339 (1908).[4]

In that case, the publisher, Bobbs-Merrill, had inserted a notice in its books that any retail sale at a price under

[4] The doctrine had been consistently applied by other federal courts in earlier cases. See *Kipling* v. *G. P. Putnam's Sons*, 120 F. 631, 634 (CA2 1903); *Doan* v. *American Book Co.*, 105 F. 772, 776 (CA7 1901); *Harrison* v. *Maynard, Merrill & Co.*, 61 F. 689, 691 (CA2 1894); *Bobbs-Merrill Co.* v. *Snellenburg*, 131 F. 530, 532 (ED Pa. 1904); *Clemens* v. *Estes*, 22 F. 899, 900 (Mass. 1885); *Stowe* v. *Thomas*, 23 F. Cas. 201, 206–207 (ED Pa. 1853).

$1 would constitute an infringement of its copyright. The defendants, who owned Macy's department store, disregarded the notice and sold the books at a lower price without Bobbs-Merrill's consent. We held that the exclusive statutory right to "vend"[5] applied only to the first sale of the copyrighted work:

> "What does the statute mean in granting 'the sole right of vending the same'? Was it intended to create a right which would permit the holder of the copyright to fasten, by notice in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.
>
> "In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of one dollar per copy." *Id.*, at 349–350.

The statute in force when *Bobbs-Merrill* was decided provided that the copyright owner had the exclusive right to "vend" the copyrighted work.[6] Congress subsequently cod-

[5] In 1908, when *Bobbs-Merrill* was decided, the copyright statute provided that copyright owners had "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and *vending*" their copyrighted works. Copyright Act of 1891, § 4952, 26 Stat. 1107 (emphasis added).

[6] See n. 5, *supra.*

ified our holding in *Bobbs-Merrill* that the exclusive right to "vend" was limited to first sales of the work.[7] Under the 1976 Act, the comparable exclusive right granted in 17 U. S. C. § 106(3) is the right "to distribute copies . . . by sale or other transfer of ownership."[8] The comparable limitation on that right is provided not by judicial interpretation, but by an express statutory provision. Section 109(a) provides:

> "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. . . ."[9]

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[7] Congress codified the first sale doctrine in § 41 of the Copyright Act of 1909, ch. 320, 35 Stat. 1084, and again in § 27 of the 1947 Act, ch. 391, 61 Stat. 660.

[8] The full text of § 106 reads as follows:

"§ 106. Exclusive rights in copyrighted works

"Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U. S. C. § 106 (1994 ed., Supp. I).

[9] The comparable section in the 1909 and 1947 Acts provided that "nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer

The *Bobbs-Merrill* opinion emphasized the critical distinction between statutory rights and contract rights.[10] In this case, L'anza relies on the terms of its contracts with its domestic distributors to limit their sales to authorized retail outlets. Because the basic holding in *Bobbs-Merrill* is now codified in § 109(a) of the Act, and because those domestic distributors are owners of the products that they purchased from L'anza (the labels of which were "lawfully made under this title"), L'anza does not, and could not, claim that the statute would enable L'anza to treat unauthorized resales by its domestic distributors as an infringement of its exclusive right to distribute copies of its labels. L'anza does claim, however, that contractual provisions are inadequate to protect it from the actions of foreign distributors who may resell L'anza's products to American vendors unable to buy from L'anza's domestic distributors, and that § 602(a) of the Act, properly construed, prohibits such unauthorized competition. To evaluate that submission, we must, of course, consider the text of § 602(a).

III

The most relevant portion of § 602(a) provides:

> "Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclu-

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of any copy of a copyrighted work the possession of which has been lawfully obtained." Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1084; see also Copyright Act of 1947, ch. 391, § 27, 61 Stat. 660. It is noteworthy that § 109(a) of the 1978 Act does not apply to "any copy"; it applies only to a copy that was "lawfully made under this title."

[10] "We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book." *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 350 (1908).

> sive right to distribute copies or phonorecords under section 106, actionable under section 501. . . ."[11]

It is significant that this provision does not categorically prohibit the unauthorized importation of copyrighted materials. Instead, it provides that such importation is an infringement of the exclusive right to distribute copies "under section 106." Like the exclusive right to "vend" that was construed in *Bobbs-Merrill*, the exclusive right to distribute is a limited right. The introductory language in § 106 expressly states that all of the exclusive rights granted by that section—including, of course, the distribution right granted by subsection (3)—are limited by the provisions of §§ 107 through 120.[12] One of those limitations, as we have noted, is provided by the terms of § 109(a), which expressly permit the owner of a lawfully made copy to sell that copy "[n]otwithstanding the provisions of section 106(3)."[13]

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[11] The remainder of § 602(a) reads as follows:

"This subsection does not apply to—

"(1) importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use;

"(2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States with respect to copies or phonorecords forming part of such person's personal baggage; or

"(3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2)."

[12] See n. 8, *supra.*

[13] See text accompanying n. 9, *supra.*

After the first sale of a copyrighted item "lawfully made under this title," any subsequent purchaser, whether from a domestic or from a foreign reseller, is obviously an "owner" of that item. Read literally, § 109(a) unambiguously states that such an owner "is entitled, without the authority of the copyright owner, to sell" that item. Moreover, since § 602(a) merely provides that unauthorized importation is an infringement of an exclusive right "under section 106," and since that limited right does not encompass resales by lawful owners, the literal text of § 602(a) is simply inapplicable to both domestic and foreign owners of L'anza's products who decide to import them and resell them in the United States.[14]

Notwithstanding the clarity of the text of §§ 106(3), 109(a), and 602(a), L'anza argues that the language of the Act supports a construction of the right granted by § 602(a) as "distinct from the right under Section 106(3) standing alone," and thus not subject to § 109(a). Brief for Respondent 15. Otherwise, L'anza argues, both the § 602(a) right itself and its exceptions[15] would be superfluous. Moreover, supported by various *amici curiae*, including the Solicitor General of the United States, L'anza contends that its construction is supported by important policy considerations. We consider these arguments separately.

IV

L'anza advances two primary arguments based on the text of the Act: (1) that § 602(a), and particularly its three exceptions, are superfluous if limited by the first sale doctrine; and (2) that the text of § 501 defining an "infringer" refers

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[14] Despite L'anza's contention to the contrary, see Brief for Respondent 26–27, the owner of goods lawfully made under the Act is entitled to the protection of the first sale doctrine in an action in a United States court even if the first sale occurred abroad. Such protection does not require the extraterritorial application of the Act any more than § 602(a)'s "acquired abroad" language does.

[15] See n. 11, *supra*.

separately to violations of § 106, on the one hand, and to imports in violation of § 602. The short answer to both of these arguments is that neither adequately explains why the words "under section 106" appear in § 602(a). The Solicitor General makes an additional textual argument: he contends that the word "importation" in § 602(a) describes an act that is not protected by the language in § 109(a) authorizing a subsequent owner "to sell or otherwise dispose of the possession of" a copy. Each of these arguments merits separate comment.

The Coverage of § 602(a)

Prior to the enactment of § 602(a), the Act already prohibited the importation of "piratical," or unauthorized, copies.[16] Moreover, that earlier prohibition is retained in § 602(b) of the present Act.[17] L'anza therefore argues (as do the Solicitor General and other *amici curiae*) that § 602(a) is superfluous unless it covers nonpiratical ("lawfully made") copies sold by the copyright owner, because importation nearly always implies a first sale. There are several flaws in this argument.

First, even if § 602(a) did apply only to piratical copies, it at least would provide the copyright holder with a private remedy against the importer, whereas the enforcement of § 602(b) is vested in the Customs Service.[18] Second, because the protection afforded by § 109(a) is available only to the "owner" of a lawfully made copy (or someone authorized by the owner), the first sale doctrine would not provide a de-

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[16] See 17 U. S. C. §§ 106, 107 (1970).

[17] Section 602(b) provides in relevant part: "In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. . . ." The first sale doctrine of § 109(a) does not protect owners of piratical copies, of course, because such copies were not "lawfully made."

[18] See n. 17, *supra*.

fense to a § 602(a) action against any nonowner such as a bailee, a licensee, a consignee, or one whose possession of the copy was unlawful.[19] Third, § 602(a) applies to a category of copies that are neither piratical nor "lawfully made under this title." That category encompasses copies that were "lawfully made" not under the United States Copyright Act, but instead, under the law of some other country.

The category of copies produced lawfully under a foreign copyright was expressly identified in the deliberations that led to the enactment of the 1976 Act. We mention one example of such a comment in 1961 simply to demonstrate that the category is not a merely hypothetical one. In a report to Congress, the Register of Copyrights stated, in part:

> "When arrangements are made for both a U. S. edition and a foreign edition of the same work, the publishers frequently agree to divide the international markets. The foreign publisher agrees not to sell his edition in the United States, and the U. S. publisher agrees not to sell his edition in certain foreign countries. It has been suggested that the import ban on piratical copies should be extended to bar the importation of the foreign edition in contravention of such an agreement." Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., 125–126 (H. R. Judiciary Comm. Print 1961).

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[19] In its opinion in this case, the Court of Appeals quoted a statement by a representative of the music industry expressing the need for protection against the importation of stolen motion picture prints: "We've had a similar situation with respect to motion picture prints, which are sent all over the world—legitimate prints made from the authentic negative. These prints get into illicit hands. They're stolen, and there's no contractual relationship. . . . Now those are not piratical copies." Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on General Revision of the U. S. Copyright Law, 88th Cong., 1st Sess., 213 (H. R. Judiciary Comm. Print 1963) (statement of Mr. Sargoy), quoted in 98 F. 3d 1109, 1116 (CA9 1996).

Even in the absence of a market allocation agreement between, for example, a publisher of the United States edition and a publisher of the British edition of the same work, each such publisher could make lawful copies. If the author of the work gave the exclusive United States distribution rights—enforceable under the Act—to the publisher of the United States edition and the exclusive British distribution rights to the publisher of the British edition,[20] however, presumably only those made by the publisher of the United States edition would be "lawfully made under this title" within the meaning of § 109(a). The first sale doctrine would not provide the publisher of the British edition who decided to sell in the American market with a defense to an action under § 602(a) (or, for that matter, to an action under § 106(3), if there was a distribution of the copies).

The argument that the statutory exceptions to § 602(a) are superfluous if the first sale doctrine is applicable rests on the assumption that the coverage of that section is coextensive with the coverage of § 109(a). But since it is, in fact, broader because it encompasses copies that are not subject to the first sale doctrine—*e. g.*, copies that are lawfully made under the law of another country—the exceptions do protect the traveler who may have made an isolated purchase of a copy of a work that could not be imported in bulk for purposes of resale. As we read the Act, although both the first sale doctrine embodied in § 109(a) and the exceptions in § 602(a) may

[20] A participant in a 1964 panel discussion expressed concern about this particular situation. Copyright Law Revision Part 4: Further Discussion and Comments on Preliminary Draft for Revised U. S. Copyright Law, 88th Cong., 2d Sess., 119 (H. R. Judiciary Comm. Print 1964) (statement of Mrs. Pilpel) ("For example, if someone were to import a copy of the British edition of an American book and the author had transferred exclusive United States and Canadian rights to an American publisher, would that British edition be in violation so that this would constitute an infringement under this section?"); see also *id.*, at 209 (statement of Mr. Manges) (describing similar situation as "a troublesome problem that confronts U. S. book publishers frequently").

be applicable in some situations, the former does not subsume the latter; those provisions retain significant independent meaning.

Section 501's Separate References to §§ 106 and 602

The text of § 501 does lend support to L'anza's submission. In relevant part, it provides:

> "(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. . . ."

The use of the words "*or* who imports," rather than words such as "*including* one who imports," is more consistent with an interpretation that a violation of § 602 is distinct from a violation of § 106 (and thus not subject to the first sale doctrine set out in § 109(a)) than with the view that it is a species of such a violation. Nevertheless, the force of that inference is outweighed by other provisions in the statutory text.

Most directly relevant is the fact that the text of § 602(a) itself unambiguously states that the prohibited importation is an infringement of the exclusive distribution right "under section 106, actionable under section 501." Unlike that phrase, which identifies § 602 violations as a species of § 106 violations, the text of § 106A, which is also cross-referenced in § 501, uses starkly different language. It states that the author's right protected by § 106A is "independent of the exclusive rights provided in Section 106." The contrast between the relevant language in § 602 and that in § 106A strongly implies that only the latter describes an independent right.[21]

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[21] The strength of the implication created by the relevant language in § 106A is not diminished by the fact that Congress enacted § 106A more

Of even greater importance is the fact that the § 106 rights are subject not only to the first sale defense in § 109(a), but also to all of the other provisions of "sections 107 through 120." If § 602(a) functioned independently, none of those sections would limit its coverage. For example, the "fair use" defense embodied in § 107[22] would be unavailable to importers if § 602(a) created a separate right not subject to the limitations on the § 106(3) distribution right. Under L'anza's interpretation of the Act, it presumably would be unlawful for a distributor to import copies of a British newspaper that contained a book review quoting excerpts from an American

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recently than § 602(a), which is part of the Copyright Act of 1976. Section 106A was passed as part of the Visual Artists Rights Act of 1990 in order to protect the moral rights of certain visual artists. Section 106A is analogous to Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works, but its coverage is more limited. See 2 P. Goldstein, Copyright § 5.12, p. 5:225 (2d ed. 1996) (§ 106A encompasses aspects of the moral rights guaranteed by Article 6*bis* of the Berne Convention, "but effectively gives these rights a narrow subject matter and scope").

[22] Title 17 U. S. C. § 107 provides as follows:

"§ 107. Limitations on exclusive rights: Fair use

"Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work.

"The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

novel protected by a United States copyright.[23] Given the importance of the fair use defense to publishers of scholarly works, as well as to publishers of periodicals, it is difficult to believe that Congress intended to impose an absolute ban on the importation of all such works containing any copying of material protected by a United States copyright.

In the context of this case, involving copyrighted labels, it seems unlikely that an importer could defend an infringement as a "fair use" of the label. In construing the statute, however, we must remember that its principal purpose was to promote the progress of the "useful Arts," U. S. Const., Art. I, § 8, cl. 8, by rewarding creativity, and its principal function is the protection of original works, rather than ordinary commercial products that use copyrighted material as a marketing aid. It is therefore appropriate to take into account the impact of the denial of the fair use defense for the importer of foreign publications. As applied to such publications, L'anza's construction of § 602 "would merely inhibit access to ideas without any countervailing benefit." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 450–451 (1984).[24]

Does an importer "sell or otherwise dispose" of copies as those words are used in § 109(a)?

Whether viewed from the standpoint of the importer or from that of the copyright holder, the textual argument advanced by the Solicitor General[25]—that the act of "im-

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[23] The § 602(a) exceptions, which are substantially narrower than § 107, would not permit such importation. See n. 11, *supra*.

[24] L'anza's reliance on § 602(a)(3)'s reference to § 108(g)(2), see n. 11, *supra*, to demonstrate that all of the *other* limitations set out in §§ 107 through 120—including the first sale and fair use doctrines—do not apply to imported copies is unavailing for the same reasons.

[25] See also Brief for Recording Industry Association of America et al. 19–21.

portation" is neither a sale nor a disposal of a copy under § 109(a)—is unpersuasive. Strictly speaking, an importer could, of course, carry merchandise from one country to another without surrendering custody of it. In a typical commercial transaction, however, the shipper transfers "possession, custody, control and title to the products"[26] to a different person, and L'anza assumes that petitioner's importation of the L'anza shipments included such a transfer. An ordinary interpretation of the statement that a person is entitled "to sell or otherwise dispose of the possession" of an item surely includes the right to ship it to another person in another country.

More important, the Solicitor General's cramped reading of the text of the statutes is at odds not only with § 602(a)'s more flexible treatment of unauthorized importation as an infringement of the distribution right (even when there is no literal "distribution"), but also with the necessarily broad reach of § 109(a). The whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution. As we have recognized, the codification of that doctrine in § 109(a) makes it clear that the doctrine applies only to copies that are "lawfully made under this title," but that was also true of the copies involved in the *Bobbs-Merrill* case, as well as those involved in the earlier cases applying the doctrine. There is no reason to assume that Congress intended either § 109(a) or the earlier codifications of the doctrine to limit its broad scope.[27]

In sum, we are not persuaded by either L'anza's or the Solicitor General's textual arguments.

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[26] App. 87.

[27] See, *e. g.*, H. R. Rep. No. 1476, 94th Cong., 2d Sess., 79 (1979) ("Section 109(a) restates and confirms" the first sale doctrine established by prior case law); S. Rep. No. 473, 94th Cong., 1st Sess., 71 (1975) (same).

V

The parties and their *amici* have debated at length the wisdom or unwisdom of governmental restraints on what is sometimes described as either the "gray market" or the practice of "parallel importation."[28] In *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281 (1988), we used those terms to refer to the importation of foreign-manufactured goods bearing a valid United States trademark without the consent of the trademark holder. *Id.*, at 285–286. We are not at all sure that those terms appropriately describe the consequences of an American manufacturer's decision to limit its promotional efforts to the domestic market and to sell its products abroad at discounted prices that are so low that its foreign distributors can compete in the domestic market.[29] But even if they do, whether or not we think it would be wise policy to provide statutory protection for such price discrimination is not a matter that is relevant to our duty to interpret the text of the Copyright Act.

Equally irrelevant is the fact that the Executive Branch of the Government has entered into at least five international trade agreements that are apparently intended to protect domestic copyright owners from the unauthorized importation of copies of their works sold in those five countries.[30] The earliest of those agreements was made in 1991; none has been ratified by the Senate. Even though they are of course

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[28] Compare, for example, Gorelick & Little, The Case for Parallel Importation, 11 N. C. J. Int'l L. & Comm. Reg. 205 (1986), with Gordon, Gray Market Is Giving Hair-Product Makers Gray Hair, N. Y. Times, July 13, 1997, section 1, p. 28, col. 1.

[29] Presumably L'anza, for example, could have avoided the consequences of that competition either (1) by providing advertising support abroad and charging higher prices, or (2) if it was satisfied to leave the promotion of the product in foreign markets to its foreign distributors, to sell its products abroad under a different name.

[30] The Solicitor General advises us that such agreements have been made with Cambodia, Trinidad and Tobago, Jamaica, Ecuador, and Sri Lanka.

consistent with the position taken by the Solicitor General in this litigation, they shed no light on the proper interpretation of a statute that was enacted in 1976.[31]

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE GINSBURG, concurring.

This case involves a "round trip" journey, travel of the copies in question from the United States to places abroad, then back again. I join the Court's opinion recognizing that we do not today resolve cases in which the allegedly infringing imports were manufactured abroad. See W. Patry, Copyright Law and Practice 166–170 (1997 Supp.) (commenting that provisions of Title 17 do not apply extraterritorially unless expressly so stated, hence the words "lawfully made under this title" in the "first sale" provision, 17 U. S. C. § 109(a), must mean "lawfully made in the United States"); see generally P. Goldstein, Copyright § 16.0, pp. 16:1–16:2 (2d ed. 1998) ("Copyright protection is territorial. The rights granted by the United States Copyright Act extend no farther than the nation's borders.").

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[31] We also note that in 1991, when the first of the five agreements was signed, the Third Circuit had already issued its opinion in *Sebastian Int'l, Inc.* v. *Consumer Contacts (PTY) Ltd.*, 847 F. 2d 1093 (1988), adopting a position contrary to that subsequently endorsed by the Executive Branch.

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LEWIS *v.* UNITED STATES

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

No. 96–7151. Argued November 12, 1997—Decided March 9, 1998

A federal indictment charged petitioner Lewis and her husband with beating and killing his 4-year-old daughter while they lived at an Army base in Louisiana. Relying on the federal Assimilative Crimes Act (ACA), 18 U. S. C. § 13(a)—which provides that "[w]hoever within . . . any [federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable . . . within the jurisdiction of the State . . . in which such place is situated, . . . shall be guilty of a like offense and subject to like punishment"—the indictment charged the defendants under a Louisiana statute defining first-degree murder to include "killing . . . [w]hen the offender has the specific intent to kill or . . . harm . . . a victim under the age of twelve . . . ." Upon her conviction of Louisiana first-degree murder, the District Court sentenced Lewis to life imprisonment without parole. The Fifth Circuit held that the Louisiana statute was not assimilated into federal law under the ACA because the federal second-degree murder statute applicable to federal enclaves, 18 U. S. C. § 1111 (1988 ed.), governed the crime at issue. The court nonetheless affirmed Lewis' conviction on the ground that, in finding her guilty of the state charge, the jury had necessarily found all of the requisite elements of federal second-degree murder. And it affirmed her sentence on the ground that it was no greater than the maximum sentence (life) permitted by § 1111.

Held:

1. Because the ACA does not make Louisiana's first-degree murder statute part of federal law, the federal second-degree murder statute, § 1111, governs the crime at issue. Pp. 159–172.

(a) The basic question before this Court is the meaning of the ACA phrase "not made punishable by *any enactment* of Congress." (Emphasis added.) The Court rejects an absolutely literal reading of the italicized words because that would dramatically separate the ACA from its basic purpose of borrowing state law to fill gaps in the federal criminal law applicable on federal enclaves, and would conflict with the ACA's history and features. See, *e. g.*, *Williams* v. *United States*, 327 U. S. 711, 718–719. On the other hand, the Court cannot find a convincing justification in language, purpose, or precedent for the Government's

narrow interpretation that "any enactment" refers, with limited exceptions, only to federal enactments that share the same statutory elements as the relevant state law. *Id.*, at 717, distinguished. Rather, the ACA's language and its gap-filling purpose taken together indicate that, to determine whether a particular state statute is assimilated, a court must first ask the question that the ACA's language requires: Is the defendant's "act or omission . . . made punishable by *any* enactment of Congress." (Emphasis added.) If the answer is "no," that will normally end the matter because the ACA presumably would assimilate the state statute. If the answer is "yes," however, the court must ask the further question whether the federal statutes that apply to the "act or omission" reveal a legislative intent to preclude application of the state law in question, say, because the federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute, see, *e. g.*, *id.*, at 724. Pp. 159–166.

(b) Application of these principles to this case reveals that federal law does not assimilate the child murder provision of Louisiana's first-degree murder statute. Among other things, § 1111 defines first-degree murder to include "willful, deliberate, malicious, and premeditated killing," as well as certain listed felony murders and instances of transferred intent, and says that "murder in the second degree" is "any other murder" and is punishable by imprisonment for "any term of years or for life." In contrast, the Louisiana statute defines first-degree murder as, *inter alia*, the killing of someone under 12 with a "specific intent to kill or . . . harm," and makes it punishable by "death or life imprisonment" without parole. Here, the defendant's "act or omission" is "made punishable by a[n] enactment of Congress" because § 1111 makes Lewis' "act . . . punishable" as second-degree murder. Moreover, applicable federal law indicates an intent to punish conduct such as the defendant's to the exclusion of the state statute at issue. Even though the two statutes cover different forms of behavior, other § 1111 features, taken together, demonstrate Congress' intent to completely cover all types of federal enclave murder as an integrated whole. These features include the fact that § 1111 is drafted in a detailed manner to cover all variants of murder; the way in which its "first-degree" and "second-degree" provisions are linguistically interwoven; the fact that its "first-degree" list is detailed; the fact that that list sets forth several circumstances at the same level of generality as does the Louisiana law; and the extreme breadth of the possible federal sentences, ranging all the way from *any* term of years, to death. Also supporting preclusive intent are the circumstances that Congress has recently focused directly several times upon the § 1111 first-degree list's content, subtracting certain specified felonies or adding others; that, by drawing the line between

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first and second degree, Congress has carefully decided just when it does, and does not, intend for murder to be punishable by death, a major way in which the Louisiana statute (which provides the death penalty) differs from the federal second-degree provision (which does not); that, when writing and amending the ACA, Congress has referred to murder as an example of a crime covered by, not as an example of a gap in, federal law; that § 1111 applies only on federal enclaves, so that assimilation of Louisiana law would treat enclave residents differently from those living elsewhere in that State, by subjecting them to two sets of "territorial" criminal laws in addition to the general federal criminal laws that apply nationwide; and that there apparently is not a single reported case in which a federal court has used the ACA to assimilate a state murder law. Given all these considerations, there is no gap for Louisiana's statute to fill. Pp. 166–172.

2. Lewis is entitled to resentencing. As she argues and the Government concedes, the Fifth Circuit erred in affirming her life sentence because § 1111, unlike the Louisiana statute, does not make such a sentence mandatory for second-degree murder, but provides for a sentence of "any term of years or life." Moreover, the federal Sentencing Guidelines provide for a range of 168 to 210 months' imprisonment for a first-time offender like her who murders a "vulnerable victim." Although a judge could impose a higher sentence by departing from the Guidelines range, it is for the District Court to make such a determination in the first instance. Pp. 172–173.

92 F. 3d 1371, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 173. KENNEDY, J., filed a dissenting opinion, *post*, p. 180.

Frank Granger argued the cause and filed briefs for petitioner.

Malcolm L. Stewart argued the cause for the United States. With him on the brief were *Acting Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.*

**John Lanahan* and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

JUSTICE BREYER delivered the opinion of the Court.

The federal Assimilative Crimes Act (ACA or Act) assimilates into federal law, and thereby makes applicable on federal enclaves such as Army bases, certain criminal laws of the State in which the enclave is located. It says:

> "Whoever within or upon any [federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, . . . shall be guilty of a like offense and subject to like punishment." 18 U. S. C. § 13(a).

The question in this case is whether the ACA makes applicable on a federal Army base located in Louisiana a state first-degree murder statute that defines first-degree murder to include the "killing of a human being . . . [w]hen the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve . . . ." La. Rev. Stat. Ann. § 14:30(A)(5) (West 1986 and Supp. 1997).

We hold that the ACA does not make the state provision part of federal law. A federal murder statute, 18 U. S. C. § 1111, therefore governs the crime at issue—the killing of a 4-year-old child "with malice aforethought" but without "premeditation." Under that statute this crime is second-degree, not first-degree, murder.

I

A federal grand jury indictment charged that petitioner, Debra Faye Lewis, and her husband James Lewis, beat and killed James' 4-year-old daughter while all three lived at Fort Polk, a federal Army base in Louisiana. Relying on the ACA, the indictment charged a violation of Louisiana's first-degree murder statute. La. Rev. Stat. Ann. § 14:30 (West 1986 and Supp. 1993). Upon her conviction, the Dis-

trict Court sentenced Debra Lewis to life imprisonment without parole. See § 14:30(C) (West 1986).

On appeal the Fifth Circuit held that Louisiana's statute did not apply at Fort Polk. 92 F. 3d 1371 (1996). It noted that the Act made state criminal statutes applicable on federal enclaves only where the wrongful "'act or omission'" was "'not made punishable by any enactment of Congress.'" *Id.*, at 1373–1374 (citing 18 U. S. C. § 13). Because Congress made Lewis' acts "punishable" as federal second-degree murder, and the federal and state laws were directed at roughly the same sort of conduct, the Fifth Circuit reasoned that the ACA did not permit the application of Louisiana's first-degree murder statute to petitioner's acts. 92 F. 3d, at 1375–1377. The court nonetheless affirmed Lewis' conviction on the ground that in convicting her of the state charge the jury had necessarily found all of the requisite elements of federal second-degree murder. *Id.*, at 1378; cf. *Rutledge* v. *United States*, 517 U. S. 292, 305–306 (1996). And it affirmed the sentence on the ground that it was no greater than the maximum sentence (life) permitted by the federal second-degree murder statute. 92 F. 3d, at 1379–1380.

We granted certiorari primarily to consider the Fifth Circuit's ACA determination. We conclude that the holding was correct, though we also believe that Lewis is entitled to resentencing on the federal second-degree murder conviction.

II

The ACA applies state law to a defendant's acts or omissions that are "not made punishable by *any enactment* of Congress." 18 U. S. C. § 13(a) (emphasis added). The basic question before us concerns the meaning of the italicized phrase. These words say that the ACA does *not* assimilate a state statute if the defendant's "act" or "omission" is punished by "any [federal] enactment." If the words are taken literally, Louisiana's law could not possibly apply to Lewis,

for there are several federal "enactments" that make Lewis' acts punishable, for example, the federal (second-degree) murder statute, § 1111, and the federal assault law, § 113. We agree with the Government, however, that this is not a sensible interpretation of this language, since a literal reading of the words "any enactment" would dramatically separate the statute from its intended purpose.

The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves. See *Williams* v. *United States*, 327 U. S. 711, 718–719 (1946) (ACA exists "to fill in gaps" in federal law where Congress has not "define[d] the missing offenses"); *United States* v. *Sharpnack*, 355 U. S. 286, 289 (1958) (ACA represents congressional decision of "adopting for otherwise undefined offenses the policy of general conformity to local law"); *United States* v. *Press Publishing Co.*, 219 U. S. 1, 9–10 (1911) (state laws apply to crimes "which were not previously provided for by a law of the United States"); *Franklin* v. *United States*, 216 U. S. 559, 568 (1910) (assimilation occurs where state laws "not displaced by specific laws enacted by Congress").

In the 1820's, when the ACA began its life, federal statutory law punished only a few crimes committed on federal enclaves, such as murder and manslaughter. See 1 Stat. 113. The federal courts lacked the power to supplement these few statutory crimes through the use of the common law. See *United States* v. *Hudson*, 7 Cranch 32, 34 (1812). Consequently James Buchanan, then a Congressman, could point out to his fellow House Members a "palpable defect in our system," namely, that "a great variety of actions, to which a high degree of moral guilt is attached, and which are punished . . . at the common law, and by every State . . . may be committed with impunity" on federal enclaves. 40 Annals of Cong. 930 (1823). Daniel Webster sought to cure this palpable defect by introducing a bill that both increased the number of federal crimes and also made "the residue"

criminal, see 1 Cong. Deb. 338 (1825), by assimilating state law where federal statutes did not provide for the "punishment" of an "offence." 4 Stat. 115. This law, with only a few changes, has become today's ACA. See *Williams*, *supra*, at 719–723 (describing history of ACA).

Two features of the Act indicate a congressional intent to confine the scope of the words "any enactment" more narrowly than (and hence extend the Act's reach beyond what) a literal reading might suggest. First, a literal interpretation of the words "any enactment" would leave federal criminal enclave law subject to gaps of the very kind the Act was designed to fill. The Act would be unable to assimilate even a highly specific state law aimed directly at a serious, narrowly defined evil, if the language of *any* federal statute, however broad and however clearly aimed at a different kind of harm, were to cover the defendant's act. Were there only a state, and no federal, law against murder, for example, a federal prohibition of assault could prevent the state statute from filling the obvious resulting gap.

At the same time, prior to its modern amendment the ACA's language more clearly set limits upon the scope of the word "any." The original version of the ACA said that assimilation of a relevant state law was proper when "any offence shall be committed . . . the punishment of which *offence* is not specially provided for by any law of the United States." 4 Stat. 115 (emphasis added); see also 30 Stat. 717 (later reenactment also using "offense"). The word "offense" avoided the purpose-thwarting interpretation of the Act discussed above, for it limited the relevant federal "enactment" to an enactment that punished *offenses* of the same *kind* as those punished by state law. Presumably, a federal assault statute would not have provided punishment for the "offense" that state murder law condemned. Congress changed the Act's language in 1909, removing the word "offense" and inserting the words "act or thing," 35 Stat. 1145, which later became the current "act or omission." But Con-

gress did so for reasons irrelevant here, see H. R. Rep. No. 2, 60th Cong., 1st Sess., 25 (1908) (stating that, technically speaking, conduct otherwise not forbidden by law was not an "offense"), and did not intend to alter the basic meaning of the Act. See *Williams*, *supra*, at 722–723.

For these or similar reasons, many lower courts have interpreted the words "any enactment" more narrowly than a literal reading might suggest. And they have applied the Act to assimilate state statutes in circumstances they thought roughly similar to those suggested by our assault/murder example above. See, *e. g.*, *United States* v. *Kaufman*, 862 F. 2d 236, 238 (CA9 1988) (existence of federal law punishing the carrying of a gun does not prevent assimilation of state law punishing threatening someone with a gun); *Fields* v. *United States*, 438 F. 2d 205, 207–208 (CA2 1971) (assimilation of state malicious shooting law proper despite existence of federal assault statute); *United States* v. *Brown*, 608 F. 2d 551, 553–554 (CA5 1979) (child abuse different in kind from generic federal assault, and so state law could be assimilated). But see *United States* v. *Chaussee*, 536 F. 2d 637, 644 (CA7 1976) (stating a more literal test). Like the Government, we conclude that Congress did not intend the relevant words—"*any* enactment"—to carry an absolutely literal meaning.

On the other hand, we cannot accept the narrow interpretation of the relevant words (and the statute's consequently broader reach) that the Solicitor General seems to urge. Drawing on our language in *Williams*, *supra*, at 717, some lower courts have said that the words "any enactment" refer only to federal enactments that make criminal the same "precise acts" as those made criminal by the relevant state law. See, *e. g.*, *United States* v. *Johnson*, 967 F. 2d 1431, 1436 (CA10 1992). The Government apparently interprets this test to mean that, with limited exceptions, the ACA would assimilate a state law so long as that state law defines a crime in terms of at least one element that does

not appear in the relevant federal enactment. See Tr. of Oral Arg. 27 ("[I]n the great majority of cases the question of whether the State law offense has been made punishable by an enactment of Congress can be resolved by asking, is there a Federal statute that contains precisely the same essential elements as the State statute"). But this interpretation of federal "enactments" is too narrow.

The Government's view of the "precise acts" test—which comes close to a "precise elements" test—would have the ACA assimilate state law even where there is no gap to fill. Suppose, for example, that state criminal law (but not federal criminal law) makes possession of a state bank charter an element of an offense it calls "bank robbery"; or suppose that state law makes purse snatching criminal under a statute that is indistinguishable from a comparable federal law but for a somewhat different definition of the word "purse." Where, one might ask, is the gap? As Congress has enacted more and more federal statutes, including many that are applicable only to federal enclaves, see, *e. g.*, 18 U. S. C. § 113 (assault); § 1460 (possession with intent to sell obscene materials), such possibilities become more realistic. And to that extent the Government's broad view of assimilation threatens not only to fill nonexistent gaps, but also to rewrite each federal enclave-related criminal law in 50 different ways, depending upon special, perhaps idiosyncratic, drafting circumstances in the different States. See *Williams*, 327 U. S., at 718 (ACA may not be used to "enlarg[e] . . . modif[y] or repea[l] existing provisions of the Federal Code"). It would also leave residents of federal enclaves randomly subject to three sets of criminal laws (special federal territorial criminal law, general federal criminal law, and state criminal law) where their state counterparts would be subject only to the latter two types.

Nothing in the Act's language or in its purpose warrants imposing such narrow limits upon the words "any enactment" and thereby so significantly broadening the statute's

reach. Nor does the use by this Court of the words "precise acts" in the leading case in which this Court has applied the Act, *Williams*, 327 U. S., at 717, help the Government in this respect. In *Williams*, the Court held that the ACA did not assimilate a State's "statutory rape" crime (with a cut-off age of 18) both because federal adultery and fornication statutes covered the defendant's "precise acts," and because the policies underlying a similar federal statute (with a cutoff age of 16) made clear there was no gap to fill. *Id.*, at 724–725. The Court's opinion refers to both of these circumstances and does not decide whether the Act would, or would not, have applied in the absence of only one. We cannot find a convincing justification in language, purpose, or precedent for the Government's interpretation. Hence, we conclude that, just as a literal interpretation would produce an ACA that is too narrow, see *supra*, at 161–162, so the Government's interpretation would produce an ACA that is too broad.

In our view, the ACA's language and its gap-filling purpose taken together indicate that a court must first ask the question that the ACA's language requires: Is the defendant's "act or omission . . . made punishable by *any* enactment of Congress." 18 U. S. C. § 13(a) (emphasis added). If the answer to this question is "no," that will normally end the matter. The ACA presumably would assimilate the statute. If the answer to the question is "yes," however, the court must ask the further question whether the federal statutes that apply to the "act or omission" preclude application of the state law in question, say, because its application would interfere with the achievement of a federal policy, see *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383, 389–390 (1944), because the state law would effectively rewrite an offense definition that Congress carefully considered, see *Williams*, 327 U. S., at 718, or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue, see *id.*, at 724 (no assimilation where Congress has "covered the field with uniform fed-

eral legislation"). See also *Franklin,* 216 U. S., at 568 (assimilation proper only where state laws "not displaced by specific laws enacted by Congress").

There are too many different state and federal criminal laws, applicable in too many different kinds of circumstances, bearing too many different relations to other laws, to common-law tradition, and to each other, for a touchstone to provide an automatic general answer to this second question. Still, it seems fairly obvious that the Act will not apply where both state and federal statutes seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional, or other technical, considerations, or where differences amount only to those of name, definitional language, or punishment. See, *e. g.*, *United States* v. *Adams,* 502 F. Supp. 21, 25 (SD Fla. 1980) (misdemeanor/felony difference did not justify assimilation).

The Act's basic purpose makes it similarly clear that assimilation may not rewrite distinctions among the forms of criminal behavior that Congress intended to create. *Williams, supra,* at 717–718 (nothing in the history or language of the ACA to indicate that once Congress has "defined a penal offense, it has authorized such definition to be enlarged" by state law). Hence, ordinarily, there will be no gap for the Act to fill where a set of federal enactments taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amount to different ways of committing the same basic crime.

At the same time, a substantial difference in the kind of wrongful behavior covered (on the one hand by the state statute, on the other, by federal enactments) will ordinarily indicate a gap for a state statute to fill—unless Congress, through the comprehensiveness of its regulation, cf. *Wisconsin Public Intervenor* v. *Mortier,* 501 U. S. 597, 604–605 (1991), or through language revealing a conflicting policy, see

Williams, supra, at 724–725, indicates to the contrary in a particular case. See also *Johnson* v. *Yellow Cab, supra,* at 389–390; *Blackburn* v. *United States,* 100 F. 3d 1426, 1435 (CA9 1996). The primary question (we repeat) is one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defendant's to the exclusion of the particular state statute at issue?

III

We must now apply these principles to this case. The relevant federal murder statute—applicable only on federal enclaves—read as follows in 1993, the time of petitioner's crime:

> "§ 1111. Murder
>
> "(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> "Any other murder is murder in the second degree.
>
> "(b) Within the special maritime and territorial jurisdiction of the United States,
>
> "Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment', in which event he shall be sentenced to imprisonment for life;
>
> "Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life." 18 U. S. C. § 1111 (1988 ed.).

This statute says that "murder in the first degree" shall be punished by death or life imprisonment. It says that "murder in the second degree" shall be punished by imprisonment for "any term of years or for life." It defines first-degree murder as a "willful, deliberate, malicious, and premeditated killing," and also adds certain kinds of felony murder (*i. e.*, murder occurring during the commission of other crimes) and certain instances of transferred intent (*i. e.*, D's killing of A, while intending to murder B). It defines second-degree murder as "[a]ny other murder."

Louisiana's statute says the following:

> "A. First degree murder is the killing of a human being:
>
> "(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, or simple robbery.
>
> "(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
>
> "(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> "(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.
>
> "(5) *When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.*
>
> "(6) When the offender has the specific intent to kill or to inflict great bodily harm while engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in

> Schedules I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.
>
> "(7) When the offender has specific intent to kill and is engaged in the activities prohibited by R. S. 14:107.1(C)(1).
>
> . . . . . .
>
> "C. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury." La. Rev. Stat. Ann. § 14:30 (West 1986 and Supp. 1997) (emphasis added).

This statute says that murder in the first degree shall be punished by "death or life imprisonment" without parole. It defines first-degree murder as the "killing of a human being" with a "specific intent to kill or to inflict great bodily harm" where the "offender" is committing certain other felonies or has been paid for the crime or kills more than one victim, or kills a fireman, a peace officer, someone over the age of 64, or someone under the age of 12. In this case, the jury found that the defendant killed a child under the age of 12 with a "specific intent to kill or to inflict great bodily harm" upon that child.

In deciding whether the ACA assimilates Louisiana's law, we first ask whether the defendant's "act or omission" is "made punishable by *any* enactment of Congress." 18 U. S. C. § 13(a) (emphasis added); see *supra,* at 164. The answer to this question is "yes." An "enactment of Congress," namely, § 1111, makes the defendant's "act . . . punishable" as second-degree murder. This answer is not conclusive, however, for reasons we have pointed out. Rather, we must ask a second question. See *supra,* at 164–165. Does applicable federal law indicate an intent to punish conduct such as the defendant's to the exclusion of the particular state statute at issue?

We concede at the outset the Government's claim that the two statutes cover different forms of behavior. The federal second-degree murder statute covers a wide range of conduct; the Louisiana first-degree murder provision focuses upon a narrower (and different) range of conduct. We also concede that, other things being equal, this consideration argues in favor of assimilation. Yet other things are not equal; and other features of the federal statute convince us that Congress has intended that the federal murder statute preclude application of a first-degree murder statute such as Louisiana's to a killing on a federal enclave.

The most obvious such feature is the detailed manner in which the federal murder statute is drafted. It purports to make criminal a particular form of wrongful behavior, namely, "murder," which it defines as "the unlawful killing of a human being with malice aforethought." It covers all variants of murder. It divides murderous behavior into two parts: a specifically defined list of "first-degree" murders and all "other" murders, which it labels "second-degree." This fact, the way in which "first-degree" and "second-degree" provisions are linguistically interwoven; the fact that the "first-degree" list is detailed; and the fact that the list sets forth several circumstances at the same level of generality as does Louisiana's statute, taken together, indicate that Congress intended its statute to cover a particular field—namely, "unlawful killing of a human being with malice aforethought"—as an integrated whole. The complete coverage of the federal statute over all types of federal enclave murder is reinforced by the extreme breadth of the possible sentences, ranging all the way from *any* term of years, to death. There is no gap for Louisiana's statute to fill.

Several other circumstances offer support for the conclusion that Congress' omissions from its "first-degree" murder list reflect a considered legislative judgment. Congress, for example, has recently focused directly several times upon the content of the "first-degree" list, subtracting certain speci-

fied circumstances or adding others. See Pub. L. 99–646, 100 Stat. 3623 (substituting "aggravated sexual abuse or sexual abuse" for "rape"); Pub. L. 98–473, 98 Stat. 2138 (adding "escape, murder, kidnaping, treason, espionage," and "sabotage" to first-degree list). By drawing the line between first and second degree, Congress also has carefully decided just when it does, and when it does not, intend for murder to be punishable by death—a major way in which the Louisiana first-degree murder statute (which provides the death penalty) differs from the federal second-degree provision (which does not). 18 U. S. C. § 1111(b); La. Rev. Stat. Ann. § 14:30(C) (West Supp. 1997). The death penalty is a matter that typically draws specific congressional attention. See, *e. g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, § 60003, 108 Stat. 1968 (section entitled "Specific Offenses For Which [the] Death Penalty Is Authorized"). As this Court said in *Williams*, "[w]here offenses have been specifically defined by Congress and the public has been guided by such definitions for many years," it is unusual for Congress through general legislation like the ACA "to amend such definitions or the punishments prescribed for such offenses, without making clear its intent to do so." 327 U. S., at 718 (footnote omitted).

Further, Congress when writing and amending the ACA has referred to the conduct at issue here—murder—as an example of a crime covered by, not as an example of a gap in, federal law. See H. R. Rep. No. 1584, 76th Cong., 3d Sess., 1 (1940) ("Certain of the major crimes . . . such . . . as murder" are "expressly defined" by Congress; assimilation of state law is proper as to "other offenses"); 1 Cong. Deb. 338 (1825) (Daniel Webster explaining original assimilation provision as a way to cover "the residue" of crimes not "provide[d] for" by Congress; at the time federal law contained a federal enclave murder provision, see 1 Stat. 113); see also *United States* v. *Sharpnack*, 355 U. S., at 289, and n. 5 (citing 18 U. S. C. § 1111 for proposition that Congress has

increasingly "enact[ed] for the enclaves specific criminal statutes" and "to that extent, [has] excluded the state laws from that field").

Finally, the federal criminal statute before us applies only on federal enclaves. § 1111(b). Hence, there is a sense in which assimilation of Louisiana law would treat those living on federal enclaves differently from those living elsewhere in Louisiana, for it would subject them to two sets of "territorial" criminal laws in addition to the general federal criminal laws that apply nationwide. See *supra*, at 163. Given all these considerations, it is perhaps not surprising that we have been unable to find a single reported case in which a federal court has used the ACA to assimilate a state murder law to fill a supposed "gap" in the federal murder statute.

The Government, arguing to the contrary, says that Louisiana's provision is a type of "child protection" statute, filling a "gap" in federal enclave-related criminal law due to the fact that Congress left "child abuse," like much other domestic relations law, to the States. See Brief for United States 23, 29–30. The fact that Congress, when writing various criminal statutes, has focused directly upon "child protection" weakens the force of this argument. See, *e. g.*, 21 U. S. C. §§ 859(a)–(b) (person selling drugs to minors is subject to twice the maximum sentence as one who deals to adults, and repeat offenders who sell to children subject to *three times* the normal maximum); 18 U. S. C. § 1201(g) ("special rule" for kidnaping offenses involving minors, with enhanced penalties in certain cases); §§ 2241(c) and 2243 (prohibiting sexual abuse of minors); § 2251 (prohibiting sexual exploitation of children); § 2251A (selling and buying of children); § 2258 (failure to report child abuse). And, without expressing any view on the merits of lower court cases that have assimilated state child abuse statutes despite the presence of a federal assault law, § 113, see, *e. g.*, *United States* v. *Brown*, 608 F. 2d, at 553–554; *United States* v. *Fesler*, 781 F. 2d 384, 390–391 (CA5 1986), we note that the

federal assault prohibition is less comprehensive than the federal murder statute, and the relevant statutory relationships are less direct than those at issue here. We conclude that the consideration to which the Government points is not strong enough to open a child-related "gap" in the comprehensive effort to define murder on federal enclaves.

For these reasons we agree with the Fifth Circuit that federal law does not assimilate the child victim provision of Louisiana's first-degree murder statute.

IV

The Fifth Circuit affirmed petitioner's conviction on the ground that the jury, in convicting petitioner under the Louisiana statute, necessarily found all of the requisite elements of the federal second-degree murder offense. 92 F. 3d, at 1379; cf. *Rutledge* v. *United States*, 517 U. S., at 305–306. Petitioner does not contest the legal correctness of this conclusion.

Petitioner, however, does argue that the Fifth Circuit was wrong to affirm her sentence (life imprisonment). She points out that the federal second-degree murder statute, unlike Louisiana's first-degree murder statute, does not make a life sentence mandatory. See 18 U. S. C. § 1111(b) (sentence of "any term of years or for life"). Moreover, the Sentencing Guidelines provide for a range of 168 to 210 months' imprisonment for a first-time offender who murders a "vulnerable victim," United States Sentencing Commission, Guidelines Manual §§ 2A1.2, 3A1.1, and ch. 5, pt. A (Nov. 1994), although a judge could impose a higher sentence by departing from the Guidelines range. See *id.*, ch. 5, pt. K; see also *Koon* v. *United States*, 518 U. S. 81, 92–96 (1996) (describing circumstances for departures).

The Government concedes petitioner's point. The Solicitor General writes:

> "If the jury had found petitioner guilty of second degree murder under federal law, the district court would have

> been required to utilize the Sentencing Guidelines provisions applicable to that offense, and the court might have imposed a sentence below the statutory maximum. An upward departure from that range, if appropriate, could reach the statutory maximum of a life sentence, but it is for the district court in the first instance to make such a determination. Resentencing under the Guidelines is therefore appropriate if this Court vacates petitioner's conviction on the assimilated state offense and orders entry of a judgment of conviction for federal second degree murder." Brief for United States 38 (footnote and citations omitted).

We consequently vacate the Fifth Circuit's judgment in respect to petitioner's sentence and remand the case for resentencing.

It is so ordered.

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

As the proliferation of opinions indicates, this is a most difficult case. I agree with the Court's conclusion that the Assimilative Crimes Act (ACA), 18 U. S. C. § 13(a), does not incorporate Louisiana's first-degree murder statute into the criminal law governing federal enclaves in that State. I write separately because it seems to me that the Court's manner of reaching that result turns the language of the ACA into an empty vessel, and invites the lower courts to fill it with free-ranging speculation about the result that Congress would prefer in each case. Although I agree that the ACA is not a model of legislative draftsmanship, I believe we have an obligation to search harder for its meaning before abandoning the field to judicial intuition.

The Court quotes the text of the ACA early in its opinion, but then identifies several policy reasons for leaving it behind. The statutory language is deceptively simple.

> "Whoever within or upon any [federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, . . . shall be guilty of a like offense and subject to a like punishment." § 13(a).

At first glance, this appears to say that state law is not assimilated if the defendant can be prosecuted under any federal statute. The Court acknowledges this, but concludes that "a literal reading of the words 'any enactment' would dramatically separate the statute from its intended purpose," *ante*, at 160, because, for example, a general federal assault statute would prevent assimilation of a state prohibition against murder.

It seems to me that the term "any enactment" is not the text that poses the difficulty. Whether a federal assault statute (which is assuredly an "enactment") prevents assimilation of a state murder statute to punish an assault that results in death depends principally upon whether fatal assault constitutes the same "act or omission" that the assault statute punishes. Many hypotheticals posing the same issue can readily be conceived of. For example, whether a state murder statute is barred from assimilation by a federal double-parking prohibition, when the behavior in question consists of the defendant's stopping and jumping out of his car in the traffic lane to assault and kill the victim. The federal parking prohibition is sure enough an "enactment," but the issue is whether the "act or omission" to which it applies is a different one. So also with a federal statute punishing insurance fraud, where the murderer kills in order to collect a life insurance policy on the victim.

Many lower courts have analyzed situations like these under what they call the "precise acts" test, see, *e. g.*, *United States* v. *Kaufman*, 862 F. 2d 236 (CA9 1988), which in practice is no test at all but an appeal to vague policy intuitions.

See, *e. g.*, *United States* v. *Brown*, 608 F. 2d 551 (CA5 1979) (striking a child is not the same "precise act" for purposes of a federal assault law and a state law against child abuse). I am skeptical of any interpretation which leaves a statute doing no real interpretive work in most of the hard cases which it was drafted to resolve. On that score, however, the Court's solution is no improvement. After rejecting proposals from the petitioner and from the United States that would have given the ACA more definite content (on the policy grounds that they would produce too little, and too much, assimilation, respectively), the Court invites judges to speculate about whether Congress would approve of assimilation in each particular case.

> "[T]he court must ask . . . whether the federal statutes that apply to the 'act or omission' preclude application of the state law in question, say, because its application would interfere with the achievement of a federal policy, because the state law would effectively rewrite an offense definition that Congress carefully considered, or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue . . . . The primary question (we repeat) is one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defendant's to the exclusion of the particular state statute at issue?" *Ante*, at 164, 166 (citations omitted).

Those questions simply transform the ACA into a mirror that reflects the judge's assessment of whether assimilation of a particular state law would be good federal policy.

I believe that the statutory history of the ACA supports a more principled and constraining interpretation of the current language. The original version of the ACA provided for assimilation whenever "any offence shall be committed . . . , the punishment of which offence is not specially provided for by any law of the United States." 4 Stat. 115.

Subsequent amendments replaced the word "offence" with "act or thing," 35 Stat. 1145, and eventually the present formulation, "act or omission." But we held in *Williams* v. *United States*, 327 U. S. 711, 722–723 (1946), that those amendments were designed to respond to a perceived technical deficiency, and that they did not intend to change the meaning of the Act.

Williams reached that conclusion by studying the legislative history of the ACA amendments. Although I am not prepared to endorse that particular methodology, reading the ACA against the backdrop of its statutory predecessors does shed some light on its otherwise puzzling language. An "act or omission . . . made punishable by [law]" is the very definition of a criminal "offense," and certainly might have been another way to express that same idea. In addition, the ACA still provides that a defendant charged with an assimilated state crime "shall be guilty of a *like offense* and subject to a like punishment." 18 U. S. C. § 13(a) (emphasis added). Since an interpretation that ascribes greater substantive significance to the amendments would produce such a vague and unhelpful statute, I think that *Williams*'s reading of the ACA was essentially correct. A defendant may therefore be prosecuted under the ACA for an "offense" which is "like" the one defined by state law if, and only if, that same "offense" is not also defined by federal law.

That interpretation would hardly dispel all of the confusion surrounding the ACA, because courts would still have to decide whether the assimilated state offense is "the same" as some crime defined by federal law. As JUSTICE KENNEDY points out in dissent, "[t]here is a methodology at hand for this purpose, and it is the *Blockburger* test we use in double jeopardy law." *Post*, at 182. Two offenses are different, for double jeopardy purposes, whenever each contains an element that the other does not. See, *e. g.*, *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932). That test can be

easily and mechanically applied, and has the virtue of producing consistent and predictable results.

The *Blockburger* test, however, establishes what constitutes the "same offence" for purposes of the traditional practice that underlies the Double Jeopardy Clause, U. S. Const., Amdt. 5. That constitutional guarantee not only assumes a scheme of "offences" much more orderly than those referred to by the ACA (since they are the offenses designed by a single sovereign), but also pursues policy concerns that are entirely different. When it is fair to try a defendant a second time has little to do with when it is desirable to subject a defendant to two separate criminal prohibitions. Thus, for example, double jeopardy law treats greater and lesser included offenses as the same, see, *e. g.*, *Harris* v. *Oklahoma*, 433 U. S. 682 (1977) *(per curiam)*, so that a person tried for felony murder cannot subsequently be prosecuted for the armed robbery that constituted the charged felony. That is fair enough; but it is assuredly *not* desirable that a jurisdiction (the federal enclave) which has an armed robbery law not have a felony-murder law. Contrariwise, as the Court's opinion points out, *ante*, at 163, *Blockburger*'s emphasis on the formal elements of crimes causes it to *deny* the "sameness" of some quite similar offenses because of trivial differences in the way they are defined. In other words, the *Blockburger* test gives the phrase "same offence" a technical meaning that reflects our double jeopardy traditions, see *Grady* v. *Corbin*, 495 U. S. 508, 528–536 (1990) (SCALIA, J., dissenting), but that is neither a layman's understanding of the term nor a meaning that produces sensible results for purposes of "gap filling." There is no reason to assume, it seems to me, that Congress had the term of art in the Double Jeopardy Clause in mind when it enacted the ACA.

JUSTICE KENNEDY contends that all of these concerns can be accommodated through adjustments to the *Blockburger* test. In his view, for example, "the existence of a lesser included federal offense does not prevent the assimilation of

a greater state offense under the ACA, or vice versa." *Post*, at 183. He proposes that courts should "look beyond slight differences in wording and jurisdictional elements to discern whether, as a practical matter, the elements of the two crimes are the same." *Post*, at 182. In order to avoid overruling *Williams*, he also suggests that assimilation is improper when "Congress . . . adverts to a specific element of an offense and sets it at a level different from the level set by state law." *Post*, at 183. I admire JUSTICE KENNEDY's effort to construct an interpretation of the ACA that yields more certain and predictable results, but the modifications he proposes largely dispel the virtues of familiarity, clarity, and predictability that would make *Blockburger* the means to such an end. Ultimately, moreover, those modifications are driven by a view of the policies underlying the Act which I do not share. JUSTICE KENNEDY contends that the ACA is primarily about federalism, and that respect for that principle requires a strong presumption in favor of assimilation. *Post*, at 181–182. To the extent that we can divine anything about the ACA's "purpose" from the historical context which produced it, I agree with the Court that the statute was apparently designed "to fill gaps in the federal criminal law" at a time when there was almost no federal criminal law. *Ante*, at 160; see also *Williams*, *supra*, at 718–719.

Rejecting *Blockburger*'s elements test leaves me without an easy and mechanical answer to the question of when a state and federal offense are the "same" under the ACA. But the language of the original 1825 ACA suggests that the focus of that inquiry should be on the way that crimes were traditionally defined and categorized at common law. It provided that

> ". . . if any offence shall be committed in [an enclave], the punishment of which offence is not specially provided for by any law of the United States, such offence shall . . . receive the same punishment as the laws of the state . . .

> provide for the like offence when committed within the body of any county of such state." 4 Stat. 115.

Congress did not provide any methodology for determining whether an "offence" under state law is "provided for by any law of the United States"; the statute appears, instead, to presume the reader's familiarity with a set of discrete "offence[s]" existing apart from the particular provisions of either state or federal statutory law.

In my opinion, the legal community of that day could only have regarded such language as a reference to the traditional vocabulary and categories of the common law. Indeed, the original ACA was at least in part a response to our decision in *United States* v. *Hudson*, 7 Cranch 32 (1812), which held that the federal courts could not recognize and punish common-law crimes in the absence of a specific federal statute. The common law's taxonomy of criminal behavior developed over the centuries through the interplay of statutes and judicial decisions, and its basic categories of criminal offenses remain familiar today: murder, rape, assault, burglary, larceny, fraud, forgery, and so on. I believe that a contemporary reader of the original ACA would have understood it to apply if, and only if, the federal criminal statutes simply failed to cover some significant "offence" category generally understood to be part of the common law.

Since 1825, of course, state and federal legislatures have created a tremendous variety of new statutory crimes that both cut across and expand the old common-law categories. Some of those new "offences" may have become so well established in our common legal culture that their absence from the federal criminal law would now represent a significant gap in its coverage—a gap of the sort the ACA was designed to fill. That possibility introduces an unavoidable element of judgment and discretion into the application of the ACA, and to that extent my interpretation is subject to the same criticisms I have leveled at the approaches taken by the Court and by JUSTICE KENNEDY. But I think that

danger is more theoretical than practical. The structure of the criminal law, like the basic categories of human vice, has remained quite stable over the centuries. There have been a few genuine innovations recently; I have in mind, for example, antitrust or securities crimes which did not exist in 1825. But Congress has been the principal innovator in most of those areas, and I doubt that courts will confront many new "offence" candidates that are not already covered by the federal criminal law. Regardless, the approach outlined above would produce more predictable results than the majority's balancing test, and has the additional virtue of being more firmly grounded in the text and statutory history.

It also produces a clear answer in this case. Ms. Lewis's conduct is not just punishable under some federal criminal statute; it is punishable *as murder* under 18 U. S. C. § 1111. Louisiana's murder statutes are structured somewhat differently from their federal counterparts, but they are still unquestionably murder statutes. Because that "offence" is certainly "made punishable by any enactment of Congress," there is no gap for the ACA to fill. That remains true even if the common-law category at the appropriate level of generality is instead *murder in the first degree.* That "offence" is also defined and punished by the federal criminal law, although the prosecutors in this case apparently did not believe that they could establish its elements. Accordingly, I concur in the judgment, and in Part IV of the majority's opinion.

JUSTICE KENNEDY, dissenting.

As the majority recognizes, the touchstone for interpreting the Assimilative Crimes Act (ACA) is the intent of Congress. *Ante*, at 166. One of Congress' purposes in enacting the ACA was to fill gaps in federal criminal law. *Ante*, at 160. The majority fails to weigh, however, a second, countervailing policy behind the ACA: the value of federalism. The intent of Congress was to preserve state law

except where it is "displaced by specific laws enacted by Congress." *Franklin* v. *United States*, 216 U. S. 559, 568 (1910). In other words, the ACA embodies Congress' "policy of general conformity to local law." *United States* v. *Sharpnack*, 355 U. S. 286, 289 (1958). The majority quotes these passages with approval, *ante*, at 160, yet ignores the principles of federalism upon which they rest.

A central tenet of federalism is concurrent jurisdiction over many subjects. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 425, 435 (1819). One result of concurrent jurisdiction is that, outside federal enclaves, citizens can be subject to the criminal laws of both state and federal sovereigns for the same act or course of conduct. See *Heath* v. *Alabama*, 474 U. S. 82, 88–89 (1985). The ACA seeks to mirror the results of concurrent jurisdiction in enclaves where, but for its provisions, state laws would be suspended in their entirety. Congress chose this means to recognize and respect the power of both sovereigns. We should implement this principle by assimilating state law except where Congress has manifested a contrary intention in "specific [federal] laws." *Franklin*, *supra*, at 568. But see *ante*, at 163 (suggesting that persons within federal enclaves should not be "randomly subject" to state as well as federal law, even though both sovereigns regulate those outside enclaves).

The majority recognizes that assimilation is not barred simply because the conduct at issue could be punished under a federal statute. It is correct, then, to assume that assimilation depends on whether Congress has proscribed the same offense. *Ante*, at 161–162. Yet in trying to define the same offense, the majority asks whether assimilation would interfere with a federal policy, rewrite a federal offense, or intrude upon a field occupied by the Federal Government. *Ante*, at 164–165. The majority's standards are a roundabout way to ask whether specific federal laws conflict with state laws. The standards take too little note of the value of federalism and the concomitant presumption in favor of

assimilation. And for many concrete cases, they are too vague to be of help.

A more serious problem with the majority's approach, however, is that it undervalues the best indicia of congressional intent: the words of the criminal statutes in question and the factual elements they define. There is a methodology at hand for this purpose, and it is the *Blockburger* test we use in double jeopardy law. See *Blockburger* v. *United States*, 284 U. S. 299 (1932); see also *Missouri* v. *Hunter*, 459 U. S. 359, 366–367 (1983) (*Blockburger* is a rule for divining congressional intent). Under *Blockburger*, we examine whether "[e]ach of the offenses created requires proof of a different element." 284 U. S., at 304. In other words, does "each provision requir[e] proof of a fact which the other does not"? *Ibid.*

The same-elements test turns on the texts of the statutes in question, the clearest and most certain indicators of the will of Congress. The test is straightforward, and courts and Congress are already familiar with its dynamic. Following *Blockburger*, a same-elements approach under the ACA would respect federalism by allowing a broad scope for assimilation of state law. The majority rejects this approach, however, because federal and state statutes may have trivial differences in wording or may differ in jurisdictional elements. *Ante*, at 163, 165.

It would be simpler and more faithful to federalism to use a same-elements inquiry as the starting point for the ACA analysis. Courts could use this standard and still accommodate the majority's concerns. Under this view, we would look beyond slight differences in wording and jurisdictional elements to discern whether, as a practical matter, the elements of the two crimes are the same. The majority frets that a small difference in the definitions of purses in federal and state purse-snatching laws would by itself permit assimilation. *Ante*, at 163. But a slight difference in definition need not by itself allow assimilation. See Amar & Marcus,

Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 38–44 (1995) (advocating a similar approach for double jeopardy claims involving combinations of federal and state offenses). The majority also wonders whether one could assimilate state laws forbidding robbery of state-chartered banks because a federal bank-robbery law did not require a state charter. *Ante*, at 163. But again, a jurisdictional element need not by itself allow assimilation, if all substantive elements of the offenses are identical.

Because the purposes of the ACA and double jeopardy law differ, some other adjustments to *Blockburger* may be necessary. For instance, *Blockburger* treats greater and lesser included offenses as the same to protect the finality of a single prosecution, but finality is not the purpose of the ACA. Congress chooses to allow greater and lesser included offenses to coexist at the federal level, though a particular offender cannot be convicted of both. So too the existence of a lesser included federal offense does not prevent the assimilation of a greater state offense under the ACA, or vice versa. See *ante*, at 171 (citing cases finding federal assault statute does not prevent assimilation of state child-abuse laws).

Another way in which the ACA differs from double jeopardy law is compelled by our own precedent interpreting the ACA. See *Williams* v. *United States*, 327 U. S. 711 (1946). Congress sometimes adverts to a specific element of an offense and sets it at a level different from the level set by state law. When the federal and state offenses have otherwise identical elements, assimilation is not proper. In the *Williams* case, for example, a state statutory-rape law set the age of majority at 18. *Id.*, at 716. Congress had enacted a federal carnal-knowledge statute, setting the age of majority at 16. *Id.*, at 714, n. 6. Once Congress had adverted to and set the age of majority, state law could not be used to rewrite and broaden this particular element. See *id.*, at 717–718, 724–725. Because Congress had manifested

a clear intent to the contrary, assimilation was improper. The same would be true if a state grand-larceny law required a theft of at least $200, while a federal grand-larceny law required a theft of $250 or more.

Congress could have defined first-degree murder to include the killing of children younger than 3, even though state law set the requisite age at 12. Had Congress done so, *Williams* would apply and assimilation of state law would be improper if all other elements were the same. Here, on the other hand, Congress has not taken a victim's age into account at all in defining first-degree murder. The state offense includes a substantive age element missing from the federal statute, so the two do not share the same elements and assimilation is proper. The majority's analysis is more obscure and leads it to an incorrect conclusion. For these reasons, and with all respect, I dissent.

Syllabus

GRAY *v.* MARYLAND

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 96–8653. Argued December 8, 1997—Decided March 9, 1998

Anthony Bell confessed to the police that he, petitioner Gray, and another man participated in the beating that caused Stacey Williams' death. After the third man died, a Maryland grand jury indicted Bell and Gray for murder, and the State tried them jointly. When the trial judge permitted the State to introduce a redacted version of Bell's confession, the detective who read it to the jury said "deleted" or "deletion" whenever the name of Gray or the third participant appeared. Immediately after that reading, however, the detective answered affirmatively when the prosecutor asked, "after [Bell] gave you that information, you subsequently were able to arrest . . . Gray; is that correct?" The State also introduced a written copy of the confession with the two names omitted, leaving in their place blanks separated by commas. The judge instructed the jury that the confession could be used as evidence only against Bell, not Gray. The jury convicted both defendants. Maryland's intermediate appellate court held that *Bruton* v. *United States*, 391 U. S. 123, prohibited use of the confession and set aside Gray's conviction. Maryland's highest court disagreed and reinstated that conviction.

Held: The confession here at issue, which substituted blanks and the word "delete" for Gray's proper name, falls within the class of statements to which *Bruton*'s protective rule applies. Pp. 189–197.

(a) *Bruton* also involved two defendants tried jointly for the same crime, with the confession of one of them incriminating both himself and the other. This Court held that, despite a limiting instruction that the jury should consider the confession as evidence only against the confessing codefendant, the introduction of such a confession at a joint trial violates the nonconfessing defendant's Sixth Amendment right to cross-examine witnesses. The Court explained that this situation, in which the powerfully incriminating extrajudicial statements of a codefendant are deliberately spread before the jury in a joint trial, is one of the contexts in which the risk that the jury will not, or cannot, follow limiting instructions is so great, and the consequences of failure so devastating to the defendant, that the introduction of the evidence cannot be allowed. See 391 U. S., at 135–136. *Bruton*'s scope was limited by *Richardson* v. *Marsh*, 481 U. S. 200, 211, in which the Court held that the Confrontation Clause is not violated by the admission of a nontesti-

fying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only that defendant's name, but any reference to his or her existence. Pp. 189–191.

(b) Unlike *Richardson*'s redacted confession, the confession here refers directly to Gray's "existence." Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements as to warrant the same legal results. For one thing, a jury will often react similarly to an unredacted confession and a confession redacted as here, for it will realize that the confession refers specifically to the defendant, even when the State does not blatantly link the defendant to the deleted name, as it did below by asking the detective whether Gray was arrested on the basis of information in Bell's confession. For another thing, the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference. Finally, *Bruton*'s protected statements and statements redacted to leave a blank or some other similarly obvious alteration, function the same way grammatically: They point directly to, and accuse, the nonconfessing codefendant. Pp. 192–195.

(c) Although *Richardson* placed outside *Bruton*'s scope statements that incriminate inferentially, 481 U. S., at 208, and the jury must use inference to connect Bell's statements with Gray, *Richardson* does not control the result here. Inference pure and simple cannot make the critical difference. If it did, then *Richardson* would also place outside *Bruton*'s scope confessions that use, *e. g.*, nicknames and unique descriptions, whereas this Court has assumed that such identifiers fall inside *Bruton*'s protection, see *Harrington* v. *California*, 395 U. S. 250, 253. Thus, *Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself, but became incriminating "only when linked with evidence introduced later at trial." 481 U. S., at 208. In contrast, the inferences here involve statements that, despite redaction, obviously refer directly to someone, often obviously to Gray, and involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. *Richardson*'s policy reasons for its conclusion—that application of *Bruton*'s rule would force prosecutors to abandon use either of the confession or of a joint trial in instances where adequate redaction would "not [be] possible," 481 U. S., at 209, and would lead to those same

results, or provoke mistrials, because of the difficulty of predicting, before introduction of all the evidence, whether *Bruton* barred use of a particular confession that incriminated "by connection," see *ibid.*—are inapplicable in the circumstances here. Pp. 195–197.

344 Md. 417, 687 A. 2d 660, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, *post*, p. 200.

Arthur A. DeLano, Jr., argued the cause for petitioner. With him on the briefs were *Stephen E. Harris* and *Nancy S. Forster.*

Carmen M. Shepard, Deputy Attorney General of Maryland, argued the cause for respondent. With her on the brief were *J. Joseph Curran, Jr.*, Attorney General, and *Gary E. Bair* and *Mary Ellen Barbera*, Assistant Attorneys General.

Roy W. McLeese III argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben.**

**David Reiser* and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Dennis C. Vacco*, Attorney General of New York, *Barbara G. Billet*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *Marlene O. Tuczinski*, Assistant Attorney General, *John M. Balley*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *Margery S. Bronster* of Hawaii, *Richard P. Ieyoub* of Louisiana, *Frank J. Kelley* of Michigan, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *W. A. Drew Edmondson* of Oklahoma, *Jan Graham* of Utah, and *William H. Sorrell* of Vermont; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

JUSTICE BREYER delivered the opinion of the Court.

The issue in this case concerns the application of *Bruton* v. *United States*, 391 U. S. 123 (1968). *Bruton* involved two defendants accused of participating in the same crime and tried jointly before the same jury. One of the defendants had confessed. His confession named and incriminated the other defendant. The trial judge issued a limiting instruction, telling the jury that it should consider the confession as evidence only against the codefendant who had confessed and not against the defendant named in the confession. *Bruton* held that, despite the limiting instruction, the Constitution forbids the use of such a confession in the joint trial.

The case before us differs from *Bruton* in that the prosecution here redacted the codefendant's confession by substituting for the defendant's name in the confession a blank space or the word "deleted." We must decide whether these substitutions make a significant legal difference. We hold that they do not and that *Bruton*'s protective rule applies.

I

In 1993, Stacey Williams died after a severe beating. Anthony Bell gave a confession, to the Baltimore City police, in which he said that he (Bell), Kevin Gray, and Jacquin "Tank" Vanlandingham had participated in the beating that resulted in Williams' death. Vanlandingham later died. A Maryland grand jury indicted Bell and Gray for murder. The State of Maryland tried them jointly.

The trial judge, after denying Gray's motion for a separate trial, permitted the State to introduce Bell's confession into evidence at trial. But the judge ordered the confession redacted. Consequently, the police detective who read the confession into evidence said the word "deleted" or "deletion" whenever Gray's name or Vanlandingham's name appeared. Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, "after he gave you that information, you subsequently were able

to arrest Mr. Kevin Gray; is that correct?" The officer responded, "That's correct." App. 12. The State also introduced into evidence a written copy of the confession with those two names omitted, leaving in their place blank white spaces separated by commas. See Appendix, *infra*. The State produced other witnesses, who said that six persons (including Bell, Gray, and Vanlandingham) participated in the beating. Gray testified and denied his participation. Bell did not testify.

When instructing the jury, the trial judge specified that the confession was evidence only against Bell; the instructions said that the jury should not use the confession as evidence against Gray. The jury convicted both Bell and Gray. Gray appealed.

Maryland's intermediate appellate court accepted Gray's argument that *Bruton* prohibited use of the confession and set aside his conviction. 107 Md. App. 311, 667 A. 2d 983 (1995). Maryland's highest court disagreed and reinstated the conviction. 344 Md. 417, 687 A. 2d 660 (1997). We granted certiorari in order to consider *Bruton*'s application to a redaction that replaces a name with an obvious blank space or symbol or word such as "deleted."

II

In deciding whether *Bruton*'s protective rule applies to the redacted confession before us, we must consider both *Bruton* and a later case, *Richardson* v. *Marsh*, 481 U. S. 200 (1987), which limited *Bruton*'s scope. We shall briefly summarize each of these two cases.

Bruton, as we have said, involved two defendants—Evans and Bruton—tried jointly for robbery. Evans did not testify, but the Government introduced into evidence Evans' confession, which stated that both he (Evans) and Bruton together had committed the robbery. 391 U. S., at 124. The trial judge told the jury it could consider the confession

as evidence only against Evans, not against Bruton. *Id.*, at 125.

This Court held that, despite the limiting instruction, the introduction of Evans' out-of-court confession at Bruton's trial had violated Bruton's right, protected by the Sixth Amendment, to cross-examine witnesses. *Id.*, at 137. The Court recognized that in many circumstances a limiting instruction will adequately protect one defendant from the prejudicial effects of the introduction at a joint trial of evidence intended for use only against a different defendant. *Id.*, at 135. But it said:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect . . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.*, at 135–136 (citations omitted).

The Court found that Evans' confession constituted just such a "powerfully incriminating extrajudicial statemen[t]," and that its introduction into evidence, insulated from cross-examination, violated Bruton's Sixth Amendment rights. *Id.*, at 135.

In *Richardson* v. *Marsh, supra,* the Court considered a redacted confession. The case involved a joint murder trial of Marsh and Williams. The State had redacted the confession of one defendant, Williams, so as to "omit all reference"

to his codefendant, Marsh—"indeed, to omit all indication that *anyone* other than . . . Williams" and a third person had "participated in the crime." *Id.*, at 203 (emphasis in original). The trial court also instructed the jury not to consider the confession against Marsh. *Id.*, at 205. As redacted, the confession indicated that Williams and the third person had discussed the murder in the front seat of a car while they traveled to the victim's house. *Id.*, at 203–204, n. 1. The redacted confession contained no indication that Marsh—or any other person—was in the car. *Ibid.* Later in the trial, however, Marsh testified that she was in the back seat of the car. *Id.*, at 204. For that reason, in context, the confession still could have helped convince the jury that Marsh knew about the murder in advance and therefore had participated knowingly in the crime.

The Court held that this redacted confession fell outside *Bruton*'s scope and was admissible (with appropriate limiting instructions) at the joint trial. The Court distinguished Evans' confession in *Bruton* as a confession that was "incriminating on its face," and which had "expressly implicat[ed]" Bruton. 481 U. S., at 208. By contrast, Williams' confession amounted to "evidence requiring linkage" in that it "became" incriminating in respect to Marsh "only when linked with evidence introduced later at trial." *Ibid.* The Court held

> "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.*, at 211.

The Court added: "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.*, at 211, n. 5.

III

Originally, the codefendant's confession in the case before us, like that in *Bruton*, referred to, and directly implicated, another defendant. The State, however, redacted that confession by removing the nonconfessing defendant's name. Nonetheless, unlike *Richardson*'s redacted confession, this confession refers directly to the "existence" of the nonconfessing defendant. The State has simply replaced the nonconfessing defendant's name with a kind of symbol, namely, the word "deleted" or a blank space set off by commas. The redacted confession, for example, responded to the question "Who was in the group that beat Stacey," with the phrase, "Me, , and a few other guys." See Appendix, *infra*, at 199. And when the police witness read the confession in court, he said the word "deleted" or "deletion" where the blank spaces appear. We therefore must decide a question that *Richardson* left open, namely, whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word "deleted," or a similar symbol, still falls within *Bruton*'s protective rule. We hold that it does.

Bruton, as interpreted by *Richardson*, holds that certain "powerfully incriminating extrajudicial statements of a codefendant"—those naming another defendant—considered as a class, are so prejudicial that limiting instructions cannot work. *Richardson*, 481 U. S., at 207; *Bruton*, 391 U. S., at 135. Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the *Bruton* Court found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result.

For one thing, a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. This is true even when the State does not blatantly link the defendant to the deleted name, as it did in this case by asking whether Gray was arrested on the basis of information in Bell's confession as soon as the officer had finished reading the redacted statement. Consider a simplified but typical example, a confession that reads "I, Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not likely fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank, in the phrase "I, Bob Smith, along with , robbed the bank," refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.

For another thing, the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference. That is why Judge Learned Hand, many years ago, wrote in a similar instance that blacking out the name of a codefendant not only "would have been futile. . . . [T]here could not have been the slightest doubt as to whose names had been blacked out," but "even if there had been, that blacking out itself would

have not only laid the doubt, but underscored the answer." *United States* v. *Delli Paoli*, 229 F. 2d 319, 321 (CA2 1956), aff'd, 352 U. S. 232 (1957), overruled by *Bruton* v. *United States*, 391 U. S. 123 (1968). See also *Malinski* v. *New York*, 324 U. S. 401, 430 (1945) (Rutledge, J., dissenting) (describing substitution of names in confession with "X" or "Y" and other similar redactions as "devices . . . so obvious as perhaps to emphasize the identity of those they purported to conceal").

Finally, *Bruton*'s protected statements and statements redacted to leave a blank or some other similarly obvious alteration function the same way grammatically. They are directly accusatory. Evans' statement in *Bruton* used a proper name to point explicitly to an accused defendant. And *Bruton* held that the "powerfully incriminating" effect of what Justice Stewart called "an out-of-court accusation," 391 U. S., at 138 (concurring opinion), creates a special, and vital, need for cross-examination—a need that would be immediately obvious had the codefendant pointed directly to the defendant in the courtroom itself. The blank space in an obviously redacted confession also points directly to the defendant, and it accuses the defendant in a manner similar to Evans' use of Bruton's name or to a testifying codefendant's accusatory finger. By way of contrast, the factual statement at issue in *Richardson*—a statement about what others said in the front seat of a car—differs from directly accusatory evidence in this respect, for it does not point directly to a defendant at all.

We concede certain differences between *Bruton* and this case. A confession that uses a blank or the word "delete" (or, for that matter, a first name or a nickname) less obviously refers to the defendant than a confession that uses the defendant's full and proper name. Moreover, in some instances the person to whom the blank refers may not be clear: Although the followup question asked by the State in this case eliminated all doubt, the reference might not be

transparent in other cases in which a confession, like the present confession, uses two (or more) blanks, even though only one other defendant appears at trial, and in which the trial indicates that there are more participants than the confession has named. Nonetheless, as we have said, we believe that, considered as a class, redactions that replace a proper name with an obvious blank, the word "delete," a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results.

IV

The State, in arguing for a contrary conclusion, relies heavily upon *Richardson*. But we do not believe *Richardson* controls the result here. We concede that *Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially. 481 U. S., at 208. We also concede that the jury must use inference to connect the statement in this redacted confession with the defendant. But inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, descriptions as unique as the "red-haired, bearded, one-eyed man-with-a-limp," *United States* v. *Grinnell Corp.*, 384 U. S. 563, 591 (1966) (Fortas, J., dissenting), and perhaps even full names of defendants who are always known by a nickname. This Court has assumed, however, that nicknames and specific descriptions fall inside, not outside, *Bruton*'s protection. See *Harrington* v. *California*, 395 U. S. 250, 253 (1969) (assuming *Bruton* violation where confessions describe codefendant as the "white guy" and gives a description of his age, height, weight, and hair color). The Solicitor General, although supporting Maryland in this case, concedes that this is appropriate. Brief for United States as *Amicus Curiae* 18–19, n. 8.

That being so, *Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself and which became incriminating "only when linked with evidence introduced later at trial." 481 U. S., at 208. The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in *Richardson*'s words, "*facially* incriminat[es]" the codefendant. *Id.*, at 209 (emphasis added). Like the confession in *Bruton* itself, the accusation that the redacted confession makes "is more vivid than inferential incrimination, and hence more difficult to thrust out of mind." 481 U. S., at 208.

Nor are the policy reasons that *Richardson* provided in support of its conclusion applicable here. *Richardson* expressed concern lest application of *Bruton*'s rule apply where "redaction" of confessions, particularly "confessions incriminating by connection," would often "not [be] possible," thereby forcing prosecutors too often to abandon use either of the confession or of a joint trial. 481 U. S., at 209. Additional redaction of a confession that uses a blank space, the word "delete," or a symbol, however, normally is possible. Consider as an example a portion of the confession before us: The witness who read the confession told the jury that the confession (among other things) said,

> "Question: Who was in the group that beat Stacey?
>
> "Answer: Me, deleted, deleted, and a few other guys." App. 11.

Why could the witness not, instead, have said:

> "Question: Who was in the group that beat Stacey?
>
> "Answer: Me and a few other guys."

Richardson itself provides a similar example of this kind of redaction. The confession there at issue had been "redacted to omit all reference to respondent—indeed, to omit all indication that anyone other than Martin and Williams participated in the crime," 481 U. S., at 203 (emphasis deleted), and it did not indicate that it had been redacted. But cf. *post*, at 203 (SCALIA, J., dissenting) (suggesting that the Court has "never before endorsed . . . the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown").

The *Richardson* Court also feared that the inclusion, within *Bruton*'s protective rule, of confessions that incriminated "by connection" too often would provoke mistrials, or would unnecessarily lead prosecutors to abandon the confession or joint trial, because neither the prosecutors nor the judge could easily predict, until after the introduction of all the evidence, whether or not *Bruton* had barred use of the confession. 481 U. S., at 209. To include the use of blanks, the word "delete," symbols, or other indications of redaction, within *Bruton*'s protections, however, runs no such risk. Their use is easily identified prior to trial and does not depend, in any special way, upon the other evidence introduced in the case. We also note that several Circuits have interpreted *Bruton* similarly for many years, see, *e. g.*, *United States* v. *Garcia*, 836 F. 2d 385 (CA8 1987); *Clark* v. *Maggio*, 737 F. 2d 471 (CA5 1984), yet no one has told us of any significant practical difficulties arising out of their administration of that rule.

For these reasons, we hold that the confession here at issue, which substituted blanks and the word "delete" for the petitioner's proper name, falls within the class of statements to which *Bruton*'s protections apply.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

[Typewritten Version of Handwritten Redacted Statement, State's Exhibit 5B]

(REDACTED STATEMENT)

This is a statement of Anthony Bell, taken on 1–4–94 at 0925 hrs in the small interview room. Statement taken by Det. Pennington and Det. Ritz.

(Q) Is your name Anthony Bell

(A) Yes

(Q) Are 19 years old and your date of Birth is 6–17–74

(A) Yes

(Q) Can you read and write

(A) Yes

(Q) Are you under the influence of alcohol or drugs

(A) No

(Q) You were explained your Explanation of Rights, do you fully understand them

(A) Yes

(Q) Are you willing to answer questions without an attorney present at this time

(A) Yes

Anthony Bell

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Bell, Anthony

(Q) Has anyone promised you anything if you answer questions

(A) No

(Q) What can you tell me about the beating of Stacey Williams that occurred on 10 November 1993

(A) An argument broke out between and Stacey in the 500 blk of Louden Ave Stacey got smacked and then ran into Wildwood Parkway. Me , and a few other guys ran after Stacey. We caught up to him on Wild-

wood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Ave I then walked over and used the phone. Stacey and the others walked down Louden

(Q) When Stacey was beaten on Wildwood Parkway, how was he beaten

Anthony Bell

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Bell, Anthony

(A) Hit, kicked

(Q) Who hit and kicked Stacey

(A) I hit Stacey, he was kicked but I don't know who kicked him

(Q) Who was in the group that beat Stacey

(A) Me, , and a few other guys

(Q) Do you have the other guys names

(A) , and me, I don't remember who was out there

(Q) Did anyone pick Stacey up and drop him to the ground

(A) No when I was there.

(Q) What was the argument over between Stacey and

Anthony Bell

[Page -4-]

Bell, Anthony

(A) Some money that Stacey owed

(Q) How many guys were hitting on Stacey

(A) About six guys

(Q) Do you have a black jacket with Park Heights written on the back

(A) Yeh

(Q) Who else has these jacket.

(A) ,

(Q) After reading this statement would you sign it
(A) Yes

Anthony Bell

Det. William F. Ritz Det. Homer Pennington

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In *Richardson* v. *Marsh*, 481 U. S. 200 (1987), we declined to extend the "narrow exception" of *Bruton* v. *United States*, 391 U. S. 123 (1968), beyond confessions that facially incriminate a defendant. Today the Court "concede[s] that *Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially," *ante*, at 195, and "concede[s] that the jury must use inference to connect the statement in this redacted confession with the defendant," *ibid.*, but nonetheless extends *Bruton* to confessions that have been redacted to delete the defendant's name. Because I believe the line drawn in *Richardson* should not be changed, I respectfully dissent.

The almost invariable assumption of the law is that jurors follow their instructions. *Francis* v. *Franklin*, 471 U. S. 307, 324–325, n. 9 (1985). This rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, *supra*, at 211. We have held, for example, that the state may introduce evidence of a defendant's prior convictions for the purpose of sentencing enhancement, or statements elicited from a defendant in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), for the purpose of impeachment, so long as the jury is instructed that such evidence may not be considered for the purpose of determining guilt. *Spencer* v. *Texas*, 385 U. S. 554 (1967); *Harris* v. *New York*, 401 U. S. 222 (1971). The same applies to codefendant confessions:

"[A] witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." *Richardson*, *supra*, at 206. In *Bruton*, we recognized a "narrow exception" to this rule: "We held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." 481 U. S., at 207.

We declined in *Richardson*, however, to extend *Bruton* to confessions that incriminate only by inference from other evidence. When incrimination is inferential, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." 481 U. S., at 208. Today the Court struggles to decide whether a confession redacted to omit the defendant's name is incriminating on its face or by inference. On the one hand, the Court "concede[s] that the jury must use inference to connect the statement in this redacted confession with the defendant," *ante*, at 195, but later asserts, on the other hand, that "the redacted confession with the blank prominent on its face . . . '*facially* incriminat[es]'" him, *ante*, at 196. The Court should have stopped with its concession: The statement "Me, deleted, deleted, and a few other guys" does not facially incriminate anyone but the speaker. The Court's analogizing of "deleted" to a physical description that clearly identifies the defendant (which we have assumed *Bruton* covers, see *Harrington* v. *California*, 395 U. S. 250, 253 (1969)) does not survive scrutiny. By "facially incriminating," we have meant incriminating independent of other evidence introduced at trial. *Richardson*, *supra*, at 208–209. Since the defendant's appearance at counsel table is not evidence, the description "red-haired, bearded, one-eyed man-with-a-limp," *ante*, at 195, would be facially incriminating—unless, of course, the defendant had dyed his hair black and shaved

his beard before trial, and the prosecution introduced evidence concerning his former appearance. Similarly, the statement "Me, Kevin Gray, and a few other guys" would be facially incriminating, unless the defendant's name set forth in the indictment was not Kevin Gray, and evidence was introduced to the effect that he sometimes used "Kevin Gray" as an alias. By contrast, the person to whom "deleted" refers in "Me, deleted, deleted, and a few other guys" is not apparent from anything the jury knows independent of the evidence at trial. Though the jury may speculate, the statement expressly implicates no one but the speaker.

Of course the Court is correct that confessions redacted to omit the defendant's name are more likely to incriminate than confessions redacted to omit any reference to his existence. But it is also true—and more relevant here—that confessions redacted to omit the defendant's name are *less* likely to incriminate than confessions that expressly state it. The latter are "powerfully incriminating" as a class, *Bruton*, *supra*, at 124, n. 1, 135; the former are not so. Here, for instance, there were two names deleted, five or more participants in the crime, and only one other defendant on trial. The jury no doubt may "speculate about the reference," *ante*, at 193, as it speculates when evidence connects a defendant to a confession that does not refer to his existence. The issue, however, is not whether the confession incriminated petitioner, but whether the incrimination is so "powerful" that we must depart from the normal presumption that the jury follows its instructions. *Richardson*, *supra*, at 208, n. 3. I think it is not—and I am certain that drawing the line for departing from the ordinary rule at the *facial identification* of the defendant makes more sense than drawing it anywhere else.

The Court's extension of *Bruton* to name-redacted confessions "as a class" will seriously compromise "society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U. S. 412, 426

(1986) (citation omitted). We explained in *Richardson* that forgoing use of codefendant confessions or joint trials was "too high" a price to ensure that juries never disregard their instructions. 481 U. S., at 209–210. The Court minimizes the damage that it does by suggesting that "[a]dditional redaction of a confession that uses a blank space, the word 'delete,' or a symbol . . . normally is possible." In the present case, it asks, why could the police officer not have testified that Bell's answer was "Me and a few other guys"? *Ante*, at 196. The answer, it seems obvious to me, is because that is not what Bell said. Bell's answer was "Me, Tank, Kevin and a few other guys." Introducing the statement with full disclosure of deletions is one thing; introducing as the complete statement what was in fact only a part is something else. And of course even concealed deletions from the text will often not do the job that the Court demands. For inchoate offenses—conspiracy in particular—redaction to delete all reference to a confederate would often render the confession nonsensical. If the question was "Who agreed to beat Stacey?", and the answer was "Me and Kevin," we might redact the answer to "Me and [deleted]," or perhaps to "Me and somebody else," but surely not to just "Me"—for that would no longer be a confession to the conspiracy charge, but rather the foundation for an insanity defense. To my knowledge we have never before endorsed—and to my strong belief we ought not endorse—the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown.[1] The risk to the integrity of our system (not to mention the increase in its complexity) posed by the approval of such

[1] The Court is mistaken to suggest that in *Richardson* v. *Marsh*, 481 U. S. 200 (1987), we endorsed rewriting confessions as a proper method of redaction. See *ante*, at 197. There the parties agreed to the method of redaction, App. in *Richardson* v. *Marsh*, O. T. 1986, No. 85–1433, pp. 100, 107–108, and we had no occasion to address the propriety of editing confessions without showing the nature of the editing.

freelance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves.

The United States Constitution guarantees, not a perfect system of criminal justice (as to which there can be considerable disagreement), but a minimum standard of fairness. Lest we lose sight of the forest for the trees, it should be borne in mind that federal and state rules of criminal procedure—which can afford to seek perfection because they can be more readily changed—exclude nontestifying-codefendant confessions even where the Sixth Amendment does not. Under the Federal Rules of Criminal Procedure (and Maryland's), a trial court may order separate trials if joinder will prejudice a defendant. See Fed. Rule Crim. Proc. 14; Md. Crim. Rule 4–253(c) (1998). Maryland courts have described the term "prejudice" as a "term of art," which "refers only to prejudice resulting to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Ogonowski* v. *State*, 589 A. 2d 513, 520, cert. denied, 593 A. 2d 1127 (1991). The Federal Rule expressly contemplates that in ruling on a severance motion the court will inspect "*in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." Fed. Rule Crim. Proc. 14. Federal and most state trial courts (including Maryland's) also have the discretion to exclude unfairly prejudicial (albeit probative) evidence. Fed. Rule Evid. 403; Md. Rule Evid. 5–403 (1998). Here, petitioner moved for a severance on the ground that the admission of Bell's confession would be unfairly prejudicial. The trial court denied the motion, explaining that where a confession names two others, and the evidence is that five or six others participated, redaction of petitioner's name would not leave the jury with the "unavoidable inference" that Bell implicated Gray. App. 8.

I do not understand the Court to disagree that the redaction itself left unclear to whom the blank referred.[2] See *ante*, at 194–195. That being so, the rule set forth in *Richardson* applies, and the statement could constitutionally be admitted with limiting instruction. This remains, insofar as the Sixth Amendment is concerned, the most "reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, 481 U. S., at 211. For these reasons, I would affirm the judgment of the Court of Appeals of Maryland.

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[2] The Court does believe, however, that the answer to a "followup question"—"All right, now, officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" ("That's correct")—"eliminated all doubt" as to the subject of the redaction. *Ante*, at 189, 194. That is probably not so, and is certainly far from clear. Testimony that preceded the introduction of Bell's confession had already established that Gray had become a suspect in the case, and that a warrant had been issued for his arrest, *before Bell confessed.* Brief for Respondent 26, n. 10. Respondent contends that, given this trial background, and in its context, the prosecutor's question did not imply any connection between Bell's confession and Gray's arrest, and was simply a means of making the transition from Bell's statement to the next piece of evidence, Gray's statement. *Ibid.* That is at least arguable, and an appellate court is in a poor position to resolve such a contextual question *de novo.* That is why objections to trial testimony are supposed to be made *at the time*—so that trial judges, who hear the testimony in full, live context, can make such determinations in the first instance. But if the question *did* bring the redaction home to the defendant, surely that shows the impropriety of the question rather than of the redaction—*and the question was not objected to.* The failure to object deprives petitioner of the right to complain of some incremental identifiability added to the redacted statement by the question and answer. Of course the Court's reliance upon this testimony belies its contention that name-redacted confessions are powerfully incriminating "as a class," *ante*, at 195.

GLENDORA *v.* PORZIO ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 97–7300. Decided March 9, 1998

Held: Abusive filer's motion to proceed *in forma pauperis* is denied; and for the reasons discussed in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, she is barred from filing any further certiorari petitions in noncriminal matters unless she first pays the required docketing fee and submits her petition in compliance with Rule 33.1.

Motion denied.

PER CURIAM.

Pro se petitioner Glendora seeks leave to proceed *in forma pauperis* to file a petition for a writ of certiorari to the Second Circuit. The District Court dismissed petitioner's claims alleging violation of her due process rights and a conspiracy to violate her due process rights under Rev. Stat. § 1979, 42 U. S. C. § 1983, and 42 U. S. C. § 1985, respectively. The claims, which arose out of a dispute with her landlord, were based on purported "sewer service" used by her landlord's lawyers and acceptance of the affidavits of service by the state-court trial judge. The Second Circuit denied petitioner's motion to proceed *in forma pauperis* and dismissed her appeal as frivolous.

We deny petitioner leave to proceed *in forma pauperis.* She is allowed until March 30, 1998, to pay the docketing fees required by Rule 38 and to submit her petition in compliance with Rule 33.1. For the reasons discussed below, we also direct the Clerk of the Court not to accept any further petitions for certiorari in noncriminal matters from petitioner unless she first pays the docketing fee required by Rule 38 and submits her petition in compliance with Rule 33.1.

Petitioner has filed 14 petitions with this Court since 1994. All have been denied without recorded dissent. In 1997, we invoked Rule 39.8 to deny petitioner *in forma pauperis* sta-

tus. *Glendora* v. *DiPaola*, 522 U. S. 965. Petitioner nevertheless has filed another frivolous petition with this Court. In her petition, Glendora asserts that the state trial court judge who presided over her dispute with her landlord sanctioned "sewer service" by her landlord's lawyers, and that the District Court and Court of Appeals sanctioned this conduct. She does not address the District Court's reasons for dismissing her complaint.

Accordingly, we enter this order barring prospective *in forma pauperis* filings by petitioner in noncriminal cases for the reasons discussed in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

It is so ordered.

JUSTICE STEVENS, dissenting.

For reasons previously stated, see *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited, I respectfully dissent.

Per Curiam

HETZEL *v.* PRINCE WILLIAM COUNTY, VIRGINIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97–954. Decided March 23, 1998

A jury awarded petitioner $750,000 on her claims against respondent county under Title VII of the Civil Rights Act of 1964, but the District Court reduced the damages to $500,000. The Fourth Circuit affirmed the liability finding, but set aside the damages award as grossly excessive and remanded for recalculation. The District Court then awarded petitioner $50,000. She filed a motion for a new trial in which she declined the award, arguing that, in reducing her damages, the Fourth Circuit had effectively offered her a remittitur, which entitled her to a new trial under the Seventh Amendment's guarantee of a jury trial. The District Court agreed, concluding that when a court finds a jury's verdict excessive and reduces it, the plaintiff has a right either to accept the reduced award or to have a new trial on the damages issue. The Fourth Circuit then granted respondents' mandamus petition and stayed the scheduled retrial, noting that its prior decision had ordered the District Court to recalculate the damages "and to enter final judgment thereon."

Held: The Fourth Circuit violated petitioner's Seventh Amendment right to a jury trial. Because the Amendment prohibits the reexamination of facts determined by a jury, a court has no authority, upon a motion for a new trial, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury." *Kennon* v. *Gilmer*, 131 U. S. 22, 29. In determining that the evidence did not support the jury's general damages award and in ordering the District Court to recalculate the damages, the appeals court imposed a remittitur. The District Court correctly afforded petitioner the option of a new trial when it entered judgment for the reduced damages.

Certiorari granted; reversed.

PER CURIAM.

A jury in the Eastern District of Virginia found for petitioner Hetzel on her claims against respondent County of Prince William under Title VII of the Civil Rights Act

of 1964, 42 U. S. C. § 2000e *et seq.*, and Rev. Stat. § 1979, 42 U. S. C. § 1983. The District Court reduced the damages from $750,000 to $500,000, on the grounds that one of the claims supporting the award was legally insufficient. On respondents' appeal to the Court of Appeals for the Fourth Circuit, that court affirmed the finding of liability, but held that the damages award was grossly excessive because it was unsupported by the limited evidence of harm presented at trial. *Hetzel* v. *County of Prince William*, 89 F. 3d 169, cert. denied, 519 U. S. 1028 (1996). The court "set aside the damage award and remand[ed] the case to the district court for the recalculation of the award of damages for emotional distress." 89 F. 3d, at 173.

On remand, the District Court recalculated the damages and awarded petitioner $50,000. Petitioner filed a motion for a new trial in which she declined the award. She argued that in reducing her damages, the Court of Appeals in effect had offered her a remittitur, and that she was therefore entitled to a new trial under the Seventh Amendment's guarantee of a right to trial by jury. Respondents agreed that the Court of Appeals' decision functioned as a remittitur, but contended that the decision did not allow petitioner the option of a new trial. In a memorandum opinion, the District Court determined that although the Court of Appeals' mandate clearly reversed the judgment and remanded for recalculation of damages, it did not address the Seventh Amendment issue, which had not arisen until petitioner rejected the recalculated damages award and sought a new trial. Concluding that Circuit precedent was clear that when a court finds a jury's verdict excessive and reduces it, the plaintiff has a right either to accept the reduced award or to have a new trial, the court granted petitioner's motion for a new trial on the issue of damages.

Respondents petitioned the Court of Appeals for a writ of mandamus, contending that the District Court did not have authority under its prior decision to order a new trial. In

an unpublished order, the Court of Appeals granted the petition and stayed the scheduled retrial. It stated that its prior decision had ordered the District Court to recalculate the damages "and to enter final judgment thereon." It also reiterated that pursuant to its earlier mandate, the District Court should closely examine two cases it had previously noted as comparable to what would be an appropriate award in petitioner's case.[1]

Petitioner contends that this action of the Court of Appeals violated her Seventh Amendment right to a jury trial.[2] We agree. The Seventh Amendment provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amdt. 7.

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[1] After the Court of Appeals issued its mandamus order, the District Court again recalculated the damages and entered judgment for petitioner in the amount of $15,000, which was the greater of the amounts awarded in the two cases noted by the Court of Appeals. Petitioner's appeal from that judgment is pending in the Court of Appeals. We do not think it appropriate to stay our decision, however, since the Court of Appeals, at the time it issued its writ of mandamus, was presented with petitioner's Seventh Amendment claim in the District Court's memorandum opinion granting a new trial.

[2] Respondents argue that we should not consider petitioner's Seventh Amendment claim because she failed to raise it in her prior petition for certiorari. *Hetzel* v. *County of Prince William*, 89 F. 3d 169 (CA4), cert. denied, 519 U. S. 1028 (1996). We think it apparent, however, that petitioner did not raise this claim at that time because she reasonably construed the Court of Appeals' decision as not depriving her of the option of a new trial if she were to reject the remitted damages award. The Court of Appeals' decision ordered only that the judgment be reversed and the case remanded to the District Court for recalculation of damages. 83 F. 3d, at 173. To interpret that decision as precluding the option of a new trial would require petitioner to assume a deviation from normal practice and an action by the Court of Appeals that at minimum implicated constitutional concerns. We agree with the District Court that the original mandate was not so explicit as to compel that interpretation.

In *Kennon* v. *Gilmer*, 131 U. S. 22, 27–28 (1889), the plaintiff won a general damages verdict for $20,000, and the trial court denied a motion for a new trial. On appeal, the Supreme Court of the Territory of Montana reduced the verdict to $10,000 on the grounds that the evidence was insufficient to sustain such a high damages award, and affirmed the judgment for that amount. *Ibid.* This Court concluded that the judgment reducing the amount of the verdict "without submitting the case to another jury, or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest, was irregular, and, so far as we are informed, unprecedented." *Ibid.* It noted that in accord with the Seventh Amendment's prohibition on the reexamination of facts determined by a jury, a court has no authority, upon a motion for a new trial, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury." *Id.*, at 29.

In determining that the evidence did not support the jury's general damages award and in ordering the District Court to recalculate the damages, the Court of Appeals in this case imposed a remittitur. The District Court correctly afforded petitioner the option of a new trial when it entered judgment for the reduced damages. The Court of Appeals' writ of mandamus, requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment. See *id.*, at 29–30; see also *Dimick* v. *Schiedt*, 293 U. S. 474, 486 (1935) (reaffirming the practice of conditionally remitting damages, but noting that where a verdict is set aside as grossly inadequate or excessive, both parties remain entitled to have a jury determine the issues of liability and the extent of injury); *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 433 (1996) (the trial judge's discretion includes "overturning

verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)"); *id.*, at 462–463 (SCALIA, J., dissenting).

Respondents contend that the action of the Court of Appeals here is supported by *Neely* v. *Martin K. Eby Constr. Co.*, 386 U. S. 317, 329–330 (1967). But that case dealt with the application of Federal Rule of Civil Procedure 50(d) in a situation where the Court of Appeals had held that the evidence was insufficient to support a finding of liability. It did not involve overturning an award of damages where the evidence was found sufficient to support a finding of liability.

We therefore grant the petition for certiorari and reverse the judgment of the Court of Appeals issuing a writ of mandamus to the District Court.

Reversed.

Syllabus

COHEN *v.* DE LA CRUZ ET AL.

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

No. 96–1923. Argued January 20, 1998—Decided March 24, 1998

After the local rent control administrator ordered petitioner to refund $31,382.50 in excessive rents he had charged respondent tenants, he sought to discharge his debts under Chapter 7 of the Bankruptcy Code (Code). The tenants filed an adversary proceeding, arguing that the debt owed to them was nondischargeable under 11 U. S. C. § 523(a)(2)(A) of the Code, which excepts from discharge "any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . actual fraud." They also sought treble damages, attorney's fees, and costs under the New Jersey Consumer Fraud Act. The Bankruptcy Court ruled in their favor, finding that petitioner had committed "actual fraud" within the meaning of § 523(a)(2)(A) and that his conduct violated the New Jersey law. The court therefore awarded the tenants treble damages totaling $94,147.50, plus attorney's fees and costs. The District Court affirmed, as did the Third Circuit, which held that debts resulting from fraud are nondischargeable in their entirety under § 523(a)(2)(A), and that the award of treble damages (plus attorney's fees and costs) in this case was therefore nondischargeable.

Held: Because § 523(a)(2)(A) excepts from discharge all liability arising from fraud, treble damages (plus attorney's fees and costs) awarded on account of the debtor's fraud fall within the scope of the exception. The most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of "any debt" respecting "money, property, services, or . . . credit" that the debtor has fraudulently obtained. See *Field* v. *Mans*, 516 U. S. 59, 61, 64. First, an obligation to pay treble damages satisfies the threshold condition that it constitute a "debt." That word is defined as liability on a "claim," § 101(12), which in turn is defined as a "right to payment," § 101(5)(A), which this Court has said means an enforceable obligation, *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 559. An award of treble damages is an enforceable obligation of the debtor, and the creditor has a corresponding right to payment. Moreover, the phrase "to the extent obtained by" in § 523(a)(2)(A) modifies "money, property, services, or . . . credit"—not "any debt"—so that the exception encompasses "any debt . . . for money, property, [etc.], to the extent [that the money, property, etc., is] obtained by" fraud. The phrase thereby makes clear that the share of money, property, etc., so

obtained gives rise to a nondischargeable debt. Once it is established that specific money or property has been obtained by fraud, however, "any debt" arising therefrom is excepted from discharge.

The Court rejects petitioner's argument that a "debt for" money, property, etc., is necessarily limited to the value of the "money, property, services, or . . . credit" the debtor obtained by fraud, such that a restitutionary ceiling would be imposed on the extent to which a debtor's liability for fraud is nondischargeable. That argument is at odds with the meaning of "debt for" in parallel exceptions to discharge set forth in § 523(a), which use "debt for" to mean "debt as a result of," "debt with respect to," "debt by reason of," and the like. The Court's reading of § 523(a)(2)(A) is also reinforced by the fraud exception's history. Moreover, § 523(a)'s various exceptions from discharge reflect Congress' conclusion that the creditors' interest in recovering full payment of debts in these categories outweighs the debtors' interest in a complete fresh start, see *Grogan* v. *Garner*, 498 U. S. 279, 287. But petitioner's construction of the fraud exception would leave creditors short of being made whole whenever the loss to the creditor from the fraud exceeds the value obtained by the debtor. Because, under New Jersey law, the debt for fraudulently obtaining $31,382.50 in rent payments includes treble damages and attorney's fees and costs, petitioner's entire debt of $94,147.50 (plus attorney's fees and costs) is nondischargeable in bankruptcy. Pp. 217–223.

106 F. 3d 52, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Donald B. Ayer argued the cause for petitioner. With him on the briefs were *James E. Anklam*, *Howard J. Bashman*, and *John Francis Gough*.

Gregory G. Diebold argued the cause for respondents. With him on the brief was *Brian Wolfman*.

Jeffrey A. Lamken argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *William Kanter*, and *Alisa B. Klein*.

JUSTICE O'CONNOR delivered the opinion of the Court.

Section 523(a)(2)(A) of the Bankruptcy Code (Code) excepts from discharge in bankruptcy "any debt . . . for money,

property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U. S. C. § 523(a)(2)(A). The issue in this case is whether § 523(a)(2)(A) bars the discharge of treble damages awarded on account of the debtor's fraudulent acquisition of "money, property, services, or . . . credit," or whether the exception only encompasses the value of the "money, property, services, or . . . credit" the debtor obtains through fraud. We hold that § 523(a)(2)(A) prevents the discharge of all liability arising from fraud, and that an award of treble damages therefore falls within the scope of the exception.

I

Petitioner owned several residential properties in and around Hoboken, New Jersey, one of which was subject to a local rent control ordinance. In 1989, the Hoboken Rent Control Administrator determined that petitioner had been charging rents above the levels permitted by the ordinance, and ordered him to refund to the affected tenants, who are respondents in this Court, $31,382.50 in excess rents charged. Petitioner did not comply with the order.

Petitioner subsequently filed for relief under Chapter 7 of the Bankruptcy Code, seeking to discharge his debts. The tenants filed an adversary proceeding against petitioner in the Bankruptcy Court, arguing that the debt owed to them arose from rent payments obtained by "actual fraud" and that the debt was therefore nondischargeable under 11 U. S. C. § 523(a)(2)(A). They also sought treble damages and attorney's fees and costs pursuant to the New Jersey Consumer Fraud Act. See N. J. Stat. Ann. §§ 56:8–2, 56:8–19 (West 1989).

Following a bench trial, the Bankruptcy Court ruled in the tenants' favor. *In re Cohen*, 185 B. R. 171 (1994); 185 B. R. 180 (1995). The court found that petitioner had committed "actual fraud" within the meaning of 11 U. S. C. § 523(a)(2)(A) and that his conduct amounted to an "unconscionable com-

mercial practice" under the New Jersey Consumer Fraud Act. As a result, the court awarded the tenants treble damages totaling $94,147.50, plus reasonable attorney's fees and costs. Noting that courts had reached conflicting conclusions on whether § 523(a)(2)(A) excepts from discharge punitive damages (such as the treble damages at issue here), the Bankruptcy Court sided with those decisions holding that § 523(a)(2)(A) encompasses all obligations arising out of fraudulent conduct, including both punitive and compensatory damages.* 185 B. R., at 188–189. The District Court affirmed. 191 B. R. 599 (1996).

The Court of Appeals for the Third Circuit affirmed in a divided opinion. *In re Cohen*, 106 F. 3d 52 (1997). After accepting the finding of the Bankruptcy Court that petitioner had committed fraud under § 523(a)(2)(A) and the New Jersey Consumer Fraud Act, the Court of Appeals turned to whether the treble damages portion of petitioner's liability represents a "debt . . . for money, property, services, or . . . credit, to the extent obtained by . . . actual fraud." § 523(a)(2)(A). The court observed that the term "debt," defined in the Code as a "right to payment," § 101(5)(A), plainly encompasses all liability for fraud, whether in the form of punitive or compensatory damages. And the phrase "to the extent obtained by," the court reasoned, modifies "money, property, services, or . . . credit," and therefore distinguishes not between compensatory and punitive damages awarded for fraud but instead between money or property obtained through fraudulent means and money or property obtained through nonfraudulent means. *Id.*, at 57. Here, the court concluded, the entire award of $94,147.50 (plus attorney's fees and costs) resulted from money obtained

*The Bankruptcy Court characterized an award of treble damages under the New Jersey Consumer Fraud Act as punitive in nature, see 185 B. R., at 188, and the Court of Appeals assumed as much without deciding the question, *In re Cohen*, 106 F. 3d 52, 55, n. 2 (CA3 1997). That issue does not affect our analysis, and we have no occasion to revisit it here.

through fraud and is therefore nondischargeable. *Id.*, at 59. Judge Greenberg dissented, concluding that treble damages are not encompassed by § 523(a)(2)(A) because they "do not reflect money, property, or services the debtor 'obtained.'" *Id.*, at 60.

As the Court of Appeals recognized, *id.*, at 56, its interpretation of § 523(a)(2)(A) is in accord with that of the Eleventh Circuit but in conflict with that of the Ninth Circuit. Compare *In re St. Laurent*, 991 F. 2d 672, 677–681 (CA11 1993), with *In re Levy*, 951 F. 2d 196, 198–199 (CA9 1991). Bankruptcy courts have likewise reached differing conclusions on whether § 523(a)(2)(A) prevents the discharge in bankruptcy of punitive damages awarded on account of fraud. Compare *In re George*, 205 B. R. 679, 682 (Bkrtcy. Ct. Conn. 1997) (punitive damages not dischargeable); *In re Spicer*, 155 B. R. 795, 801 (Bkrtcy. Ct. DC) (same), aff 'd, 57 F. 3d 1152 (CADC 1995), cert. denied, 516 U. S. 1043 (1996); *In re Winters*, 159 B. R. 789, 790 (Bkrtcy. Ct. ED Ky. 1993) (same), with *In re Bozzano*, 173 B. R. 990, 997–999 (Bkrtcy. Ct. MDNC 1994) (punitive damages dischargeable); *In re Sciscoe*, 164 B. R. 86, 89 (Bkrtcy. Ct. SD Ind. 1993) (same); *In re Brady*, 154 B. R. 82, 85 (Bkrtcy. Ct. WD Mo. 1993) (same). We noted the issue without resolving it in *Grogan* v. *Garner*, 498 U. S. 279, 282, n. 2 (1991). We granted certiorari to address the conflict in the lower courts, 521 U. S. 1152 (1997), and we now affirm.

II

The Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an "honest but unfortunate debtor." *Grogan* v. *Garner*, 498 U. S., at 287 (internal quotation marks omitted); see *id.*, at 290; *Brown* v. *Felsen*, 442 U. S. 127, 138 (1979). Section 523(a)(2)(A) continues the tradition, excepting from discharge "any debt . . . for money, property, serv-

ices, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud."

The most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of "any debt" respecting "money, property, services, or . . . credit" that the debtor has fraudulently obtained, including treble damages assessed on account of the fraud. See *Field* v. *Mans*, 516 U. S. 59, 61, 64 (1995) (describing § 523(a)(2)(A) as barring discharge of debts "resulting from" or "traceable to" fraud). First, an obligation to pay treble damages satisfies the threshold condition that it constitute a "debt." A "debt" is defined in the Code as "liability on a claim," § 101(12), a "claim" is defined in turn as a "right to payment," § 101(5)(A), and a "right to payment," we have said, "is nothing more nor less than an enforceable obligation." *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 559 (1990). Those definitions "reflec[t] Congress' broad . . . view of the class of obligations that qualify as a 'claim' giving rise to a 'debt,'" *id.*, at 558, and they plainly encompass treble damages: An award of treble damages is an "enforceable obligation" of the debtor, and the creditor has a corresponding "right to payment."

Moreover, the phrase "to the extent obtained by" in § 523(a)(2)(A), as the Court of Appeals recognized, does not impose any limitation on the extent to which "any debt" arising from fraud is excepted from discharge. "[T]o the extent obtained by" modifies "money, property, services, or . . . credit"—not "any debt"—so that the exception encompasses "any debt . . . for money, property, services, or . . . credit, to the extent [that the money, property, services, or . . . credit is] obtained by" fraud. The phrase thereby makes clear that the share of money, property, etc., that is obtained by fraud gives rise to a nondischargeable debt. Once it is established that specific money or property has been obtained by fraud, however, "any debt" arising therefrom is excepted from dis-

charge. In this case, petitioner received rent payments from respondents for a number of years, of which $31,382.50 was obtained by fraud. His full liability traceable to that sum—$94,147.50 plus attorney's fees and costs—thus falls within the exception.

Petitioner does not dispute that the term "debt" encompasses treble damages or that the phrase "to the extent obtained by" modifies "money, property, services, or . . . credit." He nonetheless contends that "any debt . . . for money, property, services, or . . . credit, to the extent obtained by" fraud does not include treble damages awarded in a fraud action. Petitioner submits that § 523(a)(2)(A) excepts from discharge only the portion of the damages award in a fraud action corresponding to the *value* of the "money, property, services, or . . . credit" the debtor obtained by fraud. The essential premise of petitioner's argument is that a "debt for" money, property, or services obtained by fraud is necessarily limited to the value of the money, property, or services received by the debtor. Petitioner, in this sense, interprets "debt for"—or alternatively, "liability on a claim for"—in § 523(a)(2)(A) to mean "liability on a claim to obtain," *i. e.*, "liability on a claim to obtain the money, property, services, or credit obtained by fraud," thus imposing a restitutionary ceiling on the extent to which a debtor's liability for fraud is nondischargeable.

Petitioner's reading of "debt for" in § 523(a)(2)(A), however, is at odds with the meaning of the same phrase in parallel provisions. Section 523(a) defines several categories of liabilities that are excepted from discharge, and the words "debt for" introduce many of them, viz., "debt . . . for a tax or a customs duty . . . with respect to which a return . . . was not filed," § 523(a)(1)(B)(i), "debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," § 523(a)(4), "debt . . . for willful and malicious injury by the debtor to another entity," § 523(a)(6), and "debt . . . for death or personal injury caused by the debtor's op-

eration of a motor vehicle if such operation was unlawful because the debtor was intoxicated," § 523(a)(9). None of these use "debt for" in the restitutionary sense of "liability on a claim to obtain"; it makes little sense to speak of "liability on a claim to obtain willful and malicious injury" or "liability on a claim to obtain fraud or defalcation." Instead, "debt for" is used throughout to mean "debt as a result of," "debt with respect to," "debt by reason of," and the like, see American Heritage Dictionary 709 (3d ed. 1992); Black's Law Dictionary 644 (6th ed. 1990), connoting broadly any liability arising from the specified object, see *Davenport*, *supra*, at 563 (characterizing § 523(a)(7), which excepts from discharge certain debts "for a fine, penalty, or forfeiture" as encompassing "debts arising from a 'fine, penalty, or forfeiture' ").

Because each use of "debt for" in § 523(a) serves the identical function of introducing a category of nondischargeable debt, the presumption that equivalent words have equivalent meaning when repeated in the same statute, *e. g.*, *Ratzlaf* v. *United States*, 510 U. S. 135, 143 (1994), has particular resonance here. And contrary to petitioner's submission, it is of no moment that "debt for" in § 523(a)(2)(A) has as its immediate object a commodity (money, property, etc.), but in some of the other exceptions has as its immediate object a description of misconduct, *e. g.*, § 523(a)(4) ("debt for fraud or defalcation [by a] fiduciary"). Section 523(a)(2)(A) also describes misconduct ("false pretenses, a false representation, or actual fraud"), even if it first specifies the result of that conduct (money, property, etc., obtained). The exception in § 523(a)(9) is framed in the same way, initially specifying an outcome as the immediate object of "debt for" ("death or personal injury"), and subsequently describing the misconduct giving rise to that outcome ("operation of a motor vehicle [while] intoxicated"). It is clear that "debt for" in that provision means "debt arising from" or "debt on account of," and it follows that "debt for" has the same meaning in § 523(a)(2)(A). When construed in the context of the statute

as a whole, then, § 523(a)(2)(A) is best read to prohibit the discharge of any liability arising from a debtor's fraudulent acquisition of money, property, etc., including an award of treble damages for the fraud.

The history of the fraud exception reinforces our reading of § 523(a)(2)(A). The Bankruptcy Act of 1898 prohibited discharge of "judgments in actions for frauds, or obtaining property by false pretenses or false representations," § 17, 30 Stat. 550, and an award of punitive damages for fraud plainly fits in the category of "judgments in actions for fraud." The exception was broadened in 1903 to include all "liabilities for obtaining property by false pretenses or false representations," § 5, 32 Stat. 798, language that, *a fortiori*, encompasses liability for punitive damages. See *Brown*, 442 U. S., at 138 (interpreting the provision as prohibiting discharge of "all debts arising out of conduct specified" therein); *In re St. Laurent*, 991 F. 2d, at 679 (noting "practice of holding debts for punitive damages nondischargeable" under this exception "if the compensatory damages . . . were themselves nondischargeable"). And the Bankruptcy Act of 1978 enacted a "substantially similar" provision, *Brown*, *supra*, at 129, n. 1, barring discharge of "any debt . . . for obtaining money, property, services, or . . . credit, by . . . false pretenses, a false representation, or actual fraud." 11 U. S. C. § 523(a)(2)(A) (1982 ed.).

As the result of a slight amendment to the language in 1984, referred to in the legislative history only as a "stylistic change," see S. Rep. No. 98–65, p. 80 (1983), § 523(a)(2)(A) now excepts from discharge "any debt . . . for money, property, services, or . . . credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud." We, however, "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure," *Davenport*, 495 U. S., at 563, and the change to the language of § 523(a)(2)(A) in 1984 in no way signals an intention to narrow the established

scope of the fraud exception along the lines suggested by petitioner. If, as petitioner contends, Congress wished to limit the exception to that portion of the debtor's liability representing a restitutionary—as opposed to a compensatory or punitive—recovery for fraud, one would expect Congress to have made unmistakably clear its intent to distinguish among theories of recovery in this manner. See, *e. g.*, § 523(a)(7) (barring discharge of debts "for a fine, penalty, or forfeiture payable to . . . a governmental unit," but only if the debt "is not compensation for actual pecuniary loss").

The conclusion that § 523(a)(2)(A) bars the discharge of all liability arising from fraud is further borne out by the implications of petitioner's alternative construction. The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress "that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start." *Grogan*, 498 U. S., at 287. But if, as petitioner would have it, the fraud exception only barred discharge of the value of any money, property, etc., fraudulently obtained by the debtor, the objective of ensuring full recovery by the creditor would be ill served. Limiting the exception to the value of the money or property fraudulently obtained by the debtor could prevent even a compensatory recovery for losses occasioned by fraud. For instance, if a debtor fraudulently represents that he will use a certain grade of shingles to roof a house and is paid accordingly, the cost of repairing any resulting water damage to the house could far exceed the payment to the debtor to install the shingles. See *In re Church*, 69 B. R. 425, 427 (Bkrtcy. Ct. ND Tex. 1987). The United States, as *amicus curiae*, posits another example along these lines, involving "a debtor who fraudulently represents to aircraft manufacturers that his steel bolts are aircraft quality [and] obtains sales of $5,000" for the bolts, but "the fraud causes a multi-million dollar airplane to crash." Brief for United States as *Amicus Curiae* 21.

As petitioner acknowledges, his gloss on § 523(a)(2)(A) would allow the debtor in those situations to discharge any liability for losses caused by his fraud in excess of the amount he initially received, leaving the creditor far short of being made whole. And the portion of a creditor's recovery that exceeds the value of the money, property, etc., fraudulently obtained by the debtor—and that hence would be dischargeable under petitioner's view—might include compensation not only for losses brought about by fraud but also for attorney's fees and costs of suit associated with establishing fraud. But see § 523(d) (allowing award of attorney's fees and costs to the *debtor* where a creditor requests dischargeability determination under § 523(a)(2) for a consumer debt that is ultimately found to be dischargeable). Those sorts of results would not square with the intent of the fraud exception. As we have observed previously in addressing different issues surrounding the scope of that exception, it is "unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Grogan*, *supra*, at 287.

In short, the text of § 523(a)(2)(A), the meaning of parallel provisions in the statute, the historical pedigree of the fraud exception, and the general policy underlying the exceptions to discharge all support our conclusion that "any debt . . . for money, property, services, or . . . credit, to the extent obtained by" fraud encompasses any liability arising from money, property, etc., that is fraudulently obtained, including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor. Under New Jersey law, the debt for fraudulently obtaining $31,382.50 in rent payments includes treble damages and attorney's fees and costs, and consequently, petitioner's entire debt of $94,147.50 (plus attorney's fees and costs) is nondischargeable in bankruptcy. Accordingly, we affirm the judgment of the Court of Appeals.

It is so ordered.

Syllabus

ALMENDAREZ-TORRES *v.* UNITED STATES

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

No. 96–6839. Argued October 14, 1997—Decided March 24, 1998

Title 8 U. S. C. § 1326(a) makes it a crime for a deported alien to return to the United States without special permission and authorizes a maximum prison term of two years. In 1988, Congress added subsection (b)(2), which authorizes a maximum prison term of 20 years for "any alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." Petitioner pleaded guilty to violating § 1326, admitting that he had been deported, that he had unlawfully returned, and that the earlier deportation had taken place pursuant to three convictions for aggravated felonies. The District Court sentenced him under the applicable Sentencing Guideline range to 85 months' imprisonment, rejecting his argument that, since his indictment failed to mention his aggravated felony convictions, the court could not sentence him to more than the maximum imprisonment authorized by § 1326(a). The Fifth Circuit also rejected his argument, holding that subsection (b)(2) is a penalty provision which simply permits the imposition of a higher sentence when the unlawfully returning alien also has a record of prior convictions.

Held: Subsection (b)(2) is a penalty provision, which simply authorizes an enhanced sentence. Since it does not create a separate crime, the Government is not required to charge the fact of an earlier conviction in the indictment. Pp. 228–248.

(a) An indictment must set forth each element of the crime that it charges, *Hamling* v. *United States*, 418 U. S. 87, 117, but it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime. Within limits, see *McMillan* v. *Pennsylvania*, 477 U. S. 79, 84–91, the question of which factors are which is normally a matter for Congress. See *Staples* v. *United States*, 511 U. S. 600, 604. Pp. 228–229.

(b) That Congress intended subsection (b)(2) to set forth a sentencing factor is reasonably clear from a number of considerations. Its subject matter is a typical sentencing factor, and the lower courts have almost uniformly interpreted statutes that authorize higher sentences for recidivists as setting forth sentencing factors, not as creating separate crimes. In addition, the words "subject to subsection (b)" at the beginning of subsection (a) and "[n]otwithstanding subsection (a)" at

the beginning of subsection (b) have a meaning that is neither obscure nor pointless if subsection (b) is interpreted to provide additional penalties, but not if it is intended to set forth substantive crimes. Moreover, the circumstances of subsection (b)'s adoption support this reading of the statutory text. The title of the 1988 amendment—"Criminal *penalties* for reentry of certain deported aliens," 102 Stat. 4471 (emphasis added)—also signals a provision that deals with penalties for a substantive crime, and it is reinforced by a legislative history that speaks only about the creation of new penalties. Finally, interpreting the subsection to create a separate offense risks unfairness, for the introduction at trial of evidence of a defendant's prior crimes risks significant prejudice. See, *e. g., Spencer* v. *Texas*, 385 U. S. 554, 560. Pp. 229–235.

(c) Additional arguments supporting a contrary interpretation—that the magnitude of the increase in the maximum authorized sentence shows a congressional intent to create a separate crime, that statutory language added after petitioner's conviction offers courts guidance on how to interpret subsection (b)(2), and that the doctrine of constitutional doubt requires this Court to interpret the subsection as setting forth a separate crime—are rejected. Pp. 235–239.

(d) There is not sufficient support, in this Court's precedents or elsewhere, for petitioner's claim that the Constitution requires Congress to treat recidivism as an element of the offense irrespective of Congress' contrary intent. At most, *In re Winship*, 397 U. S. 358, 364; *Mullaney* v. *Wilbur*, 421 U. S. 684, 704; *Patterson* v. *New York*, 432 U. S. 197; and *Specht* v. *Patterson*, 386 U. S. 605, taken together, yield the broad proposition that *sometimes* the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element of the crime, but they offer no more support than that for petitioner's position. And a legislature's decision to treat recidivism, in particular, as a sentencing factor rather than an element of the crime does not exceed constitutional limits on the legislature's power to define the elements of an offense. *McMillan* v. *Pennsylvania*, *supra*, distinguished. Petitioner's additional arguments—that courts have a tradition of treating recidivism as an element of the related crime, and that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional "elements" requirement—are rejected. Pp. 239–247.

(e) The Court expresses no view on whether some heightened standard of proof might apply to sentencing determinations bearing significantly on the severity of sentence. Cf. *United States* v. *Watts*, 519 U. S. 148, 156, and n. 2 *(per curiam)*. Pp. 247–248.

113 F. 3d 515, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 248.

Peter Fleury argued the cause for petitioner. With him on the briefs was *Timothy Crooks.*

Beth S. Brinkmann argued the cause for the United States. With her on the brief were *Acting Solicitor General Dellinger*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, and *William C. Brown.**

JUSTICE BREYER delivered the opinion of the Court.

Subsection (a) of 8 U. S. C. § 1326 defines a crime. It forbids an alien who once was deported to return to the United States without special permission, and it authorizes a prison term of up to, but no more than, two years. Subsection (b)(2) of the same section authorizes a prison term of up to, but no more than, 20 years for "any alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." The question before us is whether this latter provision defines a separate crime or simply authorizes an enhanced penalty. If the former, *i. e.*, if it constitutes a separate crime, then the Government must write an indictment that mentions the additional element, namely, a prior aggravated felony conviction. If the latter, *i. e.*, if the provision simply authorizes an enhanced sentence when an offender also has an earlier conviction, then the indictment need not mention that fact, for the fact of an earlier conviction is not an element of the present crime.

We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the

**Stephen R. Sady* and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

Government to charge the factor that it mentions, an earlier conviction, in the indictment.

I

In September 1995, a federal grand jury returned an indictment charging petitioner, Hugo Almendarez-Torres, with having been "found in the United States . . . after being deported" without the "permission and consent of the Attorney General" in "violation of . . . Section 1326." App. 3. In December 1995, Almendarez-Torres entered a plea of guilty. At a hearing, before the District Court accepted his plea, Almendarez-Torres admitted that he had been deported, that he had later unlawfully returned to the United States, and that the earlier deportation had taken place "pursuant to" three earlier "convictions" for aggravated felonies. *Id.*, at 10–14.

In March 1996, the District Court held a sentencing hearing. Almendarez-Torres pointed out that an indictment must set forth all the elements of a crime. See *Hamling* v. *United States*, 418 U. S. 87, 117 (1974). He added that his indictment had not mentioned his earlier aggravated felony convictions. And he argued that, consequently, the court could not sentence him to more than two years imprisonment, the maximum authorized for an offender without an earlier conviction. The District Court rejected this argument. It found applicable a Sentencing Guideline range of 77 to 96 months, see United States Sentencing Commission, Guidelines Manual §2L1.2; ch. 5, pt. A (sentencing table) (Nov. 1995) (USSG), and it imposed a sentence of 85 months' imprisonment. App. 17.

On appeal the Fifth Circuit also rejected petitioner's argument. 113 F. 3d 515 (1996). Like seven other Circuits, it has held that subsection (b)(2) is a penalty provision that simply permits a sentencing judge to impose a higher sentence when the unlawfully returning alien also has a record of prior convictions. *United States* v. *Vasquez-Olvera*, 999

F. 2d 943, 945–947 (CA5 1993); see *United States* v. *Forbes*, 16 F. 3d 1294, 1297–1300 (CA1 1994); *United States* v. *DeLeon-Rodriguez*, 70 F. 3d 764, 765–767 (CA3 1995); *United States* v. *Crawford*, 18 F. 3d 1173, 1176–1178 (CA4 1994); *United States* v. *Munoz-Cerna*, 47 F. 3d 207, 210, n. 6 (CA7 1995); *United States* v. *Haggerty*, 85 F. 3d 403, 404–405 (CA8 1996); *United States* v. *Valdez*, 103 F. 3d 95, 97–98 (CA10 1996); *United States* v. *Palacios-Casquete*, 55 F. 3d 557, 559–560 (CA11 1995); cf. *United States* v. *Cole*, 32 F. 3d 16, 18–19 (CA2 1994) (reaching same result with respect to 8 U. S. C. § 1326(b)(1)). The Ninth Circuit, however, has reached the opposite conclusion. *United States* v. *Gonzalez-Medina*, 976 F. 2d 570, 572 (1992) (subsection (b)(2) constitutes separate crime). We granted certiorari to resolve this difference among the Circuits.

II

An indictment must set forth each element of the crime that it charges. *Hamling* v. *United States*, *supra*, at 117. But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime. Within limits, see *McMillan* v. *Pennsylvania*, 477 U. S. 79, 84–91 (1986), the question of which factors are which is normally a matter for Congress. See *Staples* v. *United States*, 511 U. S. 600, 604 (1994) (definition of a criminal offense entrusted to the legislature, " 'particularly in the case of federal crimes, which are solely creatures of statute' ") (quoting *Liparota* v. *United States*, 471 U. S. 419, 424 (1985)). We therefore look to the statute before us and ask what Congress intended. Did it intend the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment? In answering this question, we look to the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text.

See, *e. g., United States* v. *Wells,* 519 U. S. 482, 490–492 (1997); *Garrett* v. *United States,* 471 U. S. 773, 779 (1985).

The directly relevant portions of the statute as it existed at the time of petitioner's conviction included subsection (a), which Congress had enacted in 1952, and subsection (b), which Congress added in 1988. See 8 U. S. C. § 1326 (1952 ed.), as enacted June 27, 1952, § 276, 66 Stat. 229; 8 U. S. C. § 1326 (1988 ed.) (reflecting amendments made by § 7345(a), 102 Stat. 4471). We print those portions of text below:

> "§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens.
>
> "(a) Subject to subsection (b) of this section, any alien who—
>
> "(1) has been . . . deported . . . , and thereafter
>
> "(2) enters . . . , or is at any time found in, the United States [without the Attorney General's consent or the legal equivalent],
>
> "shall be fined under title 18, or imprisoned not more than 2 years, or both.
>
> "(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—
>
> "(1) whose deportation was subsequent to a conviction for commission of [certain misdemeanors], or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or
>
> "(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both." 8 U. S. C. § 1326.

A

Although the statute's language forces a close reading of the text, as well as consideration of other interpretive circumstances, see *Wells, supra,* we believe that the answer

to the question presented—whether Congress intended subsection (b)(2) to set forth a sentencing factor or a separate crime—is reasonably clear.

At the outset, we note that the relevant statutory subject matter is recidivism. That subject matter—prior commission of a serious crime—is as typical a sentencing factor as one might imagine. See, *e. g.,* USSG §§ 4A1.1, 4A1.2 (Nov. 1997) (requiring sentencing judge to consider an offender's prior record in every case); 28 U. S. C. § 994(h) (instructing Commission to write Guidelines that increase sentences dramatically for serious recidivists); 18 U. S. C. § 924(e) (Armed Career Criminal Act of 1984) (imposing significantly higher sentence for felon-in-possession violation by serious recidivists); 21 U. S. C. §§ 841(b)(1)(A)–(D) (same for drug distribution); United States Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics 35, 49 (for year ending Sept. 30, 1996, 20.3% of all federal cases involved offenders with substantial criminal records (criminal history categories IV–VI); 44.2% of drug cases involved offenders with prior convictions). Perhaps reflecting this fact, the lower courts have almost uniformly interpreted statutes (that authorize higher sentences for recidivists) as setting forth sentencing factors, not as creating new crimes (at least where the conduct, in the absence of the recidivism, is independently unlawful). *E. g., United States* v. *McGatha,* 891 F. 2d 1520, 1525 (CA11 1990) (18 U. S. C. § 924(e)); *United States* v. *Arango-Montoya,* 61 F. 3d 1331, 1339 (CA7 1995) (21 U. S. C. § 841(b)); *United States* v. *Jackson,* 824 F. 2d 21, 25, and n. 6 (CADC 1987). And we have found no statute that clearly makes recidivism an offense element in such circumstances. But cf. 18 U. S. C. § 922(g)(1) (prior felony conviction an element but conduct *not* otherwise unlawful).

With recidivism as the subject matter in mind, we turn to the statute's language. In essence, subsection (a) says that "any alien" once "deported," who reappears in the United

States without appropriate permission, shall be fined or "imprisoned not more than 2 years." Subsection (b) says that "any alien described in" subsection (a), "whose deportation was subsequent to a conviction" for a minor, or for a major, crime, may be subject to a much longer prison term.

The statute includes the words "subject to subsection (b)" at the beginning of subsection (a), and the words "[n]otwithstanding subsection (a)" at the beginning of subsection (b). If Congress intended subsection (b) to set forth substantive crimes, in respect to which subsection (a) would define a lesser included offense, see *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), what are those words doing there? The dissent believes that the words mean that the substantive crime defined by "subsection (a) is inapplicable to an alien covered by subsection (b)," *post*, at 264, hence the words represent an effort to say that a defendant cannot be punished for both substantive crimes. But that is not what the words say. Nor has Congress ever (to our knowledge) used these or similar words anywhere else in the federal criminal code for such a purpose. See, *e. g.*, 18 U. S. C. § 113 (aggravated and simple assault); §§ 1111, 1112 (murder and manslaughter); § 2113 (bank robbery and incidental crimes); §§ 2241, 2242 (aggravated and simple sexual abuse). And this should come as no surprise since, for at least 60 years, the federal courts have presumed that Congress does *not* intend for a defendant to be cumulatively punished for two crimes where one crime is a lesser included offense of the other. See *Whalen* v. *United States*, 445 U. S. 684, 691–693 (1980); *Blockburger*, *supra*.

If, however, Congress intended subsection (b) to provide additional penalties, the mystery disappears. The words "subject to subsection (b)" and "[n]otwithstanding subsection (a)" then are neither obscure nor pointless. They say, without obscurity, that the crime set forth in subsection (a), which both defines a crime and sets forth a penalty, is "sub-

ject to" subsection (b)'s different penalties (where the alien is also a felon or aggravated felon). And (b)'s higher maximum penalties may apply to an offender who violates (a) "notwithstanding" the fact that (a) sets forth a lesser penalty for one who has committed the same substantive crime. Nor is it pointless to specify that (b)'s punishments, not (a)'s punishment, apply whenever an offender commits (a)'s offense in a manner set forth by (b).

Moreover, the circumstances of subsection (b)'s adoption support this reading of the statutory text. We have examined the language of the statute in 1988, when Congress added the provision here at issue. That original language does not help petitioner. In 1988, the statute read as follows (with the 1988 amendment underscored):

> "§ 1326. Reentry of deported alien; *criminal penalties for reentry of certain deported aliens.*
>
> "*(a) Subject to subsection (b) of this section,* any alien who—
>
> "(1) has been . . . deported . . . , and thereafter
>
> "(2) enters . . . , or is at any time found in, the United States [without the Attorney General's consent or the legal equivalent],
>
> "shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.
>
> "*(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—*
>
> "*(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 years, or both; or*
>
> "*(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.*" 8 U. S. C. § 1326 (1988 ed.) (emphasis added).

Thus, at the time of the amendment, the operative language of subsection (a)'s ordinary reentering-alien provision said that a reentering alien "*shall be guilty of a felony*, and *upon conviction thereof*, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000." The 1988 amendment, subsection (b), by way of contrast, referred only to punishment—an increased punishment for the felon, or the aggravated felon, whom subsection (a) has "described." Although one could read the language, "any alien described in [subsection (a)]," standing alone, as importing subsection (a)'s elements into new offenses defined in subsection (b), that reading seems both unusual and awkward when taken in context, for the reasons just given. Linguistically speaking, it seems more likely that Congress simply meant to "describe" an alien who, in the words of the 1988 statute, was "guilty of a felony" defined in subsection (a) and "convict[ed] thereof."

As the dissent points out, *post*, at 265, Congress later struck from subsection (a) the words just quoted, and added in their place the words, "shall be fined under title 18, or imprisoned not more than two years." See Immigration Act of 1990 (1990 Act), § 543(b)(3), 104 Stat. 5059. But this amendment was one of a series in the 1990 Act that uniformly updated and simplified the phrasing of various, disparate civil and criminal penalty provisions in the Immigration and Naturalization Act. See, *e. g.*, 1990 Act, § 543(b)(1) (amending 8 U. S. C. § 1282(c)); § 543(b)(2)(C) (amending 8 U. S. C. § 1325); § 543(b)(4) (amending 8 U. S. C. § 1327); § 543(b)(5) (amending 8 U. S. C. § 1328). The section of the Act that contained the amendment is titled "Increase in Fine Levels; Authority of the INS to Collect Fines," and the relevant subsection, simply "Criminal Fine Levels." 1990 Act, § 543(b), 104 Stat. 5057, 5059. Although the 1990 amendment did have the effect of making the penalty provision in subsection (a) (which had remained unchanged since 1952) parallel with its counterparts in later enacted subsection (b),

neither the amendment's language, nor the legislative history of the 1990 Act, suggests that in this housekeeping measure, Congress intended to change, or to clarify, the fundamental relationship between the two subsections.

We also note that "the title of a statute and the heading of a section" are "tools available for the resolution of a doubt" about the meaning of a statute. *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947); see also *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 189 (1991). The title of the 1988 amendment is "Criminal *penalties* for reentry of certain deported aliens." § 7345, 102 Stat. 4471 (emphasis added). A title that contains the word "penalties" more often, but certainly not always, see *post*, at 266–267, signals a provision that deals with penalties for a substantive crime.

In this instance the amendment's title does not reflect careless, or mistaken, drafting, for the title is reinforced by a legislative history that speaks about, and only about, the creation of new penalties. See S. 973, 100th Cong., 1st Sess. (1987), 133 Cong. Rec. 8771 (1987) (original bill titled, "A bill to provide for additional criminal penalties for deported aliens who reenter the United States, and for other purposes"); 134 Cong. Rec. 27429 (1988) (section-by-section analysis referring to Senate bill as increasing penalties for unlawful reentry); *id.*, at 27445 (remarks of Sen. D'Amato) (law would "increas[e] current penalties for illegal reentry after deportation"); *id.*, at 27462 (remarks of Sen. Chiles) (law would "impose stiff penalties" against deported aliens previously convicted of drug offenses); 133 Cong. Rec. 28840–28841 (1987) (remarks of Rep. Smith) (corresponding House bill creates three-tier penalty structure). The history, to our knowledge, contains no language at all that indicates Congress intended to create a new substantive crime.

Finally, the contrary interpretation—a substantive criminal offense—risks unfairness. If subsection (b)(2) sets forth a separate crime, the Government would be required to

prove to the jury that the defendant was previously deported "subsequent to a conviction for commission of an aggravated felony." As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice. See, *e. g.*, *Spencer* v. *Texas*, 385 U. S. 554, 560 (1967) (evidence of prior crimes "is generally recognized to have potentiality for prejudice"). Even if a defendant's stipulation were to keep the name and details of the previous offense from the jury, see *Old Chief* v. *United States*, 519 U. S. 172, 178–179 (1997), jurors would still learn, from the indictment, the judge, or the prosecutor, that the defendant had committed an *aggravated* felony. And, as we said last Term, "there can be no question that evidence of the . . . *nature* of the prior offense," here, that it was "aggravated" or serious, "carries a risk of unfair prejudice to the defendant." *Id.*, at 185 (emphasis added). Like several lower courts, we do not believe, other things being equal, that Congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested. See, *e. g.*, *United States* v. *Forbes*, 16 F. 3d, at 1298–1300; *United States* v. *Rumney*, 867 F. 2d 714, 718–719 (CA1 1989); *United States* v. *Brewer*, 853 F. 2d 1319, 1324–1325 (CA6 1988) (en banc); *United States* v. *Jackson*, 824 F. 2d, at 25–26; *Government of Virgin Islands* v. *Castillo*, 550 F. 2d 850, 854 (CA3 1977).

In sum, we believe that Congress intended to set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense.

B

We must also consider several additional arguments that have been or might be made for a contrary interpretation of the statute. First, one might try to derive a congressional intent to establish a separate crime from the *magnitude* of the increase in the maximum authorized sentence. The magnitude of the change that Congress made in 1988, however, proves little. That change—from a 2-year maximum to 5- and 15-year maximums—is well within the range

set forth in other statutes that the lower courts have generally interpreted as providing for sentencing enhancements. Compare 8 U. S. C. § 1326 (1988 ed.) with 21 U. S. C. §§ 841(b)(1)(B) and (D) (distributing less than 50 kilograms of marijuana, maximum 5 years; distributing 100 or more kilograms of marijuana, 5 to 40 years), §§ 841(b)(1)(A) and (C) (distributing less than 100 grams of heroin, maximum 20 years; distributing 1 kilogram or more of heroin, maximum of life imprisonment), § 841(b)(1)(B) (distributing 500 grams or more of cocaine, 5 to 40 years; same, with prior drug felony conviction, 10 years to life); § 962 (doubling maximum term for second and subsequent violations of drug importation laws); 18 U. S. C. § 844 (using or carrying explosive device during commission of felony, maximum 10 years; subsequent offense, maximum 20 years); § 2241(c) (sexual abuse of children, maximum life; second offense, mandatory life); § 2320(a) (trafficking in counterfeit goods, maximum 10 years; subsequent offense, maximum 20 years). Congress later amended the statute, increasing the maximums to 10 and to 20 years, respectively. Violent Crime Control and Law Enforcement Act of 1994, §§ 130001(b)(1)(B) and (b)(2), 108 Stat. 2023. But nothing suggests that, in doing so, Congress intended to transform that statute's basic nature. And the later limits are close to the range suggested by other statutes regardless.

Second, petitioner and the dissent point, in part, to statutory language that did not exist when petitioner was convicted in 1995. Petitioner, for example, points out that in 1996, Congress added two new subsections, (b)(3) and (b)(4), which, petitioner says, created new substantive crimes. See Antiterrorism and Effective Death Penalty Act of 1996, § 401(c), 110 Stat. 1267 (adding subsection (b)(3)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 305(b), 110 Stat. 3009–606 to 3009–607 (adding subsection (b)(4)). Both petitioner and the dissent also refer to another 1996 statutory provision in which Congress used

the word "offense" to refer to the subsection now before us. See IIRIRA, § 334, 110 Stat. 3009–635.

These later enacted laws, however, are beside the point. They do not declare the meaning of earlier law. Cf. *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958). They do not seek to clarify an earlier enacted general term. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969). They do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute. Cf. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 595–596 (1980). They do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions. Cf. *ibid.; Darlington*, *supra*, at 86. Consequently, we do not find in them any forward looking legislative mandate, guidance, or direct suggestion about how courts should interpret the earlier provisions.

Regardless, it is not obvious that the two new subsections to which petitioner points create new crimes (a matter on which we express no view) nor, in adding them, did Congress do more than leave the legal question here at issue where it found it. The fact that Congress used a technical, crime-suggesting word—"offense"—eight years later in a different, and minor, statutory provision proves nothing—not least because it is more than offset by different words in the same later statute that suggest with greater force the exact opposite, namely, the precise interpretation of the relation of subsection (b) to subsection (a) that we adopt. See IIRIRA, § 321(c), 110 Stat. 3009–628 (stating that a new definition of "aggravated felony" applies "*under*" subsection (b) "*only to violations*" of subsection (a)).

Finally, petitioner and the dissent argue that the doctrine of "constitutional doubt" requires us to interpret subsection (b)(2) as setting forth a separate crime. As Justice Holmes said long ago: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United*

States v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916) (citing *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)); see also *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust* v. *Sullivan*, 500 U. S. 173, 191 (1991); see also *FTC* v. *American Tobacco Co.*, 264 U. S. 298, 305–307 (1924). The doctrine seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a "fair" one.

Unlike the dissent, we do not believe these conditions are met in the present case. The statutory language is somewhat complex. But after considering the matter in context, we believe the interpretative circumstances point significantly in one direction. More important, even if we were to assume that petitioner's construction of the statute is "fairly possible," *Jin Fuey Moy*, *supra*, at 401, the constitutional questions he raises, while requiring discussion, simply do *not* lead us to doubt gravely that Congress may authorize courts to impose longer sentences upon recidivists who commit a particular crime. The fact that we, unlike the dissent, do

not gravely doubt the statute's constitutionality in this respect is a crucial point. That is because the "constitutional doubt" doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious. And precedent makes clear that the Court need not apply (for it has not always applied) the doctrine in circumstances similar to those here—where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional. See, *e. g.*, *Rust*, 500 U. S., at 190–191 (declining to apply doctrine although petitioner's constitutional claims not "without some force"); *id.*, at 204–207 (Blackmun, J., dissenting); *United States* v. *Monsanto*, 491 U. S. 600, 611 (1989); *id.*, at 636 (Blackmun, J., dissenting); *United States* v. *Locke*, 471 U. S. 84, 95 (1985); *id.*, at 120 (STEVENS, J., dissenting).

III

Invoking several of the Court's precedents, petitioner claims that the Constitution requires Congress to treat recidivism as an element of the offense—irrespective of Congress' contrary intent. Moreover, petitioner says, that requirement carries with it three subsidiary requirements that the Constitution mandates in respect to ordinary, legislatively intended, elements of crimes. The indictment must state the "element." See, *e. g.*, *Hamling* v. *United States*, 418 U. S., at 117. The Government must prove that "element" to a jury. See, *e. g.*, *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968). And the Government must prove the "element" beyond a reasonable doubt. See, *e. g.*, *Patterson* v. *New York*, 432 U. S. 197, 210 (1977). We cannot find sufficient support, however, in our precedents or elsewhere, for petitioner's claim.

This Court has explicitly held that the Constitution's Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In re Winship, 397 U. S. 358, 364 (1970). But *Winship,* the case in which the Court set forth this proposition of constitutional law, does not decide this case. It said that the Constitution entitles juveniles, like adults, to the benefit of proof beyond a reasonable doubt in respect to the *elements* of the crime. It did not consider whether, or when, the Constitution requires the Government to treat a particular fact as an element, *i. e.*, as a "fact necessary to constitute the crime," even where the crime-defining statute does not do so.

Mullaney v. *Wilbur*, 421 U. S. 684 (1975), provides petitioner with stronger support. The Court there struck down a state homicide statute under which the State presumed that all homicides were committed with "malice," punishable by life imprisonment, unless the defendant proved that he had acted in the heat of passion. *Id.*, at 688. The Court wrote that "if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect" just by redefining "the elements that constitut[ed] different crimes, characterizing them as factors that bear solely on the extent of punishment." *Id.*, at 698. It simultaneously held that the prosecution must establish "beyond a reasonable doubt" the nonexistence of "heat of passion"—the fact that, under the State's statutory scheme, distinguished a homicide punishable by a life sentence from a homicide punishable by a maximum of 20 years. *Id.*, at 704. Read literally, this language, we concede, suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt.

This Court's later case, *Patterson* v. *New York*, *supra*, however, makes absolutely clear that such a reading of *Mullaney* is wrong. The Court, in *Patterson*, pointed out that the State in *Mullaney* made the critical fact—the absence of "heat of passion"—*not* simply a potential sentencing factor, *but also* a critical part of the definition of "malice afore-

thought," which was itself in turn "part of" the statute's definition of "homicide," the crime in question. *Patterson*, 432 U. S., at 215–216. (The Maine Supreme Court, in defining the crime, had said that "malice" was "presumed" unless "rebutted" by the defendant's showing of "heat of passion." *Id.*, at 216.) The Court found this circumstance extremely important. It said that *Mullaney* had considered (and held "impermissible") the shifting of a burden of proof "*with respect to a fact which the State deems so important that it must be either proved or presumed.*" 432 U. S., at 215 (emphasis added). And the Court then held that similar burden shifting *was* permissible with respect to New York's homicide-related sentencing factor "extreme emotional disturbance." *Id.*, at 205–206. That factor was not a factor that the state statute had deemed "so important" in relation to the crime that it must be either "proved or presumed." *Id.*, at 205–206, 215.

The upshot is that *Mullaney*'s language, if read literally, suggests that the Constitution requires that most, if not all, sentencing factors be treated as elements. But *Patterson* suggests the exact opposite, namely, that the Constitution requires scarcely any sentencing factors to be treated in that way. The cases, taken together, cannot significantly help petitioner, for the statute here involves a sentencing factor—the prior commission of an aggravated felony—that is neither "presumed" to be present, nor need be "proved" to be present, in order to prove the commission of the relevant crime. See 8 U. S. C. § 1326(a) (defining offense elements). Indeed, as we have said, it involves one of the most frequently found factors that affects sentencing—recidivism.

Nor does *Specht* v. *Patterson*, 386 U. S. 605 (1967), which petitioner cites, provide significant additional help, for *Specht* was decided before *Patterson* (indeed before *Winship*); it did not consider the kind of matter here at issue; and, as this Court later noted, the Colorado defendant in *Specht* was "confronted with 'a radically different situation'

from the usual sentencing proceeding." *McMillan* v. *Pennsylvania*, 477 U. S., at 89. At most, petitioner might read all these cases, taken together, for the broad proposition that *sometimes* the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element. But we do not see how they can help petitioner more than that.

We turn then to the case upon which petitioner must primarily rely, *McMillan* v. *Pennsylvania*. The Court there considered a Pennsylvania statute that set forth a sentencing factor—"visibly possessing a firearm"—the presence of which required the judge to impose a minimum prison term of five years. The Court held that the Constitution did *not* require the State to treat the factor as an element of the crime. In so holding, the Court said that the State's "link-[ing] the 'severity of punishment' to 'the presence or absence of an identified fact' " did *not* automatically make of that fact an "element." *Id.*, at 84 (quoting *Patterson* v. *New York*, *supra*, at 214). It said, citing *Patterson*, that "the state legislature's definition of the elements of the offense is usually dispositive." 477 U. S., at 85. It said that it would not "define precisely the constitutional limits" of a legislature's power to define the elements of an offense. *Id.*, at 86. And it held that, whatever those limits might be, the State had not exceeded them. *Ibid.* Petitioner must therefore concede that "firearm possession" (in respect to a mandatory minimum sentence) does not violate those limits. And he must argue that, nonetheless, "recidivism" (in respect to an authorized maximum) does violate those limits.

In assessing petitioner's claim, we have examined *McMillan* to determine the various features of the case upon which the Court's conclusion arguably turned. The *McMillan* Court pointed out: (1) that the statute plainly "does not transgress the limits expressly set out in *Patterson*," *ibid.;* (2) that the defendant (unlike *Mullaney*'s defendant) did not face " 'a differential in sentencing ranging from a nominal

fine to a mandatory life sentence,' " 477 U. S., at 87 (quoting *Mullaney*, 421 U. S., at 700); (3) that the statute did not "alte[r] the maximum penalty for the crime" but "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it," 477 U. S., at 87–88; (4) that the statute did not "creat[e] a separate offense calling for a separate penalty," *id.*, at 88; and (5) that the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense," but, to the contrary, "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor," *id.*, at 88, 89–90.

This case resembles *McMillan* in respect to most of these factors. But it is different in respect to the third factor, for it does "alte[r] the maximum penalty for the crime," *id.*, at 87; and it also creates a wider range of appropriate punishments than did the statute in *McMillan*. We nonetheless conclude that these differences do not change the constitutional outcome for several basic reasons.

First, the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence. See, *e. g.*, *Parke* v. *Raley*, 506 U. S. 20, 26 (1992) (Recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States); U. S. Dept. of Justice, Office of Justice Programs, Statutes Requiring the Use of Criminal History Record Information 17–41 (June 1991) (50-state survey); USSG §§4A1.1, 4A1.2 (Nov. 1997) (requiring sentencing court to consider defendant's prior record in every case). Consistent with this tradition, the Court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was "necessary to bring the case within the statute." *Graham* v. *West Virginia*, 224 U. S. 616, 624 (1912). That con-

clusion followed, the Court said, from "*the distinct nature of the issue,*" and the fact that recidivism "does not relate to the commission of the offense, *but goes to the punishment only,* and therefore . . . may be subsequently decided." *Id.,* at 629 (emphasis added). The Court has not deviated from this view. See *Oyler* v. *Boles,* 368 U. S. 448, 452 (1962) (due process does not require advance notice that trial for substantive offense will be followed by accusation that the defendant is a habitual offender); *Parke, supra,* at 27 ("[A] charge under a recidivism statute does not state a separate offense, but goes to punishment only"). And, as we said before, *supra,* at 230, Congress, reflecting this tradition, has never, to our knowledge, made a defendant's recidivism an element of an offense where the conduct proscribed is otherwise unlawful. See *United States* v. *Jackson,* 824 F. 2d 21, 25, and n. 6 (CADC 1987) (opinion of R. Ginsburg, J.) (referring to fact that few, if any, federal statutes make "prior criminal convictions . . . elements of another criminal offense to be proved before the jury"). Although these precedents do not foreclose petitioner's claim (because, for example, the state statute at issue in *Graham* and *Oyler* provided for a jury determination of disputed prior convictions), to hold that the Constitution requires that recidivism be deemed an "element" of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as "go[ing] to the punishment only." *Graham, supra,* at 629.

Second, the major difference between this case and *McMillan* consists of the circumstance that the sentencing factor at issue here (the prior conviction) triggers an increase in the maximum permissive sentence, while the sentencing factor at issue in *McMillan* triggered a mandatory minimum sentence. Yet that difference—between a permissive maximum and a mandatory minimum—does not systematically, or normally, work to the disadvantage of a criminal defendant. To the contrary, a statutory minimum binds a sentencing judge; a statutory maximum does not. A mandatory mini-

mum can, as JUSTICE STEVENS dissenting in *McMillan* pointed out, "mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed." 477 U. S., at 95. It can eliminate a sentencing judge's discretion in its entirety. See, *e. g.*, 18 U. S. C. § 2241(c) (authorizing maximum term of life imprisonment for sexual abuse of children; mandating life imprisonment for second offense). And it can produce unfairly disproportionate impacts on certain kinds of offenders. See United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System 26–34 (Aug. 1991) (discussing "tariff" and "cliff" effects of mandatory minimums). In sum, the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue.

Although *McMillan* pointed to a difference between mandatory minimums and higher authorized maximums, it neither "rested its judgment" on that difference, nor "rejected" the above analysis, as the dissent contends, *post*, at 254. Rather, *McMillan* said that the petitioners' argument in that case would have had "more *superficial* appeal" if the sentencing fact "exposed them to greater or additional punishment." 477 U. S., at 88 (emphasis added). For the reasons just given, and in light of the particular sentencing factor at issue in this case—recidivism—we should take *McMillan*'s statement to mean no more than it said, and therefore not to make a determinative difference here.

Third, the statute's broad permissive sentencing range does not itself create significantly greater unfairness. Judges (and parole boards) have typically exercised their discretion within broad statutory ranges. See, *e. g.*, *supra*, at 232, 236 (statutory examples); National Institute of Justice, Sentencing Reform in the United States (Aug. 1985) (survey of sentencing laws in the 50 States); L. Friedman, Crime and Punishment in American History 159–163 (1993)

(history of indeterminate sentencing). And the Sentencing Guidelines have recently sought to channel that discretion using "sentencing factors" which no one here claims that the Constitution thereby makes "elements" of a crime.

Finally, the remaining *McMillan* factors support the conclusion that Congress has the constitutional power to treat the feature before us—prior conviction of an aggravated felony—as a sentencing factor for this particular offense (illegal entry after deportation). The relevant statutory provisions do not change a pre-existing definition of a well-established crime, nor is there any more reason here, than in *McMillan*, to think Congress intended to "evade" the Constitution, either by "presuming" guilt or "restructuring" the elements of an offense. Cf. *McMillan*, *supra*, at 86–87, 89–90.

For these reasons, we cannot find in *McMillan* (a case holding that the Constitution *permits* a legislature to *require* a longer sentence for gun possession) significant support for the proposition that the Constitution *forbids* a legislature to *authorize* a longer sentence for recidivism.

Petitioner makes two basic additional arguments in response. He points to what he calls a different "tradition"—that of courts having treated recidivism as an element of the related crime. See, *e. g.*, *Massey* v. *United States*, 281 F. 293, 297–298 (CA8 1922); *Singer* v. *United States*, 278 F. 415, 420 (CA3 1922); *People* v. *Sickles*, 51 N. E. 288, 289 (N. Y. 1898); see also *post*, at 256–257 (citing authority). We do not find this claim convincing, however, for any such tradition is not uniform. See *Spencer* v. *Texas*, 385 U. S., at 566 ("The method for determining prior convictions varies . . . between jurisdictions affording a jury trial on this issue . . . and those leaving that question to the court"); Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332, 347 (1965) (as of 1965, eight States' recidivism statutes provide for determination of prior convictions by judge, not jury). Nor does it appear modern. Compare *State* v. *Thorne*, 129 Wash. 2d

736, 776–784, 921 P. 2d 514, 533–538 (1996) (upholding state recidivism law against federal constitutional challenge), with *State* v. *Furth*, 5 Wash. 2d 1, 11–19, 104 P. 2d 925, 930–933 (1940). And it nowhere (to our knowledge) rested upon a federal constitutional guarantee. See, *e. g.*, *Massey* v. *United States*, *supra*, at 297 (applying federal law, noting jury determination of prior offense applied "unless the statute designates a different mode of procedure").

Petitioner also argues, in essence, that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional "elements" requirement. We have explained why we believe the Constitution, as interpreted in *McMillan* and earlier cases, does not impose that requirement. We add that such a rule would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here. See *Walton* v. *Arizona*, 497 U. S. 639, 647 (1990) (rejecting capital defendant's argument that every finding of fact underlying death sentence must be made by a jury); *Hildwin* v. *Florida*, 490 U. S. 638, 640–641 (1989) *(per curiam)* (judge may impose death penalty based on his finding of aggravating factor because such factor is not element of offense to be determined by jury); *Spaziano* v. *Florida*, 468 U. S. 447, 465 (1984) (same). And we would also find it difficult to reconcile any such rule with our precedent holding that the sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes. *Graham*, 224 U. S., at 623–624.

For these reasons, we reject petitioner's constitutional claim that his recidivism must be treated as an element of his offense.

IV

We mention one final point. Petitioner makes no separate, subsidiary, standard of proof claims with respect to his

sentencing, perhaps because he admitted his recidivism at the time he pleaded guilty and would therefore find it difficult to show that the standard of proof could have made a difference to his case. Accordingly, we express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence. Cf. *United States* v. *Watts*, 519 U. S. 148, 156, and n. 2 (1997) *(per curiam)* (acknowledging, but not resolving, "divergence of opinion among the Circuits" as to proper standard for determining the existence of "relevant conduct" that would lead to an increase in sentence).

The judgment of the Court of Appeals is

Affirmed.

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

Because Hugo Roman Almendarez-Torres illegally reentered the United States after having been convicted of an aggravated felony, he was subject to a maximum possible sentence of 20 years' imprisonment. See 8 U. S. C. § 1326(b)(2). Had he not been convicted of that felony, he would have been subject to a maximum of only two years. See 8 U. S. C. § 1326(a). The Court today holds that § 1326(b)(2) does not set forth a separate offense, and that conviction of a prior felony is merely a sentencing enhancement for the offense set forth in § 1326(a). This causes the Court to confront the difficult question whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime—to be charged in the indictment, and found beyond a reasonable doubt by a jury. Until the Court said so, it was far from obvious that the answer to this question was no; on the basis of our prior law, in fact, the answer was considerably doubtful.

In all our prior cases bearing upon the issue, however, we confronted a criminal statute or state-court criminal ruling

that unambiguously relieved the prosecution of the burden of proving a critical fact to the jury beyond a reasonable doubt. In *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), the statute provided that "'visibl[e] possess[ion] [of] a firearm'" "'shall not be an element of the crime,'" but shall be determined at sentencing by "'[t]he court . . . by a preponderance of the evidence,'" *id.*, at 81, n. 1 (quoting 42 Pa. Cons. Stat. § 9712 (1982)). In *In re Winship*, 397 U. S. 358 (1970), it provided that determinations of criminal action in juvenile cases "'must be based on a preponderance of the evidence,'" *id.*, at 360 (quoting N. Y. Family Court Act § 744(b)). In *Patterson* v. *New York*, 432 U. S. 197 (1977), the statute provided that extreme emotional disturbance "'is an affirmative defense,'" *id.*, at 198, n. 2 (quoting N. Y. Penal Law § 125.25 (McKinney 1975)). And in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), Maine's highest court had held that in murder cases malice aforethought was presumed and had to be negated by the defendant, *id.*, at 689 (citing *State* v. *Lafferty*, 309 A. 2d 647 (1973)).

In contrast to the provisions involved in these cases, 8 U. S. C. § 1326 does not, on its face, place the constitutional issue before us: It does not say that subsection (b)(2) is merely a sentencing enhancement. The text of the statute supports, if it does not indeed demand, the conclusion that subsection (b)(2) is a separate offense that includes the violation described in subsection (a) but adds the additional element of prior felony conviction. I therefore do not reach the difficult constitutional issue in this case because I adopt, as I think our cases require, that reasonable interpretation of § 1326 which avoids the problem. Illegal reentry *simpliciter* (§ 1326(a)) and illegal reentry after conviction of an aggravated felony (§ 1326(b)(2)) are separate criminal offenses. Prior conviction of an aggravated felony being an element of the latter offense, it must be charged in the indictment. Since it was not, petitioner's sentence must be set aside.

I

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909). This "cardinal principle," which "has for so long been applied by this Court that it is beyond debate," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988), requires merely a determination of serious constitutional *doubt*, and not a determination of *unconstitutionality*. That must be so, of course, for otherwise the rule would "mea[n] that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, *supra*, at 408. The Court contends that neither of the two conditions for application of this rule is present here: that the constitutional question is not doubtful, and that the statute is not susceptible of a construction that will avoid it. I shall address the former point first.[1]

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[1] The Court asserts that we have declined to apply the doctrine "in circumstances similar to those here—where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional." *Ante*, at 239. The cases it cites, however, do not support this contention. In *Rust* v. *Sullivan*, 500 U. S. 173 (1991), the Court believed that "[t]here [was] *no question* but that the statutory prohibition . . . [was] constitutional," *id.*, at 192 (emphasis added). And in *United States* v. *Locke*, 471 U. S. 84 (1985), the Court found the doctrine inapplicable not because of lack of constitutional doubt, but because the statutory language did not permit an interpretation that would "avoid a constitutional question," *id.*, at 96. Similarly, in *United States* v. *Monsanto*, 491 U. S. 600 (1989), "the language of [the statute was] plain and unambiguous," *id.*, at 606.

That it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject is clear enough from our prior cases resolving questions on the margins of this one. In *In re Winship*, *supra*, we invalidated a New York statute under which the burden of proof in a juvenile delinquency proceeding was reduced to proof by a preponderance of the evidence. We held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," 397 U. S., at 364, and that the same protection extends to "a juvenile . . . charged with an act which would constitute a crime if committed by an adult," *id.*, at 359.

Five years later, in *Mullaney* v. *Wilbur*, *supra*, we unanimously extended *Winship*'s protections to determinations that went not to a defendant's guilt or innocence, but simply to the length of his sentence. We invalidated Maine's homicide law, under which all intentional murders were presumed to be committed with malice aforethought (and, as such, were punishable by life imprisonment), unless the defendant could rebut this presumption with proof that he acted in the heat of passion (in which case the conviction would be reduced to manslaughter and the maximum sentence to 20 years). We acknowledged that "under Maine law these facts of intent [were] not general elements of the crime of felonious homicide[, but] [i]nstead, [bore] only on the appropriate punishment category." 421 U. S., at 699. Nonetheless, we rejected this distinction between guilt and punishment. "[I]f *Winship*," we said, "were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute differ-

ent crimes, characterizing them as factors that bear solely on the extent of punishment." *Id.*, at 697–698.

In *Patterson* v. *New York*, we cut back on some of the broader implications of *Mullaney*. Although that case contained, we acknowledged, "some language . . . that ha[d] been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability,'" we denied that we "intend[ed] . . . such far-reaching effect." 432 U. S., at 214–215, n. 15. Accordingly, we upheld in *Patterson* New York's law casting upon the defendant the burden of proving as an "affirmative defense" to second-degree murder that he "'acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse,'" *id.*, at 198–199, n. 2, which defense would reduce his crime to manslaughter. We explained that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required," *id.*, at 210, and that the State need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." *Id.*, at 207. We cautioned, however, that while our decision might "seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes[,] . . . there are obviously constitutional limits beyond which the States may not go in this regard." *Id.*, at 210.

Finally, and most recently, in *McMillan* v. *Pennsylvania*, 477 U. S., at 81, we upheld Pennsylvania's Mandatory Minimum Sentencing Act, which prescribed a mandatory *minimum* sentence of five years upon a judge's finding by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of certain enumerated offenses which all carried maximum sentences of

more than five years. We observed that "we [had] never attempted to define precisely the constitutional limits noted in *Patterson*, *i. e.*, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases," but explained that, whatever those limits, Pennsylvania's law did not transgress them, *id.*, at 86, *primarily because* it "neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense calling for a separate penalty; it operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm," *id.*, at 87–88.

The feebleness of the Court's contention that here there is no serious constitutional doubt is evidenced by the degree to which it must ignore or distort the analysis of *McMillan*. As just described, that opinion emphasized—and emphasized repeatedly—that an increase of the maximum penalty was not at issue. Beyond that, it specifically acknowledged that the outcome might have been different (*i. e.*, the statute might have been unconstitutional) if the maximum sentence had been affected:

> "Petitioners' claim that visible possession under the Pennsylvania statute is 'really' an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, cf. 18 U. S. C. § 2113(d) (providing separate and greater punishment for bank robberies accomplished through 'use of a dangerous weapon or device'), but it does not." *Id.*, at 88.

The opinion distinguished one of our own precedents on this very ground, noting that the Colorado Sex Offenders Act invalidated in *Specht* v. *Patterson*, 386 U. S. 605 (1967), increased a sex offender's sentence from a 10-year maximum

to an indefinite term up to and including life imprisonment. 477 U. S., at 88.

Despite all of that, the Court would have us believe that the present statute's alteration of the maximum permissible sentence—which it acknowledges is "the major difference between this case and *McMillan*," *ante*, at 244—militates *in favor of*, rather than *against*, this statute's constitutionality, because an increase of the minimum sentence (rather than the permissible maximum) is more disadvantageous to the defendant. *Ibid.* That is certainly an arguable position (it was argued, as the Court has the temerity to note, by the *dissent* in *McMillan*). But it is a position which *McMillan* not only rejected, but *upon the converse of which McMillan rested its judgment.*

In addition to inverting the consequence of this distinction (between statutes that prescribe a minimum sentence and those that increase the permissible maximum sentence) the Court seeks to minimize the importance of the distinction by characterizing it as merely one of five factors relied on in *McMillan*, and asserting that the other four factors here are the same. *Ante*, at 242–243. In fact, however, *McMillan* did not set forth any five-factor test; the Court selectively recruits "factors" from various parts of the discussion. Its first factor, for example, that "'the statute plainly does not transgress the limits expressly set out in *Patterson*,'" *ante*, at 242, quoting *McMillan*, 477 U. S, at 86—viz., that it does not "discar[d] the presumption of innocence" or "relieve the prosecution of its burden of proving guilt," *id.*, at 87—merely narrows the issue to the one before the Court, rather than giving any clue to the resolution of that issue. It is no more a factor in solving the constitutional problem before us than is the observation that § 1326 is not an *ex post facto* law and does not effect an unreasonable search or seizure. The Court's second, fourth, and part of its fifth "factors" are in fact all subparts of the crucial third factor (the one that is absent here), since they are all culled from the general dis-

cussion in *McMillan* of how the Pennsylvania statute simply limited a sentencing judge's discretion. We said that, whereas in *Mullaney* the State had imposed " 'a differential in sentencing ranging from a nominal fine to a mandatory life sentence' " (the Court's "second" factor), Pennsylvania's law "neither alter[ed] the maximum penalty for the crime committed [the Court's 'third' factor] nor create[d] a separate offense calling for a separate penalty [the Court's 'fourth' factor]; it operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm [the Court's 'third' factor]. . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense [part of the Court's 'fifth' factor]." 477 U. S., at 87–88.

The Court's recruitment of "factors" is, as I have said, selective. Omitted, for example, is *McMillan*'s statement that "petitioners do not contend that the particular factor made relevant [by the statute] . . . has historically been treated 'in the Anglo-American legal tradition' as requiring proof beyond a reasonable doubt." *Id.*, at 90, quoting *Patterson*, 432 U. S., at 226. Petitioner does make such an assertion in the present case—correctly, as I shall discuss. But even with its selective harvesting, the Court is incorrect in its assertion that "most" of the "factors" it recites, *ante*, at 243 (and in its implication that all except the third of them) exist in the present case as well. The second of them contrasted the consequence of the fact assumed in *Mullaney* (extension of the permissible sentence from as little as a nominal fine to as much as a mandatory life sentence) with the consequence of the fact at issue in *McMillan* (no extension of the permissible sentence at all, but merely a "limit[ation of] the sentencing court's discretion in selecting a penalty within the range already available," 477 U. S., at 88). The present case resembles *Mullaney* rather than *McMillan* in this regard,

since the fact at issue increases the permissible sentence tenfold. And the only significant part of the fifth "factor"—that the statute in *McMillan* "'dictated the precise weight to be given [the statutory] factor,'" *ante*, at 243, quoting *McMillan*, *supra*, at 89–90—is likewise a point of difference and *not* of similarity.

But this parsing of various factors is really beside the point. No one can read our pre-*McMillan* cases, and especially *Mullaney* (whose limits were adverted to in *Patterson* but never precisely described), without entertaining a serious doubt as to whether the statute as interpreted by the Court in the present case is constitutional. And no one can read *McMillan*, our latest opinion on the point, without perceiving that the determinative element in our validation of the Pennsylvania statute was the fact that it merely limited the sentencing judge's discretion within the range of penalty already available, *rather than* substantially increasing the available sentence. And even more than that: No one can read *McMillan* without learning that the Court was *open* to the argument that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime (such an argument, it said, would have "at least . . . superficial appeal," 477 U. S., at 88). If all that were not enough, there must be added the fact that many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their State Constitutions, see, *e. g.*, *State* v. *McClay*, 146 Me. 104, 112, 78 A. 2d 347, 352 (1951); *Tuttle* v. *Commonwealth*, 68 Mass. 505, 506 (1854) (prior conviction increasing maximum sentence must be set forth in indictment); *State* v. *Furth*, 5 Wash. 2d 1, 11–19, 104 P. 2d 925, 930–933 (1940); *State ex rel. Lockmiller* v. *Mayo*, 88 Fla. 96, 98–99, 101 So. 228, 229 (1924); *Roberson* v. *State*, 362 P. 2d 1115, 1118–1119 (Okla. Crim. App. 1961), or as a matter of common law, see, *e. g.*, *People ex rel. Cosgriff* v. *Craig*, 195 N. Y. 190, 194–195, 88 N. E. 38, 39 (1909); *People*

v. *McDonald*, 233 Mich. 98, 102, 105, 206 N. W. 516, 518, 519 (1925); *State* v. *Smith*, 129 Iowa 709, 710–715, 106 N. W. 187, 188–189 (1906) ("By the uniform current of authority, the fact of the prior convictions is to be taken as part of the offense instantly charged, at least to the extent of aggravating it and authorizing an increased punishment"); *State* v. *Pennye*, 102 Ariz. 207, 208–209, 427 P. 2d 525, 526–527 (1967); *State* v. *Waterhouse*, 209 Ore. 424, 428–433, 307 P. 2d 327, 329–331 (1957); *Robbins* v. *State*, 219 Ark. 376, 380–381, 242 S. W. 2d 640, 643 (1951); *State* v. *Eichler*, 248 Iowa 1267, 1270–1273, 83 N. W. 2d 576, 577–579 (1957).[2]

In the end, the Court cannot credibly argue that the question whether a fact which increases maximum permissible punishment must be found by a jury beyond a reasonable doubt is an easy one. That, perhaps, is why the Court stresses, and stresses repeatedly, the limited subject matter that § 1326(b) addresses—recidivism. It even tries, with utter lack of logic, to limit its rejection of the fair reading of *McMillan* to recidivism cases. "For the reasons just given," it says, "*and in light of the particular sentencing factor at issue in this case—recidivism*—we should take

[2] It would not be, as the Court claims, "anomalous" to require jury trial for a factor increasing the maximum sentence, "in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty . . . ." *Ante*, at 247, citing *Walton* v. *Arizona*, 497 U. S. 639 (1990); *Hildwin* v. *Florida*, 490 U. S. 638 (1989) *(per curiam);* and *Spaziano* v. *Florida*, 468 U. S. 447 (1984). Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a *jury* has found the defendant *guilty* of *all the elements* of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed—even where that decision is constrained by a statutory requirement that certain "aggravating factors" must exist. The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on *all the elements* of the charge.

McMillan's statement [regarding the "superficial appeal" the defendant's argument would have had if the factor at issue increased his maximum sentence] to mean no more than it said, and therefore not to make a determinative difference here." *Ante*, at 245 (emphasis added). It is impossible to understand how *McMillan* could mean one thing in a later case where recidivism is at issue, and something else in a later case where some other sentencing factor is at issue. One might say, of course, that recidivism *should be an exception* to the general rule set forth in *McMillan*—but that more forthright characterization would display how doubtful the constitutional question is in light of our prior case law.

In any event, there is no rational basis for *making* recidivism an exception. The Court is of the view that recidivism need not be proved to a jury beyond a reasonable doubt (a view that, as I shall discuss, is precisely contrary to the common-law tradition) because it "'goes to the punishment only.'" It relies for this conclusion upon our opinion in *Graham* v. *West Virginia*, 224 U. S. 616 (1912). See *ante*, at 243, quoting *Graham*, *supra*, at 624; see also *ante*, at 247. The *holding* of *Graham* provides no support for the Court's position. It upheld against due process and double jeopardy objections a state recidivism law under which a defendant's prior convictions were charged and tried in a separate proceeding after he was convicted of the underlying offense. As the Court notes, *ante*, at 243, the prior convictions were not charged in the same indictment as the underlying offense; but they *were* charged in an "information" before the defendant was tried for the prior convictions, and, more importantly, the law explicitly preserved his right to a jury determination on the recidivism question. See *Graham*, *supra*, at 622–623; see also *Oyler* v. *Boles*, 368 U. S. 448, 453 (1962) (same). It is true, however, that if the *basis* for *Graham*'s holding were accepted, one would have to conclude that recidivism need not be tried to the jury and found beyond a reasonable doubt. The essence of *Graham*'s reason-

ing was that in the recidivism proceeding the defendant "was not held to answer for an offense," 224 U. S., at 624, since the recidivism charge "'goes to the punishment only,'" *ibid.*, quoting *McDonald* v. *Massachusetts*, 180 U. S. 311, 313 (1901).

But that basis for dispensing with the protections of jury trial and findings beyond a reasonable doubt was explicitly rejected in *Mullaney*, which *accorded* these protections to facts that were "not general elements of the crime of felonious homicide . . . [but bore] only on the appropriate punishment category," 421 U. S., at 699. Whatever else *Mullaney* stands for, it certainly stands for the proposition that what *Graham* used as the line of demarcation for double jeopardy and some due process purposes (the matter "goes only to the punishment") is *not* the line of demarcation for purposes of the right to jury trial and to proof beyond a reasonable doubt. So also does *McMillan*, which even while narrowing *Mullaney* made it very clear that the mere fact that a certain finding "goes only to the penalty" does not end the inquiry. The Court is certainly correct that the distinctive treatment of recidivism determinations for double jeopardy purposes takes some explaining; but it takes some explaining for the Court no less than for me. And the explanation assuredly is *not* (what the Court apparently suggests) that recidivism is never an element of the crime. It does much less violence to our jurisprudence, and to the traditional practice of requiring a jury finding of recidivism beyond a reasonable doubt, to explain *Graham* as a recidivism exception to the normal double jeopardy rule that conviction of a lesser included offense bars later trial for the greater crime. Our double jeopardy law, after all, is based upon traditional American and English practice, see *United States* v. *Dixon*, 509 U. S. 688, 704 (1993); *United States* v. *Wilson*, 420 U. S. 332, 339–344 (1975), and that practice has allowed recidivism to be charged and tried separately, see *Spencer* v. *Texas*, 385 U. S. 554, 566–567 (1967); *Graham*, *supra*, at 623,

625–626, 631; *McDonald*, *supra*, at 312–313. It has *not* allowed recidivism to be determined by a judge as more likely than not.

While I have given many arguments supporting the position that the Constitution requires the recidivism finding in this case to be made by a jury beyond a reasonable doubt, I do not endorse that position as necessarily correct. Indeed, that would defeat my whole purpose, which is to honor the practice of not deciding doubtful constitutional questions unnecessarily. What I have tried to establish—and all that I need to establish—is that on the basis of our jurisprudence to date, the answer to the constitutional question is not clear. It is the Court's burden, on the other hand, to establish that its constitutional answer shines forth clearly from our cases. That burden simply cannot be sustained. I think it beyond question that there was, until today's unnecessary resolution of the point, "serious doubt" whether the Constitution permits a defendant's sentencing exposure to be increased tenfold on the basis of a fact that is not charged, tried to a jury, and found beyond a reasonable doubt. If the Court wishes to abandon the doctrine of constitutional doubt, it should do so forthrightly, rather than by declaring certainty on a point that is clouded in doubt.

II

The Court contends that the doctrine of constitutional doubt is also inapplicable because § 1326 is not fairly susceptible of the construction which avoids the constitutional problem—*i. e.*, the construction whereby subsection (b)(2) sets forth a separate criminal offense. *Ante*, at 238. The Court begins its statutory analysis not by examining the text of § 1326, but by demonstrating that the "subject matter [of the statute]—prior commission of a serious crime—is as typical a sentencing factor as one might imagine." *Ante*, at 230. That is eminently demonstrable, sounds powerfully good, but in fact proves nothing at all. It is certainly true that a

judge (whether or not bound by the Federal Sentencing Guidelines) is likely to sentence nearer the maximum permitted for the offense if the defendant is a repeat offender. But the same can be said of many, perhaps most, factors that are used to define aggravated offenses. For example, judges will "typically" sentence nearer the maximum that a statute allows if the crime of conviction is committed with a firearm, or in the course of another felony; but that in no way suggests that armed robbery and felony murder are sentencing enhancements rather than separate crimes.

The *relevant* question for present purposes is not whether prior felony conviction is "typically" used as a sentencing factor, but rather whether, in statutes that provide higher maximum sentences for crimes committed by convicted felons, prior conviction is "typically" treated as a mere sentence enhancement or rather as an element of a separate offense. The answer to that question is the latter. That was the rule at common law, and was the near-uniform practice among the States at the time of the most recent study I am aware of. See Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332, 333–334 (1965); Note, The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions, 33 N. Y. U. L. Rev. 210, 215–216 (1958). At common law, the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime. See, *e. g.*, *Spencer* v. *Texas*, *supra*, at 566; *Massey* v. *United States*, 281 F. 293, 297 (CA8 1922); *Singer* v. *United States*, 278 F. 415, 420 (CA3 1922); *People* v. *Sickles*, 156 N. Y. 541, 545, 51 N. E. 288, 289 (1898). While several States later altered this procedure by providing a separate proceeding for the determination of prior convictions, at least as late as 1965 all but eight retained the defendant's right to a jury determination on this issue. See Note, 40 N. Y. U. L. Rev., at 333–334, 347. I am at a loss to explain the Court's assertion that it has "found no statute that clearly makes recidivism an offense

element" added to another crime, *ante*, at 230. There are many such.[3]

It is interesting that the Court drags the red herring of recidivism through both parts of its opinion—the "constitutional doubt" part and the "statutory interpretation" part alike. As just discussed, logic demonstrates that the nature of that charge (the fact that it is a "typical" sentencing factor) has nothing to do with what this statute means. And as discussed earlier, the text and reasoning of *McMillan*, and of the cases *McMillan* distinguishes, provide no basis for saying that recidivism is exempt from the Court's clear acknowledgment that taking away from the jury facts that increase the maximum sentence is constitutionally questionable. One wonders what state courts, and lower federal courts, are supposed to do with today's mysterious utterances. Are they to pursue logic, and conclude that *all* ambiguous statutes adding punishment for factors accompanying the principal offense are mere enhancements, or are they illogically to give this special treatment only to recidivism? Are they to deem the reasoning of *McMillan* superseded for *all* cases, or does it remain an open and doubtful question, for all cases except those involving recidivism, whether statutory maximums can be increased without the benefit of jury trial? Whatever else one may say about today's opinion, there is no doubt that it has brought to this area of the law more confusion than clarification.

Passing over the red herring, let me turn now to the statute at issue—§ 1326 as it stood when petitioner was con-

[3] For federal statutes of this sort, see, *e. g.*, 15 U. S. C. § 1264(a), 18 U. S. C. § 924(c), and § 2114(a). In each of these provisions, recidivism is recited in a list of sentence-increasing aggravators that include, for example, intent to defraud or mislead (15 U. S. C. § 1264(a)), use of a firearm that is a machine gun, or a destructive device, or that is equipped with a silencer (18 U. S. C. § 924(c)), and wounding or threatening life with a dangerous weapon (§ 2114(a)). It would do violence to the text to treat recidivism as a mere enhancement while treating the parallel provisions as aggravated offenses, which they obviously are.

victed. The author of today's opinion for the Court once agreed that the "language and structure" of this enactment "are subject to two plausible readings," one of them being that recidivism constitutes a separate offense. *United States* v. *Forbes*, 16 F. 3d 1294, 1298 (CA1 1994) (opinion of Coffin, J., joined by Breyer, C. J.).[4] This would surely be enough to satisfy the requirement expressed by Justice Holmes, see *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916), and approved by the Court, *ante*, at 237–238, that the constitutional-doubt-avoiding construction be "fairly possible." Today, however, the Court relegates statutory language and structure to merely two of five "factors" that "help courts determine a statute's objectives and thereby illuminate its text," *ante*, at 228.

The statutory text reads, in relevant part, as follows:

> "Reentry of deported alien; criminal penalties for reentry of certain deported aliens
>
> "(a) Subject to subsection (b) of this section, any alien who [has been deported and thereafter reenters the United States] . . . shall be fined under title 18, or imprisoned not more than 2 years, or both.
>
> "(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—
>
> "(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or
>
> "(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien

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[4] The statutory text at issue in *Forbes* was in all relevant respects identical to the statute before us here, except that the years of imprisonment for the offenses were less; they were increased by a 1994 amendment, see § 130001(b), 108 Stat. 2023.

> shall be fined under such title, imprisoned not more than 20 years, or both." 8 U. S. C. § 1326(b).

One is struck at once by the parallel structure of subsections (a) and (b). *Neither* subsection says that the individual it describes "shall be guilty of a felony," and *both* subsections say that the individuals they describe "shall be fined under title 18, or imprisoned not more than [2, 10, or 20] years." If this suffices to define a substantive offense in subsection (a) (as all agree it does), it is hard to see why it would not define a substantive offense in each paragraph of subsection (b) as well. Cf., for example, 21 U. S. C. § 841, which has a subsection (a) entitled "Unlawful acts," and a subsection (b) entitled "Penalties."

The opening phrase of subsection (b) certainly does not indicate that what follows merely supplements or enhances the penalty provision of subsection (a); what follows is to apply "notwithstanding" all of subsection (a), *i. e.*, "in spite of" or "without prevention or obstruction from or by" subsection (a). See, *e. g.*, Webster's New International Dictionary 1669 (2d ed. 1949). The next phrase ("in the case of any alien described in . . . subsection [(a)]") imports by reference the substantive acts attributed to the hypothetical alien (deportation and unauthorized reentry) in subsection (a). Significantly, this phrase does not apply subsection (b) to any alien "convicted under" subsection (a)—which is what one would expect if the provision was merely increasing the penalty for certain subsection (a) convictions. See, *e. g., United States* v. *Davis*, 801 F. 2d 754, 755–756 (CA5 1986) (noting that "predicat[ing] punishment upon conviction" of another offense is one of the "common indicia of sentence-enhancement provisions"). Instead, subsection (b) applies to an alien "described in" subsection (a)—one who has been deported and has reentered illegally. And finally, subsection (a)'s provision that it applies "[s]ubject to subsection (b)" means that subsection (a) is inapplicable to an alien covered by subsection (b), just as subsection (b) applies "not-

withstanding" that the alien would otherwise be covered by subsection (a).[5]

The Court relies on an earlier version of § 1326 to support its interpretation of the statute in its current form. *Ante*, at 232. While I agree that such statutory history is a legitimate tool of construction, the statutory history of § 1326 does not support, but rather undermines, the Court's interpretation. That earlier version contained a subsection (a) that, in addition to setting forth penalties (as did the subparts of subsection (b)), contained the phrase (which the subparts of subsection (b) did not) "shall be guilty of a felony, and upon conviction thereof . . . ." With such a formulation, of course, it would be easier to conclude that subsection (a) defines the crime and sets forth the basic penalty, and subsection (b) sets forth merely penalty enhancements. But if that was what the additional language in subsection (a) of the 1988 statute connoted, then what was the *elimination* of that additional language (in the 1990 version of the statute at issue here) meant to achieve? See § 543(b)(3), 104 Stat. 5059. The more strongly the "shall be guilty of a felony" language suggests that subsection (b) of the 1988 statute contained only enhancements, the more strongly the otherwise inexplicable elimination of that language sug-

[5] The Court contends that treating subsection (b) as establishing substantive offenses renders the "notwithstanding" and "subject to" provisions redundant, because even without them our lesser included-offense jurisprudence would prevent a defendant from being convicted under both subsections (a) and (b). *Ante*, at 231. Redundancy, however, consists of the annoying practice of saying the same thing twice, not the sensible practice of saying once, with clarity and conciseness, what the law provides. The author of today's opinion once agreed that "[t]he fact that each subsection makes reference to the other is simply the logical way of indicating the relationship between the arguably two separate crimes." *United States* v. *Forbes*, 16 F. 3d 1294, 1298 (CA1 1994). But if this be redundancy, it is redundancy that the Court's alternative reading does not cure—unless one believes that, without the "notwithstanding" and "subject to" language, our interpretive jurisprudence would permit the subsection (a) penalty to be added to the subsection (b) penalties.

gests that subsection (b) of the 1990 statute was meant to be *parallel* with subsection (a)—*i. e.*, that both subsections were meant to set forth not merely penalties but also offenses.[6]

After considering the subject matter and statutory language, the third factor the Court considers in arriving at its determination that this statute can only be read as a sentencing enhancement is the title of the 1988 amendment that added subsection (b)(2): "Criminal Penalties for Reentry of Certain Deported Aliens." See § 7345, 102 Stat. 4471, cited *ante*, at 234. Of course, this title pertains to a subsection (b)(2) which, unlike the (b)(2) under which petitioner was convicted, was not parallel with the preceding subsection (a). But even disregarding that, the title of the amendment proves nothing at all. While "Criminal Penalties for Reentry" might normally be more suggestive of an enhancement than of a separate offense, there is good reason to believe it imports no such suggestion here. For the very next provision of the same enactment, which adjusts the *substantive requirements* for the crime of aiding and abetting the unlawful entry of an alien, is entitled "Criminal Penalties for Aiding or Assisting Certain Aliens to Enter the United States." See § 7346, 102 Stat. 4471. Evidently, new substantive offenses that were penalized were simply entitled "Criminal Penalties" for the relevant offense. Moreover,

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[6] Immediately after stressing the significance of the 1988 version of § 1326(a), the Court dismisses the 1990 amendment that eliminated the 1988 language upon which it relies, as a "housekeeping measure" by which "Congress [did not] inten[d] to change, or to clarify, the fundamental relationship between" subsections (a) and (b). *Ante*, at 234. The Court offers no support for this confident characterization, unless it is the mistaken assumption that statutory changes or clarifications unconfirmed by legislative history are inoperative. "Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning." *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 385, n. 2 (1992).

the 1988 amendment kept the original title of § 1326 ("Reentry of Deported Alien") intact, leaving it to apply to both subsection (a) and subsection (b). See § 7345, *supra;* § 276, 66 Stat. 229.

The Court's fourth factor leading it to conclude that this statute cannot reasonably be construed as establishing substantive offenses is legislative history. See *ante*, at 234. It is, again, the legislative history of the provision as it existed in 1988, before subsection (a) was stripped of the language "shall be guilty of a felony," thereby making subsections (a) and (b) parallel. Even so, it is of no help to the Court's case. The stray statements that the Court culls from the Congressional Record prove only that the new subsection (b) was thought to increase penalties for unlawful reentry. But there is no dispute that it does that! The critical question is whether it does it by adding penalties to the subsection (a) offense, or by creating additional, more severely punished, offenses. That technical point is not alluded to in any of the remarks the Court recites.

The Court's fifth and last argument in support of its interpretation of the statute is the contention that "the contrary interpretation . . . risks unfairness," *ibid.*, because it would require bringing the existence of the prior felony conviction to the attention of the jury. But it is also "unfair," of course, to deprive the defendant of a jury determination (and a beyond-a-reasonable-doubt burden of proof) on the critical question of the prior conviction. This Court's own assessment of which of those disadvantages is the greater can be of relevance here only insofar as we can presume that that perception would have been shared by the enacting Congress. We usually presume, however, not that an earlier Congress agreed with our current policy judgments, but rather that it agreed with the disposition provided by traditional practice or the common law. See *United States* v. *Texas,* 507 U. S. 529, 534 (1993); *Astoria Fed. Sav. & Loan Assn.* v. *Solimino,* 501 U. S. 104, 108 (1991); *Norfolk Redevel-*

opment and Housing Authority v. *Chesapeake & Potomac Telephone Co. of Va.*, 464 U. S. 30, 35 (1983); *Morissette* v. *United States*, 342 U. S. 246, 263 (1952). As noted earlier, the Court's hostility to jury determination of prior convictions is quite simply at odds with the manner in which recidivism laws have historically been treated in this country.

Moreover, even if we were free to resolve this matter according to our current views of what is fair, the Court's judgment that avoiding jury "infection" is more important than affording a jury verdict (beyond a reasonable doubt) does not seem to me sound. The Court is not correct, to begin with, that the fact of prior conviction is "almost never contested," *ante*, at 235, particularly in unlawful-entry cases. That is clear from the very legislative history of the present statute. Senator Chiles explained that "identifying and prosecuting . . . illegal alien felons is a long and complex process" because "[i]t is not uncommon for an alien who has committed a certain felony to pay his bond and walk, only to be apprehended for a similar crime in the next county but with a new name and identification." 133 Cong. Rec. 8771 (1987). He went on to describe two specific aliens, one from whom police "seized 3 passports issued to him in 3 different names, 11 drivers licenses, immigration cards and numerous firearms and stolen property," and the other on whom immigration officials had "5 alien files . . . with 13 aliases, different birth dates and different social security cards." *Id.*, at 8771, 8772. He said that "these aliens [were] not exceptions but rather common amongst the 100,000 illegal alien felons in the United States." *Id.*, at 8772. Representative Smith stated that aliens arrested for felonies "often are able to pay expensive bonds and disappear under a new identity often to reappear in court with a different name and a new offense. In some cases, they may return to their native lands and reenter the United States with new names and papers but committing the same crimes." *Id.*, at 28840. And on the other side of the ledger, I doubt whether "infection" of the jury

with knowledge of the prior crime is a serious problem. See, *e. g.*, *Spencer*, 385 U. S., at 561 ("The defendants' interests [in keeping prejudicial prior convictions from the jury] are protected by limiting instructions and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence" (citation omitted)); *Old Chief* v. *United States*, 519 U. S. 172, 191 (1997) (it is an abuse of discretion under Federal Rule of Evidence 403 to disallow defendant's stipulation to prior felony convictions where such convictions are an element of the offense); cf. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 30 ("In 1996, 98.2% of all Section 1326 defendants pleaded guilty"). If it is a problem, however, there are legislative and even judicial means for dealing with it, short of what today's decision does: taking the matter away from the jury in all cases. See Note, 40 N. Y. U. L. Rev., at 333–334 (describing commonly used procedures under which defendant's right to a jury is invoked only "[i]f [he] denies the existence of prior convictions or stands mute"); *Spencer*, *supra*, at 567 (describing the English rule, under which the indictment alleges both the substantive offense and prior conviction, but the jury is not charged on the prior conviction until after it convicts the defendant of the substantive offense).

In sum, I find none of the four nontextual factors relied upon by the Court to support its interpretation ("typicality" of recidivism as a sentencing factor; titles; legislative history; and risk of unfairness) persuasive. What does seem to me significant, however, is a related statutory provision, introduced by a 1996 amendment, which explicitly refers to subsection (b)(2) as setting forth "offenses." See § 334, 110 Stat. 3009–635 (instructing United States Sentencing Commission to amend sentencing guidelines "for offenses under . . . 1326(b)"). This later amendment can of course not cause subsection (b)(2) to have meant, at the time of petitioner's conviction, something different from what it then

said. But Congress's expressed understanding that subsection (b) creates separate offenses is surely evidence that it is "fairly possible" to read the provision that way.[7]

I emphasize (to conclude this part of the discussion) that "fairly possible" is all that needs to be established. The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one—the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. "Adopt the interpretation that avoids the constitutional doubt if that is the right one" produces precisely the same result as "adopt the right interpretation." Rather, the doctrine of constitutional doubt comes into play when the statute is "susceptible of" the problem-avoiding interpretation, *Delaware & Hudson Co.*, 213 U. S., at 408—when that interpretation is *reasonable,* though not necessarily the best. I think it quite impossible to maintain that this standard is not met by the interpretation of subsection (b) which regards it as creating separate offenses.

* * *

For the foregoing reasons, I think we must interpret the statute before us here as establishing a separate offense rather than a sentence enhancement. It can be argued that, once the constitutional doubts that require this course have been resolved, statutes no less ambiguous than the one before us here will be interpretable as sentence enhancements,

[7] The Court is incorrect in its contention that the effective-date provision of the 1996 amendments reflects the opposite congressional understanding. See *ante*, at 237. That provision states that the amendments "apply under [subsection (b)] . . . only to violations of [subsection (a)]," occurring on or after the date of enactment. § 321(c), 110 Stat. 3009–628. There is no dispute, of course, that if subsection (b) creates separate offenses, one of the elements of the separate offenses is the lesser offense set forth in subsection (a). The quoted language is the clearest and simplest way of saying that *that element* of the subsection (b) offenses must have occurred after the date of enactment in order for the amendments to be applicable.

so that not much will have been achieved. That begs the question, of course, as to how the constitutional doubt will be resolved. Moreover, where the doctrine of constitutional doubt does not apply, the same result may be dictated by the rule of lenity, which would preserve rather than destroy the criminal defendant's right to jury findings beyond a reasonable doubt. See, *e. g.*, *People ex rel. Cosgriff* v. *Craig*, 195 N. Y., at 197, 88 N. E., at 40 ("It is unnecessary in this case to decide how great punishment the legislature may constitutionally authorize Courts of Special Sessions to impose on a conviction without a common-law jury. It is sufficient to say that in cases of doubtful construction or of conflicting statutory provisions, that interpretation should be given which best protects the rights of a person charged with an offense, to a trial according to the common law"). Whichever doctrine is applied for the purpose, it seems to me a sound principle that whenever Congress wishes a fact to increase the maximum sentence without altering the substantive offense, it must make that intention unambiguously clear. Accordingly, I would find that § 1326(b)(2) establishes a separate offense, and would reverse the judgment below.

Syllabus

OHIO ADULT PAROLE AUTHORITY ET AL. *v.* WOODARD

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

No. 96–1769. Argued December 10, 1997—Decided March 25, 1998

After respondent Woodard's Ohio murder conviction and death sentence were affirmed on direct appeal and this Court denied certiorari, petitioner Ohio Adult Parole Authority commenced its clemency investigation in accordance with state law, informing respondent that he could have his voluntary interview with Authority members on a particular date, and that his clemency hearing would be held a week later. Respondent filed this suit under 42 U. S. C. § 1983, alleging that Ohio's clemency process violated his Fourteenth Amendment due process right and his Fifth Amendment right to remain silent. The District Court granted judgment on the pleadings to the State, and the Sixth Circuit affirmed in part and reversed in part. Noting that *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458, 464–465, had decisively rejected the argument that federal law can create a liberty interest in clemency, the latter court held that respondent had failed to establish a life or liberty interest protected by due process. The court also held, however, that respondent's "original" pretrial life and liberty interests were protected by a "second strand" of due process analysis under *Evitts* v. *Lucey*, 469 U. S. 387, 393, although the amount of process due could be minimal because clemency, while an "integral part" of the adjudicatory system, is far removed from trial. The court remanded for the District Court to decide what that process should be. Finally, the Sixth Circuit concluded that Ohio's voluntary interview procedure presented respondent with a "Hobson's choice" between asserting his Fifth Amendment privilege against self-incrimination and participating in Ohio's clemency review process, thereby raising the specter of an unconstitutional condition.

Held: The judgment is reversed.

107 F. 3d 1178, reversed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Part III, concluding that giving an inmate the option of voluntarily participating in an interview as part of the clemency process does not violate his Fifth Amendment rights. That Amendment protects against compelled self-incrimination. See *Baxter* v. *Palmigiano*, 425

U. S. 308, 316–318. Even on assumptions most favorable to respondent's claim—*i. e.*, that nothing in the clemency procedure grants applicants immunity for what they might say or makes the interview in any way confidential, and that the Authority will draw adverse inferences from respondent's refusal to answer questions—his testimony at a voluntary interview would not be "compelled." He merely faces a choice quite similar to those made by a criminal defendant in the course of criminal proceedings. For example, a defendant who chooses to testify in his own defense abandons the privilege against self-incrimination when the prosecution seeks to cross-examine him, and may be impeached by proof of prior convictions. In these situations, the undoubted pressures to testify that are generated by the strength of the government's case do not constitute "compulsion" for Fifth Amendment purposes. See *Williams* v. *Florida*, 399 U. S. 78, 84–85. Similarly, respondent here has the choice of providing information to the Authority—at the risk of damaging his case for clemency or for postconviction relief—or of remaining silent, but the pressure to speak does not make the interview compelled. Pp. 285–288.

THE CHIEF JUSTICE, joined by JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS, concluded in Part II that an inmate does not establish a violation of the Due Process Clause in clemency proceedings, under either *Dumschat* or *Evitts,* where, as here, the procedures in question do no more than confirm that such decisions are committed, as is the Nation's tradition, to the executive's authority. This Court reaffirms its holding in *Dumschat*, *supra,* at 464, that pardon and commutation decisions are rarely, if ever, appropriate subjects for judicial review. Respondent's argument that there is a continuing life interest in clemency that is broader in scope than the "original" life interest adjudicated at trial and sentencing is barred by *Dumschat.* The process respondent seeks would be inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations. Although respondent maintains a residual life interest, *e. g.*, in not being summarily executed by prison guards, he cannot use that interest to challenge the clemency determination by requiring the procedural protections he seeks. *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 7. Also rejected is respondent's claim that clemency is entitled to due process protection under *Evitts.* Expressly relying on the combination of two lines of cases to justify the conclusion that a criminal defendant has a right to effective assistance of counsel on a first appeal as of right, 469 U. S., at 394–396, the *Evitts* Court did not

Syllabus

purport to create a new "strand" of due process analysis, and it did not rely on the notion of a continuum of due process rights, as respondent claims. There is no such continuum. See, *e. g.*, *Murray* v. *Giarratano*, 492 U. S. 1, 9–10. An examination of the function and significance of the discretionary clemency decision at issue here readily shows that it is far different from a first appeal as of right, and thus is not "'an integral part of the . . . system for finally adjudicating . . . guilt or innocence,'" as *Evitts*, *supra*, at 393, requires. Pp. 279–285.

JUSTICE O'CONNOR, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded that, because a prisoner under a death sentence has a continuing interest in his life, the question raised is what process is constitutionally necessary to protect that interest. Although due process demands are reduced once society has validly convicted an individual of a crime and therefore established its right to punish, *Ford* v. *Wainwright*, 477 U. S. 399, 429 (O'CONNOR, J., concurring in result in part and dissenting in part), the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process. However, a remand to permit the District Court to address respondent's specific allegations of due process violations is not required. The process he received comports with Ohio's regulations and observes whatever limitations the Due Process Clause may impose on clemency proceedings. Pp. 288–290.

REHNQUIST, C. J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part III, the opinion of the Court with respect to Part I, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Part II, in which SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 288. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 290.

William A. Klatt, First Assistant Attorney General of Ohio, argued the cause for petitioners. With him on the briefs were *Betty D. Montgomery*, Attorney General, *Jeffrey S. Sutton*, State Solicitor, *Simon B. Karas*, and *Jon C. Walden*, Assistant Attorney General.

S. Adele Shank argued the cause for respondent. With her on the brief were *David H. Bodiker*, by appointment of the Court, 522 U. S. 930, *Michael J. Benza*, by appointment of the Court, 522 U. S. 804, and *Gregory W. Meyers.**

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, and an opinion with respect to Part II in which JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join.

This case requires us to resolve two inquiries as to constitutional limitations on state clemency proceedings. The

*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, *Robert R. Anderson*, Senior Assistant Attorney General, *William G. Prahl*, Supervising Deputy Attorney General, and *Ward A. Campbell*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Albert B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Peter Verniero* of New Jersey, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark W. Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *Richard Cullen* of Virginia, *Christine O. Gregoire* of Washington, and *William U. Hill* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Daniel T. Kobil*, *Steven R. Shapiro,* and *Diann Y. Rust-Tierney;* and for the National Association of Criminal Defense Lawyers by *Andrea D. Lyon* and *Barbara E. Bergman.*

Jerome J. Shestack filed a brief for the American Bar Association as *amicus curiae.*

first is whether an inmate has a protected life or liberty interest in clemency proceedings, under either *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), or *Evitts* v. *Lucey*, 469 U. S. 387 (1985). The second is whether giving inmates the option of voluntarily participating in an interview as part of the clemency process violates an inmate's Fifth Amendment rights.

We reaffirm our holding in *Dumschat*, *supra*, that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Id.*, at 464 (footnote omitted). The Due Process Clause is not violated where, as here, the procedures in question do no more than confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive.[1] We further hold that a voluntary inmate interview does not violate the Fifth Amendment.

I

The Ohio Constitution gives the Governor the power to grant clemency upon such conditions as he thinks proper. Ohio Const., Art. III, § 2. The Ohio General Assembly cannot curtail this discretionary decisionmaking power, but it may regulate the application and investigation process. *State* v. *Sheward*, 71 Ohio St. 3d 513, 524–525, 644 N. E. 2d 369, 378 (1994). The General Assembly has delegated in large part the conduct of clemency review to petitioner Ohio Adult Parole Authority (Authority). Ohio Rev. Code Ann. § 2967.07 (1993).

In the case of an inmate under death sentence, the Authority must conduct a clemency hearing within 45 days of the scheduled date of execution. Prior to the hearing, the inmate may request an interview with one or more parole

[1] JUSTICE STEVENS in dissent says that a defendant would be entitled to raise an equal protection claim in connection with a clemency decision. *Post*, at 292. But respondent has raised no such claim here, and therefore we have no occasion to decide that question.

board members. Counsel is not allowed at that interview. The Authority must hold the hearing, complete its clemency review, and make a recommendation to the Governor, even if the inmate subsequently obtains a stay of execution. If additional information later becomes available, the Authority may in its discretion hold another hearing or alter its recommendation.

Respondent Eugene Woodard was sentenced to death for aggravated murder committed in the course of a carjacking. His conviction and sentence were affirmed on appeal, *State* v. *Woodard*, 68 Ohio St. 3d 70, 623 N. E. 2d 75 (1993), and this Court denied certiorari, 512 U. S. 1246 (1994). When respondent failed to obtain a stay of execution more than 45 days before his scheduled execution date, the Authority commenced its clemency investigation. It informed respondent that he could have a clemency interview on September 9, 1994, if he wished, and that his clemency hearing would be on September 16, 1994.

Respondent did not request an interview. Instead, he objected to the short notice of the interview and requested assurances that counsel could attend and participate in the interview and hearing. When the Authority failed to respond to these requests, respondent filed suit in United States District Court on September 14, alleging under Rev. Stat. § 1979, 42 U. S. C. § 1983, that Ohio's clemency process violated his Fourteenth Amendment right to due process and his Fifth Amendment right to remain silent.

The District Court granted the State's motion for judgment on the pleadings. The Court of Appeals for the Sixth Circuit affirmed in part and reversed in part. 107 F. 3d 1178 (1997). That court determined that under a "first strand" of due process analysis, arising out of the clemency proceeding itself, respondent had failed to establish a protected life or liberty interest. It noted that our decision in *Dumschat*, *supra*, at 464–465, "decisively rejected the argument that

federal law can create a liberty interest in clemency." 107 F. 3d, at 1183.

The Court of Appeals further concluded that there was no state-created life or liberty interest in clemency. *Id.*, at 1184–1185. Since the Governor retains complete discretion to make the final decision, and the Authority's recommendation is purely advisory, the State has not created a protected interest. *Olim* v. *Wakinekona*, 461 U. S. 238, 249 (1983). The court noted that it would reach the same conclusion under *Sandin* v. *Conner*, 515 U. S. 472 (1995), to the extent that decision modified the *Olim* analysis.

The Court of Appeals went on to consider, however, a "second strand" of due process analysis centered on "the role of clemency in the entire punitive scheme." 107 F. 3d, at 1186. The court relied on our statement in *Evitts* that "if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' . . . the procedures used in deciding appeals must comport with the demands of" due process. 469 U. S., at 393 (quoting *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956)). The court thought this reasoning logically applied to subsequent proceedings, including discretionary appeals, postconviction proceedings, and clemency.

Due process thus protected respondent's "original" life and liberty interests that he possessed before trial at each proceeding. But the amount of process due was in proportion to the degree to which the stage was an "integral part" of the trial process. Clemency, while not required by the Due Process Clause, was a significant, traditionally available remedy for preventing miscarriages of justice when judicial process was exhausted. It therefore came within the *Evitts* framework as an "integral part" of the adjudicatory system. However, since clemency was far removed from trial, the process due could be minimal. The Court did not itself decide what that process should be, but remanded to the District Court for that purpose.

Finally, the Court of Appeals also agreed with respondent that the voluntary interview procedure presented him with a "Hobson's choice" between asserting his Fifth Amendment rights and participating in the clemency review process, raising the specter of an unconstitutional condition. 107 F. 3d, at 1189. There was no compelling state interest that would justify forcing such a choice on the inmate. On the other hand, the inmate had a measurable interest in avoiding incrimination in ongoing postconviction proceedings, as well as with respect to possible charges for other crimes that could be revealed during the interview. While noting some uncertainties surrounding application of the unconstitutional conditions doctrine, the Court of Appeals concluded the doctrine could be applied in this case.

The dissenting judge would have affirmed the District Court's judgment. *Id.*, at 1194. He agreed with the majority's determination that there was no protected interest under *Dumschat.* But he thought that the majority's finding of a due process interest under *Evitts*, *supra*, was necessarily inconsistent with the holding and rationale of *Dumschat. Evitts* did not purport to overrule *Dumschat.* He also concluded that respondent's Fifth Amendment claim was too speculative, given the voluntary nature of the clemency interview. We granted certiorari, 521 U. S. 1117 (1997), and we now reverse.

II

Respondent argues first, in disagreement with the Court of Appeals, that there is a life interest in clemency broader in scope than the "original" life interest adjudicated at trial and sentencing. *Ford* v. *Wainwright*, 477 U. S. 399 (1986). This continuing life interest, it is argued, requires due process protection until respondent is executed.[2] Relying on

[2] Respondent alternatively tries to characterize his claim as a challenge only to the application process conducted by the Authority, and not to the final discretionary decision by the Governor. Brief for Respondent 8. But, respondent still must have a protected life or liberty interest in the

Eighth Amendment decisions holding that additional procedural protections are required in capital cases, see, *e. g.*, *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980), respondent asserts that *Dumschat* does not control the outcome in this case because it involved only a liberty interest. JUSTICE STEVENS' dissent agrees on both counts. *Post*, at 291–292.

In *Dumschat*, an inmate claimed Connecticut's clemency procedure violated due process because the Connecticut Board of Pardons failed to provide an explanation for its denial of his commutation application. The Court held that "an inmate has 'no constitutional or inherent right' to commutation of his sentence." 452 U. S., at 464. It noted that, unlike probation decisions, "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Ibid.* The Court relied on its prior decision in *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1 (1979), where it rejected the claim "that a constitutional entitlement to release [on parole] exists independently of a right explicitly conferred by the State." *Dumschat*, 452 U. S., at 463–464. The individual's interest in release or commutation "'is indistinguishable from the initial resistance to being confined,'" and that interest has already been extinguished by the conviction and sentence. *Id.*, at 464 (quoting *Greenholtz*, *supra*, at 7). The Court therefore concluded that a petition for commutation, like an appeal for clemency, "is simply a unilateral hope." 452 U. S., at 465.

Respondent's claim of a broader due process interest in Ohio's clemency proceedings is barred by *Dumschat*. The process respondent seeks would be inconsistent with the heart of executive clemency, which is to grant clemency as a

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application process. Otherwise, as the Court of Appeals correctly noted, he is asserting merely a protected interest in process itself, which is not a cognizable claim. 107 F. 3d 1178, 1184 (CA6 1997); see also *Olim* v. *Wakinekona*, 461 U. S. 238, 249–250 (1983).

matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations. The dissent agrees with respondent that because "a living person" has a constitutionally protected life interest, it is incorrect to assert that respondent's life interest has been "extinguished." *Post*, at 291. We agree that respondent maintains a residual life interest, *e. g.*, in not being summarily executed by prison guards. However, as *Greenholtz* helps to make clear, respondent cannot use his interest in not being executed in accord with his sentence to challenge the clemency determination by requiring the procedural protections he seeks. 442 U. S., at 7.[3]

The reasoning of *Dumschat* did not depend on the fact that it was not a capital case. The distinctions accorded a life interest to which respondent and the dissent point, *post*, at 291–292, 293–295, are primarily relevant to trial. And this Court has generally rejected attempts to expand any distinctions further. See, *e. g.*, *Murray* v. *Giarratano*, 492 U. S. 1, 8–9 (1989) (opinion of REHNQUIST, C. J.) (there is no constitutional right to counsel in collateral proceedings for death row inmates; cases recognizing special constraints on capital proceedings have dealt with the trial stage); *Satterwhite* v. *Texas*, 486 U. S. 249, 256 (1988) (applying traditional standard of appellate review to a Sixth Amendment claim in a capital case); *Smith* v. *Murray*, 477 U. S. 527, 538 (1986) (applying same standard of review on federal habeas in capi-

[3] For the same reason, respondent's reliance on *Ford* v. *Wainwright*, 477 U. S. 399, 425 (1986), is misplaced. In *Ford*, the Court held that the Eighth Amendment prevents the execution of a person who has become insane since the time of trial. *Id.*, at 410. This substantive constitutional prohibition implicated due process protections. This protected interest, however, arose subsequent to trial, and was separate from the life interest already adjudicated in the inmate's conviction and sentence. See *id.*, at 425 (Powell, J., concurring). This interest therefore had not been afforded due process protection. The Court's recognition of a protected interest thus did not rely on the notion of a continuing "original" life interest.

tal and noncapital cases); *Ford, supra,* at 425 (Powell, J., concurring) (noting that the Court's decisions imposing heightened requirements on capital trials and sentencing proceedings do not apply in the postconviction context).[4] The Court's analysis in *Dumschat,* moreover, turned not on the fact that it was a noncapital case, but on the nature of the benefit sought: "In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." 452 U. S., at 464 (footnote omitted). A death row inmate's petition for clemency is also a "unilateral hope." The defendant in effect accepts the *finality* of the death sentence for purposes of *adjudication,* and appeals for clemency as a matter of *grace.*

Respondent also asserts that, as in *Greenholtz,* Ohio has created protected interests by establishing mandatory clemency application and review procedures. In *Greenholtz, supra,* at 11–12, the Court held that the expectancy of release on parole created by the mandatory language of the Nebraska statute was entitled to some measure of constitutional protection.

Ohio's clemency procedures do not violate due process. Despite the Authority's mandatory procedures, the ultimate decisionmaker, the Governor, retains broad discretion. Under any analysis, the Governor's executive discretion need not be fettered by the types of procedural protections sought by respondent. See *Greenholtz, supra,* at 12–16 (recognizing the Nebraska parole statute created a protected liberty

[4] The dissent provides no basis for its assertion that the special considerations afforded a capital defendant's life interest at the trial stage "apply with special force to the final stage of the decisional process that precedes an official deprivation of life." *Post,* at 295. This not only ignores our case law to the contrary, *supra,* at 281 and this page, but also assumes that executive clemency hearings are part and parcel of the judicial process preceding an execution.

interest, yet rejecting a claim that due process necessitated a formal parole hearing and a statement of evidence relied upon by the parole board). There is thus no substantive expectation of clemency. Moreover, under *Conner*, 515 U. S., at 484, the availability of clemency, or the manner in which the State conducts clemency proceedings, does not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Ibid.;* see 107 F. 3d, at 1185–1186. A denial of clemency merely means that the inmate must serve the sentence originally imposed.

Respondent also relies on the "second strand" of due process analysis adopted by the Court of Appeals. He claims that under the rationale of *Evitts* v. *Lucey*, 469 U. S. 387 (1985), clemency is an integral part of Ohio's system of adjudicating the guilt or innocence of the defendant and is therefore entitled to due process protection. Clemency, he says, is an integral part of the judicial system because it has historically been available as a significant remedy, its availability impacts earlier stages of the criminal justice system, and it enhances the reliability of convictions and sentences. Respondent further suggests, as did the Sixth Circuit, that *Evitts* established a due process continuum across all phases of the judicial process.

In *Evitts*, the Court held that there is a constitutional right to effective assistance of counsel on a first appeal as of right. *Id.*, at 396. This holding, however, was expressly based on the combination of two lines of prior decisions. One line of cases held that the Fourteenth Amendment guarantees a criminal defendant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal adequate and effective, including the right to counsel. See *Griffin* v. *Illinois*, 351 U. S., at 20; *Douglas* v. *California*, 372 U. S. 353 (1963). The second line of cases held that the Sixth Amendment right to counsel at trial comprehended the right to effective assistance of counsel. See *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963); *Cuyler* v. *Sullivan*,

446 U. S. 335, 344 (1980). These two lines of cases justified the Court's conclusion that a criminal defendant has a right to effective assistance of counsel on a first appeal as of right. *Evitts*, *supra*, at 394–396.

The Court did not thereby purport to create a new "strand" of due process analysis. And it did not rely on the notion of a continuum of due process rights. Instead, the Court evaluated the function and significance of a first appeal as of right, in light of prior cases. Related decisions similarly make clear that there is no continuum requiring varying levels of process at every conceivable phase of the criminal system. See, *e. g.*, *Giarratano*, 492 U. S., at 9–10 (no due process right to counsel for capital inmates in state postconviction proceedings); *Pennsylvania* v. *Finley*, 481 U. S. 551, 555–557 (1987) (no right to counsel in state postconviction proceedings); *Ross* v. *Moffitt*, 417 U. S. 600, 610–611 (1974) (no right to counsel for discretionary appeals on direct review).

An examination of the function and significance of the discretionary clemency decision at issue here readily shows it is far different from the first appeal of right at issue in *Evitts*. Clemency proceedings are not part of the trial—or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the executive branch, independent of direct appeal and collateral relief proceedings. *Greenholtz*, 442 U. S., at 7–8. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings. While traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally "been the business of courts." *Dumschat*, 452 U. S., at 464. Cf. *Herrera* v. *Collins*, 506 U. S. 390, 411–415 (1993) (recognizing the traditional availability and significance of clemency as part of executive authority, without suggesting that clemency proceedings are subject to judicial review); *Ex*

parte Grossman, 267 U. S. 87, 120–121 (1925) (executive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts).

Thus, clemency proceedings are not "'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,'" *Evitts*, *supra*, at 393 (quoting *Griffin* v. *Illinois*, *supra*, at 18). Procedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked. Here, the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges. Respondent is already under a sentence of death, determined to have been lawfully imposed. If clemency is granted, he obtains a benefit; if it is denied, he is no worse off than he was before.[5]

III

Respondent also presses on us the Court of Appeals' conclusion that the provision of a voluntary inmate interview, without the benefit of counsel or a grant of immunity for any statements made by the inmate, implicates the inmate's Fifth and Fourteenth Amendment right not to incriminate himself. Because there is only one guaranteed clemency review, respondent asserts, his decision to participate is not truly voluntary. And in the interview he may be forced to answer questions; or, if he remains silent, his silence may be used against him. Respondent further asserts there is a substantial risk of incrimination since postconviction proceedings are in progress and since he could potentially incriminate himself on other crimes. Respondent therefore concludes that the interview unconstitutionally conditions his assertion

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[5] The dissent mischaracterizes the question at issue as a determination to deprive a person of life. *Post*, at 290. That determination has already been made with all required due process protections.

of the right to pursue clemency on his waiver of the right to remain silent. While the Court of Appeals accepted respondent's rubric of "unconstitutional conditions," we find it unnecessary to address it in deciding this case. In our opinion, the procedures of the Authority do not under any view violate the Fifth Amendment privilege.

The Fifth Amendment protects against compelled self-incrimination. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 316–318 (1976). The record itself does not tell us what, if any, use is made by the board of the clemency interview, or of an inmate's refusal to answer questions posed to him at that interview. But the Authority in its brief dispels much of the uncertainty:

> "Nothing in the procedure grants clemency applicants immunity for what they might say or makes the interview in any way confidential. Ohio has permissibly chosen not to allow the inmate to say one thing in the interview and another in a habeas petition, and no amount of discovery will alter this feature of the procedure." Reply Brief for Petitioners 6.

Assuming also that the Authority will draw adverse inferences from respondent's refusal to answer questions—which it may do in a civil proceeding without offending the Fifth Amendment, *Palmigiano, supra,* at 316–318—we do not think that respondent's testimony at a clemency interview would be "compelled" within the meaning of the Fifth Amendment. It is difficult to see how a voluntary interview could "compel" respondent to speak. He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment.

Long ago we held that a defendant who took the stand in his own defense could not claim the privilege against self-incrimination when the prosecution sought to cross-examine

him. *Brown* v. *Walker*, 161 U. S. 591, 597–598 (1896); *Brown* v. *United States*, 356 U. S. 148, 154–155 (1958). A defendant who takes the stand in his own behalf may be impeached by proof of prior convictions without violation of the Fifth Amendment privilege. *Spencer* v. *Texas*, 385 U. S. 554, 561 (1967). A defendant whose motion for acquittal at the close of the government's case is denied must then elect whether to stand on his motion or to put on a defense, with the accompanying risk that in doing so he will augment the government's case against him. *McGautha* v. *California*, 402 U. S. 183, 215 (1971). In each of these situations, there are undoubted pressures—generated by the strength of the government's case against him—pushing the criminal defendant to testify. But it has never been suggested that such pressures constitute "compulsion" for Fifth Amendment purposes.

In *Williams* v. *Florida*, 399 U. S. 78 (1970), it was claimed that Florida's requirement of advance notice of alibi from a criminal defendant, in default of which he would be precluded from asserting the alibi defense, violated the privilege. We said:

> "Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments." *Id.*, at 84–85 (footnote omitted).

Here, respondent has the same choice of providing information to the Authority—at the risk of damaging his case for

clemency or for postconviction relief—or of remaining silent. But this pressure to speak in the hope of improving his chance of being granted clemency does not make the interview compelled. We therefore hold that the Ohio clemency interview, even on assumptions most favorable to respondent's claim, does not violate the Fifth Amendment privilege against compelled self-incrimination.

IV

We hold that neither the Due Process Clause nor the Fifth Amendment privilege against self-incrimination is violated by Ohio's clemency proceedings. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and concurring in the judgment.

A prisoner under a death sentence remains a living person and consequently has an interest in his life. The question this case raises is the issue of what process is constitutionally necessary to protect that interest in the context of Ohio's clemency procedures. It is clear that "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." *Ford* v. *Wainwright*, 477 U. S. 399, 429 (1986) (O'CONNOR, J., concurring in result in part and dissenting in part). I do not, however, agree with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards. THE CHIEF JUSTICE's reasoning rests on our decisions in *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), and *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1 (1979). In those cases, the Court found that an inmate seeking commutation of a life sentence or discre-

tionary parole had no protected liberty interest in release from lawful confinement. When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished. But it is incorrect, as Justice Stevens' dissent notes, to say that a prisoner has been deprived of all interest in his life before his execution. See *post*, at 291–292. Thus, although it is true that "pardon and commutation decisions have not traditionally been the business of courts," *Dumschat*, *supra*, at 464, and that the decision whether to grant clemency is entrusted to the Governor under Ohio law, I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.

In my view, however, a remand to permit the District Court to address respondent's specific allegations of due process violations is not required. The Ohio Death Penalty Clemency Procedure provides that, if a stay has not yet issued, the parole board must schedule a clemency hearing 45 days before an execution for a date approximately 21 days in advance of the execution. The board must also advise the prisoner that he is entitled to a prehearing interview with one or more parole board members. Although the Ohio Adult Parole Authority complied with those instructions here, respondent raises several objections to the process afforded him. He contends that 3 days' notice of his interview and 10 days' notice of the hearing were inadequate; that he did not have a meaningful opportunity to prepare his clemency application because postconviction proceedings were pending; that his counsel was improperly excluded from the interview and permitted to participate in the hearing only at the discretion of the parole board chair; and that he was precluded from testifying or submitting documentary evi-

dence at the hearing. I do not believe that any of these allegations amounts to a due process violation. The process respondent received, including notice of the hearing and an opportunity to participate in an interview, comports with Ohio's regulations and observes whatever limitations the Due Process Clause may impose on clemency proceedings. Moreover, I agree that the voluntary inmate interview that forms part of Ohio's process did not violate respondent's Fifth and Fourteenth Amendment privilege against self-incrimination.

Accordingly, I join Parts I and III of the Court's opinion and concur in the judgment.

JUSTICE STEVENS, concurring in part and dissenting in part.

When a parole board conducts a hearing to determine whether the State shall actually execute one of its death row inmates—in other words, whether the State shall deprive that person of life—does it have an obligation to comply with the Due Process Clause of the Fourteenth Amendment? In my judgment, the text of the Clause provides the answer to that question. It expressly provides that no State has the power to "deprive any person of life, liberty, or property, without due process of law."

Without deciding what "minimal, perhaps even barely perceptible," procedural safeguards are required in clemency proceedings, the Court of Appeals correctly answered the basic question presented and remanded the case to the District Court to determine whether Ohio's procedures meet the "minimal" requirements of due process.[1] In Part II of his opinion today, however, THE CHIEF JUSTICE takes a different view—essentially concluding that a clemency proceeding could *never* violate the Due Process Clause. Thus, under such reasoning, even procedures infected by bribery, per-

[1] 107 F. 3d 1178, 1187–1188 (CA6 1997).

sonal or political animosity, or the deliberate fabrication of false evidence would be constitutionally acceptable. Like JUSTICE O'CONNOR, I respectfully disagree with that conclusion.

I

The text of the Due Process Clause properly directs our attention to state action that may "deprive" a person of life, liberty, or property. When we are evaluating claims that the State has unfairly deprived someone of liberty or property, it is appropriate first to ask whether the state action adversely affected any constitutionally protected interest. Thus, we may conclude, for example, that a prisoner has no "liberty interest" in the place where he is confined, *Meachum* v. *Fano*, 427 U. S. 215 (1976), or that an at-will employee has no "property interest" in his job, *Bishop* v. *Wood*, 426 U. S. 341 (1976). There is, however, no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.

Nor does *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), counsel a different conclusion. In that case the Court held that a refusal to commute a prison inmate's life sentence was not a deprivation of his liberty because the liberty interest at stake had already been extinguished. *Id.*, at 461, 464. The holding was supported by the "crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty one desires." *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 9 (1979).[2] That "crucial distinction" points

[2] "Our language in *Greenholtz* leaves no room for doubt: 'There is *no constitutional or inherent right* of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty."' 442 U. S., at 7 (emphasis supplied; citation omitted). *Greenholtz* pointedly dis-

in the opposite direction in this case because respondent is contesting the State's decision to deprive him of life that he still has, rather than any conditional liberty that he desires. Thus, it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause.

II

There are valid reasons for concluding that even if due process is required in clemency proceedings, only the most basic elements of fair procedure are required. Presumably a State might eliminate this aspect of capital sentencing entirely, and it unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy. Nevertheless, there are equally valid reasons for concluding that these proceedings are not entirely exempt from judicial review. I think, for example, that no one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency. Our cases also support the conclusion that if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause.

Even if a State has no constitutional obligation to grant criminal defendants a right to appeal, when it does establish appellate courts, the procedures employed by those courts must satisfy the Due Process Clause. *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985). Likewise, even if a State has no duty to authorize parole or probation, if it does exercise its discre-

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tinguished parole revocation and probation revocation cases, noting that there is a 'critical' difference between denial of a prisoner's request for initial release on parole and revocation of a parolee's conditional liberty. *Id.*, at 9–11, quoting, *inter alia*, Friendly, 'Some Kind of Hearing,' 123 U. Pa. L. Rev. 1267, 1296 (1975)." *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458, 464 (1981) (footnote omitted).

tion to grant conditional liberty to convicted felons, any decision to deprive a parolee or a probationer of such conditional liberty must accord that person due process. *Morrissey* v. *Brewer*, 408 U. S. 471, 480–490 (1972); *Gagnon* v. *Scarpelli*, 411 U. S. 778, 781–782 (1973). Similarly, if a State establishes postconviction proceedings, these proceedings must comport with due process.[3]

The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in those cases.[4] For "death is a different kind of punishment

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[3] While it is true that the constitutional protections in state postconviction proceedings are less stringent than at trial or on direct review, *e. g.*, *Pennsylvania* v. *Finley*, 481 U. S. 551, 555–557 (1987), we have never held or suggested that the Due Process Clause does not apply to these proceedings. Indeed, *Finley* itself asked whether the State's postconviction proceedings comported with the "fundamental fairness mandated by the Due Process Clause." *Id.*, at 556–557; see also *Murray* v. *Giarratano*, 492 U. S. 1, 8 (1989) (opinion of REHNQUIST, C. J.) ("'[T]he fundamental fairness mandated by the Due Process Clause does not require that the [S]tate supply a lawyer'" (quoting *Finley*, 481 U. S., at 557)). THE CHIEF JUSTICE, then, is simply wrong when he states that these cases "make clear that there is no continuum requiring varying levels of process at every . . . phase of the criminal system," *ante*, at 284; instead, these cases simply turned on *what process is due*. If there could be any question whether state postconviction proceedings are subject to due process protections, our unanimous opinion in *Yates* v. *Aiken*, 484 U. S. 211, 217–218 (1988), makes it clear that they are.

[4] The Court has recognized the integral role that clemency proceedings play in the decision whether to deprive a person of life. *Herrera* v. *Collins*, 506 U. S. 390, 411–417 (1993). Indeed, every one of the 38 States that has the death penalty also has clemency procedures. Ala. Const., Amdt. 38, Ala. Code § 15–18–100 (1995); Ariz. Const., Art. V, § 5, Ariz. Rev. Stat. Ann. §§ 31–443, 31–445 (1996); Ark. Const., Art. VI, § 18, Ark. Code Ann. § 5–4–607 (1997), and § 16–93–204 (Supp. 1997); Cal. Const., Art. V, § 8, Cal. Penal Code Ann. §§ 4800–4807 (West 1982 and Supp. 1998); Colo. Const., Art. IV, § 7, Colo. Rev. Stat. §§ 16–17–101, 16–17–102 (1997); Conn. Const., Art. IV, § 13, Conn. Gen. Stat. § 18–26 (1997); Del. Const., Art. VII, § 1, Del. Code Ann., Tit. 29, § 2103 (1997); Fla. Const., Art. IV, § 8, Fla. Stat. § 940.01 (1997); Ga. Const., Art. IV, § 2, ¶ 2, Ga. Code Ann. §§ 42–9–20, 42–9–42 (1997); Idaho Const., Art. IV, § 7, Idaho Code § 20–240 (1997);

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. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 357–

Ill. Const., Art. V, § 12, Ill. Comp. Stat., ch. 730, § 5/3–3–13 (1997); Ind. Const., Art. V, § 17, Ind. Code §§ 11–9–2–1 to 11–9–2–4, 35–38–6–8 (1993); Kan. Const., Art. I, § 7, Kan. Stat. Ann. § 22–3701 (1995); 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 (1996), and Art. 41, § 4–513 (1997); Miss. Const., Art. V, § 124, Miss. Code Ann. § 47–5–115 (1981); Mo. Const., Art. IV, § 7, Mo. Rev. Stat. §§ 217.220, 217.800, 552.070 (1994); Mont. Const., Art. VI, § 12, Mont. Code Ann. §§ 46–23–301 to 46–23–316 (1994); Neb. Const., Art. IV, § 13, Neb. Rev. Stat. §§ 83–1,127 to 83–1,132 (1994); Nev. Const., Art. V, § 13, Nev. Rev. Stat. § 213.080 (1995); 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 (West 1985); N. M. Const., Art. V, § 6, N. M. Stat. Ann. § 31–21–17 (Supp. 1997); N. Y. Const., Art. IV, § 4, N. Y. Exec. Law §§ 15–19 (McKinney 1993); N. C. Const., Art. III, § 5(6), N. C. Gen. Stat. §§ 147–23 to 147–25 (1993); Ohio Const., Art. III, § 11, Ohio Rev. Code Ann. §§ 2967.01 to 2967.12 (1996); Okla. Const., Art. VI, § 10, Okla. Stat., Tit. 21, § 701.11a (Supp. 1998); Ore. Const., Art. V, § 14, Ore. Rev. Stat. §§ 144.640 to 144.670 (1991); Pa. Const., Art. IV, § 9; S. C. Const., Art. IV, § 14, S. C. Code Ann. §§ 24–21–910 to 24–21–1000 (1977 and Supp. 1997); S. D. Const., Art. IV, § 3, S. D. Codified Laws §§ 23A–27A–20 to 23A–27A–21, 24–14–1 to 24–14–7 (1988); Tenn. Const., Art. III, § 6, Tenn. Code Ann. §§ 40–27–101 to 40–27–109 (1997); Tex. Const., Art. IV, § 11, Tex. Code Crim. Proc. Ann., Art. 48.01 (Vernon Supp. 1997); Utah Const., Art. VII, § 12, Utah Code Ann. § 77–27–5.5 (1995); Va. Const., Art. V, § 12, Va. Code Ann. §§ 53.1–229 to 53.1–231 (1994); Wash. Const., Art. III, § 9, Wash. Rev. Code § 10.01.120 (1994); Wyo. Const., Art. IV, § 5, Wyo. Stat. § 7–13–801 (1995). It is, of course, irrelevant that States need not establish clemency proceedings; having established these proceedings, they must comport with due process. See *Evitts* v. *Lucey*, 469 U. S. 387, 393, 400–401 (1985).

358 (1977) (citations omitted) (plurality opinion). Those considerations apply with special force to the final stage of the decisional process that precedes an official deprivation of life.

Accordingly, while I join Part III of the Court's opinion, I cannot accept the reasoning or the conclusion in Part II. Because this case comes to us in an interlocutory posture, I agree with the Court of Appeals that the case should be remanded to the District Court, "in light of relevant evidentiary materials submitted by the parties,"[5] for a determination whether Ohio's procedures meet the minimum requirements of due process.

[5] 107 F. 3d, at 1194.

Syllabus

TEXAS *v.* UNITED STATES

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

No. 97–29. Argued January 14, 1998—Decided March 31, 1998

In 1995, the Texas Legislature enacted a comprehensive scheme (Chapter 39) that holds local school boards accountable to the State for student achievement in the public schools. When a school district falls short of Chapter 39's accreditation criteria, the State Commissioner of Education may select from 10 possible sanctions, including appointment of a master to oversee the district's operations, Tex. Educ. Code Ann. § 39.131(a)(7), or appointment of a management team to direct operations in areas of unacceptable performance or to require contracting out of services, § 39.131(a)(8). Texas, a covered jurisdiction under § 5 of the Voting Rights Act of 1965, submitted Chapter 39 to the United States Attorney General for a determination whether any of the sanctions affected voting and thus required preclearance. While the Assistant Attorney General for Civil Rights did not object to §§ 39.131(a)(7) and (8), he cautioned that under certain circumstances their implementation might result in a § 5 violation. Texas subsequently filed a complaint in the District Court, seeking a declaration that § 5 does not apply to the §§ 39.131(a)(7) and (8) sanctions. The court did not reach the merits of the case because it concluded that Texas's claim was not ripe.

Held: Texas's claim is not ripe for adjudication. A claim resting upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all,'" is not fit for adjudication. *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 580–581. Whether the problem Texas presents will ever need solving is too speculative. Texas will appoint a master or management team only after a school district falls below state standards and the Commissioner has tried other, less intrusive sanctions. Texas has not pointed to any school district in which the application of § 39.131(a)(7) or (8) is currently foreseen or even likely. Even if there were greater certainty regarding implementation, the claim would not be ripe because the legal issues Texas raises are not yet fit for judicial decision and because the hardship to Texas of withholding court consideration until the State chooses to implement one of the sanctions is insubstantial. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149. Pp. 300–302.

Affirmed.

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

Javier Aguilar, Special Assistant Attorney General of Texas, argued the cause for appellant. With him on the briefs were *Dan Morales*, Attorney General, *Jorge Vega*, First Assistant Attorney General, and *Deborah A. Verbil*, Special Assistant Attorney General.

Paul R. Q. Wolfson argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Pinzler*, *Deputy Solicitor General Wallace*, *Mark L. Gross*, and *Miriam R. Eisenstein*.*

JUSTICE SCALIA delivered the opinion of the Court.

Appellant, the State of Texas, appeals from the judgment of a three-judge District Court for the District of Columbia. The State had sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, do not apply to implementation of certain sections of the Texas Education Code that permit the State to sanction local school districts for failure to meet state-mandated educational achievement levels. This appeal presents the question whether the controversy is ripe.

I

In Texas, both the state government and local school districts are responsible for the public schools. There are more than 1,000 school districts, each run by an elected school board. In 1995, the Texas Legislature enacted a

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**Daniel J. Popeo* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Pamela S. Karlan, *Laughlin McDonald*, *Neil Bradley*, *Cristina Correia*, *Elaine R. Jones*, *Theodore M. Shaw*, *Norman J. Chachkin*, *Jacqueline Berrien*, *Victor A. Bolden*, and *Steven R. Shapiro* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

comprehensive scheme (Chapter 39) that holds local school boards accountable to the State for student achievement. Tex. Educ. Code Ann. §§ 39.021–39.131 (1996). Chapter 39 contains detailed prescriptions for assessment of student academic skills, development of academic performance indicators, determination of accreditation status for school districts, and imposition of accreditation sanctions. It seeks to measure the academic performance of Texas schoolchildren, to reward the schools and school districts that achieve the legislative goals, and to sanction those that fall short.

When a district fails to satisfy the State's accreditation criteria, the State Commissioner of Education may select from 10 possible sanctions that are listed in ascending order of severity. §§ 39.131(a)(1)–(10). Those include, "to the extent the [C]ommissioner determines necessary," § 39.131(a), appointing a master to oversee the district's operations, § 39.131(a)(7), or appointing a management team to direct the district's operations in areas of unacceptable performance or to require the district to contract for services from another person, § 39.131(a)(8). When the Commissioner appoints masters or management teams, he "shall clearly define the[ir] powers and duties" and shall review the need for them every 90 days. § 39.131(e). A master or management team may approve or disapprove any action taken by a school principal, the district superintendent, or the district's board of trustees, and may also direct them to act. §§ 39.131(e)(1), (2). State law prohibits masters or management teams from taking any action concerning a district election, changing the number of members on or the method of selecting the board of trustees, setting a tax rate for the district, or adopting a budget which establishes a different level of spending for the district from that set by the board. §§ 39.131(e)(3)–(6).

Texas is a covered jurisdiction under § 5 of the Voting Rights Act of 1965, see 28 CFR pt. 51, App. (1997), and consequently, before it can implement changes affecting vot-

ing it must obtain preclearance from the United States District Court for the District of Columbia or from the Attorney General of the United States. 42 U. S. C. § 1973c. Texas submitted Chapter 39 to the Attorney General for administrative preclearance. The Assistant Attorney General* requested further information, including the criteria used to select special masters and management teams, a detailed description of their powers and duties, and the difference between their duties and those of the elected boards. The State responded by pointing out the limits placed on masters and management teams in § 39.131(e), and by noting that the actual authority granted "is set by the Commissioner at the time of appointment depending on the needs of the district." App. to Juris. Statement 99a. After receiving this information, the Assistant Attorney General concluded that the first six sanctions do not affect voting and therefore do not require preclearance. He did not object to §§ 39.131(a)(7) and (8), insofar as the provisions are "enabling in nature," but he cautioned that "under certain foreseeable circumstances their implementation may result in a violation of Section 5" which would require preclearance. *Id.*, at 36a.

On June 7, 1996, Texas filed a complaint in the United States District Court for the District of Columbia, seeking a declaration that § 5 does not apply to the sanctions authorized by §§ 39.131(a)(7) and (8), because (1) they are not changes with respect to voting, and (2) they are consistent with conditions attached to grants of federal financial assistance that authorize and require the imposition of sanctions to ensure accountability of local education authorities. The District Court did not reach the merits of these arguments because it concluded that Texas's claim was not ripe. We noted probable jurisdiction. 521 U. S. 1150 (1997).

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*The authority for determinations under § 5 has been delegated to the Assistant Attorney General for the Civil Rights Division. 28 CFR § 51.3 (1997).

II

A claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 580–581 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)). Whether Texas will appoint a master or management team under §§ 39.131(a)(7) and (8) is contingent on a number of factors. First, a school district must fall below the state standards. Then, pursuant to state policy, the Commissioner must try first "the imposition of sanctions which do not include the appointment of a master or management team," App. 10 (Original Complaint ¶12). He may, for example, "order the preparation of a student achievement improvement plan . . . , the submission of the plan to the [C]ommissioner for approval, and implementation of the plan," § 39.131(a)(3), or "appoint an agency monitor to participate in and report to the agency on the activities of the board of trustees or the superintendent," § 39.131(a)(6). It is only if these less intrusive options fail that a Commissioner may appoint a master or management team, Tr. of Oral Arg. 16, and even then, only "to the extent the [C]ommissioner determines necessary," § 39.131(a). Texas has not pointed to any particular school district in which the application of § 39.131(a)(7) or (8) is currently foreseen or even likely. Indeed, Texas hopes that there will be no need to appoint a master or management team for any district. Tr. of Oral Arg. 16–17. Under these circumstances, where "we have no idea whether or when such [a sanction] will be ordered," the issue is not fit for adjudication. *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158, 163 (1967); see also *Renne* v. *Geary*, 501 U. S. 312, 321–322 (1991).

Even if there were greater certainty regarding ultimate implementation of paragraphs (a)(7) and (a)(8) of the statute, we do not think Texas's claim would be ripe. Ripeness "re-

quir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967). As to fitness of the issues: Texas asks us to hold that under no circumstances can the imposition of these sanctions constitute a change affecting voting. We do not have sufficient confidence in our powers of imagination to affirm such a negative. The operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true, "[d]etermination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Longshoremen* v. *Boyd*, 347 U. S. 222, 224 (1954). In the present case, the remoteness and abstraction are increased by the fact that Chapter 39 has yet to be interpreted by the Texas courts. Thus, "[p]ostponing consideration of the questions presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe" the provisions. *Renne*, *supra*, at 323.

And as for hardship to the parties: This is not a case like *Abbott Laboratories* v. *Gardner*, *supra*, at 152, where the regulation at issue had a "direct effect on the day-to-day business" of the plaintiffs, because they were compelled to affix required labeling to their products under threat of criminal sanction. Texas is not required to engage in, or to refrain from, any conduct, unless and until it chooses to implement one of the noncleared remedies. To be sure, if that contingency should arise compliance with the preclearance procedure could delay much needed action. (Prior to this litigation, Texas sought preclearance for the appointment of a master in a Dallas County school district, and despite a request for expedition the Attorney General took 90 days to give approval. See Brief for Appellant 37, n. 28.) But even that inconvenience is avoidable. If Texas is confident that

the imposition of a master or management team does not constitute a change affecting voting, it should simply go ahead with the appointment. Should the Attorney General or a private individual bring suit (and if the matter is as clear, even at this distance, as Texas thinks it is), we have no reason to doubt that a district court will deny a preliminary injunction. See *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 506 (1992); *City of Lockhart* v. *United States*, 460 U. S. 125, 129, n. 3 (1983). Texas claims that it suffers the immediate hardship of a "threat to federalism." But that is an abstraction—and an abstraction no graver than the "threat to personal freedom" that exists whenever an agency regulation is promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected. Cf. *Toilet Goods Assn., supra*, at 164.

In sum, we find it too speculative whether the problem Texas presents will ever need solving; we find the legal issues Texas raises not yet fit for our consideration, and the hardship to Texas of biding its time insubstantial. Accordingly, we agree with the District Court that this matter is not ripe for adjudication.

The judgment of the District Court is affirmed.

It is so ordered.

Syllabus

UNITED STATES *v.* SCHEFFER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 96–1133. Argued November 3, 1997—Decided March 31, 1998

A polygraph examination of respondent airman indicated, in the opinion of the Air Force examiner administering the test, that there was "no deception" in respondent's denial that he had used drugs since enlisting. Urinalysis, however, revealed the presence of methamphetamine, and respondent was tried by general court-martial for using that drug and for other offenses. In denying his motion to introduce the polygraph evidence to support his testimony that he did not knowingly use drugs, the military judge relied on Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings. Respondent was convicted on all counts, and the Air Force Court of Criminal Appeals affirmed. The Court of Appeals for the Armed Forces reversed, holding that a *per se* exclusion of polygraph evidence offered by an accused to support his credibility violates his Sixth Amendment right to present a defense.

Held: The judgment is reversed.

44 M. J. 442, reversed.

JUSTICE THOMAS delivered the opinion of the Court with respect to Parts I, II–A, and II–D, concluding that Military Rule of Evidence 707 does not unconstitutionally abridge the right of accused members of the military to present a defense. Pp. 308–312, 315–317.

(a) A defendant's right to present relevant evidence is subject to reasonable restrictions to accommodate other legitimate interests in the criminal trial process. See, *e. g.*, *Rock* v. *Arkansas*, 483 U. S. 44, 55. State and federal rulemakers therefore have broad latitude under the Constitution to establish rules excluding evidence. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *E. g.*, *id.*, at 56. This Court has found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. See, *e. g.*, *id.*, at 58. Rule 707 serves the legitimate interest of ensuring that only reliable evidence is introduced. There is simply no consensus that polygraph evidence is reliable: The scientific community and the state and federal courts are extremely polarized on the matter. Pp. 308–312.

Syllabus

(b) Rule 707 does not implicate a sufficiently weighty interest of the accused to raise a constitutional concern under this Court's precedents. The three cases principally relied upon by the Court of Appeals, *Rock*, *supra*, at 57, *Washington* v. *Texas*, 388 U. S. 14, 23, and *Chambers* v. *Mississippi*, 410 U. S. 284, 302–303, do not support a right to introduce polygraph evidence, even in very narrow circumstances. The exclusions of evidence there declared unconstitutional significantly undermined fundamental elements of the accused's defense. Such is not the case here, where the court members heard all the relevant details of the charged offense from respondent's perspective, and Rule 707 did not preclude him from introducing any factual evidence, but merely barred him from introducing expert opinion testimony to bolster his own credibility. Moreover, in contrast to the rule at issue in *Rock*, *supra*, at 52, Rule 707 did not prohibit respondent from testifying on his own behalf; he freely exercised his choice to convey his version of the facts at trial. Pp. 315–317.

THOMAS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and II–D, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts II–B and II–C, in which REHNQUIST, C. J., and SCALIA and SOUTER, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR, GINSBURG, and BREYER, JJ., joined, *post*, p. 318. STEVENS, J., filed a dissenting opinion, *post*, p. 320.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger*, *Acting Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, *David C. Frederick*, *Joel M. Gershowitz*, and *Michael J. Breslin.*

Kim L. Sheffield argued the cause for respondent. With her on the brief were *Carol L. Hubbard*, *Michael L. McIntyre*, *Robin S. Wink*, and *W. Craig Mullen.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *John M. Bailey*, Chief State's Attorney of Connecticut, and *Judith Rossi*, Senior Assistant State's Attorney, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *M. Jane Brady* of Delaware, *Thurbert E. Baker*

JUSTICE THOMAS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and II–D, and an opinion with respect to Parts II–B and II–C, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE SOUTER join.

This case presents the question whether Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, unconstitutionally abridges the right of accused members of the military to present a defense. We hold that it does not.

I

In March 1992, respondent Edward Scheffer, an airman stationed at March Air Force Base in California, volunteered to work as an informant on drug investigations for the Air Force Office of Special Investigations (OSI). His OSI supervisors advised him that, from time to time during the course of his undercover work, they would ask him to submit to drug testing and polygraph examinations. In early April,

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of Georgia, *Jeffrey A. Modisett* of Indiana, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Charles Molony Condon* of South Carolina, *Richard Cullen* of Virginia, *Christine O. Gregoire* of Washington, *Robert A. Butterworth* of Florida, and *William U. Hill* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Briefs of *amici curiae* urging affirmance were filed for the American Polygraph Association by *Gordon L. Vaughan;* for the United States Army Defense Appellate Division by *John T. Phelps II;* for the Committee of Concerned Social Scientists by *Charles F. Peterson;* for the National Association of Criminal Defense Lawyers by *Charles W. Daniels* and *Barbara E. Bergman;* and for the United States Navy-Marine Corps Appellate Defense Division by *Syed N. Ahmad.*

one of the OSI agents supervising respondent requested that he submit to a urine test. Shortly after providing the urine sample, but before the results of the test were known, respondent agreed to take a polygraph test administered by an OSI examiner. In the opinion of the examiner, the test "indicated no deception" when respondent denied using drugs since joining the Air Force.[1]

On April 30, respondent unaccountably failed to appear for work and could not be found on the base. He was absent without leave until May 13, when an Iowa state patrolman arrested him following a routine traffic stop and held him for return to the base. OSI agents later learned that respondent's urinalysis revealed the presence of methamphetamine.

Respondent was tried by general court-martial on charges of using methamphetamine, failing to go to his appointed place of duty, wrongfully absenting himself from the base for 13 days, and, with respect to an unrelated matter, uttering 17 insufficient funds checks. He testified at trial on his own behalf, relying upon an "innocent ingestion" theory and denying that he had knowingly used drugs while working for OSI. On cross-examination, the prosecution attempted to impeach respondent with inconsistencies between his trial testimony and earlier statements he had made to OSI.

Respondent sought to introduce the polygraph evidence in support of his testimony that he did not knowingly use drugs. The military judge denied the motion, relying on Military Rule of Evidence 707, which provides, in relevant part:

> "(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take,

[1] The OSI examiner asked three relevant questions: (1) "Since you've been in the [Air Force], have you used any illegal drugs?"; (2) "Have you lied about any of the drug information you've given OSI?"; and (3) "Besides your parents, have you told anyone you're assisting OSI?" Respondent answered "no" to each question. App. 12.

> failure to take, or taking of a polygraph examination, shall not be admitted into evidence."

The military judge determined that Rule 707 was constitutional because "the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant."[2] App. 28. He further reasoned that the factfinder might give undue weight to the polygraph examiner's testimony, and that collateral arguments about such evidence could consume "an inordinate amount of time and expense." *Ibid.*

Respondent was convicted on all counts and was sentenced to a bad-conduct discharge, confinement for 30 months, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The Air Force Court of Criminal Appeals affirmed in all material respects, explaining that Rule 707 "does not arbitrarily limit the accused's ability to present reliable evidence." 41 M. J. 683, 691 (1995) (en banc).

By a 3-to-2 vote, the United States Court of Appeals for the Armed Forces reversed. 44 M. J. 442 (1996). Without pointing to any particular language in the Sixth Amendment, the Court of Appeals held that "[a] *per se* exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility . . . violates his Sixth Amendment right to present a defense." *Id.*, at 445.[3] Judge Crawford, dissent-

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[2] Article 36 of the Uniform Code of Military Justice authorizes the President, as Commander in Chief of the Armed Forces, see U. S. Const., Art. II, § 2, to promulgate rules of evidence for military courts: "Pretrial, trial, and post-trial procedures, including modes of proof, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U. S. C. § 836(a).

[3] In this Court, respondent cites the Sixth Amendment's Compulsory Process Clause as the specific constitutional provision supporting his claim. He also briefly contends that the "combined effect" of the Fifth and Sixth Amendments confers upon him the right to a "'meaningful op-

ing, stressed that a defendant's right to present relevant evidence is not absolute, that relevant evidence can be excluded for valid reasons, and that Rule 707 was supported by a number of valid justifications. *Id.*, at 449–451. We granted certiorari, 520 U. S. 1227 (1997), and we now reverse.

II

A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions.[4] See *Taylor* v. *Illinois*, 484 U. S. 400, 410 (1988); *Rock* v. *Arkansas*, 483 U. S. 44, 55 (1987); *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973). A defendant's interest in presenting such evidence may thus "'bow to accommodate other legitimate interests in the criminal trial process.'" *Rock*, *supra*, at 55 (quoting *Chambers*, *supra*, at 295); accord, *Michigan* v. *Lucas*, 500 U. S. 145, 149 (1991). As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Rock*, *supra*, at 56; accord, *Lucas*, *supra*, at 151. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. See *Rock*, *supra*, at 58; *Chambers*, *supra*, at 302; *Washington* v. *Texas*, 388 U. S. 14, 22–23 (1967).

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portunity to present a complete defense,'" *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986) (citations omitted), and that this right in turn encompasses a constitutional right to present polygraph evidence to bolster his credibility.

[4] The words "defendant" and "jury" are used throughout in reference to general principles of law and in discussing nonmilitary precedents. In reference to this case or to the military specifically, the terms "court," "court members," or "court-martial" are used throughout, as is the military term "accused," rather than the civilian term "defendant."

Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the court members' role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.[5] The Rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents.

A

State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules. See, *e. g.*, Fed. Rules Evid. 702, 802, 901; see also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589 (1993).

The contentions of respondent and the dissent notwithstanding, there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. 1 D. Faigman, D. Kaye, M. Saks, & J. Sanders, Modern Scientific Evidence 565, n. †, § 14–2.0 to § 14–7.0 (1997); see also 1 P. Giannelli & E. Imwinkelried, Scientific

[5] These interests, among others, were recognized by the drafters of Rule 707, who justified the Rule on the following grounds: the risk that court members would be misled by polygraph evidence; the risk that the traditional responsibility of court members to ascertain the facts and adjudge guilt or innocence would be usurped; the danger that confusion of the issues "'could result in the court-martial degenerating into a trial of the polygraph machine;'" the likely waste of time on collateral issues; and the fact that the "'reliability of polygraph evidence has not been sufficiently established.'" See 41 M. J. 683, 686 (USAF Ct. Crim. App. 1995) (citing Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence, App. 22, p. A22–46 (1994 ed.)).

Evidence § 8–2(C), pp. 225–227 (2d ed. 1993) (hereinafter Giannelli & Imwinkelried); 1 J. Strong, McCormick on Evidence § 206, p. 909 (4th ed. 1992) (hereinafter McCormick). Some studies have concluded that polygraph tests overall are accurate and reliable. See, *e. g.,* S. Abrams, The Complete Polygraph Handbook 190–191 (1989) (reporting the overall accuracy rate from laboratory studies involving the common "control question technique" polygraph to be "in the range of 87 percent"). Others have found that polygraph tests assess truthfulness significantly less accurately—that scientific field studies suggest the accuracy rate of the "control question technique" polygraph is "little better than could be obtained by the toss of a coin," that is, 50 percent. See Iacono & Lykken, The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests, in 1 Modern Scientific Evidence, *supra,* § 14–5.3, at 629 (hereinafter Iacono & Lykken).[6]

This lack of scientific consensus is reflected in the disagreement among state and federal courts concerning both the

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[6] The United States notes that in 1983 Congress' Office of Technology Assessment evaluated all available studies on the reliability of polygraphs and concluded that "'[o]verall, the cumulative research evidence suggests that when used in criminal investigations, the polygraph test detects deception better than chance, but with error rates that could be considered significant.'" Brief for United States 21 (quoting U. S. Congress, Office of Technology Assessment, Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum 5 (OTA–TM–H–15, Nov. 1983)). Respondent, however, contends current research shows polygraph testing is reliable more than 90 percent of the time. Brief for Respondent 22, and n. 19 (citing J. Matte, Forensic Psychophysiology Using the Polygraph 121–129 (1996)). Even if the basic debate about the reliability of polygraph technology itself were resolved, however, there would still be controversy over the efficacy of countermeasures, or deliberately adopted strategies that a polygraph examinee can employ to provoke physiological responses that will obscure accurate readings and thus "fool" the polygraph machine and the examiner. See, *e. g.,* Iacono & Lykken § 14–3.0.

admissibility and the reliability of polygraph evidence.[7] Although some Federal Courts of Appeals have abandoned the *per se* rule excluding polygraph evidence, leaving its admission or exclusion to the discretion of district courts under *Daubert*, see, *e. g.*, *United States* v. *Posado*, 57 F. 3d 428, 434 (CA5 1995); *United States* v. *Cordoba*, 104 F. 3d 225, 228 (CA9 1997), at least one Federal Circuit has recently reaffirmed its *per se* ban, see *United States* v. *Sanchez*, 118 F. 3d 192, 197 (CA4 1997), and another recently noted that it has "not decided whether polygraphy has reached a sufficient state of reliability to be admissible." *United States* v. *Messina*, 131 F. 3d 36, 42 (CA2 1997). Most States maintain *per se* rules excluding polygraph evidence. See, *e. g.*, *State* v. *Porter*, 241 Conn. 57, 92–95, 698 A. 2d 739, 758–759 (1997); *People* v. *Gard*, 158 Ill. 2d 191, 202–204, 632 N. E. 2d 1026, 1032 (1994); *In re Odell*, 672 A. 2d 457, 459 (RI 1996) *(per curiam); Perkins* v. *State*, 902 S. W. 2d 88, 94–95 (Ct. App. Tex. 1995). New Mexico is unique in making polygraph evidence generally admissible without the prior stipulation of the parties and without significant restriction. See N. M.

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[7] Until quite recently, federal and state courts were uniform in categorically ruling polygraph evidence inadmissible under the test set forth in *Frye* v. *United States*, 293 F. 1013 (CADC 1923), which held that scientific evidence must gain the general acceptance of the relevant expert community to be admissible. In *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), we held that *Frye* had been superseded by the Federal Rules of Evidence and that expert testimony could be admitted if the district court deemed it both relevant and reliable.

Prior to *Daubert*, neither federal nor state courts found any Sixth Amendment obstacle to the categorical rule. See, *e. g.*, *Bashor* v. *Risley*, 730 F. 2d 1228, 1238 (CA9), cert. denied, 469 U. S. 838 (1984); *People* v. *Price*, 1 Cal. 4th 324, 419–420, 821 P. 2d 610, 663 (1991), cert. denied, 506 U. S. 851 (1992). Nothing in *Daubert* foreclosed, as a constitutional matter, *per se* exclusionary rules for certain types of expert or scientific evidence. It would be an odd inversion of our hierarchy of laws if altering or interpreting a rule of evidence worked a corresponding change in the meaning of the Constitution.

Rule Evid. § 11–707.[8] Whatever their approach, state and federal courts continue to express doubt about whether such evidence is reliable. See, *e. g., United States* v. *Messina*, *supra*, at 42; *United States* v. *Posado*, *supra*, at 434; *State* v. *Porter*, *supra*, at 126–127, 698 A. 2d, at 774; *Perkins* v. *State*, *supra*, at 94; *People* v. *Gard*, *supra*, at 202–204, 632 N. E. 2d, at 1032; *In re Odell*, *supra*, at 459.

The approach taken by the President in adopting Rule 707—excluding polygraph evidence in all military trials—is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a *per se* rule excluding all polygraph evidence.

B

It is equally clear that Rule 707 serves a second legitimate governmental interest: Preserving the court members' core

[8] Respondent argues that because the Government—and in particular the Department of Defense—routinely uses polygraph testing, the Government must consider polygraphs reliable. Governmental use of polygraph tests, however, is primarily in the field of personnel screening, and to a lesser extent as a tool in criminal and intelligence investigations, but not as evidence at trials. See Brief for United States 34, n. 17; Barland, The Polygraph Test in the USA and Elsewhere, in The Polygraph Test 76 (A. Gale ed. 1988). Such limited, out of court uses of polygraph techniques obviously differ in character from, and carry less severe consequences than, the use of polygraphs as evidence in a criminal trial. They do not establish the reliability of polygraphs as trial evidence, and they do not invalidate reliability as a valid concern supporting Rule 707's categorical ban.

function of making credibility determinations in criminal trials. A fundamental premise of our criminal trial system is that "the *jury* is the lie detector." *United States* v. *Barnard*, 490 F. 2d 907, 912 (CA9 1973) (emphasis added), cert. denied, 416 U. S. 959 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." *Aetna Life Ins. Co.* v. *Ward*, 140 U. S. 76, 88 (1891).

By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations. The common form of polygraph test measures a variety of physiological responses to a set of questions asked by the examiner, who then interprets these physiological correlates of anxiety and offers an opinion to the jury about whether the witness—often, as in this case, the accused—was deceptive in answering questions about the very matters at issue in the trial. See 1 McCormick § 206.[9] Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive

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[9] The examiner interprets various physiological responses of the examinee, including blood pressure, perspiration, and respiration, while asking a series of questions, commonly in three categories: direct accusatory questions concerning the matter under investigation, irrelevant or neutral questions, and more general "control" questions concerning wrongdoing by the subject in general. The examiner forms an opinion of the subject's truthfulness by comparing the physiological reactions to each set of questions. See generally Giannelli & Imwinkelried 219–222; Honts & Quick, The Polygraph in 1995: Progress in Science and the Law, 71 N. D. L. Rev. 987, 990–992 (1995).

weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt. Those jurisdictions may also take into account the fact that a judge cannot determine, when ruling on a motion to admit polygraph evidence, whether a particular polygraph expert is likely to influence the jury unduly. For these reasons, the President is within his constitutional prerogative to promulgate a *per se* rule that simply excludes all such evidence.

C

A third legitimate interest served by Rule 707 is avoiding litigation over issues other than the guilt or innocence of the accused. Such collateral litigation prolongs criminal trials and threatens to distract the jury from its central function of determining guilt or innocence. Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case.[10] It thus offends no constitutional principle for the President to conclude that a *per se* rule excluding all polygraph evidence is appropriate. Because litigation over the admissibility of polygraph evidence is by its very nature col-

[10] Although some of this litigation could take place outside the presence of the jury, at the very least a foundation must be laid for the jury to assess the qualifications and skill of the polygrapher and the validity of the exam, and significant cross-examination could occur on these issues.

lateral, a *per se* rule prohibiting its admission is not an arbitrary or disproportionate means of avoiding it.[11]

D

The three of our precedents upon which the Court of Appeals principally relied, *Rock* v. *Arkansas*, *Washington* v. *Texas*, and *Chambers* v. *Mississippi*, do not support a right to introduce polygraph evidence, even in very narrow circumstances. The exclusions of evidence that we declared unconstitutional in those cases significantly undermined fundamental elements of the defendant's defense. Such is not the case here.

In *Rock*, the defendant, accused of a killing to which she was the only eyewitness, was allegedly able to remember the facts of the killing only after having her memory hypnotically refreshed. See *Rock* v. *Arkansas*, 483 U. S., at 46. Because Arkansas excluded all hypnotically refreshed testimony, the defendant was unable to testify about certain relevant facts, including whether the killing had been accidental. See *id.*, at 47–49. In holding that the exclusion of this evidence violated the defendant's "right to present a defense," we noted that the rule deprived the jury of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts. See *id.*, at 57. Moreover, the rule infringed upon the defendant's interest in testifying in her own defense—an interest that we deemed particularly significant, as it is the defendant who is the target of any crimi-

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[11] Although the Court of Appeals stated that it had "merely remove[d] the obstacle of the *per se* rule against admissibility" of polygraph evidence in cases where the accused wishes to proffer an exculpatory polygraph to rebut an attack on his credibility, 44 M. J. 442, 446 (1996), and respondent thus implicitly argues that the Constitution would require collateral litigation only in such cases, we cannot see a principled justification whereby a right derived from the Constitution could be so narrowly contained.

nal prosecution. See *id.*, at 52. For this reason, we stated that a defendant ought to be allowed "to present his own version of events in his own words." *Ibid.*

In *Washington*, the statutes involved prevented co-defendants or coparticipants in a crime from testifying for one another and thus precluded the defendant from introducing his accomplice's testimony that the accomplice had in fact committed the crime. See *Washington* v. *Texas*, 388 U. S., at 16–17. In reversing Washington's conviction, we held that the Sixth Amendment was violated because "the State arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed." *Id.*, at 23.[12]

In *Chambers*, we found a due process violation in the combined application of Mississippi's common-law "voucher rule," which prevented a party from impeaching his own witness, and its hearsay rule that excluded the testimony of three persons to whom that witness had confessed. See *Chambers* v. *Mississippi*, 410 U. S., at 302. *Chambers* specifically confined its holding to the "facts and circumstances" presented in that case; we thus stressed that the ruling did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.*, at 302–303. *Chambers* therefore does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence.

Rock, *Washington*, and *Chambers* do not require that Rule 707 be invalidated, because, unlike the evidentiary rules at issue in those cases, Rule 707 does not implicate any signifi-

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[12] In addition, we noted that the State of Texas could advance no legitimate interests in support of the evidentiary rules at issue, and those rules burdened only the defense and not the prosecution. See 388 U. S., at 22–23. Rule 707 suffers from neither of these defects.

cant interest of the accused. Here, the court members heard all the relevant details of the charged offense from the perspective of the accused, and the Rule did not preclude him from introducing any factual evidence.[13] Rather, respondent was barred merely from introducing expert opinion testimony to bolster his own credibility. Moreover, in contrast to the rule at issue in *Rock*, Rule 707 did not prohibit respondent from testifying on his own behalf; he freely exercised his choice to convey his version of the facts to the court-martial members. We therefore cannot conclude that respondent's defense was significantly impaired by the exclusion of polygraph evidence. Rule 707 is thus constitutional under our precedents.

* * *

For the foregoing reasons, Military Rule of Evidence 707 does not unconstitutionally abridge the right to present a defense. The judgment of the Court of Appeals is reversed.

It is so ordered.

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[13] The dissent suggests, *post*, at 331, that polygraph results constitute "factual evidence." The raw results of a polygraph exam—the subject's pulse, respiration, and perspiration rates—may be factual data, but these are not introduced at trial, and even if they were, they would not be "facts" about the alleged crime at hand. Rather, the evidence introduced is the expert opinion testimony of the polygrapher about whether the subject was truthful or deceptive in answering questions about the alleged crime. A *per se* rule excluding polygraph results therefore does not prevent an accused—just as it did not prevent respondent here—from introducing factual evidence or testimony about the crime itself, such as alibi witness testimony, see *ibid.* For the same reasons, an expert polygrapher's interpretation of polygraph results is not evidence of "'the accused's whole conduct,'" see *post*, at 336, to which Dean Wigmore referred. It is not evidence of the "'accused's . . . conduct'" at all, much less "conduct" concerning the actual crime at issue. It is merely the opinion of a witness with no knowledge about any of the facts surrounding the alleged crime, concerning whether the defendant spoke truthfully or deceptively on another occasion.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and concurring in the judgment.

I join Parts I, II–A, and II–D of the opinion of the Court.

In my view it should have been sufficient to decide this case to observe, as the principal opinion does, that various courts and jurisdictions "may reasonably reach differing conclusions as to whether polygraph evidence should be admitted." *Ante*, at 312. The continuing, good-faith disagreement among experts and courts on the subject of polygraph reliability counsels against our invalidating a *per se* exclusion of polygraph results or of the fact an accused has taken or refused to take a polygraph examination. If we were to accept respondent's position, of course, our holding would bind state courts, as well as military and federal courts. Given the ongoing debate about polygraphs, I agree the rule of exclusion is not so arbitrary or disproportionate that it is unconstitutional.

I doubt, though, that the rule of *per se* exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does. Though the considerable discretion given to the trial court in admitting or excluding scientific evidence is not a constitutional mandate, see *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 587 (1993), there is some tension between that rule and our holding today. And, as JUSTICE STEVENS points out, there is much inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests.

With all respect, moreover, it seems the principal opinion overreaches when it rests its holding on the additional ground that the jury's role in making credibility determinations is diminished when it hears polygraph evidence. I am in substantial agreement with JUSTICE STEVENS' observation that the argument demeans and mistakes the role and

competence of jurors in deciding the factual question of guilt or innocence. *Post*, at 336–337. In the last analysis the principal opinion says it is unwise to allow the jury to hear "a conclusion about the ultimate issue in the trial." *Ante*, at 314. I had thought this tired argument had long since been given its deserved repose as a categorical rule of exclusion. Rule 704(a) of the Federal Rules of Evidence states: "Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The Advisory Committee's Notes state:

> "The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from 'usurping the province of the jury,' is aptly characterized as 'empty rhetoric.' 7 Wigmore § 1920, p. 17." Advisory Committee's Notes on Fed. Rule Evid. 704, 28 U. S. C., p. 888.

The principal opinion is made less convincing by its contradicting the rationale of Rule 704 and the well considered reasons the Advisory Committee recited in support of its adoption.

The attempt to revive this outmoded theory is especially inapt in the context of the military justice system; for the one narrow exception to the abolition of the ultimate issue rule still surviving in the Federal Rules of Evidence has been omitted from the corresponding rule adopted for the military. The ultimate issue exception in the Federal Rules of Evidence is as follows:

> "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may

> state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." Fed. Rule Evid. 704(b).

The drafting committee for the Military Rules of Evidence renounced even this remnant. It said: "The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts." Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence, App. 22, p. A22–48 (1995 ed.). Any supposed need to protect the role of the finder of fact is diminished even further by this specific acknowledgment that members of military courts are not likely to give excessive weight to opinions of experts or otherwise to be misled or confused by their testimony. Neither in the federal system nor in the military courts, then, is it convincing to say that polygraph test results should be excluded because of some lingering concern about usurping the jury's responsibility to decide ultimate issues.

JUSTICE STEVENS, dissenting.

The United States Court of Appeals for the Armed Forces held that the President violated the Constitution in June 1991, when he promulgated Rule 707 of the Military Rules of Evidence. Had I been a member of that court, I would not have decided that question without first requiring the parties to brief and argue the antecedent question whether Rule 707 violates Article 36(a) of the Uniform Code of Military Justice, 10 U. S. C. § 836(a). As presently advised, I am persuaded that the Rule does violate the statute and should be held invalid for that reason. I also agree with the Court of Appeals that the Rule is unconstitutional. This Court's contrary holding rests on a serious undervaluation of the importance of the citizen's constitutional right to present a de-

fense to a criminal charge and an unrealistic appraisal of the importance of the governmental interests that undergird the Rule. Before discussing the constitutional issue, I shall comment briefly on the statutory question.

I

Rule 707 is a blanket rule of exclusion.[1] No matter how reliable and how probative the results of a polygraph test may be, Rule 707 categorically denies the defendant any opportunity to persuade the court that the evidence should be received for any purpose. Indeed, even if the parties stipulate in advance that the results of a lie detector test may be admitted, the Rule requires exclusion.

The principal charge against the respondent in this case was that he had knowingly used methamphetamine. His principal defense was "innocent ingestion"; even if the urinalysis test conducted on April 7, 1992, correctly indicated that he did ingest the substance, he claims to have been unaware of that fact. The results of the lie detector test conducted three days later, if accurate, constitute factual evidence that his physical condition at that time was consistent with the theory of his defense and inconsistent with the theory of the prosecution. The results were also relevant because they tended to confirm the credibility of his testimony. Under Rule 707, even if the results of the polygraph test were more reliable than the results of the urinalysis, the weaker evidence is admissible and the stronger evidence is inadmissible.

Under the now discredited reasoning in a case decided 75 years ago, *Frye* v. *United States*, 54 App. D. C. 46, 293

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[1] Rule 707 states, in relevant part:

"Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." Mil. Rule Evid. 707(a).

F. 1013 (1923), that anomalous result would also have been reached in nonmilitary cases tried in the federal courts. In recent years, however, we have not only repudiated *Frye*'s general approach to scientific evidence, but the federal courts have also been engaged in the process of rejecting the once-popular view that all lie detector evidence should be categorically inadmissible.[2] Well reasoned opinions are concluding, consistently with this Court's decisions in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), and *General Electric Co.* v. *Joiner*, 522 U. S. 136 (1997), that the federal rules wisely allow district judges to exercise broad discretion when evaluating the admissibility of scientific evidence.[3] Those opinions correctly observe that the rules of evidence generally recognized in the trial of civil and criminal cases in the federal courts do not contain any blanket prohibition against the admissibility of polygraph evidence.

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[2] "There is no question that in recent years polygraph testing has gained increasingly widespread acceptance as a useful and reliable scientific tool. Because of the advances that have been achieved in the field which have led to the greater use of polygraph examination, coupled with a lack of evidence that juries are unduly swayed by polygraph evidence, we agree with those courts which have found that a per se rule disallowing polygraph evidence is no longer warranted. . . . Thus, we believe the best approach in this area is one which balances the need to admit all relevant and reliable evidence against the danger that the admission of the evidence for a given purpose will be unfairly prejudicial." *United States* v. *Piccinonna*, 885 F. 2d 1529, 1535 (CA11 1989). "[W]e do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court." *United States* v. *Posado*, 57 F. 3d 428, 434 (CA5 1995).

[3] "The per se . . . rule excluding unstipulated polygraph evidence is inconsistent with the 'flexible inquiry' assigned to the trial judge by *Daubert*. This is particularly evident because *Frye*, which was overruled by *Daubert*, involved the admissibility of polygraph evidence." *United States* v. *Cordoba*, 104 F. 3d 225, 227 (CA9 1997).

In accord with the modern trend of decisions on this admissibility issue, in 1987 the Court of Military Appeals held that an accused was "entitled to attempt to lay" the foundation for admission of favorable polygraph evidence. *United States* v. *Gipson*, 24 M. J. 246, 253 (1987). The President responded to *Gipson* by adopting Rule 707. The governing statute authorized him to promulgate evidentiary rules "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U. S. C. § 836(a).[4] Thus, if there are military concerns that warrant a special rule for military tribunals, the statute gives him ample authority to promulgate special rules that take such concerns into account.

Rule 707 has no counterpart in either the Federal Rules of Evidence or the Federal Rules of Criminal Procedure. Moreover, to the extent that the use of the lie detector plays a special role in the military establishment, military practices are more favorable to a rule of admissibility than is the less structured use of lie detectors in the civilian sector of our society. That is so because the military carefully regulates the administration of polygraph tests to ensure reliable results. The military maintains "very stringent standards for polygraph examiners"[5] and has established its own Poly-

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[4] "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U. S. C. § 836(a).

[5] According to the Department of Defense's 1996 Report to Congress:

"The Department of Defense maintains very stringent standards for polygraph examiners. The Department of Defense Polygraph Institute's basic polygraph program is the only program known to base its curriculum on forensic psychophysiology, and conceptual, abstract, and applied knowl-

graph Institute, which is "generally considered to be the best training facility for polygraph examiners in the United States."[6] The military has administered hundreds of thousands of such tests and routinely uses their results for a wide variety of official decisions.[7]

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edge that meet the requirements of a master's degree-level of study. Candidates selected for the Department of Defense polygraph positions must meet the following minimum requirements:

"1. Be a United States citizen.

"2. Be at least 25 years of age.

"3. Be a graduate of an accredited four-year college or have equivalent experience that demonstrates the ability to master graduate-level academic courses.

"4. Have two years of experience as an investigator with a Federal or other law enforcement agency. . . .

"5. Be of high moral character and sound emotional temperament, as confirmed by a background investigation.

"6. Complete a Department of Defense-approved course of polygraph instruction.

"7. Be adjudged suitable for the position after being administered a polygraph examination designed to ensure that the candidate realizes, and is sensitive to, the personal impact of such examinations.

"All federal polygraph examiners receive their basic polygraph training at the Department of Defense Polygraph Institute. After completing the basic polygraph training, DoD personnel must serve an internship consisting of a minimum of six months on-the-job-training and conduct at least 25 polygraph examinations under the supervision of a certified polygraph examiner before being certified as a Department of Defense polygraph examiner. In addition, DoD polygraph examiners are required to complete 80 hours of continuing education every two years." Department of Defense Polygraph Program, Annual Polygraph Report to Congress, Fiscal Year 1996, pp. 14–15; see also Yankee, The Current Status of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception, 40 J. Forensic Sciences 63 (1995).

[6] Honts & Perry, Polygraph Admissibility: Changes and Challenges, 16 Law and Human Behavior 357, 359, n. 1 (1992) (hereinafter Honts & Perry).

[7] Between 1981 and 1997, the Department of Defense conducted over 400,000 polygraph examinations to resolve issues arising in counterintelligence, security, and criminal investigations. Department of Defense Polygraph Program, Annual Polygraph Report to Congress, Fiscal Year

The stated reasons for the adoption of Rule 707 do not rely on any special military concern. They merely invoke three interests: (1) the interest in excluding unreliable evidence; (2) the interest in protecting the trier of fact from being misled by an unwarranted assumption that the polygraph evidence has "an aura of near infallibility"; and (3) the interest in avoiding collateral debates about the admissibility of particular test results.

It seems clear that those interests pose less serious concerns in the military than in the civilian context. Disputes about the qualifications of the examiners, the equipment, and the testing procedures should seldom arise with respect to the tests conducted by the military. Moreover, there surely is no reason to assume that military personnel who perform the factfinding function are less competent than ordinary jurors to assess the reliability of particular results, or their relevance to the issues.[8] Thus, there is no identifiable military concern that justifies the President's promulgation of a special military rule that is more burdensome to the accused in military trials than the evidentiary rules applicable to the trial of civilians.

It, therefore, seems fairly clear that Rule 707 does not comply with the statute. I do not rest on this ground, however, because briefing might persuade me to change my views, and because the Court has decided only the constitutional question.

II

The Court's opinion barely acknowledges that a person accused of a crime has a constitutional right to present a

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1997, p. 1; *id.*, Fiscal Year 1996, p. 1; *id.*, Fiscal Year 1995, p. 1; *id.*, Fiscal Year 1994, p. 1; *id.*, Fiscal Year 1993, App. A; *id.*, Fiscal Year 1992, App. A; *id.*, Fiscal Year 1991, App. A–1 (reporting information for 1981–1991).

[8] When the members of the court-martial are officers, as was true in this case, they typically have at least a college degree as well as significant military service. See 10 U. S. C. § 825(d)(2); see also, *e. g.*, *United States* v. *Carter*, 22 M. J. 771, 776 (A. C. M. R. 1986).

defense. It is not necessary to point to "any particular language in the Sixth Amendment," *ante*, at 307, to support the conclusion that the right is firmly established. It is, however, appropriate to comment on the importance of that right before discussing the three interests that the Government relies upon to justify Rule 707.

The Sixth Amendment provides that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." Because this right "is an essential attribute of the adversary system itself," we have repeatedly stated that few rights "are more fundamental than that of an accused to present witnesses in his own defense."[9] According to Joseph Story, that provision was included in the Bill of Rights in reaction to a notorious common-law rule categorically excluding defense evidence in treason and felony cases.[10] Our holding in *Washington* v. *Texas*, 388 U. S. 14 (1967), that this right is applicable to the States, rested on the premises that it "is in plain terms the right to present a defense" and that it "is a fundamental element of due proc-

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[9] "Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, *e. g.*, *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). Indeed, this right is an essential attribute of the adversary system itself. . . . The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment . . . ." *Taylor* v. *Illinois*, 484 U. S. 400, 408–409 (1988).

[10] "Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury." *Washington* v. *Texas*, 388 U. S. 14, 19–20 (1967) (footnotes omitted).

ess of law."[11] Consistent with the history of the provision, the Court in that case held that a state rule of evidence that excluded "whole categories" of testimony on the basis of a presumption of unreliability was unconstitutional.[12]

The blanket rule of inadmissibility held invalid in *Washington* v. *Texas* covered the testimony of alleged accomplices. Both before and after that decision, the Court has recognized the potential injustice produced by rules that exclude entire categories of relevant evidence that is potentially unreliable. At common law interested parties such as defendants,[13] their spouses,[14] and their co-conspirators[15] were not competent

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[11] "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.*, at 19.

[12] "It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

"The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury." *Id.*, at 22.

[13] "It is familiar knowledge that the old common law carefully excluded from the witness stand parties to the record, and those who were interested in the result; and this rule extended to both civil and criminal cases. Fear of perjury was the reason for the rule." *Benson* v. *United States*, 146 U. S. 325, 335 (1892).

[14] "The common-law rule, accepted at an early date as controlling in this country, was that husband and wife were incompetent as witnesses for or against each other. . . .

"The Court recognized that the basic reason underlying th[e] exclusion [of one spouse's testimony on behalf of the other] had been the practice of disqualifying witnesses with a personal interest in the outcome of a case. Widespread disqualifications because of interest, however, had long since

[Footnote 15 is on p. 328]

witnesses. "Nor were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors." *Benson* v. *United States*, 146 U. S. 325, 336 (1892). And, of course, under the regime established by *Frye* v. *United States*, scientific evidence was inadmissible unless it met a stringent "general acceptance" test. Over the years, with respect to category after category, strict rules of exclusion have been replaced by rules that broaden the discretion of trial judges to admit potentially unreliable evidence and to allow properly instructed juries to evaluate its weight. While that trend has included both rulemaking and nonconstitutional judicial decisions, the direction of the trend has been consistent and it has been manifested in constitutional holdings as well.

Commenting on the trend that had followed the decision in *Benson*, the Court in 1918 observed that in the

> "years which have elapsed since the decision of the *Benson Case*, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the

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been abolished both in this country and in England in accordance with the modern trend which permitted interested witnesses to testify and left it for the jury to assess their credibility. Certainly, since defendants were uniformly allowed to testify in their own behalf, there was no longer a good reason to prevent them from using their spouses as witnesses. With the original reason for barring favorable testimony of spouses gone the Court concluded that this aspect of the old rule should go too." *Hawkins* v. *United States*, 358 U. S. 74, 75–76 (1958).

[15] See *Washington* v. *Texas*, 388 U. S., at 20–21.

> truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." *Rosen* v. *United States*, 245 U. S. 467, 471.

See also *Funk* v. *United States*, 290 U. S. 371, 377–378 (1933). It was in a case involving the disqualification of spousal testimony that Justice Stewart stated: "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins* v. *United States*, 358 U. S. 74, 81 (1958) (concurring opinion).

State evidentiary rules may so seriously impede the discovery of truth, "as well as the doing of justice," that they preclude the "meaningful opportunity to present a complete defense" that is guaranteed by the Constitution, *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986) (internal quotation marks omitted).[16] In *Chambers* v. *Mississippi*, 410 U. S. 284, 302

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[16] "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers* v. *Mississippi*, [410 U. S. 284 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington* v. *Texas*, 388 U. S. 14, 23 (1967); *Davis* v. *Alaska*, 415 U. S. 308 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California* v. *Trombetta*, 467 U. S. [479, 485 (1984)]; cf. *Strickland* v. *Washington*, 466 U. S. 668, 684–685 (1984) ('The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment'). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U. S. 257, 273 (1948); *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence

(1973), we concluded that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[17] As the Court notes today, restrictions on the "defendant's right to present relevant evidence," *ante*, at 308, must comply with the admonition in *Rock* v. *Arkansas*, 483 U. S. 44, 56 (1987), that they "may not be arbitrary or disproportionate to the purposes they are designed to serve." Applying that admonition to Arkansas' blanket rule prohibiting the admission of hypnotically refreshed testimony, we concluded that a "State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Id.*, at 61. That statement of constitutional law is directly relevant to this case.

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bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' *United States* v. *Cronic*, 466 U. S. 648, 656 (1984). See also *Washington* v. *Texas*, *supra*, at 22–23." *Crane* v. *Kentucky*, 476 U. S., at 690–691.

[17] "Few rights are more fundamental than that of an accused to present witnesses in his own defense. *E. g.*, *Webb* v. *Texas*, 409 U. S. 95 (1972); *Washington* v. *Texas*, 388 U. S. 14, 19 (1967); *In re Oliver*, 333 U. S. 257 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers* v. *Mississippi*, 410 U. S., at 302.

III

The constitutional requirement that a blanket exclusion of potentially unreliable evidence must be proportionate to the purposes served by the rule obviously makes it necessary to evaluate the interests on both sides of the balance. Today the Court all but ignores the strength of the defendant's interest in having polygraph evidence admitted in certain cases. As the facts of this case illustrate, the Court is quite wrong in assuming that the impact of Rule 707 on respondent's defense was not significant because it did not preclude the introduction of any "factual evidence" or prevent him from conveying "his version of the facts to the court-martial members." *Ante*, at 317. Under such reasoning, a rule that excluded the testimony of alibi witnesses would not be significant as long as the defendant is free to testify himself. But given the defendant's strong interest in the outcome—an interest that was sufficient to make his testimony presumptively untrustworthy and therefore inadmissible at common law—his uncorroborated testimony is certain to be less persuasive than that of a third-party witness. A rule that bars him "from introducing expert opinion testimony to bolster his own credibility," *ibid.*, unquestionably impairs any "meaningful opportunity to present a complete defense"; indeed, it is sure to be outcome determinative in many cases.

Moreover, in this case the results of the polygraph test, taken just three days after the urinalysis, constitute independent factual evidence that is not otherwise available and that strongly supports his defense of "innocent ingestion." Just as flight or other evidence of "consciousness of guilt" may sometimes be relevant, on some occasions evidence of "consciousness of innocence" may also be relevant to the central issue at trial. Both the answers to the questions propounded by the examiner, and the physical manifestations produced by those utterances, were probative of an innocent state of mind shortly after he ingested the drugs. In Dean Wigmore's view, both "conduct" and "utterances" may con-

stitute factual evidence of a "consciousness of innocence."[18] As the Second Circuit has held, when there is a serious factual dispute over the "basic defense [that defendant] was unaware of any criminal wrongdoing," evidence of his innocent state of mind is "critical to a fair adjudication of criminal charges."[19] The exclusion of the test results in this case cannot be fairly equated with a ruling that merely prevented the defendant from encumbering the record with cumulative evidence. Because the Rule may well have affected the outcome of the trial, it unquestionably "infringed upon a weighty interest of the accused." *Ante*, at 308.

The question, then, is whether the three interests on which the Government relies are powerful enough to support a categorical rule excluding the results of all polygraph tests no matter how unfair such a rule may be in particular cases.

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[18] "Moreover, there are other principles by which a defendant may occasionally avail himself of conduct as evidence in his favor—in particular, of conduct indicating consciousness of innocence, . . . of utterances asserting his innocence . . . , and, in sedition charges, of conduct indicating a loyal state of mind . . . ." 1A J. Wigmore, Evidence § 56.1, p. 1180 (Tillers rev. ed. 1983); see *United States* v. *Reifsteck*, 841 F. 2d 701, 705 (CA6 1988).

[19] "Mariotta's basic defense was that he was unaware of any criminal wrongdoing at Wedtech, that he was an innocent victim of the machinations of the sophisticated businessmen whom he had brought into the company to handle its financial affairs. That defense was seriously in issue as to most of the charges against him, drawing considerable support from the evidence. . . .

"With the credibility of the accusations about Mariotta's knowledge of wrongdoing seriously challenged, evidence of his denial of such knowledge in response to an opportunity to obtain immunity by admitting it and implicating others became highly significant to a fair presentation of his defense. . . .

"Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, we have not hesitated to order a new trial." *United States* v. *Biaggi*, 909 F. 2d 662, 691–692 (CA2 1990); see also *United States* v. *Bucur*, 194 F. 2d 297 (CA7 1952); *Herman* v. *United States*, 48 F. 2d 479 (CA5 1931).

Reliability

There are a host of studies that place the reliability of polygraph tests at 85% to 90%.[20] While critics of the polygraph argue that accuracy is much lower, even the studies cited by the critics place polygraph accuracy at 70%.[21] Moreover, to the extent that the polygraph errs, studies have repeatedly shown that the polygraph is more likely to find innocent people guilty than vice versa.[22] Thus, exculpatory polygraphs—like the one in this case—are likely to be more reliable than inculpatory ones.

Of course, within the broad category of lie detector evidence, there may be a wide variation in both the validity and the relevance[23] of particular test results. Questions about the examiner's integrity, independence, choice of questions, or training in the detection of deliberate attempts to provoke misleading physiological responses may justify exclusion of

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[20] Raskin, Honts, & Kircher, The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests, in 1 Modern Scientific Evidence 572 (D. Faigman, D. Kaye, M. Saks, & J. Sanders eds. 1997) (hereinafter Faigman) (compiling eight laboratory studies that place mean accuracy at approximately 90%); *id.*, at 575 (compiling four field studies, scored by independent examiners, that place mean accuracy at 90.5%); Raskin, Honts, & Kircher, A Response to Professors Iacono and Lykken, in Faigman 627 (compiling six field studies, scored by original examiners, that place mean accuracy at 97.5%); Abrams, The Complete Polygraph Handbook 190–191 (1989) (compiling 13 laboratory studies that, excluding inconclusive results, place mean accuracy at 87%).

[21] Iacono & Lykken, The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests, in Faigman 608 (compiling three studies that place mean accuracy at 70%).

[22] *E. g.*, Iacono & Lykken, The Case Against Polygraph Tests, in Faigman 608–609; Raskin, Honts, & Kircher, A Response to Professors Iacono and Lykken, in Faigman 621; Honts & Perry 362; Abrams, The Complete Polygraph Handbook, at 187–188, 191.

[23] See, *e. g.*, Judge Gonzalez's careful attention to the relevance inquiry in the proceedings on remand from the Court of Appeals decision in *Piccinonna.* 729 F. Supp. 1336 (SD Fla. 1990).

specific evidence. But such questions are properly addressed in adversary proceedings; they fall far short of justifying a blanket exclusion of this type of expert testimony.

There is no legal requirement that expert testimony must satisfy a particular degree of reliability to be admissible. Expert testimony about a defendant's "future dangerousness" to determine his eligibility for the death penalty, even if wrong "most of the time," is routinely admitted. *Barefoot* v. *Estelle*, 463 U. S. 880, 898–901 (1983). Studies indicate that handwriting analysis, and even fingerprint identifications, may be less trustworthy than polygraph evidence in certain cases.[24] And, of course, even highly dubious eyewit-

[24] One study compared the accuracy of fingerprinting, handwriting analysis, polygraph tests, and eyewitness identification. The study consisted of 80 volunteers divided into 20 groups of 4. Fingerprints and handwriting samples were taken from all of the participants.

In each group of four, one person was randomly assigned the role of "perpetrator." The perpetrator was instructed to take an envelope to a building doorkeeper (who knew that he would later need to identify the perpetrator), sign a receipt, and pick up a package. After the "crime," all participants were given a polygraph examination.

The fingerprinting expert (comparing the original fingerprints with those on the envelope), the handwriting expert (comparing the original samples with the signed receipt), and the polygrapher (analyzing the tests) sought to identify the perpetrator of each group. In addition, two days after the "crime," the doorkeeper was asked to pick the picture of the perpetrator out of a set of four pictures.

The results of the study demonstrate that polygraph evidence compares favorably with other types of evidence. Excluding "inconclusive" results from each test, the fingerprinting expert resolved 100% of the cases correctly, the polygrapher resolved 95% of the cases correctly, the handwriting expert resolved 94% of the cases correctly, and the eyewitness resolved only 64% of the cases correctly. Interestingly, when "inconclusive" results were included, the polygraph test was more accurate than any of the other methods: The polygrapher resolved 90% of the cases correctly, compared with 85% for the handwriting expert, 35% for the eyewitness, and 20% for the fingerprinting expert. Widacki & Horvath, An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification, 23 J. Forensic Sciences 596, 596–600 (1978); see also Honts & Perry 365.

ness testimony is, and should be, admitted and tested in the crucible of cross-examination. The Court's reliance on potential unreliability as a justification for a categorical rule of inadmissibility reveals that it is "overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U. S., at 596.[25]

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[25] The Government argues that there is a widespread danger that people will learn to "fool" the polygraph, and that this possibility undermines any claim of reliability. For example, the Government points to the availability of a book called Beat the Box: The Insider's Guide to Outwitting the Lie Detector. Tr. of Oral Arg. 53; Brief for United States 25, n. 10. Beat the Box, however, actually cuts against a *per se* ban on polygraph evidence. As the preface to the book states:

"Dr. Kalashnikov [the author] is a polygraph professional. If you go up against him, or someone like him, he'll probably catch you at your game. That's because he knows his work and does it by the book.

"What most people don't realize is that there are a lot of not so professional polygraph examiners out there. It's very possible that you may be tested by someone who is more concerned about the number of tests he will run this week (and his Christmas bonus) than he is about the precision of each individual test.

. . . . .

"Remember, the adage is that you can't beat the polygraph system but you can beat the operator. This book is gleefully dedicated to the idea of a sporting chance." V. Kalashnikov, Beat the Box: The Insider's Guide to Outwitting the Lie Detector (1983) (preface); *id.*, at 9 ("[W]hile the system is all but unbeatable, you can surely beat the examiner").

Thus, Beat the Box actually supports the notion that polygraphs are reliable when conducted by a highly trained examiner—like the one in this case.

Nonetheless, some research has indicated that people can be trained to use "countermeasures" to fool the polygraph. See, *e. g.*, Honts, Raskin, & Kircher, Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests, 79 J. Applied Psychology 252 (1994). This possibility, however, does not justify a *per se* ban. First, research indicates that individuals must receive specific training before they can fool the polygraph (*i. e.*, information alone is not enough). Honts, Hodes, & Raskin, Effects

The Role of the Jury

It is the function of the jury to make credibility determinations. In my judgment evidence that tends to establish either a consciousness of guilt or a consciousness of innocence may be of assistance to the jury in making such determinations. That also was the opinion of Dean Wigmore:

> "Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations." 2 J. Wigmore, Evidence § 293, p. 232 (J. Chadbourn rev. ed. 1979).

There is, of course, some risk that some "juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise," *ante*, at 313–314. In my judgment, however, it is much more likely that juries will be guided by the instructions of the trial judge concerning the credibility of expert as well as lay witnesses. The strong presumption that juries will follow the court's instructions, see, *e. g.*, *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987), applies to exculpatory as well as inculpatory evidence. Com-

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of Physical Countermeasures on the Physiological Detection of Deception, 70 J. Applied Psychology 177, 185 (1985); see also Honts, Raskin, Kircher, & Hodes, Effects of Spontaneous Countermeasures on the Physiological Detection of Deception, 16 J. Police Science and Administration 91, 93 (1988) (spontaneous countermeasures ineffective). Second, as countermeasures are discovered, it is fair to assume that polygraphers will develop ways to detect these countermeasures. See, *e. g.*, Abrams & Davidson, Counter-Countermeasures in Polygraph Testing, 17 Polygraph 16, 17–19 (1988); Raskin, Honts, & Kircher, The Case for Polygraph Tests, in Faigman 577–578. Of course, in any trial, jurors would be instructed on the possibility of countermeasures and could give this possibility its appropriate weight.

mon sense suggests that the testimony of disinterested third parties that is relevant to the jury's credibility determination will assist rather than impair the jury's deliberations. As with the reliance on the potential unreliability of this type of evidence, the reliance on a fear that the average jury is not able to assess the weight of this testimony reflects a distressing lack of confidence in the intelligence of the average American.[26]

Collateral Litigation

The potential burden of collateral proceedings to determine the examiner's qualifications is a manifestly insufficient justification for a categorical exclusion of expert testimony. Such proceedings are a routine predicate for the admission of any expert testimony, and may always give rise to searching cross-examination. If testimony that is critical to a fair determination of guilt or innocence could be excluded for that reason, the right to a meaningful opportunity to present a defense would be an illusion.

It is incongruous for the party that selected the examiner, the equipment, the testing procedures, and the questions asked of the defendant to complain about the examinee's burden of proving that the test was properly conducted. While there may well be a need for substantial collateral proceedings when the party objecting to admissibility has a basis for questioning some aspect of the examination, it seems quite obvious that the Government is in no position to challenge

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[26] Indeed, research indicates that jurors do not "blindly" accept polygraph evidence, but that they instead weigh polygraph evidence along with other evidence. Cavoukian & Heslegrave, The Admissibility of Polygraph Evidence in Court: Some Empirical Findings, 4 Law and Human Behavior 117, 123, 127–128, 130 (1980) (hereinafter Cavoukian & Heslegrave); see also Honts & Perry 366–367. One study found that expert testimony about the limits of the polygraph "*completely eliminated* the effect of the polygraph evidence" on the jury. Cavoukian & Heslegrave 128–129 (emphasis added).

the competence of the procedures that it has developed and relied upon in hundreds of thousands of cases.

In all events the concern about the burden of collateral debates about the integrity of a particular examination, or the competence of a particular examiner, provides no support for a categorical rule that requires exclusion even when the test is taken pursuant to a stipulation and even when there has been a stipulation resolving all potential collateral issues. Indeed, in this very case there would have been no need for any collateral proceedings because respondent did not question the qualifications of the expert who examined him, and surely the Government is in no position to argue that one who has successfully completed its carefully developed training program[27] is unqualified. The interest in avoiding burdensome collateral proceedings might support a rule prescribing minimum standards that must be met before any test is admissible,[28] but it surely does not support the blunderbuss at issue.[29]

IV

The Government's concerns would unquestionably support the exclusion of polygraph evidence in particular cases, and may well be sufficient to support a narrower rule designed to respond to specific concerns. In my judgment, however,

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[27] See n. 5, *supra.*

[28] See N. M. Rule Evid. § 11–707.

[29] It has been suggested that if exculpatory polygraph evidence may be adduced by the defendant, the prosecutor should also be allowed to introduce inculpatory test results. That conclusion would not be dictated by a holding that vindicates the defendant's Sixth Amendment right to summon witnesses. Moreover, as noted above, studies indicate that exculpatory polygraphs are more reliable than inculpatory ones. See n. 22, *supra.* In any event, a concern about possible future legal developments is surely not implicated by the narrow issue presented by the holding of the Court of Appeals for the Armed Forces in this case. Even if it were, I can see nothing fundamentally unfair about permitting the results of a test taken pursuant to stipulation being admitted into evidence to prove consciousness of guilt as well as consciousness of innocence.

those concerns are plainly insufficient to support a categorical rule that prohibits the admission of polygraph evidence in all cases, no matter how reliable or probative the evidence may be. Accordingly, I respectfully dissent.

Syllabus

FELTNER *v.* COLUMBIA PICTURES TELEVISION, INC.

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

No. 96–1768. Argued January 21, 1998—Decided March 31, 1998

Respondent Columbia Pictures Television, Inc., terminated agreements licensing several television series to three television stations owned by petitioner Feltner after the stations' royalty payments became delinquent. When the stations continued to broadcast the programs, Columbia sued Feltner and others for, *inter alia*, copyright infringement. Columbia won partial summary judgment as to liability on its copyright infringement claims and then exercised the option afforded by § 504(c) of the Copyright Act of 1976 (Act) to recover statutory damages in lieu of actual damages. The District Court denied Feltner's request for a jury trial, and awarded Columbia statutory damages following a bench trial. The Ninth Circuit affirmed, holding that neither § 504(c) nor the Seventh Amendment provides a right to a jury trial on statutory damages.

Held:

1. There is no statutory right to a jury trial when a copyright owner elects to recover statutory damages. Section 504(c) makes no mention of a right to a jury trial or to juries at all, providing instead that damages should be assessed in an amount "the court deems just," and that in the event that "the court finds" an infringement that is willful or innocent, "the court in its discretion" may increase or decrease the statutory damages. The word "court" in this context appears to mean judge, not jury. Other remedies provisions in the Act use the term "court" in contexts generally thought to confer authority on a judge, and the Act does not use the term "court" when addressing awards of actual damages and profits, see § 504(b), which generally are thought to constitute legal relief, *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 477. Feltner's reliance on *Lorillard* v. *Pons*, 434 U. S. 575, 585, for a contrary interpretation is misplaced. There being no statutory right to a jury trial on statutory damages, the constitutional question must be addressed. See *Tull* v. *United States*, 481 U. S. 412, 417. Pp. 345–347.

2. The Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c), including the amount itself. Pp. 347–355.

Syllabus

(a) The Seventh Amendment applies to both common-law causes of action and to statutory actions more analogous to cases tried in 18th-century courts of law than to suits customarily tried in courts of equity or admiralty. *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42. To determine the proper analogue, this Court examines both the nature of the statutory action and the remedy sought. See *ibid.* Pp. 347–348.

(b) There are close 18th-century analogues to § 504(c) statutory damages actions. Before the adoption of the Seventh Amendment, the common law and statutes in England and this country granted copyright owners causes of action for infringement. More importantly, copyright suits for monetary damages were tried in courts of law, and thus before juries. There is no evidence that the first federal copyright law, the Copyright Act of 1790, changed this practice; and damages actions under the Copyright Act of 1831 were consistently tried before juries. The Court is unpersuaded by Columbia's contention that, despite this undisputed historical evidence, statutory damages are clearly equitable in nature. Pp. 348–353.

(c) The right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any, awarded to the copyright owner. There is overwhelming evidence that the consistent common-law practice was for juries to award damages. More specifically, this was the consistent practice in copyright cases. *Tull* v. *United States*, *supra*—in which this Court determined that, although the Seventh Amendment grants a right to a jury trial on liability for civil penalties under the Clean Water Act, Congress could constitutionally authorize trial judges to assess the amount of the civil penalties—is inapposite to this case. In *Tull*, there was no evidence that juries historically had determined the amount of civil penalties to be paid to the Government, and the awarding of such penalties could be viewed as analogous to sentencing in a criminal proceeding. Here there is no similar analogy, and there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff. Pp. 353–355.

106 F. 3d 284, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 355.

John G. Roberts, Jr., argued the cause for petitioner. With him on the briefs were *David G. Leitch* and *Jonathan S. Franklin.*

Henry J. Tashman argued the cause for respondent. With him on the brief was *Gregory J. Kopta.**

JUSTICE THOMAS delivered the opinion of the Court.

Section 504(c) of the Copyright Act of 1976 permits a copyright owner "to recover, instead of actual damages and profits, an award of statutory damages . . . , in a sum of not less than $500 or more than $20,000 as the court considers just." 90 Stat. 2585, as amended, 17 U. S. C. § 504(c)(1). In this case, we consider whether § 504(c) or the Seventh Amendment grants a right to a jury trial when a copyright owner elects to recover statutory damages. We hold that although the statute is silent on the point, the Seventh Amendment provides a right to a jury trial, which includes a right to a jury determination of the amount of statutory damages. We therefore reverse.

I

Petitioner C. Elvin Feltner owns Krypton International Corporation, which in 1990 acquired three television stations in the southeastern United States. Respondent Columbia Pictures Television, Inc., had licensed several television series to these stations, including "Who's the Boss," "Silver Spoons," "Hart to Hart," and "T. J. Hooker." After the stations became delinquent in making their royalty payments to Columbia, Krypton and Columbia entered into negotiations to restructure the stations' debt. These discussions were unavailing, and Columbia terminated the stations' li-

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**Howard B. Abrams, pro se*, filed a brief as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Society of Composers, Authors and Publishers by *I. Fred Koenigsberg* and *Philip H. Schaeffer;* for the International Anticounterfeiting Coalition, Inc., by *Peter W. James, Anthony M. Keats,* and *Larry W. McFarland;* and for the National Football League et al. by *Neil K. Roman* and *Robert A. Long, Jr.*

cense agreements in October 1991. Despite Columbia's termination, the stations continued broadcasting the programs.

Columbia sued Feltner, Krypton, the stations, various Krypton subsidiaries, and certain Krypton officers in Federal District Court alleging, *inter alia*, copyright infringement arising from the stations' unauthorized broadcasting of the programs. Columbia sought various forms of relief under the Copyright Act of 1976 (Copyright Act), 17 U. S. C. § 101 *et seq.*, including a permanent injunction, § 502; impoundment of all copies of the programs, § 503; actual damages or, in the alternative, statutory damages, § 504; and costs and attorney's fees, § 505. On Columbia's motion, the District Court entered partial summary judgment as to liability for Columbia on its copyright infringement claims.[1]

Columbia exercised the option afforded by § 504(c) of the Copyright Act to recover "Statutory Damages" in lieu of actual damages. In relevant part, § 504(c) provides:

> "Statutory Damages—
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> "(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, . . . in a sum of not less than $500 or more than $20,000 as the court considers just. . . .
>
> "(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of

[1] During the course of the litigation, Columbia dropped all claims against all parties except its copyright claims against Feltner.

> copyright, the court [in] its discretion may reduce the award of statutory damages to a sum of not less than $200. . . .” 17 U. S. C. § 504(c).

The District Court denied Feltner's request for a jury trial on statutory damages, ruling instead that such issues would be determined at a bench trial. After two days of trial, the trial judge held that each episode of each series constituted a separate work and that the airing of the same episode by different stations controlled by Feltner constituted separate violations; accordingly, the trial judge determined that there had been a total of 440 acts of infringement. The trial judge further found that Feltner's infringement was willful and fixed statutory damages at $20,000 per act of infringement. Applying that amount to the number of acts of infringement, the trial judge determined that Columbia was entitled to $8,800,000 in statutory damages, plus costs and attorney's fees.

The Court of Appeals for the Ninth Circuit affirmed in all relevant respects. *Columbia Pictures Television* v. *Krypton Broadcasting of Birmingham, Inc.*, 106 F. 3d 284 (1997).[2] Most importantly for present purposes, the court rejected Feltner's argument that he was entitled to have a jury determine statutory damages. Relying on *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F. 2d 1157 (CA9 1977)—which held that § 25(b) of the Copyright Act of 1909, the statutory predecessor of § 504(c), required the trial judge to assess statutory damages[3]—the Court of

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[2] The Court of Appeals vacated and remanded (for further explanation) the District Court's award of costs and attorney's fees to Columbia. See 106 F. 3d, at 296.

[3] Under the 1909 Act, a copyright plaintiff could recover, “in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph[,] such damages shall not exceed the sum of [$200] nor be less than the sum of [$50], and such damages shall in

Appeals held that § 504(c) does not grant a right to a jury determination of statutory damages. The court reasoned that "[i]f Congress intended to overrule *Krofft* by having the jury determine the proper award of statutory damages, it would have altered" the language "as the court considers just" in § 504(c). 106 F. 3d, at 293. The Court of Appeals further concluded that the "Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of such damages is equitable in nature." *Ibid.* We granted certiorari. 521 U. S. 1151 (1997).

II

Before inquiring into the applicability of the Seventh Amendment, we must "'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Tull* v. *United States*, 481 U. S. 412, 417, n. 3 (1987) (quoting *Curtis* v. *Loether*, 415 U. S. 189, 192, n. 6 (1974)). Such a construction is not possible here, for we cannot discern "any congressional intent to grant . . . the right to a jury trial," 481 U. S., at 417, n. 3, on an award of statutory damages.[4]

The language of § 504(c) does not grant a right to have a jury assess statutory damages. Statutory damages are to be assessed in an amount that "the court considers just." § 504(c)(1). Further, in the event that "the court finds" the infringement was willful or innocent, "the court in its discretion" may, within limits, increase or decrease the amount of

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no other case exceed the sum of [$5,000] nor be less than the sum of [$250] . . ." Act of Mar. 4, 1909, § 25(b), 35 Stat. 1081 (later amended and codified at 17 U. S. C. § 101(b)).

[4] The Courts of Appeals have unanimously held that § 504(c) is not susceptible of an interpretation that would avoid the Seventh Amendment question. See, *e. g.*, *Cass County Music Co.* v. *C. H. L. R., Inc.*, 88 F. 3d 635, 641 (CA8 1996); *Video Views, Inc.* v. *Studio 21, Ltd.*, 925 F. 2d 1010, 1014 (CA7 1991); *Gnossos Music* v. *Mitken Inc.*, 653 F. 2d 117, 119 (CA4 1981); see also *Oboler* v. *Goldin*, 714 F. 2d 211, 213 (CA2 1983); 4 M. Nimmer & D. Nimmer, Nimmer on Copyright § 14.04[C] (1997).

statutory damages. § 504(c)(2). These phrases, like the entire statutory provision, make no mention of a right to a jury trial or, for that matter, to juries at all.

The word "court" in this context appears to mean judge, not jury. Cf. *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U. S. 228, 232 (1952) (referring to the "*judicial* discretion" necessary for "the court's choice between a computed measure of damage and that imputed by" the Copyright Act of 1909 (emphasis added)). In fact, the other remedies provisions of the Copyright Act use the term "court" in contexts generally thought to confer authority on a judge, rather than a jury. See, *e. g.*, § 502 ("court . . . may . . . grant temporary and final injunctions"); § 503(a) ("[T]he court may order the impounding . . . of all copies or phonorecords"); § 503(b) ("As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords"); § 505 ("[T]he court in its discretion may allow the recovery of full costs" of litigation, and "the court may also award a reasonable attorney's fee"). In contrast, the Copyright Act does not use the term "court" in the subsection addressing awards of actual damages and profits, see § 504(b), which generally are thought to constitute legal relief. See *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 477 (1962) (action for damages for trademark infringement "subject to cognizance by a court of law"); see also *Arnstein* v. *Porter*, 154 F. 2d 464, 468 (CA2 1946) (copyright action for damages is "triable at 'law' and by a jury as of right"); *Video Views, Inc.* v. *Studio 21, Ltd.*, 925 F. 2d 1010, 1014 (CA7 1991) ("little question that the right to a jury trial exists in a copyright infringement action when the copyright owner endeavors to prove and recover its *actual* damages"); 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 12.10[B] (1997) ("beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial" (footnotes omitted)).

Feltner relies on *Lorillard* v. *Pons*, 434 U. S. 575, 585 (1978), in which we held that the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, 29 U. S. C. § 621 *et seq.*, provides a statutory right to a jury trial in an action for unpaid wages even though the statute authorizes "the court . . . to grant such legal or equitable relief as may be appropriate," § 626(b). That holding, however, turned on two crucial factors: The ADEA's remedial provisions were expressly to be enforced in accordance with the Fair Labor Standards Act of 1938, as amended, 29 U. S. C. § 101 *et seq.*, which had been uniformly interpreted to provide a right to a jury trial, *Lorillard* v. *Pons*, 434 U. S., at 580–581; and the statute used the word "legal," which we found to be a "term of art" used in cases "in which legal relief is available and legal rights are determined" by juries, *id.*, at 583. Section 504(c), in contrast, does not make explicit reference to another statute that has been uniformly interpreted to provide a right to jury trial and does not use the word "legal" or other language denoting legal relief or rights.[5]

We thus discern no statutory right to a jury trial when a copyright owner elects to recover statutory damages. Accordingly, we must reach the constitutional question.

III

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U. S. Const., Amdt. 7. Since Justice Story's time, the Court

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[5] In addition, a copyright plaintiff may elect statutory damages "at any time before final judgment is rendered." § 504(c)(1). The parties agree, and we have found no indication to the contrary, that election may occur even after a jury has returned a verdict on liability and an award of actual damages. It is at least unlikely that Congress intended that a jury, having already made a determination of actual damages, should be reconvened to make a determination of statutory damages.

has understood "Suits at common law" to refer "not merely [to] suits, which the *common* law recognized among its old and settled proceedings, but [to] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830) (emphasis in original). The Seventh Amendment thus applies not only to common-law causes of action, but also to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42 (1989) (citing *Curtis* v. *Loether*, 415 U. S., at 193). To determine whether a statutory action is more analogous to cases tried in courts of law than to suits tried in courts of equity or admiralty, we examine both the nature of the statutory action and the remedy sought. See 492 U. S., at 42.

Unlike many of our recent Seventh Amendment cases, which have involved modern statutory rights unknown to 18th-century England, see, *e. g.*, *Wooddell* v. *Electrical Workers*, 502 U. S. 93 (1991) (alleged violations of union's duties under Labor Management Relations Act, 1947, and Labor-Management Reporting and Disclosure Act of 1959); *Granfinanciera* v. *Nordberg*, *supra* (action to rescind fraudulent preference under Bankruptcy Act); *Tull* v. *United States*, 481 U. S. 412 (1987) (Government's claim for civil penalties under Clean Water Act); *Curtis* v. *Loether*, *supra* (claim under Title VIII of Civil Rights Act of 1968), in this case there are close analogues to actions seeking statutory damages under § 504(c). Before the adoption of the Seventh Amendment, the common law and statutes in England and this country granted copyright owners causes of action for infringement. More importantly, copyright suits for mone-

tary damages were tried in courts of law, and thus before juries.

By the middle of the 17th century, the common law recognized an author's right to prevent the unauthorized publication of his manuscript. See, *e. g., Stationers Co.* v. *Patentees,* Carter's Rep. 89, 124 Eng. Rep. 842 (C. P. 1666). This protection derived from the principle that the manuscript was the product of intellectual labor and was as much the author's property as the material on which it was written. See *Millar* v. *Taylor,* 4 Burr. 2303, 2398, 98 Eng. Rep. 201, 252 (K. B. 1769) (opinion of Mansfield, C. J.) (common-law copyright derived from principle that "it is just, that an Author should reap the pecuniary Profits of his own ingenuity and Labour"); 1 W. Patry, Copyright Law and Practice 3 (1994). Actions seeking damages for infringement of common-law copyright, like actions seeking damages for invasions of other property rights, were tried in courts of law in actions on the case. See *Millar* v. *Taylor*, *supra*, at 2396–2397, 98 Eng. Rep., at 251. Actions on the case, like other actions at law, were tried before juries. See *McClenachan* v. *McCarty,* 1 Dall. 375, 378 (C. P. Phila. Cty. 1788); 5 J. Moore, Moore's Federal Practice ¶38.11[5] (2d ed. 1996); 1 J. Chitty, Treatise on Pleading and Parties to Actions 164 (1892).

In 1710, the first English copyright statute, the Statute of Anne, was enacted to protect published books. 8 Anne ch. 19 (1710). Under the Statute of Anne, damages for infringement were set at "one Penny for every Sheet which shall be found in [the infringer's] custody, either printed or printing, published, or exposed to Sale," half ("one Moiety") to go to the Crown and half to the copyright owner, and were "to be recovered . . . by Action of Debt, Bill, Plaint, or Information." § 1. Like the earlier practice with regard to common-law copyright claims for damages, actions seeking damages under the Statute of Anne were tried in courts of law. See

Beckford v. *Hood*, 7 T. R. 621, 627, 101 Eng. Rep. 1164, 1167 (K. B. 1798) (opinion of Kenyon, C. J.) ("[T]he statute having vested that right in the author, the common law gives the remedy by action on the case for the violation of it").

The practice of trying copyright damages actions at law before juries was followed in this country, where statutory copyright protections were enacted even before adoption of the Constitution. In 1783, the Continental Congress passed a resolution recommending that the States secure copyright protections for authors. See U. S. Copyright Office, Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright, Bulletin No. 3, p. 1 (rev. ed. 1963) (hereinafter Copyright Enactments). Twelve States (all except Delaware) responded by enacting copyright statutes, each of which provided a cause of action for damages, and none of which made any reference to equity jurisdiction. At least three of these state statutes expressly stated that damages were to be recovered through actions at law, see *id.*, at 2 (in Connecticut, damages for double the value of the infringed copy "to be recovered . . . in any court of law in this State"); *id.*, at 17 (in Georgia, similar damages enforceable "in due course of law"); *id.*, at 19 (in New York, similar damages enforceable in "any court of law"), while four others provided that damages would be recovered in an "action of debt," a prototypical action brought in a court of law before a jury. See F. Maitland, Forms of Action at Common Law 357 (1929) (hereinafter Maitland); see Copyright Enactments 4–9 (in Massachusetts, New Hampshire, and Rhode Island, damages enforceable by "action of debt"); *id.*, at 12 (in South Carolina, damages of one shilling per sheet enforceable by "debt, bill, plaint or information"). Although these statutes were short-lived, and hence few courts had occasion to interpret them, the available evidence suggests that the practice was for copyright actions seeking damages to be tried to a jury. See *Hudson & Goodwin* v. *Patten*, 1 Root 133, 134

(Conn. Super. Ct. 1789) (jury awarded copyright owner £100 under Connecticut copyright statute).

Moreover, three of the state statutes specifically authorized an award of damages from a statutory range, just as § 504(c) does today. See Copyright Enactments 4 (in Massachusetts, damages of not less than £5 and not more than £3,000); *id.*, at 8 (in New Hampshire, damages of not less than £5 and not more than £1,000); *id.*, at 9 (in Rhode Island, damages of not less than £5 and not more than £3,000). Although we have found no direct evidence of the practice under these statutes, there is no reason to suppose that such actions were intended to deviate from the traditional practice: The damages were to be recovered by an "action of debt," see *id.*, at 4–9, which was an action at law, see Maitland 357.

In 1790, Congress passed the first federal copyright statute, the Copyright Act of 1790, which similarly authorized the awarding of damages for copyright infringements. Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 125. The Copyright Act of 1790 provided that damages for copyright infringement of published works would be "the sum of fifty cents for every sheet which shall be found in [the infringer's] possession, . . . to be recovered by action of debt in any court of record in the United States, wherein the same is cognizable." § 2. Like the Statute of Anne, the Copyright Act of 1790 provided that half ("one moiety") of such damages were to go to the copyright owner and half to the United States. For infringement of an unpublished manuscript, the statute entitled a copyright owner to "all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof." § 6.

There is no evidence that the Copyright Act of 1790 changed the practice of trying copyright actions for damages in courts of law before juries. As we have noted, actions on the case and actions of debt were actions at law for which a

jury was required. See *supra,* at 349, 350.[6] Moreover, actions to recover damages under the Copyright Act of 1831—which differed from the Copyright Act of 1790 only in the amount (increased to $1 from 50 cents) authorized to be recovered for certain infringing sheets—were consistently tried to juries. See, *e. g., Backus* v. *Gould,* 7 How. 798, 802 (1849) (jury awarded damages of $2,069.75); *Reed* v. *Carusi,* 20 F. Cas. 431, 432 (No. 11,642) (CC Md. 1845) (jury awarded damages of $200); *Millett* v. *Snowden,* 17 F. Cas. 374, 375 (No. 9,600) (SDNY 1844) (jury awarded damages of $625); *Dwight* v. *Appleton,* 8 F. Cas. 183, 185 (No. 4,215) (SDNY 1843) (jury awarded damages of $2,000).

Columbia does not dispute this historical evidence. In fact, Columbia makes no attempt to draw an analogy between an action for statutory damages under § 504(c) and *any* historical cause of action—including those actions for monetary relief that we have characterized as equitable, such as actions for disgorgement of improper profits. See *Teamsters* v. *Terry,* 494 U. S. 558, 570–571 (1990); *Tull* v. *United States,* 481 U. S., at 424. Rather, Columbia merely contends that statutory damages are clearly equitable in nature.

We are not persuaded. We have recognized the "general rule" that monetary relief is legal, *Teamsters* v. *Terry, supra,* at 570, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment. See *Curtis* v. *Loether,* 415 U. S., at 196 (actual damages are "traditional form of relief offered in the courts of law"); *Tull* v. *United States,* 481 U. S., at 422

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[6] The Copyright Act of 1790 did not provide for equitable remedies at all, and in *Stevens* v. *Gladding,* 17 How. 447 (1855), we held that, even after Congress had provided for equity jurisdiction under the Copyright Act, see Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, the statute's damages provision could not be enforced through a suit in equity. 17 How., at 455; see also *Callaghan* v. *Myers,* 128 U. S. 617, 663 (1888) (*Stevens* v. *Gladding* determined that "the penalties given by § 7 of the copyright act of 1831 cannot be enforced in a suit in equity").

("Remedies intended to punish culpable individuals . . . were issued by courts of law, not courts of equity"). Nor, as we have previously stated, is a monetary remedy rendered equitable simply because it is "not fixed or readily calculable from a fixed formula." *Id.*, at 422, n. 7. And there is historical evidence that cases involving discretionary monetary relief were tried before juries. See, *e. g.*, *Coryell* v. *Colbaugh*, 1 N. J. L. 77 (1791) (jury award of "exemplary damages" in an action on a promise of marriage). Accordingly, we must conclude that the Seventh Amendment provides a right to a jury trial where the copyright owner elects to recover statutory damages.

The right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any, awarded to the copyright owner. It has long been recognized that "by the law the jury are judges of the damages." *Lord Townshend* v. *Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994–995 (C. P. 1677). Thus in *Dimick* v. *Schiedt*, 293 U. S. 474 (1935), the Court stated that "the common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Id.*, at 480 (internal quotation marks and citations omitted). And there is overwhelming evidence that the consistent practice at common law was for juries to award damages. See, *e. g.*, *Duke of York* v. *Pilkington*, 2 Show. 246, 89 Eng. Rep. 918 (K. B. 1760) (jury award of £100,000 in a slander action); *Wilkes* v. *Wood*, Lofft 1, 19, 98 Eng. Rep. 489, 499 (C. P. 1763) (jury award of £1,000 in an action of trespass); *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C. P. 1763) (upholding jury award of £300 in an action for trespass, assault and imprisonment); *Genay* v. *Norris*, 1 S. C. L. 6, 7 (1784) (jury award of £400); *Coryell* v. *Colbaugh*, *supra* (sustaining correctness of jury award of exemplary damages in an action on a promise of marriage); see also K. Redden, Punitive Dam-

ages § 2.2, p. 27 (1980) (describing "primacy of the jury in the awarding of damages").

More specifically, this was the consistent practice in copyright cases. In *Hudson & Goodwin* v. *Patten*, 1 Root, at 134, for example, a jury awarded a copyright owner £100 under the Connecticut copyright statute, which permitted damages in an amount double the value of the infringed copy. In addition, juries assessed the amount of damages under the Copyright Act of 1831, even though that statute, like the Copyright Act of 1790, fixed damages at a set amount per infringing sheet. See *Backus* v. *Gould*, *supra*, at 802 (jury awarded damages of $2,069.75); *Reed* v. *Carusi*, *supra*, at 432 (same, but $200); *Dwight* v. *Appleton*, *supra*, at 185 (same, but $2,000); *Millett* v. *Snowden*, *supra*, at 375 (same, but $625).

Relying on *Tull* v. *United States*, *supra*, Columbia contends that the Seventh Amendment does not provide a right to a jury determination of the amount of the award. In *Tull*, we held that the Seventh Amendment grants a right to a jury trial on all issues relating to liability for civil penalties under the Clean Water Act, 33 U. S. C. §§ 1251, 1319(d),[7] see 481 U. S., at 425, but then went on to decide that Congress could constitutionally authorize trial judges to assess the amount of the civil penalties, see *id.*, at 426–427.[8] According to Columbia, *Tull* demonstrates that a jury determination of the amount of statutory damages is not necessary "to preserve 'the substance of the common-law right of trial by jury.'" *Id.*, at 426 (quoting *Colgrove* v. *Battin*, 413 U. S. 149, 157 (1973)).

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[7] Section 1319(d) of the Clean Water Act provided that violators of certain sections of the Act "shall be subject to a civil penalty not to exceed $10,000 per day" during the period of the violation. 481 U. S., at 414.

[8] This portion of our opinion was arguably dicta, for our holding that there was a right to a jury trial on issues relating to liability required us to reverse the lower court's liability determination.

In *Tull,* however, we were presented with no evidence that juries historically had determined the amount of civil penalties to be paid to the Government.[9] Moreover, the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding. See 481 U. S., at 428 (SCALIA, J., concurring in part and dissenting in part).[10] Here, of course, there is no similar analogy, and there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff. *Tull* is thus inapposite. As a result, if a party so demands, a jury must determine the actual amount of statutory damages under § 504(c) in order "to preserve 'the substance of the common-law right of trial by jury.'" *Id.*, at 426.

* * *

For the foregoing reasons, we hold that the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself. The judgment below is reversed, and we remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

It is often enough that we must hold an enactment of Congress to be unconstitutional. I see no reason to do so here—

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[9] It should be noted that *Tull* is at least in tension with *Bank of Hamilton* v. *Lessee of Dudley,* 2 Pet. 492 (1829), in which the Court held in light of the Seventh Amendment that a jury must determine the amount of compensation for improvements to real estate, and with *Dimick* v. *Schiedt,* 293 U. S. 474 (1935), in which the Court held that the Seventh Amendment bars the use of additur.

[10] As we have noted, even under the Statute of Anne and the Copyright Act of 1790, the amount awarded to the Government ("one Moiety") was determined by a jury.

not because I believe that jury trial is not constitutionally required (I do not reach that issue), but because the statute can and therefore should be read to provide jury trial.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909). The Copyright Act of 1976 authorizes statutory damages for copyright infringement "in a sum of not less than $500 or more than $20,000 as the court considers just." 17 U. S. C. § 504(c). The Court concludes that it is not "fairly possible," *ante*, at 345 (internal quotation marks omitted), to read § 504(c) as authorizing jury determination of the amount of those damages. I disagree.

In common legal parlance, the word "court" can mean "[t]he judge or judges, as distinguished from the counsel or jury." Webster's New International Dictionary 611 (2d ed. 1949) (def. 10d). But it also has a broader meaning, which includes both judge and jury. See, *e. g.*, *ibid.* (def. 10b: "The persons duly assembled under authority of law for the administration of justice"); Black's Law Dictionary 318 (5th ed. 1979) (". . . A body organized to administer justice, and including both judge and jury"). We held in *Lorillard* v. *Pons*, 434 U. S. 575 (1978), that a statute authorizing "the court . . . to grant such legal or equitable relief as may be appropriate," 29 U. S. C. § 626(b), could fairly be read to afford a right to jury trial on claims for backpay under the Age Discrimination in Employment Act of 1967.

As the Court correctly observes, *ante*, at 347, there was more evidence in *Lorillard* than there is in the present case that "court" was being used to include the jury. The remedial provision at issue explicitly referred to the "'powers, remedies, and *procedures*'" of the Fair Labor Standards Act, under which "it was well established that there was a right to a jury trial," *Lorillard*, 434 U. S., at 580. The provision's

reference to "legal . . . relief" also strongly suggested a statutory right to jury trial. *Id.*, at 583. The text of § 504(c) lacks such clear indications that "court" is being used in its broader sense. But their absence hardly demonstrates that the broader reading is not "fairly possible," *e. g.*, *Tull* v. *United States*, 481 U. S. 412, 417, n. 3 (1987). The only significant evidence cited by the Court for *that* proposition is that the "Copyright Act use[s] the term 'court' in contexts generally thought to confer authority on a judge, rather than a jury," *ante*, at 346, but "does not use the term 'court' in the subsection addressing awards of actual damages and profits, see § 504(b), which generally are thought to constitute legal relief," *ibid.* That is a fair observation, but it is not, in my view, probative enough to compel an interpretation that is constitutionally doubtful.

That is at least so in light of contradictory evidence from the statutory history, which the Court chooses to ignore. Section 504(c) is the direct descendant of a remedy created for unauthorized performance of dramatic compositions in an 1856 copyright statute. That statute provided for damages "not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just," enforced through an "action on the case or other equivalent remedy." Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139. Because actions on the case were historically tried at law, it seems clear that this original statute permitted juries to assess such damages. See *Lorillard*, *supra*, at 583. Although subsequent revisions omitted the reference to "action[s] on the case," they carried forward the language specifying damages "as to the court shall appear to be just." See Act of July 8, 1870, ch. 230, § 101, 16 Stat. 214; Act of Jan. 6, 1897, ch. 4, 29 Stat. 482. In 1909, Congress extended those provisions to permit all copyright owners to recover "in lieu of actual damages and profits such damages as to the court shall appear just . . . ." Act of Mar. 4, 1909, ch. 320, § 25(b),

35 Stat. 1081. We have recognized that, although the prior statutory damages provisions

> "were broadened [in 1909] so as to include other copyrights and the limitations were changed in amount, . . . the principle on which they proceeded—that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained. The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just.'" *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 107 (1919).

If a right to jury trial was consistent with the meaning of the phrase "as to the court . . . shall appear to be just" in the 1856 statutory damages provision, I see no reason to insist that the phrase "as the court considers just" has a different meaning in that provision's latest reenactment. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard*, *supra*, at 581.

I do not contend that reading "court" to include "jury" is necessarily the *best* interpretation of this statutory text. The Court is perhaps correct that the indications pointing to a change in meaning from the 1856 statute predominate. As I have written elsewhere, however:

> "The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one—the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. 'Adopt the interpretation that avoids the constitutional doubt if that is the right one' produces precisely the same result as 'adopt the right interpretation.' Rather, the doctrine of constitutional doubt comes into play when the statute is 'susceptible of' the problem-

> avoiding interpretation, *Delaware & Hudson Co.*, 213 U. S., at 408—when that interpretation is *reasonable*, though not necessarily the best." *Almendarez-Torres* v. *United States*, *ante*, at 270 (dissenting opinion).

As the majority's discussion amply demonstrates, there would be considerable doubt about the constitutionality of § 504(c) if it did not permit jury determination of the amount of statutory damages. Because an interpretation of § 504(c) that avoids the Seventh Amendment question is at least "fairly possible," I would adopt that interpretation, prevent the invalidation of this statute, and reserve the constitutional issue for another day.

Syllabus

UNITED STATES *v.* UNITED STATES SHOE CORP.

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

No. 97–372. Argued March 4, 1998—Decided March 31, 1998

The Harbor Maintenance Tax (HMT) obligates exporters, importers, and domestic shippers, 26 U. S. C. § 4461(c)(1), to pay 0.125 percent of the value of the commercial cargo they ship through the Nation's ports, § 4461(a). The HMT is imposed at the time of loading for exports and unloading for other shipments. § 4461(c)(2). It is collected by the Customs Service and deposited in the Harbor Maintenance Trust Fund (Fund), from which Congress may appropriate amounts to pay for harbor maintenance and development projects and related expenses. § 9505. Respondent United States Shoe Corporation (U. S. Shoe) paid the HMT for articles the company exported during the period April to June 1994 and then filed a protest with the Customs Service alleging that, to the extent the toll applies to exports, it violates the Export Clause, U. S. Const., Art. I, § 9, cl. 5, which states: "No Tax or Duty shall be laid on Articles exported from any State." The Customs Service responded to U. S. Shoe with a form letter stating that the HMT is a statutorily mandated user fee, not an unconstitutional tax on exports. U. S. Shoe then sued for a refund, asserting that the HMT violates the Export Clause as applied to exports. In granting U. S. Shoe summary judgment, the Court of International Trade (CIT) held that it had jurisdiction under 28 U. S. C. § 1581(i) and that the HMT qualifies as a tax. Rejecting the Government's characterization of the HMT as a user fee, the CIT reasoned that the tax is assessed ad valorem directly upon the value of the cargo itself, not upon any services rendered for the cargo. The Federal Circuit affirmed.

Held:

1. The CIT properly entertained jurisdiction in this case. Section 1581(i)(4) gives that court residual jurisdiction over "any civil action . . . against the United States . . . that arises out of any [federal] law . . . providing for . . . administration and enforcement with respect to the matters referred to in [§ 1581(i)(1)]," which in turn applies to "revenue from imports." This dispute involves such a law. The HMT statute, although applied to exports here, applies equally to imports. That § 1581(i) does not use the word "exports" is hardly surprising in view of the Export Clause, which confines customs duties to imports. More-

over, 26 U. S. C. § 4462(f)(2) directs that the HMT "be treated as . . . a customs duty" for jurisdictional purposes. Such duties, by their very nature, provide for revenue from imports and are encompassed within 28 U. S. C. § 1581(i)(1). Accordingly, CIT jurisdiction over controversies regarding HMT administration and enforcement accords with § 1581(i)(4). Pp. 365–366.

2. Although the Export Clause categorically bars Congress from imposing any tax on exports, *United States* v. *International Business Machines Corp.*, 517 U. S. 843 *(IBM)*, it does not rule out a "user fee" that lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for Government-supplied services, facilities, or benefits, see *Pace* v. *Burgess*, 92 U. S. 372, 375–376. The HMT, however, is a tax, and thus violates the Export Clause as applied to exports. Pp. 366–370.

(a) The HMT bears the indicia of a tax: Congress expressly described it as such, 26 U. S. C. § 4461(a), codified it as part of the Internal Revenue Code, and provided that, for administrative, enforcement, and jurisdictional purposes, it should be treated "as if [it] were a customs duty," §§ 4462(f)(1), (2). Prior cases in which this Court upheld flat and ad valorem charges as valid user fees do not govern here because they involved constitutional provisions other than the Export Clause. *IBM* plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority. 517 U. S., at 851, 852, 857, 861. Pp. 366–369.

(b) The guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context remains this Court's time-tested *Pace* decision. The *Pace* Court upheld a fee for stamps placed on tobacco packaged for export. The stamp was required to prevent fraud, and the charge for it, the Court said, served as "compensation given for services [in fact] rendered." 92 U. S., at 375. In holding that the fee was not a duty, the Court emphasized that the charge bore no relationship to the quantity or value of the goods stamped for export. *Ibid.* *Pace* establishes that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here. Unlike the fee at issue in *Pace*, the HMT *is* determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services, facilities, and benefits used or usable by the exporter. The Court's holding does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor

development and maintenance. It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities. Pp. 369–370.

114 F. 3d 1564, affirmed.

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

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Kent L. Jones*, *David M. Cohen*, *Todd M. Hughes*, and *Lara Levinson*.

James R. Atwood argued the cause for respondent. With him on the brief were *Brian S. Goldstein*, *Steven S. Weiser*, *Laurence M. Friedman*, *Paul A. Horowitz*, and *Robert A. Long, Jr.**

JUSTICE GINSBURG delivered the opinion of the Court.

The Export Clause of the Constitution states: "No Tax or Duty shall be laid on Articles exported from any State."

**Hardy Myers*, Attorney General of Oregon, *Michael D. Reynolds*, Solicitor General, *David Schuman*, Deputy Attorney General, and *Robert M. Atkinson*, Assistant Attorney General, filed a brief for the State of Oregon as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Addison Wesley Longman et al. by *Carlos Rodriguez* and *Todd C. Fineberg;* for the Aluminum Co. of America et al. by *Melvin S. Schwechter*, *John C. Cleary*, and *Julie A. Coletti;* for Baxter Healthcare Corp. et al. by *Mark S. Zolno* and *Michael E. Roll;* for Boise Cascade et al. by *Steven P. Florsheim*, *Robert B. Silverman*, and *Erik D. Smithweiss;* for Cobe Laboratories, Inc., et al. by *Lynn S. Baker*, *Thomas E. Johnson*, and *Gregory W. Bowman;* for General Chemical Corp. et al. by *Patrick D. Gill*, *John S. Rode*, and *Eleanore Kelly-Kobayashi;* for the National Industrial Transportation League by *Nicholas J. DiMichael;* and for Texaco Refining and Marketing, Inc., et al. by *Steven H. Becker* and *Charles H. Critchlow*.

Briefs of *amici curiae* were filed for Amoco Chemical Co. by *Robert E. Burke* and *Christopher E. Pey;* for Arctic Cat, Inc., et al. by *Robert J. Hennessey;* for New Holland North America, Inc., et al. by *Munford Page Hall II* and *John B. Rehm;* and for Totes-Isotoner Corp. et al. by *John M. Peterson* and *George W. Thompson*.

U. S. Const., Art. I, § 9, cl. 5. We held in *United States* v. *International Business Machines Corp.*, 517 U. S. 843 (1996) *(IBM)*, that the Export Clause categorically bars Congress from imposing any tax on exports. The Clause, however, does not rule out a "user fee," provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for Government-supplied services, facilities, or benefits. See *Pace* v. *Burgess*, 92 U. S. 372, 375–376 (1876). This case presents the question whether the Harbor Maintenance Tax (HMT), 26 U. S. C. § 4461(a), as applied to goods loaded at United States ports for export, is an impermissible tax on exports or, instead, a legitimate user fee. We hold, in accord with the Federal Circuit, that the tax, which is imposed on an ad valorem basis, is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee.

I

The HMT, enacted as part of the Water Resources Development Act of 1986, 26 U. S. C. §§ 4461–4462, imposes a uniform charge on shipments of commercial cargo through the Nation's ports. The charge is currently set at 0.125 percent of the cargo's value. Exporters, importers, and domestic shippers are liable for the HMT, § 4461(c)(1), which is imposed at the time of loading for exports and unloading for other shipments, § 4461(c)(2). The HMT is collected by the Customs Service and deposited in the Harbor Maintenance Trust Fund (Fund). Congress may appropriate amounts from the Fund to pay for harbor maintenance and development projects, including costs associated with the St. Lawrence Seaway, or related expenses. § 9505.

Respondent United States Shoe Corporation (U. S. Shoe) paid the HMT for articles the company exported during the period April to June 1994 and then filed a protest with the Customs Service alleging the unconstitutionality of the toll

to the extent it applies to exports. The Customs Service responded with a form letter stating that the HMT is a statutorily mandated fee assessment on port users, not an unconstitutional tax on exports. On November 3, 1994, U. S. Shoe brought this action against the Government in the Court of International Trade (CIT). The company sought a refund on the ground that the HMT is unconstitutional as applied to exports.

Sitting as a three-judge court, the CIT held that its jurisdiction was properly invoked under 28 U. S. C. § 1581(i); on the merits, the CIT agreed with U. S. Shoe that the HMT qualifies as a tax. 907 F. Supp. 408 (1995). Rejecting the Government's characterization of the HMT as a user fee rather than a tax, the CIT reasoned: "The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo . . . . Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported." *Id.*, at 418. Relying on the Export Clause, the CIT entered summary judgment for U. S. Shoe.

The Court of Appeals for the Federal Circuit, sitting as a five-judge panel, affirmed. 114 F. 3d 1564 (1997). On auxiliary questions, the Federal Circuit upheld the CIT's exercise of jurisdiction under § 1581(i) and agreed with the lower court that the HMT applied to goods in export transit.[1] Concluding that the HMT is not based on a fair approximation of port use, the Federal Circuit also agreed that the HMT imposes a tax, not a user fee. In making this determination, the Court of Appeals emphasized that the HMT does not depend on the amount or manner of port use, but is determined solely by the value of cargo. Judge Mayer dissented; in his view, Congress properly designed the HMT as a user fee, a toll on shippers that supplies funds not for the

[1] The Government does not here challenge the determination that the HMT applies to goods in export transit.

general support of government, but exclusively for the facilitation of commercial navigation.

Numerous cases challenging the constitutionality of the HMT as applied to exports are currently pending in the CIT and the Court of Federal Claims.[2] We granted certiorari, 522 U. S. 944 (1997), to review the Federal Circuit's determination that the HMT violates the Export Clause.

II

As an initial matter, we conclude that the CIT properly entertained jurisdiction in this case. The complaint alleged exclusive original jurisdiction in that tribunal under 28 U. S. C. § 1581(a) or, alternatively, § 1581(i). App. 26. We agree with the CIT and the Federal Circuit that § 1581(i) is the applicable jurisdictional prescription. The key directive is stated in 26 U. S. C. § 4462(f)(2), which instructs that for jurisdictional purposes, the HMT "shall be treated as if such tax were a customs duty."

Section 1581(a) surely concerns customs duties. It confers exclusive original jurisdiction on the CIT in "any civil action commenced to contest the [Customs Service's] denial of a protest." A protest, as indicated in 19 U. S. C. § 1514, is an essential prerequisite when one challenges an actual Customs decision. As to the HMT, however, the Federal Circuit correctly noted that protests are not pivotal, for Customs "performs no active role," it undertakes "no analysis [or adjudication]," "issues no directives," "imposes no liabilities"; instead, Customs "merely passively collects" HMT payments. 114 F. 3d, at 1569.

Section 1581(i) describes the CIT's residual jurisdiction over

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[2] According to the Government, some 4,000 cases raising this claim are currently stayed in the CIT, with more than 100 additional cases stayed in the Court of Federal Claims. See Brief for United States 4.

> "any civil action commenced against the United States . . . that arises out of any law of the United States providing for —
>
> "(1) revenue from imports or tonnage;
>
> . . . . .
>
> "(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection . . . ."

This dispute, as the Federal Circuit stated, "involve[s] the 'administration and enforcement' of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports." 114 F. 3d, at 1571. True, § 1581(i) does not use the word "exports." But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting. In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§]1581(i)(1)." 907 F. Supp., at 421. Accordingly, CIT jurisdiction over controversies regarding the administration and enforcement of the HMT accords with § 1581(i)(4).[3]

III

Two Terms ago, in *IBM*, this Court considered the question whether a tax on insurance premiums paid to protect

[3] Because we determine that the CIT has exclusive jurisdiction over challenges to the HMT under § 1581(i)(4), it follows that the Court of Federal Claims lacks jurisdiction over the challenges to the HMT currently pending there. See 28 U. S. C. § 1491(b). The plaintiffs in these challenges may invoke § 1631, which authorizes intercourt transfers, when "in the interest of justice," to cure want of jurisdiction. See also § 610 (as used in Title 28, the term "court" includes the Court of Federal Claims and the CIT).

exports against loss violated the Export Clause. Distinguishing case law developed under the Commerce Clause, 517 U. S., at 850–852, and the Import-Export Clause, *id.*, at 857–861, the Court held that the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit. Before this Court's decision in *IBM*, the Government argued that the HMT, even if characterized as a "tax" rather than a "user fee," should survive constitutional review "because it applies without discrimination to exports, imports and domestic commerce alike." Reply Brief for United States 9, n. 2. Recognizing that *IBM* "rejected an indistinguishable contention," the Government now asserts only that HMT is "'a permissible user fee,'" Reply Brief for United States 9, n. 2, a toll within the tolerance of Export Clause precedent. Adhering to the Court's reasoning in *IBM*, we reject the Government's current position.

The HMT bears the indicia of a tax. Congress expressly described it as "a *tax* on any port use," 26 U. S. C. § 4461(a) (emphasis added), and codified the HMT as part of the Internal Revenue Code. In like vein, Congress provided that, for administrative, enforcement, and jurisdictional purposes, the HMT should be treated "as if [it] were a customs duty." §§ 4462(f)(1), (2). However, "we must regard things rather than names," *Pace* v. *Burgess*, 92 U. S., at 376, in determining whether an imposition on exports ranks as a tax. The crucial question is whether the HMT is a tax on exports in operation as well as nomenclature or whether, despite the label Congress has put on it, the exaction is instead a bona fide user fee.

In arguing that the HMT constitutes a user fee, the Government relies on our decisions in *United States* v. *Sperry Corp.*, 493 U. S. 52 (1989), *Massachusetts* v. *United States*, 435 U. S. 444 (1978), and *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972). In those cases, this Court upheld flat and ad valorem charges

as valid user fees. See *United States* v. *Sperry Corp.*, 493 U. S., at 62 (1½ percent ad valorem fee applied to awards certified by the Iran-United States Claims Tribunal qualifies as a user fee and is not so excessive as to violate the Takings Clause); *Massachusetts* v. *United States*, 435 U. S., at 463–467 (flat federal registration fee imposed annually on all civil aircraft meets genuine user fee standards and, as applied to state-owned aircraft, does not dishonor State's immunity from federal taxation); *Evansville-Vanderburgh Airport Authority*, 405 U. S., at 717–721 (flat charge for each passenger enplaning, levied for the maintenance of State's airport facilities, does not run afoul of the dormant Commerce Clause). Those decisions involved constitutional provisions other than the Export Clause, however, and thus do not govern here.

IBM plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority. The Court there emphasized that the "text of the Export Clause . . . expressly prohibits Congress from laying any tax or duty on exports." 517 U. S., at 852; see also *id.*, at 861 ("[T]he Framers sought to alleviate . . . concerns [that Northern States would tax exports to the disadvantage of Southern States] by completely denying to Congress the power to tax exports at all."). Accordingly, the Court reasoned in *IBM*, "[o]ur decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid." *Id.*, at 851; see also *id.*, at 857 ("We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. . . . [M]eaningful textual differences exist [between the two Clauses] and should not be overlooked."). In *Sperry*, moreover, we noted that the Takings Clause imposes fewer constraints on user fees than does the dormant Commerce Clause. See 493 U. S., at 61, n. 7 (analysis under Tak-

ings Clause is less "exacting" than under the dormant Commerce Clause). *A fortiori*, therefore, the Takings Clause is less restrictive than the Export Clause.

The guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context remains our time-tested decision in *Pace*. *Pace* involved a federal excise tax on tobacco. Congress provided that the tax would not apply to tobacco intended for export. To prevent fraud, however, Congress required that tobacco the manufacturer planned to export carry a stamp indicating that intention. Each stamp cost 25 cents (later 10 cents) per package of tobacco. Congress did not limit the quantity or value of the tobacco packaged for export or the size of the stamped package; "[t]hese were unlimited, except by the discretion of the exporter or the convenience of handling." 92 U. S., at 375.

The Court upheld the charge, concluding that it was "in no sense a duty on exportation," but rather "compensation given for services [in fact] rendered." *Ibid.* In so ruling, the Court emphasized two characteristics of the charge: It "bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed"; and the fee was not excessive, taking into account the cost of arrangements needed both "to give to the exporter the benefit of exemption from taxation, and . . . to secure . . . against the perpetration of fraud." *Ibid.*

Pace establishes that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here. Unlike the stamp charge in *Pace*, the HMT is determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter. As the Federal Circuit noted, the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging. See 114 F. 3d, at 1572.

In sum, if we are "to guard against . . . the imposition of a [tax] under the pretext of fixing a fee," *Pace* v. *Burgess*, 92 U. S., at 376, and resist erosion of the Court's decision in *IBM*, we must hold that the HMT violates the Export Clause as applied to exports. This does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance. It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities.

* * *

For the foregoing reasons, the judgment of the Court of Appeals for the Federal Circuit is

Affirmed.

Syllabus

BREARD *v.* GREENE, WARDEN

ON APPLICATION FOR STAY AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97–8214 (A–732). Decided April 14, 1998*

Petitioner Breard, a Paraguayan citizen, was convicted and sentenced to death in Virginia state court. He filed a motion for habeas relief in Federal District Court, arguing for the first time that his convictions and sentences should be overturned because Virginia authorities violated the Vienna Convention by failing to inform him that, as a foreign national, he had a right to contact the Paraguayan Consulate. The court held, however, that he procedurally defaulted his claim when he failed to raise it in state court and that he could not demonstrate cause and prejudice for this default. The Fourth Circuit affirmed. The Republic of Paraguay and its officials also brought suit in the District Court, alleging that their separate rights under the Convention had been violated by Virginia's failure to inform Breard of his Convention rights and to inform the Paraguayan Consulate of his arrest, conviction, and sentence. The Paraguayan Consul General also asserted a 42 U. S. C. § 1983 claim. The court concluded that it lacked subject-matter jurisdiction because Paraguay was not alleging a continuing violation of federal law and therefore could not bring its claims within the Eleventh Amendment immunity exception. The Fourth Circuit affirmed. Paraguay also instituted proceedings against the United States in the International Court of Justice (ICJ), alleging that the United States violated the Convention at Breard's arrest. The ICJ issued an order requesting the United States to "take all measures at its disposal to ensure that . . . Breard is not executed pending the final decision in these proceedings." Breard then filed a petition for an original writ of habeas corpus and a

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*Together with No. 97–1390 (A–738), *Republic of Paraguay et al.* v. *Gilmore, Governor of Virginia, et al.*, on application for stay or injunction and on petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, No. 97–8660 (A–767), *In re Breard*, on application for stay and on petition for writ of habeas corpus, No. 125, Orig. (A–771), *Republic of Paraguay et al.* v. *Gilmore, Governor of Virginia, et al.*, on application for temporary restraining order or preliminary injunction and on motion for leave to file a bill of complaint.

stay application in this Court to "enforce" the ICJ's order, and Paraguay filed a motion for leave to file an original bill of complaint.

Held: Breard is not entitled to relief on any theory offered. He procedurally defaulted his Vienna Convention claim, if any, by failing to raise it in the state courts. The argument that the claim may be heard in federal court because the Convention is the "supreme law of the land" and thus trumps the procedural default doctrine is plainly incorrect for two reasons. First, a well-established rule of international law, embodied in the Convention itself, specifies that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. In this country, assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. *Wainwright* v. *Sykes*, 433 U. S. 72. Second, Breard's ability to obtain relief based on Convention violations is subject to the subsequently enacted Antiterrorism and Effective Death Penalty Act, which denies a habeas petitioner alleging that he is held in violation of treaties an evidentiary hearing if he has failed to develop the claim's factual basis in state-court proceedings. See, *e. g.*, *Reid* v. *Covert*, 354 U. S. 1, 18. As for Paraguay's suits, neither the Convention's text nor its history clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violating consular notification provisions. The Eleventh Amendment's "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State," *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 329–330, provides a separate reason why Paraguay's suit may not proceed. The Consul General's § 1983 suit is not cognizable because Paraguay, for whose benefit the suit is brought, is not a "person within the jurisdiction" of the United States authorized to bring suit under that section. See, *e. g.*, *Moor* v. *County of Alameda*, 411 U. S. 693, 699. It is the Virginia Governor's prerogative to stay Breard's execution pending the ICJ's decision; nothing in this Court's existing case law allows it to make that decision for him.

Habeas corpus, motion for leave to file bill of complaint, certiorari, and stay applications denied. Reported below: No. 97–8214, 134 F. 3d 615, and No. 97–1390, 134 F. 3d 622.

PER CURIAM.

Angel Francisco Breard is scheduled to be executed by the Commonwealth of Virginia this evening at 9 p.m. Breard, a citizen of Paraguay, came to the United States in 1986, at the

age of 20. In 1992, Breard was charged with the attempted rape and capital murder of Ruth Dickie. At his trial in 1993, the State presented overwhelming evidence of guilt, including semen found on Dickie's body matching Breard's DNA profile and hairs on Dickie's body identical in all microscopic characteristics to hair samples taken from Breard. Breard chose to take the witness stand in his defense. During his testimony, Breard confessed to killing Dickie, but explained that he had only done so because of a Satanic curse placed on him by his father-in-law. Following a jury trial in the Circuit Court of Arlington County, Virginia, Breard was convicted of both charges and sentenced to death. On appeal, the Virginia Supreme Court affirmed Breard's convictions and sentences, *Breard* v. *Commonwealth*, 248 Va. 68, 445 S. E. 2d 670 (1994), and we denied certiorari, 513 U. S. 971 (1994). State collateral relief was subsequently denied as well.

Breard then filed a motion for habeas relief under 28 U. S. C. § 2254 in Federal District Court on August 20, 1996. In that motion, Breard argued for the first time that his convictions and sentences should be overturned because of alleged violations of the Vienna Convention on Consular Relations (Vienna Convention), April 24, 1963, [1970] 21 U. S. T. 77, T. I. A. S. No. 6820, at the time of his arrest. Specifically, Breard alleged that the Vienna Convention was violated when the arresting authorities failed to inform him that, as a foreign national, he had the right to contact the Paraguayan Consulate. The District Court rejected this claim, concluding that Breard procedurally defaulted the claim when he failed to raise it in state court and that Breard could not demonstrate cause and prejudice for this default. *Breard* v. *Netherland*, 949 F. Supp. 1255, 1266 (ED Va. 1996). The Fourth Circuit affirmed. *Breard* v. *Pruett*, 134 F. 3d 615, 620 (1998). Breard has petitioned this Court for a writ of certiorari.

In September 1996, the Republic of Paraguay, the Ambassador of Paraguay to the United States, and the Consul General of Paraguay to the United States (collectively Paraguay) brought suit in Federal District Court against certain Virginia officials, alleging that their separate rights under the Vienna Convention had been violated by the Commonwealth's failure to inform Breard of his rights under the treaty and to inform the Paraguayan Consulate of Breard's arrest, convictions, and sentences. In addition, the Consul General asserted a parallel claim under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging a denial of his rights under the Vienna Convention. The District Court concluded that it lacked subject-matter jurisdiction over these suits because Paraguay was not alleging a "continuing violation of federal law" and therefore could not bring its claims within the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U. S. 123 (1908). *Republic of Paraguay* v. *Allen*, 949 F. Supp. 1269, 1272–1273 (ED Va. 1996). The Fourth Circuit affirmed on Eleventh Amendment grounds. *Republic of Paraguay* v. *Allen*, 134 F. 3d 622 (1998). Paraguay has also petitioned this Court for a writ of certiorari.

On April 3, 1998, nearly five years after Breard's convictions became final, the Republic of Paraguay instituted proceedings against the United States in the International Court of Justice (ICJ), alleging that the United States violated the Vienna Convention at the time of Breard's arrest. On April 9, the ICJ noted jurisdiction and issued an order requesting that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . . ." The ICJ set a briefing schedule for this matter, with oral argument likely to be held this November. Breard then filed a petition for an original writ of habeas corpus and a stay application in this Court in order to "enforce" the ICJ's order. Paraguay filed a motion for leave to file a bill of complaint in this Court, citing this Court's original jurisdiction

over cases "affecting Ambassadors . . . and Consuls." U. S. Const., Art. III, § 2.

It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts. Nevertheless, in their petitions for certiorari, both Breard and Paraguay contend that Breard's Vienna Convention claim may be heard in federal court because the Convention is the "supreme law of the land" and thus trumps the procedural default doctrine. Pet. for Cert. in No. 97–8214, pp. 15–18; Pet. for Cert. in No. 97–1390, p. 14, n. 8. This argument is plainly incorrect for two reasons.

First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. See *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 723 (1988); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 700 (1988); *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539 (1987). This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Article 36(2), [1970] 21 U. S. T., at 101. It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Claims not so raised are considered defaulted. *Ibid.* By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention

in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.

Second, although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Reid* v. *Covert*, 354 U. S. 1, 18 (1957) (plurality opinion); see also *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, "the one last in date will control the other"). The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969. But in 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner alleging that he is held in violation of "treaties of the United States" will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." 28 U. S. C. §§2254(a), (e)(2) (1994 ed., Supp. IV). Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be. This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him. Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him. That limitation, Breard also ar-

gues, is not justified because his Vienna Convention claims were so novel that he could not have discovered them any earlier. Assuming that were true, such novel claims would be barred on habeas review under *Teague* v. *Lane*, 489 U. S. 288 (1989).

Even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial. *Arizona* v. *Fulminante*, 499 U. S. 279 (1991). In this action, no such showing could even arguably be made. Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been. Breard's asserted prejudice—that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice courts routinely reject in those cases where an inmate alleges that his plea of guilty was infected by attorney error. See, *e. g.*, *Hill* v. *Lockhart*, 474 U. S. 52, 59 (1985).

As for Paraguay's suits (both the original action and the case coming to us on petition for certiorari), neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions. The Eleventh Amendment provides a separate reason why Paraguay's suit might not succeed. That Amendment's "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State" was enunciated in *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 329–330 (1934). Though Paraguay claims that its suit is within an exemption dealing with continuing consequences of past violations of federal rights, see *Milliken* v.

Bradley, 433 U. S. 267 (1977), we do not agree. The failure to notify the Paraguayan Consul occurred long ago and has no continuing effect. The causal link present in *Milliken* is absent in this suit.

Insofar as the Consul General seeks to base his claims on § 1983, his suit is not cognizable. Section 1983 provides a cause of action to any "person within the jurisdiction" of the United States for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws." As an initial matter, it is clear that Paraguay is not authorized to bring suit under § 1983. Paraguay is not a "person" as that term is used in § 1983. See *Moor* v. *County of Alameda*, 411 U. S. 693, 699 (1973); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 323–324 (1966); cf. *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58 (1989). Nor is Paraguay "within the jurisdiction" of the United States. And since the Consul General is acting only in his official capacity, he has no greater ability to proceed under § 1983 than does the country he represents. Any rights that the Consul General might have by virtue of the Vienna Convention exist for the benefit of Paraguay, not for him as an individual.

It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.

For the foregoing reasons, we deny the petition for an original writ of habeas corpus, the motion for leave to file a

bill of complaint, the petitions for certiorari, and the accompanying stay applications filed by Breard and Paraguay.

Statement of JUSTICE SOUTER.

I agree with the Court that the lack of any reasonably arguable causal connection between the alleged treaty violations and Breard's convictions and sentences disentitle him to relief on any theory offered. Moreover, I have substantial doubts that either Paraguay or any official acting for it is a "person" within the meaning of 42 U. S. C. § 1983 and that the Vienna Convention is enforceable in any judicial proceeding now underway. For these reasons, I believe the stay requests should be denied, with the result that Paraguay's claims will be mooted. Accordingly, I have voted to deny Paraguay's and Breard's respective petitions for certiorari (Nos. 97–1390 and 97–8214), Paraguay's motion for leave to file a bill of complaint (No. 125, Orig.), Breard's application for an original writ of habeas corpus (No. 97–8660), and the associated requests for a stay of execution.

JUSTICE STEVENS, dissenting.

The Court of Appeals' decision denying petitioner Breard's first application for a federal writ of habeas corpus became final on February 18, 1998. Under this Court's Rules, a timely petition for a writ of certiorari to review that decision could have been filed as late as May 19, 1998. See Rule 13.1 ("[A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment"). Ordinary review of that petition pursuant to our Rules would have given us additional time thereafter to consider its merits in the light of the response filed by the Commonwealth of Virginia. We have, however, been deprived of the normal time for considered deliberation by the Commonwealth's decision to set the date of petitioner's execution for today.

There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases. Indeed, the international aspects of this case provide an additional reason for adhering to our established Rules and procedures. I would therefore grant the applications for a stay, and I respectfully dissent from the decision to act hastily rather than with the deliberation that is appropriate in a case of this character.

JUSTICE GINSBURG, dissenting in No. 97–8214 (A–732).

I would grant the application for a stay of execution in order to consider in the ordinary course the instant petition, Breard's first federal petition for writ of habeas corpus.

JUSTICE BREYER, dissenting.

In my view, several of the issues raised here are of sufficient difficulty to warrant less speedy consideration. Breard argues, for example, that the novelty of his Vienna Convention claim is sufficient to create "cause" for his having failed to present that claim to the Virginia state courts. Pet. for Cert. in No. 97–8214, pp. 20–22. He might add that the nature of his claim, were we to accept it, is such as to create a "watershed rule of criminal procedure," which might overcome the bar to consideration otherwise posed by *Teague* v. *Lane*, 489 U. S. 288, 311 (1989). He additionally says that what the Solicitor General describes as Virginia's violation of the Convention "prejudiced" him by isolating him at a critical moment from Consular Officials who might have advised him to try to avoid the death penalty by pleading guilty. Pet. for Cert. in No. 97–8214, p. 22; see Brief for United States as *Amicus Curiae* in Nos. 97–1390 and 97–8214, p. 12 ("[T]he Executive Branch has conceded that the Vienna Convention was violated"). I cannot say, without examining the record more fully, that these arguments are *obviously* without merit. Nor am I willing to accept without fuller briefing and consideration the positions taken

by the majority on all of the sometimes difficult issues that the majority addresses.

At the same time, the international aspects of the cases have provided us with the advantage of additional briefing even in the short time available. More time would likely mean additional briefing and argument, perhaps, for example, on the potential relevance of proceedings in an international forum.

Finally, as JUSTICE STEVENS points out, Virginia is now pursuing an execution schedule that leaves less time for argument and for Court consideration than the Court's Rules provide for ordinary cases. Like JUSTICE STEVENS, I can find no special reason here to truncate the period of time that the Court's Rules would otherwise make available.

For these reasons, taken together, I would grant the requested stay of execution and consider the petitions for certiorari in the ordinary course.

Syllabus

ATLANTIC MUTUAL INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 97–147. Argued March 2, 1998—Decided April 21, 1998

Before enactment of the Tax Reform Act of 1986, the Internal Revenue Code gave property and casualty (PC) insurers a full deduction for "loss reserves": estimated amounts of losses reported but not yet paid, losses incurred but not yet reported, and administrative costs of resolving claims. In each taxable year, not only losses paid, but the full amount of the loss reserves, reduced by the amount of the loss reserves claimed for the prior taxable year, were treated as a business expense. Section 1023 of the 1986 Act required PC insurers, beginning with the 1987 taxable year, to discount unpaid losses to present value when claiming them as a deduction. Requiring insurers to subtract undiscounted year-end 1986 reserves from discounted year-end 1987 reserves in computing 1987 losses would produce artificially low deductions, so the Act included a transitional rule requiring insurers to discount 1986 reserves as well. This rule changed the "method of accounting" for computing taxable income. To avoid requiring PC insurers to recognize as income the difference between undiscounted and discounted year-end 1986 loss reserves, the Act afforded them a "fresh start," to wit, an exclusion from taxable income of the difference between undiscounted and discounted year-end 1986 loss reserves. § 1023(e)(3)(A). It foreclosed the possibility that they would inflate reserves to manipulate the "fresh start" by excepting "reserve strengthening" from the exclusion. § 1023(e)(3)(B). Treasury Regulation § 1.846–3(c)(3)(ii) defines "reserve strengthening" to include any net additions to reserves. Respondent Commissioner determined that petitioner, Atlantic Mutual Insurance Co., and its subsidiary, a PC insurer, made net additions to loss reserves in 1986, reducing the "fresh start" entitlement and resulting in a tax deficiency. The Tax Court disagreed, holding that "reserve strengthening" refers to only those increases that result from changes in computation methods or assumptions. In reversing, the Third Circuit concluded that the Treasury Regulation's definition of "reserve strengthening" is based on a permissible statutory construction.

Held: The Treasury Regulation represents a reasonable interpretation of the term "reserve strengthening." Neither prior legislation nor industry use establishes the plain meaning Atlantic ascribes to that term:

reserve increases attributable to changes in methods or assumptions. Since the term is ambiguous, the question is not whether the Treasury Regulation represents the best interpretation of the statute, but whether it represents a reasonable one. See *Cottage Savings Assn.* v. *Commissioner*, 499 U. S. 554, 560–561. As a purely linguistic matter, the phrase is broad enough to embrace *all* increases in the reserve's amount, for whatever reason and from whatever source. The provision at issue is a limitation upon an extraordinary deduction accorded to PC insurers. There was no need for the deduction to be microscopically fair, and the interpretation adopted in the Treasury Regulation seems to be a reasonable accommodation of the competing interests of fairness, administrability, and avoidance of abuse. Given the hundreds (or more likely thousands) of claims involved, claims resolved for less than estimated reserves will tend to offset claims that settle for more than estimated reserves. Any discrepancy would not approach the unrealistic proportions claimed by Atlantic. Pp. 387–391.

111 F. 3d 1056, affirmed.

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

George R. Abramowitz argued the cause for petitioner. With him on the briefs were *Dennis L. Allen*, *M. Kristan Rizzolo*, *John S. Breckinridge, Jr.*, and *James H. Kenworthy.*

Kent L. Jones argued the cause for respondent. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Argrett*, *Deputy Solicitor General Wallace*, *David I. Pincus*, and *Edward T. Perelmuter.**

JUSTICE SCALIA delivered the opinion of the Court.

Property and casualty insurance companies maintain accounting reserves for "unpaid losses." Under the Tax Reform Act of 1986, increases in loss reserves that constitute "reserve strengthening" do not qualify for a certain one-time tax benefit. We must decide whether the term "reserve strengthening" reasonably encompasses any increase in re-

*Briefs of *amici curiae* urging reversal were filed for Ambase Corp. by *Peter H. Winslow* and *Gregory K. Oyler;* and for the American Insurance Association et al. by *Matthew J. Zinn*, *J. Walker Johnson*, *Craig A. Berrington*, *Allan J. Stein*, and *Steven C. Elliott.*

serves, or only increases that result from changes in the methods or assumptions used to compute them.

I

Atlantic Mutual Insurance Co. is the common parent of an affiliated group of corporations, including Centennial Insurance Co., a property and casualty (PC) insurer. From 1985 to 1993, the two corporations (Atlantic) maintained what insurers call "loss reserves." Loss reserves are estimates of amounts insurers will have to pay for losses that have been reported but not yet paid, for losses that have been incurred but not yet reported, and for administrative costs of resolving claims.

Before enactment of the Tax Reform Act of 1986, Pub. L. 99–514, 100 Stat. 2085, the Internal Revenue Code gave PC insurers a full deduction for loss reserves as "losses incurred." In each taxable year, not only losses paid, but the full amount of the loss reserves, reduced by the amount of the loss reserves claimed for the prior taxable year, would be treated as a business expense. 26 U. S. C. §§ 832(b)(5) and (c)(4) (1982 ed.). This designation enabled the PC insurer to take, in effect, a current deduction for future loss payments without adjusting for the "time value of money"—the fact that "'[a] dollar today is worth more than a dollar tomorrow,'" D. Herwitz & M. Barrett, Accounting for Lawyers 221 (2d ed. 1997). Section 1023 of the 1986 Act amended the Code to require PC insurers, for taxable years beginning after December 31, 1986, to discount unpaid losses to present value when claiming them as a deduction. 100 Stat. 2399, 2404, 26 U. S. C. §§ 832(b)(5)(A), 846 (1982 ed., Supp. V). Absent a transitional rule, PC insurers would have been left to subtract undiscounted year-end 1986 reserves from discounted year-end 1987 reserves for purposes of computing losses incurred for taxable year 1987—producing artificially low deductions. The 1986 Act softened this consequence by requiring PC insurers, for purposes of that

1987 tax computation, to discount 1986 reserves as well. 100 Stat. 2404, note following 26 U. S. C. § 846.

Because the requirement that PC insurers discount 1986 reserves changed the "method of accounting" for computing taxable income, PC insurers, absent another transitional rule, would have been required to recognize as income the difference between undiscounted and discounted year-end 1986 loss reserves. See 26 U. S. C. § 481(a) (1988 ed.). To avoid this consequence, § 1023(e)(3)(A) of the 1986 Act afforded PC insurers a "fresh start," to wit, an exclusion from taxable income of the difference between undiscounted and discounted year-end 1986 loss reserves. 100 Stat. 2404, note following 26 U. S. C. § 846. Of course the greater the 1986 reserves, the greater the exclusion. Section 1023(e)(3)(B) of the 1986 Act foreclosed the possibility that insurers would inflate reserves to manipulate the "fresh start" by excepting "reserve strengthening" from the exclusion:

> "(B) RESERVE STRENGTHENING IN YEARS AFTER 1985.—Subparagraph (A) [the fresh-start provision] shall not apply to any reserve strengthening in a taxable year beginning in 1986, and such strengthening shall be treated as occurring in the taxpayer's 1st taxable year beginning after December 31, 1986." 100 Stat. 2404, note following 26 U. S. C. § 846.

Regulations promulgated by the Treasury Department set forth rules for determining the amount of "reserve strengthening":

> "(1) *In general.* The amount of reserve strengthening (weakening) is the amount that is determined under paragraph (c)(2) or (3) to have been added to (subtracted from) an unpaid loss reserve in a taxable year beginning in 1986. For purposes of section 1023(e)(3)(B) of the 1986 Act, the amount of reserve strengthening (weakening) must be determined separately for each unpaid loss

> reserve by applying the rules of this paragraph (c). This determination is made without regard to the reasonableness of the amount of the unpaid loss reserve and without regard to the taxpayer's discretion, or lack thereof, in establishing the amount of the unpaid loss reserve. . . .
>
> . . . . . .
>
> "(3) *Accident years before 1986*—(i) *In general.* For each taxable year beginning in 1986, the amount of reserve strengthening (weakening) for an unpaid loss reserve for an accident year before 1986 is the amount by which the reserve at the end of that taxable year exceeds (is less than)—
>
> "(A) The reserve at the end of the immediately preceding taxable year; reduced by
>
> "(B) Claims paid and loss adjustment expenses paid ("loss payments") in the taxable year beginning in 1986 with respect to losses that are attributable to the reserve. . . ." Treas. Reg. § 1.846–3(c), 26 CFR § 1.846–3(c) (1997).

In short, any net additions to reserves (with two exceptions not here at issue, § 1.846–3(c)(3)(ii)) constitute "reserve strengthening" under the regulation.

The Commissioner of Internal Revenue determined that Atlantic made net additions to reserves—"reserve strengthening"—during 1986, reducing the "fresh start" entitlement by an amount that resulted in a tax deficiency of $519,987. The Tax Court disagreed, holding that Atlantic had not strengthened its reserves. "Reserve strengthening," the Tax Court held, refers only to increases in reserves that result from changes in the methods or assumptions used to compute them. (Atlantic's reserve increases, there is no dispute, did not result from any such change.) The United States Court of Appeals for the Third Circuit reversed the Tax Court, concluding that the Treasury Regulation's defini-

tion of "reserve strengthening" to include any net additions to reserves is based on a permissible construction of the statute. 111 F. 3d 1056 (1997). (It expressly disagreed with the Eighth Circuit's conclusion in *Western National Mutual Insurance Co.* v. *Commissioner*, 65 F. 3d 90 (1995), that the Treasury Regulation is invalid.) We granted certiorari. 522 U. S. 931 (1997).

II

The 1986 Act does not define "reserve strengthening." Atlantic contends that the term has a plain meaning under the statute: reserve increases attributable to changes in methods or assumptions. If that is what the term plainly means, Atlantic must prevail, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984).

Atlantic contends that the plain meaning of "reserve strengthening" can be discerned, first, from its use in the PC insurance industry. It presented at trial two expert reports which, by "constructing a working definition of the term" that requires "a material change in methodology and/or assumptions," App. 68, 74, purport to demonstrate that Atlantic "did not strengthen reserves," *id.*, at 99. Our task, of course, is to determine not what the term *ought* to mean, but what it *does* mean. Atlantic's first expert, before "constructing" a definition, expressly acknowledged that "reserve strengthening" is "not a well-defined PC insurance or actuarial term of art to be found in PC actuarial, accounting, or insurance regulatory literature." *Id.*, at 60. On this point she was in agreement with the Commissioner's experts: "In the property-casualty industry the term 'reserve strengthening' has various meanings, rather than a single universal meaning," *id.*, at 124. If the expert reports establish anything, it is that "reserve strengthening" does not have an established meaning in the PC insurance industry.

Atlantic next contends that a plain meaning can be discerned from prior use of the term in life insurance tax legislation. According to Atlantic, the term has its roots in the Life Insurance Company Income Tax Act of 1959, which provided tax consequences for changes in the "basis" for determining life insurance reserves. 73 Stat. 125, 26 U. S. C. § 810(d) (1958 ed., Supp. I). But that provision does not define, or for that matter even use, the term "reserve strengthening." Though the regulation that implemented the provision uses the term "reserve strengthening" in a caption, Treas. Reg. § 1.810–3(a), 26 CFR § 1.810–3(a) (1997), its text does not mention the term, and one of its Examples speaks only of "reserve strengthening attributable to the change in basis which occurred in 1959," § 1.810–3(b), Ex. 2. If, as Atlantic argues, "basis" and "assumptions or methodologies" are interchangeable terms, Brief for Petitioner 17, n. 8, and a change in basis is necessary for "reserve strengthening," it is redundant to say "reserve strengthening attributable to the change in basis which occurred in 1959," much as it would be to say "a sunburn attributable to the sun in 1959." On Atlantic's assumptions, the more natural formulation would have been simply "reserve strengthening in 1959." Thus, the 1959 Act and implementing regulation suggest, if anything, that a change in basis is a sufficient, but not a necessary, condition for "reserve strengthening."

Atlantic further contends that the term "reserve strengthening" draws a plain meaning from a provision of the Tax Reform Act of 1984 that accorded a "fresh start" adjustment to life insurance reserves. Div. A, 98 Stat. 758, note following 26 U. S. C. § 801 (1984 Act). That provision, like the "fresh start" adjustment for PC insurers in the 1986 Act, said that the "fresh start" would not apply to reserve strengthening, specifically, "to any reserve strengthening reported for Federal income tax purposes after September 27, 1983, for a taxable year ending before January 1, 1984." 98

Stat. 759. Unlike the 1986 Act, however, the 1984 Act expressly provided that "reserve strengthening" would not be excluded from the "fresh start" if the insurer "employs the reserve practice used for purposes of the most recent annual statement filed before September 27, 1983 . . . ." *Ibid.* If, as Atlantic contends, reserve strengthening encompasses only reserve increases that result from a change in reserve practices (viz., change in methods or assumptions), the saving clause is superfluous. Thus, to the extent the definition of "reserve strengthening" in the life insurance context is relevant to its meaning here (which is questionable, see 111 F. 3d, at 1061–1062), the 1984 Act, like the regulations under the 1959 Act, tends to contradict, rather than support, petitioner's interpretation. We conclude that neither prior legislation nor industry use establishes the plain meaning Atlantic ascribes to "reserve strengthening."

III

Since the term "reserve strengthening" is ambiguous, the task that confronts us is to decide, not whether the Treasury Regulation represents the best interpretation of the statute, but whether it represents a reasonable one. See *Cottage Savings Assn.* v. *Commissioner*, 499 U. S. 554, 560–561 (1991). We conclude that it does.

As a purely linguistic matter, the phrase is certainly broad enough to embrace *all* increases in (*all* "strengthening of") the amount of the reserve, for whatever reason and from whatever source. Atlantic contends that this interpretation is unreasonable because, in theory, it produces absurd results, as the following example supposedly illustrates: Assume that in 1985 a PC insurer had four case reserves of $500 each (total reserves of $2,000). If two cases settled in 1986 for $750 each ($1,500 total), the remaining loss reserve would be $1,000. Under the regulation, according to Atlantic, the Commissioner would find "reserve strengthening" of

$500 (1986 loss reserves ($1,000) less (first year reserves ($2,000) less second year payments ($1,500))), even though reserves did not increase. The Commissioner denies this consequence, contending that under the stipulation in this case the increase in the reserve would be "reduced to zero" by an offsetting adjustment when the payment is made, and that adjustments in the IBNR reserve (reserve for claims "incurred but not reported") may result from payments in excess of prior reserve amounts, offsetting changes in other reserves. Brief for Respondent 36–39.

We need not resolve that dispute, because we agree with the Commissioner that Atlantic's horrific example is in any event unrealistic. The property and casualty insurer that had only four cases would not be in business very long, with or without the benefit of the tax adjustment—or if he would, his talents could be put to better use in Las Vegas. The whole point of the insurance business is to spread the insured risk over a large number of cases, where experience and the law of probabilities can be relied upon. And where hundreds (or more likely thousands) of claims are involved, claims resolved for less than estimated reserves will tend to offset claims that settle for more than estimated reserves. See Notice of Proposed Rulemaking Discounted Unpaid Losses, FI–139–86, 1991–2 Cum. Bull. 946, 947 ("For most unpaid loss reserves . . . any potential inaccuracies are likely to offset each other in the aggregate"). There may, to be sure, be some discrepancy in one direction or the other, but it would not approach the relative proportions claimed by Atlantic.

It should be borne in mind that the provision at issue here is a limitation upon an extraordinary deduction accorded to PC insurers. There was certainly no need for that deduction to be microscopically fair, and the interpretation adopted by the Treasury Regulation seems to us a reasonable accommodation—and one that the statute very likely

intended—of the competing interests of fairness, administrability, and avoidance of abuse.

* * *

Because the Treasury Regulation represents a reasonable interpretation of the term "reserve strengthening," we affirm the judgment of the Court of Appeals.

It is so ordered.

Syllabus

CAMPBELL *v.* LOUISIANA

CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

No. 96–1584. Argued January 20, 1998—Decided April 21, 1998

A grand jury in Evangeline Parish, Louisiana, indicted petitioner Campbell for second-degree murder. In light of evidence that, for the prior 16½ years, no black person had served as grand jury foreperson in the Parish even though more than 20 percent of the registered voters were black, Campbell filed a motion to quash the indictment on the ground that his grand jury was constituted in violation of his Fourteenth Amendment equal protection and due process rights and the Sixth Amendment's fair-cross-section requirement. The trial judge denied the motion because Campbell, a white man accused of killing another white man, lacked standing to complain about the exclusion of black persons from serving as forepersons. He was convicted, but the Louisiana Court of Appeal ordered an evidentiary hearing, holding that Campbell could object to the alleged discrimination under the holding in *Powers* v. *Ohio*, 499 U. S. 400, that a white defendant had standing to challenge racial discrimination against black persons in the use of peremptory challenges. In reversing, the State Supreme Court declined to extend *Powers* to a claim such as Campbell's. It also found that he was not afforded standing to raise a due process objection by *Hobby* v. *United States*, 468 U. S. 339, in which the Court held that no relief could be granted to a white defendant even if his due process rights had been violated by discrimination in the selection of a federal grand jury foreperson whose duties were purely "ministerial." Noting that the Louisiana foreperson's role was similarly ministerial, the court held that any discrimination had little, if any, effect on Campbell's due process right of fundamental fairness.

Held:

1. A white criminal defendant has the requisite standing to raise equal protection and due process objections to discrimination against black persons in the selection of grand jurors. Pp. 396–403.

(a) This case must be treated as one alleging discriminatory selection of grand jurors, not just of a grand jury foreperson. In the federal system and in most States using grand juries, the foreperson is selected from the ranks of the already seated jurors. In Louisiana, by contrast, the judge selects the foreperson from the grand jury venire before the remaining members are chosen by lot. In addition to his other

duties, the Louisiana foreperson has the same full voting powers as other grand jury members. As a result, when the Louisiana judge selected the foreperson, he also selected one member of the grand jury outside of the drawing system used to compose the balance of that body. Pp. 396–397.

(b) Campbell, like any other white defendant, has standing under *Powers, supra,* to raise an equal protection challenge to the discriminatory selection of his grand jury. The excluded jurors' own right not to be discriminatorily denied grand jury service can be asserted by Campbell because he satisfies the three preconditions for third-party standing outlined in *Powers, supra,* at 411. First, regardless of skin color, an accused suffers a significant "injury in fact" when the grand jury's composition is tainted by racial discrimination. The integrity of the body's decisions depends on the integrity of the process used to select the grand jurors. If that process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions. See *Rose* v. *Mitchell,* 443 U. S. 545, 555–556. The Court rejects the State's argument that no harm is inflicted when a single grand juror is selected based on racial prejudice because the discrimination is invisible to the grand jurors on that panel, and only becomes apparent when a pattern emerges over the course of years. This argument underestimates the seriousness of the allegations here: If they are true, the impartiality and discretion of the judge himself would be called into question. Second, Campbell has a "close relationship" to the excluded jurors, who share with him a common interest in eradicating discrimination from the grand jury selection process, and a vital interest in asserting their rights because his conviction may be overturned as a result. See, *e. g.*, *Powers,* 499 U. S., at 413–414. The State's argument that Campbell has but a tenuous connection to jurors excluded in the past confuses his underlying claim—that black persons were excluded from his grand jury—with the evidence needed to prove it—that similarly situated venirepersons were excluded in previous cases on account of intentional discrimination. Third, given the economic burdens of litigation and the small financial reward available, a grand juror excluded because of race has little incentive to sue to vindicate his own rights. See *id.*, at 415. Pp. 397–400.

(c) A white defendant alleging discriminatory selection of grand jurors has standing to litigate whether his conviction was procured by means or procedures which contravene due process. *Hobby, supra,* at 350, proceeded on the implied assumption that such standing exists. The Louisiana Supreme Court's reading of *Hobby* as foreclosing Campbell's standing is inconsistent with that implicit assumption and with the Court's explicit reasoning in *Hobby.* Campbell's challenge is different

in kind and degree from the one there at issue because it implicates the impermissible appointment of a member of the grand jury. What concerns Campbell is not the foreperson's performance of his ministerial duty to preside, but his performance as a grand juror, namely, voting to charge Campbell with second-degree murder. The significance of this distinction was acknowledged in *Hobby, supra,* at 348. By its own terms, then, *Hobby* does not address a claim like Campbell's. Pp. 400–403.

2. The Court declines to address whether Campbell also has standing to raise a fair-cross-section claim. Neither of the Louisiana appellate courts discussed this contention, and Campbell has made no effort to meet his burden of showing the issue was properly presented to those courts. See *Adams* v. *Robertson,* 520 U. S. 83, 86 *(per curiam).* P. 403.

673 So. 2d 1061, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court with respect to Parts I, II, IV, and V, and the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined, *post,* p. 403.

Dmitrc I. Burnes argued the cause for petitioner. With him on the briefs was *Richard V. Burnes.*

Richard P. Ieyoub, Attorney General of Louisiana, argued the cause for respondent. With him on the brief were *Kathleen E. Petersen* and *Mary Ellen Hunley,* Assistant Attorneys General, and *Paul R. Baier.**

JUSTICE KENNEDY delivered the opinion of the Court.

We must decide whether a white criminal defendant has standing to object to discrimination against black persons in the selection of grand jurors. Finding he has the requisite standing to raise equal protection and due process claims, we reverse and remand.

I

A grand jury in Evangeline Parish, Louisiana, indicted petitioner Terry Campbell on one count of second-degree

**Joshua L. Dratel, Lisa Kemler,* and *Richard A. Greenberg* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

murder. Campbell, who is white, filed a timely pretrial motion to quash the indictment on the grounds the grand jury was constituted in violation of his equal protection and due process rights under the Fourteenth Amendment and in violation of the Sixth Amendment's fair-cross-section requirement. Campbell alleged a longstanding practice of racial discrimination in the selection of grand jury forepersons in the parish. His sole piece of evidence is that, between January 1976 and August 1993, no black person served as a grand jury foreperson in the parish, even though more than 20 percent of the registered voters were black persons. See Brief for Petitioner 16. The State does not dispute this evidence. The trial judge refused to quash the indictment because "Campbell, being a white man accused of killing another white man," lacked standing to complain "where all of the forepersons were white." App. to Pet. for Cert. G–33.

After Campbell's first trial resulted in a mistrial, he was retried, convicted of second-degree murder, and sentenced to life in prison without possibility of parole. Campbell renewed his challenge to the grand jury foreperson selection procedures in a motion for new trial, which was denied. See *id.*, at I–2. The Louisiana Court of Appeal reversed, because, under our decision in *Powers* v. *Ohio*, 499 U. S. 400 (1991), Campbell had standing to object to the alleged discrimination even though he is white. 651 So. 2d 412 (1995). The Court of Appeal remanded the case for an evidentiary hearing because it found Campbell's evidence of discrimination inadequate. *Id.*, at 413.

The Louisiana Supreme Court reversed. It distinguished *Powers* as turning on the "considerable and substantial impact" that a prosecutor's discriminatory use of peremptory challenges has on a defendant's trial as well as on the integrity of the judicial system. See 661 So. 2d 1321, 1324 (1995). The court declined to extend *Powers* to a claim of discrimination in the selection of a grand jury foreperson. It also found *Hobby* v. *United States*, 468 U. S. 339 (1984), did not

afford Campbell standing to raise a due process objection. In *Hobby*, this Court held no relief could be granted to a white defendant even if his due process rights were violated by discrimination in the selection of a federal grand jury foreperson. Noting that *Hobby* turned on the ministerial nature of the federal grand jury foreperson's duties, the Louisiana Supreme Court held "[t]he role of the grand jury foreman in Louisiana appears to be similarly ministerial" such that any discrimination "has little, if any, effect on the defendant's due process right of fundamental fairness." 661 So. 2d, at 1324. Because the Court of Appeal had not addressed Campbell's other asserted points of error, the Louisiana Supreme Court remanded the case. After the Court of Appeal rejected Campbell's remaining claims, 673 So. 2d 1061 (1996), the Louisiana Supreme Court refused to reconsider its ruling on the grand jury issue, 685 So. 2d 140 (1997). We granted certiorari to address the narrow question of Campbell's standing to raise equal protection, due process, and fair-cross-section claims. 521 U. S. 1151 (1997).

II

As an initial matter, we note Campbell complains about more than discrimination in the selection of his grand jury foreperson; he alleges that discrimination shaped the composition of the grand jury itself. In the federal system and in most States which use grand juries, the foreperson is selected from the ranks of the already seated grand jurors. See 1 S. Beale, W. Bryson, J. Felman, & M. Elston, Grand Jury Law and Practice § 4:6, pp. 4–20 to 4–21 (2d ed. 1997) (either the judge selects the foreperson or fellow grand jurors elect him or her). Under those systems, the title "foreperson" is bestowed on one of the existing grand jurors without any change in the grand jury's composition. In Louisiana, by contrast, the judge selects the foreperson from the grand jury venire before the remaining members of the grand jury have been chosen by lot. La. Code Crim. Proc.

Ann., Art. 413(B) (West Supp. 1997); see also 1 Beale, *supra*, at 4–22, n. 11 (Ohio, Oklahoma, Tennessee, and Virginia use procedures similar to Louisiana's). In addition to his other duties, the foreperson of the Louisiana grand jury has the same full voting powers as other grand jury members. As a result, when the Louisiana judge selected the foreperson, he also selected one member of the grand jury outside of the drawing system used to compose the balance of that body. These considerations require us to treat the case as one alleging discriminatory selection of grand jurors.

III

Standing to litigate often turns on imprecise distinctions and requires difficult line-drawing. On occasion, however, we can ascertain standing with relative ease by applying rules established in prior cases. See *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). Campbell's equal protection claim is such an instance.

In *Powers* v. *Ohio*, *supra*, we found a white defendant had standing to challenge racial discrimination against black persons in the use of peremptory challenges. We determined the defendant himself could raise the equal protection rights of the excluded jurors. Recognizing our general reluctance to permit a litigant to assert the rights of a third party, we found three preconditions had been satisfied: (1) the defendant suffered an "injury in fact"; (2) he had a "close relationship" to the excluded jurors; and (3) there was some hindrance to the excluded jurors asserting their own rights. *Powers*, *supra*, at 411 (citing *Singleton* v. *Wulff*, 428 U. S. 106 (1976)). We concluded a white defendant suffers a serious injury in fact because discrimination at the *voir dire* stage "'casts doubt on the integrity of the judicial process' . . . and places the fairness of a criminal proceeding in doubt." 499 U. S., at 411. This cloud of doubt deprives the defendant of the certainty that a verdict in his case "is given in accordance with the law by persons who are fair." *Id.*, at 413.

Second, the excluded juror and criminal defendant have a close relationship: They share a common interest in eliminating discrimination, and the criminal defendant has an incentive to serve as an effective advocate because a victory may result in overturning his conviction. *Id.*, at 413–414. Third, given the economic burdens of litigation and the small financial reward available, "a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id.*, at 415. Upon consideration of these factors, we concluded a white defendant had standing to bring an equal protection challenge to racial discrimination against black persons in the petit jury selection process.

Although Campbell challenges discriminatory selection of grand jurors, rather than petit jurors, *Powers*' reasoning applies to this case on the question of standing. Our prior cases have not decided whether a white defendant's own equal protection rights are violated when the composition of his grand jury is tainted by discrimination against black persons. We do not need to address this issue because Campbell seeks to assert the well-established equal protection rights of black persons not to be excluded from grand jury service on the basis of their race. See Tr. 9 (Dec. 2, 1993); see also *Carter* v. *Jury Comm'n of Greene Cty.*, 396 U. S. 320, 329–330 (1970) (racial exclusion of prospective grand and petit jurors violates their constitutional rights). Campbell satisfies the three preconditions for third-party standing outlined in *Powers*.

Regardless of his or her skin color, the accused suffers a significant injury in fact when the composition of the grand jury is tainted by racial discrimination. "[D]iscrimination on the basis of race in the selection of members of a grand jury . . . strikes at the fundamental values of our judicial system" because the grand jury is a central component of the criminal justice process. *Rose* v. *Mitchell*, 443 U. S. 545, 556 (1979). The Fifth Amendment requires the Federal Gov-

ernment to use a grand jury to initiate a prosecution, and 22 States adopt a similar rule as a matter of state law. See 1 Beale, *supra*, § 1:2, at 1–3; see also *Hurtado* v. *California*, 110 U. S. 516 (1884) (Fifth Amendment's grand jury requirement is not binding on the States). The grand jury, like the petit jury, "acts as a vital check against the wrongful exercise of power by the State and its prosecutors." *Powers*, *supra*, at 411. It controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision to charge a capital crime. See *Vasquez* v. *Hillery*, 474 U. S. 254, 263 (1986). The integrity of these decisions depends on the integrity of the process used to select the grand jurors. If that process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions. See *Rose*, *supra*, at 555–556 ("Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process").

Powers emphasized the harm inflicted when a prosecutor discriminates by striking racial minorities in open court and in front of the entire jury pool. The Court expressed concern that this tactic might encourage the jury to be lawless in its own actions. See 499 U. S., at 412–413. The State suggests this sort of harm is not inflicted when a single grand juror is selected based on racial prejudice because the discrimination is invisible to the grand jurors on that panel; it only becomes apparent when a pattern emerges over the course of years. See Brief for Respondent 16. This argument, however, underestimates the seriousness of the allegations. In *Powers*, even if the prosecutor had been motivated by racial prejudice, those responsible for the defendant's fate, the judge and the jury, had shown no actual bias. If, by contrast, the allegations here are true, the impartiality and discretion of the judge himself would be called into question.

The remaining two preconditions to establish third-party standing are satisfied with little trouble. We find no reason why a white defendant would be any less effective as an advocate for excluded grand jurors than for excluded petit jurors. See *Powers*, *supra*, at 413–414. The defendant and the excluded grand juror share a common interest in eradicating discrimination from the grand jury selection process, and the defendant has a vital interest in asserting the excluded juror's rights because his conviction may be overturned as a result. See *Vasquez*, *supra*, at 264; *Rose*, *supra*, at 551; *Cassell* v. *Texas*, 339 U. S. 282 (1950). The State contends Campbell's connection to "the excluded class of . . . jurors . . . who were not called to serve . . . for the prior 16½ years is tenuous, at best." Brief for Respondent 22. This argument confuses Campbell's underlying claim with the evidence needed to prove it. To assert the rights of those venirepersons who were excluded from serving on the grand jury in his case, Campbell must prove their exclusion was on account of intentional discrimination. He seeks to do so based on past treatment of similarly situated venirepersons in other cases, see *Castaneda* v. *Partida*, 430 U. S. 482, 494 (1977), but this does not mean he seeks to assert those venirepersons' rights. As a final matter, excluded grand jurors have the same economic disincentives to assert their own rights as do excluded petit jurors. See *Powers*, *supra*, at 415. We find Campbell, like any other white defendant, has standing to raise an equal protection challenge to discrimination against black persons in the selection of his grand jury.

IV

It is axiomatic that one has standing to litigate his or her own due process rights. We need not explore the nature and extent of a defendant's due process rights when he alleges discriminatory selection of grand jurors, and confine our holding to his standing to raise the issue. Our decision in *Peters* v. *Kiff* addressed the due process question, al-

though a majority of Justices could not agree on a comprehensive statement of the rule or an appropriate remedy for any violation. See 407 U. S. 493, 504 (1972) (opinion of Marshall, J.) ("[W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand . . . jury, on the ground that it arbitrarily excludes . . . members of any race, and thereby denies him due process of law"); *id.*, at 507 (White, J., joined by Brennan and Powell, JJ., concurring in judgment) ("[T]he strong statutory policy of [18 U. S. C.] § 243, which reflects the central concern of the Fourteenth Amendment" permits a white defendant to challenge discrimination in grand jury selection). Our more recent decision in *Hobby* v. *United States* proceeded on the implied assumption that a white defendant had standing to raise a due process objection to discriminatory appointment of a federal grand jury foreperson and skipped ahead to the question whether a remedy was available. 468 U. S., at 350. It is unnecessary here to discuss the nature and full extent of due process protection in the context of grand jury selection. That issue, to the extent it is still open based upon our earlier precedents, should be determined on the merits, assuming a court finds it necessary to reach the point in light of the concomitant equal protection claim. The relevant assumption of *Hobby,* and our holding here, is that a defendant has standing to litigate whether his conviction was procured by means or procedures which contravene due process.

The Louisiana Supreme Court erred in reading *Hobby* to foreclose Campbell's standing to bring a due process challenge. 661 So. 2d, at 1324. In *Hobby,* we held discrimination in the selection of a federal grand jury foreperson did not infringe principles of fundamental fairness because the foreperson's duties were "ministerial." See *Hobby*, *supra*, at 345–346. In this case, the Louisiana Supreme Court decided a Louisiana grand jury foreperson's duties were ministerial too, but then couched its decision in terms of Camp-

bell's lack of standing to litigate a due process claim. 661 So. 2d, at 1324.

The Louisiana Supreme Court was wrong on both counts. Its interpretation of *Hobby* is inconsistent with the implicit assumption of standing we have just noted and with our explicit reasoning in that case. In *Hobby*, a federal grand jury foreperson was selected from the existing grand jurors, so the decision to pick one grand juror over another, at least arguably, affected the defendant only if the foreperson was given some significant duties that he would not have had as a regular grand juror. See *supra*, at 396. Against this background, the Court rejected the defendant's claim because the ministerial role of a federal grand jury foreperson "is not such a vital one that discrimination in the appointment of an individual to that post significantly invades" due process. *Hobby*, *supra*, at 346. Campbell's challenge is different in kind and degree because it implicates the impermissible appointment of a member of the grand jury. See *supra*, at 396–397. What concerns Campbell is not the foreperson's performance of his duty to preside, but performance as a grand juror, namely, voting to charge Campbell with second-degree murder.

The significance of this distinction was acknowledged by *Hobby*'s discussion of a previous case, *Rose* v. *Mitchell*, 443 U. S. 545 (1979). In *Rose*, we assumed relief could be granted for a constitutional challenge to discrimination in the appointment of a state grand jury foreperson. See *id.*, at 556. *Hobby* distinguished *Rose* in part because it involved Tennessee's grand jury system. Under the Tennessee law then in effect, 12 members of the grand jury were selected at random, and then the judge appointed a 13th member who also served as foreperson. See *Hobby*, 468 U. S., at 347. As a result, *Hobby* pointed out discrimination in selection of the foreperson in Tennessee was much more serious than in the federal system because the former can affect the composition of the grand jury whereas the latter cannot: "So

long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process." *Id.*, at 348. By its own terms, then, *Hobby* does not address a claim like Campbell's.

V

One of the questions raised on certiorari is whether Campbell also has standing to raise a fair-cross-section claim. It appears neither the Louisiana Supreme Court nor the Louisiana Court of Appeal discussed this contention. "With 'very rare exceptions,' . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams* v. *Robertson*, 520 U. S. 83, 86 (1997) *(per curiam)*. Campbell has made no effort to meet his burden of showing this issue was properly presented to the Louisiana appellate courts, even after the State pointed out this omission before this Court. See Brief for Respondent 29–30. In fact, Campbell devotes no more than one page of text in his brief to his fair-cross-section claim. See Brief for Petitioner 31–32. We decline to address the issue.

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

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

I fail to understand how the rights of blacks excluded from jury service can be vindicated by letting a white murderer go free. Yet, in *Powers* v. *Ohio*, 499 U. S. 400 (1991), the Court held that a white criminal defendant had standing to challenge his criminal conviction based upon alleged violations of the equal protection rights of black prospective ju-

rors. Today's decision, rather than merely reaffirming *Powers*' misguided doctrine of third-party standing, applies that doctrine to a context in which even *Powers'* rationales are inapplicable. Because *Powers* is both incorrect as an initial matter and inapposite to the case at hand, I respectfully dissent from Part III of the Court's opinion. I join Parts I, II, IV, and V and concur in the judgment reversing and remanding to the Louisiana Supreme Court.

Powers broke new ground by holding for the first time that a criminal defendant may raise an equal protection challenge to the use of peremptory strikes to exclude jurors of a different race. See *id.*, at 422 (SCALIA, J., dissenting) (explaining that *Powers* was inconsistent with "a vast body of clear statement" in our precedents). Recognizing that the defendant could not claim that his own equal protection rights had been denied, the Court held that the defendant had standing to assert the equal protection rights of veniremen excluded from the jury. *Id.*, at 410–416. The Court concluded that the defendant had such "third party standing" because three criteria had been met: he had suffered an "injury in fact"; he had a "close relation" to the excluded jurors; and there was "some hindrance" to the jurors' ability to protect their own interests. *Id.*, at 410–411.

Powers distorted standing principles and equal protection law and should be overruled.[1] As JUSTICE SCALIA explained at length in his dissent, the defendant in *Powers*

[1] As I have explained elsewhere, the entire line of cases following *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (holding that the Equal Protection Clause applies to the use of peremptory strikes), including *Powers*, is a misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges. The *Batson* doctrine, rather than helping to ensure the fairness of criminal trials, serves only to undercut that fairness by emphasizing the rights of excluded jurors at the expense of the traditional protections accorded criminal defendants of all races. See *Georgia* v. *McCollum*, 505 U. S. 42, 60–62 (1992) (THOMAS, J., concurring in judgment).

could not satisfy even the first element of standing—injury in fact. *Id.*, at 426–429. The defendant, though certainly displeased with his conviction, failed to demonstrate that the alleged discriminatory use of peremptory challenges against veniremen of another race had any effect on the outcome of his trial. The Court instead found that the defendant had suffered a "cognizable" injury because racial discrimination in jury selection "'casts doubt on the integrity of the judicial process'" and "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Id.*, at 411–412. But the severity of an alleged wrong and a perception of unfairness do not constitute injury in fact. Indeed, "'[i]njury in perception' would seem to be the very *antithesis* of 'injury in fact.'" *Id.*, at 427 (SCALIA, J., dissenting). Furthermore, there is no reason why a violation of a third party's right to serve on a jury should be grounds for reversal when other violations of third-party rights, such as obtaining evidence against the defendant in violation of another person's Fourth or Fifth Amendment rights, are not. *Id.*, at 429 (SCALIA, J., dissenting).

Powers further rested on an alleged "close relation[ship]" that arises between a defendant and veniremen because *voir dire* permits them "to establish a relation, if not a bond of trust," that continues throughout the trial. *Id.*, at 411, 413. According to the Court, excluded veniremen share the accused's interest in eliminating racial discrimination because a peremptory strike inflicts upon a venireman a "profound personal humiliation heightened by its public character." *Id.*, at 413–414. But there was simply no basis for the Court's finding of a "close relation[ship]" or "common interest," *id.*, at 413, between black veniremen and white defendants. Regardless of whether black veniremen wish to serve on a particular jury, they do not share the white defendant's interest in obtaining a reversal of his conviction. Surely a black venireman would be dismayed to learn that a white

defendant used the venireman's constitutional rights as a means to overturn the defendant's conviction.[2]

Finally, *Powers* concluded that there are substantial obstacles to suit by excluded veniremen, including the costs of proceeding individually and the difficulty of establishing a likelihood of recurrence. *Id.*, at 414–415. These obstacles, though perhaps often present in the context of *Batson* v. *Kentucky*, 476 U. S. 79 (1986), are alone insufficient to justify third-party standing.

Even if the *Powers* justifications were persuasive, they would still be wholly inapplicable to this case, which involves neither peremptory strikes nor discrimination in the selection of the petit jury. The "injury in fact" allegedly present in *Powers* is wholly absent from the context at hand. *Powers* reasoned that repeated peremptory strikes of members of one race constituted an "overt wrong, often apparent to the entire jury panel," that threatened to "cas[t] doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Powers*, 499 U. S., at 412. Here, in contrast, the judge selected one member of the grand jury venire to serve as foreman, and the remaining members of the grand jury were selected at random. Even if discriminatory, the judge's selection (rather than exclusion) of a single member of the grand jury could hardly constitute an "overt" wrong that would affect the remainder of the grand jury proceedings, much less the subsequent trial. The Court therefore resorts to emphasizing the seriousness of the allegation of racial discrimination (as though repetition conveys some talismanic power), but that, of course, cannot substitute for injury in fact.

In this case, unlike *Powers*, petitioner's allegation of injury in fact is not merely unsupported; it is directly foreclosed. There is no allegation in this case that the composition of

[2] Of course, the same sense of dismay would arise if the defendant and the excluded venireman were of the same race.

petitioner's *trial* jury was affected by discrimination. Instead, the allegation is merely that there was discrimination in the selection of the grand jury (and of only one member). The properly constituted petit jury's verdict of guilt beyond a reasonable doubt was in no way affected by the composition of the grand jury. Indeed, to the extent that race played any part in the composition of petitioner's petit jury, it was by petitioner's own actions, as petitioner used 5 of his 12 peremptory strikes to eliminate blacks from the petit jury venire. Petitioner's attempt to assert that he was injured by the alleged exclusion of blacks at the grand jury stage is belied by his own use of peremptory strikes against blacks at the petit jury stage.

It would be to no avail to suggest that the alleged discrimination in grand jury selection could have caused an indictment improperly to be rendered, because the petit jury's verdict conclusively establishes that no reasonable grand jury could have failed to indict petitioner.[3] Nor can the Court find support in our precedents allowing a defendant to challenge his conviction based upon discrimination in grand jury selection, because all of those cases involved defendants' assertions of *their own* rights. See, *e. g.*, *Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Cassell* v. *Texas*, 339 U. S. 282 (1950). Although we often do not require a criminal defendant to establish a cause-and-effect relationship between the procedural illegality and the subsequent conviction when the defendant asserts a denial of his own rights, see 499 U. S., at 427–428 (SCALIA, J., dissenting) (noting that the government generally bears the burden of establishing harmlessness of such errors), even the *Powers* majority acknowledged that

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[3] For this reason, it is unlikely that petitioner ultimately will prevail on the merits of his due process claim. However, I agree with the Court's conclusion that petitioner has standing to raise that claim because petitioner asserts *his own* due process right. I join Part IV of the Court's opinion because it addresses only standing and does not address "the nature and extent" of petitioner's due process right. *Ante*, at 400.

such a showing is the foremost requirement of third-party standing, as evidenced by the lengths to which it went in an attempt to justify its finding of injury in fact.

The Court's finding of a close relationship (an ambient fraternity of sorts) between petitioner and the black veniremen whose rights he seeks to vindicate is likewise unsupported. The Court, of course, never identifies precisely whose rights petitioner seeks to vindicate. Is it all veniremen who were not chosen as foreman? Is it all nonwhite veniremen? All black veniremen? Or just the black veniremen who were not ultimately chosen for the grand jury? Leaving aside the fact that the Court fails to identify the rights-holders, I fail to see how a "close relationship" could have developed between petitioner and the veniremen. Even if a "bond," *Powers* v. *Ohio*, *supra*, at 413, could develop between veniremen and defendants during *voir dire*, such a bond could not develop in the context of a judge's selection of a grand jury foreman—a context in which the defendant plays no role. Nor can any "common interest" between a defendant and excluded veniremen arise based upon a public humiliation suffered by the latter, because unlike the exercise of peremptory strikes, Evangeline Parish's process of selecting foremen does not constitute "overt" action against particular veniremen. Rather, those veniremen not chosen (all but one) are simply left to take their chances at being randomly selected for the remaining seats on the grand jury.

Finally, there are ample opportunities for prospective jurors whose equal protection rights have been violated to vindicate those rights, rather than relying upon a defendant of another race to do so for them. In contrast to the *Batson* line of cases, where an allegation may concern discrimination in the defendant's case alone, in this case petitioner alleges systematic discrimination in the selection of grand jury foremen in Evangeline Parish. Such systematic discrimination provides a large class of potential plaintiffs and the opportu-

nity for declaratory or injunctive relief to prevent repeated violations.

For these reasons, I would hold that petitioner—who does not claim that he was discriminated against or that the alleged discrimination against others had any effect on the outcome of his trial—lacks standing to raise the equal protection rights of excluded black veniremen. Accordingly, I join Parts I, II, IV, and V of the Court's opinion and concur in the judgment.

Syllabus

BEACH ET UX. *v.* OCWEN FEDERAL BANK

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 97–5310. Argued March 2, 1998—Decided April 21, 1998

Petitioners David and Linda Beach refinanced their Florida house in 1986 with a loan from Great Western Bank. In 1991, they stopped making mortgage payments, and in 1992 Great Western began this foreclosure proceeding. Respondent bank was thereafter substituted as the plaintiff. The Beaches acknowledged their default but raised affirmative defenses, alleging, *inter alia*, that the bank's failure to make disclosures required by the Truth in Lending Act gave them the right under 15 U. S. C. § 1635 to rescind the mortgage agreement. The Florida trial court rejected that defense, holding, among other things, that any right to rescind had expired in 1989 under § 1635(f), which provides that the right of rescission "shall expire" three years after the loan closes. The State's intermediate appellate court affirmed, as did the Florida Supreme Court. That court remarked that § 1635(f)'s plain language evidences an unconditional congressional intent to limit the right of rescission to three years and distinguished its prior cases permitting a recoupment defense by ostensibly barred claims as involving statutes of limitation, not statutes extinguishing rights defensively asserted.

Held: A borrower may not assert the § 1635 right to rescind as an affirmative defense in a collection action brought by the lender after § 1635(f)'s 3-year period has run. Absent "the clearest congressional language" to the contrary, *Reiter* v. *Cooper*, 507 U. S. 258, 264, a defendant may raise a claim in recoupment, a "'defense arising out of some feature of the transaction upon which the plaintiff's action is grounded,'" *Rothensies* v. *Electric Storage Battery Co.*, 329 U. S. 296, 299 (quoting *Bull* v. *United States*, 295 U. S. 247, 262), even if the applicable statute of limitation would otherwise bar the claim as an independent cause of action. The 3-year period of § 1635(f), however, is not a statute of limitation that governs only the institution of suit; instead, it operates, with the lapse of time, to extinguish the right of rescission. The section's uncompromising statement that the borrower's right "shall expire" with the running of time manifests a congressional intent to extinguish completely the right of rescission at the end of the 3-year period. The absence of a provision authorizing rescission as a defense stands in stark contrast to § 1640(e), which expressly provides that the Act's 1-year limitation on actions for recovery of damages "does not bar . . . assert[ion of] a violation . . . in an action . . . brought more than one year from the

date of the . . . violation as a matter of defense by recoupment." This quite different treatment of recoupment of damages and rescission in the nature of recoupment must be understood to reflect a deliberate intent on the part of Congress, see *Bates* v. *United States*, 522 U. S. 23, 29–30, and makes perfectly good sense. Since a statutory rescission right could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk, while permitting recoupment of damages regardless of the date a collection action may be brought. Pp. 415–419.

692 So. 2d 146, affirmed.

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

Bruce S. Rogow argued the cause for petitioners. With him on the briefs were *Beverly A. Pohl* and *Michael Tankersley.*

Carter G. Phillips argued the cause for respondent. With him on the brief were *James A. Huizinga, Michael F. Wasserman, Steven Ellison,* and *Patricia Lebow.**

JUSTICE SOUTER delivered the opinion of the Court.

Under the Truth in Lending Act, 82 Stat. 146, 15 U. S. C. § 1601 *et seq.,* when a loan made in a consumer credit transaction is secured by the borrower's principal dwelling, the borrower may rescind the loan agreement if the lender fails to deliver certain forms or to disclose important terms accurately. See 15 U. S. C. § 1635. Under § 1635(f) of the statute, this right of rescission "shall expire" in the usual case three years after the loan closes or upon the sale of the secured property, whichever date is earlier. The question here is whether a borrower may assert this right to rescind as an affirmative defense in a collection action brought by the lender more than three years after the consummation

*Briefs of *amici curiae* urging reversal were filed for the American Association of Retired Persons by *Jean Constantine-Davis* and *Nina F. Simon;* and for Dorothy Botelho et al. by *Richard J. Rubin* and *Gary Klein.*

Thomas M. Hefferon, John C. Englander, and *Jeremiah S. Buckley* filed a brief for the Federal Home Loan Mortgage Corp. et al. as *amici curiae* urging affirmance.

of the transaction. We answer no and hold that § 1635(f) completely extinguishes the right of rescission at the end of the 3-year period.

I

The declared purpose of the Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U. S. C. § 1601(a); see *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 363–368 (1973). Accordingly, the Act requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights. See §§ 1631, 1632, 1635, 1638. Failure to satisfy the Act subjects a lender to criminal penalties for noncompliance, see § 1611, as well as to statutory and actual damages traceable to a lender's failure to make the requisite disclosures, see § 1640. Section 1640(e) provides that an action for such damages "may be brought" within one year after a violation of the Act, but that a borrower may assert the right to damages "as a matter of defense by recoupment or set-off" in a collection action brought by the lender even after the one year is up.

Going beyond these rights to damages, the Act also authorizes a borrower whose loan is secured with his "principal dwelling," and who has been denied the requisite disclosures, to rescind the loan transaction entirely "until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later." § 1635(a). A borrower who exercises this right to rescind "is not liable for any finance or other charge, and any security interest given by [him], including any such interest arising by operation of law, becomes void" upon rescission. § 1635(b). Within 20 days

after receiving notice of rescission, the lender must "return to the [borrower] any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Ibid.* The Act provides, however, that the borrower's right of rescission "shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first," even if the required disclosures have never been made. § 1635(f).[1] The Act gives a borrower no express permission to assert the right of rescission as an affirmative defense after the expiration of the 3-year period.

The borrowers in this case, petitioners David and Linda Beach, built a house in Jupiter, Florida, in 1986 with a secured $85,000 construction loan from Fidelity Federal Savings Bank of Florida. In the same year, the Beaches refinanced the house with a loan from Great Western Bank.[2] In 1991, the Beaches stopped making mortgage payments, and in 1992 the bank began this foreclosure proceeding. The Beaches acknowledged their default but raised affirmative defenses, alleging that the bank's failure to make disclosures required by the Act[3] gave them rights under §§ 1635 and

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[1] The Act provides a limited extension of this 3-year time period when "(1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding." 15 U. S. C. § 1635(f). Under such circumstances, "the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later." *Ibid.*

[2] Ocwen Federal Bank was substituted as the plaintiff while this case was pending in the trial court.

[3] Specifically, the Beaches claimed that the bank had failed to disclose properly and accurately (1) the amount financed, in violation of § 1638(a)(3); (2) the finance charge, in violation of § 1638(a)(3); (3) the annual percentage rate, in violation of § 1638(a)(4); (4) the number, amounts, and timing of

1640 to rescind the mortgage agreement and to reduce the bank's claim by the amount of their actual and statutory damages.

The Circuit Court of the 15th Judicial Circuit of Florida agreed that under § 1640 the Beaches were entitled to "offset the amount owed to Great Western" by $396 in actual damages and $1,000 in statutory damages because the bank had overstated the monthly mortgage payment by $0.58 and the finance charge by $201.84. But the court rejected the Beaches' effort to rescind the mortgage under § 1635, holding that the loan at issue was immune to rescission as part of a "residential mortgage transaction" (defined in § 1602(w)) and, in the alternative, that any right to rescind had expired after three years, in 1989. The court found it telling that Congress had included no saving clause to revive an expired right of rescission as a defense in the nature of recoupment or setoff.

The State's intermediate appellate court affirmed, *Beach* v. *Great Western Bank*, 670 So. 2d 986 (Fla. 4th Dist. Ct. App. 1996), and so did the Supreme Court of Florida, which addressed only the issue of rescission as a defense, *Beach* v. *Great Western Bank*, 692 So. 2d 146 (1997).[4] That court remarked on the plain language of § 1635(f) as evidence of unconditional congressional intent to limit the right of rescission to three years and explained that its prior cases permitting a defense of recoupment by an ostensibly barred claim were distinguishable because, among other things, they involved statutes of limitation, not statutes extinguishing rights defensively asserted.

Because the reading of § 1635(f) given by the Supreme Court of Florida conflicts with the decisions of several other

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payments scheduled to repay the obligation, in violation of § 1638(a)(6); and (5) the total of payments, in violation of § 1638(a)(5).

[4] Although the *per curiam* opinion posed the question as one "[u]nder Florida law," 692 So. 2d, at 147, it distinguished cases based on state law as inapposite and held that a defense of rescission was unavailable under the Act after three years.

courts,[5] we granted certiorari, 522 U. S. 912 (1997), to determine whether under federal law the statutory right of rescission provided by § 1635 may be revived as an affirmative defense after its expiration under § 1635(f). We affirm.

II

The Beaches concede that any right they may have had to institute an independent proceeding for rescission under § 1635 lapsed in 1989, three years after they closed the loan with the bank, but they argue that the restriction to three years in § 1635(f) is a statute of limitation governing only the institution of suit and accordingly has no effect when a borrower claims a § 1635 right of rescission as a "defense in recoupment" to a collection action. They are, of course, correct that as a general matter a defendant's right to plead "recoupment," a "'defense arising out of some feature of the transaction upon which the plaintiff's action is grounded,'" *Rothensies* v. *Electric Storage Battery Co.*, 329 U. S. 296, 299 (1946) (quoting *Bull* v. *United States*, 295 U. S. 247, 262 (1935)), survives the expiration of the period provided by a statute of limitation that would otherwise bar the recoupment claim as an independent cause of action. So long as the plaintiff's action is timely, see *ibid.*, a defendant may raise a claim in recoupment even if he could no longer bring it independently, absent "'the clearest congressional language'" to the contrary. *Reiter* v. *Cooper*, 507 U. S. 258, 264 (1993) (quoting *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 71 (1956)). As we have said before, the object of a statute of limitation in keeping "stale litigation out of the courts," *id.*, at 72, would be distorted if the statute were

[5] See, *e. g.*, *In re Barsky*, 210 B. R. 683 (Bkrtcy. Ct. ED Pa. 1997); *In re Botelho*, 195 B. R. 558 (Bkrtcy. Ct. Mass. 1996); *In re Shaw*, 178 B. R. 380 (Bkrtcy. Ct. NJ 1994); *Federal Deposit Ins. Corp.* v. *Ablin*, 177 Ill. App. 3d 390, 532 N. E. 2d 379 (1988); *Community Nat. Bank & Trust Co. of N. Y.* v. *McClammy*, 525 N. Y. S. 2d 629, 138 App. Div. 2d 339 (1988); *Dawe* v. *Merchants Mortgage and Trust Corp.*, 683 P. 2d 796 (Colo. 1984) (en banc).

applied to bar an otherwise legitimate defense to a timely lawsuit, for limitation statutes "are aimed at lawsuits, not at the consideration of particular issues in lawsuits," *ibid.*

The Beaches come up short, however, on the question whether this is a case for the general rule at all. The issue here is not whether limitation statutes affect recoupment rights, but whether § 1635(f) is a statute of limitation, that is, "whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim" or "merely to bar the remedy for its enforcement." *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 358–359, and n. 4 (1943). The "ultimate question" is whether Congress intended that "the right shall be enforceable in any event after the prescribed time," *id.*, at 360; accord, *Burnett* v. *New York Central R. Co.*, 380 U. S. 424 (1965), and in this instance, the answer is apparent from the plain language of § 1635(f). See *Good Samaritan Hospital* v. *Shalala*, 508 U. S. 402, 409 (1993).

The terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time. So, in *Reiter* v. *Cooper*, *supra*, at 263–264, we concluded that 49 U. S. C. § 11706(c)(2), providing that a shipper "'must begin a civil action to recover damages under [§ 11705(b)(3)] within two years after the claim accrues,'" was a statute of limitation raising no bar to a claim made in recoupment. See Note, Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1179 (1950) (most statutes of limitation provide either that "all actions . . . shall be brought within" or "no action . . . shall be brought more than" so many years after "the cause thereof accrued" (internal quotation marks omitted)); H. Wood, 1 Limitation of Actions § 1, pp. 2–3 (4th ed. 1916) ("[S]tatutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are . . . statutes of limitation").

To be sure, a limitation provision may be held to be nothing more than a bar to bringing suit, even though its terms are ostensibly more ambitious than the language of the classic formulations cited above. Thus, for example, in *Distribution Servs., Ltd.* v. *Eddie Parker Interests, Inc.*, 897 F. 2d 811 (1990), the Fifth Circuit concluded that § 3(6) of the Carriage of Goods by Sea Act is a statute of limitation permitting counterclaim brought by way of recoupment, despite its fierce-sounding provision that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods," 46 U. S. C. App. § 1303(6).

Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the "right of rescission [under the Act] shall expire" at the end of the time period. It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous. There is no reason, then, even to resort to the canons of construction that we use to resolve doubtful cases, such as the rule that the creation of a right in the same statute that provides a limitation is some evidence that the right was meant to be limited, not just the remedy. See *Midstate Horticultural Co.*, *supra*, at 360; *Burnett*, *supra*, at 427, n. 2; *Davis* v. *Mills*, 194 U. S. 451, 454 (1904).

The Act, however, has left even less to chance (if that is possible) than its "expire" provision would allow, standing alone. It is useful to look ahead to § 1640 with its provisions for recovery of damages. Subsection (e) reads that the 1-year limit on actions for damages "does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from

the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." 15 U. S. C. § 1640(e). Thus the effect of the 1-year limitation provision on damages actions is expressly deflected from recoupment claims. The quite different treatment of rescission stands in stark contrast to this, however, there being no provision for rescission as a defense that would mitigate the uncompromising provision of § 1635(f) that the borrower's right "shall expire" with the running of the time. Indeed, when Congress amended the Act in 1995 to soften certain restrictions on rescission as a defense in § 8, 109 Stat. 275–276, 15 U. S. C. §§ 1635(i)(1) and (2) (1994 ed., Supp. I), it took care to provide that any such liberality was "subject to the [three year] time period provided in subsection (f)," *ibid.*, and it left a borrower's only hope for further recoupment in the slim promise of § 1635(i)(3), that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." § 8, 109 Stat. 276.[6] Thus, recoupment of damages and rescission in the nature of recoupment receive unmistakably different treatments, which under the normal rule of construction are understood to reflect a deliberate intent on the part of Congress. See *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) ("'"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"'") (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983), in turn quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972)). And the distinction thus indicated makes perfectly good sense. Since a statutory right of rescission could cloud a bank's title on foreclosure,

[6] Since there is no claim before us that Florida law purports to provide any right to rescind defensively on the grounds relevant under the Act, we have no occasion to explore how state recoupment law might work when raised in a foreclosure proceeding outside the 3-year period.

Congress may well have chosen to circumscribe that risk, while permitting recoupment damages regardless of the date a collection action may be brought. See Board of Governors of Federal Reserve System, Annual Report to Congress on Truth in Lending for the Year 1971, p. 19 (Jan. 3, 1972); National Commission on Consumer Finance, Consumer Credit in the United States 189–190 (Dec. 1972).

We respect Congress's manifest intent by concluding that the Act permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run. Accordingly, we affirm the judgment of the Supreme Court of Florida.

It is so ordered.

Syllabus

MILLER *v.* ALBRIGHT, SECRETARY OF STATE

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

No. 96–1060. Argued November 4, 1997—Decided April 22, 1998

Petitioner was born out of wedlock in 1970 in the Philippines. Her mother is a Filipino national. Her father, Charlie Miller, is an American citizen residing in Texas who served in the United States military in the Philippines at the time of petitioner's conception. He never married petitioner's mother, and there is no evidence that he was in the Philippines at the time of her birth or that he ever returned there after completing his tour of duty. In 1992, the State Department denied petitioner's application for registration as a United States citizen. After a Texas court granted Mr. Miller's petition for a paternity decree finding him to be her father, petitioner reapplied for citizenship status, which was again denied on the ground that the Texas decree did not satisfy 8 U. S. C. § 1409(a)(4)'s requirement that a child born out of wedlock and outside the United States to an alien mother and an American father be legitimated before age 18 in order to acquire citizenship. Petitioner and Mr. Miller then sued the Secretary of State in Federal District Court in Texas, seeking a judgment declaring her to be a United States citizen. They emphasized that the citizenship of an out-of-wedlock, foreign-born child of an alien father and an American mother is established at birth under § 1409(c), and alleged that § 1409's different treatment of citizen fathers and citizen mothers violated Mr. Miller's Fifth Amendment equal protection right by utilizing the suspect classification of gender without justification. Concluding that Mr. Miller did not have standing, the court dismissed him as a party and transferred venue to the District Court for the District of Columbia. That court dismissed the suit on the ground that federal courts do not have power to grant citizenship. The Court of Appeals affirmed, holding that petitioner had standing to sue, but concluding that the § 1409 requirements imposed on a child like her, but not on the foreign-born, out-of-wedlock child of an American mother, were justified by governmental interests in fostering the child's ties with this country and with her citizen parent.

Held: The judgment is affirmed.

96 F. 3d 1467, affirmed.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE, concluded that § 1409(a)(4)'s requirement that children born abroad and out of wedlock to citizen fathers, but not to citizen mothers, obtain formal

proof of paternity by age 18 does not violate the Fifth Amendment. Pp. 428–445.

(a) The foregoing is the only issue presented by this case's facts. Certain other issues need not be resolved: Whether *Fiallo* v. *Bell*, 430 U. S. 787, dictates the outcome here; the validity of the distinction drawn by §§ 1401(g) and 1409(c) between residency requirements for unmarried citizen fathers and unmarried citizen mothers wishing to transmit citizenship at birth to their foreign-born, out-of-wedlock children; and the validity of §§ 1409(a)(1) and (a)(3), which impose additional requirements on citizen fathers wishing to transmit such citizenship. Because petitioner is contesting the Government's refusal to register and treat her as a citizen, a judgment in her favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess. The Court of Appeals was therefore correct that she has standing to invoke the federal courts' jurisdiction. Moreover, because her claim relies heavily on the proposition that her citizen father should have the same right to transmit citizenship as would a citizen mother, the Court should evaluate the alleged discrimination against him, as well as its impact on her. See, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 193–197. Pp. 428–433.

(b) The § 1409(a)(4) rule applicable to each class of out-of-wedlock children born abroad is eminently reasonable and justified by important Government interests: ensuring reliable proof that a person born out of wedlock who claims citizenship by birth actually shares a blood relationship with an American citizen; encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and fostering ties between the child and the United States. Male and female parents of foreign-born, out-of-wedlock children are differently situated in several pertinent respects. The child's blood relationship to its birth mother is immediately obvious and is typically established by hospital records and birth certificates, but the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record. Similarly, the child's birth mother certainly knows of the child's existence and typically will have immediate custody, whereas, due to the normal interval of nine months between conception and birth, an unmarried father may not even know that his child exists, and the child may not know the father's identity. Section 1409(a)(4)'s requirement—that children born out of wedlock to citizen fathers obtain formal proof of paternity by age 18, either through legitimation, written acknowledgment by the father under oath, or adjudication by a competent court—is well tailored to address these concerns. The conclusion that Congress may require an affirmative act by unmarried fathers and their children, but not mothers and their

children, is directly supported by *Lehr* v. *Robertson*, 463 U. S. 248. Pp. 433–441.

(c) The argument that § 1409(a)(4) is unconstitutional because it is a stereotypical "gender-based classification" must be rejected. None of the governmental interests underlying § 1409(a)(4) can be fairly characterized as an accidental byproduct of a traditional way of thinking about the members of either sex. The biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born out of wedlock in foreign lands, and an impartial analysis of those differences rebuts the strong presumption that gender-based legal distinctions are suspect. Pp. 442–445.

JUSTICE O'CONNOR, joined by JUSTICE KENNEDY, concluded that petitioner should not be accorded standing to raise her father's gender discrimination claim. This Court applies a presumption against third-party standing as a prudential limitation on the exercise of federal jurisdiction, see, *e. g.*, *Singleton* v. *Wulff*, 428 U. S. 106, 113, and that presumption may only be rebutted in particular circumstances: where a litigant has suffered injury in fact and has a close relation to a third party, and where some hindrance to the third party's ability to protect his or her own interests exists, see *Powers* v. *Ohio*, 499 U. S. 400, 411. Petitioner has not demonstrated a genuine obstacle to her father's ability to assert his own rights that rises to the level of a hindrance. Accordingly, she is precluded from raising his equal protection claims in this case. Although petitioner may still assert her own rights, she cannot invoke a gender discrimination claim that would trigger heightened scrutiny. Section 1409 draws a distinction based on the gender of the parent, not the child, and any claim of discrimination based on differential treatment of illegitimate versus legitimate children is not presented in the question on which certiorari was granted. Thus, petitioner's own constitutional challenge is subject only to rational basis scrutiny. Even though § 1409 could not withstand heightened scrutiny, it is sustainable under the lower standard. Pp. 445–452.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed with the outcome of this case on the ground that the complaint must be dismissed because the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress. Petitioner, having been born outside United States territory, can only become a citizen by naturalization under congressional authority. See, *e. g.*, *United States* v. *Wong Kim Ark*, 169 U. S. 649, 702–703. If there is no congressional enactment granting her citizenship, she remains an alien. By its plain language, 8 U. S. C. § 1409 sets forth a precondition to the acquisition of citizenship that petitioner admittedly has not met.

Thus, even if the Court were to agree that the difference in treatment between the illegitimate children of citizen fathers and citizen mothers is unconstitutional, it could not, consistent with the extremely limited judicial power in this area, see, *e. g., Fiallo* v. *Bell*, 430 U. S. 787, 792, remedy that constitutional infirmity by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship, see *INS* v. *Pangilinan*, 486 U. S. 875, 884. This is not a case in which the Court may remedy an alleged equal protection violation by either expanding or limiting the benefits conferred so as to deny or grant them equally to all. Pp. 452–459.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in which KENNEDY, J., joined, *post*, p. 445. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 452. GINSBURG, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 460. BREYER, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 471.

Donald Ross Patterson argued the cause and filed briefs for petitioner.

Deputy Solicitor General Kneedler argued the cause for respondent. With him on the brief were *Acting Solicitor General Dellinger*, *Assistant Attorney General Hunger*, *Edward C. DuMont*, *Michael Jay Singer*, and *John S. Koppel*.*

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

There are "two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U. S. 649, 702 (1898). Within the former category, the Fourteenth Amendment of the Constitution guarantees that every person "born in the United States, and subject to the

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**Walter A. Smith, Jr.*, *Steven R. Shapiro*, *Lucas Guttentag*, *Sara L. Mandelbaum*, and *Martha Davis* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." 169 U. S., at 702. Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress. *Id.*, at 703.

The petitioner in this case challenges the constitutionality of the statutory provisions governing the acquisition of citizenship at birth by children born out of wedlock and outside of the United States. The specific challenge is to the distinction drawn by § 309 of the Immigration and Nationality Act (INA), 66 Stat. 238, as amended, 8 U. S. C. § 1409, between the child of an alien father and a citizen mother, on the one hand, and the child of an alien mother and a citizen father, on the other. Subject to residence requirements for the citizen parent, the citizenship of the former is established at birth; the citizenship of the latter is not established unless and until either the father or his child takes certain affirmative steps to create or confirm their relationship. Petitioner contends that the statutory requirement that those steps be taken while the child is a minor violates the Fifth Amendment because the statute contains no limitation on the time within which the child of a citizen mother may prove that she became a citizen at birth.

We find no merit in the challenge because the statute does not impose any limitation on the time within which the members of either class of children may prove that they qualify for citizenship. It does establish different qualifications for citizenship for the two classes of children, but we are persuaded that the qualifications for the members of each of those classes, so far as they are implicated by the facts of this case, are well supported by valid governmental interests. We therefore conclude that the statutory distinction is neither arbitrary nor invidious.

I

Petitioner was born on June 20, 1970, in Angeles City, Republic of the Philippines. The records of the Local Civil

Registrar disclose that her birth was registered 10 days later, that she was named Lorena Peñero, that her mother was Luz Peñero, a Filipino national, and that her birth was "illegitimate." Spaces on the form referring to the name and the nationality of the father are blank.

Petitioner grew up and received her high school and college education in the Philippines. At least until after her 21st birthday, she never lived in the United States. App. 19. There is no evidence that either she or her mother ever resided outside of the Philippines.[1]

Petitioner's father, Charlie Miller, is an American citizen residing in Texas.[2] He apparently served in the United States Air Force and was stationed in the Philippines at the time of petitioner's conception. *Id.*, at 21. He never married petitioner's mother, and there is no evidence that he was in the Philippines at the time of petitioner's birth or that he ever returned there after completing his tour of duty. In 1992, Miller filed a petition in a Texas court to establish his relationship with petitioner. The petition was unopposed and the court entered a "Voluntary Paternity Decree" finding him "to be the biological and legal father of Lorelyn Penero Miller." The decree provided that "[t]he parent-child relationship is created between the father and the child as if the child were born to the father and mother during marriage." App. to Pet. for Cert. 38.

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[1] Her mother was born in Leyte. Several years after petitioner's birth, her mother married a man named Frank Raspotnik and raised a family in Angeles City. App. 22.

[2] Although there is no formal finding that his paternity has been established by clear and convincing evidence, it is undisputed. In a letter to petitioner's attorney, the State Department acknowledged that it was "satisfied that Mr. Charlie R. Miller, the putative father, is a U. S. citizen, that he possesses sufficient physical presence in the United States to transmit citizenship, and that there is sufficient evidence that he had access to the applicant's mother at the probable time of conception." App. to Pet. for Cert. 32–33.

In November 1991, petitioner filed an application for registration as a United States citizen with the State Department. The application was denied in March 1992, and petitioner reapplied after her father obtained the paternity decree in Texas in July 1992. The reapplication was also denied on the ground that the Texas decree did not satisfy "the requirements of Section 309(a)(4) INA, which requires that a child born out of wedlock be legitimated before age eighteen in order to acquire U. S. citizenship under Section 301(g) INA (formerly Section 301(a)(7) INA)." *Id.*, at 33. In further explanation of its reliance on § 309(a)(4), the denial letter added: "Without such legitimation before age eighteen, there is no legally recognized relationship under the INA and the child acquires no rights of citizenship through an American citizen parent."[3] *Ibid.*

II

In 1993, petitioner and her father filed an amended complaint against the Secretary of State in the United States District Court for the Eastern District of Texas, seeking a judgment declaring that petitioner is a citizen of the United States and that she therefore has the right to possess an American passport. They alleged that the INA's different treatment of citizen mothers and citizen fathers violated Mr. Miller's "right to equal protection under the laws by utilizing the suspect classification of gender without justification." App. 11. In response to a motion to dismiss filed by the

[3] The comment, of course, related only to cases in which the child born out of wedlock claims citizenship through her father. Moreover, the reference to age 18 was inaccurate; petitioner was born prior to 1986, when § 309(a) was amended to change the relevant age from 21 to 18, see Pub. L. 99–653, § 13, 100 Stat. 3657, and she falls within a narrow age bracket whose members may elect to have the preamendment law apply, see note following 8 U. S. C. § 1409 (Effective Date of 1986 Amendment) (quoting § 23(e), as added, Pub. L. 100–525, § 8(r), 102 Stat. 2619). This oversight does not affect her case, however, because she was over 21 when the Texas decree was entered.

Government, the District Court concluded that Mr. Miller did not have standing and dismissed him as a party. Because venue in Texas was therefore improper, see 28 U. S. C. § 1391(e), the court transferred the case to the District Court for the District of Columbia, the site of the Secretary's residence. The Government renewed its motion in that forum, and that court concluded that even though petitioner had suffered an injury caused by the Secretary's refusal to register her as a citizen, the injury was not "redressable" because federal courts do not have the power to "grant citizenship." 870 F. Supp. 1, 3 (1994) (citing *INS* v. *Pangilinan*, 486 U. S. 875, 884 (1988)).

The Court of Appeals for the District of Columbia Circuit affirmed, but on different grounds. It first held that petitioner does have standing to challenge the constitutionality of 8 U. S. C. § 1409(a). If her challenge should succeed, the court could enter a judgment declaring that she was already a citizen pursuant to other provisions of the INA. 96 F. 3d 1467, 1470 (1996). On the merits, however, the court concluded that the requirements imposed on the "illegitimate" child of an American citizen father, but not on the child of a citizen mother, were justified by the interest in fostering the child's ties with this country. It explained:

> "[W]e conclude, as did the Ninth Circuit, that 'a desire to promote early ties to this country and to those relatives who are citizens of this country is not a[n ir]rational basis for the requirements made by' sections 1409(a)(3) and (4). *Ablang* [v. *Reno*], 52 F. 3d at 806. Furthermore, we find it entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father. A mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence. As the Court has recognized, 'mothers and fathers of illegitimate children are not similarly situated.' *Parham v. Hughes*, 441 U. S. 347, 355 (1979).

> 'The putative father often goes his way unconscious of the birth of the child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother.' *Id.* at 355 n. 7 (internal quotation marks and citation omitted). This sex-based distinction seems especially warranted where, as here, the applicant for citizenship was fathered by a U. S. serviceman while serving a tour of duty overseas." *Id.*, at 1472.

Judge Wald concurred in the judgment despite her opinion that there is "no rational basis for a law that requires a U. S. citizen father, but not a U. S. citizen mother, to formally legitimate a child before she reaches majority as well as agree in writing to provide financial support until that date or forever forfeit the right to transmit citizenship." *Id.*, at 1473. While she agreed that "requiring some sort of minimal 'family ties' between parent and child, as well as fostering an early connection between child and country, is rational government policy," she did not agree that those goals justify "a set of procedural hurdles for men—and only men—who wish to confer citizenship on their children." *Id.*, at 1474. She nevertheless regretfully concurred in the judgment because she believed that our decision in *Fiallo* v. *Bell*, 430 U. S. 787 (1977), required the court to uphold the constitutionality of § 1409. 96 F. 3d, at 1473.

We granted certiorari to address the following question:

> "Is the distinction in 8 U. S. C. § 1409 between 'illegitimate' children of United States citizen mothers and 'illegitimate' children of United States citizen fathers a violation of the Fifth Amendment to the United States Constitution?" 520 U. S. 1208 (1997).

III

Before explaining our answer to the single question that we agreed to address, it is useful to put to one side certain

issues that need not be resolved. First, we need not decide whether *Fiallo* v. *Bell* dictates the outcome of this case, because that case involved the claims of several aliens to a special immigration preference, whereas here petitioner claims that she is, and for years has been, an American citizen.[4] Additionally, *Fiallo* involved challenges to the statutory distinctions between "illegitimate" and "legitimate" children, which are not encompassed in the question presented in this case and which we therefore do not consider.

The statutory provision at issue in this case, 8 U. S. C. § 1409, draws two types of distinctions between citizen fathers and citizen mothers of children born out of wedlock. The first relates to the class of unmarried persons who may transmit citizenship at birth to their offspring, and the second defines the affirmative steps that are required to transmit such citizenship.

With respect to the eligible class of parents, an unmarried father may not transmit his citizenship to a child born abroad to an alien mother unless he satisfies the residency require-

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[4] The sections of the INA challenged in *Fiallo* defined the terms "child" and "parent," which determine eligibility for the special preference immigration status accorded to the "children" and "parents" of United States citizens and lawful permanent residents. *Fiallo* v. *Bell*, 430 U. S. 787, 788–789 (1977). "'Child'" was defined to include "'an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother.'" *Id.*, at 788–789, n. 1 (quoting 8 U. S. C. § 1101(b)(1)(D) (1976 ed.)). Thus, the statute did not permit an illegitimate child to seek preference by virtue of relationship with its citizen or resident father, nor could an alien father seek preference based on his illegitimate child's citizenship or residence. 430 U. S., at 789. Following this Court's decision in *Fiallo* upholding those provisions, in 1986 Congress amended the INA to recognize "child" and "parent" status where the preference is sought based on the relationship of a child born out of wedlock to its natural father "if the father has or had a bona fide parent-child relationship with the person." Pub. L. 99–603, § 315(a), 100 Stat. 3439, as amended, 8 U. S. C. § 1101(b)(1)(D) (1982 ed., Supp. IV).

ment in § 1401(g) that applies to a citizen parent who is married to an alien.[5] Under that provision, the citizen parent must have resided in the United States for a total of at least five years, at least two of which were after attaining the age of 14 years.[6] If the citizen parent is an unmarried mother, however, § 1409(c) rather than § 1401(g) applies; under that subsection she need only have had one year of continuous residence in the United States in order to confer citizenship on her offspring.[7] Since petitioner's father satisfied the residency requirement in § 1401(g), the validity of the distinction between that requirement and the unusually generous provision in § 1409(c) is not at issue.[8]

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[5] See 8 U. S. C. § 1409(a) (directing that §§ 1401(c), (d), (e), (g) and 1408(2) "shall apply" if the specified conditions of § 1409(a) are met).

[6] Title 8 U. S. C. § 1401 provides:

"The following shall be nationals and citizens of the United States at birth:

. . . . . .

"(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years . . . ."

Prior to its amendment in 1986, the section had required residence of 10 total years, at least 5 of which were after attaining the age of 14. See § 301(a)(7), 66 Stat. 236.

[7] Section 309(c) of the INA, codified in 8 U. S. C. § 1409(c), provides: "(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."

[8] The Government has offered two explanations for the special rule applicable to unmarried citizen mothers who give birth abroad: first, an assumption that the citizen mother would probably have custody, and second,

As for affirmative steps, § 1409(a), as amended in 1986, imposes four requirements concerning unmarried citizen fathers that must be satisfied to confer citizenship "as of the date of birth" on a person born out of wedlock to an alien mother in another country. Citizenship for such persons is established if:

> "(1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> "(2) the father had the nationality of the United States at the time of the person's birth,
>
> "(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> "(4) while the person is under the age of 18 years—
>
> "(A) the person is legitimated under the law of the person's residence or domicile,
>
> "(B) the father acknowledges paternity of the person in writing under oath, or
>
> "(C) the paternity of the person is established by adjudication of a competent court." 8 U. S. C. § 1409(a).

Only the second of these four requirements is expressly included in § 1409(c), the provision applicable to unwed citizen mothers. See n. 7, *supra.* Petitioner, relying heavily on Judge Wald's separate opinion below, argues that there is no rational basis for imposing the other three requirements on children of citizen fathers but not citizen mothers. The first requirement is not at issue here, however, because the Government does not question Mr. Miller's blood relationship with petitioner.

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that in most foreign countries the nationality of an illegitimate child is that of the mother unless paternity has been established. The Government submits that the special rule would minimize the risk that such a child might otherwise be stateless. See Brief for Respondent 32–34.

Moreover, even though the parties have disputed the validity of the third condition[9]—and even though that condition is repeatedly targeted in JUSTICE BREYER's dissent—we need not resolve that debate because it is unclear whether the requirement even applies in petitioner's case; it was added in 1986, after her birth, and she falls within a special interim provision that allows her to elect application of the preamendment § 1409(a), which required only legitimation before age 21. See n. 3, *supra.* And even if the condition did apply to her claim of citizenship, the State Department's refusal to register petitioner as a citizen was expressly based on § 1409(a)(4). Indeed, since that subsection is written in the disjunctive, it is only necessary to uphold the least onerous of the three alternative methods of compliance to sustain the Government's position. Thus, the only issue presented by the facts of this case is whether the requirement in § 1409(a)(4)—that children born out of wedlock to citizen fathers, but not citizen mothers, obtain formal proof of paternity by age 18, either through legitimation, written acknowledgment by the father under oath, or adjudication by a competent court—violates the Fifth Amendment.

It is of significance that the petitioner in this case, unlike the petitioners in *Fiallo,* see 430 U. S., at 790, and n. 3, is not challenging the denial of an application for special status. She is contesting the Government's refusal to register and treat her as a citizen. If she were to prevail, the judgment in her favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess.

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[9] The Government asserts that the purpose of § 1409(a)(3) is "'to facilitate the enforcement of a child support order and, thus, lessen the chance that the child could become a financial burden to the states.'" Brief for Respondent 25–26, n. 13 (quoting Hearings on H. R. 4823 et al. before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 99th Cong., 2d Sess., 150 (1986) (statement of Joan M. Clark, Assistant Secretary of State for Consular Affairs) (hereinafter Hearings)).

We therefore agree with the Court of Appeals that she has standing to invoke the jurisdiction of the federal courts. See 96 F. 3d, at 1469–1470 (distinguishing *INS* v. *Pangilinan*, 486 U. S. 875 (1988)). Moreover, because her claim relies heavily on the proposition that her citizen father should have the same right to transmit citizenship as would a citizen mother, we shall evaluate the alleged discrimination against him as well as its impact on her. See, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 193–197 (1976).[10]

IV

Under the terms of the INA, the joint conduct of a citizen and an alien that results in conception is not sufficient to produce an American citizen, regardless of whether the citizen parent is the male or the female partner. If the two parties engage in a second joint act—if they agree to marry one another—citizenship will follow. The provision at issue in this case, however, deals only with cases in which no relevant joint conduct occurs after conception; it determines the ability of each of those parties, acting separately, to confer citizenship on a child born outside of the United States.

If the citizen is the unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion—an alternative that is available by law to many, and in reality to most, women around the world. She must then actually give birth to the child. Section 1409(c) re-

[10] As a threshold matter, the Government now argues—though it never asserted this position below or in opposition to certiorari—that an alien outside the territory of the United States "has no substantive rights cognizable under the Fifth Amendment." Brief for Respondent 11–12. Even if that is so, the question to be decided is whether petitioner is such an alien or whether, as she claims, she is a citizen. Thus, we must address the merits to determine whether the predicate for this argument is accurate. In the cases on which the Government relies, *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), and *United States* v. *Verdugo-Urquidez*, 494 U. S. 259 (1990), it was perfectly clear that the complaining aliens were not citizens or nationals of the United States.

wards that choice and that labor by conferring citizenship on her child.

If the citizen is the unmarried male, he need not participate in the decision to give birth rather than to choose an abortion; he need not be present at the birth; and for at least 17 years thereafter he need not provide any parental support, either moral or financial, to either the mother or the child, in order to preserve his right to confer citizenship on the child pursuant to § 1409(a). In order retroactively to transmit his citizenship to the child as of the date of the child's birth, all that § 1409(a)(4) requires is that he be willing and able to acknowledge his paternity in writing under oath while the child is still a minor. 8 U. S. C. § 1409(a)(4)(B). In fact, § 1409(a)(4) requires even less of the unmarried father—that provision is alternatively satisfied if, before the child turns 18, its paternity "is established by adjudication of a competent court." § 1409(a)(4)(C). It would appear that the child could obtain such an adjudication absent any affirmative act by the father, and perhaps even over his express objection.

There is thus a vast difference between the burdens imposed on the respective parents of potential citizens born out of wedlock in a foreign land. It seems obvious that the burdens imposed on the female citizen are more severe than those imposed on the male citizen by § 1409(a)(4), the only provision at issue in this case. It is nevertheless argued that the male citizen and his offspring are the victims of irrational discrimination because § 1409(a)(4) is the product of "'overbroad stereotypes about the relative abilities of men and women.'" Brief for Petitioner 8. We find the argument singularly unpersuasive.[11]

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[11] Though petitioner claims to be a citizen from birth, rather than claiming an immigration preference, citizenship does not pass by descent. *Rogers* v. *Bellei*, 401 U. S. 815, 830 (1971). Thus she must still meet the statutory requirements set by Congress for citizenship. *Id.*, at 828–830; *United States* v. *Ginsberg*, 243 U. S. 472, 474 (1917). Deference to the

Insofar as the argument rests on the fact that the male citizen parent will "forever forfeit the right to transmit citizenship" if he does not come forward while the child is a minor, whereas there is no limit on the time within which the citizen mother may prove her blood relationship, the argument overlooks the difference between a substantive condition and a procedural limitation. The substantive conduct of the unmarried citizen mother that qualifies her child for citizenship is completed at the moment of birth; the relevant conduct of the unmarried citizen father or his child may occur at any time within 18 years thereafter. There is, however, no procedural hurdle that limits the time or the method by which either parent (or the child) may provide the State Department with evidence that the necessary steps were taken to transmit citizenship to the child.

The substantive requirement embodied in § 1409(a)(4) serves, at least in part, to ensure that a person born out of wedlock who claims citizenship by birth actually shares a blood relationship with an American citizen. As originally enacted in 1952, § 1409(a) required simply that "the paternity of such child [born out of wedlock] is established while such child is under the age of twenty-one years by legitimation." 66 Stat. 238. The section offered no other means of proving a biological relationship. In 1986, at the same time that it modified the INA provisions at issue in *Fiallo* in favor of unmarried fathers and their out-of-wedlock children, see n. 4, *supra*, Congress expanded § 1409(a) to allow the two other alternatives now found in subsections (4)(B) and (4)(C).

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political branches dictates "a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Mathews* v. *Diaz*, 426 U. S. 67, 82 (1976). Even if, as petitioner and her *amici* argue, the heightened scrutiny that normally governs gender discrimination claims applied in this context, see *United States* v. *Virginia*, 518 U. S. 515, 532–534 (1996), we are persuaded that the requirement imposed by § 1409(a)(4) on children of unmarried male, but not female, citizens is substantially related to important governmental objectives.

Pub. L. 99–653, § 13, 100 Stat. 3657. The purpose of the amendment was to "simplify and facilitate determinations of acquisition of citizenship by children born out of wedlock to an American citizen father, by eliminating the necessity of determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction." Hearings, at 150. The 1986 amendment also added § 1409(a)(1), which requires paternity to be established by clear and convincing evidence, in order to deter fraudulent claims; but that standard of proof was viewed as an ancillary measure, not a replacement for proof of paternity by legitimation or a formal alternative. See *id.*, at 150, 155.

There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective. See *Trimble* v. *Gordon*, 430 U. S. 762, 770–771 (1977); *Fiallo*, 430 U. S., at 799, n. 8. Nor can it be denied that the male and female parents are differently situated in this respect. The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record. Thus, the requirement that the father make a timely written acknowledgment under oath, or that the child obtain a court adjudication of paternity, produces the rough equivalent of the documentation that is already available to evidence the blood relationship between the mother and the child. If the statute had required the citizen parent, whether male or female, to obtain appropriate formal documentation within 30 days after birth, it would have been "gender-neutral" on its face, even though in practical operation it would disfavor unmarried males because in virtually every case such a requirement would be superfluous for the mother. Surely the fact that the statute allows 18 years in which to provide evidence that is comparable to what the

mother provides immediately after birth cannot be viewed as discriminating against the father or his child.

Nevertheless, petitioner reiterates the suggestion that it is irrational to require a formal act such as a written acknowledgment or a court adjudication because the advent of reliable genetic testing fully addresses the problem of proving paternity, and subsection (a)(1) already requires proof of paternity by clear and convincing evidence. See 96 F. 3d, at 1474. We respectfully disagree. Nothing in subsection (a)(1) requires the citizen father or his child to obtain a genetic paternity test. It is difficult, moreover, to understand why signing a paternity acknowledgment under oath prior to the child's 18th birthday is more burdensome than obtaining a genetic test, which is relatively expensive,[12] normally requires physical intrusion for both the putative father and child,[13] and often is not available in foreign countries.[14] Congress could fairly conclude that despite recent scientific advances, it still remains preferable to require some formal legal act to establish paternity, coupled with a clear-and-convincing evidence standard to deter fraud. The time limi-

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[12] See 7 U. S. Dept. of State, Foreign Affairs Manual § 1131.5–4(c) (1996) (hereinafter Foreign Affairs Manual). Commercially available testing in the United States presently appears to cost between about $450 to $600 per test. See Hotaling, Is He or Isn't He?, Los Angeles Times Magazine, Sept. 7, 1997, pp. 36, 54 (hereinafter Hotaling); Mirabella, Lab's Tests Give Answers to Genetic Questions, Baltimore Sun, Nov. 25, 1997, pp. 1C, 8C, cols. 2, 4 (hereinafter Mirabella).

[13] Laboratories that conduct genetic paternity testing typically use either blood samples or cells scraped from the inside of the cheek of the putative father, the child, and often the mother as well. See, *e. g.*, 1 D. Faigman, D. Kaye, M. Saks, & J. Sanders, Modern Scientific Evidence §§ 19–2.2, 19–2.7.1, pp. 761, 763, 775 (1997); Hotaling 36, 54; Mirabella, at 8C, cols. 2, 4.

[14] The State Department has observed that "the competence, integrity, and availability of blood testing physicians and facilities vary around the world." 7 Foreign Affairs Manual § 1131.5–4(c). There are presently about 75 DNA testing laboratories in the United States, 51 of which are accredited by the American Association of Blood Banks. Hotaling 36.

tation, in turn, provides assurance that the formal act is based upon reliable evidence, and also deters fraud.[15] Congress is of course free to revise its collective judgment and permit genetic proof of paternity rather than requiring some formal legal act by the father or a court,[16] but the Constitution does not now require any such change.

Section 1409 also serves two other important purposes that are unrelated to the determination of paternity: the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States. When a child is born out of wedlock outside of the United States, the citizen mother, unlike the citizen father, certainly knows of her child's existence and typically will have custody of the child immediately after the birth. Such a child thus has the opportunity to develop ties with its citizen mother at an early age, and may even grow up in the United States if the mother returns. By contrast, due to the normal interval of nine months between conception and birth, the unmarried father may not even know that his child exists, and the child may not know the father's identity. Section 1409(a)(4) requires a relatively easy, formal step by either the citizen father or his child that shows beyond doubt that at least one of the two knows of their blood relationship, thus assuring at least the opportunity for them to develop a personal relationship.

The facts of this very case provide a ready example of the concern. Mr. Miller and petitioner both failed to take any steps to establish a legal relationship with each other before

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[15] Once a child reaches the legal age of majority, a male citizen could make a fraudulent claim of paternity on the person's behalf without any risk of liability for child support.

[16] In a different context Congress has already recognized the value of genetic paternity testing. See 96 F. 3d 1467, 1474–1475 (CADC 1996) (discussing Child Support Enforcement Amendments of 1984).

petitioner's 21st birthday, and there is no indication in the record that they had any contact whatsoever before she applied for a United States passport. Given the size of the American military establishment that has been stationed in various parts of the world for the past half century, it is reasonable to assume that this case is not unusual. In 1970, when petitioner was born, about 683,000 service personnel were stationed in the Far East, 24,000 of whom were in the Philippines. U. S. Dept. of Commerce, Statistical Abstract of the United States 381 (99th ed. 1978). Of all Americans in the military at that time, only one percent were female.[17] These figures, coupled with the interval between conception and birth and the fact that military personnel regularly return to the United States when a tour of duty ends, suggest that Congress had legitimate concerns about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children. It was surely reasonable when the INA was enacted in 1952, and remains equally reasonable today, for Congress to condition the award of citizenship to such children on an act that demonstrates, at a minimum, the possibility that those who become citizens will develop ties with this country—a requirement that performs a meaningful purpose for citizen fathers but normally would be superfluous for citizen mothers.

It is of course possible that any child born in a foreign country may ultimately fail to establish ties with its citizen parent and with this country, even though the child's citizen parent has engaged in the conduct that qualifies the child for citizenship. A citizen mother may abandon her child before

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[17] Office of the Assistant Secretary of Defense, Background Study, Use of Women in the Military 5 (2d ed. 1978). The proportion of military personnel who were female in 1970 had dropped from a high of 2.2 percent in 1945. *Id.*, at 3. Since 1970, the proportion has steadily increased to its present level of about 13 percent. See Dept. of Defense, Selected Manpower Statistics 23 (1996).

returning to the States, and a citizen father, even after acknowledging paternity, may die or abscond before his child has an opportunity to bond with him or visit this country. The fact that the interest in fostering ties with this country may not be fully achieved for either class of children does not qualify the legitimacy or the importance of that interest. If, as Congress reasonably may have assumed, the formal requirements in § 1409(a)(4) tend to make it just as likely that fathers will have the opportunity to develop a meaningful relationship with their children as does the fact that the mother knows of her baby's existence and often has custody at birth, the statute's effect will reduce, rather than aggravate, the disparity between the two classes of children.

We are convinced not only that strong governmental interests justify the additional requirement imposed on children of citizen fathers, but also that the particular means used in § 1409(a)(4) are well tailored to serve those interests. It is perfectly appropriate to require some formal act, not just any evidence that the father or his child know of the other's existence. Such a formal act, whether legitimation, written acknowledgment by the father, or a court adjudication, lessens the risk of fraudulent claims made years after the relevant conduct was required. As for the requirement that the formal act take place while the child is a minor, Congress obviously has a powerful interest in fostering ties with the child's citizen parent and the United States during his or her formative years. If there is no reliable, contemporaneous proof that the child and the citizen father had the opportunity to form familial bonds before the child turned 18, Congress reasonably may demand that the child show sufficient ties to this country on its own rather than through its citizen parent in order to be a citizen.[18]

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[18] The same policy presently applies to foreign-born persons not eligible for citizenship at birth: A child may obtain special immigration preference and the immediate issuance of a visa based on a parent's citizenship or lawful residence, but only until age 21. 8 U. S. C. §§ 1101(b)(1), 1153(d).

Our conclusion that Congress may require an affirmative act by unmarried fathers and their children, but not mothers and their children, is directly supported by our decision in *Lehr* v. *Robertson*, 463 U. S. 248 (1983). That case involved a New York law that automatically provided mothers of "illegitimate" children with prior notice of an adoption proceeding and the right to veto an adoption, but only extended those rights to unmarried fathers whose claim of paternity was supported by some formal public act, such as a court adjudication, the filing of a notice of intent to claim paternity, or written acknowledgment by the mother. *Id.*, at 251–252, n. 5, 266. The petitioner in *Lehr*, an unmarried putative father, need only have mailed a postcard to the State's "putative father registry" to enjoy the same rights as the child's undisputed mother, *id.*, at 264, yet he argued that this gender-based requirement violated the Equal Protection Clause. We rejected that argument, and we find the comparable claim in this case, if anything, even less persuasive. Whereas the putative father in *Lehr* was deprived of certain rights because he failed to take some affirmative step within about two years of the child's birth (when the adoption proceeding took place), here the unfavorable gender-based treatment was attributable to Mr. Miller's failure to take appropriate action within 21 years of petitioner's birth *and* petitioner's own failure to obtain a paternity adjudication by a "competent court" before she turned 18.[19]

Even though the rule applicable to each class of children born abroad is eminently reasonable and justified by important Government policies, petitioner and her *amici* argue that § 1409 is unconstitutional because it is a "gender-based classification." We shall comment briefly on that argument.

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[19] JUSTICE BREYER questions the relevance of *Lehr* because it was decided before advances in genetic testing, see *post*, at 487; there was, however, no question about the paternity of the father in that case. As in this case, the father there failed to act promptly to establish a relationship with his child.

V

The words "stereotype," "stereotyping," and "stereotypical" are used repeatedly in petitioner's and her *amici*'s briefs. They note that we have condemned statutory classifications that rest on the assumption that gender may serve as a proxy for relevant qualifications to serve as the administrator of an estate, *Reed* v. *Reed*, 404 U. S. 71 (1971), to engage in professional nursing, *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718 (1982), or to train for military service, *United States* v. *Virginia*, 518 U. S. 515 (1996), to name a few examples. Moreover, we have expressly repudiated cases that rested on the assumption that only the members of one sex could suitably practice law or tend bar. See *Hogan*, 458 U. S., at 725, n. 10 (commenting on *Bradwell* v. *State*, 16 Wall. 130 (1873), and *Goesaert* v. *Cleary*, 335 U. S. 464 (1948)). Discrimination that "is merely the accidental byproduct of a traditional way of thinking about females" is unacceptable. *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in judgment).

The gender equality principle that was implicated in those cases is only indirectly involved in this case for two reasons.[20] First, the conclusion that petitioner is not a citizen rests on several coinciding factors, not just the gender of her citizen parent. On the facts of this case, even if petitioner's mother had been a citizen[21] and her father had been the alien, petitioner would not qualify for citizenship because her mother has never been to the United States. Alternatively, if her citizen parent had been a female member of the Air Force and, like Mr. Miller, had returned to the States at the end of her tour of duty, § 1409 quite probably would have been irrelevant and petitioner would have become a citizen at

[20] Of course, the sex of the person claiming citizenship is irrelevant; if she were a male, petitioner's case would be no stronger.

[21] Theoretically she might have been the child of an American soldier stationed in the Philippines during World War II. See *Ablang* v. *Reno*, 52 F. 3d 801, 802 (CA9 1995), cert. denied, 516 U. S. 1043 (1996).

birth by force of the Constitution itself.[22] Second, it is not merely the sex of the citizen parent that determines whether the child is a citizen under the terms of the statute; rather, it is an event creating a legal relationship between parent and child—the birth itself for citizen mothers, but postbirth conduct for citizen fathers and their offspring. Nevertheless, we may assume that if the classification in § 1409 were merely the product of an outmoded stereotype, it would be invalid.

The "gender stereotypes" on which § 1409 is supposedly premised are (1) "that the American father is never anything more than the proverbial breadwinner who remains aloof from day-to-day child rearing duties,"[23] and (2) "that a mother will be closer to her child born out of wedlock than a father will be to his."[24] Even disregarding the statute's separate, nonstereotypical purpose of ensuring reliable proof of a blood relationship, neither of those propositions fairly reflects the justifications for the classification actually at issue.

Section 1409(a)(4) is not concerned with either the average father or even the average father of a child born out of wedlock. It is concerned with a father (a) whose child was born in a foreign country, and (b) who is unwilling or unable to acknowledge his paternity, and whose child is unable or unwilling to obtain a court paternity adjudication. A congressional assumption that such a father and his child are especially unlikely to develop a relationship, and thus to foster the child's ties with this country, has a solid basis even if we assume that all fathers who have made some effort to become acquainted with their children are as good, if not better, parents than members of the opposite sex.

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[22] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U. S. Const., Amdt. 14, § 1.

[23] Brief for American Civil Liberties Union et al. as *Amici Curiae* 8.

[24] 96 F. 3d, at 1473 (Wald, J., concurring in judgment).

Nor does the statute assume that all mothers of illegitimate children will necessarily have a closer relationship with their children than will fathers. It does assume that all of them will be present at the event that transmits their citizenship to the child, that hospital records and birth certificates will normally make a further acknowledgment and formal proof of parentage unnecessary, and that their initial custody will at least give them the opportunity to develop a caring relationship with the child. Section 1409(a)(4)—the only provision that we need consider—is therefore supported by the undisputed assumption that fathers are less likely than mothers to have the *opportunity* to develop relationships, not simply, as JUSTICE BREYER contends, *post*, at 482–483, that they are less likely to take advantage of that opportunity when it exists.[25] These assumptions are firmly grounded and adequately explain why Congress found it unnecessary to impose requirements on the mother that were entirely appropriate for the father.

None of the premises on which the statutory classification is grounded can be fairly characterized as an accidental byproduct of a traditional way of thinking about the mem-

[25] JUSTICE BREYER does not dispute the fact that the unmarried father of a child born abroad is less likely than the unmarried mother to have the opportunity to develop a relationship with the child. He nevertheless would replace the gender-based distinction with either a "knowledge of birth" requirement or a distinction between "Caretaker and Noncaretaker Parents." *Post*, at 487. Neither substitute seems a likely candidate for serious congressional consideration. The former in practice would be just as gender based as the present requirement, for surely every mother has knowledge of the birth when it occurs; nor would that option eliminate the need for formal steps and time limits to ensure that the parent truly had knowledge during the child's youth. The latter would be confusing at best, for JUSTICE BREYER does not tell us how he would decide whether a father like Mr. Miller would qualify as a "caretaker" or a "noncaretaker"; and it would also be far less protective of families than the present statute, for it would deny citizenship to out-of-wedlock children who have relationships with their citizen parents but are not in the primary care or custody of those parents.

bers of either sex. The biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands. Indeed, it is the suggestion that simply because Congress has authorized citizenship at birth for children born abroad to unmarried mothers, it cannot impose any postbirth conditions upon the granting of citizenship to the foreign-born children of citizen fathers, that might be characterized as merely a byproduct of the strong presumption that gender-based legal distinctions are suspect. An impartial analysis of the relevant differences between citizen mothers and citizen fathers plainly rebuts that presumption.[26]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice O'Connor, with whom Justice Kennedy joins, concurring in the judgment.

This Court has long applied a presumption against third-party standing as a prudential limitation on the exercise of federal jurisdiction. Federal courts, we have held, "must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton* v. *Wulff*, 428 U. S. 106, 113 (1976); see also *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975). Contrary to this prudential rule, the principal opinion recognizes that petitioner has standing to raise an equal protection challenge to 8 U. S. C. § 1409. The statute, however, accords differential treatment to fathers and mothers, not to sons and daughters. Thus,

[26] See *Michael M.* v. *Superior Court, Sonoma Cty.*, 450 U. S. 464, 497–498, n. 4 (1981) (Stevens, J., dissenting). Justice Scalia argues that petitioner's suit must be dismissed because the courts have "no power to provide the relief requested." *Post*, at 453. Because we conclude that there is no constitutional violation to remedy, we express no opinion on this question.

although petitioner is clearly injured by the fact that she has been denied citizenship, the *discriminatory* impact of the provision falls on petitioner's father, Charlie Miller, who is no longer a party to this suit. Consequently, I do not believe that we should consider petitioner's gender discrimination claim.

The principal opinion recognizes that petitioner's claim turns on "the proposition that her citizen father should have the same right to transmit citizenship as would a citizen mother" and resolves to "evaluate the alleged discrimination against [petitioner's father] as well as its impact on [petitioner]." *Ante*, at 433. But even when "the very same allegedly illegal act that affects the litigant also affects a third party," a plaintiff "cannot rest his claim to relief on the legal rights and interests of [the] third part[y]." *Department of Labor* v. *Triplett*, 494 U. S. 715, 720 (1990) (internal quotation marks omitted). A party raising a constitutional challenge to a statute must demonstrate not only "that the alleged unconstitutional feature [of the statute] injures him" but also that "he is within the class of persons with respect to whom the act is unconstitutional." *Heald* v. *District of Columbia*, 259 U. S. 114, 123 (1922). This requirement arises from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that "third parties themselves usually will be the best proponents of their rights." *Singleton*, *supra*, at 113–114; see also *Holden* v. *Hardy*, 169 U. S. 366, 397 (1898).

In support of the decision to consider Charlie Miller's claim, both JUSTICE STEVENS, in the principal opinion, and JUSTICE BREYER, in dissent, cite *Craig* v. *Boren*, 429 U. S. 190 (1976). In that case, we allowed a vendor to challenge a state law that permitted sales of 3.2% beer to females who had reached the age of 18 but prohibited such sales to males until they turned 21. Because the law proscribed the sale rather than the consumption of beer, the Court determined

that a vendor was the "least awkward challenger" to the gender-based distinction. *Id.*, at 197. We reasoned that prudential objectives would not be served by rejecting third-party standing because "the lower court already ha[d] entertained the relevant constitutional challenge." *Id.*, at 193. Here, however, the court below expressly did *not* take account of Charlie Miller's equal protection rights, instead reviewing petitioner's challenge as a first-party claim of gender discrimination against the children of citizen fathers as opposed to the children of citizen mothers. See 96 F. 3d 1467, 1470 (CADC 1996).

More importantly, since this Court decided *Craig*, we have articulated the contours of the third-party standing inquiry in greater detail. In *Powers* v. *Ohio*, 499 U. S. 400 (1991), we stated that a litigant seeking to assert the rights of another party must satisfy three interrelated criteria: "The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.*, at 411 (internal quotation marks and citations omitted); see also *Campbell* v. *Louisiana*, *ante*, at 397–398. While it seems clear that petitioner has a significant stake in challenging the statute and a close relationship with her father, she has not demonstrated a substantial hindrance to her father's ability to assert his own rights. *Powers* and our earlier precedents suggest that the absence of such an obstacle precludes third-party standing. See 499 U. S., at 411 (explaining that "[all] three important criteria [must be] satisfied," *i. e.*, that there "must exist some hindrance to the third party's ability to protect his or her own interests" before the presumption is rebutted); see also *Singleton*, *supra*, at 116 ("Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply").

Petitioner has not demonstrated that Charlie Miller confronted a "genuine obstacle" to the assertion of his own rights that rises to the level of a hindrance. 428 U. S., at 116; see also *Barrows* v. *Jackson*, 346 U. S. 249, 257 (1953) (third-party standing accorded because it "would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court"). In fact, Charlie Miller originally filed suit and asserted his own rights but then opted not to pursue his claim throughout this litigation. It is true that he was wrongly dismissed from the action by the Eastern District of Texas, and that the Government made the misguided argument before that court that "[t]he rights, if any, which have been injured are those of Lorelyn Penero Miller, the true plaintiff in this action." See Motion to Dismiss Plaintiff's First Amended Complaint or, in the Alternative, to Transfer Venue 4. But because he failed to appeal the erroneous dismissal of his claim, any hindrance to the vindication of Charlie Miller's constitutional rights is ultimately self imposed.

I am reluctant to accept that the Government's litigation strategy, or an unfavorable ruling in the lower courts, could be a sufficiently severe obstacle to the assertion of a litigant's own rights to warrant an exception to our prudential standing requirements. Those requirements were adopted to serve the institutional interests of the federal courts, not the convenience of the litigants. See *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 231 (1990); *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986). JUSTICE BREYER asserts that appeals take time and money, and that a change of venue left Charlie Miller uncertain where to appeal. See *post,* at 474. But the only obstacle was the inconvenience caused by the normal course of litigation, which often involves a transfer of venue. Charlie Miller never indicated any intent to challenge his dismissal from the suit, and there is no suggestion that he faced any unusual practical or legal barriers to filing a notice of appeal. Instituting a suit is it-

self burdensome—arguably as burdensome as filing an appeal from the denial of a claim—and to conclude that the course of events that transpired in this case constituted a hindrance to Charlie Miller's ability to assert his rights would be a step toward eliminating the hindrance prong altogether.

Thus far, we have permitted third-party standing only where more "daunting" barriers deterred the rightholder. *Powers*, *supra*, at 414. To take an extreme example, in *Hodel* v. *Irving*, 481 U. S. 704 (1987), we concluded that plaintiffs had third-party standing to assert the rights of their deceased parents. *Id.*, at 711–712. And in *Powers*, we noted that potential jurors are not parties to the proceeding, cannot easily obtain declaratory or injunctive relief from a prosecutor's exercise of peremptory challenges, would find it difficult to demonstrate a likelihood that discrimination against them would recur, and have economic disincentives to filing suit. 499 U. S., at 414–415. Privacy concerns may also provide a compelling explanation for a third party's absence from the litigation. In *Carey* v. *Population Services Int'l*, 431 U. S. 678 (1977), we determined that a vendor could challenge the law prohibiting the distribution of contraceptives to minors because the desire to avoid publicity would deter potential purchasers from defending their own rights. *Id.*, at 684, n. 4; see also *Eisenstadt* v. *Baird*, 405 U. S. 438, 446 (1972). Likewise, in *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958), the Court held that an organization could raise the privacy rights of its members because litigation initiated by those members would disclose their identity and destroy the very privacy they sought to protect. *Id.*, at 459. Where insurmountable procedural obstacles preclude a rightholder's own suit, the Court has also accorded third-party standing. In *Singleton*, we concluded that physicians could assert the rights of indigent women denied funding for abortion because imminent mootness prevented the women from bringing their claims. See 428 U. S., at 108. Simi-

larly, *Barrows* involved the constitutional rights of the prospective victims of a racially restrictive real estate covenant, who were unidentified and thus not before the Court. See 346 U. S., at 254. And in *Craig*, the case from which the Court garners its sole support for according third-party standing here, the named plaintiff turned 21 during the course of the litigation, which mooted his challenge to the beer-sale restriction. See 429 U. S., at 192.

Where legitimate obstacles such as these exist, which lie beyond the control of the rightholder, that party's absence from a suit more likely stems from disability than from disinterest. A hindrance signals that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so. See *Singleton*, *supra*, at 116 ("If there is some genuine obstacle . . . the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent"). Furthermore, where a hindrance impedes the assertion of a claim, the right likely will not be asserted—and thus the relevant law will not be enforced—unless the Court recognizes third-party standing. In *Barrows*, for example, the Court permitted third-party standing because "the reasons which underlie [the] rule denying standing to raise another's rights" were "outweighed by the need to protect the fundamental rights" which would otherwise have been denied. 346 U. S., at 257.

Moreover, in contrast to this case, the white property owner contesting the racially restrictive covenant in *Barrows* was its "only effective adversary" because she was "the one in whose charge and keeping repose[d] the power to continue to use her property to discriminate or to discontinue such use." *Id.*, at 259. Here, although we have an injured party before us, the party actually discriminated against is both best suited to challenging the statute and available to undertake that task. See *Gladstone, Realtors* v. *Village of*

Bellwood, 441 U. S. 91, 100 (1979) (prudential barriers seek "to limit access to the federal courts to those litigants best suited to assert a particular claim"). In light of petitioner's uncertain constitutional status and the potential problems with fashioning a remedy for her injury, see *post,* at 452–458 (Scalia, J., concurring in judgment), allowing her to assert Charlie Miller's claim will likely dilute rather than protect his constitutional rights.

Although petitioner cannot raise her father's rights, she may raise her own. While it is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States, see *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950), and *United States* v. *Verdugo-Urquidez,* 494 U. S. 259 (1990), I will assume that petitioner may challenge the constitutionality of § 1409. Her challenge, however, triggers only rational basis scrutiny. As pointed out above, see *supra,* at 445, § 1409 does not draw a distinction based on the gender of the child, so petitioner cannot claim that she has been injured by gender discrimination. See *Allen* v. *Wright,* 468 U. S. 737, 755 (1984) (an injury arising from discrimination "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct") (internal quotation marks omitted). Moreover, the grant of certiorari was limited to the question whether § 1409 discriminates "between 'illegitimate' children of United States citizen mothers and 'illegitimate' children of United States citizen fathers," so any claim of discrimination based on differential treatment of illegitimate versus legitimate children is not presented. See 520 U. S. 1208 (1997).

Given that petitioner cannot raise a claim of discrimination triggering heightened scrutiny, she can argue only that § 1409 irrationally discriminates between illegitimate children of citizen fathers and citizen mothers. Although I do not share Justice Stevens' assessment that the provision withstands heightened scrutiny, *ante,* at 433–444, I believe

it passes rational scrutiny for the reasons he gives for sustaining it under the higher standard. It is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence. See *Heller* v. *Doe*, 509 U. S. 312, 320 (1993) ("[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification" (internal quotation marks and citations omitted)). This is particularly true when the classification is adopted with reference to immigration, an area where Congress frequently must base its decisions on generalizations about groups of people.

* * *

We adopted the presumption against third-party standing to preserve the court's "properly limited" role, *Warth*, 422 U. S., at 498, and we have identified a particular set of circumstances that will rebut that presumption. I believe that we should treat those considerations, in particular the hindrance prong, as meaningful criteria. Consequently, I would not accord petitioner standing to raise her father's claim of gender discrimination. Petitioner's own constitutional challenge triggers only rational basis scrutiny, and § 1409 is sustainable under that standard. Accordingly, I concur in the judgment affirming the Court of Appeals' decision.

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

I agree with the outcome in this case, but for a reason more fundamental than the one relied upon by JUSTICE STEVENS. In my view it makes no difference whether or not

§ 1409(a) passes "heightened scrutiny" or any other test Members of the Court might choose to apply. The complaint must be dismissed because the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.

The Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U. S. 649, 702 (1898). Under the Fourteenth Amendment, "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." *Ibid.* Petitioner, having been born outside the territory of the United States, is an alien as far as the Constitution is concerned, and "can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress." *Id.*, at 702–703; see also *Rogers* v. *Bellei*, 401 U. S. 815, 827 (1971). Here it is the "authority of Congress" that is appealed to—its power under Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization." If there is no congressional enactment granting petitioner citizenship, she remains an alien.

The enactment on which petitioner relies is § 309 of the Immigration and Nationality Act (INA), 66 Stat. 238, as amended, 8 U. S. C. § 1409, which establishes the requirements for the acquisition of citizenship by a child born out of wedlock when the child's father is a United States citizen. Section 1409(a) provides, in relevant part, that § 1401(g), which confers citizenship on foreign-born children when one parent is an alien and the other a citizen of the United States, shall apply:

> "(a) . . . as of the date of birth to a person born out of wedlock if—
>
> "(1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> "(2) the father had the nationality of the United States at the time of the person's birth,

"(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

"(4) while the person is under the age of 18 years—

"(A) the person is legitimated under the law of the person's residence or domicile,

"(B) the father acknowledges paternity of the person in writing under oath, or

"(C) the paternity of the person is established by adjudication of a competent court."

By its plain language, § 1409(a) sets forth a precondition to the acquisition of citizenship under § 1401(g) by the illegitimate child of a citizen-father. Petitioner does not come into federal court claiming that she met that precondition, and that the State Department's conclusion to the contrary was factually in error. Rather, she acknowledges that she did not meet the last two requirements of that precondition, §§ 1409(a)(3) and (4). She nonetheless asks for a "declaratory judgment that [she] is a citizen of the United States" and an order to the Secretary of State requiring the State Department to grant her application for citizenship, App. 11–12, because the requirements she did not meet are not also imposed upon illegitimate children of citizen-mothers, and therefore violate the Equal Protection Clause.[1] Even if we

[1] Petitioner makes the equal protection claim on behalf of her father, not on her own behalf. JUSTICE BREYER finds that she has third-party standing to make the claim because "[s]he has a 'close' and relevant relationship" with her father, and "there was 'some hindrance' to her father's asserting his own rights." *Post*, at 473 (quoting from *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991)). As an original matter, I would agree with JUSTICE O'CONNOR that this ground is inadequate, but I do not read our cases as demanding so significant an impairment of the rightholder's ability to sue as she does. For example, in *Craig* v. *Boren*, 429 U. S. 190, 197 (1976), although the rightholder who was one of the named plaintiffs had indeed lost his ability to sue because he had turned 21, there was "no barrier whatever" to assertion of the constitutional claim by other Oklahoma males between 18 and 20. *Id.*, at 216 (Burger, C. J., dissenting). Certainly here, as in

were to agree that the difference in treatment between illegitimate children of citizen-fathers and citizen-mothers is unconstitutional, we could not, consistent with the limited judicial power in this area, remedy that constitutional infirmity by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship. "Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship." *INS* v. *Pangilinan*, 486 U. S. 875, 884 (1988) (internal quotation marks and citation omitted).

Judicial power over immigration and naturalization is extremely limited. "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 210 (1953)). See also *Landon* v. *Plasencia*, 459 U. S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative"); *Mathews* v. *Diaz*, 426 U. S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"); *Kleindienst* v. *Mandel*, 408 U. S. 753, 769–770 (1972) ("[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established"); *Galvan* v. *Press*, 347 U. S. 522, 531 (1954) ("That the formulation of [policies pertaining to the

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Craig, petitioner is the "least awkward challenger," *id.*, at 197, since it is her right to citizenship that is at stake. Our law on this subject is in need of what may charitably be called clarification, but I would leave it for another day. Since I accept petitioner's third-party standing, there is no need for me to reach the Government's claim (which it asserts for the first time in its brief on the merits in this Court) that petitioner cannot invoke the Equal Protection Clause on her own behalf because she is not within the jurisdiction of the United States. Brief for Respondent 11–12.

entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government"). Because only Congress has the power to set the requirements for acquisition of citizenship by persons not born within the territory of the United States, federal courts cannot exercise that power under the guise of their remedial authority. "Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations." *Pangilinan*, *supra*, at 885. "An alien who seeks political rights as a member of this Nation can rightfully obtain them *only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications.*" *United States* v. *Ginsberg*, 243 U. S. 472, 474 (1917) (emphasis added).

Petitioner argues, and JUSTICE BREYER's dissent seems to agree, see *post*, at 488–489, that because she meets the requirements of § 1401(g), the Court may declare her a citizen "at birth" under that provision and ignore § 1409(a) entirely, which allegedly unconstitutionally takes away that citizenship. Brief for Petitioner 14–15. This argument adopts a fanciful view of the statute, whereby § 1409(a) takes away what § 1401(g) has unconditionally conferred—as though § 1409(a) were some sort of a condition subsequent to the conveyance of real estate in a will. If anything, of course, it would be a condition *precedent*, since it says that § 1401(g) "shall apply as of the date of birth to a person born out of wedlock *if* " the person meets the requirements there set forth. 8 U. S. C. § 1409(a) (emphasis added). But a unitary statute is not to be picked apart in this fashion. To be sure, § 1401(g), read in isolation, might refer to both married and unmarried parents. We do not, however, read statutory provisions in isolation, as if other provisions in the same Act do not exist, see *King* v. *St. Vincent's Hospital*, 502 U. S. 215,

221 (1991). Section 1401(g) does *not* confer citizenship upon children born out of wedlock unless the requirements in § 1409 are satisfied.

It can be argued that in exempting an applicant from an unconstitutional requirement (either part or all of § 1409(a)) a court is not rewriting the law, but simply ignoring that portion of the law which is a nullity. See *post*, at 488–489 (BREYER, J., dissenting). That assumes, however, a judicial power to sever the unconstitutional portion from the remainder, and to apply the remainder unencumbered. Such a power exists in other cases—and is exercised on the basis of the Court's assessment as to whether Congress would have enacted the remainder of the law without the invalidated provision. See *New York* v. *United States*, 505 U. S. 144, 186 (1992). I know of no instance, however, in which this Court has severed an unconstitutional restriction upon the grant of immigration or citizenship. It is in my view incompatible with the plenary power of Congress over those fields for judges to speculate as to what Congress would have enacted if it had not enacted what it did—whether it would, for example, have preferred to extend the requirements of §§ 1409(a)(3) and (4) to mothers instead of eliminating them for fathers, or even to deny citizenship to illegitimate children entirely. ("[T]he Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent." *Rogers*, 401 U. S., at 830.) Moreover, if the mere character of the naturalization power were not enough to render the severing of a limitation upon citizenship improper, the INA itself contains a clear statement of congressional intent: "A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise*." 8 U. S. C. § 1421(d) (emphasis added). JUSTICE BREYER's reliance upon the INA's general severability clause, 66 Stat. 281, § 406, is misplaced because the specific governs the general, see *Morales* v. *Trans World Airlines*,

Inc., 504 U. S. 374, 384–385 (1992). The question of severance ultimately turns on "whether the provisions are inseparable by virtue of inherent character," *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 322 (1936), which must be gleaned from the structure and nature of the Act.

Another obstacle to judicial deletion of the challenged requirements is the fact that when a statutory violation of equal protection has occurred, it is not foreordained which particular statutory provision is invalid. The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here, supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers). "[W]e have noted that a court sustaining [an equal protection] claim faces 'two remedial alternatives: [It] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Heckler* v. *Mathews*, 465 U. S. 728, 738 (1984), quoting *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result). Given the nature of the law at issue here, and given the clear command of 8 U. S. C. § 1421(d) ("under the conditions prescribed in this subchapter and not otherwise"), there is no doubt which of those alternatives the Court must employ. It cannot confer citizenship where Congress has not done so.

In any event, this is not like the ordinary equal protection case, in which one class is subjected to a restriction from which the other class is exempt. See, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 191–192 (1976) (men can be served alcoholic beverages only if over 21 years of age, whereas women need be only 18). Here *each* class is subjected to restrictions from which the other is exempt. While illegitimate children of citizen-fathers must meet the requirements of § 1409(a)

from which illegitimate children of citizen-mothers are exempt, illegitimate children of citizen-mothers must meet the quite different requirements of § 1409(c), from which illegitimate children of citizen-fathers are exempt.[2] In this situation, eliminating the restrictions on fathers does not produce a law that complies with the Equal Protection Clause (assuming it is initially in violation), but rather produces a law that treats fathers *more* favorably than mothers. There is no way a court can "fix" the law by merely disregarding one provision or the other as unconstitutional. It would have to disregard them *both*, either leaving no restrictions whatever upon citizenship of illegitimate children or (what I think the more proper course) denying naturalization of illegitimate children entirely (since § 1401(g) was not meant to apply by its unqualified terms to illegitimate children). Even outside the particularly sensitive area of immigration and naturalization, I am aware of no case that has engaged in such radical statutory surgery, and it certainly cannot be engaged in here.

In sum, this is not a case in which we have the power to remedy the alleged equal protection violation by either expanding or limiting the benefits conferred so as to deny or grant them equally to all. "We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests." *Fiallo*, 430 U. S., at 795, n. 6. Federal judges may not decide what those national interests are, and what requirements for citizenship best serve them.

Because petitioner is not a citizen under any Act of Congress, we cannot give her the declaratory judgment or affirmative relief she requests. I therefore concur in the judgment.

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[2] Title 8 U. S. C. § 1409(c) provides that an illegitimate child born to a citizen-mother shall be a citizen "if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."

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

As JUSTICE BREYER convincingly demonstrates, 8 U. S. C. § 1409 classifies unconstitutionally on the basis of gender in determining the capacity of a parent to qualify a child for citizenship. The section rests on familiar generalizations: mothers, as a rule, are responsible for a child born out of wedlock; fathers unmarried to the child's mother, ordinarily, are not. The law at issue might have made custody or support the relevant criterion. Instead, it treats mothers one way, fathers another, shaping Government policy to fit and reinforce the stereotype or historic pattern.

Characteristic of sex-based classifications, the stereotypes underlying this legislation may hold true for many, even most, individuals. But in prior decisions the Court has rejected official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn. While the Court is divided on Lorelyn Miller's standing to sue, a solid majority adheres to that vital understanding. As JUSTICE O'CONNOR's opinion makes plain, distinctions based on gender trigger heightened scrutiny and "[i]t is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny." *Ante*, at 452 (opinion concurring in judgment); *post*, at 482–488 (BREYER, J., dissenting).

On the surface, § 1409 treats females favorably. Indeed, it might be seen as a benign preference, an affirmative action of sorts. Compare *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 731, and n. 17 (1982), with *id.*, at 740–744 (Powell, J., dissenting). Two Justices today apparently take this view. JUSTICE STEVENS' opinion, in which THE CHIEF JUSTICE joins, portrays § 1409 as helpfully recognizing the different situations of unmarried mothers and fathers during the prenatal period and at birth, and fairly equalizing the "burdens" that each parent bears. See *ante*, at 433–434, 438. But pages of history place the provision in real-world

perspective. Section 1409 is one of the few provisions remaining in the United States Code that uses sex as a criterion in delineating citizens' rights. It is an innovation in this respect: During most of our Nation's past, laws on the transmission of citizenship from parent to child discriminated adversely against citizen mothers, not against citizen fathers.

I

The first statute on the citizenship of children born abroad, enacted in 1790, stated: "[T]he children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. Statutes passed in 1795 and 1802 similarly conditioned the citizenship of the child born abroad on the father's at least one-time residence in the United States. Act of Jan. 29, 1795, § 3, 1 Stat. 415; Act of Apr. 14, 1802, § 4, 2 Stat. 155. This father's residence requirement suggests that Congress intended a child born abroad to gain citizenship only when the father was a citizen. That, indeed, was the law of England at the time. See 2 J. Kent, Commentaries on American Law *50–*51 (hereinafter Kent's Commentaries); 4 Geo. 2, ch. 21 (1731). The statutory language Congress adopted, however, was ambiguous. One could read the words "children of citizens" to mean that the child of a United States citizen mother and a foreign father would qualify for citizenship if the father had at some point resided in the country. See Binney, The Alienigenae of the United States, 2 Am. L. Reg. 193, 203–205 (1854). Or, as Chancellor Kent observed, the words might mean that both parents had to be United States citizens for citizenship to pass. 2 Kent's Commentaries *53.

Under the 1802 legislation, children born abroad could not become citizens unless their parents were citizens in 1802,

which meant that as the years passed few foreign-born persons could qualify. Daniel Webster, among others, proposed remedial legislation. His bill would have granted citizenship to children born abroad to United States-born citizen mothers as well as fathers. His effort was unsuccessful. See Cong. Globe, 30th Cong., 1st Sess., 827 (1848); F. Franklin, The Legislative History of Naturalization in the United States 271–276 (reprint ed. 1971). Instead, in 1855, Congress clarified that citizenship would pass to children born abroad only when the father was a United States citizen. Act of Feb. 10, 1855, § 2, 10 Stat. 604. Codified as § 1993 of the Revised Statutes, the provision originating in 1855 read: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." Rev. Stat. § 1993.

In these early statutes, Congress did not differentiate between children born abroad to married parents and those born out of wedlock. Section 1993, as applied, allowed transmission of citizenship to children born out of wedlock if the father legitimated the child. See, *e. g.*, 32 Op. Atty. Gen. 162, 164–165 (1920); see also *Guyer* v. *Smith*, 22 Md. 239 (1864) (foreign-born children who remain illegitimate do not qualify for citizenship). In several reported instances, children legitimated by their fathers gained citizenship even though the legitimation occurred, as it did in Lorelyn Miller's case, after the child reached majority. See *In re P*, 4 I. & N. Dec. 354 (C. O. 1951); 7 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 93.04[2][d], pp. 93–43 to 93–44 (1992) (hereinafter Gordon). But see 3 G. Hackworth, Digest of International Law 29 (1942) (noting a case in which legitimation postmajority was deemed sufficient, but maintaining that "[n]ormally the legitimation must take place during the minority of the child").

In the early part of this century, the State Department permitted the transmission of citizenship from unwed mother to child reasoning that, for the child born out of wedlock, the mother "stands in the place of the father." House Committee on Immigration and Naturalization, A Report Proposing A Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments, 76th Cong., 1st Sess., 18 (Comm. Print 1939) (hereinafter Proposed Code). Ultimately, however, the Attorney General rejected the Department's reasoning, finding it incompatible with § 1993's exclusive reference to fathers. See 39 Op. Atty. Gen. 397, 398 (1939).

Women's inability to transmit their United States citizenship to children born abroad was one among many gender-based distinctions drawn in our immigration and nationality laws. The woman who married a foreign citizen risked losing her United States nationality. In early days, "marriage with an alien, whether a friend or an enemy, produce[d] no dissolution of the native allegiance of the wife." *Shanks* v. *Dupont*, 3 Pet. 242, 246 (1830) (Story, J.). By the end of the 19th century, however, a few courts adopted the view that a woman's nationality followed her husband's, see, *e. g.*, *Pequignot* v. *Detroit*, 16 F. 211, 216 (CC ED Mich. 1883), particularly when the woman resided abroad in her husband's country, see, *e. g.*, *Ruckgaber* v. *Moore*, 104 F. 947, 948–949 (CC ED NY 1900). See generally C. Bredbenner, A Nationality of Her Own: Women, Marriage, and the Law of Citizenship 58–59 (1998) (hereinafter Bredbenner); Sapiro, Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States, 13 Politics & Soc. 1, 4–10 (1984). State Department officials inclined towards this view as well. See L. Gettys, The Law of Citizenship in the United States 118 (1934). In 1907, Congress settled the matter: It provided by statute that a female United States citizen automatically lost her citizenship upon marriage to an alien. Act of Mar. 2, 1907, § 3, 34 Stat. 1228. This Court upheld the statute, noting that "[t]he identity of husband and

wife is an ancient principle of our jurisprudence." *Mackenzie* v. *Hare*, 239 U. S. 299, 311 (1915).

The statutory rule that women relinquished their United States citizenship upon marriage to an alien encountered increasing opposition, fueled in large part by the women's suffrage movement and the enhanced importance of citizenship to women as they obtained the right to vote. See Bredbenner 64, 68–81; Sapiro, *supra*, at 12–13. In response, Congress provided a measure of relief. Under the 1922 Cable Act, marriage to an alien no longer stripped a woman of her citizenship automatically. Act of Sept. 22, 1922 (Cable Act), ch. 411, § 3, 42 Stat. 1022. But equal respect for a woman's nationality remained only partially realized. A woman still lost her United States citizenship if she married an alien ineligible for citizenship; she could not become a citizen by naturalization if her husband did not qualify for citizenship; she was presumed to have renounced her citizenship if she lived abroad in her husband's country for two years, or if she lived abroad elsewhere for five years. *Id.*, §§ 3, 5; see also Sapiro, *supra*, at 11–12. A woman who became a naturalized citizen was unable to transmit her citizenship to her children if her noncitizen husband remained alive and they were not separated. See *In re Citizenship Status of Minor Children*, 25 F. 2d 210 (NJ 1928) ("the status of the wife was dependent upon that of her husband, and therefore the children acquired their citizenship from the same source as had been theretofore existent under the common law"); see also Gettys, *supra*, at 56–57. No restrictions of like kind applied to male United States citizens.

Instead, Congress treated wives and children of male United States citizens or immigrants benevolently. The 1855 legislation automatically granted citizenship to women who married United States citizens. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604; see also *Kelly* v. *Owen*, 7 Wall. 496, 498 (1869) (the 1855 Act "confers the privileges of citizenship upon women married to citizens of the United States" with-

out further action); Bredbenner 15. Under an 1804 statute, if a male alien died after completing the United States residence requirement but before actual naturalization, his widow and children would be "considered as citizens." Act of Mar. 26, 1804, § 2, 2 Stat. 292, 293. That 1804 measure granted no corresponding dispensation to the husband and children of an alien woman. In addition, Congress provided statutory exemptions to entry requirements for the wives and children of men but not for the husbands and children of women. See, *e. g.*, Act of Mar. 3, 1903, § 37, 32 Stat. 1213, 1221 (wives and children entering the country to join permanent resident aliens and found to have contracted contagious diseases during transit shall not be deported if the diseases were easily curable or did not present a danger to others); S. Rep. No. 1515, 81st Cong., 2d Sess., 415–417 (1950) (wives exempt from literacy and quota requirements).

In 1934, Congress moved in a new direction. It terminated the discrimination against United States citizen mothers in regard to children born abroad. Specifically, Congress amended § 1993 to read:

> "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child." Act of May 24, 1934, § 1, 48 Stat. 797.[1]

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[1] A 1921 bill contained a similar provision allowing United States citizen women to transmit citizenship to their children born abroad. The bill provided: "A child born at any time without the United States, either parent being at the time of such birth a citizen of the United States, may, if not a citizen under section 1993 of the Revised Statutes, derive United States citizenship under this section." H. R. Rep. No. 15603, 66th Cong., 3d Sess., § 33(2), p. 26 (1921). This 1921 bill, a precursor to the Cable

Senate and House Reports on the Act stated that the change was made "to establish complete equality between American men and women in the matter of citizenship for themselves and for their children." S. Rep. No. 865, 73d Cong., 2d Sess., 1 (1934); accord, H. R. Rep. No. 131, 73d Cong., 1st Sess., 2 (1933); see generally Orfield, The Citizenship Act of 1934, 2 U. Chi. L. Rev. 99, 100–106 (1935). Congress again did not speak of children born out of wedlock, but the 1934 Act "was construed as authorizing transmission of American citizenship by descent by an American citizen mother to a child born abroad . . . out of wedlock under the same conditions as a child born in wedlock." 7 Gordon § 93.04[2][b], at 93–42; see also *id.*, § 93.04[2][d][iii], at 93–46.

The 1934 Act's equal respect for the citizenship stature of mothers and fathers of children born abroad did not remain unmodified. Six years later, Congress passed the Nationality Act of 1940, which replaced the Revised Statutes' single provision on citizenship of children born abroad with an array of provisions that turned on whether the child was born in an outlying possession of the United States, whether one or both of the child's parents were United States citizens, and whether the child was born in or out of wedlock. The 1940 Act preserved Congress' earlier recognition of parental equality in regard to children born in wedlock, but established a different regime for children born out of wedlock, one that disadvantaged United States citizen fathers and their children.

Under the 1940 Act, if the mother of the child born abroad out of wedlock held United States citizenship and previously had resided in the country or in a United States possession, the child gained the mother's nationality from birth, provided the child's paternity was not established by legitima-

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Act, passed the House Committee on Immigration and Naturalization but proceeded no further. See H. R. Rep. No. 1185, 66th Cong., 3d Sess., 1 (1921).

tion or a court order.[2] But if the father and not the mother held United States citizenship, then the child would qualify for United States citizenship only upon legitimation or adjudication of paternity during the child's minority. Furthermore, the child generally had to live in the United States for five years before the age of 21. The same residency requirement applied to children born abroad to married couples with only one United States citizen parent, whether that parent was the mother or the father. Nationality Act of 1940, §§ 201, 205, 54 Stat. 1138–1140.[3]

Subsequent legislation retained the gender lines drawn in the 1940 Act. The Immigration and Nationality Act of 1952 made only one significant change regarding the citizenship of children born abroad out of wedlock. It removed the provision that a mother could pass on her nationality to her child only if the paternity of the child had not been established.[4]

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[2] Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen. 8 U. S. C. § 1101(a)(22). The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island. See T. Aleinikoff, D. Martin, & H. Motomura, Immigration: Process and Policy 974–975, n. 2 (3d ed. 1995). The provision that a child born abroad out of wedlock to a United States citizen mother gains her nationality has been interpreted to mean that the child gains her citizenship as well; thus if the mother is not just a United States national but also a United States citizen, the child is a United States citizen. See 7 Gordon § 93.04[2][b], at 93–42; *id.*, § 93.04[2][d][viii], at 93–49.

[3] The provision granting citizenship to children born abroad out of wedlock applied retroactively; the provision granting citizenship to children born in wedlock did not. The 1934 Act, too, was nonretroactive. The net result was that a child born abroad out of wedlock to a United States citizen mother in 1933 or earlier had United States citizenship after the 1940 Act, but a child born in wedlock did not until 1994 when Congress enacted legislation making the 1934 Act retroactive. Pub. L. 103–416, Tit. I, § 101(a)(2), 108 Stat. 4306, codified at 8 U. S. C. § 1401(h).

[4] The 1952 Act also provided that periods of service in the Armed Forces abroad could count toward satisfying the parental residency requirement in regard to a child born after January 13, 1941. Immigration and Nation-

Immigration and Nationality Act, § 309, 66 Stat. 238–239. In 1986, however, Congress added further gender-based differentials. The Legislature that year permitted substitution of a written acknowledgment under oath or adjudication of paternity prior to age 18 in place of formal legitimation. To that extent, Congress eased access to citizenship by a child born abroad out of wedlock to a United States citizen father. At the same time, however, Congress imposed on such a child two further requirements: production of clear and convincing evidence of paternity, also a written statement from the father promising support until the child turned 18. The requirements for a child of a United States citizen mother remained the same; such a child obtained the mother's nationality if the mother had resided in the United States or its territorial possessions for at least a year before the child's birth. Act of Nov. 14, 1986, § 13, 100 Stat. 3657, codified as amended at 8 U. S. C. § 1409. No substantive change has been made since 1986 in the law governing citizenship of children born abroad out of wedlock.

II

The history of the treatment of children born abroad to United States citizen parents counsels skeptical examination of the Government's prime explanation for the gender line drawn by § 1409—the close connection of mother to child, in contrast to the distant or fleeting father-child link. Or, as JUSTICE STEVENS puts it, a mother's presence at birth, identification on the birth certificate, and likely "initial custody" of the child give her an "opportunity to develop a caring relationship with the child," *ante*, at 444, which Congress legitimately could assume a father lacks. For most of our Nation's past, Congress demonstrated no high regard or respect for the mother-child affiliation. It bears emphasis, too, that in 1934, when Congress allowed United States citi-

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ality Act of 1952, §§ 301(a)(7), 309(b), 66 Stat. 236, 238, codified as amended at 8 U. S. C. §§ 1401(g), 1409(b).

zen mothers to transmit their citizenship to their foreign-born children, Congress simultaneously and for the first time required that such children (unless both parents were citizens) fulfill a residence requirement: "[T]he right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday." Act of May 24, 1934, § 1, 48 Stat. 797. Commentary underscores what the text conveys. Congress largely relied on a residence requirement, not the sex of the child's citizen parent, to assure an abiding affiliation with the United States. See Proposed Code 10–11, 14.

Even if one accepts at face value the Government's current rationale, it is surely based on generalizations (stereotypes) about the way women (or men) are. These generalizations pervade the opinion of JUSTICE STEVENS, which constantly relates and relies on what "typically," or "normally," or "probably" happens "often." *E. g.*, *ante,* at 436, 437, 442.

We have repeatedly cautioned, however, that when the Government controls "gates to opportunity," it "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" *United States* v. *Virginia,* 518 U. S. 515, 541 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan,* 458 U. S., at 725); see also *Orr* v. *Orr,* 440 U. S. 268, 283 (1979) ("Where, as here, the State's . . . purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."). Only an "'exceedingly persuasive justification,'" *Kirchberg* v. *Feenstra,* 450 U. S. 455, 461 (1981) (quoting *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 273 (1979)), one that does "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females," *United States* v. *Virginia,* 518 U. S., at 533, will support dif-

ferential treatment of men and women. See *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 152 (1994) (KENNEDY, J., concurring in judgment) (noting that prevailing case law "reveal[s] a strong presumption that gender classifications are invalid").

One can demur to the Government's observation that more United States citizen mothers of children born abroad out of wedlock actually raise their children than do United States citizen fathers of such children. As JUSTICE BREYER has elucidated, this observation does not justify distinctions between male and female United States citizens who take responsibility, or avoid responsibility, for raising their children. Nor does it justify reliance on gender distinctions when the alleged purpose—assuring close ties to the United States—can be achieved without reference to gender. As Judge Wald commented in discussing an analogous claim when this case was before the Court of Appeals,

> "Congress is free to promote close family ties by ensuring that citizenship is conferred only on children who have at least minimal contact with citizen parents during their early and formative years. . . . But this putative interest provides absolutely no basis for requiring fathers, and only fathers, to formally declare parentage and agree to provide financial support before a child reaches age 18." *Miller* v. *Christopher*, 96 F. 3d 1467, 1476 (CADC 1996) (opinion concurring in judgment).

* * *

In 1934, it was no doubt true that many female United States citizens who gave birth abroad had married foreigners and moved to their husbands' country, and that the children of such marriages were brought up as natives of a foreign land. And if a female United States citizen were married to a United States citizen, her children born abroad could obtain United States citizenship through their father. Thus, the historic restriction of citizenship to children born abroad

of United States citizen fathers may not have affected many women. But, in the words of one woman who testified in favor of the 1934 Act (and later became the first woman to sit as a federal district court judge), "[w]hether there are a lot of people who suffer or whether there are a few who suffer, it seems to us that the principle of equal application of the law to men and women ought to receive recognition." Hearings on H. R. 3673 and H. R. 77 before the House Committee on Immigration and Naturalization, 73d Cong., 1st Sess., 36 (1933) (testimony of Burnita Shelton Matthews). Congress recognized this equality principle in 1934, and is positioned to restore that impartiality before the century is out.

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

Since the founding of our Nation, American statutory law, reflecting a long-established legal tradition, has provided for the transmission of American citizenship from parent to child—even when the child is born abroad. Today's case focuses upon statutes that make those children, when born out of wedlock, "citizens of the United States at birth." 8 U. S. C. §§ 1401 and 1409. The statutes, as applied where only one parent is American, require the American parent—whether father or mother—to prove the child is his or hers and to meet a residency requirement. The statutes go on to require (1) that the American parent promise to provide financial support for the child until the child is 18, and (2) that the American parent (or a court) legitimate or formally acknowledge the child before the child turns 18—*if and only if the American parent is the father,* but not if the parent is the mother.

What sense does it make to apply these latter two conditions only to fathers and not to mothers in today's world—where paternity can readily be proved and where women and men both are likely to earn a living in the workplace? As

JUSTICE O'CONNOR has observed, and as a majority of the Court agrees, "[i]t is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny." *Ante*, at 452. These two gender-based distinctions lack the "'exceedingly persuasive'" support that the Constitution requires. *United States* v. *Virginia*, 518 U. S. 515, 530 (1996). Consequently, the statute that imposes them violates the Fifth Amendment's "equal protection" guarantee. See *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954).

I

The family whose rights are at issue here consists of Charlie Miller, an American citizen, Luz Peñero, a citizen of the Philippines, and their daughter, Lorelyn. Lorelyn was born out of wedlock in 1970 in the Philippines. The relevant citizenship statutes state that a child born out of wedlock shall be a "citize[n] of the United States at birth," § 1401, if the child is born to a father who "had the nationality of the United States at the time of the person's birth," if the "blood relationship between the person and the father is established by clear and convincing evidence," if the father had been physically present in the United States for five years, and:

> "(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> "(4) while the person is under the age of 18 years—
>
> "(A) the person is legitimated under the law of the person's residence or domicile,
>
> "(B) the father acknowledges paternity of the person in writing under oath, or
>
> "(C) the paternity of the person is established by adjudication of a competent court." 8 U. S. C. §§ 1409(a) and 1401(g).

Charlie Miller did not meet the requirements set forth in subsections (3) and (4) above on time. And the question be-

fore us is whether the Constitution forbids the application of those requirements for the reason that the statute imposed them only where the child's American parent is the child's father, not the mother. In my view the Constitution does forbid their application.

II

I agree with JUSTICE STEVENS' resolution of the Government's three threshold claims. First, the Government takes issue with Lorelyn's argument that provisions (3) and (4) unconstitutionally infringe the rights of her father, Charlie, an American citizen. Brief for Respondent 11. It adds that Charlie, not Lorelyn, should assert those rights himself and that Lorelyn lacks legal "standing" to do so. *Id.*, at 11, and n. 2. This Court has made clear, however, that a party can "assert" the constitutional rights of another person, where (1) that party has "suffered an 'injury in fact' "; (2) the party and the other person have a "close relationship"; and (3) "there was some hindrance" to the other person's "asserting" his "own rights." *Campbell* v. *Louisiana*, *ante*, at 397; see also *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991). And these three requirements are met here.

Lorelyn has suffered an "injury in fact." She has a "close" and relevant relationship with the other person, namely, her father. And there was "some hindrance" to her father's asserting his own rights. Charlie began this lawsuit (originally filed in Texas) as a party, raising his own equal protection claim. The Government originally moved to dismiss the complaint, contending that *Charlie* "should be dismissed from this suit because he lack[ed] standing." Motion to Dismiss Plaintiff's First Amended Complaint, or, in the Alternative, to Transfer Venue 6. The District Court agreed with the Government that Charlie lacked "standing," and he was dismissed from the suit. App. 11a. Lorelyn remained as the sole plaintiff, and for reasons of venue, see 28 U. S. C. § 1391(e)(1), the court then transferred the case to the District of Columbia pursuant to § 1406(a). App. 11a.

The conclusion that the Government "hindered" Charlie's assertion of his own rights in this case is irresistible.

The Government points out that Charlie might have appealed the adverse Texas District Court ruling. Brief for Respondent 11, n. 2. But appeals take time and money; the transfer of venue left the plaintiffs uncertain about where to appeal; the case was being heard with Lorelyn as plaintiff in any event; and the resulting comparison of costs and benefits (viewed prospectively) likely would have discouraged Charlie's pursuit of the alternative appeal route. The Government's successful dismissal motion thus had practical consequences that "hindered" Charlie at least as much as those we have elsewhere said create "hindrances" sufficient to satisfy this portion of the "third-party standing" test. See, *e. g.*, *Campbell*, *supra*, at 398 (criminal defendant can assert rights of racially excluded petit jurors because of "arduous" process surrounding, and small benefits accruing to, juror effort to vindicate own rights); cf. *Craig* v. *Boren*, 429 U. S. 190, 193–194 (1976) ("decision . . . to forgo consideration of the constitutional merits . . . to await" another party's identical claim would "foster repetitive and time-consuming litigation under the guise of caution and prudence").

Second, the Government, citing *United States* v. *Verdugo-Urquidez*, 494 U. S. 259 (1990), and *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), argues that the Fifth Amendment does not protect an alien, such as Lorelyn, living outside the United States. Brief for Respondent 11–12. The rights to be vindicated here, however, are Charlie's, not Lorelyn's. And, in any event, those cases, as JUSTICE STEVENS points out, are irrelevant, for the matter at issue here is whether or not Lorelyn is a citizen. See *Rogers* v. *Bellei*, 401 U. S. 815 (1971) (considering on the merits a putative citizen's claim that he was a citizen due to the operation of the Fifth Amendment, even though he apparently was living outside the United States at the time he filed suit).

Third, the Government argues that Lorelyn cannot succeed because a federal court lacks the power to grant her the relief she seeks, namely, a grant of citizenship. Brief for Respondent 43–50. As I shall later explain in more detail, however, this argument is beside the point, for, once the two unconstitutional clauses are excised from the statute, that statute operates automatically to confer citizenship upon Lorelyn "at birth." 8 U. S. C. § 1401; see Part V, *infra*.

JUSTICE O'CONNOR, joined by JUSTICE KENNEDY, says that Lorelyn cannot assert her father's rights because "she has not demonstrated a substantial hindrance to her father's ability to assert his own rights." *Ante*, at 447. But the obstacles that the Government placed in her father's path substantially hindered his efforts to do so in practice. See *supra*, at 473–474. Several of the cases mentioned in JUSTICE O'CONNOR's opinion involved the denial of standing, but none of those cases involved any "hindrance," and JUSTICE O'CONNOR does not claim that they do. See *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 234 (1990) (husband lacks standing to assert wife's moot claim); *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 544–545 (1986) (school board member lacks standing to defend on board's behalf a claim that all other board members voted not to defend); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 112, n. 25 (1979) (nonresidents lack standing to challenge local real estate practices as discriminatory); *Heald* v. *District of Columbia*, 259 U. S. 114, 123 (1922) (District resident lacks standing to claim local tax unconstitutional as applied to bonds held by nonresidents outside District). I have previously pointed to cases in which the Court has found third-party standing where the "hindrance" was of the same kind and approximate degree as that present here. *Supra*, at 474. There are, of course, other cases finding standing that arguably involve even greater hindrance. See, *e. g.*, *Hodel* v. *Irving*, 481 U. S. 704, 711–712 (1987); *Carey* v. *Population Services Int'l*, 431 U. S. 678, 684, n. 4 (1977); *Singleton* v.

Wulff, 428 U. S. 106, 108 (1976); *Craig*, *supra*, at 192; *Eisenstadt* v. *Baird*, 405 U. S. 438, 446 (1972); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 459 (1958); *Barrows* v. *Jackson*, 346 U. S. 249, 254 (1953). But they set no inner limit.

Nor do I agree with JUSTICE O'CONNOR's determination that "rational scrutiny" must apply to Lorelyn's assertion of her own rights. Lorelyn belongs to a class made up of children of citizen fathers, whom the law distinguishes from the class of children of citizen mothers, solely on grounds of the parent's gender. This Court, I assume, would use heightened scrutiny were it to review discriminatory laws based upon ancestry, say, laws that denied voting rights or educational opportunity based upon the religion, or the racial makeup, of a parent or grandparent. And, if that is so, I am not certain that it makes a significant difference whether one calls the rights at issue those of Lorelyn or of her father. *Allen* v. *Wright*, 468 U. S. 737 (1984), does not hold to the contrary. *Id.*, at 755 (black schoolchildren's parents who claimed a "stigmatizing injury" due to Internal Revenue Service decision to grant tax exempt status to racially discriminatory private schools had not been "personally denied equal treatment," and thus had not been injured).

Regardless, like JUSTICE O'CONNOR, I "do not share," and thus I believe a Court majority does not share, "JUSTICE STEVENS' assessment that the provision withstands heightened scrutiny." *Ante*, at 451. I also agree with JUSTICE O'CONNOR that "[i]t is unlikely" that "gender classifications based on stereotypes can survive heightened scrutiny," *ante*, at 452, a view shared by at least five Members of this Court. Indeed, for reasons to which I shall now turn, we must subject the provisions here at issue to "heightened scrutiny." And those provisions cannot survive.

III

This case is about American citizenship and its transmission from an American parent to his child. The right of citi-

zenship, as this Court has said, is "a most precious right." *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 159 (1963); see also *Fedorenko* v. *United States*, 449 U. S. 490, 507 (1981) (citizenship is a "priceless treasure" (internal quotation marks omitted)); *Luria* v. *United States*, 231 U. S. 9, 22 (1913) ("Citizenship is membership in a political society"); *Afroyim* v. *Rusk*, 387 U. S. 253, 268 (1967) ("[This Nation's] citizenry is the country and the country is its citizenry").

Further, the tie of parent to child is a special one, which in other circumstances by itself has warranted special constitutional protection. See, *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); see also *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942).

Moreover, American statutory law has consistently recognized the rights of American parents to transmit their citizenship to their children. See Act of Mar. 26, 1790, § 1, 1 Stat. 103; Act of Jan. 29, 1795, § 3, 1 Stat. 415; Act of Apr. 14, 1802, § 4, 2 Stat. 155; Act of Feb. 10, 1855, § 1, 10 Stat. 604; Rev. Stat. § 1993; Act of Mar. 2, 1907, § 6, 34 Stat. 1229; Act of May 24, 1934, § 1, 48 Stat. 797; Nationality Act of 1940, § 201(g), 54 Stat. 1139; Immigration and Nationality Act of 1952, §§ 301(a)(7), (b), 66 Stat. 235, 236, as amended, 8 U. S. C. § 1401; cf., *e. g.*, 1 Oppenheim's International Law § 384 (R. Jennings & A. Watts 9th ed. 1992) (noting that in many States, children born abroad of nationals become nationals); 43 A. Berger, Encyclopedic Dictionary of Roman Law 389 (1953) (Roman citizenship was acquired principally by parentage); Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248, 248–261, 278 (1935) (discussing citizenship laws throughout the world and noting the "widespread extent of the rule of *jus sanguinis*"); E. de Vattel, The Law of Nations 101–102 (J. Chitty transl. 1883) (1758).

Finally, the classification at issue is gender based, and we have held that, under the equal protection principle, such

classifications may not rest on generalizations about the different capacities of males and females when neutral categories would serve the legislature's end. *United States* v. *Virginia*, 518 U. S., at 540–546.

These circumstances mean that courts should not diminish the quality of review—that they should not apply specially lenient standards—when they review these statutes. The statutes focus upon two of the most serious of human relationships, that of parent to child and that of individual to the State. They tie each to the other, transforming both while strengthening the bonds of loyalty that connect family with Nation. Yet because they confer the status of citizenship "at birth," they do not involve the transfer of loyalties that underlies the naturalization of aliens, where precedent sets a more lenient standard of review. See *Fiallo* v. *Bell*, 430 U. S. 787 (1977).

To the contrary, the same standard of review must apply when a married American couple travel abroad or temporarily work abroad and have a child as when a single American parent has a child born abroad out of wedlock. If the standard that the law applies is specially lenient, then statutes conferring citizenship upon these children could discriminate virtually free of independent judicial review. And as a result, many such children, lacking citizenship, would be placed outside the domain of basic constitutional protections. Nothing in the Constitution requires so anomalous a result.

I recognize that, ever since the Civil War, the transmission of American citizenship from parent to child, *jus sanguinis*, has played a role secondary to that of the transmission of citizenship by birthplace, *jus soli*. See *Rogers* v. *Bellei*, 401 U. S., at 828; see also *Weedin* v. *Chin Bow*, 274 U. S. 657, 669–671 (1927) (citing *United States* v. *Wong Kim Ark*, 169 U. S. 649, 674 (1898), and *id.*, at 714 (Fuller, C. J., dissenting)). That lesser role reflects the fact that the Fourteenth Amendment's Citizenship Clause does not mention statutes that might confer citizenship "at birth" to children of Americans

born abroad. U. S. Const., Amdt. 14, § 1 (stating that "[a]ll persons born or naturalized in the United States . . . are citizens"). But that omission, though it may give Congress the power to decide whether or not to extend citizenship to children born outside the United States, see *Rogers* v. *Bellei*, *supra*, at 835, does not justify more lenient "equal protection" review of statutes that embody a congressional decision to do so.

Nothing in the language of the Citizenship Clause argues for less close scrutiny of those laws conferring citizenship at birth that Congress decides to enact. Nor have I found any support for a lesser standard in either the history of the Clause or its purpose. To the contrary, those who wrote the Citizenship Clause hoped thereby to assure that courts would not exclude newly freed slaves—born within the United States—from the protections the Fourteenth Amendment provided, including "equal protection of the laws." See, *e. g.*, *Afroyim* v. *Rusk*, 387 U. S., at 262; *id.*, at 283–284 (Harlan, J., dissenting); H. Flack, Adoption of the Fourteenth Amendment 83–97 (1908). They took special care, lest deprivation of citizenship undermine the Amendment's guarantee of "equal protection of the laws." Care is no less necessary when statutes, transferring citizenship between American parent and child, make the child a citizen "at birth." How then could the Fourteenth Amendment itself provide support for a diminished standard of review?

Nor have I found any such support in the history of the *jus sanguinis* statutes. That history shows a virtually unbroken tradition of transmitting American citizenship from parent to child "at birth," under statutes that imposed certain residence requirements. *Supra,* at 477; see also *Bellei*, *supra*, at 835. A single gap occurred when, for a brief period of time, the relevant statutes (perhaps inadvertently) failed to confer citizenship upon what must have been a small group of children born abroad between 1802 and 1855 whose citizen fathers were also born between 1802 and 1855. See

Montana v. *Kennedy*, 366 U. S. 308, 311–312 (1961); *Weedin*, *supra*, at 663–664; *Wong Kim Ark*, *supra*, at 673–674. But even then, some courts, recognizing the importance of the right, found common-law authority for the transmission to those children of their parent's American citizenship. See *Ludlam* v. *Ludlam*, 26 N. Y. 356, 362–372 (1863); see also *Lynch* v. *Clarke*, 1 Sandf. Ch. 583, 659–663 (N. Y. 1844).

The history of these statutes does reveal considerable discrimination against women, particularly from 1855 to 1934. See *ante*, at 463–465 (GINSBURG, J., dissenting). But that discrimination then cannot justify this discrimination now, when much discrimination that the law once tolerated, including "*de jure* segregation and the total exclusion of women from juries," is "now unconstitutional even though [it] once coexisted with the Equal Protection Clause." *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 143, n. 15 (1994).

Neither have I found case law that could justify use here of a more lenient standard of review. JUSTICE STEVENS points out that this Court has said it will apply a more lenient standard in matters of "'immigration and naturalization.'" *Ante*, at 435, n. 11 (quoting *Mathews* v. *Diaz*, 426 U. S. 67, 82 (1976)). But that language arises in a case involving aliens. The Court did not say it intended that phrase to include statutes that confer citizenship "at birth." And Congress does not believe that this kind of citizenship involves "naturalization." 8 U. S. C. § 1101(a)(23) ("The term 'naturalization' means the conferring of nationality of a state upon a person *after* birth, by any means whatsoever" (emphasis added)). The Court to my knowledge has never said, or held, or reasoned that statutes automatically conferring citizenship "at birth" upon the American child of American parents receive a more lenient standard of review.

The Court has applied a deferential standard of review in cases involving aliens, not in cases in which only citizens' rights were at issue. See *Mathews*, *supra* (rights of alien

residents); *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972) (citizens' rights related to treatment of alien); *Fiallo* v. *Bell*, 430 U. S. 787 (1977) (citizens' rights to obtain immigration preferences for relatives who are aliens). When the Court has considered the latter kind of case, it has not lowered the standard of review. See *Bellei*, 401 U. S., at 828–836 (evaluating due process challenge to citizenship statute under generally applicable standard).

In sum, the statutes that automatically transfer American citizenship from parent to child "at birth" differ significantly from those that confer citizenship on those who originally owed loyalty to a different nation. To fail to recognize this difference, and consequently to apply an unusually lenient constitutional standard of review here, could deprive the children of millions of Americans, married and unmarried, working abroad, traveling, say, even temporarily to Canada or Mexico, of the most basic kind of constitutional protection. See U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 53 (1997) (Table 54) (reporting that, as of 1990, 1.86 million United States citizens were born abroad or at sea to American parents); see also Hearing before the Subcommittee on International Operations of the House Committee on Foreign Affairs, 102d Cong., 1st Sess., 114 (1991) (testimony of Andrew P. Sundberg) ("According to the most recent survey carried out by the State Department, 40,000 children are born abroad each year to a U. S. citizen parent"). Thus, generally prevailing, not specially lenient, standards of review must apply.

IV

If we apply undiluted equal protection standards, we must hold the two statutory provisions at issue unconstitutional. The statutes discriminate on the basis of gender, making it significantly more difficult for American fathers than for American mothers to transmit American citizenship to their children born out of wedlock. If the citizen parent is a man,

the statute requires (1) a promise by the father to support the child until the child is 18, and (2) before the child turns 18, legitimation, written acknowledgment by the father under oath, or an adjudication of paternity. 8 U. S. C. § 1409(a). If the citizen parent is a woman, she need not do either. § 1409(c).

Distinctions of this kind—based upon gender—are subject to a "'strong presumption'" of constitutional invalidity. *Virginia*, 518 U. S., at 532 (quoting *J. E. B.*, *supra*, at 152 (KENNEDY, J., concurring in judgment)). The Equal Protection Clause permits them only if the Government meets the "demanding" burden of showing an "'exceedingly persuasive'" justification for the distinction. *Virginia*, *supra*, at 533; see also *J. E. B.*, *supra*, at 136; *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724 (1982); *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273 (1979); *Kirchberg* v. *Feenstra*, 450 U. S. 455, 461 (1981). That distinction must further important governmental objectives, and the discriminatory means employed must be "substantially related" to the achievement of those objectives. *Virginia*, *supra*, at 533 (citing *Mississippi Univ. for Women*, *supra*, at 724). This justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U. S., at 533. Further, "it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.*; see also *J. E. B.*, *supra*, at 139–140, and n. 11; *Craig*, 429 U. S., at 201; *Califano* v. *Goldfarb*, 430 U. S. 199, 223–224 (1977) (STEVENS, J., concurring in judgment); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643 (1975). The fact that the statutes "discriminat[e] against males rather than against females" is beside the point. *Mississippi Univ. for Women*, 458 U. S., at 723.

The statutory distinctions here violate these standards. They depend for their validity upon the generalization that mothers are significantly more likely than fathers to care for

their children, or to develop caring relationships with their children. But consider how the statutes work once one abandons that generalization as the illegitimate basis for legislative line-drawing we have held it to be. *Id.*, at 726, 730. First, assume that the American citizen is also the Caretaker Parent. The statute would then require a Male Caretaker Parent to acknowledge his child prior to the child's 18th birthday (or for the parent or child to obtain a court equivalent) and to provide financial support. It would not require a Female Caretaker Parent to do either. The gender-based distinction that would impose added burdens only upon the Male Caretaker Parent would serve no purpose at all. Second, assume that the American citizen is the Non-Caretaker Parent. In that circumstance, the statute would forgive a Female Non-Caretaker Parent from complying with the requirements (for formal acknowledgment and written promises to provide financial support) that it would impose upon a Male Non-Caretaker Parent. Again, the gender-based distinction that would impose lesser burdens only upon the Female Non-Caretaker Parent would serve no purpose.

To illustrate the point, compare the family before us—Charlie, Lorelyn, and Luz—with an imagined family—Carlos, a Philippine citizen, Lucy, his daughter, and Lenora, Lucy's mother and an American citizen. Suppose that Lenora, Lucy's unmarried mother, returned to the United States soon after Lucy's birth, leaving Carlos to raise his daughter. Why, under those circumstances, should Lenora not be required to fulfill the same statutory requirements that here apply to Charlie? Alternatively, imagine that Charlie had taken his daughter Lorelyn back to the United States to raise. The statute would not make Lorelyn an American from birth unless Charlie satisfied its two conditions. But had our imaginary family mother, Lenora, taken her child Lucy back to the United States, the statute would have automatically made her an American from birth with-

out anyone having satisfied the two conditions. The example suggests how arbitrary the statute's gender-based distinction is once one abandons the generalization that mothers, not fathers, will act as caretaker parents.

Let me now deal more specifically with the justifications that JUSTICE STEVENS finds adequate. JUSTICE STEVENS asserts that subsection (a)(4) serves two interests: first, "ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent," *ante*, at 436, and second, "encouraging" certain relationships or ties, namely, "the development of a healthy relationship between the citizen parent and the child while the child is a minor," *ante*, at 438, as well as "the related interest in fostering ties between the foreign-born child and the United States," *ibid.* I have no doubt that these interests are important. But the relationship between the statutory requirements and those particular objectives is one of total misfit.

Subsection (a)(4) requires, for example, the American citizen father to "acknowledg[e]" paternity before the child reaches 18 years of age, or for the child or parent to obtain a court equivalent (legitimation or adjudication of paternity). JUSTICE STEVENS suggests that this requirement "produces the rough equivalent of the documentation," such as a birth certificate memorialized in hospital records, "already available to evidence the blood relationship between the mother and the child." *Ante*, at 436. But, even if I assume the "equivalency" (only for argument's sake, since birth certificates do not invariably carry a mother's true name or omit the father's), I still do not understand the need for the prior-to-18 legitimation-or-acknowledgment requirement. When the statute was written, one might have seen the requirement as offering some protection against false paternity claims. But that added protection is unnecessary in light of inexpensive DNA testing that will prove paternity with certainty. See Shapiro, Reifler, and Psome, The DNA Paternity Test: Legislating the Future Paternity Action, 7 J.

Law & Health 1, 29 (1992–1993) (current testing methods can determine probability of paternity to 99.999999% accuracy); see also H. R. Rep. No. 98–527, p. 38 (1983).

Moreover, a different provision of the statute, subsection (a)(1), already requires proof of paternity by "clear and convincing evidence." No one contests the validity of that provision, and I believe that biological differences between men and women would justify its imposition where paternity is at issue. In light of that provision, subsection (a)(4)'s protection against false claims is not needed. Indeed, the Government concedes that, in light of the "clear and convincing evidence" requirement, the "time limit for meeting the legitimation-or-acknowledgement requirement of Section 309(a)(4) must . . . reflect, at least in part, some *other* congressional concern." Brief for Respondent 27 (emphasis added).

JUSTICE STEVENS says that this "other concern" is a concern for the establishment of relationships and ties, to the father and to the United States, all before the child is 18. *Ante*, at 438. According to JUSTICE STEVENS, the way in which the requirement serves this purpose is by making certain the father knows of the child's existence—in the same way, it says, that a mother, by giving birth, automatically knows that the child exists. *Ibid.*

The distance between this knowledge and the claimed objectives, however, is far too great to satisfy any legal requirement of tailoring or proportionality. And the assumption that this knowledge of birth could make a significant gender-related difference rests upon a host of unproved gender-related hypotheses. Simple knowledge of a child's existence may, or may not, be followed by the kinds of relationships for which JUSTICE STEVENS hopes. A mother or a father, knowing of a child's birth, may nonetheless fail to care for the child or even to acknowledge the child. A father with strong ties to the child may, simply by lack of knowledge, fail to comply with the statute's formal require-

ments. A father with weak ties might readily comply. Moreover, the statute does little to assure any tie for, as JUSTICE STEVENS acknowledges, a child might obtain an adjudication of paternity "absent any affirmative act by the father, and perhaps even over his express objection." *Ante*, at 434.

To make plausible the connection between the statute's requirement and the asserted "relationship" goals, JUSTICE STEVENS must find a factual scenario where a father's knowledge—equivalent to the mother's knowledge that she has given birth—could lead to the establishment of a more meaningful parenting relationship or tie to America. He therefore points to what one might term the "war baby" problem—the problem created by American servicemen fathering children overseas and returning to America unaware of the related pregnancy or birth. The statutory remedy before us, however, is disproportionately broad even when considered in relation to that problem. JUSTICE STEVENS refers to 683,000 service personnel stationed in the Far East in 1970 when Lorelyn was born. *Ante*, at 439. The statute applies, however, to all Americans who live or travel abroad, including the 3.2 million private citizens, and the 925,000 Federal Government employees, who live, or who are stationed, abroad—of whom today only 240,000 are active duty military employees, many of whom are women. U. S. Dept. of State, Private American Citizens Residing Abroad (Nov. 21, 1997); U. S. Dept. of Commerce, Bureau of the Census, Americans Overseas in U. S. Censuses, Technical Paper 62, p. 62 (Nov. 1993) (1990 census figures); U. S. Dept. of Defense, Selected Manpower Statistics 23, 44 (DIOR/MO1–96 1996). Nor does the statute seem to have been aimed at the "war baby" problem, for the precursor to the provisions at issue was first proposed in a 1938 report and was first adopted in the Nationality Act of 1940, which was enacted *before* the United States entered World War II. Nationality Laws of the United States: Message from the President of the United

States, 76th Cong., 1st Sess., pt. 1, pp. 17–18 (Comm. Print submitted to House Comm. on Immigration and Naturalization, 1939); Nationality Act of 1940, § 205, 54 Stat. 1139.

Nor is there need for the gender-based discrimination at issue here, for, were Congress truly interested in achieving the goals JUSTICE STEVENS posits in the way JUSTICE STEVENS suggests, it could simply substitute a requirement of knowledge of birth for the present subsection (a)(4); or it could distinguish between Caretaker and Noncaretaker Parents, rather than between men and women. A statute that does not do so, but instead relies upon gender-based distinctions, appears rational only, as I have said, *supra*, at 482–484, if one accepts the legitimacy of gender-based generalizations that, for example, would equate gender and caretaking—generalizations of a kind that this Court has previously found constitutionally impermissible. See, *e. g.*, *Virginia*, 518 U. S., at 542, 546 (striking down men-only admissions policy at Virginia Military Institute even assuming that "most women would not choose VMI's adversative method"); *J. E. B.*, 511 U. S., at 139, n. 11 (invalidating gender-based peremptory challenges "[e]ven if a measure of truth can be found in some of the gender stereotypes used to justify" them); *Craig*, 429 U. S., at 201 (invalidating Oklahoma law that established different drinking ages for men and women, although the evidence supporting the age differential was "not trivial in a statistical sense"); *Wiesenfeld*, 420 U. S., at 645 (holding unconstitutional statutory classification giving to widowed mothers benefits not available to widowed fathers even though "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support"). Although JUSTICE STEVENS cites *Lehr* v. *Robertson*, 463 U. S. 248 (1983), for support, *ante*, at 441, that case was decided before the DNA advances described earlier.

For similar reasons, subsection (3) denies Charlie Miller "equal protection" of the laws. That subsection requires an

American father to "agre[e] . . . to provide financial support" for the child until the child "reaches the age of 18," but does not require the same of an American mother. I agree with the Government that this provision has as one objective helping to assure ties between father and child. Brief for Respondent 26. But I do not see why the same need does not exist with respect to a mother. And, where the American parent is the Non-Caretaker Parent, the need for such assurances would seem the same in respect to either sex. Where the American parent is the Caretaker Parent, there would seem no need for the assurance regardless of gender. Since either men or women may be caretakers, and since either men or women may be "breadwinners," one could justify the gender distinction only on the ground that more women are caretakers than men, and more men are "breadwinners" than women. This, again, is the kind of generalization that we have rejected as justifying a gender-based distinction in other cases. *Virginia*, *supra*, at 540–546; *J. E. B.*, *supra*, at 139, n. 11; *Craig*, *supra*, at 201; *Wiesenfeld*, *supra*, at 645.

For these reasons, I can find no "exceedingly persuasive" justification for the gender-based distinctions that the statute draws.

V

JUSTICE SCALIA argues that, if the provisions at issue violate the Constitution, we nonetheless are powerless to find a remedy. But that is not so. The remedy is simply that of striking from the statute the two subsections that offend the Constitution's equal protection requirement, namely, subsections (a)(3) and (a)(4). With those subsections omitted, the statute says that the daughter, Lorelyn, of one who, like Charlie, has proved paternity by "clear and convincing evidence," is an American citizen, and has lived in the United States for five years, is a "citize[n] of the United States at birth." 8 U. S. C. §§ 1409(a) and 1401. Whatever limitations there may be upon the Court's powers to grant citizen-

ship, those limitations are not applicable here, for the Court need not grant citizenship. The statute itself grants citizenship automatically, and "at birth." And this Court need only declare that that is so. *INS* v. *Pangilinan*, 486 U. S. 875 (1988), which JUSTICE SCALIA cites in support, is beside the point, for the plaintiffs in that case, conceding that the statute at issue did not make them citizens, asked the courts to confer citizenship as a remedy in equity. Cf. *Bellei*, 401 U. S., at 828–836 (assessing claim that statute conferred citizenship in the absence of a provision argued to be unconstitutional, without identifying any special remedial problems).

Of course, we can excise the two provisions only if Congress likely would prefer their excision, rather than imposing similar requirements upon mothers. *Califano* v. *Westcott*, 443 U. S. 76, 89–93 (1979); *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result). But, since the provisions at issue seem designed in significant part to address difficulties in proving paternity (along with providing encouragement for fathers to legitimate the child) and, since DNA advances have overcome the paternity-proof difficulties, I believe that Congress would have preferred severance.

JUSTICE SCALIA is also wrong, I believe, when he says that "the INA itself contains a clear statement of congressional intent" not to sever, *ante*, at 457, for the Act in fact contains the following explicit severability provision:

> "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." § 406, 66 Stat. 281; see note following 8 U. S. C. § 1101, p. 38, "Separability."

The provision cited by JUSTICE SCALIA says:

> "A person may be naturalized as a citizen of the United States in the manner and under the conditions

> prescribed in this title and not otherwise." § 310(d), 66 Stat. 239, 8 U. S. C. § 1421(d).

As "naturalization" under this statute does not include the conferral of citizenship at birth, the provision does not apply here. See 8 U. S. C. § 1101(a)(23) ("The term 'naturalization' means the conferring of nationality of a state upon a person *after* birth" (emphasis added)).

JUSTICE SCALIA also says that the law, as excised, would favor fathers over mothers. *Ante*, at 459. The law, however, would require both fathers and mothers to prove their parentage; it would require that one or the other be an American, it would impose residency requirements that, if anything, would disfavor fathers. I cannot find the reverse favoritism that JUSTICE SCALIA fears.

For these reasons, I would reverse the judgment of the Court of Appeals.

Syllabus

CALIFORNIA ET AL. *v.* DEEP SEA RESEARCH, INC., ET AL.

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

No. 96–1400. Argued December 1, 1997—Decided April 22, 1998

The S. S. *Brother Jonathan* and its cargo sank off the coast of California in 1865. Shortly after the disaster, five insurance companies paid claims for the loss of certain cargo, but it is unclear whether the ship and the remaining cargo were insured. There is no evidence that either the State or the insurance companies have attempted to locate or recover the wreckage. In this action, respondent Deep Sea Research, Inc. (DSR), which has located the wreck, seeks rights to the vessel and cargo under the Federal District Court's *in rem* admiralty jurisdiction. California moved to dismiss, claiming that it possesses title to the wreck either under the Abandoned Shipwreck Act of 1987 (ASA)—which provides that the Federal Government asserts and transfers title to a State of any "abandoned shipwreck" embedded in the State's submerged lands or on a State's submerged lands and included, or eligible for inclusion, in the National Register—or under Cal. Pub. Res. Code Ann. § 6313—which vests title in the State to all abandoned shipwrecks on or in the State's tide and submerged lands—and therefore DSR's *in rem* action is an action against the State in violation of the Eleventh Amendment. DSR countered that the ASA could not divest the federal courts of the exclusive admiralty and maritime jurisdiction conferred by Article III, § 2, of the Constitution and requested a warrant for the arrest of the vessel and its cargo. The District Court concluded that the State failed to demonstrate a "colorable claim" to the wreck under the ASA; found that the ASA pre-empts § 6313; issued a warrant for the vessel's arrest; appointed DSR the vessel's custodian and made it the exclusive salvor; and decided that it would defer adjudication of title until after DSR completed the salvage operation. The Ninth Circuit affirmed, agreeing that the ASA pre-empts § 6313; that the Eleventh Amendment does not bar the federal court's jurisdiction over the *in rem* proceeding as to the application of the ASA; that the State did not prove that the *Brother Jonathan* is abandoned under the ASA; and that the wreck's uninsured portion should not be treated as abandoned.

Syllabus

Held:

1. The Eleventh Amendment does not bar a federal court's jurisdiction over an *in rem* admiralty action where the res is not within the State's possession. Pp. 501–508.

(a) The federal courts have a unique role in admiralty cases as conferred by Article III, § 2, cl. 1, of the Constitution. That jurisdiction encompasses proceedings *in rem.* The jurisdiction of federal courts is also constrained, however, by the Eleventh Amendment. Early cases appear to have assumed the federal courts' jurisdiction over admiralty *in rem* actions despite the Eleventh Amendment. Subsequent decisions altered the role of federal courts by explaining that admiralty and maritime jurisdiction is not wholly exempt from the Eleventh Amendment. *Ex parte New York*, 256 U. S. 490 *(New York I)*. Thus, this Court held that the federal courts lacked jurisdiction over an *in rem* action against a tugboat operated by New York State, *Ex parte New York*, 256 U. S. 503 *(New York II)*, and that Florida could not invoke the Eleventh Amendment to block the arrest of maritime artifacts in the State's possession where that possession was unlawful, *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (plurality opinion). However, those opinions did not address situations comparable to this case, in which DSR asserts rights to a res not in the State's possession. The action in *New York I*, although styled as an *in rem* action, was actually, as the Court explained in that decision, an *in personam* action against a state official; and the action in *New York II* was an *in rem* suit against a vessel that was property of the State, in its possession and employed for governmental use. Assertions in the opinions in *Treasure Salvors*, which might be read to suggest that a federal court may not undertake *in rem* adjudication of the State's interest in property without the State's consent, regardless of the status of the res, should not be divorced from the context of that case and reflexively applied to the very different circumstances presented by this case. Also, because *Treasure Salvors* addressed only the District Court's authority to issue a warrant to arrest artifacts, any references to what the lower courts could have done if adjudicating the artifacts' title do not control the outcome here. Nor does the fact that *Treasure Salvors* has been cited for the general proposition that federal courts cannot adjudicate a State's claim of title to property prevent a more nuanced application of that decision in the context of the federal courts' *in rem* admiralty jurisdiction. Pp. 501–506.

(b) In considering whether the Eleventh Amendment applies where the State asserts claim in an admiralty action to a res not in its posses-

sion, this Court's decisions involving the Federal Government's sovereign immunity in *in rem* admiralty actions provide guidance, for the Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government. Based on the longstanding precedent that the federal courts' *in rem* admiralty jurisdiction is barred only where the Federal Government actually possesses the disputed res, *e. g., The Davis*, 10 Wall. 15, the Eleventh Amendment does not bar federal jurisdiction over the *Brother Jonathan*, and the District Court may adjudicate DSR's and the State's claims to the shipwreck. Pp. 506–508.

2. Because the lower courts' conclusion that the *Brother Jonathan* was not abandoned for ASA purposes was influenced by the assumption that the Eleventh Amendment was relevant to the courts' inquiry, the case is remanded for reconsideration of the abandonment issue, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law. The District Court's full consideration of the ASA's application on remand might negate the need to address the issue whether the ASA pre-empts § 6313, and, thus, this Court declines to undertake that analysis. Pp. 508–509.

102 F. 3d 379, affirmed in part, vacated in part, and remanded.

O'Connor, J., delivered the opinion for a unanimous Court. Stevens, J., filed a concurring opinion, *post*, p. 509. Kennedy, J., filed a concurring opinion, in which Ginsburg and Breyer, JJ., joined, *post*, p. 510.

Joseph C. Rusconi, Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Daniel E. Lungren*, Attorney General, *Roderick E. Walston*, Chief Assistant Attorney General, *Richard M. Frank*, Assistant Attorney General, *Dennis M. Eagan*, Deputy Attorney General, *Jack Rump*, and *Peter Pelkofer*.

David C. Frederick argued the cause for the United States, respondent under this Court's Rule 12.6, in support of petitioners. With him on the briefs were *Acting Solicitor General Dellinger*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Preston*, and *Richard A. Olderman*.

Fletcher C. Alford argued the cause for respondent. With him on the brief were *Stuart M. Gordon*, *David Collins*, and *David J. Bederman*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This action, involving the adjudication of various claims to a historic shipwreck, requires us to address the interaction between the Eleventh Amendment and the *in rem* admiralty jurisdiction of the federal courts. Respondent Deep Sea Research, Inc. (DSR), located the ship, known as the S. S. *Brother Jonathan*, in California's territorial waters. When DSR turned to the federal courts for resolution of its claims to the vessel, California contended that the Eleventh Amendment precluded a federal court from considering DSR's claims in light of the State's asserted rights to the *Brother Jonathan* under federal and state law. We conclude that the Eleventh Amendment does not bar the jurisdiction

*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, and *Eric J. Taylor*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Michael J. Bowers* of Georgia, *Calvin E. Holloway, Sr.*, of Guam, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Charles Molony Condon* of South Carolina, *William H. Sorrell* of Vermont, *Richard Cullen* of Virginia, and *Alva A. Swan* of the Virgin Islands; for the Council of State Governments et al. by *Richard Ruda* and *James I. Crowley;* and for the National Trust for Historic Preservation et al. by *Robert A. Long, Jr.*, *Paul W. Edmondson*, *Elizabeth S. Merritt*, *Thompson M. Mayes*, *Edith M. Shine*, and *Laura S. Nelson*.

Briefs of *amici curiae* urging affirmance were filed for the American Institute of Marine Underwriters by *Marilyn L. Lytle;* for the Atlantic Mutual Insurance Co. et al. by *Guilford D. Ware* and *Martha M. Poindexter;* for the Columbus-America Discovery Group et al. by *Richard T. Robol*, *Jane E. Rindsberg*, *Richard A. Cordray*, and *Alan G. Choate;* and for Salvors, Inc., by *Peter E. Hess*.

of a federal court over an *in rem* admiralty action where the res is not within the State's possession.

I

The dispute before us arises out of respondent DSR's assertion of rights to both the vessel and cargo of the *Brother Jonathan*, a 220-foot, wooden-hulled, double side-wheeled steamship that struck a submerged rock in July 1865 during a voyage between San Francisco and Vancouver. It took less than an hour for the *Brother Jonathan* to sink, and most of the ship's passengers and crew perished. The ship's cargo, also lost in the accident, included a shipment of up to $2 million in gold and a United States Army payroll that some estimates place at $250,000. See Nolte, Shipwreck: Brother Jonathan Discovered, San Francisco Chronicle, Feb. 25, 1994, p. 1, reprinted in App. 127–131. One of few parts of the ship recovered was the wheel, which was later displayed in a saloon in Crescent City, California. R. Phelan, The Gold Chain 242 (1987).

Shortly after the disaster, five insurance companies paid claims totaling $48,490 for the loss of certain cargo. It is unclear whether the remaining cargo and the ship itself were insured. See Wreck of the Steamship Brother Jonathan, New York Times, Aug. 26, 1865, reprinted in App. 140–147. Prior to DSR's location of the vessel, the only recovery of cargo from the shipwreck may have occurred in the 1930's, when a fisherman found 22 pounds of gold bars minted in 1865 and believed to have come from the *Brother Jonathan*. The fisherman died, however, without revealing the source of his treasure. Nolte, *supra*, App. 130. There appears to be no evidence that either the State of California or the insurance companies that paid claims have attempted to locate or recover the wreckage.

In 1991, DSR filed an action in the United States District Court for the Northern District of California seeking rights to the wreck of the *Brother Jonathan* and its cargo under

that court's *in rem* admiralty jurisdiction. California intervened, asserting an interest in the *Brother Jonathan* based on the Abandoned Shipwreck Act of 1987 (ASA), 102 Stat. 432, 43 U. S. C. §§ 2101–2106, which provides that the Federal Government asserts and transfers title to a State of any "abandoned shipwreck" that either is embedded in submerged lands of a State or is on a State's submerged lands "and is included in or determined eligible for inclusion in the National Register," § 2105(a)(3). According to California, the ASA applies because the *Brother Jonathan* is abandoned and is both embedded on state land and eligible for inclusion in the National Register of Historic Places (National Register). California also laid claim to the *Brother Jonathan* under Cal. Pub. Res. Code Ann. § 6313 (West Supp. 1998) (hereinafter § 6313), which vests title in the State "to all abandoned shipwrecks . . . on or in the tide and submerged lands of California."

The District Court initially dismissed DSR's action without prejudice at DSR's initiative. The case was reinstated in 1994 after DSR actually located the *Brother Jonathan* 4½ miles off the coast of Crescent City, where it apparently rests upright on the sea floor under more than 200 feet of water. Based on its possession of several artifacts from the *Brother Jonathan*, including china, a full bottle of champagne, and a brass spike from the ship's hull, DSR sought either an award of title to the ship and its cargo or a salvage award for its efforts in recovering the ship. DSR also claimed a right of ownership based on its purchase of subrogation interests from some of the insurance companies that had paid claims on the ship's cargo.

In response, the State of California entered an appearance for the limited purpose of filing a motion to dismiss DSR's *in rem* complaint for lack of jurisdiction. According to the State, it possesses title to the *Brother Jonathan* under either the ASA or § 6313, and therefore, DSR's *in rem* action against the vessel is an action against the State in violation

of the Eleventh Amendment. DSR disputed both of the State's statutory ownership claims, and argued that the ASA could not divest the federal courts of the exclusive admiralty and maritime jurisdiction conferred by Article III, § 2, of the United States Constitution. DSR also filed a motion requesting that the District Court issue a warrant for the arrest of the *Brother Jonathan* and its cargo, as well as an order appointing DSR the exclusive salvor of the shipwreck.

The District Court held two hearings on the motions. The first focused on whether the wreck is located within California's territorial waters, and the second concerned the possible abandonment, embeddedness, and historical significance of the shipwreck, issues relevant to California's claims to the res. For purposes of the pending motions, DSR stipulated that the *Brother Jonathan* is located upon submerged lands belonging to California.

After the hearings, the District Court concluded that the State failed to demonstrate a "colorable claim" to the *Brother Jonathan* under federal law, reasoning that the State had not established by a preponderance of the evidence that the ship is abandoned, embedded in the sea floor, or eligible for listing in the National Register as is required to establish title under the ASA. 883 F. Supp. 1343, 1357 (ND Cal. 1995). As for California's state law claim, the court determined that the ASA pre-empts § 6313. Accordingly, the court issued a warrant for the arrest of the *Brother Jonathan*, appointed DSR custodian of the shipwreck subject to further order of the court, and ordered DSR to take possession of the shipwreck as its exclusive salvor pending the court's determination of "the manner in which the wreck and its cargo, or the proceeds therefrom, should be distributed." *Id.*, at 1364.

The District Court stated that it was not deciding whether "any individual items of cargo or personal property have been abandoned," explaining that "[a]t this stage in the litigation, DSR is not asking the court to award it salvage fees from the *res* of the wreck, or to otherwise make any order

regarding title to or distribution of the wreck or its contents." *Id.*, at 1354. The District Court thought that the most prudent course would be to adjudicate title after DSR completes the salvage operation. Following the District Court's ruling, the United States asserted a claim to any property on the *Brother Jonathan* belonging to the Federal Government.

The State appealed, arguing that its immunity from suit under the Eleventh Amendment does not hinge upon the demonstration by a preponderance of the evidence that the ASA applies to the *Brother Jonathan.* 102 F. 3d 379, 383 (CA9 1996). According to the State, it had established sufficient claim to the shipwreck under state law by "assert[ing] that the *Brother Jonathan* is on its submerged lands and that . . . § 6313 vests title in the State to abandoned shipwrecks on its submerged lands." *Id.*, at 385. Underlying the State's argument was a challenge to the District Court's ruling that the ASA pre-empts the California statute. The State also maintained that it had a colorable claim to the *Brother Jonathan* under the ASA, arguing that it presented ample evidence of both abandonment and embeddedness, and that the District Court applied the wrong test by "requir[ing] that abandonment be shown by an affirmative act on the part of the original owner demonstrating intent to renounce ownership." *Ibid.*

The Court of Appeals for the Ninth Circuit affirmed the District Court's orders. The court first concluded that § 6313 is pre-empted by the ASA because the state statute "takes title to shipwrecks that do not meet the requirements of the ASA and which are therefore within the exclusive admiralty jurisdiction of the federal courts." *Id.*, at 384. With respect to the State's claim under the ASA, the court presumed that "a federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction," and concluded that "it was appropriate for the district court to require the State to present evidence that

the ASA applied to the *Brother Jonathan*, *i. e.*, that it was abandoned and either embedded or eligible for listing in the National Register, before dismissing the case." *Id.*, at 386. According to the court's reasoning, "in addressing the questions of abandonment, embeddedness, and historical significance of the wreck under the ASA, a federal court does not adjudicate the state's rights," because the ASA establishes the Federal Government's title to a qualifying shipwreck, which is then transferred to a State. *Id.*, at 387. Consequently, in the court's view, "a federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment." *Ibid.*

As to the specifics of the State's claim under the ASA, the court held that the District Court did not err in concluding that the State failed to prove that the *Brother Jonathan* is abandoned within the meaning of the statute. The court reasoned that, in the absence of a definition of abandonment in the ASA, "Congress presumably intended that courts apply the definition of abandonment that has evolved under maritime law." *Ibid.* In maritime law, the court explained, abandonment occurs either when title to a vessel has been affirmatively renounced or when circumstances give rise to an inference of abandonment. Here, the Court of Appeals concluded, the District Court's "failure to infer abandonment from the evidence presented by the State was not clearly erroneous," given the insurance companies' claims to the ship's insured cargo and undisputed evidence presented by DSR that the technology required to salvage the *Brother Jonathan* has been developed only recently. *Id.*, at 388. The court also rejected the State's bid to treat the uninsured portion of the wreck as abandoned, explaining that the District Court did not address the status of individual items of cargo or personal property, and that "divid[ing] the wreck of the *Brother Jonathan* into abandoned and unabandoned portions for the purposes of the ASA" would lead to both

federal and state courts adjudicating the wreck's fate, which, in the court's view, would be "confusing and inefficient," and also "inconsistent with the general rule in maritime law of treating wrecks as a legally unified *res.*" *Id.*, at 389.

Summarizing its reasoning, the court stated that, "[b]ecause the law is reluctant to find abandonment, and because a finding of partial abandonment would deprive those holding title to the unabandoned portion of the wreck access to the federal forum, we hold that the *Brother Jonathan* is not abandoned." *Ibid.* (citation omitted). The court reserved the question whether there might be some point at which the insured portion of a shipwreck "becomes so negligible" that the entire wreck would be abandoned under the ASA. *Ibid.* The court also declined to take judicial notice of evidence that, during pendency of the appeal, the *Brother Jonathan* was determined eligible for inclusion in the National Register.

By concluding that the State must prove its claim to the *Brother Jonathan* by a preponderance of the evidence in order to invoke the immunity afforded by the Eleventh Amendment, the Ninth Circuit diverged from other Courts of Appeals that have held that a State need only make a bare assertion to ownership of a res. See *Zych* v. *Wrecked Vessel Believed to be the Lady Elgin*, 960 F. 2d 665, 670 (CA7), cert. denied, 506 U. S. 985 (1992); *Maritime Underwater Surveys, Inc.* v. *The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F. 2d 6, 8 (CA1 1983).* We granted certiorari to address whether a State's Eleventh Amendment immunity in an *in rem* admiralty action depends upon evidence of the State's ownership of the res, and to consider the related

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*While the petition for certiorari in this case was pending, the United States Court of Appeals for the Sixth Circuit adopted the reasoning of the Ninth Circuit. See *Fairport Int'l Exploration, Inc.* v. *Shipwrecked Vessel Known as The Captain Lawrence*, 105 F. 3d 1078 (CA6 1997), cert. pending, No. 96–1936.

questions whether the *Brother Jonathan* is subject to the ASA and whether the ASA pre-empts § 6313. 520 U. S. 1263 (1997).

II

The judicial power of federal courts extends "to all Cases of admiralty and maritime Jurisdiction." Art. III, § 2, cl. 1. The federal courts have had a unique role in admiralty cases since the birth of this Nation, because "[m]aritime commerce was . . . the jugular vein of the Thirteen States." F. Frankfurter & J. Landis, The Business of the Supreme Court 7 (1927). Accordingly, "[t]he need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *Ibid.* The constitutional provision was incorporated into the first Judiciary Act in 1789, and federal courts have retained "admiralty or maritime jurisdiction" since then. See 28 U. S. C. § 1333(1). That jurisdiction encompasses "maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien." *Madruga* v. *Superior Court of Cal., County of San Diego*, 346 U. S. 556, 560 (1954).

The jurisdiction of the federal courts is constrained, however, by the Eleventh Amendment, under which "[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, or by Citizens or Subjects of any Foreign State." Although the Amendment, by its terms, "would appear to restrict only the Article III diversity jurisdiction of the federal courts," *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 54 (1996), the Court has interpreted the Amendment more broadly. See, *e. g.*, *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991). According to this Court's precedents, a State may not be sued in federal court by one of its own citizens,

see *Hans* v. *Louisiana*, 134 U. S. 1 (1890), and a state official is immune from suit in federal court for actions taken in an official capacity, see *Smith* v. *Reeves*, 178 U. S. 436 (1900).

The Court has not always charted a clear path in explaining the interaction between the Eleventh Amendment and the federal courts' *in rem* admiralty jurisdiction. Early cases involving the disposition of "prize" vessels captured during wartime appear to have assumed that federal courts could adjudicate the *in rem* disposition of the bounty even when state officials raised an objection. See *United States* v. *Peters*, 5 Cranch 115, 139–141 (1809). As Justice Story explained, in admiralty actions *in rem*,

> "the jurisdiction of the [federal] court is founded upon the possession of the thing; and if the State should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides, the language of the [Eleventh] [A]mendment is, that 'the judicial power of the United States shall not be construed to extend to any suit *in law or equity*.' But a suit in the admiralty is not, correctly speaking, a suit in law or in equity; but is often spoken of in contradistinction to both." 2 J. Story, Commentaries on the Constitution of the United States § 1689, pp. 491–492 (5th ed. 1891).

Justice Washington, riding Circuit, expressed the same view in *United States* v. *Bright*, 24 F. Cas. 1232, 1236 (No. 14,647) (CC Pa. 1809), where he reasoned:

> "[I]n cases of admiralty and maritime jurisdiction the property in dispute is generally in the possession of the court, or of persons bound to produce it, or its equivalent, and the proceedings are in rem. The court decides in whom the right is, and distributes the proceeds accordingly. In such a case the court need not depend upon the good will of a state claiming an interest in the thing to enable it to execute its decree. All the world

> are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot lie by, and, after the decree is passed say that she was a party, and therefore not bound, for want of jurisdiction in the court."

Although those statements might suggest that the Eleventh Amendment has little application in *in rem* admiralty proceedings, subsequent decisions have altered that understanding of the federal courts' role. In *Ex parte New York*, 256 U. S. 490 (1921) *(New York I)*, the Court explained that admiralty and maritime jurisdiction is not wholly exempt from the operation of the Eleventh Amendment, thereby rejecting the views of Justices Story and Washington. *Id.*, at 497–498. On the same day, in its opinion in *Ex parte New York*, 256 U. S. 503 (1921) *(New York II)*, the Court likewise concluded that the federal courts lacked jurisdiction over a wrongful death action brought *in rem* against a tugboat operated by the State of New York on the Erie Canal, although the Court did not specifically rely on the Eleventh Amendment in its holding.

The Court's most recent case involving an *in rem* admiralty action, *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), addressed whether the Eleventh Amendment "bars an in rem admiralty action seeking to recover property owned by a state." *Id.*, at 682 (internal quotation marks omitted). A plurality of the Court suggested that *New York II* could be distinguished on the ground that, in *Treasure Salvors*, the State's possession of maritime artifacts was unauthorized, and the State therefore could not invoke the Eleventh Amendment to block their arrest. 458 U. S., at 695–699 (citing *Ex parte Young*, 209 U. S. 123 (1908), and *Tindal* v. *Wesley*, 167 U. S. 204 (1897)). As the plurality explained, "since the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest." 458 U. S., at 697.

That reference to a "colorable claim" is at the crux of this case. Both the District Court and the Ninth Circuit interpreted the "colorable claim" requirement as imposing a burden on the State to demonstrate by a preponderance of the evidence that the *Brother Jonathan* meets the criteria set forth in the ASA. See 102 F. 3d, at 386; 883 F. Supp., at 1349. Other Courts of Appeals have concluded that a State need only make a bare assertion to ownership of a res in order to establish its sovereign immunity in an *in rem* admiralty action. See, *e. g.*, *Zych*, 960 F. 2d, at 670.

By our reasoning, however, either approach glosses over an important distinction present here. In this case, unlike in *Treasure Salvors*, DSR asserts rights to a res that is not in the possession of the State. The Eleventh Amendment's role in that type of dispute was not decided by the plurality opinion in *Treasure Salvors*, which decided "whether a federal court exercising admiralty *in rem* jurisdiction may seize property held by state officials under a claim that the property belongs to the State." 458 U. S., at 683; see also *id.*, at 697 ("In ruling that the Eleventh Amendment does not bar execution of the warrant, we need not decide the extent to which a federal district court exercising admiralty *in rem* jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res").

Nor did the opinions in *New York I* or *New York II* address a situation comparable to this case. The holding in *New York I* explained that, although the suit at issue was styled as an *in rem* libel action seeking recovery of damages against tugboats chartered by the State, the proceedings were actually "in the nature of an action *in personam* against [the Superintendent of Public Works of the State of New York], not individually, but in his [official] capacity." 256 U. S., at 501. The action in *New York II* was an *in rem* suit against a vessel described as being "at all times mentioned in the

libel and at present . . . the absolute property of the State of New York, in its possession and control, and employed in the public service of the State for governmental uses and purposes . . . ." 256 U. S., at 508. As Justice White explained in his opinion in *Treasure Salvors:*

> "The *In re New York* cases . . . reflect the special concern in admiralty that maritime property of the sovereign is not to be seized. . . . [They] are but the most apposite examples of the line of cases concerning *in rem* actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted ownership of the res. The Court's consistent interpretation of the respective but related immunity doctrines pertaining to such vessels has been, upon proper presentation that the sovereign entity claims ownership *of a res in its possession,* to dismiss the suit or modify its judgment accordingly." 458 U. S., at 709–710 (opinion concurring in judgment in part and dissenting in part) (emphasis added).

It is true that statements in the fractured opinions in *Treasure Salvors* might be read to suggest that a federal court may not undertake *in rem* adjudication of the State's interest in property without the State's consent, regardless of the status of the res. See, *e. g., id.,* at 682 (plurality opinion) ("The court did not have power . . . to adjudicate the State's interest in the property without the State's consent"); *id.,* at 711 (White, J., concurring in judgment in part and dissenting in part) ("It is . . . beyond reasonable dispute that the Eleventh Amendment bars a federal court from deciding the rights and obligations of a State in a contract unless the State consents"). Those assertions, however, should not be divorced from the context of *Treasure Salvors* and reflexively applied to the very different circumstances presented by this case. In *Treasure Salvors,* the State had possession—albeit unlawfully—of the artifacts at issue. Also, the

opinion addressed the District Court's authority to issue a warrant to arrest the artifacts, not the disposition of title to them. As the plurality explained, "[t]he proper resolution of [the Eleventh Amendment] issue . . . does not *require*—or permit—a determination of the State's ownership of the artifacts." *Id.*, at 699 (emphasis added); see also *id.*, at 700 (noting that while adjudication of the State's right to the artifacts "would be justified if the State voluntarily advanced a claim to [them], it may not be justified as part of the Eleventh Amendment analysis, the only issue before us"). Thus, any references in *Treasure Salvors* to what the lower courts could have done if they had solely adjudicated title to the artifacts, rather than issued a warrant to arrest the res, do not control the outcome of this case, particularly given that it comes before us in a very different posture, *i. e.*, in an admiralty action *in rem* where the State makes no claim of actual possession of the res.

Nor does the fact that *Treasure Salvors* has been cited for the general proposition that federal courts cannot adjudicate a State's claim of title to property, see, *e. g.*, *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 289–290 (1997) (O'Connor, J., concurring in part and concurring in judgment); *id.*, at 305–306 (Souter, J., dissenting), prevent a more nuanced application of *Treasure Salvors* in the context of the federal courts' *in rem* admiralty jurisdiction. Although the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests, it does not necessarily follow that it applies to *in rem* admiralty actions, or that in such actions, federal courts may not exercise jurisdiction over property that the State does not actually possess.

In considering whether the Eleventh Amendment applies where the State asserts a claim in admiralty to a res not in its possession, this Court's decisions in cases involving the sovereign immunity of the Federal Government in *in rem* admiralty actions provide guidance, for this Court has recognized a correlation between sovereign immunity principles

applicable to States and the Federal Government. See *Tindal* v. *Wesley*, 167 U. S., at 213; see also *Treasure Salvors*, *supra*, at 710 (White, J., concurring in judgment in part and dissenting in part) (discussing analogy between immunity in "*in rem* actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted ownership of the res"). In one such case, *The Davis*, 10 Wall. 15 (1870), the Court explained that "proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court." *Id.*, at 20. The possession referred to was "an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." *Id.*, at 21; see also *The Siren*, 7 Wall. 152, 159 (1869) (describing "exemption of the government from a direct proceeding *in rem* against the vessel whilst in its custody"). The Court's jurisprudence respecting the sovereign immunity of foreign governments has likewise turned on the sovereign's possession of the res at issue. See, *e. g.*, *The Pesaro*, 255 U. S. 216, 219 (1921) (federal court's *in rem* jurisdiction not barred by mere suggestion of foreign government's ownership of vessel).

While this Court's decision in *The Davis* was issued over a century ago, its fundamental premise remains valid in *in rem* admiralty actions, in light of the federal courts' constitutionally established jurisdiction in that area and the fact that a requirement that a State possess the disputed res in such cases is "consistent with the principle which exempts the [State] from suit and its possession from disturbance by virtue of judicial process." *The Davis*, *supra*, at 21. Based on longstanding precedent respecting the federal courts' assumption of *in rem* admiralty jurisdiction over vessels that are not in the possession of a sovereign, we conclude that the Eleventh Amendment does not bar federal jurisdiction

over the *Brother Jonathan* and, therefore, that the District Court may adjudicate DSR's and the State's claims to the shipwreck. We have no occasion in this case to consider any other circumstances under which an *in rem* admiralty action might proceed in federal court despite the Eleventh Amendment.

III

There remains the issue whether the courts below properly concluded that the *Brother Jonathan* was not abandoned for purposes of the ASA. That conclusion was necessarily influenced by the assumption that the Eleventh Amendment was relevant to the courts' inquiry. The Court of Appeals' determination that the wreck and its contents are not abandoned for purposes of the ASA was affected by concerns that if "the vessel had been partially abandoned, both the federal court and the state court would be adjudicating the fate of the *Brother Jonathan*." 102 F. 3d, at 389. Moreover, the District Court's inquiry was a preliminary one, based on the concern that it was premature "for the court to find that any individual items of cargo or personal property have been abandoned." 883 F. Supp., at 1354. In light of our ruling that the Eleventh Amendment does not bar complete adjudication of the competing claims to the *Brother Jonathan* in federal court, the application of the ASA must be reevaluated. Because the record before this Court is limited to the preliminary issues before the District Court, we decline to resolve whether the *Brother Jonathan* is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law.

Our grant of certiorari also encompassed the question whether the courts below properly concluded that the ASA pre-empts § 6313, which apparently operates to transfer title to abandoned shipwrecks not covered by the ASA to the State. Because the District Court's full consideration of the

application of the ASA on remand might negate the need to address the pre-emption issue, we decline to undertake that analysis.

Accordingly, the judgment of the Court of Appeals assuming jurisdiction over this case is affirmed, its judgment in all other respects is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

In *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), both the four Members of the plurality and the four dissenters agreed that the District Court "did not have power . . . to adjudicate the State's interest in the property without the State's consent." *Id.*, at 682; see also *id.*, at 699–700; *id.*, at 703, n. (White, J., concurring in judgment in part and dissenting in part). Our reasons for reaching that common conclusion were different, but I am now persuaded that all of us might well have reached a different conclusion if the position of Justices Story and Washington (that the Eleventh Amendment is no bar to any *in rem* admiralty action) had been brought to our attention. I believe that both opinions made the mistake of assuming that the Eleventh Amendment has the same application to an *in rem* admiralty action as to any other action seeking possession of property in the control of state officers.

My error, in writing for the plurality, was the assumption that the reasoning in *Tindal* v. *Wesley*, 167 U. S. 204 (1897), and *United States* v. *Lee*, 106 U. S. 196 (1882), which supported our holding that Treasure Salvors was entitled to possession of the artifacts, also precluded a binding determination of the State's interest in the property. Under the reasoning of those cases, the fact that the state officials were acting without lawful authority meant that a judgment against them would not bind the State. See 458 U. S., at 687–688 ("In holding that the action was not barred by the

Eleventh Amendment, the Court in *Tindal* emphasized that any judgment awarding possession to the plaintiff would not subsequently bind the State"). That reasoning would have been sound if we were deciding an ejectment action in which the right to possession of a parcel of real estate was in dispute; moreover, it seemed appropriate in *Treasure Salvors* because we were focusing on the validity of the arrest warrant.

Having given further consideration to the special characteristics of *in rem* admiralty actions, and more particularly to the statements by Justice Story and Justice Washington quoted in the Court's opinion, *ante*, at 502–503* I am now convinced that we should have affirmed the *Treasure Salvors* judgment in its entirety. Accordingly, I agree with the Court's holding that the State of California may be bound by a federal court's *in rem* adjudication of rights to the *Brother Jonathan* and its cargo.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

I join the opinion of the Court. In my view, the opinion's discussion of *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), does not embed in our law the distinction between a State's possession or nonpossession for purposes of Eleventh Amendment analysis in admiralty cases. In light of the subsisting doubts surrounding that case and JUSTICE STEVENS' concurring opinion today, it ought to be evident that the issue is open to reconsideration.

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*See also Fletcher, A Historical Interpretation of the Eleventh Amendment, 35 Stan. L. Rev. 1033, 1078–1083 (1983) (discussing the historical basis for this interpretation).

Syllabus

EDWARDS ET AL. *v.* UNITED STATES

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

No. 96–8732. Argued February 23, 1998—Decided April 28, 1998

At petitioners' trial under 21 U. S. C. §§ 841 and 846 for "conspir[ing]" to "possess with intent to . . . distribute [mixtures containing two] controlled substance[s]," namely, cocaine and cocaine base (*i. e.*, "crack"), the jury was instructed that the Government must prove that the conspiracy involved measurable amounts of "cocaine *or* cocaine base." (Emphasis added.) The jury returned a general verdict of guilty, and the District Judge imposed sentences based on his finding that each petitioner's illegal conduct involved *both* cocaine *and* crack. Petitioners argued (for the first time) in the Seventh Circuit that their sentences were unlawful insofar as they were based upon crack, because the word "or" in the jury instruction meant that the judge must assume that the conspiracy involved only cocaine, which is treated more leniently than crack by United States Sentencing Guidelines § 2D1.1(c). However, the court held that the judge need not assume that only cocaine was involved, pointing out that, because the Guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy, the jury's belief about which drugs were involved—cocaine, crack, or both—was beside the point.

Held: Because the Guidelines instruct *the judge* in a case like this to determine both the amount and kind of controlled substances for which a defendant should be held accountable, and then to impose a sentence that varies depending upon those determinations, see, *e. g.*, *Witte* v. *United States*, 515 U. S. 389, it is the judge who is required to determine whether the "controlled substances" at issue—and how much of them—consisted of cocaine, crack, or both. That is what the judge did in this case, and the jury's beliefs about the conspiracy are irrelevant. This Court need not, and does not, consider the merits of petitioners' claims that the drug statutes and the Constitution required the judge to assume that *the jury* convicted them of a conspiracy involving *only* cocaine. Even if that were so, it would make no difference here. The Guidelines instruct the judge to base a drug-conspiracy offender's sentence on his "relevant conduct," § 1B1.3, which includes *both* conduct that constitutes the "offense of conviction," § 1B1.3(a)(1), *and* conduct that is "part of the same course of conduct or common scheme or plan as the offense of conviction," § 1B1.3(a)(2). Thus, the judge below would

have had to determine the total amount of drugs, whether they consisted of cocaine, crack, or both, and the total amount of each—regardless of whether he believed that petitioners' crack-related conduct was part of the "offense of conviction" or "part of the same course of conduct or common scheme or plan." The Guidelines sentencing range—on either belief—is identical. Petitioners' statutory and constitutional claims could make a difference if they could argue that their sentences exceeded the statutory maximum for a cocaine-only conspiracy, or that their crack-related activities did *not* constitute part of the "same course of conduct," etc., but the record indicates that such arguments could not succeed. Their argument, made for the first time on appeal, that the judge *might* have made different factual findings had he known that the law required him to assume the jury had found a cocaine-only conspiracy is unpersuasive. Pp. 513–516.

105 F. 3d 1179, affirmed.

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

Steven Shobat, by appointment of the Court, 522 U. S. 993, argued the cause for petitioners. With him on the briefs were *Carleton K. Montgomery*, *David Zlotnick*, *Mark D. DeBofsky*, by appointment of the Court, 522 U. S. 1013, *Robert Handelsman*, by appointment of the Court, 522 U. S. 1013, *J. Michael McGuinness*, by appointment of the Court, 522 U. S. 965, and *Donald Sullivan*, by appointment of the Court, 522 U. S. 1043.

Edward C. DuMont argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben*.*

JUSTICE BREYER delivered the opinion of the Court.

The statutes at issue in this case make it a crime to "conspir[e]" to "possess with intent to . . . distribute . . . a controlled substance." 21 U. S. C. §§ 841 and 846. The Government charged petitioners with violating these statutes by conspiring "to possess with intent to distribute . . .

Jeffrey J. Pokorak, *David Porter*, and *Kyle O'Dowd* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae*.

mixtures containing" two controlled substances, namely, "cocaine . . . and cocaine base" (*i. e.*, "crack"). App. 6. The District Judge instructed the jury that "the government must prove that the conspiracy . . . involved measurable amounts of cocaine *or* cocaine base." App. 16 (emphasis added). The jury returned a general verdict of guilty. And the judge imposed sentences based on his finding that each petitioner's illegal conduct had involved *both* cocaine *and* crack.

Petitioners argued (for the first time) in the Court of Appeals for the Seventh Circuit that the judge's sentences were unlawful insofar as they were based upon crack. They said that the word "or" in the judge's instruction (permitting a guilty verdict if the conspiracy involved either cocaine or crack) meant that the judge must assume that the conspiracy involved only cocaine, which drug, they added, the Sentencing Guidelines treat more leniently than crack. See United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (Nov. 1994) (drug table) (USSG). The Court of Appeals, however, held that the judge need not assume that only cocaine was involved. 105 F. 3d 1179 (1997). It pointed out that the Sentencing Guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy. *Id.*, at 1180. And it reasoned that the jury's belief about which drugs were involved—cocaine, crack, or both—was therefore beside the point. *Id.*, at 1181. In light of a potential conflict among the Circuits on this question, see, *e. g.*, *United States* v. *Bounds*, 985 F. 2d 188, 194–195 (CA5 1993); *United States* v. *Pace*, 981 F. 2d 1123 (CA10 1992); *United States* v. *Owens*, 904 F. 2d 411 (CA8 1990), we granted certiorari.

We agree that in the circumstances of this case the judge was authorized to determine for sentencing purposes whether crack, as well as cocaine, was involved in the offense-related activities. The Sentencing Guidelines instruct *the judge* in a case like this one to determine both the

amount and the kind of "controlled substances" for which a defendant should be held accountable—and then to impose a sentence that varies depending upon amount and kind. See *United States* v. *Watts*, 519 U. S. 148 (1997) *(per curiam)* (judge may consider drug charge of which offender has been acquitted by jury in determining Guidelines sentence); *Witte* v. *United States*, 515 U. S. 389 (1995) (judge may impose higher Guidelines sentence on offender convicted of possessing marijuana based on judge's finding that offender also engaged in uncharged cocaine conspiracy). Consequently, regardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require the judge to determine whether the "controlled substances" at issue—and how much of those substances—consisted of cocaine, crack, or both. And that is what the judge did in this case.

Virtually conceding this Guidelines-related point, petitioners argue that the drug statutes, as well as the Constitution, required the judge to assume that *the jury* convicted them of a conspiracy involving *only* cocaine. Petitioners misapprehend the significance of this contention, however, for even if they are correct, it would make no difference to their case. That is because the Guidelines instruct a sentencing judge to base a drug-conspiracy offender's sentence on the offender's "relevant conduct." USSG § 1B1.3. And "relevant conduct," in a case like this, includes *both* conduct that constitutes the "offense of conviction," *id.*, § 1B1.3(a)(1), *and* conduct that is "part of the same course of conduct or common scheme or plan as the offense of conviction," *id.*, § 1B1.3(a)(2). Thus, the sentencing judge here would have had to determine the total amount of drugs, determine whether the drugs consisted of cocaine, crack, or both, and determine the total amount of each—regardless of whether the judge believed that petitioners' crack-related conduct was part of the "offense of conviction," or the judge believed that it was "part of the same course of conduct or common

scheme or plan." The Guidelines sentencing range—on either belief—is identical.

Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. USSG §5G1.1. But, as the Government points out, the sentences imposed here were within the statutory limits applicable to a cocaine-only conspiracy, given the quantities of that drug attributed to each petitioner. Brief for United States 15–16, and nn. 6–7; see 21 U. S. C. §§841(b)(1)–(3); App. 42–47, 72–82, 107–112, 136–141, 163–169 (cocaine attributed to each petitioner). Cf. *United States* v. *Orozca-Prada*, 732 F. 2d 1076, 1083–1084 (CA2 1984) (court may not sentence defendant under statutory penalties for cocaine conspiracy when jury may have found only marijuana conspiracy). Petitioners' statutory and constitutional claims also could have made a difference had it been possible to argue that their crack-related activities did *not* constitute part of the "same course of conduct or common scheme or plan." Then, of course, the crack (had it not been part of the "offense of conviction") would not have been part of the sentence-related "relevant conduct" at all. But petitioners have not made this argument, and, after reviewing the record (which shows a series of interrelated drug transactions involving both cocaine and crack), we do not see how any such claim could succeed.

Instead, petitioners argue that the judge *might* have made different factual findings if only the judge had known that the law required him to assume the jury had found a cocaine-only, not a cocaine-and-crack, conspiracy. It is sufficient for present purposes, however, to point out that petitioners did not make this particular argument in the District Court. Indeed, they seem to have raised their entire argu-

ment for the first time in the Court of Appeals. Thus, petitioners did not explain to the sentencing judge how their "jury-found-only-cocaine" assumption could have made a difference to the judge's own findings, nor did they explain how this assumption (given the judge's findings) should lead to greater leniency. Moreover, our own review of the record indicates that the judge's Guidelines-based factfinding, while resting upon the *evidence* before the jury, did not depend on any particular assumption about the type of conspiracy the jury *found*. Nor is there any indication that the assumption petitioners urge (a cocaine-only conspiracy) would likely have made a difference in respect to discretionary leniency.

For these reasons, we need not, and we do not, consider the merits of petitioners' statutory and constitutional claims.

The judgment of the Court of Appeals is

Affirmed.

Syllabus

UNITED STATES *v.* ESTATE OF ROMANI ET AL.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 96–1613. Argued January 12, 1998—Decided April 29, 1998

After a third party perfected a $400,000 judgment lien under Pennsylvania law on Francis Romani's Cambria County real property, the Internal Revenue Service filed notices of tax liens on the property, totaling some $490,000. When Mr. Romani died, his entire estate consisted of real estate worth only $53,001. Because the property was encumbered by both the judgment lien and the federal tax liens, the estate's administrator sought the county court's permission to transfer the property to the judgment creditor in lieu of execution. The court authorized the conveyance, overruling the Federal Government's objection that the transfer violated the federal priority statute, 31 U. S. C. § 3713(a), which provides that a Government claim "shall be paid first" when a decedent's estate cannot pay all of its debts. The Superior Court of Pennsylvania affirmed, as did the Pennsylvania Supreme Court. The latter court determined that there was a "plain inconsistency" between § 3713 and the Federal Tax Lien Act of 1966, which provides that a federal tax lien "shall not be valid" against judgment lien creditors until a prescribed notice has been given, 26 U. S. C. § 6323(a). The court concluded that the 1966 Act effectively limited § 3713's operation as to tax debts, relying on *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 738, which noted that the 1966 Act modified the Government's preferred position in the tax area and recognized the priority of many state claims over federal tax liens.

Held: Section 3713(a) does not require that a federal tax claim be given preference over a judgment creditor's perfected lien on real property. Pp. 522–534.

(a) There is no dispute about the meaning of either the Pennsylvania lien statute or the Tax Lien Act. It is undisputed that, under the state law, the judgment creditor acquired a valid lien on Romani's real property before his death and before the Government served notice of its tax liens. That lien was therefore perfected in the sense that there is nothing more to be done to have a choate lien. *E. g., United States* v. *City of New Britain*, 347 U. S. 81, 84. And a review of the Tax Lien Act's history reveals that each time Congress has revisited the federal tax lien, it has ameliorated pre-existing harsh consequences for the delinquent taxpayer's other secured creditors. Here, all agree that by

Syllabus

§ 6323(a)'s terms, the Government's liens are not valid as against the earlier recorded judgment lien. Pp. 522–524.

(b) Because this Court has never definitively resolved the basic question whether the federal priority statute gives the United States a preference only over other unsecured creditors, or whether it also applies to the antecedent perfected liens of secured creditors, see, *e. g.*, *United States* v. *Vermont*, 377 U. S. 351, 358, n. 8, it does not seem appropriate to view the issue here as whether the Tax Lien Act has implicitly amended or repealed § 3713(a). Instead, the proper inquiry is how best to harmonize the two statutes' impact on the Government's power to collect delinquent taxes. Pp. 524–530.

(c) Nothing in the federal priority statute's text or its long history justifies the conclusion that it authorizes the equivalent of a secret lien as a substitute for the expressly authorized tax lien that the Tax Lien Act declares "shall not be valid" in a case of this kind. On several occasions, this Court has concluded that a specific policy embodied in a later federal statute should control interpretation of the older federal priority statute, despite that law's literal, unconditional text and the fact that it had not been expressly amended by the later Act. See, *e. g.*, *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 448–451. *United States* v. *Emory*, 314 U. S. 423, 429–433, and *United States* v. *Key*, 397 U. S. 322, 324–333, distinguished. So too here, there are sound reasons for treating the Tax Lien Act as the governing statute. That Act is the later statute, the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens. It represents Congress' detailed judgment as to when the Government's claims for unpaid taxes should yield to many different sorts of interests (including, *e. g.*, judgment liens, mechanic's liens, and attorney's liens) in many different types of property (including, *e. g.*, real property, securities, and motor vehicles). See § 6323. Indeed, given this Court's unambiguous determination that the federal interest in the collection of taxes is paramount to its interest in enforcing other claims, see *Kimbell Foods, Inc.*, 440 U. S., at 733–735, it would be anomalous to conclude that Congress intended the priority statute to impose greater burdens on the citizen than those specifically crafted for tax collection purposes. Pp. 530–534.

547 Pa. 41, 688 A. 2d 703, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 535.

Kent L. Jones argued the cause for the United States. With him on the briefs were *Acting Solicitor General Waxman*, *Acting Solicitor General Dellinger*, *Assistant Attorney General Argrett*, *Deputy Solicitor General Wallace*, *William S. Estabrook*, and *Joan I. Oppenheimer*.

Patrick F. McCartan argued the cause for respondent Romani Industries, Inc. With him on the brief were *Gregory G. Katsas* and *Lawrence L. Davis*.

JUSTICE STEVENS delivered the opinion of the Court.

The federal priority statute, 31 U. S. C. § 3713(a), provides that a claim of the United States Government "shall be paid first" when a decedent's estate cannot pay all of its debts.[1] The question presented is whether that statute requires that a federal tax claim be given preference over a judgment creditor's perfected lien on real property even though such a preference is not authorized by the Federal Tax Lien Act of 1966, 26 U. S. C. § 6321 *et seq.*

I

On January 25, 1985, the Court of Common Pleas of Cambria County, Pennsylvania, entered a judgment for $400,000 in favor of Romani Industries, Inc., and against Francis

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[1] "§ 3713. Priority of Government claims

"(a)(1) A claim of the United States Government shall be paid first when—

"(A) a person indebted to the Government is insolvent and—

"(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

"(ii) property of the debtor, if absent, is attached; or

"(iii) an act of bankruptcy is committed; or

"(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

"(2) This subsection does not apply to a case under title 11." 31 U. S. C. § 3713.

The present statute is the direct descendent of § 3466 of the Revised Statutes, which had been codified in 31 U. S. C. § 191.

J. Romani. The judgment was recorded in the clerk's office and therefore, as a matter of Pennsylvania law, it became a lien on all of the defendant's real property in Cambria County. Thereafter, the Internal Revenue Service filed a series of notices of tax liens on Mr. Romani's property. The claims for unpaid taxes, interest, and penalties described in those notices amounted to approximately $490,000.

When Mr. Romani died on January 13, 1992, his entire estate consisted of real estate worth only $53,001. Because the property was encumbered by both the judgment lien and the federal tax liens, the estate's administrator sought permission from the Court of Common Pleas to transfer the property to the judgment creditor, Romani Industries, in lieu of execution. The Federal Government acknowledged that its tax liens were not valid as against the earlier judgment lien; but, giving new meaning to Franklin's aphorism that "in this world nothing can be said to be certain, except death and taxes,"[2] it opposed the transfer on the ground that the priority statute (§ 3713) gave it the right to "be paid first."

The Court of Common Pleas overruled the Government's objection and authorized the conveyance. The Superior Court of Pennsylvania affirmed, and the Supreme Court of the State also affirmed. 547 Pa. 41, 688 A. 2d 703 (1997). That court first determined that there was a "plain inconsistency" between § 3713, which appears to give the United States "absolute priority" over all competing claims, and the Tax Lien Act of 1966, which provides that the federal tax lien "shall not be valid" against judgment lien creditors until a prescribed notice has been given. *Id.*, at 45, 688 A. 2d,

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[2] Letter of Nov. 13, 1789, to Jean Baptiste Le Roy, in 10 Writings of Benjamin Franklin 69 (A. Smyth ed. 1907). As is often the case, the original meaning of the aphorism is clarified somewhat by its context: "Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes." *Ibid.*

at 705.[3] Then, relying on the reasoning in *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979), which had noted that the Tax Lien Act of 1966 modified the Federal Government's preferred position in the tax area and recognized the priority of many state claims over federal tax liens, *id.*, at 738, the court concluded that the 1966 Act had the effect of limiting the operation of § 3713 as to tax debts.

The decision of the Pennsylvania Supreme Court conflicts with two Federal Court of Appeals decisions, *Kentucky ex rel. Luckett* v. *United States*, 383 F. 2d 13 (CA6 1967), and *Nesbitt* v. *United States*, 622 F. 2d 433 (CA9 1980). Moreover, in its petition for certiorari, the Government submitted that the decision is inconsistent with our holding in *Thelusson* v. *Smith*, 2 Wheat. 396 (1817), and with the admonition that "'[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a

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[3] The Federal Tax Lien Act of 1966, 26 U. S. C. § 6321 *et seq.*, provides in pertinent part:

"§ 6321. Lien for taxes

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

"§ 6323. Validity and priority against certain persons

"(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors

"The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary."

Section 6323(f)(1)(A)(i) provides that the required notice "shall be filed[,] . . . [i]n the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated." If the State has not designated such an office, notice is to be filed with the clerk of the federal district court "for the judicial district in which the property subject to the lien is situated." § 6323(f)(1)(B).

command as that of [31 U. S. C. § 3713],'" *United States* v. *Key*, 397 U. S. 322, 324–325 (1970) (quoting *United States* v. *Emory*, 314 U. S. 423, 433 (1941)). We granted certiorari, 521 U. S. 1117 (1997), to resolve the conflict and to consider whether *Thelusson*, *Key*, or any of our other cases construing the priority statute requires a different result.

II

There is no dispute about the meaning of two of the three statutes that control the disposition of this case. It is therefore appropriate to comment on the Pennsylvania lien statute and the Federal Tax Lien Act before considering the applicability of the priority statute to property encumbered by an antecedent judgment creditor's lien.

The Pennsylvania statute expressly provides that a judgment shall create a lien against real property when it is recorded in the county where the property is located. 42 Pa. Cons. Stat. § 4303(a) (1995). After the judgment has been recorded, the judgment creditor has the same right to notice of a tax sale as a mortgagee.[4] The recording in one county does not, of course, create a lien on property located elsewhere. In this case, however, it is undisputed that the judgment creditor acquired a valid lien on the real property in

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[4] The Pennsylvania Supreme Court has elaborated:

"We must now decide whether judgment creditors are also entitled to personal or general notice by the [County Tax Claim] Bureau as a matter of due process of law.

"Judgment liens are a product of centuries of statutes which authorize a judgment creditor to seize and sell the land of debtors at a judicial sale to satisfy their debts out of the proceeds of the sale. The judgment represents a binding judicial determination of the rights and duties between the parties, and establishes their debtor-creditor relationship for all the world to notice when the judgment is recorded in a Prothonotary's Office. When entered of record, the judgment also operates as a lien upon all real property of the debtor in that county." *In re Upset Sale, Tax Claim Bureau of Berks County*, 505 Pa. 327, 334, 479 A. 2d 940, 943 (1984).

Cambria County before the judgment debtor's death and before the Government served notice of its tax liens. Romani Industries' lien was "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States* v. *City of New Britain*, 347 U. S. 81, 84 (1954); see also *Illinois ex rel. Gordon* v. *Campbell*, 329 U. S. 362, 375 (1946).

The Federal Government's right to a lien on a delinquent taxpayer's property has been a part of our law at least since 1865.[5] Originally the lien applied, without exception, to all property of the taxpayer immediately upon the neglect or failure to pay the tax upon demand.[6] An unrecorded tax lien against a delinquent taxpayer's property was valid even against a bona fide purchaser who had no notice of the lien. *United States* v. *Snyder*, 149 U. S. 210, 213–215 (1893). In 1913, Congress amended the statute to provide that the fed-

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[5] The post-Civil War Reconstruction Congress imposed a tax of three cents per pound on "the producer, owner, or holder" of cotton and a lien on the cotton until the tax was paid. Act of July 13, 1866, § 1, 14 Stat. 98. The same statute also imposed a general lien on all of a delinquent taxpayer's property, see § 9, 14 Stat. 107, which was nearly identical to a provision in the revenue Act of Mar. 3, 1865, 13 Stat. 470–471, quoted in n. 6, *infra*.

[6] The 1865 revenue Act contained the following sentence: "And if any person, bank, association, company, or corporation, liable to pay any duty, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interests, penalties, and costs that may accrue in addition thereto, upon all property and rights to property; and the collector, after demand, may levy or by warrant may authorize a deputy collector to levy upon all property and rights to property belonging to such person, bank, association, company, or corporation, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for non-payment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy." 13 Stat. 470–471. This provision, as amended, became § 3186 of the Revised Statutes.

eral tax lien "shall not be valid as against any mortgagee, purchaser, or judgment creditor" until notice has been filed with the clerk of the federal district court or with the appropriate local authorities in the district or county in which the property subject to the lien is located. Act of Mar. 4, 1913, 37 Stat. 1016. In 1939, Congress broadened the protection against unfiled tax liens to include pledgees and the holders of certain securities. Act of June 29, 1939, § 401, 53 Stat. 882–883. The Federal Tax Lien Act of 1966 again broadened that protection to encompass a variety of additional secured transactions, and also included detailed provisions protecting certain secured interests even when a notice of the federal lien previously has been filed. 80 Stat. 1125–1132, as amended, 26 U. S. C. § 6323.

In sum, each time Congress revisited the federal tax lien, it ameliorated its original harsh impact on other secured creditors of the delinquent taxpayer.[7] In this case, it is agreed that by the terms of § 6323(a), the Federal Government's liens are not valid as against the lien created by the earlier recording of Romani Industries' judgment.

III

The text of the priority statute on which the Government places its entire reliance is virtually unchanged since its enactment in 1797.[8] As we pointed out in *United States* v.

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[7] For a more thorough description of the early history and of Congress' reactions to this Court's tax lien decisions, see Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L. J. 905, 919–922 (1954) (hereinafter Kennedy).

[8] The Act of Mar. 3, 1797, § 5, 1 Stat. 515, provided:

"*And be it further enacted,* That where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall

Moore, 423 U. S. 77 (1975), not only were there earlier versions of the statute,[9] but "its roots reach back even further into the English common law," *id.*, at 80. The sovereign prerogative that was exercised by the English Crown and by many of the States as "an inherent incident of sovereignty," *ibid.*, applied only to unsecured claims. As Justice Brandeis noted in *Marshall* v. *New York*, 254 U. S. 380, 384 (1920), the common-law priority "[did] not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right." Moreover, the statute itself does not create a lien in favor of the United States.[10] Given this background, respondent argues that the statute should be read as

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be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed." Compare § 3466 of the Revised Statutes with the present statute quoted in n. 1, *supra*.

It has long been settled that the federal priority covers the Government's claims for unpaid taxes. *Price* v. *United States*, 269 U. S. 492, 499–502 (1926); *Massachusetts* v. *United States*, 333 U. S. 611, 625–626, and n. 24 (1948).

[9] "The earliest priority statute was enacted in the Act of July 31, 1789, 1 Stat. 29, which dealt with bonds posted by importers in lieu of payment of duties for release of imported goods. It provided that the 'debt due to the United States' for such duties shall be discharged first 'in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased . . . .' § 21, 1 Stat. 42. A 1792 enactment broadened the Act's coverage by providing that the language 'cases of insolvency' should be taken to include cases in which a debtor makes a voluntary assignment for the benefit of creditors, and the other situations that § 3466, 31 U. S. C. § 191, now covers. 1 Stat. 263." *United States* v. *Moore*, 423 U. S., at 81.

[10] "In construing the statutes on this subject, it has been stated by the court, on great deliberation, that the priority to which the United States are entitled, does not partake of the character of a *lien* on the property of public debtors. This distinction is always to be recollected." *United States* v. *Hooe*, 3 Cranch 73, 90 (1805).

giving the United States a preference over other unsecured creditors but not over secured creditors.[11]

There are dicta in our earlier cases that support this contention as well as dicta that tend to refute it. Perhaps the strongest support is found in Justice Story's statement:

> "What then is the nature of the priority, thus limited and established in favour of the United States? Is it a right, which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to the assignees? Or, is it a mere right of prior payment, out of the general funds of the debtor, in the hands of the assignees? We are of opinion that it clearly falls, within the latter description. The language employed is that which naturally would be employed to express such an intent; and it must be strained from its ordinary import, to speak any other." *Conard* v. *Atlantic Ins. Co. of N. Y.*, 1 Pet. 386, 439 (1828).

Justice Story's opinion that the language employed in the statute "must be strained" to give it any other meaning is entitled to special respect because he was more familiar with 18th-century usage than judges who view the statute from a 20th-century perspective.

We cannot, however, ignore the Court's earlier judgment in *Thelusson* v. *Smith*, 2 Wheat., at 426, or the more recent dicta in *United States* v. *Key*, 397 U. S., at 324–325. In *Thelusson*, the Court held that the priority statute gave the United States a preference over the claim of a judgment creditor who had a general lien on the debtor's real property.

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[11] Although this argument was not presented to the state courts, respondent may defend the judgment on a ground not previously raised. *Heckler* v. *Campbell*, 461 U. S. 458, 468–469, n. 12 (1983). We will rarely consider such an argument, however. *Ibid.;* see also *Matsushita Elec. Industrial Co.* v. *Epstein*, 516 U. S. 367, 379, n. 5 (1996).

The Court's brief opinion[12] is subject to the interpretation that the statutory priority always accords the Government a preference over judgment creditors. For two reasons, we do not accept that reading of the opinion.

First, as a factual matter, in 1817 when the case was decided, there was no procedure for recording a judgment and thereby creating a choate lien on a specific parcel of real estate. See generally 2 L. Dembitz, A Treatise on Land Titles in the United States § 127, pp. 948–952 (1895). Notwithstanding the judgment, a bona fide purchaser could have acquired the debtor's property free from any claims of the judgment creditor. See *Semple* v. *Burd*, 7 Serg. & Rawle 286, 291 (Pa. 1821) ("The prevailing object of the Legislature, has uniformly been, to support the security of a judgment creditor, by confirming his lien, except when it interferes with the circulation of property by embarrassing a fair purchaser"). That is not the case with respect to

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[12] The relevant portion of the opinion reads, in full, as follows:

"These [statutory] expressions are as general as any which could have been used, and exclude all debts due to individuals, whatever may be their dignity. . . . The law makes no exception in favour of prior judgment creditors; and no reason has been, or we think can be, shown to warrant this court in making one.

". . . The United States are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a *fi. fa.*, the property is devested out of the debtor, and cannot be made liable to the United States. A judgment gives to the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the act of congress defeats this preference in favour of the United States, in the cases specified in the 65th section of the act of 1799." *Thelusson* v. *Smith*, 2 Wheat. 396, 425–426 (1817).

In the later *Conard* case, Justice Story apologized for *Thelusson:* "The reasons for that opinion are not, owing to accidental circumstances, as fully given as they are usually given in this Court." *Conard* v. *Atlantic Ins. Co. of N. Y.*, 1 Pet. 386, 442 (1828).

Romani Industries' choate lien on the property in Cambria County.

Second, and of greater importance, in his opinion for the Court in the *Conard* case, which was joined by Justice Washington, the author of *Thelusson*,[13] Justice Story explained why that holding was fully consistent with his interpretation of the text of the priority statute:

> "The real ground of the decision, was, that the judgment creditor had never perfected his title, by any execution and levy on the Sedgely estate; that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land, did not carry a legal title to the proceeds of a sale, made under an adverse execution. This is the manner in which this case has been understood, by the Judges who concurred in the decision; and it is obvious, that it established no such proposition, as that a specific and perfected lien, can be displaced by the mere priority of the United States; since that priority is not of itself equivalent to a lien." *Conard*, 1 Pet., at 444.[14]

The Government also relies upon dicta from our opinion in *United States* v. *Key*, 397 U. S., at 324–325, which quoted from our earlier opinion in *United States* v. *Emory*, 314 U. S., at 433: "Only the plainest inconsistency would warrant our

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[13] Justice Washington's opinion for this Court in *Thelusson* affirmed, and was essentially the same as, his own opinion delivered in the Circuit Court as a Circuit Justice. 2 Wheat., at 426, n. h.

[14] Relying on this and several other cases, in 1857 the Attorney General of the United States issued an opinion concluding that *Thelusson* "has been distinctly overruled" and that the priority of the United States under this statute "will not reach back over any lien, whether it be general or specific." 9 Op. Atty. Gen. 28, 29. See also Kennedy 908–911 (advancing this same interpretation of the early priority Act decisions).

finding an implied exception to the operation of so clear a command as that of [§ 3713]." Because both *Key* and *Emory* were cases in which the competing claims were unsecured, the statutory command was perfectly clear even under Justice Story's construction of the statute. The statements made in that context, of course, shed no light on the clarity of the command when the United States relies on the statute as a basis for claiming a preference over a secured creditor. Indeed, the *Key* opinion itself made this specific point: "This case does not raise the question, never decided by this Court, whether § 3466 grants the Government priority over the prior specific liens of secured creditors. See *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 365–366 (1953)." 397 U. S., at 332, n. 11.

The *Key* opinion is only one of many in which the Court has noted that despite the age of the statute, and despite the fact that it has been the subject of a great deal of litigation, the question whether it has any application to antecedent perfected liens has never been answered definitively. See *United States* v. *Vermont*, 377 U. S. 351, 358, n. 8 (1964) (citing cases). In his dissent in *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361 (1953), Justice Frankfurter referred to the Court's reluctance to decide the issue "not only today but for almost a century and a half." 345 U. S., at 367.

The Government's priority as against specific, perfected security interests is, if possible, even less settled with regard to real property. The Court has sometimes concluded that a competing creditor who has not "divested" the debtor of "either title or possession" has only a "general, unperfected lien" that is defeated by the Government's priority. *E. g.*, *id.*, at 366. Assuming the validity of this "title or possession" test for deciding whether a lien on personal property is sufficiently choate for purposes of the priority statute (a question of federal law, see *Illinois ex rel. Gordon* v. *Campbell*, 329 U. S., at 371), we are not aware of any decisions since *Thelusson* applying that theory to claims for real prop-

erty, or of any reason to require a lienor or mortgagee to acquire possession in order to perfect an interest in real estate.

Given the fact that this basic question of interpretation remains unresolved, it does not seem appropriate to view the issue in this case as whether the Tax Lien Act of 1966 has implicitly amended or repealed the priority statute. Instead, we think the proper inquiry is how best to harmonize the impact of the two statutes on the Government's power to collect delinquent taxes.

IV

In his dissent from a particularly harsh application of the priority statute, Justice Jackson emphasized the importance of considering other relevant federal policies. Joined by three other Justices, he wrote:

> "This decision announces an unnecessarily ruthless interpretation of a statute that at its best is an arbitrary one. The statute by which the Federal Government gives its own claims against an insolvent priority over claims in favor of a state government must be applied by courts, not because federal claims are more meritorious or equitable, but only because that Government has more power. But the priority statute is an assertion of federal supremacy as against any contrary state policy. It is not a limitation on the Federal Government itself, not an assertion that the priority policy shall prevail over all other federal policies. Its generalities should not lightly be construed to frustrate a specific policy embodied in a later federal statute." *Massachusetts* v. *United States*, 333 U. S. 611, 635 (1948).

On several prior occasions the Court had followed this approach and concluded that a specific policy embodied in a later federal statute should control our construction of the priority statute, even though it had not been expressly

amended. Thus, in *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 448–451 (1883), the Court concluded that the priority statute did not apply to federal claims against national banks because the National Bank Act comprehensively regulated banks' obligations and the distribution of insolvent banks' assets. And in *United States* v. *Guaranty Trust Co. of N. Y.*, 280 U. S. 478, 485 (1930), we determined that the Transportation Act of 1920 had effectively superseded the priority statute with respect to federal claims against the railroads arising under that Act.

The bankruptcy law provides an additional context in which another federal statute was given effect despite the priority statute's literal, unconditional text. The early federal bankruptcy statutes had accorded to "'all debts due to the United States, and all taxes and assessments under the laws thereof'" a preference that was "coextensive" with that established by the priority statute. *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 158 (1912) (quoting the Bankruptcy Act of 1867, Rev. Stat. § 5101). As such, the priority Act and the bankruptcy laws "were to be regarded as *in pari materia*, and both were unqualified; . . . as neither contained any qualification, none could be interpolated." 224 U. S., at 158. The Bankruptcy Act of 1898, however, subordinated the priority of the Federal Government's claims (except for taxes due) to certain other kinds of debts. This Court resolved the tension between the new bankruptcy provisions and the priority statute by applying the former and thus treating the Government like any other general creditor. *Id.*, at 158–160; *Davis* v. *Pringle*, 268 U. S. 315, 317–319 (1925).[15]

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[15] Congress amended the priority statute in 1978 to make it expressly inapplicable to Title 11 bankruptcy cases. Pub. L. 95–598, § 322(b), 92 Stat. 2679, codified in 31 U. S. C. § 3713(a)(2). The differences between the bankruptcy laws and the priority statute have been the subject of criticism: "[A]s a result of the continuing discrepancies between the bankruptcy and insolvency rules, some creditors have had a distinct incentive

There are sound reasons for treating the Tax Lien Act of 1966 as the governing statute when the Government is claiming a preference in the insolvent estate of a delinquent taxpayer. As was the case with the National Bank Act, the Transportation Act of 1920, and the Bankruptcy Act of 1898, the Tax Lien Act is the later statute, the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens. It represents Congress' detailed judgment as to when the Government's claims for unpaid taxes should yield to many different sorts of interests (including, for instance, judgment liens, mechanic's liens, and attorney's liens) in many different types of property (including, for example, real property, securities, and motor vehicles). See 26 U. S. C. § 6323. Indeed, given our unambiguous determination that the federal interest in the collection of taxes is paramount to its interest in enforcing other claims, see *United States* v. *Kimbell Foods, Inc.*, 440 U. S., at 733–735, it would be anomalous to conclude that Congress intended the priority statute to impose greater burdens on the citizen than those specifically crafted for tax collection purposes.

Even before the 1966 amendments to the Tax Lien Act, this Court assumed that the more recent and specific provisions of that Act would apply were they to conflict with the older priority statute. In the *Gilbert Associates* case, which concerned the relative priority of the Federal Government and a New Hampshire town to funds of an insolvent taxpayer, the Court first considered whether the town could qualify as a "judgment creditor" entitled to preference under the Tax Lien Act. 345 U. S., at 363–364. Only after deciding that question in the negative did the Court conclude that

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to throw into bankruptcy a debtor whose case might have been handled, with less expense and less burden on the federal courts, in another form of proceeding." Plumb, The Federal Priority in Insolvency: Proposals for Reform, 70 Mich. L. Rev. 3, 8–9 (1971) (hereinafter Plumb).

the United States obtained preference by operation of the priority statute. *Id.*, at 365–366. The Government would now portray *Gilbert Associates* as a deviation from two other relatively recent opinions in which the Court held that the priority statute was not trumped by provisions of other statutes: *United States* v. *Emory*, 314 U. S., at 429–433 (the National Housing Act), and *United States* v. *Key*, 397 U. S., at 324–333 (Chapter X of the Bankruptcy Act). In each of those cases, however, there was no "plain inconsistency" between the commands of the priority statute and the other federal Act, nor was there reason to believe that application of the priority statute would frustrate Congress' intent. *Id.*, at 329. The same cannot be said in the present suit.

The Government emphasizes that when Congress amended the Tax Lien Act in 1966, it declined to enact the American Bar Association's proposal to modify the federal priority statute, and Congress again failed to enact a similar proposal in 1970. Both proposals would have expressly provided that the Government's priority in insolvency does not displace valid liens and security interests, and therefore would have harmonized the priority statute with the Tax Lien Act. See Hearings on H. R. 11256 and 11290 before the House Committee on Ways and Means, 89th Cong., 2d Sess., 197 (1966) (hereinafter Hearings); S. 2197, 92d Cong., 1st Sess. (1971). But both proposals also would have significantly changed the priority statute in many other respects to follow the priority scheme created by the bankruptcy laws. See Hearings, at 85, 198; Plumb 10, n. 53, 33–37. The earlier proposal may have failed because its wide-ranging subject matter was beyond the House Ways and Means Committee's jurisdiction. *Id.*, at 8. The failure of the 1970 proposal in the Senate Judiciary Committee—explained by no reports or hearings—might merely reflect disagreement with the broad changes to the priority statute, or an assumption that the proposal was not needed because, as Justice Story had believed, the priority statute does not

apply to prior perfected security interests, or any number of other views. Thus, the Committees' failures to report the proposals to the entire Congress do not necessarily indicate that any legislator thought that the priority statute should supersede the Tax Lien Act in the adjudication of federal tax claims. They provide no support for the hypothesis that both Houses of Congress silently endorsed that position.

The actual measures taken by Congress provide a superior insight regarding its intent. As we have noted, the 1966 amendments to the Tax Lien Act bespeak a strong condemnation of secret liens, which unfairly defeat the expectations of innocent creditors and frustrate "the needs of our citizens for certainty and convenience in the legal rules governing their commercial dealings." 112 Cong. Rec. 22227 (1966) (remarks of Rep. Byrnes); cf. *United States* v. *Speers*, 382 U. S. 266, 275 (1965) (referring to the "general policy against secret liens"). These policy concerns shed light on how Congress would want the conflicting statutory provisions to be harmonized:

> "Liens may be a dry-as-dust part of the law, but they are not without significance in an industrial and commercial community where construction and credit are thought to have importance. One does not readily impute to Congress the intention that many common commercial liens should be congenitally unstable." E. Brown, The Supreme Court, 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 87 (1958) (footnote omitted).

In sum, nothing in the text or the long history of interpreting the federal priority statute justifies the conclusion that it authorizes the equivalent of a secret lien as a substitute for the expressly authorized tax lien that Congress has said "shall not be valid" in a case of this kind.

The judgment of the Pennsylvania Supreme Court is affirmed.

It is so ordered.

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

I join the opinion of the Court except that portion which takes seriously, and thus encourages in the future, an argument that should be laughed out of court. The Government contended that 31 U. S. C. § 3713(a) must have priority over the Federal Tax Lien Act of 1966, because in 1966 and again in 1970 Congress "failed to enact" a proposal put forward by the American Bar Association that would have subordinated § 3713(a) to the Tax Lien Act, citing hearings before the House Committee on Ways and Means, and a bill proposed in, but not passed by, the Senate. See Brief for United States 25–27, and n. 10 (citing American Bar Association, Final Report of the Committee on Federal Liens 7, 122–124 (1959), contained in Hearings on H. R. 11256 and 11290 before the House Committee on Ways and Means, 89th Cong., 2d Sess., 85, 199 (1966); S. 2197, 92d Cong., 1st Sess. (1971)). The Court responds that these rejected proposals "provide no support for the hypothesis that both Houses of Congress silently endorsed" the supremacy of § 3713, *ante*, at 534, because those proposals contained other provisions as well, and might have been rejected because of those other provisions, or because Congress thought the existing law already made § 3713 supreme. This implies that, if the proposals had not contained those additional features, or if Members of Congress (or some part of them) had somehow made clear in the course of rejecting them that they wanted the existing supremacy of the Tax Lien Act to subsist, the rejection *would* "provide support" for the Government's case.

That is not so, for several reasons. First and most obviously, Congress cannot express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law. The Constitution sets forth the only manner in which the Members of Congress have the power to impose their will upon the country:

by a bill that passes both Houses and is either signed by the President or repassed by a supermajority after his veto. Art. I, § 7. Everything else the Members of Congress do is either prelude or internal organization. Congress can no more express its will by not legislating than an individual Member can express his will by not voting.

Second, even if Congress *could* express its will by not legislating, the will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever. The Constitution puts Congress in the business of writing new laws, not interpreting old ones. "[L]ater enacted laws . . . do not declare the meaning of earlier law." *Almendarez-Torres* v. *United States*, *ante*, at 237; *ante*, at 269–270 (SCALIA, J., dissenting) ("This later amendment can of course not cause [the statute] to have meant, at the time of petitioner's conviction, something different from what it then said"). If the *enacted* intent of a later Congress cannot change the meaning of an earlier statute, then it should go without saying that the later *unenacted intent* cannot possibly do so. It should go without saying, and it should go without arguing as well.

I have in the past been critical of the Court's using the so-called legislative history of an enactment (hearings, committee reports, and floor debates) to determine its meaning. See, *e. g.*, *Conroy* v. *Aniskoff*, 507 U. S. 511, 518–529 (1993) (SCALIA, J., concurring in judgment); *United States* v. *Thompson/Center Arms Co.*, 504 U. S. 505, 521 (1992) (SCALIA, J., concurring in judgment); *Blanchard* v. *Bergeron*, 489 U. S. 87, 98–100 (1989) (SCALIA, J., concurring in part and concurring in judgment). Today, however, the Court's fascination with the files of Congress (we must consult them, because they are there) is carried to a new silly extreme. Today's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was. If we take this sort of material seriously, we require conscientious counsel to investigate (at clients' expense) not only the hear-

ings, committee reports, and floor debates pertaining to the history of the law at issue (which is bad enough), but to find, and then investigate the hearings, committee reports, and floor debates pertaining to, later bills on the same subject that were never enacted. This is beyond all reason, and we should say so.

Syllabus

CALDERON *v.* THOMPSON

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

No. 97–215. Argued December 9, 1997—Decided April 29, 1998

In 1983, respondent Thompson was convicted of rape and murder and sentenced to death in a California state court. The special circumstance of murder during the commission of rape made him eligible for the death penalty. In ruling on his first federal habeas petition in 1995, the District Court, *inter alia*, granted relief on his rape conviction and the rape special circumstance, thus invalidating his death sentence. A Ninth Circuit panel reversed the grant in June 1996, and it denied Thompson's petition for rehearing and suggestion for hearing en banc in March 1997. In June, Thompson's certiorari petition was denied, and the Ninth Circuit issued a mandate denying all habeas relief. The State then set an August execution date, and the State Supreme Court denied Thompson's fourth state habeas petition. Two days before the execution, however, the en banc Ninth Circuit recalled its mandate *sua sponte*, based on claims and evidence presented in Thompson's first habeas petition. The court had delayed action in the interests of comity until the conclusion of his fourth state habeas proceeding. It asserted it had recalled the mandate because procedural misunderstandings at the court prevented it from calling for en banc review before the mandate issued, and because the original panel's decision would lead to a miscarriage of justice. In granting habeas relief, the court found that Thompson was denied effective assistance of counsel at trial by his attorney's failure to contest the conclusions of the State's forensic expert and to impeach the credibility of two jailhouse informants.

Held:

1. The courts of appeals' inherent power to recall their mandates, subject to review for an abuse of discretion, *Hawaii Housing Authority* v. *Midkiff*, 463 U. S. 1323, 1324 (REHNQUIST, J., in chambers), is a power of last resort, to be held in reserve against grave, unforeseen circumstances. The Ninth Circuit's recall decision rests on the most doubtful of grounds. Even if its en banc process somehow malfunctioned, the court compounded the error by delaying further action for more than four months after the alleged misunderstandings occurred. The promptness with which a court acts to correct its mistakes is evidence of the adequacy of its grounds for reopening the case. Here, just two days before the scheduled execution, the court recalled a judgment on

which the State, not to mention this Court, had placed heavy reliance. It is no answer for the court to assert it delayed action in the interests of comity when it considered only the State Supreme Court's interest in resolving Thompson's fourth habeas petition and not the more vital interests of California's executive branch. Pp. 549–553.

2. The recall was consistent with the letter of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which sets limits on successive federal habeas applications. Since the court's specific recitation that it acted on the exclusive basis of Thompson's first federal petition is not disproved by consideration of matters presented in a later filing, the court is deemed to have acted on the first, rather than a successive, application. Although AEDPA's terms do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of that statute and, in a habeas case, must be guided by the general principles underlying this Court's habeas jurisprudence. Pp. 553–554.

3. The recall was a grave abuse of discretion. Pp. 554–566.

(a) "[T]he profound societal costs that attend the exercise of habeas jurisdiction," *Smith* v. *Murray,* 477 U. S. 527, 539, make it necessary to impose significant limits on the federal courts' discretion to grant habeas relief. These limits reflect the Court's enduring respect for "the State's interest in the finality of convictions that have survived direct [state-court] review." *Brecht* v. *Abrahamson,* 507 U. S. 619, 635. Finality is essential to the criminal law's retributive and deterrent functions, and it enhances the quality of judging. It also serves to preserve the federal balance, for "a [State's power] to pass laws means little if the State cannot enforce them." *McCleskey* v. *Zant,* 499 U. S. 467, 491. A State's finality interests are compelling when a federal court of appeals issues a mandate denying federal habeas relief. Only with an assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing the moral judgment will be carried out. Unsettling these expectations inflicts a profound injury to the "powerful and legitimate interest in punishing the guilty," *Herrera* v. *Collins,* 506 U. S. 390, 421 (O'Connor, J., concurring), an interest shared by the State and crime victims alike. In these circumstances, the prisoner has already had extensive review of his claims in federal and state courts. In the absence of a strong showing of actual innocence, the State's interests in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for review. Pp. 554–557.

(b) Unless it acts to avoid a miscarriage of justice as defined by this Court's habeas jurisprudence, a federal court of appeals abuses its discretion when it *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas relief to a state prisoner. This

standard is altogether consistent with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong actual innocence showing. The rules applicable in all cases where the court recalls its mandate further ensure the practice is limited to the most rare and extraordinary case. Moreover, like other applicable habeas standards, this rule is objective in content, well defined in the case law, and familiar to federal courts. *McCleskey*, *supra*, at 496. Pp. 558–559.

(c) The miscarriage of justice standard was not met in this case. The standard is concerned with actual, as compared to legal, innocence. *Sawyer* v. *Whitley*, 505 U. S. 333, 339. To be credible, the claim must be based on reliable evidence not presented at trial. *Schlup* v. *Delo*, 513 U. S. 298, 324. A petitioner asserting his actual innocence of the underlying crime must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" presented in his habeas petition. *Id.*, at 327. A capital petitioner challenging his death sentence in particular must show "by clear and convincing evidence" that no reasonable juror would have found him eligible for the death penalty in light of the new evidence. *Sawyer*, *supra*, at 348. Thompson's claims fail under either standard. The record of his first federal habeas petition governs his actual innocence claim. He presents little evidence to undermine the trial evidence. The prosecution presented ample evidence showing that he committed rape, and his own testimony—riddled with inconsistencies and falsehoods—was devastating. Neither the additional evidence he presented to impeach the credibility of two jailhouse informants nor a pathologist's testimony disputing opinions of prosecution trial witnesses meets the "more likely than not" showing necessary to vacate his stand-alone rape conviction, much less the "clear and convincing" showing necessary to vacate his death sentence. There is no basis for a miscarriage of justice finding. Pp. 559–566.

120 F. 3d 1045, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 566.

Holly D. Wilkens, Supervising Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Daniel E. Lungren*, Attorney General, *George Williamson*, Chief Assistant Attorney General, *Dane*

R. Gillette, Senior Assistant Attorney General, and *Pamela A. Ratner*, Supervising Deputy Attorney General.

Gregory A. Long argued the cause for respondent. With him on the brief were *Quin Denvir* and *Andrew S. Love*, by appointment of the Court, 522 U. S. 1014.*

JUSTICE KENNEDY delivered the opinion of the Court.

Thomas M. Thompson was convicted in California state court of the rape and murder of Ginger Fleischli. More than 15 years after the crime, 13 years after Thompson's conviction, and 7 years after Thompson filed his first petition for federal habeas relief, the United States Court of Appeals for the Ninth Circuit issued its mandate denying the writ of habeas corpus. Two days before Thompson's scheduled execution, however, the Court of Appeals, sitting en banc, recalled the mandate and granted habeas relief to Thompson. The case presents two issues: First, whether the Court of Appeals' order recalling its mandate violated 28 U. S. C. § 2244(b) (1994 ed., Supp. II), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, § 104, 110 Stat. 1218; and second, whether the

*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Grant Woods*, Attorney General of Arizona, *Paul J. McMurdie*, and *Randall M. Howe*, Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark W. Barnett* of South Dakota, *Jan Graham* of Utah, *Christine O. Gregoire* of Washington, and *Richard Cullen* of Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Edward M. Chikofsky and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

order was an abuse of the court's discretion. The recall of the mandate was not controlled by the precise terms of AEDPA, but this does not save the order, which, we hold, was a grave abuse of discretion.

I

A

Thompson met his 20-year-old victim, Ginger Fleischli, in the summer of 1981. Fleischli shared a Laguna Beach studio apartment with David Leitch, with whom she had an intermittent sexual relationship. In August of that year, Fleischli moved out and Thompson moved in. Fleischli took up residence with Tracy Leitch, the former wife of David Leitch.

On September 11, 1981, at about 7:30 p.m., Fleischli and Tracy Leitch encountered Thompson and David Leitch at a pizza parlor. Fleischli told Tracy Leitch she was afraid Thompson might kill her if she were left alone with him. The group later went to a bar together, but David and Tracy Leitch soon departed. At 9:30 p.m., Afshin Kashani joined Thompson and Fleischli, drinking with both of them and smoking hashish with Thompson. The trio went to a second bar before walking to Thompson's apartment around 1 a.m. At about 2 a.m., after Fleischli had gone to a nearby liquor store to buy soda, Thompson told Kashani he wanted to have sexual intercourse with Fleischli that night. He assured Kashani, however, that Kashani could "have" Fleischli after Thompson and David Leitch left for Thailand to smuggle refugees and drugs back to the United States. App. 7.

Before Fleischli returned to the apartment, Kashani began walking to his truck, which seems to have been left at a local bar. On the way, Kashani realized he had forgotten his cigarettes. He returned to the apartment, where Thompson met him at the door. Thompson appeared nervous and made Kashani wait outside while Thompson retrieved the cigarettes. After returning to his truck, Kashani looked for

Fleischli at a nearby liquor store and, not finding her, went home.

Tracy Leitch visited Thompson's apartment the morning of September 12, asking where Fleischli was. Lying, Thompson said she had left the Sandpiper Inn with Kashani the night before. At a party that evening, Tracy Leitch again asked Thompson where Fleischli was. In response, Thompson described Fleischli in the past tense, saying he had liked her. The next day, Tracy Leitch filed a missing person's report with the local police department.

On September 14, police found Fleischli's body buried in a field 10 miles from the apartment shared by Thompson and David Leitch. The body was wrapped in rope as well as a sleeping bag and blanket, both taken from the apartment. Fleischli's head was wrapped with duct tape, two towels, a sheet, and her jacket. She had been stabbed five times in the head near the right ear. The body was bruised on the ankles, palms, and left wrist; the right wrist was crushed. Fleischli's shirt and bra had been cut down the middle and pulled to her elbows, restraining her arms and exposing her breasts. She had on unbuttoned jeans, but no underwear, shoes, or socks. A vaginal swab revealed semen consistent with Thompson's blood type.

Police found two footprints near the body, one smooth and one with a wavy pattern matching a shoe worn by David Leitch. Fibers from the blanket around the body were identical to fibers found in the trunk of David Leitch's car. The rope around the body was smeared with paint from the car's trunk. Other fibers matched the carpet in the apartment, which was stained with Fleischli's blood.

On or around the day police found the body, Thompson and David Leitch went to Mexico. Leitch returned to the United States, but Mexican authorities arrested Thompson on September 26, 1981. He had handcuffs with him. When questioned by police after his return to the United States, Thompson claimed Fleischli had left his apartment with Ka-

shani the night of the murder. He also said Fleischli had been stabbed in the head, though this information had not yet been made public. He further claimed not to have had sex with Fleischli, but later asserted they had engaged in consensual sex.

We next recount the lengthy procedural history of the case.

B

On November 4, 1983, an Orange County Superior Court jury convicted Thompson of the first-degree murder and forcible rape of Fleischli. The jury made a special finding that "the homicide of Ginger Lorraine Fleischli was an intentional killing personally committed by the defendant Thomas Martin Thompson." 45 Cal. 3d 86, 117, n. 23, 753 P. 2d 37, 56, n. 23 (1988). The jury further found the special circumstance of murder during the commission of rape, making Thompson eligible for the death penalty. After penalty phase proceedings the jury was unanimous in recommending a capital sentence, which the trial judge imposed. In a later trial, a different jury found David Leitch guilty of second-degree murder for his role in Fleischli's slaying.

On April 28, 1988, the California Supreme Court unanimously affirmed Thompson's rape and murder convictions and the jury's finding of the rape special circumstance. The court also affirmed Thompson's death sentence, with two of seven justices dissenting. The dissenters concurred in the affirmance of the murder and rape convictions and the rape special circumstance, but asserted the jury's sentencing recommendation had been influenced in an improper manner by evidence that Thompson had solicited the murder of David Leitch. *Id.*, at 144–145, 753 P. 2d, at 74–75. Thompson petitioned for rehearing, which the court denied in June 1988. Thompson also filed a petition for certiorari with this Court, which we denied. 488 U. S. 960 (1988).

Thompson filed his first state habeas petition, which the California Supreme Court denied in March 1989. Thompson

filed a federal habeas petition in January 1990. The District Court held Thompson's petition in abeyance while Thompson pursued unexhausted claims in state court. In January 1991, the California Supreme Court denied Thompson's second state habeas petition. In February 1993, the California Supreme Court denied Thompson's third state habeas petition.

In November 1993, the United States District Court for the Central District of California held an evidentiary hearing on the claims raised in Thompson's federal habeas petition. In an order dated March 28, 1995, the District Court granted habeas relief as to the rape conviction and rape special circumstance and denied relief as to the murder conviction. In the District Court's view, Thompson's trial attorney rendered ineffective assistance of counsel as to the rape charge. The District Court cited two failings by the attorney. First, the court held, counsel failed to contest certain of the conclusions offered by the State's forensic expert at trial. Second, the court determined, counsel should have impeached the credibility of two jailhouse informants to a greater extent than he did. In the District Court's view, these failings prejudiced Thompson under the rule of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Having granted relief as to the rape special circumstance, the District Court ruled Thompson's death sentence was invalid. As to the murder conviction, the District Court rejected Thompson's claim he had been prejudiced by what Thompson alleged were inconsistencies between the prosecution's theories at his trial and the later trial of David Leitch. Having read the transcripts of both trials, the court found "the trials differed mainly in emphasis." App. 71.

The timing of later federal proceedings is critical to the issues we now resolve. On June 19, 1996, a unanimous three-judge panel of the Court of Appeals reversed the District Court's grant of habeas relief as to the rape conviction and rape special circumstance, affirmed the denial of habeas

relief as to the murder conviction, and reinstated Thompson's death sentence. Noting that "[t]he State presented strong evidence of rape" at Thompson's trial, 109 F. 3d 1358, 1365 (CA9 1997), the court held that, irrespective of whether the performance of Thompson's counsel was deficient in the manner Thompson alleged, Thompson could not demonstrate prejudice under *Strickland.*

On August 5, 1996, Thompson filed a petition for rehearing and suggestion for rehearing en banc, which circulated to "each active judge" of the court. See U. S. Court of Appeals for the Ninth Circuit General Orders 5.4(a)(1), p. 30 (Aug. 1997). In an order dated March 6, 1997, the original panel denied the petition and rejected the suggestion, observing that "[t]he full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc." App. 137. In the same order, the panel reissued its opinion in the case with minor changes. Thompson filed a petition for certiorari with this Court, which we denied on June 2, 1997. 520 U. S. 1259. The Court of Appeals issued its mandate denying all habeas relief in Thompson's case on June 11, 1997. In response, the State of California scheduled Thompson's execution for August 5, 1997.

Thompson filed a fourth state habeas petition on July 3, 1997. In it, he alleged David Leitch had stated in a parole hearing that he had witnessed Thompson and Fleischli engaged in what appeared to be consensual intercourse on the night of Fleischli's murder. The California Supreme Court denied the petition on July 16, 1997.

On July 22, 1997, Thompson filed a motion with the Court of Appeals to recall its mandate denying habeas relief. The following day, Thompson filed a motion in United States District Court for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). In support of both motions, Thompson cited Leitch's alleged statement that he had seen Thompson and Fleischli engaged in consensual sex.

The District Court denied Thompson's Rule 60(b) motion on July 25, 1997. The court construed the motion to be a successive petition under 28 U. S. C. § 2244 as amended by AEDPA, ruling that Thompson "must not be permitted to utilize a Rule 60(b) motion to make an end-run around the requirements" of AEDPA. App. 170. The court observed that the alleged new statement by Leitch conflicted with Thompson's own account of the specifics of his encounter with Fleischli, the physical evidence in the case, and the previous stories told by Leitch himself. Thus, the court held, Thompson "certainly cannot make the requisite showing that he is actually innocent such that his execution would be a miscarriage of justice." *Id.*, at 188.

The Court of Appeals denied Thompson's motion to recall the mandate on July 28, 1997. Two days later, however, the full court voted to consider en banc whether to recall its earlier mandate "to consider whether the panel decision of our court would result in a fundamental miscarriage of justice." 120 F. 3d 1042, 1043. The court scheduled oral argument on this question for August 1, 1997, four days before Thompson's scheduled execution.

Meanwhile, on July 29, 1997, the Governor of California held a hearing on whether to grant clemency to Thompson. In addition to the arguments presented by Thompson's attorneys during the hearing, the Governor reviewed "the materials submitted on [Thompson's] behalf, the petition and letters signed by supporters of clemency, the submissions of the Orange County District Attorney, the letters of the trial judge concerning clemency," all the court opinions in Thompson's case, and "the materials and recommendation provided to [him] by the Board of Prison Terms." App. to Brief for Criminal Justice Legal Foundation as *Amicus Curiae* A–2 to A–3 (Decision of Governor Pete Wilson). In a comprehensive decision dated July 31, 1997, the Governor found Thompson "ha[d] not remotely approached making any" showing of innocence of rape or murder. *Id.*, at A–16. The

Governor agreed with the view of the judge who presided over Thompson's trial, that "it would be an absolute tragedy and a travesty of justice to even seriously consider clemency in this case." *Ibid.* (internal quotation marks omitted). Clemency was denied.

Two days before Thompson was to be executed, a divided en banc panel of the Court of Appeals recalled the court's mandate of June 11, 1997. This action came 53 days after the mandate had issued and almost a full year after Thompson had filed his suggestion for rehearing en banc. The Court of Appeals asserted it did not recall the mandate on the basis of Thompson's later motion for recall, but did so *sua sponte*, on the basis of the claims and evidence presented in Thompson's first federal habeas petition. Thus, the court said, its "recall of the mandate is not predicated on any new evidence or claims Thompson raises in his motion to recall the mandate." 120 F. 3d 1045, 1049, n. 3. The court stated it had considered whether to recall the mandate sooner, but had chosen to wait until the conclusion of Thompson's state-court proceedings before taking action.

The court presented two bases for recalling its earlier mandate. First, the court asserted that, absent certain "procedural misunderstandings within [the] court," it would have called for en banc review of the underlying decision before issuing the mandate denying relief. *Id.*, at 1047. These procedural misunderstandings included a mishandled law clerk transition in one judge's chambers and the failure of another judge to notice that the original panel had issued its opinion in the case. *Id.*, at 1067 (Kozinski, J., dissenting). Second, the en banc court asserted the decision of the original panel "would lead to a miscarriage of justice." *Id.*, at 1048.

Having recalled the mandate in Thompson's case, the en banc court went on to address the merits of his first federal habeas petition. The court held that Thompson's trial counsel had provided ineffective assistance as to the rape charge

and rape special circumstance, to the defendant's prejudice. A plurality of the court would have granted habeas relief on the additional ground of inconsistent theories by the prosecution at his trial and the later trial of David Leitch. The majority made no effort to determine whether Thompson was actually innocent of the rape and murder of Fleischli. The court nonetheless affirmed the District Court's grant of the writ as to the rape conviction and rape special circumstance, vacated Thompson's death sentence, and further "remand[ed] the question of the murder conviction for [the District Court's] initial consideration in light of our vacatur of the rape conviction." *Id.*, at 1060. Thus, almost 16 years after Fleischli's murder, the Ninth Circuit directed the District Court to "enter the partial writ unless the State elects to retry Thompson within a reasonable time." *Ibid.*

Four judges dissented. Judge Hall argued the majority's decision allowed Thompson to evade AEDPA's restrictions on successive petitions. *Id.*, at 1064–1066. Judge Kozinski detailed the circumstances which led the majority to find its en banc process had malfunctioned. He asserted that, contrary to the majority's conclusion, the court's en banc process "operated just as it's supposed to." *Id.*, at 1067. In a third dissenting opinion, Judge Kleinfeld recited in detail the evidence of Thompson's guilt of rape. *Id.*, at 1073.

Within hours of the Court of Appeals' order recalling its mandate, the State of California filed with this Court a second petition for a writ of mandamus, which we construed as a petition for certiorari. We granted the petition, 521 U. S. 1136 (1997), and now reverse.

II

Although some Justices have expressed doubt on the point, see, *e. g.*, *United States* v. *Ohio Power Co.*, 353 U. S. 98, 102–103 (1957) (Harlan, J., dissenting), the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion. *Hawaii*

Housing Authority v. *Midkiff*, 463 U. S. 1323, 1324 (1983) (REHNQUIST, J., in chambers); see also *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 249–250 (1944). In light of "the profound interests in repose" attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances. 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3938, p. 712 (2d ed. 1996). The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies.

The en banc majority asserted extraordinary circumstances justified its order recalling the mandate in Thompson's case because, "[b]ut for procedural misunderstandings by some judges of this court, an en banc call would have been made and voted upon at the ordinary time." 120 F. 3d, at 1048. As noted earlier, the original panel issued its decision denying habeas relief on June 19, 1996, and Thompson filed a petition for rehearing and suggestion for rehearing en banc on August 5, 1996. On January 17, 1997, the panel notified the full court of its intention to reject the suggestion. *Id.*, at 1067 (Kozinski, J., dissenting). The panel reissued its earlier opinion with minor revisions on March 6, 1997. In the March 6 order, the panel also denied Thompson's petition for rehearing and rejected his suggestion for rehearing en banc. The panel observed that, although the full court had been advised of Thompson's suggestion, no judge in active service had requested a vote to rehear the case en banc within the time specified in the General Orders of the Ninth Circuit. App. 137.

It appears from Judge Kozinski's opinion that the following events also transpired. On March 12, 1997, an off-panel judge wrote to the panel, requesting an opportunity to make a belated call for a vote to rehear the case en banc. The judge stated that the panel's decision had been "circulated shortly before a law clerk transition" in the judge's chambers, and that "the old and new law clerks assigned to the

case failed to communicate." 120 F. 3d, at 1067 (dissenting opinion). Another judge seconded the request and asked: "Was [the panel's January 17, 1997, notice of intention to reject the suggestion for rehearing en banc] circulated? Did I miss it?" *Ibid.* The author of the panel opinion denied the request for a belated en banc call, explaining that the requesting judges had been notified two months earlier of the panel's intention to reject Thompson's suggestion, *id.*, at 1067–1068, which itself had circulated to every active judge of the court on August 5, 1996.

The panel stayed the issuance of its mandate pending Thompson's petition to this Court for certiorari review. We denied Thompson's petition on June 2, 1997. 520 U. S. 1259. The Court of Appeals issued its mandate on June 11, 1997. According to the en banc majority, "[a] sua sponte request to consider en banc whether to recall the mandate was made shortly thereafter, even before the mandate was spread in the district court." 120 F. 3d, at 1049. "[I]n the interests of comity," however, the court delayed further action until the California Supreme Court had denied Thompson's fourth state petition for habeas relief. *Ibid.* It was not until August 3, 1997—two days before Thompson was scheduled to be executed—that the Ninth Circuit voted to recall its mandate.

Measured even by standards of general application, the Court of Appeals' decision to recall the mandate rests on the most doubtful of grounds. A mishandled law clerk transition in one judge's chambers, and the failure of another judge to notice the action proposed by the original panel, constitute the slightest of bases for setting aside the "deep rooted policy in favor of the repose of judgments." *Hazel-Atlas Glass Co.*, *supra*, at 244. This is especially true where the only consequence of the oversights was the failure of two judges to contribute their views to a determination that had been given full consideration on the merits by a panel of the court.

Even if the Ninth Circuit's en banc process did somehow malfunction—which is itself open to question, see 120 F. 3d, at 1067 (Kozinski, J., dissenting) ("[T]he process operated just as it's supposed to")—the court only compounded its error when it delayed further action for more than four months after the alleged misunderstandings took place. The promptness with which a court acts to correct its mistakes is evidence of the adequacy of its grounds for reopening the case. In this case, the two judges first revealed their oversights to the full court in March 1997. At that point the two judges remained free to "request that the [full] court vote to suspend" its time limits for voting to rehear the case en banc. See Ninth Circuit General Orders 11.11, at 83. They chose not to do so, instead waiting another four months to make what was, in effect, an identical request. The Court of Appeals for all practical purposes lay in wait while this Court acted on the petition for certiorari, the State scheduled a firm execution date for Thompson, and the Governor conducted an exhaustive clemency review. Then, only two days before Thompson was scheduled to be executed, the court came forward to recall the judgment on which the State, not to mention this Court, had placed heavy reliance.

It is no answer for the Court of Appeals to assert it delayed action in the interests of comity. Comity is not limited to the judicial branch of a state government. In this case, the executive branch of California's government took extensive action in reliance on the mandate denying relief to Thompson. Rather than focus only on the California Supreme Court's interest in considering Thompson's fourth (and, as could be predicted, meritless) state habeas petition, the Court of Appeals should have considered as well the more vital interests of California's executive branch.

It would be the rarest of cases where the negligence of two judges in expressing their views is sufficient grounds to frustrate the interests of a State of some 32 million persons in enforcing a final judgment in its favor. Even if this were

a case implicating no more than ordinary concerns of finality, we would have grave doubts about the actions taken by the Court of Appeals.

III

Thompson's is not an ordinary case, however, because he seeks relief from a criminal judgment entered in state court. To decide whether the Court of Appeals' order recalling the mandate was proper in these circumstances, we measure it not only against standards of general application, but also against the statutory and jurisprudential limits applicable in habeas corpus cases.

A

California argues the Court of Appeals' recall of its mandate was barred by 28 U. S. C. § 2244(b) (1994 ed., Supp. II) as amended by AEDPA. Section 2244(b)(1) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Subsection 2244(b)(2) provides: "A claim presented in a second or successive application under section 2254 that was not presented in a prior application shall be dismissed" unless a narrow exception applies. The immediate question is whether the Court of Appeals recalled its mandate on the basis of a "second or successive application" for habeas relief.

In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply).

As a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's "application." This carries implications for cases where a motion to recall the mandate is pending, but the court instead recalls the mandate on its own initiative. Whether these cases are subject to § 2244(b) depends on the underlying basis of the court's action. If, in recalling the mandate, the court considers new claims or evidence presented in a successive application for habeas relief, it is proper to regard the court's action as based on that application. In these cases, § 2244(b)(2) applies irrespective of whether the court characterizes the action as *sua sponte.*

In Thompson's case, however, the Court of Appeals was specific in reciting that it acted on the exclusive basis of Thompson's first federal habeas petition. The court's characterization of its action as *sua sponte* does not, of course, prove this point; had the court considered claims or evidence presented in Thompson's later filings, its action would have been based on a successive application, and so would be subject to § 2244(b). But in Thompson's case the court's recitation that it acted on the exclusive basis of his first federal petition is not disproved by consideration of matters presented in a later filing. Thus we deem the court to have acted on his first application rather than a successive one. As a result, the court's order recalling its mandate did not contravene the letter of AEDPA.

Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of the statute. In a habeas case, moreover, the court must be guided by the general principles underlying our habeas corpus jurisprudence. We now consider those principles as applied to this case.

B

In light of "the profound societal costs that attend the exercise of habeas jurisdiction," *Smith* v. *Murray,* 477 U. S. 527, 539 (1986), we have found it necessary to impose signifi-

cant limits on the discretion of federal courts to grant habeas relief. See, *e. g.*, *McCleskey* v. *Zant*, 499 U. S. 467, 487 (1991) (limiting "a district court's discretion to entertain abusive petitions"); *Wainwright* v. *Sykes*, 433 U. S. 72, 90–91 (1977) (limiting courts' discretion to entertain procedurally defaulted claims); *Teague* v. *Lane*, 489 U. S. 288, 308–310 (1989) (plurality opinion of O'Connor, J.) (limiting courts' discretion to give retroactive application to "new rules" in habeas cases); *Brecht* v. *Abrahamson*, 507 U. S. 619, 637–638 (1993) (limiting courts' discretion to grant habeas relief on the basis of "trial error").

These limits reflect our enduring respect for "the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.*, at 635; accord, *Wood* v. *Bartholomew*, 516 U. S. 1, 8 (1995) *(per curiam); Sawyer* v. *Whitley*, 505 U. S. 333, 338 (1992); *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 7 (1992); *McCleskey*, *supra*, at 491–492; *Teague*, *supra*, at 309; *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986); *Engle* v. *Isaac*, 456 U. S. 107, 127 (1982). Finality is essential to both the retributive and the deterrent functions of criminal law. "Neither innocence nor just punishment can be vindicated until the final judgment is known." *McCleskey*, *supra*, at 491. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague*, *supra*, at 309.

Finality also enhances the quality of judging. There is perhaps "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 451 (1963).

Finality serves as well to preserve the federal balance. Federal habeas review of state convictions frustrates " 'both the States' sovereign power to punish offenders and their

good-faith attempts to honor constitutional rights.'" *Murray* v. *Carrier*, *supra*, at 487 (quoting *Engle*, *supra*, at 128). "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *McCleskey*, 499 U. S., at 491.

A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years "the significant costs of federal habeas review," *id.*, at 490–491, the State is entitled to the assurance of finality. When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. See generally *Payne* v. *Tennessee*, 501 U. S. 808 (1991). To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," *Herrera* v. *Collins*, 506 U. S. 390, 421 (1993) (O'Connor, J., concurring), an interest shared by the State and the victims of crime alike.

This case well illustrates the extraordinary costs associated with a federal court of appeals' recall of its mandate denying federal habeas relief. By July 31, 1997, to vindicate the laws enacted by the legislature of the State of California, a jury had convicted Thompson of rape and murder and recommended that he be executed; the trial judge had imposed a sentence of death; the California Supreme Court had affirmed Thompson's sentence and on four occasions refused to disturb it on collateral attack; and, in a comprehensive and public decision, the Governor had determined the sentence was just. Relying upon the mandate denying habeas relief to Thompson, the State of California had invoked its entire legal and moral authority in support of executing its judg-

ment. Yet, after almost 13 years of state and federal review of Thompson's conviction and sentence, almost one year after Thompson filed his petition for rehearing and suggestion for rehearing en banc, a full 53 days after issuance of the mandate denying relief, and a mere two days before Thompson was scheduled to be executed, the Ninth Circuit recalled its mandate and granted the writ of habeas corpus. The costs imposed by these actions are as severe as any that can be imposed in federal habeas review.

We should be clear about the circumstances we address in this case. We deal not with the recall of a mandate to correct mere clerical errors in the judgment itself, similar to those described in Federal Rule of Criminal Procedure 36 or Federal Rule of Civil Procedure 60(a). The State can have little interest, based on reliance or other grounds, in preserving a mandate not in accordance with the actual decision rendered by the court. This also is not a case of fraud upon the court, calling into question the very legitimacy of the judgment. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944). Nor is this a case where the mandate is stayed under Federal Rule of Appellate Procedure 41 pending the court's disposition of a suggestion for rehearing en banc.

Rather, we are concerned with cases where, as here, a court of appeals recalls its mandate to revisit the merits of its earlier decision denying habeas relief. In these cases, the State's interests in finality are all but paramount, without regard to whether the court of appeals predicates the recall on a procedural misunderstanding or some other irregularity occurring prior to its decision. The prisoner has already had extensive review of his claims in federal and state courts. In the absence of a strong showing of "actua[l] innocen[ce]," *Murray* v. *Carrier*, *supra*, at 496, the State's interests in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for review.

Based on these considerations, we hold the general rule to be that, where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence. The rule accommodates the need to allow courts to remedy actual injustice while recognizing that, at some point, the State must be allowed to exercise its "'sovereign power to punish offenders.'" *McCleskey*, *supra*, at 491 (quoting *Murray* v. *Carrier*, 477 U. S., at 487).

This standard comports with the values and purposes underlying AEDPA. Although AEDPA does not govern this case, see *supra*, at 554, its provisions "certainly inform our consideration" of whether the Court of Appeals abused its discretion. *Felker* v. *Turpin*, 518 U. S. 651, 663 (1996). Section 2244(b) of the statute is grounded in respect for the finality of criminal judgments. With the exception of claims based on new rules of constitutional law made retroactive by this Court, see § 2244(b)(2)(A), a federal court can consider a claim presented in a second or successive application only if the prisoner shows, among other things, that the facts underlying the claim establish his innocence by clear and convincing evidence. See § 2244(b)(2)(B). It is true that the miscarriage of justice standard we adopt today is somewhat more lenient than the standard in § 2244(b)(2)(B). See, *e. g.*, § 2244(b)(2)(B)(i) (factual predicate for claim must "not have been discover[able] previously through the exercise of due diligence"). The miscarriage of justice standard is altogether consistent, however, with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence. And, of course, the rules applicable in all cases where the court recalls its mandate, see *supra*, at 549–553, further ensure the practice is limited to the most rare and extraordinary case.

Like other standards applicable in habeas cases, moreover, the miscarriage of justice standard is objective in content, "[w]ell defined in the case law," and "familiar to federal courts." *McCleskey*, 499 U. S., at 496. It is indeed the standard the Ninth Circuit determined to apply in voting to consider en banc whether to recall the mandate in Thompson's case. See App. 194 (Order of July 30, 1997) ("The full court has voted to consider whether to recall the mandate to consider whether the panel decision of our court would result in a fundamental miscarriage of justice"). Hence the standard is not only a just but also "'a sound and workable means of channeling the discretion of federal habeas courts.'" *McCleskey*, *supra*, at 496 (quoting *Murray* v. *Carrier*, *supra*, at 497).

We now determine whether this standard was met in Thompson's case.

C

"[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence." *Sawyer*, 505 U. S., at 339. We have often emphasized "the narrow scope" of the exception. *Id.*, at 340; accord, *Harris* v. *Reed*, 489 U. S. 255, 271 (1989) (O'Connor, J., concurring) ("narrow exception" for the "'extraordinary case'"). "To be credible," a claim of actual innocence must be based on reliable evidence not presented at trial. *Schlup* v. *Delo*, 513 U. S. 298, 324 (1995). Given the rarity of such evidence, "in virtually every case, the allegation of actual innocence has been summarily rejected." *Ibid.* (internal quotation marks omitted).

Although demanding in all cases, the precise scope of the miscarriage of justice exception depends on the nature of the challenge brought by the habeas petitioner. If the petitioner asserts his actual innocence of the underlying crime, he must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" presented in his habeas petition. *Id.*, at 327. If, on the other hand, a capital petitioner challenges his death sentence

in particular, he must show "by clear and convincing evidence" that no reasonable juror would have found him eligible for the death penalty in light of the new evidence. *Sawyer*, *supra*, at 348.

The *Sawyer* standard has a broader application than is at first apparent. As the Court explained in *Schlup*, when a capital petitioner challenges his underlying capital murder conviction on the basis of an element that "function[s] essentially as a sentence enhancer," the *Sawyer* "clear and convincing" standard applies to the claim. *Schlup*, *supra*, at 326. Thus, to the extent a capital petitioner claims he did not kill the victim, the *Schlup* "more likely than not" standard applies. To the extent a capital petitioner contests the special circumstances rendering him eligible for the death penalty, the *Sawyer* "clear and convincing" standard applies, irrespective of whether the special circumstances are elements of the offense of capital murder or, as here, mere sentencing enhancers.

A claim like Thompson's could present some difficulty concerning whether to apply *Schlup* or *Sawyer*. Thompson makes no appreciable effort to assert his innocence of Fleischli's murder. Instead, he challenges, first, his rape conviction, and second, the jury's finding of the special circumstance of rape. The former challenge is subject to the *Schlup* "more likely than not" standard; the latter challenge is subject to the *Sawyer* "clear and convincing" standard. In theory, then, it would be possible to vacate Thompson's stand-alone conviction of rape but to let stand his conviction of murder and sentence of death. This anomaly perhaps reflects some tension between *Sawyer* and the later decided *Schlup*. The anomaly need not detain us, however, for Thompson's claims fail under either standard.

At trial, the prosecution presented ample evidence to show Thompson committed the rape. A vaginal swab of Fleischli's body revealed semen consistent with Thompson's blood type. App. 109. In addition, there was extensive evidence

of restraint consistent with rape. Dr. Robert Richards, a pathologist who performed the autopsy on Fleischli and testified for the prosecution at trial, stated that, at or near the time of death, Fleischli suffered a crushing injury to her right wrist with surrounding bruising. *Id.*, at 9. Deputy Darryl Coder, who in his 23 years as a law enforcement officer had seen "hundreds" of handcuff injuries, testified the injury to Fleischli's right wrist was consistent with injuries caused by handcuffs, a pair of which were in Thompson's possession when he was arrested in Mexico. *Id.*, at 13, n. 9. Dr. Richards further testified that Fleischli had other bruises on her ankles, palms, left elbow, and left wrist, all of which were caused at or near the time of death. *Id.*, at 9, 10 Record 1619. Fleischli's shirt and bra had been cut down the middle and pulled down to her elbows, exposing her breasts and restraining her arms. App. 7, 109. Fleischli's mouth had been gagged with duct tape. 9 Record 1505, 11 *id.*, at 1772.

There was further evidence of rape. As Judge Kleinfeld noted in dissent, "Fleischli was murdered by Thompson, a fate more frequent among rape victims than friendly sex partners." 120 F. 3d, at 1073. Two jailhouse informants, though discredited to a substantial extent at trial, testified that Thompson had confessed the rape (as well as the murder) to them.

As the District Court observed, moreover, Thompson's own testimony "was devastating to his defense." App. 51. Contrary to the emphatic advice of trial counsel, Thompson chose to testify. The result was by all accounts a disaster for his claim that he did not rape or murder Fleischli. The prosecution got Thompson to admit he lied to police after his arrest, when he denied having sex with Fleischli. He also admitted having lied to police about Fleischli's whereabouts the night of the murder, telling them she had left his apartment with Kashani. When asked about this lie, Thompson replied, "Mr. Kashani seemed as likely a candidate [as] any-

body at that time." 18 Record 2378. He then presented his most recent, and perhaps most fantastic, account of the events of the night of the murder. Thompson testified that, after having consensual sex with Fleischli, he fell asleep and remained asleep while, not more than six feet away, someone else stabbed Fleischli five times in the head, wrapped her head and body with duct tape, two towels, a sheet, her jacket, a sleeping bag, and a rope, moved her body from the apartment, and scrubbed the carpet to remove her blood. The District Court found Thompson's testimony "was riddled with inconsistencies and outright falsehoods." App. 51. The District Court further stated: "Thompson's testimony no doubt affected the jury's verdict." *Id.*, at 51. The point is beyond dispute; since Thompson lied about almost every other material aspect of the case, the jury had good reason to believe he lied about whether the sex was consensual.

Thompson presents little evidence to undermine the evidence presented at trial. The en banc court based its decision only on the claims and evidence presented in Thompson's first petition for federal habeas relief. Had it considered the additional evidence or claims presented in Thompson's motion to recall the mandate, of course, its decision would have been subject to § 2244(b). See *supra*, at 554. Hence the record of Thompson's first federal habeas petition will govern whether he has demonstrated actual innocence of rape.

The evidence in Thompson's petition falls into two categories. First, Thompson presented additional evidence to impeach the credibility of Fink and Del Frate, the jailhouse informants who testified Thompson confessed the rape and murder to them. In the case of Fink, Thompson presented additional evidence of Fink's history as an informant and of law enforcement favors for Fink. Thompson also presented statements by law enforcement officials to the effect that Fink was an unreliable witness. In the case of Del Frate, Thompson presented evidence that law enforcement officials

and certain members of Del Frate's family regarded Del Frate as dishonest, that Del Frate shared a jail cell with David Leitch prior to meeting Thompson, that Del Frate's statements to police tracked newspaper accounts of the crime, and that Del Frate neglected to mention at trial his prior convictions for grand theft and distribution of hallucinogens without a license.

This impeachment evidence provides no basis for finding a miscarriage of justice. As in *Sawyer*, the evidence is a step removed from evidence pertaining to the crime itself. 505 U. S., at 348. It tends only to impeach the credibility of Fink and Del Frate. To find that these matters in all probability would have altered the outcome of Thompson's trial, we should have to assume, first, that there was little evidence of rape apart from the informant's testimony; and second, that the jury accepted the informants' testimony without reservation. The former assumption is belied by the evidence recited above. The latter one is belied by the substantial impeachment evidence Thompson's attorney did introduce.

With regard to Fink, Thompson's trial counsel presented the following evidence: Fink had four prior felony convictions and had spent a total of 14 years in prison at the time of trial. He used heroin on a frequent basis during the 15 years preceding trial, including the period in which he gave his statement to police. He lied about his identity as a matter of routine. He acted as an informant on numerous other occasions, including one occasion where he informed on another inmate to gain protective custody in prison. He requested and received a transfer to another penal facility in exchange for his statement against Thompson. And he admitted being unable to explain why criminals confessed to him with such frequency.

With regard to Del Frate, Thompson's trial counsel presented the following evidence: Del Frate had served time for second-degree murder and credit card forgery. At the time

of trial, Del Frate faced felony charges in Ohio and California. Del Frate admitted claiming another murderer confessed to him during the period in which Thompson confessed to him. He also admitted changing his account of Thompson's confession to him numerous times. Given the trial evidence impeaching each informant, we would disrespect the jury in Thompson's case if we were to find that, had it been presented with still more impeachment evidence, it would have reached a different verdict.

In support of his first federal habeas petition, Thompson also presented the opinions of Dr. Irving Root, a pathologist who testified on Thompson's behalf during the evidentiary hearing in Federal District Court. Dr. Root disputed certain of the opinions offered by Dr. Richards and Deputy Coder at trial. First, Dr. Root disagreed with Deputy Coder's conclusion that the crushing injury to Fleischli's left wrist was caused by handcuffs. Dr. Root stated the injury was unlike handcuff injuries he had seen on other corpses. 1 Tr. 52–54, 62–63 (Aug. 5, 1997). He did not, however, offer any alternative explanation as to how the injury might have been caused. Second, Dr. Root disputed Dr. Richards' conclusions regarding the bruises on Fleischli's body. Dr. Root opined the bruises to Fleischli's ankles and left wrist were caused at least 11 hours before death. *Id.*, at 47–50. He further stated the bruises to Fleischli's palms were the result of lividity, *i. e.*, the settling of blood by gravity after death. *Id.*, at 48. Third, Dr. Root noted there had been "infrequent" sperm on the vaginal swab of Fleischli's body. *Id.*, at 63. Dr. Root suggested this finding could be the result of low sperm count for the male, or douching or drainage after intercourse. *Ibid.* He further suggested the other evidence in the case ruled out the possibility of drainage. *Id.*, at 63–64. He did not, however, opine as to whether low sperm count or douching was the more probable of the remaining possibilities. Finally, Dr. Root summarized his tes-

timony by agreeing "there was remarkably little in the way of trauma to the decedent's body." *Id.*, at 52.

Dr. Root's testimony provides no occasion for disturbing the findings of the jury in Thompson's case. His testimony that the crushing injury to Fleischli's wrist was not caused by handcuffs is far from compelling, given Deputy Coder's extensive experience with handcuff injuries (albeit with living persons) and Dr. Root's failure to offer any alternative explanation as to how the crushing injury might have occurred. His testimony that the other bruises to Fleischli's body were caused well before death is more plausible. Unlike Dr. Richards, however, Dr. Root based his conclusions not on his own examination of the body, but on his review of the record of Dr. Richards' examination. See *id.*, at 70. It is improbable, moreover, that Fleischli had been walking about with bruises all over her body, without any witness having noticed her condition in the days and hours before Thompson murdered her. As for the infrequent sperm on the vaginal swab, Dr. Root himself suggested the cause might have been low sperm count for the male, a possibility consistent with rape. *Id.*, at 63. Finally, Dr. Root's assessment of the overall trauma to the body was to a large extent consistent with Dr. Richards' testimony at trial. For instance, Dr. Richards testified there was no evidence of vaginal tearing or bruising in Fleischli's case, though he indicated (and Dr. Root did not dispute) there was no such evidence in the majority of rape cases. 10 Record 1629. As Dr. Root himself acknowledged, his conclusion that there was "remarkably little" trauma to Fleischli's body was lifted verbatim from Dr. Richards' own autopsy report in Fleischli's case. 1 Tr. 52 (Aug. 5, 1997).

To say that no reasonable juror would have convicted Thompson of rape if presented with Dr. Root's testimony, then, we would have to ignore the totality of evidence of Thompson's guilt. This we cannot do.

In conclusion, Thompson's evidence does not meet the "more likely than not" showing necessary to vacate his stand-alone conviction of rape, much less the "clear and convincing" showing necessary to vacate his sentence of death. The judgment of the State of California will not result in a miscarriage of justice. The Court of Appeals abused its discretion in holding the contrary.

IV

The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to reinstate the June 11, 1997, mandate denying habeas relief to Thompson.

It is so ordered.

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

Like the majority, I accept the representation of the Court of Appeals that it was acting *sua sponte* in its decision to recall its previous mandate on August 3, 1997, a position supported by the record. On July 28, 1997, the panel denied respondent's motion to recall the mandate, which was an effort to seek whatever advantage he might obtain from newly discovered evidence, and during the en banc rehearing ultimately granted the court considered nothing beyond the record presented in respondent's first *habeas corpus* proceeding.

Even on my assumption that the Court of Appeals acted on its own and in the interest of the integrity of its appellate process, however, the timing of its actions is a matter for regret. The court has indicated that it chose to initiate consideration of a recall *sua sponte* shortly after this Court denied certiorari to review the appeals court's first judgment on June 2, 1997, 109 F. 3d 1358 (CA9), cert. denied, 520 U. S. 1259 (1997), but chose to take no immediate action in the interest of comity as between the state and federal systems.

The Court of Appeals accordingly refrained from acting on the merits until after the state courts had adjudicated a fourth state postconviction claim, the Governor of California had undertaken a comprehensive review of the case and had denied clemency, and the State had scheduled respondent's execution. As a consequence, the concern for comity that motivated the court came to look like hope that a state decisionmaker would somehow obviate the federal court's need to advertise its own mistakes and take corrective action.

But as unfortunate as the Court of Appeals's timing may have been, that is not the ground on which the majority reverses the judgment entered on the en banc rehearing. In rejecting the conclusion of the en banc court, the Court applies a new and erroneous standard to review the recall of the mandate, and I respectfully dissent from its mistaken conclusion.

Like the majority, I begin with the longstanding view that a court's authority to recall a mandate in order to correct error is inherent in the judicial power, *ante*, at 549–550 (citing *Hawaii Housing Authority* v. *Midkiff*, 463 U. S. 1323, 1324 (1983) (REHNQUIST, J., in chambers); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 249–250 (1944)), and subject to review only for abuse of discretion, *ante*, at 549. Although we have had no occasion to discuss the abuse standard as applied to actions of a court of appeals as distinct from those of a trial court, there is no reason to suppose the criterion should be affected merely because it is an appellate court that has exercised the discretionary power to act in the first instance. It is true, of course, that the variety of subjects left to discretionary decision requires caution in synthesizing abuse of discretion cases. See Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 762–764 (1982); Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 Syracuse L. Rev. 635, 650–653 (1971). At the least, however, one can say that a high degree of deference to the court exercising discretionary authority is the

hallmark of such review. *General Electric Co.* v. *Joiner*, 522 U. S. 136, 143–147 (1997); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U. S. 639, 642 (1976) *(per curiam)*. Thus, in such a case as this one, deference may be accorded to any reasonable selection of factors as relevant to the exercise of a court's discretion (since the determination to recall is one for which criteria of decision have not become standardized), see *United States* v. *Criden*, 648 F. 2d 814, 818 (CA3 1981), and to the weighing of these factors in light of the particular facts, see *Lawson Prods., Inc.* v. *Avnet, Inc.*, 782 F. 2d 1429, 1437 (CA7 1986); 1 S. Childress & M. Davis, Federal Standards of Review § 4.21, p. 4–163 (2d ed. 1992) ("It could be said, then, that in run-of-the-mill discretionary calls, review applies differently by the context, facts, and factors, but that many times the actual level of deference boils down to one similar to that used for the clearly erroneous rule. As a general proposition, then, abuse of discretion deference is closer to a clear error test than to the jury review test of irrationality"); cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971) (explaining the standard of review under 5 U. S. C. § 706(2)(A), which requires agencies to make choices that are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"); *ibid.* ("To make th[e] finding [required under § 706(2)(A)] the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"). The obligation of deference is only underscored here by the fact that the reason for the recall was to consider an en banc rehearing, a matter of administration for the Courts of Appeals on which this Court has been careful to avoid intrusion, see *Western Pacific Railroad Case*, 345 U. S. 247, 259, and n. 19 (1953).

The factors underlying the action of the Court of Appeals in this case were wholly appropriate, the court's stated justi-

fication having been to exercise extreme care to counter the malfunction of its own procedural mechanisms where the result otherwise might well be a constitutionally erroneous imposition of the death penalty. Indeed, the only serious question raised about the validity of such considerations goes to the legitimacy of employing en banc rehearings to correct a panel's error in the application of settled law. See 120 F. 3d 1045, 1069–1070 (CA9 1997) (Kozinski, J., dissenting). But however true it is that the en banc rehearing process cannot effectively function to review every three-judge panel that arguably goes astray in a particular case, surely it is nonetheless reasonable to resort to en banc correction that may be necessary to avoid a constitutional error standing between a life sentence and an execution. It is, after all, axiomatic that this Court cannot devote itself to error correction, and yet in death cases the exercise of our discretionary review for just this purpose may be warranted. See *Kyles* v. *Whitley*, 514 U. S. 419, 422 (1995); *id.*, at 455 (STEVENS, J., concurring).

To be sure, there lurks in the background the faint specters of overuse and misuse of the recall power. All would agree that the power to recall a mandate must be reserved for "exceptional circumstances," 120 F. 3d, at 1048; 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3938, pp. 716–717, n. 14 (1996) (citing cases from the various Courts of Appeals recognizing that the power must be used sparingly), in the interests of stable adjudication and judicial administrative efficiency, on which growing caseloads place a growing premium. All would agree, too, that the *sua sponte* recall of mandates could not be condoned as a mechanism to frustrate the limitations on second and successive habeas petitions, see, *e. g.*, 28 U. S. C. § 2244(b).[1] If

[1] The Ninth Circuit itself seems to recognize that a motion to recall the mandate filed by a petitioner subsequent to a previous request for federal habeas relief is analogous to a second or successive petition that is sub-

there were reason to suppose that the *sua sponte* recall would be overused or abused in either respect, we might well see its use as unreasonable in a given case simply to deter resort to it in too many cases. But as matters stand, we have no reason for such fears and no reason to circumscribe the Court of Appeals's response to its otherwise legitimate concerns. If history should show us up as too optimistic, we will have every occasion to revisit the issue.

Going from the legitimacy of the Court of Appeals's concerns to the reasonableness of invoking them on the facts here, I need mention only two points. The first arises on the question whether administrative mistakes in the chambers of only two judges could be seen as causing what the court saw as the threatened miscarriage of justice in permitting the execution of someone who was ineligible for death; two failures to vote for en banc review are not the cause of a miscarriage when the vote against such review is otherwise unanimous. Such at least is the math. But anyone who has ever sat on a bench with other judges knows that judges are supposed to influence each other, and they do. One may see something the others did not see, and then they all take another look. So it was reasonable here for the en banc court to believe that when only two judges mistakenly failed to vote for en banc rehearing, their misunderstandings could well have affected the result.

The only remaining bar to the application of the appeals court's policies to the facts of this case is said to be that the en banc court was mistaken in thinking the panel had committed error when it reversed the trial court's conclusion that ineffective assistance of counsel in the rape case had been prejudicial within the meaning of *Strickland* v. *Washington*, 466 U. S. 668, 693–694 (1984). But whether the en banc majority was correct on this question of law and fact is

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ject to the constraints of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See, *e. g.*, *Nevius* v. *Sumner*, 105 F. 3d 453, 461 (CA9 1996).

not the issue here. The issue on abuse-of-discretion review is simply whether those voting to recall the mandate to allow en banc review could reasonably have thought the earlier panel had been mistaken, and the conclusions of the District Court suffice to answer yes to that question. See *Thompson* v. *Calderon*, Civ. No. 89–3630–RG (CD Cal., Mar. 29, 1995), reprinted at App. 14–16. The ultimate merit of either court's answer to the underlying question is not the touchstone of abuse-of-discretion review, see *National Hockey League*, 427 U. S., at 642 (under abuse-of-discretion review, the relevant question is not whether the reviewing court would have reached the same result), and here we review only for abuse, not the merits of the underlying case (the question whether prejudice should be found on the record of this case not warranting review).[2]

The majority, of course, adhere to the terminology of abuse of discretion in reversing the Ninth Circuit. But it is abuse of discretion "informed by" the 1996 amendments to the habeas corpus statute enacted by certain provisions of AEDPA, Pub. L. 104–132, 110 Stat. 1217, *ante*, at 558; see *Felker* v. *Turpin*, 518 U. S. 651 (1996), and as so informed the abuse-of-discretion standard is beyond recognition. That aside, the Court's reformulation is as unwarranted on the Court's own terms as it is by the terms of AEDPA.

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[2] Abuse-of-discretion review of the likelihood of a miscarriage of justice is analogous to the abuse-of-discretion review of Rule 11 sanctions for frivolous filings. In that context, we held that reviewing courts should defer to district courts' conclusions about substantial legal justification. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 401–405 (1990). In the present circumstances, where the subject of our review for an abuse of discretion is an appellate court's conclusion that a threatened miscarriage of justice is sufficient to justify recalling the mandate, I believe that we similarly must give some deference to the Court of Appeals's preliminary analysis that there may have been a misapplication of a legal standard, even though we would not defer to it if we were addressing the ultimate question on the merits, whether a trial court had committed legal error.

Why AEDPA is thought to counsel review of recalls of mandates under anything but the traditional abuse-of-discretion standard is unexplained by anything in the majority opinion. The majority, like me, accepts the Court of Appeals's position that it was not covertly allowing respondent to litigate a second habeas petition; the majority assumes that the Ninth Circuit was acting on its own motion to recall the mandate, in order to allow reconsideration of the first habeas petition. *Ante*, at 554. On these assumptions, AEDPA has no application to the issue before us. Nothing in AEDPA speaks to the courts of appeals' inherent power to recall a mandate, as such, and so long as the power over mandates is not abused to enable prisoners to litigate otherwise forbidden "second or successive" habeas petitions, see 28 U. S. C. § 2244(b), AEDPA is not violated.

Nor are the policies embodied in AEDPA served by today's novelty. Section 2244(b) provides that if a claim raised in a second or successive petition was presented in a prior application, it shall be dismissed. I suppose that if the claim under en banc review were to bear analogy to anything covered by AEDPA, it would be to the previously raised claim covered by subsection (b)(1), since the claim reviewed en banc was the actual claim previously reviewed by the panel. And yet the majority does not draw any such analogy and does not dismiss on this basis. Subsection (b)(2) provides that when a second or successive petition raises a claim not previously presented, it too shall be dismissed unless based on a new and retroactive rule of constitutional law, § 2244(b)(2)(A), or based on previously undiscoverable evidence that would show to a clear and convincing degree that no reasonable factfinder would have convicted, considering all the evidence, had it not been for constitutional error, § 2244(b)(2)(B). Here, again, the majority fails to draw any analogy, for if reconsideration of a claim after *sua sponte* recall were thought to resemble a claim mentioned in subsection (b)(2), the majority would presumably require more than

it does today. In fact, the majority goes no further than to call for a showing of actual innocence sufficient for relief under our earlier cases, *ante*, at 557; yet as the Court realizes, our standard dealing with innocence of an underlying offense requires no clear and convincing proof, *ante*, at 560, see *Schlup* v. *Delo*, 513 U. S. 298, 327 (1995), and the Court would be satisfied with a demonstration of innocence by evidence "not presented at trial," *ante*, at 559, even if it had been discovered, let alone discoverable but unknown, that far back.

Whatever policy the Court is pursuing, it is not the policy of AEDPA. Nor is any other justification apparent. In this particular case, when all else is said, we simply face a recall occasioned by some administrative inadvertence awkwardly corrected; while that appellate process may have left some unfortunate impressions, neither its want of finesse nor AEDPA warrant the majority's decision to jettison the flexible abuse-of-discretion standard for the sake of solving a systemic problem that does not exist.

Syllabus

CRAWFORD-EL *v.* BRITTON

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

No. 96–827. Argued December 1, 1997—Decided May 4, 1998

Petitioner is a litigious and outspoken prisoner in the District of Columbia's correctional system. Because of overcrowding at the District's prison, he was transferred, first to Washington State, then to facilities in several other locations, and ultimately to Florida. His belongings were transferred separately. When the District's Department of Corrections received his belongings from Washington State, respondent, a District correctional officer, had petitioner's brother-in-law pick them up, rather than shipping them directly to petitioner's next destination. Petitioner did not recover the belongings until several months after he reached Florida. He filed suit under 42 U. S. C. § 1983, alleging, *inter alia*, that respondent's diversion of his property was motivated by an intent to retaliate against him for exercising his First Amendment rights. The District Court dismissed the complaint. In remanding, the en banc Court of Appeals concluded, among other things, that in an unconstitutional-motive case, a plaintiff must establish motive by clear and convincing evidence, and that the reasoning in *Harlow* v. *Fitzgerald*, 457 U. S. 800, requires special procedures to protect defendants from the costs of litigation.

Held: The Court of Appeals erred in fashioning a heightened burden of proof for unconstitutional-motive cases against public officials. Pp. 584–601.

(a) That court adopted a clear and convincing evidence requirement to deal with a potentially serious problem: because an official's state of mind is easy to allege and hard to disprove, insubstantial claims turning on improper intent may be less amenable to summary disposition than other types of claims against government officials. The standard was intended to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties. Pp. 584–586.

(b) *Harlow*'s holding does not support the imposition of a heightened proof standard for a plaintiff's affirmative case. In *Harlow*, the Court found that the President's senior aides and advisers were protected by a qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. The Court announced a single objective standard for judging that defense, shielding officials from "lia-

bility for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," 457 U. S., at 818, and eliminated the subjective standard, put forth in *Wood* v. *Strickland*, 420 U. S. 308, that "bare allegations of malice" could rebut the defense, 457 U. S., at 817–818. However, evidence concerning the defendant's subjective intent, although irrelevant to the qualified immunity defense, may be an essential component of the plaintiff's affirmative case. Since *Harlow*'s holding related only to the scope of the affirmative defense, it provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation. Pp. 586–589.

(c) One reason implicit in *Harlow*'s holding—fairness to the public official—provides no justification for special burdens on plaintiffs who allege unlawful motive. Two other reasons underlying *Harlow*'s holding—that the strong public interest in protecting officials from the costs of damages actions is best served by a defense permitting insubstantial lawsuits to be quickly terminated, and that allegations of subjective motivation might have been used to shield baseless suits from summary judgment—would provide support for the type of procedural rule adopted by the Court of Appeals here. However, countervailing concerns indicate that the balance struck in the context of defining an affirmative defense is not appropriate when evaluating the elements of the plaintiff's cause of action. Initially, there is an important distinction between the bare allegations of malice that would have provided the basis for rebutting a qualified immunity defense in *Wood* and the more specific allegations of intent that are essential elements of certain constitutional claims. In the latter instance, for example, the primary emphasis is on an intent to disadvantage all members of a class that includes the plaintiff or to deter public comment on a specific issue of public importance, not on any possible animus directed at the plaintiff. Moreover, existing law already prevents this more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial. Summary judgment may be available if there is doubt as to the illegality of the defendant's particular conduct; and, at least with certain claims, there must be evidence of causation as well as proof of an improper motive. Unlike the subjective component of the immunity defense eliminated by *Harlow*, the improper intent element of various causes of action should not ordinarily preclude summary disposition of insubstantial claims. Pp. 590–594.

(d) Without precedential grounding, changing the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority. Neither the text of § 1983 or any other federal statute nor the Federal Rules of Civil Procedure provide any support

for imposing a clear and convincing burden of proof. The Court of Appeals' unprecedented change lacks any common-law pedigree and alters the cause of action in a way that undermines § 1983's very purpose—to provide a remedy for the violation of federal rights. This Court has consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. See, *e. g.*, *Gomez* v. *Toledo*, 446 U. S. 635, 639–640. To the extent that the Court of Appeals was concerned with preventing discovery, such questions are most frequently and effectively resolved by the rulemaking or legislative process. Moreover, the court's indirect effort to regulate discovery employs a blunt instrument with a high cost that also imposes a heightened standard of proof at trial upon plaintiffs with bona fide constitutional claims. Congress has already fashioned special rules to discourage inmates' insubstantial suits in the Prison Litigation Reform Act, which draws no distinction between constitutional claims that require proof of an improper motive and those that do not. If there is a compelling need to frame new rules based on such a distinction, presumably Congress would have done so or will respond to it in future legislation. Pp. 594–597.

(e) Existing procedures are available to federal trial judges for use in handling claims that involve examination of an official's state of mind. Pp. 597–601.

93 F. 3d 813, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 601. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 601. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 611.

Daniel M. Schember argued the cause and filed briefs for petitioner.

Walter A. Smith, Jr., Special Deputy Corporation Counsel of the District of Columbia, argued the cause for respondent. With him on the brief were *John M. Ferren*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel.

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Acting Solicitor General Waxman*, *Assistant Attorney General*

Hunger, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Preston*, *Irving L. Gornstein*, *Barbara L. Herwig*, and *Robert Loeb*.*

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner, a long-time prison inmate, seeks damages from a corrections officer based on a constitutional claim that requires proof of improper motive. The broad question presented is whether the courts of appeals may craft special procedural rules for such cases to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties. The more specific question is whether, at least in cases brought by prisoners, the

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*Briefs of *amici curiae* urging affirmance were filed for the State of Missouri et al. by *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *John R. Munich*, Deputy Attorney General, and *Alana M. Barrágan-Scott* and *Gretchen E. Rowan*, Assistant Attorneys General, *Charles H. Troutman*, Acting Attorney General of Guam, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Chris Gorman* of Kentucky, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Mark W. Barnett* of South Dakota, *Dan Morales* of Texas, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Richard Cullen* of Virginia, *Julio A. Brady* of the Virgin Islands, *Darrell V. McGraw, Jr.*, of West Virginia, and *James E. Doyle* of Wisconsin; for the American Civil Liberties Union et al. by *Arthur B. Spitzer* and *Steven R. Shapiro;* and for J. Michael Quinlan et al. by *Michael L. Martinez.*

Daniel H. Bromberg and *Paul Michael Pohl* filed a brief for William G. Moore, Jr., as *amicus curiae.*

plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment.

I

Petitioner is serving a life sentence in the District of Columbia's correctional system. During his confinement he has filed several lawsuits and has assisted other prisoners with their cases. He has also provided interviews to reporters who have written news stories about prison conditions. He is a litigious and outspoken prisoner.

The events that gave rise to this case occurred in 1988 and 1989. Because of overcrowding in the District of Columbia prison in Lorton, Virginia, petitioner and other inmates were transferred to the county jail in Spokane, Washington. Thereafter, he was moved, first to a Washington State prison, later to a facility in Cameron, Missouri, next back to Lorton, then to Petersburg, Virginia, and ultimately to the federal prison in Marianna, Florida. Three boxes containing his personal belongings, including legal materials, were transferred separately. When the District of Columbia Department of Corrections received the boxes from the Washington State facility, respondent, a District correctional officer, asked petitioner's brother-in-law to pick them up rather than sending them directly to petitioner's next destination. The boxes were ultimately shipped to Marianna by petitioner's mother, at petitioner's expense, but he was initially denied permission to receive them because they had been sent outside official prison channels. He finally recovered the property several months after his arrival in Florida.

Petitioner contends that respondent deliberately misdirected the boxes to punish him for exercising his First Amendment rights and to deter similar conduct in the future. Beyond generalized allegations of respondent's hostility, he alleges specific incidents in which his protected speech had

provoked her.[1] His claimed injury caused by the delay in receiving his boxes includes the costs of having the boxes shipped and purchasing new clothes and other items in the interim, as well as mental and emotional distress. Respondent denies any retaliatory motive and asserts that she entrusted the property to petitioner's brother-in-law, who was also a District of Columbia corrections employee, in order to ensure its prompt and safe delivery.

Although the factual dispute is relatively simple, it engendered litigation that has been both protracted and complex. We shall briefly describe the proceedings that led to the en banc Court of Appeals decision that we are reviewing, and then summarize that decision.

The Early Proceedings

Petitioner filed suit against respondent and the District of Columbia seeking damages under Rev. Stat. § 1979, 42 U. S. C. § 1983.[2] The principal theory advanced in his origi-

[1] In 1986, petitioner had invited a Washington Post reporter to visit the Lorton prison and obtained a visitor application for the reporter, which resulted in a front-page article on the prison's overcrowding "crisis." Respondent had approved the visitor application, which did not disclose the visitor's affiliation with the newspaper; she allegedly accused petitioner of tricking her and threatened to make life "as hard for him as possible." App. to Pet. for Cert. 178a. Petitioner also alleges that when he had complained in 1988 about invasions of privacy, respondent told him, "You're a prisoner, you don't have any rights." *Id.*, at 179a. Later in 1988, after another front-page Washington Post article quoted petitioner as saying that litigious prisoners had been "handpicked" for transfer to Spokane "so our lawsuits will be dismissed on procedural grounds," respondent allegedly referred to him as a "legal troublemaker." *Id.*, at 180a–181a.

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

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

nal complaint was that respondent had diverted the boxes containing his legal materials in order to interfere with his constitutional right of access to the courts.

Prior to discovery, respondent, relying in part on a qualified immunity defense, moved for dismissal of the complaint or summary judgment. The motion was denied and respondent appealed, arguing, first, that the complaint did not allege a violation of any constitutional right that was clearly established at the time of her acts; and, second, that the complaint "failed to satisfy the 'heightened pleading standard' that this circuit applies to damage actions against government officials." 951 F. 2d 1314, 1316 (CADC 1991).

The Court of Appeals agreed with petitioner that his constitutional right of access to the courts was well established in 1989, and that his allegations of wrongful intent were sufficiently detailed and specific to withstand a motion to dismiss even under the Circuit's "heightened pleading standard." *Id.*, at 1318, 1321. The court concluded, however, that the allegations of actual injury to his ability to litigate were insufficient under that standard; accordingly, the complaint should have been dismissed. *Id.*, at 1321–1322. Because the contours of the pleading standard had been clarified in a decision announced while the case was on appeal, see *Hunter* v. *District of Columbia*, 943 F. 2d 69 (CADC 1991), the court concluded that petitioner should be allowed to replead.

On remand, petitioner filed an amended complaint adding more detail to support his access claim and also adding two new claims: a due process claim and the claim that respondent's alleged diversion of his property was motivated by an

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shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Only the claim against respondent is before us. The Court of Appeals did not consider whether petitioner's amended complaint stated a cause of action against the District.

intent to retaliate against him for exercising his First Amendment rights. The District Court dismissed the amended complaint because the court access claim and the due process claim were legally insufficient, and because the First Amendment retaliation claim did not allege "direct evidence of unconstitutional motive." 844 F. Supp. 795, 802 (DC 1994). The dismissal was, in effect, mandated by prior decisions of the Court of Appeals holding that allegations of circumstantial evidence of such a motivation were insufficient to withstand a motion to dismiss. See *Martin* v. *D. C. Metropolitan Police Department*, 812 F. 2d 1425, 1435 (1987); *Siegert* v. *Gilley*, 895 F. 2d 797, 800–802 (1990), aff'd on other grounds, 500 U. S. 226 (1991).

The En Banc Proceeding

A panel of the Court of Appeals affirmed the dismissal of the first two claims but suggested that the entire court should review the dismissal of the First Amendment retaliation claim. Accordingly, the en banc court ordered the parties to file briefs addressing five specific questions, two of which concerned the power of the Circuit to supplement the Federal Rules of Civil Procedure with special pleading requirements for plaintiffs bringing civil rights claims against government officials,[3] and two of which concerned possible special grounds for granting defense motions for summary judgment in cases "where the unlawfulness depends on the

[3] The first two questions asked:

"1. In cases where plaintiffs bring civil rights claims against Government officials who assert qualified immunity, may this circuit supplement the Federal Rules of Civil Procedure by requiring plaintiffs to satisfy a heightened pleading requirement in their complaint or face dismissal prior to discovery? If so, should it be done?

"2. May this circuit require that plaintiffs who allege that Government officials acted with unconstitutional intent plead direct, as opposed to circumstantial evidence of that intent? If so, should it be done?" App. to Pet. for Cert. 108a.

actor's unconstitutional motive."[4] The fifth was a catchall question that asked the parties whether there are "any alternative devices which protect defendants with qualified immunity, in cases of constitutional tort depending on the defendant's motive or intent, from the costs of litigation?" App. to Pet. for Cert. 109a.

The en banc court responded to these questions in five separate opinions. A majority of the judges appear to have agreed on these four propositions: (1) the case should be remanded to the District Court for further proceedings; (2) the plaintiff does not have to satisfy any heightened pleading requirement, and may rely on circumstantial as well as direct evidence;[5] (3) in order to prevail in an unconstitutional-motive case, the plaintiff must establish that motive by clear and convincing evidence; and (4) special procedures to protect defendants from the costs of litigation in

[4] The questions regarding summary judgment asked:

"3. In claims of constitutional tort where the unlawfulness depends on the actor's unconstitutional motive and the defendant enjoys qualified immunity, should the court grant a defense motion for summary judgment, made before plaintiff has conducted discovery, if the plaintiff has failed to adduce evidence from which the fact finder could reasonably infer the illicit motive? *See Harlow* v. *Fitzgerald*, 457 U. S. 800, 815–18 (1982); *Elliott* v. *Thomas*, 937 F. 2d 338, 345–46 (7th Cir. 1991)?

"4. In claims of constitutional tort where the unlawfulness depends on the actor's unconstitutional motive and the defendant enjoys qualified immunity, are there any circumstances, apart from national security issues of the sort at stake in *Halperin* v. *Kissinger*, 807 F. 2d 180, 184–85 (D. C. Cir. 1986), where the court should grant a defense motion for summary judgment on a showing by the defendant such that a reasonable jury would necessarily conclude that the defendant's stated motivation 'would have been reasonable'? *Id.* at 188; *see also id.* at 189 (summary judgment warranted where no reasonable jury could find that 'it was objectively unreasonable for the defendants' to be acting for stated, innocent motives)." *Id.*, at 108a–109a.

[5] On this point, the court disavowed its prior direct-evidence rule of *Martin* v. *D. C. Metropolitan Police Department*, 812 F. 2d 1425, 1435 (CADC 1987), and *Siegert* v. *Gilley*, 895 F. 2d 797, 800–802 (CADC 1990), aff'd on other grounds, 500 U. S. 226 (1991).

unconstitutional-motive cases are required by the reasoning in this Court's opinion in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

The primary opinion, written by Judge Williams, announced two principal conclusions: "First, we think *Harlow* allows an official to get summary judgment resolution of the qualified immunity issue, including the question of the official's state of mind, *before* the plaintiff has engaged in discovery on that issue. Second, we believe that unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." 93 F. 3d 813, 815 (CADC 1996).

Judge Silberman criticized Judge Williams' approach as confusing, *id.*, at 833, and suggested that *Harlow*'s reasoning pointed to a "more straightforward solution," 93 F. 3d, at 834. In his opinion, whenever a defendant asserts a legitimate motive for his or her action, only an objective inquiry into pretextuality should be allowed. "If the facts establish that the purported motivation would have been reasonable, the defendant is entitled to qualified immunity." *Ibid.*

Judge Ginsburg agreed with the decision to impose a clear and convincing standard of proof on the unconstitutional motive issue, but he could not accept Judge Williams' new requirement that the District Court must "grant summary judgment prior to discovery unless the plaintiff already has in hand" sufficient evidence to satisfy that standard. *Id.*, at 839. He described that innovation as "a rather bold intrusion into the district court's management of the fact-finding process" that would result in the defeat of meritorious claims and "invite an increase in the number of constitutional torts that are committed." *Ibid.* He would allow limited discovery on a proper showing before ruling on a summary judgment motion, but noted that in cases involving qualified immunity it would be an abuse of discretion for the trial judge to fail to consider, not only the interests of the parties, "but

also the social costs associated with discovery had against a government official." *Id.*, at 840. With reference to the case at hand, he expressed the view that if petitioner could not show that discovery might reveal more than already appeared in the record, summary judgment would be appropriate without any discovery. *Id.*, at 841–844.

Judge Henderson "fully" endorsed the plurality's new clear and convincing evidence standard, but thought that it was a mistake for her colleagues to hear this case en banc because the record already made it abundantly clear that petitioner's claim had no merit. *Id.*, at 844–845.

Chief Judge Edwards, joined by four other judges, criticized the majority for "'crossing the line between adjudication and legislation.'" *Id.*, at 847 (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 535 (1947)). He expressed the view that the new evidentiary standards were unauthorized by statute or precedent and "would make it all but certain that an entire category of constitutional tort claims against government officials—whether or not meritorious—would *never* be able to survive a defendant's assertion of qualified immunity." 93 F. 3d, at 847.

The different views expressed in those five opinions attest to the importance of both the underlying issue and a correct understanding of the relationship between our holding in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), and the plaintiff's burden when his or her entitlement to relief depends on proof of an improper motive. Despite the relative unimportance of the facts of this particular case, we therefore decided to grant certiorari. 520 U. S. 1273 (1997).

II

The Court of Appeals' requirement of clear and convincing evidence of improper motive is that court's latest effort to address a potentially serious problem: Because an official's

state of mind is "easy to allege and hard to disprove," insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials. 93 F. 3d, at 816, 821. This category of claims therefore implicates obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages. The other Courts of Appeals have also grappled with this problem, but none has adopted a heightened burden of proof. See *id.*, at 851–852, n. 7 (Edwards, C. J., concurring in judgment) (citing cases).

The new rule established in this case is not limited to suits by prisoners against local officials, but applies to all classes of plaintiffs bringing damages actions against any government official, whether federal, state, or local. See *Butz* v. *Economou*, 438 U. S. 478, 500–504 (1978). The heightened burden of proof applies, moreover, to the wide array of different federal law claims for which an official's motive is a necessary element, such as claims of race and gender discrimination in violation of the Equal Protection Clause,[6] cruel and unusual punishment in violation of the Eighth Amendment,[7] and termination of employment based on political affiliation in violation of the First Amendment,[8] as well as retaliation for the exercise of free speech or other constitutional rights.[9] A bare majority of the Court of Appeals regarded this sweeping rule as a necessary corollary to our opinion in *Harlow.*

There is, of course, an important difference between the holding in a case and the reasoning that supports that holding. We shall, therefore, begin by explaining why our hold-

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[6] *Washington* v. *Davis*, 426 U. S. 229, 239–248 (1976) (race); *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 274 (1979) (gender).

[7] *Farmer* v. *Brennan*, 511 U. S. 825, 835–840 (1994).

[8] *Branti* v. *Finkel*, 445 U. S. 507, 513–517 (1980).

[9] *E. g., Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 574 (1968).

ing in *Harlow* does not resolve the issue presented in this case—indeed, it does not even address any question concerning the plaintiff's affirmative case. We shall then consider whether the reasoning in that opinion nevertheless supports the conclusion reached by the Court of Appeals.

Harlow's Specific Holding

In 1968, A. Ernest Fitzgerald testified before a congressional subcommittee about technical difficulties and excessive costs incurred in the development of a new transport plane. His testimony was widely reported and evidently embarrassed his superiors in the Department of Defense. In 1970, his job as a management analyst with the Department of the Air Force was eliminated in a "departmental reorganization and reduction in force." *Nixon* v. *Fitzgerald*, 457 U. S. 731, 733 (1982). After the conclusion of extended proceedings before the Civil Service Commission in 1973, Fitzgerald filed suit against the President of the United States and some of his aides alleging that they had eliminated his job in retaliation for his testimony. He sought damages on both statutory grounds and "in a direct action under the Constitution." *Id.*, at 748. When his charges were reviewed in this Court, we considered the defendants' claims to immunity in two separate opinions. In *Nixon* v. *Fitzgerald*, we held that a former President is entitled to absolute immunity from damages liability predicated on conduct within the scope of his official duties. *Id.*, at 749. In *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), we held that the senior aides and advisers of the President were not entitled to absolute immunity, *id.*, at 808–813, but instead were protected by a "qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial." *Id.*, at 813.

Our definition of that qualified immunity standard was informed by three propositions that had been established by earlier cases. First, in *Gomez* v. *Toledo*, 446 U. S. 635, 639–

641 (1980), we held that qualified immunity is an affirmative defense and that "the burden of pleading it rests with the defendant." Second, in *Butz* v. *Economou*, 438 U. S., at 503–504, we determined that the scope of that defense was the same in actions against state officials under 42 U. S. C. § 1983 and in actions against federal officials under the Federal Constitution, and that in both types of actions the courts are "competent to determine the appropriate level of immunity." Third, in *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), we presumed that the defense protects all officers in the executive branch of government performing discretionary functions, *id.*, at 245–248, but held that the presumption was rebuttable, *id.*, at 249–250.

The actual scope of the defense had been the subject of debate within the Court in *Wood* v. *Strickland*, 420 U. S. 308 (1975), a case involving a constitutional claim against the members of a school board. A bare majority in that case concluded that the plaintiff could overcome the defense of qualified immunity in two different ways, either if (1) the defendant "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected," or (2) "he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." *Id.*, at 322. In dissent, Justice Powell argued that the majority's standard was too demanding of public officials, but his proposed standard, like the majority's, included both an objective and a subjective component. In his view, our opinion in *Scheuer* had established this standard: "whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted *reasonably and in good faith.*" 420 U. S., at 330 (emphasis added).

In *Harlow*, the Court reached a consensus on the proper formulation of the standard for judging the defense of quali-

fied immunity. Speaking for the Court, Justice Powell announced a single objective standard:

> "Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U. S., at 817–818.

Under that standard, a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense.

Our holding that "bare allegations of malice" cannot overcome the qualified immunity defense did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation. It is obvious, of course, that bare allegations of malice would not suffice to establish a constitutional claim. It is equally clear that an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated. For example, A. Ernest Fitzgerald's constitutional claims against President Nixon and his aides were based on the theory that they had retaliated against him for speaking out on a matter of public concern.[10] Our consideration of the immunity issues in both the *Nixon*

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[10] The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right. *Pickering*, 391 U. S., at 574. Retaliation is thus akin to an "unconstitutional condition" demanded for the receipt of a government-provided benefit. See *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972).

case and in *Harlow* itself assumed that Fitzgerald would be entitled to prevail but for the immunity defenses.[11] Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation.

Nevertheless, the en banc court's ruling makes just such a change in the plaintiff's cause of action. The court's clear and convincing evidence requirement applies to the plaintiff's showing of improper intent (a pure issue of fact), not to the separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an "essentially legal question." *Mitchell* v. *Forsyth*, 472 U. S. 511, 526–529 (1985); see *Gomez*, 446 U. S., at 640 ("[T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action"). Indeed, the court's heightened proof standard logically should govern even if the official never asserts an immunity defense. See 93 F. 3d, at 815, 838. Such a rule is not required by the holding in *Harlow.*

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[11] See *Siegert* v. *Gilley,* 500 U. S. 226, 232 (1991) (observing that "the determination of whether the plaintiff has asserted a violation of a constitutional right at all" is a "necessary concomitant" to the threshold immunity question). Indeed, when JUSTICE GINSBURG was a judge on the District of Columbia Circuit, she commented:

"Had the Court [in *Harlow*] intended its formulation of the qualified immunity defense to foreclose *all* inquiry into the defendants' state of mind, the Court might have instructed the entry of judgment for defendants Harlow and Butterfield on the constitutional claim without further ado. In fact, the Court returned the case to the district court in an open-ended remand, a disposition hardly consistent with a firm intent to delete the state of mind inquiry from every constitutional tort calculus." *Martin*, 812 F. 2d, at 1432.

This correct understanding explains why *Harlow* does not support the change in the law advocated by THE CHIEF JUSTICE, *post*, at 602.

The Reasoning in Harlow

Two reasons that are explicit in our opinion in *Harlow*, together with a third that is implicit in the holding, amply justified *Harlow*'s reformulation of the qualified immunity defense. First, there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions.[12] That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated. Second, allegations of subjective motivation might have been used to shield baseless lawsuits from summary judgment. 457 U. S., at 817–818. The objective standard, in contrast, raises questions concerning the state of the law at the time of the challenged conduct—questions that normally can be resolved on summary judgment. Third, focusing on "the objective legal reasonableness of an official's acts," *id.*, at 819, avoids the unfairness of imposing liability on a defendant who "could not reasonably be expected to anticipate subsequent legal developments, nor . . . fairly be said to 'know' that the law forbade conduct not previously identified as unlawful," *id.*, at 818.[13] That unfairness may

[12] "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950)." *Harlow*, 457 U. S., at 814.

[13] Our opinion in *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), explicitly identified fairness as an important concern: "This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.*, at 239–240 (footnote omitted). Fairness alone is not, however, a sufficient reason for the immunity defense, and thus does not justify its extension to private parties. *Wyatt* v. *Cole*, 504 U. S. 158, 168 (1992).

be present even when the official conduct is motivated, in part, by hostility to the plaintiff.

This last rationale of fairness does not provide any justification for the imposition of special burdens on plaintiffs who allege misconduct that was plainly unlawful when it occurred. While there is obvious unfairness in imposing liability—indeed, even in compelling the defendant to bear the burdens of discovery and trial—for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the plaintiff. *Harlow* itself said as much: "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.*, at 818–819; see also *Butz*, 438 U. S., at 506 ("[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law . . .").

The first two reasons underlying our holding in *Harlow*, however, would provide support for a procedural rule that makes it harder for any plaintiff, especially one whose constitutional claim requires proof of an improper motive, to survive a motion for summary judgment. But there are countervailing concerns that must be considered before concluding that the balance struck in the context of defining an affirmative defense is also appropriate when evaluating the elements of the plaintiff's cause of action. In *Harlow*, we expressly noted the need for such a balance "between the evils inevitable in any available alternative." 457 U. S., at 813–814. We further emphasized: "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.*, at 814. Social costs that adequately justified the elimination of the subjective component of an affirmative defense do not necessarily justify serious limitations upon "the only realistic" remedy for the violation of constitutional guarantees.

There are several reasons why we believe that here, unlike *Harlow*, the proper balance does not justify a judicial revision of the law to bar claims that depend on proof of an official's motive. Initially, there is an important distinction between the "bare allegations of malice" that would have provided the basis for rebutting a qualified immunity defense under *Wood* v. *Strickland* and the allegations of intent that are essential elements of certain constitutional claims. Under *Wood*, the mere allegation of intent to cause any "other injury," not just a deprivation of constitutional rights, would have permitted an open-ended inquiry into subjective motivation. 420 U. S., at 322. When intent is an element of a constitutional violation, however, the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff, see, *e. g.*, *Washington* v. *Davis*, 426 U. S. 229, 239–248 (1976), or to deter public comment on a specific issue of public importance. Thus, in *Harlow*, hostility to the content of Fitzgerald's testimony, rather than an intent to cause him harm, was the relevant component of the constitutional claim. In this case, proof that respondent diverted the plaintiff's boxes because she hated him would not necessarily demonstrate that she was responding to his public comments about prison conditions, although under *Wood* such evidence might have rebutted the qualified immunity defense.

Moreover, existing law already prevents this more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial. The immunity standard in *Harlow* itself eliminates all motive-based claims in which the official's conduct did not violate clearly established law. Even when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech), the substantive legal doctrine on which the plaintiff relies may facilitate summary judgment in two different

ways. First, there may be doubt as to the illegality of the defendant's particular conduct (for instance, whether a plaintiff's speech was on a matter of public concern). See generally *Anderson* v. *Creighton*, 483 U. S. 635, 640–641 (1987). Second, at least with certain types of claims, proof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation. Accordingly, when a public employee shows that protected speech was a "motivating factor" in an adverse employment decision, the employer still prevails by showing that it would have reached the same decision in the absence of the protected conduct. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977). Furthermore, various procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element, as we explain in more detail in Part IV, *infra*.[14]

Thus, unlike the subjective component of the immunity defense eliminated by *Harlow*, the improper intent element of various causes of action should not ordinarily preclude summary disposition of insubstantial claims. The reasoning in *Harlow*, like its specific holding, does not justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved. And, *a fortiori*, the policy con-

[14] These various protections may not entirely foreclose discovery on the issue of motive, and the Court of Appeals adopted its heightened proof standard in large part to facilitate the resolution of summary judgment motions before any discovery at all. Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from *all* discovery. *Harlow* sought to protect officials from the costs of "broad-reaching" discovery, 457 U. S., at 818, and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity. *Anderson* v. *Creighton*, 483 U. S. 635, 646, n. 6 (1987); see also *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985).

cerns underlying *Harlow* do not support JUSTICE SCALIA's unprecedented proposal to immunize all officials whose conduct is "objectively valid," regardless of improper intent, see *post*, at 612 (dissenting opinion).

III

In fashioning a special rule for constitutional claims that require proof of improper intent, the judges of the Court of Appeals relied almost entirely on our opinion in *Harlow*, and on the specific policy concerns that we identified in that opinion. As we have explained, neither that case nor those concerns warrant the wholesale change in the law that they have espoused. Without such precedential grounding, for the courts of appeals or this Court to change the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority.

Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself. The same might be said of the qualified immunity defense; but in *Harlow*, as in the series of earlier cases concerning both the absolute and the qualified immunity defenses, we were engaged in a process of adjudication that we had consistently and repeatedly viewed as appropriate for judicial decision—a process "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976); see also *Butz*, 438 U. S., at 503–504; *Wyatt* v. *Cole*, 504 U. S. 158, 170–172 (1992) (KENNEDY, J., concurring).[15] The unprecedented change

[15] Though our opinion in *Harlow* was forthright in revising the immunity defense for policy reasons, see *Anderson*, 483 U. S., at 645, that decision nonetheless followed recent Court precedent and simply eliminated one aspect of the established doctrine; it did not create a new immunity standard out of whole cloth.

made by the Court of Appeals in this case, however, lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983—to provide a remedy for the violation of federal rights.[16]

In the past, we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense, *Gomez*, 446 U. S., at 639–640, or requiring pleadings of heightened specificity in cases alleging municipal liability, *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164–169 (1993). We also declined to craft an exception to settled rules of interlocutory appellate jurisdiction and rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency. *Johnson* v. *Jones*, 515 U. S. 304, 317–318 (1995). Our reasons for those unanimous rulings apply with equal force to the imposition of a clear and convincing burden of proof in cases alleging unconstitutional motive.

As we have noted, the Court of Appeals adopted a heightened proof standard in large part to reduce the availability of discovery in actions that require proof of motive. To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process. See, *e. g.*, *Leatherman*, 507 U. S., at 168–169. Moreover, the Court of Appeals' indirect effort to regulate discovery employs a blunt instrument that carries a high cost, for its rule also imposes a heightened standard of proof at trial upon plaintiffs with bona fide con-

[16] Ironically, the heightened standard of proof directly limits the availability of the remedy in cases involving the specific evil at which the Civil Rights Act of 1871 (the predecessor of § 1983) was originally aimed—race discrimination. See *Monroe* v. *Pape*, 365 U. S. 167, 174–175 (1961).

stitutional claims. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 252–255 (1986).

One particular recent action by Congress highlights our concern with judicial rulemaking to protect officials from damages actions. Both Judge Silberman's opinion below and a brief filed in this Court by 34 States, Guam, and the Virgin Islands suggest that new substantive or procedural rules are warranted because of the very large number of civil rights actions filed by prison inmates. See 93 F. 3d, at 830, 838; Brief for State of Missouri et al. as *Amici Curiae* 12. Arguably, such cases deserve special attention because many of them are plainly frivolous and some may be motivated more by a desire to obtain a "holiday in court,"[17] than by a realistic expectation of tangible relief.

Even assuming that a perceived problem with suits by inmates could justify the creation of new rules by federal judges, Congress has already fashioned special rules to cover these cases. The Prison Litigation Reform Act, Pub. L. 104–134, 110 Stat. 1321, enacted in April 1996, contains provisions that should discourage prisoners from filing claims that are unlikely to succeed. Among the many new changes relating to civil suits, the statute requires all inmates to pay filing fees; denies *in forma pauperis* status to prisoners with three or more prior "strikes" (dismissals because a filing is frivolous, malicious, or fails to state a claim upon which relief may be granted) unless the prisoner is "under imminent danger of serious physical injury," § 804(d); bars suits for mental or emotional injury unless there is a prior showing of physical injury; limits attorney's fees; directs district courts to screen prisoners' complaints before docketing and authorizes the court on its own motion to dismiss "frivolous," "malicious," or meritless actions; permits the revocation of good

[17] In his dissent in *Harris* v. *Pate*, 440 F. 2d 315 (CA7 1971), Judge Hastings wrote in reference to the "ever increasing volume of frivolous civil actions filed by state custodial prisoners" that "[o]f course, most prisoners would enjoy a holiday in court." *Id.*, at 320.

time credits for federal prisoners who file malicious or false claims; and encourages hearings by telecommunication or in prison facilities to make it unnecessary for inmate plaintiffs to leave prison for pretrial proceedings. See 28 U. S. C. §§ 1346(b)(2), 1915, 1915A, 1932 (1994 ed., Supp. II); 42 U. S. C. § 1997e (1994 ed., Supp. II). Recent statistics suggest that the Act is already having its intended effect.[18]

Most significantly, the statute draws no distinction between constitutional claims that require proof of an improper motive and those that do not. If there is a compelling need to frame new rules of law based on such a distinction, presumably Congress either would have dealt with the problem in the Reform Act, or will respond to it in future legislation.

IV

In *Harlow*, we noted that a "'firm application of the Federal Rules of Civil Procedure' is fully warranted" and may lead to the prompt disposition of insubstantial claims. 457 U. S., at 819–820, n. 35 (quoting *Butz*, 438 U. S., at 508). Though we have rejected the Court of Appeals' solution, we are aware of the potential problem that troubled the court. It is therefore appropriate to add a few words on some of the existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind.

When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must

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[18] Despite the continuing rise in the state and federal prison populations, the number of prisoner civil rights suits filed in federal court dropped from 41,215 in fiscal year 1996 (Oct. 1, 1995–Sept. 30, 1996) to 28,635 in fiscal year 1997 (Oct. 1, 1996–Sept. 30, 1997), a decline of 31 percent. Administrative Office of the United States Courts, L. Mecham, Judicial Business of the United States Courts: 1997 Report of the Director 131–132 (Table C–2A).

exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. *Siegert* v. *Gilley*, 500 U. S. 226, 236 (1991) (KENNEDY, J., concurring in judgment). This option exists even if the official chooses not to plead the affirmative defense of qualified immunity. Second, if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery. *Harlow*, 457 U. S., at 818. To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law.[19] Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which sometimes requires complicated analysis of legal issues.

If the plaintiff's action survives these initial hurdles and is otherwise viable, the plaintiff ordinarily will be entitled to some discovery. Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery. On its own motion, the trial court

> "may alter the limits in [the Federal Rules] on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number

[19] If the district court enters an order denying the defendant's motion for dismissal or summary judgment, the official is entitled to bring an immediate interlocutory appeal of that legal ruling on the immunity question. *Johnson* v. *Jones*, 515 U. S. 304, 313, 319–320 (1995).

> of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules . . . shall be limited by the court if it determines that . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Rule 26(b)(2).

Additionally, upon motion the court may limit the time, place, and manner of discovery, or even bar discovery altogether on certain subjects, as required "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c). And the court may also set the timing and sequence of discovery. Rule 26(d).

These provisions create many options for the district judge. For instance, the court may at first permit the plaintiff to take only a focused deposition of the defendant before allowing any additional discovery. See, *e. g.*, *Martin*, 812 F. 2d, at 1437 (opinion of R. B. Ginsburg, J.). Alternatively, the court may postpone all inquiry regarding the official's subjective motive until discovery has been had on objective factual questions such as whether the plaintiff suffered any injury or whether the plaintiff actually engaged in protected conduct that could be the object of unlawful retaliation. The trial judge can therefore manage the discovery process to facilitate prompt and efficient resolution of the lawsuit; as the evidence is gathered, the defendant-official may move for partial summary judgment on objective issues that are potentially dispositive and are more amenable to summary disposition than disputes about the official's intent, which frequently turn on credibility assessments.[20] Of course, the

[20] The judge does, however, have discretion to postpone ruling on a defendant's summary judgment motion if the plaintiff needs additional discovery to explore "facts essential to justify the party's opposition." Rule 56(f).

judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible. See *Anderson*, 483 U. S., at 646, n. 6.[21]

Beyond these procedures and others that we have not mentioned, summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial. At that stage, if the defendant-official has made a properly supported motion,[22] the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive. *Liberty Lobby*, 477 U. S., at 256–257. Finally, federal trial judges are undoubtedly familiar with two additional tools that are available in extreme cases to protect public officials from undue harassment: Rule 11, which authorizes sanctions for the filing of papers that are frivolous, lacking in factual support, or "presented for any improper purpose, such as to harass"; and 28 U. S. C. § 1915(e)(2) (1994 ed., Supp. II), which authorizes dismissal "at any time" of *in forma pauperis* suits that are "frivolous or malicious."

It is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases in which an official's intent is an element. Given the

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[21] If the official seeks summary judgment on immunity grounds and the court denies the motion, the official can take an immediate interlocutory appeal, even if she has already so appealed a prior order. *Behrens* v. *Pelletier*, 516 U. S. 299, 311 (1996).

[22] "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 323 (1986) (quoting Fed. Rule Civ. Proc. 56(c)).

wide variety of civil rights and "constitutional tort" claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals.

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

It is so ordered.

JUSTICE KENNEDY, concurring.

Prisoner suits under 42 U. S. C. § 1983 can illustrate our legal order at its best and its worst. The best is that even as to prisoners the government must obey always the Constitution. The worst is that many of these suits invoke our basic charter in support of claims which fall somewhere between the frivolous and the farcical and so foster disrespect for our laws.

We must guard against disdain for the judicial system. As Madison reminds us, if the Constitution is to endure, it must from age to age retain "th[e] veneration which time bestows." James Madison, The Federalist No. 49, p. 314 (C. Rossiter ed. 1961). The analysis by THE CHIEF JUSTICE addresses these serious concerns. I am in full agreement with the Court, however, that the authority to propose those far-reaching solutions lies with the Legislative Branch, not with us.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

The petition on which we granted certiorari in this case presents two questions. The first asks:

> "In a case against a government official claiming she retaliated against the plaintiff for his exercise of First Amendment rights, does the qualified immunity doctrine require the plaintiff to prove the official's unconstitu-

> tional intent by 'clear and convincing' evidence?" Pet. for Cert. i.

The Court's opinion gives this question an extensive treatment, concluding that our cases applying the affirmative defense of qualified immunity provide no basis for placing "a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved." *Ante,* at 593.

The second question presented asks:

> "In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would have been a reasonable basis for the act, even if evidence—no matter how strong—shows the official's actual reason for the act was unconstitutional?" Pet. for Cert. i.

The Court does not explicitly discuss this question at all. Its failure to do so is both puzzling and unfortunate. Puzzling, because immunity is a "threshold" question that must be addressed prior to consideration of the merits of a plaintiff's claim. *Harlow* v. *Fitzgerald,* 457 U. S. 800, 818 (1982). Unfortunate, because in assuming that the answer to the question is "no," the Court establishes a precedent that is in considerable tension with, and significantly undermines, *Harlow.*

I would address the question directly, and conclude, along the lines suggested by Judge Silberman below, that a government official who is a defendant in a motive-based tort suit is entitled to immunity from suit so long as he can offer a legitimate reason for the action that is being challenged, and the plaintiff is unable to establish, by reliance on objective evidence, that the offered reason is actually a pretext. This is the only result that is consistent with *Harlow* and the purposes of the qualified immunity doctrine.

In *Harlow*, respondent A. Ernest Fitzgerald brought a suit claiming that White House aides Bryce Harlow and Alexander Butterfield, acting in concert with President Richard Nixon and others, had conspired to deprive him of his job, deny him reemployment, and besmirch his reputation. *Nixon* v. *Fitzgerald*, 457 U. S. 731, 738–739, n. 18 (1982). Harlow and Butterfield claimed that they were immune from this suit, and we granted certiorari to determine "the immunity available to the senior aides and advisers of the President." *Harlow*, 457 U. S., at 806. We first concluded that unlike the President, senior White House aides were not necessarily entitled to absolute immunity. We next concluded, however, that petitioners were entitled to "application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial." *Id.*, at 813.

In applying that standard in *Harlow* we did not write on a blank slate. The notion that government officials are sometimes immune from suit has been present in our jurisprudence since at least *Osborn* v. *Bank of United States*, 9 Wheat. 738, 865–866 (1824). By the time we took up the question in *Harlow*, we had come to understand qualified immunity as an affirmative defense that had both an "objective" and a "subjective" aspect. See, *e. g.*, *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975).

In *Harlow*, however, we noted that application of the subjective element of the test had often produced results at odds with the doctrine's purpose. First, some courts had considered an official's subjective good faith to be a question of fact "inherently requiring resolution by a jury," making it impossible to accomplish the goal that "insubstantial claims" not proceed to trial. 457 U. S., at 816. Second, we noted that there were "special costs" to inquiries into a government official's subjective good faith. Such inquiries were "broad-ranging," intrusive, and personal, and were thought to be "peculiarly disruptive of effective government." *Id.*, at 817.

Recognizing these problems, we "purged" qualified immunity doctrine of its subjective component and remolded it so that it turned entirely on "objective legal reasonableness," measured by the state of the law at the time of the challenged act. *Mitchell* v. *Forsyth*, 472 U. S. 511, 517 (1985); *Harlow*, *supra*, at 819. This new rule eliminated the need for the disruptive inquiry into subjective intent, ensured that insubstantial suits would still be subject to dismissal prior to trial, and had the additional benefit of allowing officials to predict when and under what circumstances they would be required to stand trial for actions undertaken in the course of their work. See, *e. g.*, *Davis* v. *Scherer*, 468 U. S. 183, 195 (1984) ("The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated"). Since then we have held that qualified immunity was to apply "across the board" without regard to the "precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Anderson* v. *Creighton*, 483 U. S. 635, 642–643 (1987).

Applying these principles to the type of motive-based tort suit at issue here, it is obvious that some form of qualified immunity is necessary, and that whether it applies in a given case must turn entirely on objective factors. It is not enough to say that because (1) the law in this area is "clearly established," and (2) this type of claim always turns on a defendant official's subjective intent, that (3) qualified immunity is therefore never available. Such logic apparently approves the "protracted and complex," *ante*, at 579, course of litigation in this case, runs afoul of *Harlow*'s concern that insubstantial claims be prevented from going to trial, and ensures that officials will be subject to the "peculiarly disruptive" inquiry into their subjective intent that the *Harlow*

rule was designed to prevent.[1] Such a rule would also allow plaintiffs to strip defendants of *Harlow*'s protections by a simple act of pleading—any minimally competent attorney (or *pro se* litigant) can convert any adverse decision into a motive-based tort, and thereby subject government officials to some measure of intrusion into their subjective worlds.

Such a result is quite inconsistent with the logic and underlying principles of *Harlow*.[2] In order to preserve the protections that *Harlow* conferred, it is necessary to construct a qualified immunity test in this context that is also based exclusively on objective factors, and prevents plaintiffs from engaging in "peculiarly disruptive" subjective investigations until after the immunity inquiry has been resolved in their favor. The test I propose accomplishes this goal. Under this test, when a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.

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[1] The Court suggests that the *Wood* v. *Strickland* subjective inquiry that we stripped from the qualified immunity analysis in *Harlow* is somehow different from the inquiry into subjective intent involved in resolution of a motive-based tort claim. *Ante*, at 592. While the inquiries may differ somewhat in terms of what precisely is being asked, this difference is without relevance for the purposes of qualified immunity doctrine. Both inquiries allow a plaintiff to probe the official's state of mind, and therefore both types of inquiry have the potential to be "peculiarly disruptive" to effective government.

[2] This result also threatens to "Balkanize" the rule of qualified immunity. *Anderson* v. *Creighton*, 483 U. S. 635, 646, 643 (1987) ("[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide").

The Court's interpretation of *Harlow* does not differ from mine. See *ante*, at 588 ("Under [the *Harlow*] standard, a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense"). The Court does not, however, carry the *Harlow* principles to their logical extension. Its failure to discuss the issue explicitly makes it difficult to understand exactly why it rejects my position, but there appear to be two possibilities.

First, the Court appears concerned that an extension of *Harlow* qualified immunity to motive-based torts will mean that some meritorious claims will go unredressed. *Ante*, at 591 ("Social costs that adequately justified the elimination of the subjective component of an affirmative defense do not necessarily justify serious limitations upon 'the only realistic' remedy for the violation of constitutional guarantees"). This is perhaps true, but it is not a sufficient reason to refuse to apply the doctrine. Every time a privilege is created or an immunity extended, it is understood that some meritorious claims will be dismissed that otherwise would have been heard. Courts and legislatures craft these immunities because it is thought that the societal benefit they confer outweighs whatever cost they create in terms of unremedied meritorious claims. In crafting our qualified immunity doctrine, we have always considered the public policy implications of our decisions. See, *e. g.*, *Wyatt* v. *Cole*, 504 U. S. 158, 167 (1992).

In considering those implications here, it is desirable to reflect on the subspecies of First Amendment claims which we address in this case. Respondent Britton is a District of Columbia corrections officer; petitioner Crawford-El is a District of Columbia prisoner who was transferred from Spokane, Washington, to Marianna, Florida, with intermediate stops along the way. The action of Britton's that gave rise to this lawsuit was asking Crawford-El's brother-in-law to

pick up boxes of the former's belongings for delivery to him, rather than shipping them directly to him in Florida. This act, considered by itself, would seem to be about as far from a violation of the First Amendment as can be conceived. But Crawford-El has alleged that Britton's decision to deliver his belongings to a relative was motivated by a desire to punish him for previous interviews with reporters that he had given, and lawsuits that he had filed. This claim of illicit motive, Crawford-El asserts, transforms a routine act in the course of prison administration into a constitutional tort.

The Court cites *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), as an example of this sort of tort. *Ante*, at 585, n. 9. But *Pickering* is but a distant cousin to the present case; there the school board plainly stated that its reason for discharging the plaintiff teacher was his writing of a letter to a newspaper criticizing the board. It was not motivation that was disputed, but whether the First Amendment protected the writing of the letter. Closer in point is *Branti* v. *Finkel*, 445 U. S. 507 (1980), also cited by the Court, but there the act complained of was the dismissal of Republican assistants by the newly appointed Democratic public defender. Objective evidence—the discharging of members of one party by the newly appointed supervisor of another party, and their replacement by members of the supervisor's party—would likely have served to defeat a claim of qualified immunity had the defendant official attempted to offer a legitimate reason for firing the Republican assistants. Thus, the defendants in neither *Pickering* nor *Branti* would have been entitled to qualified immunity under the approach that I propose.

Still more distantly related to the facts of the present case are what I would call primary First Amendment cases, where the constitutional claim does not depend on motive at all. Examples of these are *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997) (finding portions of the Communications Decency Act unconstitutional under the First

Amendment); *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560 (1991) (concluding that Indiana statute regulating nude dancing did not violate First Amendment); *Brown* v. *Hartlage*, 456 U. S. 45 (1982) (invalidating Kentucky statute that limited the speech of candidates for office); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976) (invalidating judge's order prohibiting reporting or commentary on murder trial); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975) (finding denial of permission to use municipal theater for showing of Hair to be unconstitutional prior restraint); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971) *(per curiam)* (refusing to enjoin publication of contents of classified study).

The great body of our cases involving freedom of speech would, therefore, be unaffected by this approach to qualified immunity. It would apply prototypically to a case such as the present one: A public official is charged with doing a routine act in the normal course of her duties—an act that by itself has absolutely no connection with freedom of speech—but she is charged with having performed that act out of a desire to retaliate against the plaintiff because of his previous exercise of his right to speak freely. In this case, there was surely a legitimate reason for respondent's action, and there is no evidence in the record before us that shows it to be pretextual. Under the Court's view, only a factfinder's ultimate determination of the motive with which she acted will resolve this case. I think the modest extension of *Harlow* which I propose should result in a judgment of qualified immunity for respondent.

Also relevant to a consideration of the costs my proposed rule would incur is that this suit is a request for damages brought under § 1983. If the purpose of § 1983 is to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails," it is hard to see how that purpose is substantially advanced if petition-

er's suit is allowed to proceed. *Wyatt* v. *Cole*, 504 U. S., at 161. Petitioner has already fully exercised his "federally guaranteed rights." Providing compensation to him, even if his claim is meritorious, will foster increased constitutional freedoms only for the hypothetical subsequent individual who, given the imposition of liability in this case, will not be deterred from exercising his First Amendment rights out of fear that respondent would retaliate by misdirecting his belongings.

The costs of the extension of *Harlow* that I propose would therefore be minor. The benefits would be significant, and we have recognized them before. As noted above, inquiries into the subjective state of mind of government officials are "peculiarly disruptive of effective government" and the threat of such inquiries will in some instances cause conscientious officials to shrink from making difficult choices.[3]

The policy arguments thus point strongly in favor of extending immunity in the manner I suggest. The Court's opinion, however, suggests a second reason why this rule might be unnecessary. The Court assumes that district court judges alert to the dangers of allowing these claims

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[3] This point has perhaps been made most elegantly by Judge Learned Hand, who, in an oft-cited passage, wrote:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others . . . should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).

to proceed can protect defendants by judicious and skillful manipulation of the Federal Rules of Civil Procedure. *Ante*, at 597–601. I have no doubt that, as a general matter, district court judges are entirely capable in this regard. But whether a defendant is entitled to protection against the "peculiarly disruptive" inquiry into subjective intent should not depend on the willingness or ability of a particular district court judge to limit inquiry through creative application of the Federal Rules. The scope of protection should not vary depending on the district in which the plaintiff brings his suit. Cf. *Anderson* v. *Creighton*, 483 U. S., at 643 ("An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide"). Indeed, the inconsistency with which some District Courts had applied the *Wood* v. *Strickland* subjective good-faith inquiry was one of the reasons why the *Harlow* Court stripped qualified immunity of its subjective component. *Harlow*, 457 U. S., at 816 ("And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury").

My proposed rule would supply officials with the consistency and predictability that *Harlow* and its progeny have identified as an underlying purpose of qualified immunity doctrine, without eliminating motive-based torts altogether. The Court's solution, which is dependent on the varying approaches of 700-odd district court judges, simply will not; at the end of the day, many cases will still depend on a fact-finder's decision as to motivation. No future defendant in respondent's position can know with any certainty that the simple act of delivering a prisoner's belongings in one way rather than another will not result in an extensive investigation of her state of mind at the time she did so. This result is simply not faithful to *Harlow*'s underlying concerns.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

As I have observed earlier, our treatment of qualified immunity under 42 U. S. C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume. See *Burns* v. *Reed*, 500 U. S. 478, 498, n. 1 (1991) (SCALIA, J., concurring in judgment in part and dissenting in part). That is perhaps just as well. The § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. I refer, of course, to the holding of *Monroe* v. *Pape*, 365 U. S. 167 (1961), which converted an 1871 statute covering constitutional violations committed "*under color of* any statute, ordinance, regulation, custom, or usage of any State," Rev. Stat. § 1979, 42 U. S. C. § 1983 (emphasis added), into a statute covering constitutional violations committed *without* the authority of any statute, ordinance, regulation, custom, or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law. See *Monroe*, 365 U. S., at 183; *id.*, at 224–225 (Frankfurter, J., dissenting). As described in detail by the concurring opinion of Judge Silberman in this case, see 93 F. 3d 813, 829 (CADC 1996), *Monroe* changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law. (The present suit, involving the constitutional violation of misdirecting a package, is a good enough example.) Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted.

We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified

immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote. My preference is, in undiluted form, the approach suggested by Judge Silberman's concurring opinion in the Court of Appeals: extending the "objective reasonableness" test of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), to qualified immunity insofar as it relates to intent-based constitutional torts.

THE CHIEF JUSTICE's opinion sets forth a test that is "along the lines suggested by Judge Silberman," *ante*, at 602, but that differs in a significant respect: It would allow the introduction of "objective evidence" that the constitutionally valid reason offered for the complained-of action "is actually a pretext." *Ibid.* This would consist, presumably, of objective evidence regarding the state official's subjective intent—for example, remarks showing that he had a partisan-political animus against the plaintiff. The admission of such evidence produces a less subjective-free immunity than the one established by *Harlow.* Under that case, once the trial court finds that the constitutional right was not well established, it will not admit any "objective evidence" that the defendant *knew* he was violating the Constitution. The test I favor would apply a similar rule here: once the trial court finds that the asserted grounds for the official action were objectively valid (*e. g.*, the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (*e. g.*, the incompetent person fired was a Republican). This is of course a more severe restriction upon "intent-based" constitutional torts; I am less put off by that consequence than some may be, since I believe that *no* "intent-based" constitutional tort would have been actionable under the § 1983 that Congress enacted.

Per Curiam

RICCI *v.* VILLAGE OF ARLINGTON HEIGHTS

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

No. 97–501. Argued April 21, 1998—Decided May 4, 1998

Certiorari dismissed. Reported below: 116 F. 3d 288.

Kenneth N. Flaxman argued the cause and filed briefs for petitioner.

David A. Strauss argued the cause for respondent. With him on the brief was *Jeffrey Edward Kehl.*

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, and *William C. Brown.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Susan N. Herman*, *Steven R. Shapiro*, *Harvey Grossman*, and *Stephen J. Schulhofer;* for Americans for Effective Law Enforcement, Inc., by *Wayne W. Schmidt*, *James P. Manak*, and *Bernard J. Farber;* and for the Institute for Justice by *William H. Mellor*, *Clint Bolick*, and *Scott G. Bullock.*

Richard Ruda and *James I. Crowley* filed a brief for the National League of Cities et al. as *amici curiae* urging affirmance.

William J. Mertens and *Barbara Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

Syllabus

BOUSLEY *v.* UNITED STATES

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

No. 96–8516. Argued March 3, 1998—Decided May 18, 1998

Petitioner pleaded guilty to drug possession with intent to distribute, 21 U. S. C. § 841(a)(1), and to "using" a firearm "during and in relation to a drug trafficking crime," 18 U. S. C. § 924(c)(1), but reserved the right to challenge the quantity of drugs used in calculating his sentence. He appealed his sentence, but did not challenge the plea's validity. The Eighth Circuit affirmed. Subsequently, he sought habeas relief, claiming his guilty plea lacked a factual basis because neither the "evidence" nor the "plea allocation" showed a connection between the firearms in the bedroom of the house and the garage where the drug trafficking occurred. The District Court dismissed the petition on the ground that a factual basis for the plea existed because the guns in the bedroom were in close proximity to the drugs and were readily accessible. While petitioner's appeal was pending, this Court held that a conviction for using a firearm under § 924(c)(1) requires the Government to show "active employment of the firearm," *Bailey* v. *United States*, 516 U. S. 137, 144, not its mere possession, *id.*, at 143. In affirming the dismissal in this case, the Eighth Circuit rejected petitioner's argument that *Bailey* should be applied retroactively, that his guilty plea was not knowing and intelligent because he was misinformed about the elements of a § 924(c)(1) offense, that this claim was not waived by his guilty plea, and that his conviction should therefore be vacated.

Held: Although petitioner's claim was procedurally defaulted, he may be entitled to a hearing on its merits if he makes the necessary showing to relieve the default. Pp. 618–624.

(a) Only a voluntary and intelligent guilty plea is constitutionally valid. *Brady* v. *United States*, 397 U. S. 742, 748. A plea is not intelligent unless a defendant first receives real notice of the nature of the charge against him. *Smith* v. *O'Grady*, 312 U. S. 329, 334. Petitioner's plea would be, contrary to the Eighth Circuit's view, constitutionally invalid if he proved that the District Court misinformed him as to the elements of a § 924(c)(1) offense. *Brady* v. *United States*, *supra*, *McMann* v. *Richardson*, 397 U. S. 759, and *Parker* v. *North Carolina*, 397 U. S. 790, distinguished. Pp. 618–619.

(b) The rule of *Teague* v. *Lane*, 489 U. S. 288—that new constitutional rules of criminal procedure are generally not applicable to cases that

became final before the new rules were announced—does not bar petitioner's claim. There is nothing new about the principle that a plea must be knowing and intelligent; and because *Teague* by its terms applies only to procedural rules, it is inapplicable to situations where this Court decides the meaning of a criminal statute enacted by Congress. Pp. 619–621.

(c) Nonetheless, there are significant procedural hurdles to consideration of the merits of petitioner's claim, which can be attacked on collateral review only if it was first challenged on direct review. Since petitioner appealed his sentence, but not his plea, he has procedurally defaulted the claim he presses here. To pursue the defaulted claim in habeas, he must first demonstrate either "cause and actual prejudice," *e. g.*, *Murray* v. *Carrier*, 477 U. S. 478, 489, or that he is "actually innocent," *id.*, at 496. His arguments that the legal basis for his claim was not reasonably available to counsel at the time of his plea and that it would have been futile to attack the plea before *Bailey* do not establish cause for the default. However, the District Court did not address whether petitioner was actually innocent of the charge, and the Government does not contend that he waived this claim by failing to raise it below. Thus, on remand, he may attempt to make an actual innocence showing. Actual innocence means factual innocence, not mere legal insufficiency. Accordingly, the Government is not limited to the existing record but may present any admissible evidence of petitioner's guilt. Petitioner's actual innocence showing must also extend to charges that the Government has forgone in the course of plea bargaining. However, the Government errs in maintaining that petitioner must prove actual innocence of both "using" and "carrying" a firearm in violation of § 924(c)(1). The indictment charged him only with "using" firearms, and there is no record evidence that the Government elected not to charge him with "carrying" a firearm in exchange for his guilty plea. Pp. 621–624.

97 F. 3d 284, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 625. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 629.

L. Marshall Smith, by appointment of the Court, 522 U. S. 946, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solici-*

tor General Waxman, Acting Assistant Attorney General Keeney, Roy W. McLeese III, and *Vicki S. Marani.*

Thomas C. Walsh, by invitation of the Court, 522 U. S. 990, argued the cause as *amicus curiae* urging affirmance. With him on the brief was *Brian C. Walsh.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner pleaded guilty to "using" a firearm in violation of 18 U. S. C. § 924(c)(1) in 1990. Five years later we held in *Bailey* v. *United States*, 516 U. S. 137, 144 (1995), that § 924(c)(1)'s "use" prong requires the Government to show "active employment of the firearm." Petitioner meanwhile had sought collateral relief under 28 U. S. C. § 2255, claiming that his guilty plea was not knowing and intelligent because he was misinformed by the District Court as to the nature of the charged crime. We hold that, although this claim was procedurally defaulted, petitioner may be entitled to a hearing on the merits of it if he makes the necessary showing to relieve the default.

Following his arrest in March 1990, petitioner was charged with possession of methamphetamine with intent to distribute, in violation of 21 U. S. C. § 841(a)(1). A superseding indictment added the charge that he "knowingly and intentionally used . . . firearms during and in relation to a drug trafficking crime," in violation of 18 U. S. C. § 924(c). App. 5–6. Petitioner agreed to plead guilty to both charges while reserving the right to challenge the quantity of drugs used in calculating his sentence. *Id.*, at 10–12.

The District Court accepted petitioner's pleas, finding that he was "competent to enter [the] pleas, that [they were] voluntarily entered, and that there [was] a factual basis for

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Larry W. Yackle* and *Steven R. Shapiro;* and for the National Association of Criminal Defense Lawyers et al. by *Bonnie I. Robin-Vergeer, David M. Porter,* and *Kyle O'Dowd.*

them." *Id.*, at 29–30. Following a sentencing hearing, the District Court sentenced petitioner to 78 months' imprisonment on the drug count, a consecutive term of 60 months' imprisonment on the § 924(c) count, and four years of supervised release. *Id.*, at 83–84. Petitioner appealed his sentence, but did not challenge the validity of his plea. The Court of Appeals affirmed. 950 F. 2d 727 (CA8 1991).

In June 1994, petitioner sought a writ of habeas corpus under 28 U. S. C. § 2241, challenging the factual basis for his guilty plea on the ground that neither the "evidence" nor the "plea allocution" showed a "connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." App. 109. A Magistrate Judge recommended that the petition be treated as a motion under 28 U. S. C. § 2255 and recommended dismissal, concluding that there was a factual basis for petitioner's guilty plea because the guns in petitioner's bedroom were in close proximity to drugs and were readily accessible. App. 148–153. The District Court adopted the Magistrate Judge's Report and Recommendation and ordered that the petition be dismissed. *Id.*, at 154–155.

Petitioner appealed. While his appeal was pending, we held in *Bailey* that a conviction for use of a firearm under § 924(c)(1) requires the Government to show "active employment of the firearm." 516 U. S., at 144. As we explained, active employment includes uses such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire" the weapon, *id.*, at 148, but does not include mere possession of a firearm, *id.*, at 143. Thus, a "defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds," or for "placement of a firearm to provide a sense of security or to embolden." *Id.*, at 149.

Following our decision in *Bailey*, the Court of Appeals appointed counsel to represent petitioner. Counsel argued that *Bailey* should be applied "retroactively," that petition-

er's guilty plea was involuntary because he was misinformed about the elements of a § 924(c)(1) offense, that this claim was not waived by his guilty plea, and that his conviction should therefore be vacated. Nevertheless, the Court of Appeals affirmed the District Court's order of dismissal. *Bousley* v. *Brooks*, 97 F. 3d 284 (CA8 1996).

We then granted certiorari, 521 U. S. 1152 (1997), to resolve a split among the Circuits over the permissibility of post-*Bailey* collateral attacks on § 924(c)(1) convictions obtained pursuant to guilty pleas.[1] Because the Government disagreed with the Court of Appeals' analysis, we appointed *amicus curiae* to brief and argue the case in support of the judgment below. 522 U. S. 990 (1997).

A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." *Brady* v. *United States*, 397 U. S. 742, 748 (1970). We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941). *Amicus* contends that petitioner's plea was intelligently made because, prior to pleading guilty, he was provided with a copy of his indictment, which charged him with "using" a firearm. Such circumstances, standing alone, give rise to a presumption that the defendant was informed of the nature of the charge against him. *Henderson* v. *Morgan*, 426 U. S. 637, 647 (1976); *id.*, at 650 (White, J., concurring). Petitioner nonetheless maintains that his guilty plea was unintelligent because the District Court subsequently misinformed him as to the elements of a § 924(c)(1) offense. In other words, petitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. Were

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[1] See *United States* v. *Carter*, 117 F. 3d 262 (CA5 1997); *Lee* v. *United States*, 113 F. 3d 73 (CA7 1997); *United States* v. *Barnhardt*, 93 F. 3d 706 (CA10 1996); *In re Hanserd*, 123 F. 3d 922 (CA6 1997).

this contention proved, petitioner's plea would be, contrary to the view expressed by the Court of Appeals, constitutionally invalid.

Our decisions in *Brady* v. *United States*, *supra*, *McMann* v. *Richardson*, 397 U. S. 759 (1970), and *Parker* v. *North Carolina*, 397 U. S. 790 (1970), relied upon by *amicus*, are not to the contrary. Each of those cases involved a criminal defendant who pleaded guilty after being correctly informed as to the essential nature of the charge against him. See *Brady*, *supra*, at 756; *McMann*, *supra*, at 767; *Parker*, *supra*, at 792. Those defendants later attempted to challenge their guilty pleas when it became evident that they had misjudged the strength of the Government's case or the penalties to which they were subject. For example, Brady, who pleaded guilty to kidnaping, maintained that his plea was neither voluntary nor intelligent because it was induced by a death penalty provision later held unconstitutional. 397 U. S., at 744. We rejected Brady's voluntariness argument, explaining that a "plea of guilty entered by one fully aware of the direct consequences" of the plea is voluntary in a constitutional sense "unless induced by threats . . . , misrepresentation . . . , or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business." *Id.*, at 755 (internal quotation marks omitted). We further held that Brady's plea was intelligent because, although later judicial decisions indicated that at the time of his plea he "did not correctly assess every relevant factor entering into his decision," *id.*, at 757, he was advised by competent counsel, was in control of his mental faculties, and "was made aware of the nature of the charge against him," *id.*, at 756. In this case, by contrast, petitioner asserts that he was misinformed as to the true nature of the charge against him.

Amicus urges us to apply the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), to petitioner's claim that his plea was not knowing and intelligent. In *Teague*, we held that "new constitutional rules of criminal procedure will not be applicable

to those cases which have become final before the new rules are announced," *id.*, at 310, unless the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *id.*, at 311 (quoting *Mackey* v. *United States*, 401 U. S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)), or could be considered a "watershed rul[e] of criminal procedure," 489 U. S., at 311. But we do not believe that *Teague* governs this case. The only constitutional claim made here is that petitioner's guilty plea was not knowing and intelligent. There is surely nothing new about this principle, enumerated as long ago as *Smith* v. *O'Grady*, *supra*. And because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.

This distinction between substance and procedure is an important one in the habeas context. The *Teague* doctrine is founded on the notion that one of the "principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" 489 U. S., at 312 (quoting *Desist* v. *United States*, 394 U. S. 244, 262 (1969)). Consequently, unless a new rule of criminal procedure is of such a nature that "without [it] the likelihood of an accurate conviction is seriously diminished," 489 U. S., at 313, there is no reason to apply the rule retroactively on habeas review. By contrast, decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct "'beyond the power of the criminal law-making authority to proscribe,'" *id.*, at 311 (quoting *Mackey*, *supra*, at 692), necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal." *Davis* v. *United States*, 417 U. S. 333, 346 (1974). For under our federal system it is

only Congress, and not the courts, which can make conduct criminal. *United States* v. *Lanier*, 520 U. S. 259, 267–268, n. 6 (1997); *United States* v. *Hudson*, 7 Cranch 32 (1812). Accordingly, it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid.

Though petitioner's claim is not *Teague*-barred, there are nonetheless significant procedural hurdles to its consideration on the merits. We have strictly limited the circumstances under which a guilty plea may be attacked on collateral review. "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry* v. *Johnson*, 467 U. S. 504, 508 (1984) (footnote omitted). And even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. Habeas review is an extraordinary remedy and "'will not be allowed to do service for an appeal.'" *Reed* v. *Farley*, 512 U. S. 339, 354 (1994) (quoting *Sunal* v. *Large*, 332 U. S. 174, 178 (1947)). Indeed, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979). In this case, petitioner contested his sentence on appeal, but did not challenge the validity of his plea. In failing to do so, petitioner procedurally defaulted the claim he now presses on us.

In an effort to avoid this conclusion, petitioner contends that his claim falls within an exception to the procedural default rule for claims that could not be presented without further factual development. Brief for Petitioner 28–34. In *Waley* v. *Johnston*, 316 U. S. 101 (1942) *(per curiam)*, we held that there was such an exception for a claim that a plea of guilty had been coerced by threats made by a Government

agent, when the facts were "dehors the record and their effect on the judgment was not open to consideration and review on appeal." *Id.*, at 104. Petitioner's claim, however, differs significantly from that advanced in *Waley.* He is not arguing that his guilty plea was involuntary because it was coerced, but rather that it was not intelligent because the information provided him by the District Court at his plea colloquy was erroneous. This type of claim can be fully and completely addressed on direct review based on the record created at the plea colloquy.

Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either "cause" and actual "prejudice," *Murray* v. *Carrier*, 477 U. S. 478, 485 (1986); *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), or that he is "actually innocent," *Murray*, *supra*, at 496; *Smith* v. *Murray*, 477 U. S. 527, 537 (1986).

Petitioner offers two explanations for his default in an attempt to demonstrate cause. First, he argues that "the legal basis for his claim was not reasonably available to counsel" at the time his plea was entered. Brief for Petitioner 35. This argument is without merit. While we have held that a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause for a procedural default, *Reed* v. *Ross*, 468 U. S. 1, 16 (1984), petitioner's claim does not qualify as such. The argument that it was error for the District Court to misinform petitioner as to the statutory elements of § 924(c)(1) was most surely not a novel one. See *Henderson*, 426 U. S., at 645–646. Indeed, at the time of petitioner's plea, the Federal Reporters were replete with cases involving challenges to the notion that "use" is synonymous with mere "possession." See, *e. g.*, *United States* v. *Cooper*, 942 F. 2d 1200, 1206 (CA7 1991) (appeal from plea of guilty to "use" of a firearm in violation of

§ 924(c)(1)), cert. denied, 503 U. S. 923 (1992).[2] Petitioner also contends that his default should be excused because, "before *Bailey*, any attempt to attack [his] guilty plea would have been futile." Brief for Petitioner 35. This argument, too, is unavailing. As we clearly stated in *Engle* v. *Isaac*, 456 U. S. 107 (1982), "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Id.*, at 130, n. 35. Therefore, petitioner is unable to establish cause for his default.

Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his plea colloquy "has probably resulted in the conviction of one who is actually innocent." *Murray* v. *Carrier*, *supra*, at 496. To establish actual innocence, petitioner must demonstrate that, "'in light of all the evidence,'" "it is more likely than not that no reasonable juror would have convicted him." *Schlup* v. *Delo*, 513 U. S. 298, 327–328 (1995) (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)). The District Court failed to address petitioner's actual innocence, perhaps because petitioner failed to raise it initially in his § 2255 motion. However, the Government does not contend that petitioner waived this claim by failing to raise it below. Accordingly, we believe it appropriate to remand this case to permit petitioner to attempt to make a showing of actual innocence.

It is important to note in this regard that "actual innocence" means factual innocence, not mere legal insufficiency.

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[2] Even were we to conclude that petitioner's counsel was unaware at the time that petitioner's plea colloquy was constitutionally deficient, "[w]here the basis of a . . . claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." *Engle* v. *Isaac*, 456 U. S. 107, 134 (1982).

See *Sawyer* v. *Whitley,* 505 U. S. 333, 339 (1992). In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy and would not normally have been offered before our decision in *Bailey.*[3] In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges.

In this case, the Government maintains that petitioner must demonstrate that he is actually innocent of both "using" and "carrying" a firearm in violation of § 924(c)(1). But petitioner's indictment charged him only with "using" firearms in violation of § 924(c)(1). App. 5–6. And there is no record evidence that the Government elected not to charge petitioner with "carrying" a firearm in exchange for his plea of guilty. Accordingly, petitioner need demonstrate no more than that he did not "use" a firearm as that term is defined in *Bailey.*

If, on remand, petitioner can make that showing, he will then be entitled to have his defaulted claim of an unintelligent plea considered on its merits. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[3] JUSTICE SCALIA contends that this factual innocence inquiry will be unduly complicated by the absence of a trial transcript in the guilty plea context. *Post,* at 631 (dissenting opinion). We think his concerns are overstated. In the federal system, where this case arose, guilty pleas must be accompanied by proffers, recorded verbatim on the record, demonstrating a factual basis for the plea. See Fed. Rules Crim. Proc. 11(f), (g).

JUSTICE STEVENS, concurring in part and dissenting in part.

While I agree with the Court's central holding and with its conclusion that none of its judge-made rules foreclose petitioner's collateral attack on his conviction under 18 U. S. C. § 924(c), I believe there is a flaw in its analysis that will affect the proceedings on remand. Given the fact that the record now establishes that the plea of guilty to the § 924(c) charge was constitutionally invalid, petitioner remains presumptively innocent of that offense. Accordingly, unless he again pleads guilty, the burden is on the Government to prove his unlawful use of a firearm.

I

This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague* v. *Lane*, 489 U. S. 288 (1989), because our decision in *Bailey* v. *United States*, 516 U. S. 137 (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U. S. C. § 1981 had been consistently misconstrued prior to our decision in *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989). Our comment on the significance of the pre-*Patterson* jurisprudence applies equally to the pre-*Bailey* cases construing § 924(c):

> "*Patterson* did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect.* They were not wrong according to some abstract standard of interpretive validity, but by the rules that necessarily govern our hierarchical federal court system. Cf. *Brown* v. *Allen*, 344 U. S. 443, 540 (1953)

> (Jackson, J., concurring in result). It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 312–313 (1994).

Thus in 1990 when petitioner was advised by the trial judge, by his own lawyer, and by the prosecutor that mere possession of a firearm would support a conviction under § 924(c), he received critically incorrect legal advice. The fact that all of his advisers acted in good-faith reliance on existing precedent does not mitigate the impact of that erroneous advice. Its consequences for petitioner were just as severe, and just as unfair, as if the court and counsel had knowingly conspired to deceive him in order to induce him to plead guilty to a crime that he did not commit. Our cases make it perfectly clear that a guilty plea based on such misinformation is constitutionally invalid. *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941); *Henderson* v. *Morgan*, 426 U. S. 637, 644–645 (1976). Petitioner's conviction and punishment on the § 924(c) charge "are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under [28 U. S. C.] § 2255." *Davis* v. *United States*, 417 U. S. 333, 346–347 (1974).

II

The Government charges petitioner with "procedural default" because he did not challenge his guilty plea on direct appeal. The Court accepts this argument and therefore places the burden on petitioner to demonstrate either "cause

and prejudice" or "actual innocence." See *ante*, at 622. Yet the Court cites no authority for its conclusion that "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Ante*, at 621.[1] Moreover, the primary case upon which the Government relies, *United States* v. *Timmreck*, 441 U. S. 780 (1979), actually supports the contrary proposition: that a constitutionally invalid guilty plea may be set aside on collateral attack whether or not it was challenged on appeal.

Several years before we decided *Timmreck*, the Court had held that it is reversible error for a trial judge to accept a guilty plea without following the procedures dictated by Rule 11 of the Federal Rules of Criminal Procedure. *McCarthy* v. *United States*, 394 U. S. 459 (1969). The question in *Timmreck* was whether such an error was sufficiently serious to support a collateral attack under 28 U. S. C. § 2255. Because the error was neither jurisdictional nor constitutional, we held that collateral relief was unavailable. If we had thought that the failure to challenge the constitutionality of a guilty plea on direct appeal amounted to procedural default, there would have been no need in *Timmreck* to rely on the critical difference between reversible error and the more fundamental kind of error that can be corrected on collateral review. The opinion makes it clear that an ordinary Rule 11 violation must be challenged on appeal; the only cri-

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[1] The Court does cite *Reed* v. *Farley*, 512 U. S. 339, 354 (1994), for the general proposition that habeas review "'will not be allowed to do service for an appeal.'" *Reed* is inapposite, however, as it involved neither a constitutional violation nor a guilty plea. In *Reed*, the Court rejected a state prisoner's statutory claim brought under 28 U. S. C. § 2254 on the grounds that the prisoner had neither made a timely objection nor suffered prejudice. See 512 U. S., at 349 ("An unwitting judicial slip of the kind involved here ranks with the nonconstitutional lapses we have held not cognizable in a postconviction proceeding").

terion for collateral review that it mentions is that the error must be jurisdictional or constitutional.[2]

Decisions of this Court that do not involve guilty pleas are not controlling. For example, in *United States* v. *Frady*, 456 U. S. 152 (1982), two of the Court's reasons for dismissing the § 2255 claim alleging that the jury instructions were erroneous are not present in this case. First, the defendant failed to object to the jury instructions—as required by Federal Rule of Criminal Procedure 30—before the jury retired to consider its verdict; no comparable Rule applies to petitioner's claim. Second, as the Court emphasized by quoting from both *United States* v. *Addonizio*, 442 U. S. 178, 184–185 (1979), and *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977), the prejudice to the defendant was not sufficient to warrant relief under § 2255; that is plainly not the case with respect to this petitioner. Similarly, in *Davis* v. *United States*, 411 U. S. 233, 242 (1973), there was a failure to comply with Fed-

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[2] As we explained: "In *Hill* v. *United States*, 368 U. S. 424, the Court was presented with the question whether a collateral attack under § 2255 could be predicated on a violation of Fed. Rule Crim. Proc. 32(a), which gives the defendant the right to make a statement on his own behalf before he is sentenced. The Court rejected the claim, stating: 'The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. . . .' 368 U. S., at 428." *United States* v. *Timmreck*, 441 U. S. 780, 783 (1979). The *Timmreck* Court went on to hold that "[t]he reasoning in *Hill* is equally applicable to a formal violation of Rule 11" because "[s]uch a violation is neither constitutional nor jurisdictional," and the error did not "resul[t] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.' Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the Rule." *Id.*, at 783–784.

eral Rule of Criminal Procedure 12(b)(2), which required challenges to the composition of the grand jury to be made by pretrial motion—a Rule that has no counterpart in the guilty plea context—coupled with the absence of the kind of prejudice that is present here.

The Court has never held that the constitutionality of a guilty plea cannot be attacked collaterally unless it is first challenged on direct review. Moreover, as the facts of this case demonstrate, such a holding would be unwise and would defeat the very purpose of collateral review. A layman who justifiably relied on incorrect advice from the court and counsel in deciding to plead guilty to a crime that he did not commit will ordinarily continue to assume that such advice was accurate during the time for taking an appeal. The injustice of his conviction is not mitigated by the passage of time. His plea should be treated as a nullity and the conviction based on such a plea should be voided.

Because the record in this case already unambiguously demonstrates that petitioner's plea to the § 924(c) charge is invalid as a matter of constitutional law, I would remand with directions to vacate his § 924(c) conviction and allow him to plead anew.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I agree with the Court that petitioner has not demonstrated "cause" for failing to challenge the validity of his guilty plea on direct review. I disagree, however, that a defendant who has pleaded guilty can be given the opportunity to avoid the consequences of his inexcusable procedural default by having the courts inquire into whether "'it is more likely than not that no reasonable juror would have convicted him'" of the offense to which he pleaded guilty. *Ante*, at 623, quoting *Schlup* v. *Delo*, 513 U. S. 298, 327–328 (1995).

No criminal-law system can function without rules of procedure conjoined with a rule of finality. Evidence not intro-

duced, or objections not made, at the appropriate time cannot be brought forward to reopen the conviction after judgment has been rendered. In the United States, we have developed generous exceptions to the rule of finality, one of which permits reopening, via habeas corpus, when the petitioner shows "cause" excusing the procedural default, and "actual prejudice" resulting from the alleged error. *United States* v. *Frady*, 456 U. S. 152, 167–168 (1982). We have gone even beyond that generous exception in a certain class of cases: cases that have actually gone to trial. There we have held that, "even in the absence of a showing of cause for the procedural default," habeas corpus will be granted "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup* v. *Delo*, *supra*, at 321 (internal quotation marks omitted). In every one of our cases that has considered the possibility of applying this so-called actual-innocence exception, a defendant had asked a habeas court to adjudicate a successive or procedurally defaulted constitutional claim *after his conviction by a jury.* See *Kuhlmann* v. *Wilson*, 477 U. S. 436, 441, 452 (1986) (opinion of Powell, J.); *Murray* v. *Carrier*, 477 U. S. 478, 482, 495–496 (1986); *Smith* v. *Murray*, 477 U. S. 527, 529, 537–538 (1986); *McCleskey* v. *Zant*, 499 U. S. 467, 471, 502 (1991); *Sawyer* v. *Whitley*, 505 U. S. 333, 336–337, 339–340 (1992); *Schlup, supra*, at 305, 317–332.

There are good reasons for this limitation: First and foremost, it is feasible to make an accurate assessment of "actual innocence" when a trial has been had. In *Schlup*, for example, we said that to sustain an "actual innocence" claim the petitioner must "show that it is more likely than not that no reasonable juror would have convicted him *in the light of the new evidence.*" 513 U. S., at 327 (emphasis added). That "new evidence" was to be evaluated, of course, along with the "old evidence," consisting of the transcript of the trial. The habeas court was to "make its determination concerning

the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." *Id.*, at 328 (internal quotation marks omitted). As the Court's opinion today makes clear, *ante*, at 624, the Government is permitted to supplement the trial record with any additional evidence of guilt, but the court begins with (and ordinarily ends with) a complete trial transcript to rely upon. But how is the court to determine "actual innocence" upon our remand in the present case, where conviction was based upon an admission of guilt? Presumably the defendant will introduce evidence (perhaps nothing more than his own testimony) showing that he did not "use" a firearm in committing the crime to which he pleaded guilty, and the Government, eight years after the fact, will have to find and produce witnesses saying that he did. This seems to me not to remedy a miscarriage of justice, but to produce one.*

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*The Court believes these concerns are overstated because, in the federal system, the court must be satisfied that there is a factual basis for the plea. See *ante*, at 624, n. 3. This displays a sad lack of solicitude for state courts, which handle the overwhelming majority of criminal cases. But even in the federal system, the "factual basis" requirement will typically be of no use. Consider the factual basis for the guilty plea in the present case, as set forth in the plea agreement:

"The parties . . . agree that, on or about March 19, 1990, . . . the defendant knowingly used firearms during and in relation to a drug-trafficking offense . . . . The following firearms were found in the defendant's bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The defendant admits ownership and possession of these two guns. This conduct constituted a violation of Title 18, United States Code, Section 924(c). Three other firearms were found in the two briefcases containing the bulk of the methamphetamine: a loaded .22 caliber North American Arms handgun, serial number C7854; a loaded .45 caliber Colt Model 1911 semiautomatic handgun, serial number 244682;

Second, the Court has given as one of its justifications for the super-generous miscarriage-of-justice exception to inexcusable default, "the fact that habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." *Schlup*, *supra*, at 321. That may be true enough of petitions challenging jury convictions; it assuredly will not be true of petitions challenging the "voluntariness" of guilty pleas. I put "voluntariness" in quotation marks, because we are not dealing here with only *coerced* confessions, which may indeed be rare enough. The present case is here because, in *Henderson* v. *Morgan*, 426 U. S. 637, 644–646 (1976), this Court held that where neither the indictment, defense counsel, nor the trial court explained to the defendant that intent to kill was an element of second-degree murder, his plea to that offense was "involuntary." A plea, the Court explained, can "not be voluntary *in the sense that* it constitute[s] an intelligent admission that he committed the offense unless the defendant receive[s] 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.' " *Id.*, at 645, quoting *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941). Of course the word "voluntary" had never been used (by precise speakers, at least) *in that sense*—in the sense of "intelligent"—and what the *Henderson* line of cases did was, by sleight-of-tongue, to obliterate the distinction between *involuntary* confessions and *misinformed* or even *uninformed* confessions. Once all those categories have been lumped to-

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an unloaded Ruger .357 caliber revolver, serial number 151–36099. The defendant denies knowledge of these guns." App. 8.

Of course "knowingly used" in this statement presumably means "knowingly used" in the erroneous sense that prompts this litigation. And that will almost always be the situation where the "involuntariness" of the plea is a consequence of subsequently clarified uncertainty in the law: The factual basis will not include a fact which, by hypothesis, the court and the parties think irrelevant.

gether, the cases within them are not at all rare, but indeed exceedingly numerous.

It is well established that "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 313, n. 12 (1994). Thus, every time this Court resolves a Circuit split regarding the elements of a crime defined in a federal statute, most, if not all, defendants who pleaded guilty in those Circuits on the losing end of the split will have confessed "involuntarily," having been advised by the court, or by their counsel, that the law was what (as it turns out) it was not—or even (since this would suffice for application of *Henderson*) merely *not* having been advised that the law was what (as it turns out) it was. Indeed the latter basis for "involuntariness" (mere lack of "'real notice of the true nature of the charge against him,'" *Henderson*, *supra*, at 645) might be available even to those defendants pleading guilty in the Circuits on the *winning* side of the split. Thus, our decision in *Bailey* v. *United States*, 516 U. S. 137 (1995), has generated a flood of 28 U. S. C. § 2255 habeas petitions, each asserting actual innocence of "using" a firearm in violation of 18 U. S. C. § 924(c). This Term, we will resolve a Circuit split over the meaning of another element ("carry" a firearm) in the same statute. See *Muscarello* v. *United States*, No. 96–1654; *Cleveland* v. *United States*, No. 96–8837. And we will also resolve Circuit splits over the requisite elements of five other federal criminal statutes. See *Salinas* v. *United States*, 522 U. S. 52 (1997) (18 U. S. C. § 666(a)(1)(B)); *Brogan* v. *United States*, 522 U. S. 398 (1998) (18 U. S. C. § 1001); *Bates* v. *United States*, 522 U. S. 23 (1997) (20 U. S. C. § 1097(a)); *Bryan* v. *United States*, No. 96–8422 (18 U. S. C. § 922(a)(1)(A)); *Caron* v. *United States*, No. 97–6270 (18 U. S. C. § 921(a)(20)).

To the undeniable fact that the claim of "actual innocence" is much more likely to be available in guilty-plea cases than

in jury-trial cases, there must be added the further undeniable fact that guilty-plea cases are very much more numerous than jury-trial cases. Last year, 51,647 of the 55,648 defendants convicted and sentenced in federal court (or nearly 93 percent) pleaded guilty. Administrative Office of the United States Courts, L. Mecham, Judicial Business of the United States Courts: 1997 Report of the Director 214.

When all these factors are taken into account, it could not be clearer that the premise for our adoption in *Schlup* of the super-generous "miscarriage of justice" exception to normal finality rules—viz., that the cases in which defendants seek to invoke the exception would be "extremely rare"—is simply not true when the exception is extended to guilty pleas. To the contrary, the cases will be extremely frequent, placing upon the criminal-justice system a burden it will be unable to bear—especially in light of the fact, discussed earlier, that on remand the habeas trial court will not have any trial record on the basis of which to make the "actual innocence" determination.

Not only does the disposition agreed upon today overload the criminal-justice system; it makes relief available where equity demands that relief be denied. When a defendant pleads guilty, he waives his right to have a jury make the requisite findings of guilt—typically in exchange for a lighter sentence or reduced charges. Thus, defendants plead guilty to charges that have not been proved—that perhaps *could not* be proved—in order to avoid conviction on charges of which they are "actually guilty," which carry a harsher penalty. Under today's holding, a defendant who is the "wheelman" in a bank robbery in which a person is shot and killed, and who pleads guilty in state court to the offense of voluntary manslaughter in order to avoid trial on felony-murder charges, is entitled to federal habeas review of his contention that his guilty plea was "involuntary" because he was not advised that intent to kill was an element of the manslaughter offense, and that he was "actually innocent" of man-

slaughter because he had no intent to kill. In such a case, it is excusing the petitioner from his procedural default, not holding him to it, that would be the miscarriage of justice.

The Court evidently seeks to avoid this absurd consequence by prescribing that the defendant's "showing of actual innocence must also extend" to any charge the Government has "forgone," *ante*, at 624. This is not even a fully satisfactory solution in theory, since it assumes that the "forgone" charge is identifiable. If, as is often the case, the bargaining occurred before the charge was filed ("charge-bargaining" instead of "plea-bargaining"), it will almost surely not be identifiable. And of course in practical terms, the solution is no solution at all. To avoid the patent inequity, the Government will be called upon to refute, without any factual record to rely upon, not only the defendant's testimony of his innocence on the charge of conviction, but his testimony of innocence on the "forgone" charge as well—and as to the second, even the finding of "factual basis" required in federal courts, see n., *supra*, will not exist. But even if rebuttal evidence existed, it is a bizarre waste of judicial resources to require minitrials on charges made in dusty indictments (or indeed, if they could be identified, on charges *never made*), just to determine whether the defendant can litigate a procedurally defaulted challenge to a guilty plea on a *different* offense. Rube Goldberg would envy the scheme the Court has created.

* * *

It would be marvellously inspiring to be able to boast that we have a criminal-justice system in which a claim of "actual innocence" will always be heard, no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault. But of course we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could. The "actual innocence" ex-

ception this Court has invoked to overcome inexcusable procedural default in cases decided by a jury "seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U. S., at 324. Since the balance struck there simply does not obtain in the guilty-plea context, today's decision is *not* a logical extension of *Schlup*, and it is a grave mistake. For these reasons, I respectfully dissent.

Syllabus

STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL. *v.* MARTINEZ-VILLAREAL

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

No. 97–300. Argued February 25, 1998—Decided May 18, 1998

Respondent was convicted of first-degree murder and sentenced to death. His direct appeals and habeas petitions in the Arizona state courts were unsuccessful, and his first three federal habeas petitions were denied on the ground that he had not exhausted his state remedies. In his fourth federal habeas petition, he claimed, *inter alia*, that he was incompetent to be executed under *Ford* v. *Wainwright*, 477 U. S. 399. The District Court dismissed that claim as premature, but granted the writ on other grounds. In reversing the granting of the writ, the Ninth Circuit explained that its ruling was not intended to affect later litigation of the *Ford* claim. On remand, respondent moved to reopen his petition, fearing that review of his *Ford* claim might be foreclosed by the newly enacted Antiterrorism and Effective Death Penalty Act (AEDPA), which establishes a "gatekeeping" mechanism for the consideration of "second or successive [federal] habeas corpus applications," *Felker* v. *Turpin*, 518 U. S. 651, 657; 28 U. S. C. § 2244(b). Under AEDPA, a prisoner must ask the appropriate court of appeals to direct the district court to consider such an application, § 2244(b)(3)(A), and a court of appeals' decision whether to authorize an application's filing is not appealable and cannot be the subject of a petition for rehearing or a writ of certiorari, § 2244(b)(3)(E). The District Court denied the motion. Subsequently, Arizona obtained a warrant for respondent's execution, and the state courts found him fit to be executed. The District Court denied another motion to reopen his *Ford* claim, holding that it lacked jurisdiction under AEDPA. He then asked the Ninth Circuit for permission to file a successive habeas application. That court held that § 2244(b) did not apply to a petition that raises only a competency to be executed claim and that respondent did not, therefore, need authorization to file his petition in the District Court.

Held:

1. Because respondent's claim was not a "second or successive" petition under § 2244(b), this Court has jurisdiction to review the Ninth Circuit's judgment on petitioners' certiorari petition. The fact that this was the second time that respondent asked the federal courts to provide

Syllabus

relief on his *Ford* claim does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim when it became ripe. Since respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application, the Ninth Circuit correctly held that he was not required to get authorization to file a "second or successive" application before his *Ford* claim could be heard. Accepting petitioners' interpretation—that once an individual has one fully litigated habeas petition, his new petition must be treated as successive—would have far-reaching and seemingly perverse implications for habeas practice. This Court's cases have never suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court would adjudicate those claims under the same standard as would govern those made in any other first petition. Respondent's *Ford* claim—previously dismissed as premature—should be treated in the same manner, for, in both situations, the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons, having nothing to do with the claim's merits, would bar the prisoner from ever obtaining federal habeas review. Petitioners' reliance on *Felker* v. *Turpin*, *supra*, for a contrary interpretation is misplaced. Pp. 641–645.

2. For the same reasons that this Court finds it has jurisdiction, it finds that the Ninth Circuit correctly decided that respondent was entitled to a hearing on the merits of his *Ford* claim in the District Court. Pp. 645–646.

118 F. 3d 628, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 646. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 648.

Bruce M. Ferg, Assistant Attorney General of Arizona, argued the cause for petitioners. With him on the briefs were *Grant Woods*, Attorney General, *pro se*, and *Paul J. McMurdie*.

Denise I. Young argued the cause for respondent. With her on the brief were *Paul Bender*, *Sean D. O'Brien*, *Fredric F. Kay*, and *Dale A. Baich.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Ford* v. *Wainwright*, 477 U. S. 399, 410 (1986), we held that "the Eighth Amendment prohibits a State from inflicting the penalty of death upon a prisoner who is insane." In this case, we must decide whether respondent Martinez-Villareal's *Ford* claim is subject to the restrictions on "second or successive" applications for federal habeas relief found in the newly revised 28 U. S. C. § 2244 (1994 ed., Supp. II). We conclude that it is not.

Respondent was convicted on two counts of first-degree murder and sentenced to death. He unsuccessfully challenged his conviction and sentence on direct appeal in the

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, *Dane R. Gillette*, Senior Assistant Attorney General, *Keith H. Borjon*, Supervising Deputy Attorney General, and *Emilio Eugene Varanini IV*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *M. Jane Brady* of Delaware, *Alan G. Lance* of Idaho, *Jeffrey A. Modisett* of Indiana, *Carla J. Stovall* of Kansas, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie S. Del Papa* of Nevada, *Michael F. Easley* of North Carolina, *D. Michael Fisher* of Pennsylvania, *Betty Montgomery* of Ohio, *Drew Edmondson* of Oklahoma, *Hardy Meyers* of Oregon, *Mark Barnett* of South Dakota, *Dan Morales* of Texas, *Jan Graham* of Utah, and *William U. Hill* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent Scheidegger* and *Charles L. Hobson.*

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Jerome J. Shestack*, *Jerold S. Solovy*, *Barry Levenstam*, and *C. John Koch;* for the American Civil Liberties Union by *Larry W. Yackle* and *Steven R. Shapiro;* for the National Association of Criminal Defense Lawyers by *Edward M. Chikofsky*, *Mark E. Olive*, and *David M. Porter;* and for the United Mexican States et al. by *John P. Frank* and *José A. Cárdenas.*

Arizona state courts. *Arizona* v. *Martinez-Villareal*, 145 Ariz. 441, 702 P. 2d 670, cert. denied, 474 U. S. 975 (1985). He then filed a series of petitions for habeas relief in state court, all of which were denied. He also filed three petitions for habeas relief in federal court, all of which were dismissed on the ground that they contained claims on which the state remedies had not yet been exhausted.

In March 1993, respondent filed a fourth habeas petition in federal court. In addition to raising other claims, respondent asserted that he was incompetent to be executed. Counsel for the State urged the District Court to dismiss respondent's *Ford* claim as premature. The court did so but granted the writ on other grounds. The Court of Appeals for the Ninth Circuit reversed the District Court's granting of the writ but explained that its instruction to enter judgment denying the petition was not intended to affect any later litigation of the *Ford* claim. *Martinez-Villareal* v. *Lewis*, 80 F. 3d 1301, 1309, n. 1 (1996).

On remand to the District Court, respondent, fearing that the newly enacted Antiterrorism and Effective Death Penalty Act (AEDPA) might foreclose review of his *Ford* claim, moved the court to reopen his earlier petition. In March 1997, the District Court denied the motion and reassured respondent that it had "'no intention of treating the *[Ford]* claim as a successive petition.'" 118 F. 3d 628, 630 (CA9 1997). Shortly thereafter, the State obtained a warrant for respondent's execution. Proceedings were then held in the Arizona Superior Court on respondent's mental condition. That court concluded that respondent was fit to be executed. The Arizona Supreme Court rejected his appeal of that decision.

Respondent then moved in the Federal District Court to reopen his *Ford* claim. He challenged both the conclusions reached and the procedures employed by the Arizona state courts. Petitioners responded that under AEDPA, the court lacked jurisdiction. The District Court agreed with

petitioners, ruling on May 16, 1997, that it did not have jurisdiction over the claim. Respondent then moved in the Court of Appeals for permission to file a successive habeas corpus application. § 2244(b)(3).

The Court of Appeals stayed respondent's execution so that it could consider his request. It later held that § 2244(b) did not apply to a petition that raises only a competency to be executed claim and that respondent did not, therefore, need authorization to file the petition in the District Court. It accordingly transferred the petition that had been presented to a member of that court back to the District Court. 118 F. 3d, at 634–635.

We granted certiorari, 522 U. S. 912 (1997), to resolve an apparent conflict between the Ninth Circuit and the Eleventh Circuit on this important question of federal law. See, *e. g.*, *In re Medina*, 109 F. 3d 1556 (CA11 1996).

Before reaching the question presented, however, we must first decide whether we have jurisdiction over this case. In AEDPA, Congress established a "gatekeeping" mechanism for the consideration of "second or successive habeas corpus applications" in the federal courts. *Felker* v. *Turpin*, 518 U. S. 651, 657 (1996); § 2244(b). An individual seeking to file a "second or successive" application must move in the appropriate court of appeals for an order directing the district court to consider his application. § 2244(b)(3)(A). The court of appeals then has 30 days to decide whether to grant the authorization to file. § 2244(b)(3)(D). A court of appeals' decision whether to grant authorization "to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." § 2244(b)(3)(E).

If the Court of Appeals in this case had granted respondent leave to file a second or successive application, then we would be without jurisdiction to consider petitioners' petition and would have to dismiss the writ. This is not, however, what the Court of Appeals did. The Court of Appeals

held that the § 2244(b) restrictions simply do not apply to respondent's *Ford* claim, and that there was accordingly no need for him to apply for authorization to file a second or successive petition. We conclude today that the Court of Appeals reached the correct result in this case, and that we therefore have jurisdiction to consider petitioners' petition.

Section 2244(b) provides:

> "(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> "(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> "(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense."

If respondent's current request for relief is a "second or successive" application, then it plainly should have been dismissed. The *Ford* claim had previously been presented in the 1993 petition, and would therefore be subject to dismissal under subsection (b)(1). Even if we were to consider the *Ford* claim to be newly presented in the 1997 petition, it does not fit within either of subsection (b)(2)'s exceptions, and dismissal would still be required.

Petitioners contend that because respondent has already had one "fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive." Brief for Petitioners 12. Under that reading of the statute, respondent is entitled to only one merits judgment on his federal habeas claims. Because respondent has already presented a petition to the District Court, and the District Court and the Court of Appeals have acted on that petition, § 2244(b) must apply to any subsequent request for federal habeas relief.

But the only claim on which respondent now seeks relief is the *Ford* claim that he presented to the District Court, along with a series of other claims, in 1993. The District Court, acting for the first time on the merits of any of respondent's claims for federal habeas relief, dismissed the *Ford* claim as premature, but resolved all of respondent's other claims, granting relief on one. The Court of Appeals subsequently reversed the District Court's grant of relief. At that point it became clear that respondent would have no federal habeas relief for his conviction or his death sentence, and the Arizona Supreme Court issued a warrant for his execution. His claim then unquestionably ripe, respondent moved in the state courts for a determination of his competency to be executed. Those courts concluded that he was competent, and respondent moved in the Federal District Court for review of the state court's determination.

This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief. The Court of Appeals was therefore correct in holding that

respondent was not required to get authorization to file a "second or successive" application before his *Ford* claim could be heard.

If petitioners' interpretation of "second or successive" were correct, the implications for habeas practice would be far reaching and seemingly perverse. In *Picard* v. *Connor*, 404 U. S. 270, 275 (1971), we said:

> "It has been settled since *Ex parte Royall*, 117 U. S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for *habeas corpus*. . . . The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U. S. C. §§ 2254(b) and (c), reflects a policy of federal-state comity. . . . It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied."

Later, in *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982), we went further and held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." But none of our cases expounding this doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

We believe that respondent's *Ford* claim here—previously dismissed as premature—should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies. True, the cases are not identical; respondent's *Ford* claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore

his competency to be executed could not be determined at that time. But in both situations, the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review. See, *e. g.*, *United States ex rel. Barnes* v. *Gilmore*, 968 F. Supp. 384, 385 (ND Ill. 1997) ("If Barnes continues in his nonpayment of the required $5 filing fee . . . this Court will be constrained to dismiss his petition"); *Marsh* v. *United States District Court for the Northern District of California*, 1995 WL 23942 (ND Cal., Jan. 9, 1995) ("Because petitioner has since not paid the filing fee nor submitted a signed affidavit of poverty, the petition for writ of habeas corpus is dismissed without prejudice"); *Taylor* v. *Mendoza*, 1994 WL 698493 (ND Ill., Dec. 12, 1994).*

Petitioners place great reliance on our decision in *Felker* v. *Turpin*, 518 U. S. 651 (1996), but we think that reliance is misplaced. In *Felker* we stated that the "new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what used to be called in habeas corpus practice 'abuse of the writ.'" *Id.*, at 664. It is certain that respondent's *Ford* claim would not be barred under any form of res judicata. Respondent brought his claim in a timely fashion, and it has not been ripe for resolution until now.

Thus, respondent's *Ford* claim was not a "second or successive" petition under § 2244(b) and we have jurisdiction to review the judgment of the Court of Appeals on petitioners' petition for certiorari. But for the same reasons that we find we have jurisdiction, we hold that the Court of Appeals was correct in deciding that respondent was entitled to a

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*This case does not present the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a "second or successive habeas corpus application" within the meaning of AEDPA.

hearing on the merits of his *Ford* claim in the District Court. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

It is axiomatic that "the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law." *Ex parte Bollman*, 4 Cranch 75, 94 (1807) (opinion of Marshall, C. J.). And it is impossible to conceive of language that more clearly precludes respondent's renewed competency-to-be-executed claim than the written law before us here: a "claim *presented* in a second or successive habeas corpus application . . . that was *presented* in a prior application shall be dismissed." 28 U. S. C. §2244(b)(1) (1994 ed., Supp. II) (emphasis added). The Court today flouts the unmistakable language of the statute to avoid what it calls a "perverse" result. *Ante*, at 644. There is nothing "perverse" about the result that the statute commands, except that it contradicts pre-existing judge-made law, which it was precisely the purpose of the statute to change.

Respondent received a full hearing on his competency-to-be-executed claim in state court. The state court appointed experts and held a 4-day evidentiary hearing, after which it found respondent "aware that he is to be punished for the crime of murder and . . . aware that the impending punishment for that crime is death . . . ." App. 172. Respondent appealed this determination to the Supreme Court of Arizona, which accepted jurisdiction and denied relief. He sought certiorari of that denial in this Court, which also denied relief. To say that it is "perverse" to deny respondent a second round of time-consuming lower-federal-court review of his conviction and sentence—because that means forgoing lower-federal-court review of a competency-to-be-executed claim that arises only after he has already sought federal

habeas on other issues—is to say that state-court determinations must always be reviewable, not merely by this Court, but by federal district courts. That is indeed the principle that this Court's imaginative habeas-corpus jurisprudence had established, but it is not a principle of natural law. Lest we forget, Congress did not even have to create inferior federal courts, U. S. Const., Art. I, § 8, cl. 9; Art. III, § 1, let alone invest them with plenary habeas jurisdiction over state convictions. And for much of our history, as JUSTICE THOMAS points out, *post*, at 652, prisoners convicted by validly constituted courts of general criminal jurisdiction had no recourse to habeas corpus relief *at all*. See *Wright* v. *West*, 505 U. S. 277, 285–286 (1992) (opinion of THOMAS, J.).

It seems to me much further removed from the "perverse" to deny second-time collateral federal review than it is to treat state-court proceedings as nothing more than a procedural prelude to lower-federal-court review of state supreme-court determinations. The latter was the regime that our habeas jurisprudence established and that the Antiterrorism and Effective Death Penalty Act (AEDPA) intentionally revised—to require extraordinary showings before a state prisoner can take a second trip around the extended district-court-to-Supreme-Court federal track. It is wrong for us to reshape that revision on the very lathe of judge-made habeas jurisprudence it was designed to repair.

Today's opinion resembles nothing so much as the cases of the 1920's that effectively decided that the Clayton Act, designed to eliminate federal-court injunctions against union strikes and picketing, "restrained the federal courts from nothing that was previously proper." T. Powell, The Supreme Court's Control Over the Issue of Injunctions in Labor Disputes, 13 Acad. Pol. Sci. Proc. 37, 74 (1928). In criticizing those cases as examples of *Gefühlsjurisprudenz* (and in insisting upon "the necessity of preferring . . . the *Gefühl* of the legislator to the *Gefühl* of the judge"), Dean Landis recalled Dicey's trenchant observation that "'judge-

made law occasionally represents the opinion of the day before yesterday.'" Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886, 888 (1930), quoting A. Dicey, Law and Opinion in England 369 (1926). As hard as it may be for this Court to swallow, in yesterday's enactment of AEDPA Congress curbed our prodigality with the Great Writ. The words that Landis applied to the Clayton Act fit very nicely the statute that emerges from the Court's decision in the present case: "The mutilated [AEDPA] bears ample testimony to the 'day before yesterday' that judges insist is today." 43 Harv. L. Rev., at 892. I dissent.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

From 1986 to 1991, respondent filed three petitions for federal habeas relief; each was dismissed on the ground that respondent had not yet exhausted his state remedies. In March 1993, respondent filed his fourth federal habeas petition presenting, *inter alia,* his claim under *Ford* v. *Wainwright*, 477 U. S. 399 (1986), that he was not competent to be executed. Finding that some of respondent's claims were procedurally defaulted, that others were without merit, and that respondent's *Ford* claim was not ripe for decision, the Court of Appeals held that the fourth petition should be denied. In May 1997, after the Arizona state courts rejected his *Ford* claim, respondent returned for a fifth time to federal court, again arguing that he was incompetent to be executed. Because this filing was a "second or successive habeas corpus application," respondent's *Ford* claim should have been dismissed. I therefore respectfully dissent.

Unlike the Court, I begin with the plain language of the statute. Section 2244(b)(1) provides that a "claim presented in a second or successive habeas corpus application . . . that was presented in a prior application shall be dismissed." 28 U. S. C. § 2244(b)(1) (1994 ed., Supp. II). An "application" is a "putting to, placing before, preferring a request or petition

to or before a person. The act of making a request for something." Black's Law Dictionary 98–99 (6th ed. 1990); see also Webster's Ninth New Collegiate Dictionary 97 (1991) (application is a "request, petition . . . a form used in making a request"). Respondent's March 1993 federal habeas petition was clearly a habeas "application" (the Court concedes as much), because it placed before the District Court respondent's request for a writ of habeas corpus. Once this application was denied, however, none of respondent's claims for relief—including his claim that he was incompetent to be executed—remained before the Court. It was thus necessary for respondent to file a new request for habeas relief so that his *Ford* claim would again be "pu[t] to" or "plac[ed] before" the District Court. (The Court certainly did not raise respondent's *Ford* claim *sua sponte*.) Respondent's May 1997 request for relief was therefore a habeas application distinct from his earlier requests for relief, and it was thus undoubtedly "second or successive."

Respondent's *Ford* claim was also "presented" in both his March 1993 and his May 1997 habeas applications. To "present" is "to bring or introduce into the presence of someone" or "to lay (as a charge) before a court as an object of inquiry." Webster's Ninth New Collegiate Dictionary 930 (1991). Respondent clearly "presented" his *Ford* claim in both his 1993 and his 1997 habeas applications, for in each he introduced to the District Court his argument that he is not competent to be executed. Under the plain meaning of the statute, therefore, respondent's *Ford* claim was a "claim presented in a second or successive habeas corpus application . . . that was presented in a prior application." § 2244(b)(1).

The reasons offered by the Court for disregarding the plain language of the statute are unpersuasive. Conceding that "[t]his may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim," *ante*, at 643, the Court nevertheless concludes that respondent has really filed only "*one* application for habeas

relief," *ibid.* (emphasis added). The District Court, however, did not hold respondent's *Ford* claim in abeyance when it denied his March 1993 habeas petition, so that claim was no longer before the District Court in May 1997. At best, then, respondent's May 1997 filing was an effort to reopen his *Ford* claim. But that filing (which is most definitely an "application") is subject to the statutory requirements for second or successive habeas applications. As we have recently stated in a closely related context:

> "[A] prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Calderon* v. *Thompson*, *ante*, at 553.

In just the same way, habeas petitioners cannot be permitted to evade § 2244(b)'s prohibitions simply by moving to reopen claims already presented in a prior habeas application.

The Court also reasons that respondent's "*Ford* claim here—previously dismissed as premature—should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies," for "in both situations, the habeas petitioner does not receive an adjudication of his claim." *Ante*, at 644, 645. Implicit in the Court's reasoning is its assumption that a prisoner whose habeas petition has been dismissed for failure to exhaust state remedies, and who then exhausts those remedies and returns to federal court, has not then filed a "second or successive habeas corpus application." § 2244(b)(1). To be sure, "none of our cases . . . ha[s] ever suggested" that a prisoner in such a situation was filing a successive petition. See *ante*, at 644. But that is because, before enactment of the Antiterrorism and Effective Death Penalty Act of 1996

(AEDPA), 110 Stat. 1218, a federal court could grant relief on a claim in a second or successive application so long as the ground for relief had not already been "presented *and determined*," 28 U. S. C. § 2244(a) (emphasis added), or "adjudicated," § 2244(b), in a previous application. Claims presented in a petition dismissed for failure to exhaust are neither "determined" nor "adjudicated." Thus, the pre-AEDPA practice of permitting petitioners to raise claims already presented in applications dismissed for failure to exhaust says nothing about whether those later applications were considered second or successive.

Even if the Court were correct that such an application would not have been considered second or successive, such a case is altogether different from this case, in which only one of many claims was not adjudicated. In the former situation, the federal court dismisses the unexhausted petition without prejudice, see *Rose* v. *Lundy*, 455 U. S. 509, 520–522 (1982), so it could be argued that the petition should be treated as if it had never been filed. In contrast, when a court addresses a petition and adjudicates some of the claims presented in it, that petition is certainly an "application," and any future application must be "second or successive."[1] Otherwise, the court would have adjudicated the merits of claims that had not been presented in an "application."[2]

Ultimately, the Court's holding is driven by what it sees as the "far reaching and seemingly perverse" implications for federal habeas practice of a literal reading of the statute.

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[1] If the Court's position is that respondent's May 1997 filing was an "application," but not a "second or successive" one, presumably 28 U. S. C. § 2244(b) (1994 ed., Supp. II) would not have precluded respondent from presenting, along with his claim under *Ford* v. *Wainwright*, 477 U. S. 399 (1986), a claim previously adjudicated *on the merits*, for § 2244(b) operates to bar only those claims presented in "second or successive" applications.

[2] Even if a claim dismissed without prejudice could be treated as having never been presented, dismissal, as the Court concedes, would still be required because a *Ford* claim does not fit within § 2244(b)(2)(B)'s exceptions for claims not presented in prior applications. See *ante*, at 642.

Ante, at 644. Such concerns are not, in my view, sufficient to override the statute's plain meaning. And to the extent concerns about habeas practice motivate the Court's decision, it bears repeating that federal habeas corpus is a statutory right and that this Court, not Congress, has expanded the availability of the writ. Before this judicial expansion, a prisoner seeking a writ of habeas corpus was permitted to challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody. See *Wright* v. *West*, 505 U. S. 277, 285–286 (1992) (opinion of THOMAS, J.). A *Ford* claim obviously does not present such a challenge.[3] A statute that has the effect of precluding adjudication of a claim that for most of our Nation's history would have been considered noncognizable on habeas can hardly be described as "perverse."

Accordingly, whether one considers respondent's March 1993 federal habeas petition to have been his *first* habeas application—because his three previous applications had been dismissed for failure to exhaust—or his *fourth*—because respondent had already filed three previous habeas applications by that time—his May 1997 request for relief was undoubtedly either a "second" (following his first) or "successive" (following his fourth) habeas application. Respondent's *Ford* claim, presented in this second or successive application, should have been dismissed as a "claim . . . presented in a prior application." § 2244(b)(1).

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[3] There is an additional reason why a state prisoner's *Ford* claim may not be cognizable on federal habeas. A state prisoner may bring a federal habeas petition "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254. A *Ford* claim does not challenge either the prisoner's underlying conviction or the legality of the sentence; it challenges *when* (or whether) the sentence can be carried out.

Syllabus

TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION, AVCO CORP. *v.* UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.

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

No. 97–463. Argued February 23, 1998—Decided May 18, 1998

Petitioner Textron Lycoming Reciprocating Engine Division (Textron) and respondents—an international union and one of its locals (hereinafter Union), which represented approximately 500 Textron employees—were parties to a collective-bargaining agreement that prohibited the Union from striking for any reason and required Textron to notify the Union before entering into any agreement to "subcontract out" work that would otherwise be performed by Union members. After Textron announced plans to subcontract out enough work to cause roughly one-half of the Union members to lose their jobs, the Union filed the present complaint, which, *inter alia*, alleged that Textron had fraudulently induced the Union to sign the collective-bargaining agreement, and sought damages and a declaratory judgment that the agreement was voidable at the Union's option. The complaint invoked § 301(a) of the Labor Management Relations Act as the basis of federal subject-matter jurisdiction, but did not allege that either party had ever violated the terms of the collective-bargaining agreement. The District Court dismissed the complaint for lack of subject-matter jurisdiction, concluding that the cause of action alleged did not come within § 301(a). The Third Circuit reversed.

Held: Because the Union's complaint alleges no violation of the collective-bargaining agreement, neither this Court nor the federal courts below have subject-matter jurisdiction under § 301(a), which confers jurisdiction only over "[s]uits for violation of contracts." While a federal court may, in the course of resolving a dispute concerning alleged violation of a collective-bargaining agreement, adjudicate the affirmative defense that the contract was invalid, see *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 85–86, it has no jurisdiction to resolve such a contention independently of, rather than ancillary to, its power to adjudicate "[s]uits for violation of contracts." Here, since the Union neither alleges that Textron has violated the contract, nor seeks declaratory relief from its own alleged violation, § 301(a) jurisdiction does not lie. The Union's

reliance upon the fact that it seeks a declaration of voidability under the federal Declaratory Judgment Act rests on several less than certain assumptions, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, distinguished, but is in any event inadequate because there is no indication that either party has any interest in the contract's voidability, and hence no case or controversy on this issue giving the Union access to federal courts. Pp. 656–662.

117 F. 3d 119, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 662. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 662.

Timothy B. Dyk argued the cause for petitioner. With him on the briefs were *Andrew M. Kramer* and *Daniel H. Bromberg.*

Stephen A. Yokich argued the cause for respondents. With him on the brief were *Daniel W. Sherrick*, *Marsha S. Berzon*, *James B. Coppess*, and *Laurence Gold.**

JUSTICE SCALIA delivered the opinion of the Court.

The sole question presented for review is whether federal courts have subject-matter jurisdiction of this case under § 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185(a).

I

Petitioner, Textron Lycoming Reciprocating Engine Division (Textron), employs at its Williamsport, Pennsylvania, plant approximately 500 members of respondents, the United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 187 (hereinafter UAW or Union). From April 1, 1994, to April 1, 1997, Textron and the Union were parties to a collective-bargaining agreement that pro-

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**Solicitor General Waxman*, *Deputy Solicitor General Wallace*, *Lisa Schiavo Blatt*, *Frederick L. Feinstein*, *Linda Sher*, *Norton J. Come*, and *John H. Ferguson* filed a brief for the United States as *amicus curiae* urging affirmance.

hibited the Union from striking against Textron for any reason and, through the adoption of a separate memorandum agreement, required Textron to give the Union seven days' notice before entering into any agreement to "subcontract out" work that would otherwise be performed by Union members. In June 1994, Textron announced that it planned to subcontract out a volume of work that would cause roughly one-half of the Union members to lose their jobs.

Thereafter, in November 1995, the Union filed the present complaint in Federal District Court, alleging that Textron fraudulently induced the Union to sign the collective-bargaining agreement. Specifically, the Union claims that both before and during negotiations it repeatedly asked Textron to provide any information it might have regarding plans to subcontract out work that would otherwise be performed by Union members; and that during negotiations, Textron had in fact completed such a plan, but despite the Union's repeated requests said nothing about its existence. As redress, the Union seeks "a declaratory judgment that the existing collective bargaining agreement between the parties is voidable at the option of [the] UAW," and "compensatory and punitive damages . . . to compensate [the Union and its members] for the harm caused by [Textron's] misrepresentations and concealments and to deter other Employers from similar conduct." App. 19. The Union does not allege that either it or Textron ever violated the terms of the collective-bargaining agreement. As the basis of federal subject-matter jurisdiction, the complaint invokes § 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a).[1]

[1] The Union's brief before this Court asserts, in a footnote and without elaboration, that "there may well be jurisdiction over this case under 28 U. S. C. § 1331 as well as under § 301, since the case 'arises under' the federal common law of contract." Brief for Respondents 23, n. 11. That issue was not contained within the Question Presented in the Petition for Certiorari, which read:

"Whether Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185, which confers federal jurisdiction over '[s]uits for violation of contracts between an employer and a labor organization,' permits a

The District Court dismissed the complaint for lack of subject-matter jurisdiction, concluding that the cause of action it set forth did not come within § 301(a). The Court of Appeals for the Third Circuit reversed, 117 F. 3d 119 (1997); we granted certiorari, 522 U. S. 979 (1997).

II

Section 301(a) of the Labor Management Relations Act, 1947, provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156, 29 U. S. C. § 185(a).

By its terms, this provision confers federal subject-matter jurisdiction only over "[s]uits for violation of contracts." The Union, and the Government in an *amicus* brief filed in support of the Union, contend that this includes suits alleging that a contract is invalid. Focusing on the breadth of the word "for," the Government argues that § 301(a) "is broad enough to encompass not only a suit that 'alleges' a violation of contract, but also one that concerns a violation of contract, or is intended to establish a legal right to engage in what otherwise would be a contract violation." Brief for United States as *Amicus Curiae* 11 (footnotes omitted). It is true enough, as the Government points out, that one of the numerous definitions of the word "for" is "[i]ndicating the end with reference to which anything acts, serves, or is done; . . . . As a preparation towards, against, or in view of; having as goal or object; . . . . With the purpose or object of; . . . with a view to." Webster's New International Dic-

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union to sue in federal court to declare a collective bargaining agreement voidable in the absence of any alleged violation of the agreement."

tionary 984 (2d ed. 1950) (def. 2). Even applying that definition, the Government must make a considerable stretch to bring the present case within it. This suit obviously does not have as its "purpose or object" violation of any contract. The most the Government can assert (and it falls short of the definition) is that the suit seeks to facilitate "*what otherwise would be* . . . contract violation[s]." Brief for United States 11 (emphasis added).

More basically, however, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U. S. 129, 132 (1993). Accord, *Cohen* v. *de la Cruz*, *ante*, at 220. It is not the meaning of "for" we are seeking here, but the meaning of "[s]uits for violation of contracts." That phrase cannot possibly bear the meaning ascribed to it by the Government. No one, for example, would describe a corporation's harassing lawsuit against a competitor as a "suit for unfair competition," even though that is precisely its "goal or object." In the same vein, a suit "for violation of a contract" is not one filed "with a view to" a future contract violation (much less to facilitate action that "otherwise would be" a contract violation). It is one filed *because a contract has been violated*, just as a suit "*for* unfair competition" is one filed because unfair competition has occurred. In this context, the word "for" has an unmistakably backward-looking connotation, *i. e.*, "[i]ndicating the cause, motive, or occasion of an act, state, or condition; hence, because of; on account of; in consequence of; as the effect of; for the sake of; as, cursed himself *for* showing leniency." Webster's New International Dictionary 984 (2d ed. 1950) (def. 7). "Suits for violation of contracts" under § 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated.

This does not mean that a federal court can never adjudicate the validity of a contract under § 301(a). That provision

simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense. See *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 85–86 (1982). Similarly, a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid. But in these cases, the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate "[s]uits for violation of contracts."

This would seem to be the end of the matter. Here, the Union neither alleges that Textron has violated the contract, nor seeks declaratory relief from its own alleged violation. Indeed, as far as the Union's complaint discloses, both parties are in absolute compliance with the terms of the collective-bargaining agreement. Section 301(a) jurisdiction does not lie over such a case.

The Union, however, asserts that the outcome is altered by the fact that it seeks relief pursuant to the Declaratory Judgment Act, 28 U. S. C. § 2201.[2] It argues that in order to determine whether § 301(a) jurisdiction lies over the declaratory-judgment aspect of its suit, we must look to the character of the threatened action to which its suit would interpose a defense, which in this case would be Textron's action for breach of the collective-bargaining agreement. It relies on our decision in *Skelly Oil Co.* v. *Phillips Petroleum*

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[2] The Declaratory Judgment Act provides, in relevant part, that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U. S. C. § 2201(a).

Co., 339 U. S. 667 (1950), which held that a declaratory action asserting a federal defense to a nonfederal claim was not a "civil actio[n] arising under the . . . laws . . . of the United States" within the meaning of the federal-question jurisdiction statute, 28 U. S. C. § 1331. This argument makes several assumptions that we do not think can be indulged.

First, it assumes that facts which were the *converse* of *Skelly Oil*—*i. e.*, a declaratory-judgment complaint raising a *nonfederal* defense to an anticipated *federal* claim—*would* confer § 1331 jurisdiction. That is not clear. It can be argued that anticipating a federal claim in a suit asserting a nonfederal defense no more effectively invokes § 1331 jurisdiction than anticipating a federal defense in a suit asserting a nonfederal claim. (The latter, of course, is barred by the well-pleaded-complaint rule, see *Rivet* v. *Regions Bank of La.*, 522 U. S. 470, 475 (1998).) Perhaps it was the purpose of the Declaratory Judgment Act to permit such anticipation, see *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 19, n. 19 (1983), but *Skelly Oil* did not present that issue, and some of its language suggests that the declaratory-judgment plaintiff must himself have a federal claim.[3] No decision

[3] "Prior to [the Declaratory Judgment] Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction . . . . The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 671–672 (1950).

"[I]t has been settled doctrine that where a suit is brought in the federal courts 'upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character.' But 'a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws.'" *Id.*, at 672, quoting *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 464 (1894).

of this Court has squarely confronted and explicitly upheld federal-question jurisdiction on the basis of the anticipated claim against which the declaratory-judgment plaintiff presents a nonfederal defense; and neither the Union nor the Government cites such a decision by any other federal court.[4]

Second, the Union's *Skelly Oil* argument assumes that what would suffice to sustain a declaratory-judgment action premised on § 1331 federal-question jurisdiction would suffice to sustain a declaratory-judgment action brought under § 301(a). But the language of the two provisions is quite different. Whereas § 1331 authorizes "civil actions arising under the . . . laws . . . of the United States" (which can arguably embrace a civil action presenting a defense to a federal claim), § 301(a) authorizes only "[s]uits for violation of contracts."

But assuming (without deciding) that the converse of *Skelly Oil* confers § 1331 jurisdiction, and that what suffices for § 1331 suffices for § 301(a) as well, the Union's prayer for a declaration that the collective-bargaining agreement was voidable is in our view inadequate to save the present suit, because it does not, and as far as the record shows it never did, present a case or controversy giving the Union access to federal courts. That is obviously so at the present time, because the collective-bargaining agreement, whether voidable or not, has expired; the only question is whether the parties had any concrete dispute over the contract's voidability at the time the suit was filed.

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[4] In *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1 (1983), we observed, with seeming approval, that "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Id.*, at 19. The cases brought forward to support that observation, however, were suits by alleged patent infringers to declare a patent invalid, which of course themselves raise a federal question. See *id.*, at 19, n. 19.

We see no evidence that they did. To be sure, Textron vigorously contested the complaint's allegations of fraud that are *the asserted cause* of the claimed voidability as well as of the claimed damages; but that is no indication that Textron had any interest in defending the binding nature of the contract. Indeed, there is not even any indication that the *Union* had a concrete interest in establishing the *non*binding nature of the contract. This was not (as one might have expected in a declaratory-judgment suit of this sort) a situation in which the Union had threatened to strike over the contracting-out, and Textron had asserted that a strike would violate the collective-bargaining agreement. The Union never threatened to strike. As far as appears, the company that had just eliminated the work of half its Williamsport employees would have been perfectly willing to be excused from a contract negotiated when the Union was in a stronger bargaining position, and the Union had no intent or disposition to exercise a theoretical option to avoid a contract that was better than what it could negotiate anew. The fact that the fraud damages claim, if successful, would establish a voidability that (as far as appears) no one cared about, does not make the question of voidability a "case of actual controversy," 28 U. S. C. § 2201, over which federal courts have § 301(a) jurisdiction. "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision [Art. III, § 2] and is operative only in respect to controversies which are such in the constitutional sense." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239–240 (1937). See also *Public Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 242–243 (1952).

* * *

Because the Union's complaint alleges no violation of the collective-bargaining agreement, neither we nor the federal courts below have subject-matter jurisdiction over this case

under § 301(a) of the Labor Management Relations Act. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, concurring.

If the Union's allegations are true, it seems clear that petitioner violated its statutory duty to bargain in good faith. Our conclusion that the federal courts do not have § 301(a) jurisdiction over the Union's suit therefore comports with the important goal of protecting the primary jurisdiction of the National Labor Relations Board in resolving disputes arising from the collective-bargaining process. As the Court has long recognized, "[i]t is implicit in the entire structure of the [National Labor Relations] Act that the Board acts to oversee and referee the process of collective bargaining." *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 107–108 (1970). "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules." *Garner* v. *Teamsters*, 346 U. S. 485, 490 (1953). The rules governing disputes that arise out of the collective-bargaining process are within the special competence of the National Labor Relations Board. Cf. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959). The fact that the Board undoubtedly has more expertise in the collective-bargaining area than federal judges provides an additional reason for concluding that Congress meant what it said in § 301(a) and for rejecting the Union's and the Government's broad reading of the "[s]uits for violation of contracts" language.

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

I agree with the first five pages of the Court's opinion. See *ante*, at 654–658. I also agree with the Court that the Union failed to show (or even to allege) a significant likelihood that it would strike and that Textron would then sue it

for breach of its collective-bargaining agreement. See *ante*, at 661. I write separately, however, because this factual circumstance has more significance than the Court's opinion suggests. See *ante*, at 658–660. Indeed, in my view, if the Union had shown that a strike and consequent employer breach-of-contract lawsuit were imminent, then the Declaratory Judgment Act, 28 U. S. C. § 2201, would have authorized the District Court to adjudicate this controversy. Unlike the Court, I would not leave the matter undecided.

My conclusion flows from the following two legal propositions: *Proposition One.* The Declaratory Judgment Act permits a federal court to "declare the rights and other legal relations of any interested party" as long as there exists an "actual controversy" that is "within [the] jurisdiction" of a federal court. 28 U. S. C. § 2201(a).

Proposition Two. Section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 185(a), permits a federal court to adjudicate *both* an employer's claim that a contract's (*i. e.*, a collective-bargaining agreement's) "no strike" clause forbids an ongoing strike *and* the related Union defense that it is free to strike because the contract itself is invalid. See *ante*, at 657–658; Brief for Petitioner 29 ("[B]efore enforcing an agreement, courts must adjudicate affirmative defenses such as fraud . . . in the collective bargaining process"); Brief for United States as *Amicus Curiae* 13–14; *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 85–86 (1982).

Proposition One means that the Declaratory Judgment Act gives a federal court the power to declare the "rights" and "legal relations" of both union and employer where the "controversy" described in *Proposition Two* is "actual," *e. g.*, where the strike and consequent employer lawsuit is imminent. Moreover, this Court has pointed out that "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant [such as the employer here] brought a coercive

action to enforce its rights, that suit would necessarily present a federal question." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 19 (1983). Hence the characterization of the Union's "no valid contract" claim as a "defense" that could not *independently* support § 301 jurisdiction is beside the point. See *ibid.; Public Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 248 (1952) (in declaratory judgment context, "it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court"); see also 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2767, p. 741 (2d ed. 1983) ("federal nature of the right claimed not to exist is crucial to jurisdiction").

This conclusion draws support in principle from the Declaratory Judgment Act's basic objective, which is "to permit adjudication of either party's claims of right." *Franchise Tax Board*, *supra*, at 19, n. 19. And the conclusion draws support in practice from the prevalence in the lower courts of "reverse" declaratory judgment actions that focus upon a party's likely defense, including actions found in contexts such as that now before us. See, *e. g.*, *El Paso Bldg. & Constr. Trades Council* v. *Associated Gen. Contractors of Am.*, 376 F. 2d 797, 799–800 (CA5 1967) (union threatened to strike, then filed declaratory judgment action for determination of contract's validity, and court took jurisdiction under § 301); *McNally Pittsburg, Inc.* v. *International Assn. of Bridge, Structural, and Ornamental Iron Workers*, 812 F. 2d 615 (CA10 1987) (where actual controversy existed with union, employer allowed to seek prospective declaration that contract was invalid); *Mobil Oil Corp.* v. *Oil, Chemical and Atomic Workers Int'l Union, AFL–CIO*, 483 F. 2d 603 (CA5 1973) (same), rev'd on other grounds, 504 F. 2d 272 (1974) (en banc). Cf. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 176 (1965) (one likely to be sued for patent infringement "need not await the

filing of a threatened suit by the patentee; the validity of the patent may be tested under the Declaratory Judgment Act").

I cannot find any reason for an exception that would forbid "reverse" declaratory judgment actions in labor law contexts such as this one. To the contrary, this Court has suggested that the availability of declaratory judgment actions furthers the LMRA's basic purposes. See *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 454–455 (1957) (§ 301 designed to promote "industrial peace" by "provid[ing] the necessary legal remedies"); *id.*, at 455–456 (quoting from floor statement of Representative Barden, 93 Cong. Rec. 3656–3657 (1947), that "the section . . . contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate . . . [including a suit] under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract"); *Smith* v. *Evening News Assn.*, 371 U. S. 195, 199 (1962) ("[Section] 301 is not to be given a narrow reading"). And the Government, in an *amicus curiae* brief, tells us that such an action would not interfere with the National Labor Relations Board's administration of federal labor law. See Brief for United States as *Amicus Curiae* 27 ("The Board . . . has concluded in this and other cases . . . that a suit under Section 301(a) to declare a contract voidable based on fraud in the inducement does not unduly intrude upon its authority").

Thus Declaratory Judgment Act jurisdiction would lie in a case like this one, *provided, however*, that the declaratory judgment plaintiff demonstrates an "actual controversy." 28 U. S. C. § 2201(a); *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239–240 (1937). The Union failed to make any such showing here, and for that reason I agree with the Court's ultimate conclusion.

Syllabus

ARKANSAS EDUCATIONAL TELEVISION COMMISSION *v.* FORBES

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

No. 96–779. Argued October 8, 1997—Decided May 18, 1998

Petitioner Arkansas Educational Television Commission (AETC), a state-owned public television broadcaster, sponsored a debate between the major party candidates for the 1992 election in Arkansas' Third Congressional District. When AETC denied the request of respondent Forbes, an independent candidate with little popular support, for permission to participate in the debate, Forbes filed this suit, claiming, *inter alia*, that he was entitled to participate under the First Amendment. The jury made express findings that Forbes' exclusion had not been influenced by political pressure or disagreement with his views. The District Court entered judgment for AETC. The Eighth Circuit reversed, holding that the debate was a public forum to which all ballot-qualified candidates had a presumptive right of access. Applying strict scrutiny, the court determined that AETC's assessment of Forbes' "political viability" was neither a compelling nor a narrowly tailored reason for excluding him.

Held: AETC's exclusion of Forbes from the debate was consistent with the First Amendment. Pp. 672–683.

(a) Unlike most other public television programs, candidate debates are subject to scrutiny under this Court's public forum doctrine. Having first arisen in the context of streets and parks, the doctrine should not be extended in a mechanical way to the different context of television broadcasting. Broad rights of access for outside speakers would be antithetical, as a general rule, to the editorial discretion that broadcasters must exercise to fulfill their journalistic purpose and statutory obligations. For two reasons, however, candidate debates present the narrow exception to the rule. First, unlike AETC's other broadcasts, the debate was by design a forum for candidates' political speech. Consistent with the long tradition of such debates, AETC's implicit representation was that the views expressed were those of the candidates, not its own. The debate's very purpose was to allow the expression of those views with minimal intrusion by the broadcaster. Second, candidate debates are of exceptional significance in the electoral process. Deliberation on candidates' positions and qualifications is integral to our system of government, and electoral speech may have its most pro-

found and widespread impact when it is disseminated through televised debates. Thus, the special characteristics of candidate debates support the conclusion that the AETC debate was a forum of some type. The question of what type must be answered by reference to this Court's public forum precedents. Pp. 672–676.

(b) For the Court's purposes, it will suffice to employ the categories of speech fora already established in the case law. The Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802. Traditional public fora are defined by the objective characteristics of the property, such as whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45. The government can exclude a speaker from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest. *Cornelius, supra,* at 800. Designated public fora are created by purposeful governmental action opening a nontraditional public forum for expressive use by the general public or by a particular class of speakers. *E. g., International Soc. for Krishna Consciousness, Inc.* v. *Lee,* 505 U. S. 672, 678 *(ISKCON)*. If the government excludes a speaker who falls within the class to which such a forum is made generally available, its action is subject to strict scrutiny. *E. g., Cornelius, supra,* at 802. Property that is not a traditional public forum or a designated public forum is either a nonpublic forum or not a forum at all. *ISKCON, supra,* at 678–679. Access to a nonpublic forum can be restricted if the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's views. *Cornelius, supra,* at 800. Pp. 677–678.

(c) The AETC debate was a nonpublic forum. The parties agree that it was not a traditional public forum, and it was not a designated public forum under this Court's precedents. Those cases demonstrate, *inter alia,* that the government does not create a designated public forum when it does no more than reserve eligibility for access to a forum to a particular class of speakers, whose members must then, as individuals, "obtain permission," *Cornelius,* 473 U. S., at 804, to use it. Contrary to the Eighth Circuit's assertion, AETC did not make its debate generally available to candidates for the congressional seat at issue. Instead, it reserved eligibility for participation to candidates for that seat (as opposed to some other seat), and then made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate. Such "selective access," unsupported by evidence of a purposeful designation for public use, does not create a public

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forum, but indicates that the debate was a nonpublic forum. *Id.*, at 805. Pp. 678–682.

(d) AETC's decision to exclude Forbes was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment. The record demonstrates beyond dispute that Forbes was excluded not because of his viewpoint, but because he had not generated appreciable public interest. There is no serious argument that AETC did not act in good faith in this case. Pp. 682–683.

93 F. 3d 497, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, THOMAS, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 683.

Richard D. Marks argued the cause for petitioner. With him on the briefs was *Alden L. Atkins.*

Deputy Solicitor General Wallace argued the cause for the Federal Communications Commission et al. as *amici curiae* urging reversal. With him on the briefs were *Acting Solicitor General Dellinger*, *Jonathan E. Nuechterlein*, *William E. Kennard*, *Christopher J. Wright*, *Daniel M. Armstrong*, and *C. Grey Pash, Jr.*

Kelly Shackelford argued the cause for respondent. With him on the briefs was *John W. Whitehead.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, *Charles W. Getz IV*, Assistant Attorney General, *Edna Walz*, Deputy Attorney General, and *Daniel Schweitzer*, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Grant Woods* of Arizona, *Gale A. Norton* of Colorado, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *William H. Sorrell* of Vermont, and *William U. Hill* of Wyoming; for the City of New York by *Paul A. Crotty* and *Leonard J. Koerner;* for the Association of America's Public Television

JUSTICE KENNEDY delivered the opinion of the Court.

A state-owned public television broadcaster sponsored a candidate debate from which it excluded an independent candidate with little popular support. The issue before us is whether, by reason of its state ownership, the station had a constitutional obligation to allow every candidate access to the debate. We conclude that, unlike most other public television programs, the candidate debate was subject to constitutional constraints applicable to nonpublic fora under our forum precedents. Even so, the broadcaster's decision to exclude the candidate was a reasonable, viewpoint-neutral exercise of journalistic discretion.

I

Petitioner, the Arkansas Educational Television Commission (AETC), is an Arkansas state agency owning and operating a network of five noncommercial television stations (Arkansas Educational Television Network or AETN). The eight members of AETC are appointed by the Governor for 8-year terms and are removable only for good cause. Ark. Code Ann. §§ 6–3–102(a)(1), (b)(1) (Supp. 1997), § 25–16–804(b)(1) (1996). AETC members are barred from holding any other state or federal office, with the exception of teach-

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Stations et al. by *E. Barrett Prettyman, Jr.*, and *Robert Corn-Revere;* and for the Commission on Presidential Debates by *Lewis K. Loss* and *William H. Briggs, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Marjorie Heins* and *Steven R. Shapiro;* for the Brennan Center for Justice at New York University School of Law by *Philip Allen Lacovara;* for Greens/Green Party USA by *John C. Klotz;* for Eugene McCarthy et al. by *Arthur D. Goldstein;* for the Natural Law Party of the United States by *Jay B. Marcus;* for the Pacific Legal Foundation by *Sharon L. Browne* and *Deborah J. La Fetra;* and for Perot '96 by *Jamin B. Raskin* and *R. Clayton Mulford.*

Peter Verniero, Attorney General, and *Joseph L. Yannotti,* Assistant Attorney General, filed a brief for the State of New Jersey as *amicus curiae.*

ing positions. Ark. Code Ann. § 6–3–102(a)(3) (Supp. 1997). To insulate its programming decisions from political pressure, AETC employs an executive director and professional staff who exercise broad editorial discretion in planning the network's programming. AETC has also adopted the Statement of Principles of Editorial Integrity in Public Broadcasting, which counsel adherence to "generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters." App. to Pet. for Cert. 82a.

In the spring of 1992, AETC staff began planning a series of debates between candidates for federal office in the November 1992 elections. AETC decided to televise a total of five debates, scheduling one for the Senate election and one for each of the four congressional elections in Arkansas. Working in close consultation with Bill Simmons, Arkansas Bureau Chief for the Associated Press, AETC staff developed a debate format allowing about 53 minutes during each 1-hour debate for questions to and answers by the candidates. Given the time constraint, the staff and Simmons "decided to limit participation in the debates to the major party candidates or any other candidate who had strong popular support." Record, Affidavit of Bill Simmons ¶ 5.

On June 17, 1992, AETC invited the Republican and Democratic candidates for Arkansas' Third Congressional District to participate in the AETC debate for that seat. Two months later, after obtaining the 2,000 signatures required by Arkansas law, see Ark. Code Ann. § 7–7–103(c)(1) (Supp. 1993), respondent Ralph Forbes was certified as an independent candidate qualified to appear on the ballot for the seat. Forbes was a perennial candidate who had sought, without success, a number of elected offices in Arkansas. On August 24, 1992, he wrote to AETC requesting permission to participate in the debate for his district, scheduled for October 22, 1992. On September 4, AETC Executive Director Susan Howarth denied Forbes' request, explaining that AETC had

"made a bona fide journalistic judgement that our viewers would best be served by limiting the debate" to the candidates already invited. App. 61.

On October 19, 1992, Forbes filed suit against AETC, seeking injunctive and declaratory relief as well as damages. Forbes claimed he was entitled to participate in the debate under both the First Amendment and 47 U. S. C. § 315, which affords political candidates a limited right of access to television air time. Forbes requested a preliminary injunction mandating his inclusion in the debate. The District Court denied the request, as did the United States Court of Appeals for the Eighth Circuit. The District Court later dismissed Forbes' action for failure to state a claim.

Sitting en banc, the Court of Appeals affirmed the dismissal of Forbes' statutory claim, holding that he had failed to exhaust his administrative remedies. The court reversed, however, the dismissal of Forbes' First Amendment claim. Observing that AETC is a state actor, the court held Forbes had "a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have [had] a legitimate reason to exclude him strong enough to survive First Amendment scrutiny." *Forbes* v. *Arkansas Ed. Television Network Foundation*, 22 F. 3d 1423, 1428 (CA8), cert. denied, 513 U. S. 995 (1994), 514 U. S. 1110 (1995). Because AETC had not yet filed an answer to Forbes' complaint, it had not given any reason for excluding him from the debate, and the Court of Appeals remanded the action for further proceedings.

On remand, the District Court found as a matter of law that the debate was a nonpublic forum, and the issue became whether Forbes' views were the reason for his exclusion. At trial, AETC professional staff testified Forbes was excluded because he lacked any campaign organization, had not generated appreciable voter support, and was not regarded as a serious candidate by the press covering the election. The jury made express findings that AETC's decision to ex-

clude Forbes had not been influenced by political pressure or disagreement with his views. The District Court entered judgment for AETC.

The Court of Appeals again reversed. The court acknowledged that AETC's decision to exclude Forbes "was made in good faith" and was "exactly the kind of journalistic judgment routinely made by newspeople." 93 F. 3d 497, 505 (CA8 1996). The court asserted, nevertheless, that AETC had "opened its facilities to a particular group—candidates running for the Third District Congressional seat." *Id.*, at 504. AETC's action, the court held, made the debate a public forum, to which all candidates "legally qualified to appear on the ballot" had a presumptive right of access. *Ibid.* Applying strict scrutiny, the court determined that AETC's assessment of Forbes' "political viability" was neither a "compelling nor [a] narrowly tailored" reason for excluding him from the debate. *Id.*, at 504–505.

A conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in *Chandler* v. *Georgia Public Telecommunications Comm'n*, 917 F. 2d 486 (1990), cert. denied, 502 U. S. 816 (1991), together with the manifest importance of the case, led us to grant certiorari. 520 U. S. 1114 (1997). We now reverse.

II

Forbes has long since abandoned his statutory claims under 47 U. S. C. § 315, and so the issue is whether his exclusion from the debate was consistent with the First Amendment. The Court of Appeals held it was not, applying our public forum precedents. Appearing as *amicus curiae* in support of petitioner, the United States argues that our forum precedents should be of little relevance in the context of television broadcasting. At the outset, then, it is instructive to ask whether public forum principles apply to the case at all.

Having first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical

way to the very different context of public television broadcasting. In the case of streets and parks, the open access and viewpoint neutrality commanded by the doctrine is "compatible with the intended purpose of the property." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 49 (1983). So too was the requirement of viewpoint neutrality compatible with the university's funding of student publications in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). In the case of television broadcasting, however, broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.

Congress has rejected the argument that "broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 105 (1973). Instead, television broadcasters enjoy the "widest journalistic freedom" consistent with their public responsibilities. *Id.*, at 110; *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 378 (1984). Among the broadcaster's responsibilities is the duty to schedule programming that serves the "public interest, convenience, and necessity." 47 U. S. C. §309(a). Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming.

As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be particularly vulnerable to claims of this type because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint based. To comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints. "That editors—newspaper or broadcast—can and do abuse this power is beyond doubt,"

Columbia Broadcasting System, Inc., 412 U. S., at 124; but "[c]alculated risks of abuse are taken in order to preserve higher values." *Id.*, at 125. Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, preestablished criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.

When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity. Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 636 (1994) ("Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats' ") (quoting *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986)). Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 570 (1995) (a speaker need not "generate, as an original matter, each item featured in the communication").

Claims of access under our public forum precedents could obstruct the legitimate purposes of television broadcasters. Were the doctrine given sweeping application in this context, courts "would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired." *Columbia Broadcasting System, Inc.*, *supra*, at 127. "The

result would be a further erosion of the journalistic discretion of broadcasters," transferring "control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals" who bring suit under our forum precedents. 412 U. S., at 124. In effect, we would "exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators." *Id.*, at 125.

In the absence of any congressional command to "[r]egimen[t] broadcasters" in this manner, *id.*, at 127, we are disinclined to do so through doctrines of our own design. This is not to say the First Amendment would bar the legislative imposition of neutral rules for access to public broadcasting. Instead, we say that, in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming.

Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule. For two reasons, a candidate debate like the one at issue here is different from other programming. First, unlike AETC's other broadcasts, the debate was by design a forum for political speech by the candidates. Consistent with the long tradition of candidate debates, the implicit representation of the broadcaster was that the views expressed were those of the candidates, not its own. The very purpose of the debate was to allow the candidates to express their views with minimal intrusion by the broadcaster. In this respect the debate differed even from a political talk show, whose host can express partisan views and then limit the discussion to those ideas.

Second, in our tradition, candidate debates are of exceptional significance in the electoral process. "[I]t is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their

positions on vital public issues before choosing among them on election day." *CBS, Inc.* v. *FCC*, 453 U. S. 367, 396 (1981) (internal quotation marks omitted). Deliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates. A majority of the population cites television as its primary source of election information, and debates are regarded as the "only occasion during a campaign when the attention of a large portion of the American public is focused on the election, as well as the only campaign information format which potentially offers sufficient time to explore issues and policies in depth in a neutral forum." Congressional Research Service, Campaign Debates in Presidential General Elections, summ. (June 15, 1993).

As we later discuss, in many cases it is not feasible for the broadcaster to allow unlimited access to a candidate debate. Yet the requirement of neutrality remains; a broadcaster cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's views. Viewpoint discrimination in this context would present not a "[c]alculated ris[k]," *Columbia Broadcasting System, Inc.*, *supra*, at 125, but an inevitability of skewing the electoral dialogue.

The special characteristics of candidate debates support the conclusion that the AETC debate was a forum of some type. The question of what type must be answered by reference to our public forum precedents, to which we now turn.

III

Forbes argues, and the Court of Appeals held, that the debate was a public forum to which he had a First Amendment right of access. Under our precedents, however, the debate was a nonpublic forum, from which AETC could exclude Forbes in the reasonable, viewpoint-neutral exercise of its journalistic discretion.

A

For our purposes, it will suffice to employ the categories of speech fora already established and discussed in our cases. "[T]he Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802 (1985). Traditional public fora are defined by the objective characteristics of the property, such as whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate." *Perry Ed. Assn.*, 460 U. S., at 45. The government can exclude a speaker from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, *supra*, at 800.

Designated public fora, in contrast, are created by purposeful governmental action. "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." 473 U. S., at 802; accord, *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678 (1992) *(ISKCON)* (designated public forum is "property that the State has opened for expressive activity by part or all of the public"). Hence "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U. S., at 802. If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny. *Ibid.; United States* v. *Kokinda*, 497 U. S. 720, 726–727 (1990) (plurality opinion of O'Connor, J.).

Other government properties are either nonpublic fora or not fora at all. *ISKCON*, *supra*, at 678–679. The government can restrict access to a nonpublic forum "as long

as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius*, *supra*, at 800 (internal quotation marks omitted).

In summary, traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers. The government is free to open additional properties for expressive use by the general public or by a particular class of speakers, thereby creating designated public fora. Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all.

B

The parties agree the AETC debate was not a traditional public forum. The Court has rejected the view that traditional public forum status extends beyond its historic confines, see *ISKCON*, 505 U. S., at 680–681; and even had a more expansive conception of traditional public fora been adopted, see, *e. g.*, *id.*, at 698–699 (KENNEDY, J., concurring in judgments), the almost unfettered access of a traditional public forum would be incompatible with the programming dictates a television broadcaster must follow. See *supra*, at 673–675. The issue, then, is whether the debate was a designated public forum or a nonpublic forum.

Under our precedents, the AETC debate was not a designated public forum. To create a forum of this type, the government must intend to make the property "generally available," *Widmar* v. *Vincent*, 454 U. S. 263, 264 (1981), to a class of speakers. Accord, *Cornelius*, *supra*, at 802. In *Widmar*, for example, a state university created a public forum for registered student groups by implementing a policy that expressly made its meeting facilities "generally open" to such groups. 454 U. S., at 267; accord, *Perry*, *supra*, at 45 (desig-

nated public forum is "generally open"). A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers. In *Perry*, for example, the Court held a school district's internal mail system was not a designated public forum even though selected speakers were able to gain access to it. The basis for the holding in *Perry* was explained by the Court in *Cornelius:*

> "In contrast to the general access policy in *Widmar*, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted." 473 U. S., at 803.

And in *Cornelius* itself, the Court held the Combined Federal Campaign (CFC) charity drive was not a designated public forum because "[t]he Government's consistent policy ha[d] been to limit participation in the CFC to 'appropriate' [*i. e.*, charitable rather than political] voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials." *Id.*, at 804.

These cases illustrate the distinction between "general access," *id.*, at 803, which indicates the property is a designated public forum, and "selective access," *id.*, at 805, which indicates the property is a nonpublic forum. On one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers, as the university made its facilities generally available to student groups in *Widmar*. On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission," 473 U. S., at 804, to use it. For instance, the Federal Government did not create a designated public forum in *Cornelius*

when it reserved eligibility for participation in the CFC drive to charitable agencies, and then made individual, nonministerial judgments as to which of the eligible agencies would participate. *Ibid.*

The *Cornelius* distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Here, the debate did not have an open-microphone format. Contrary to the assertion of the Court of Appeals, AETC did not make its debate generally available to candidates for Arkansas' Third Congressional District seat. Instead, just as the Federal Government in *Cornelius* reserved eligibility for participation in the CFC program to certain classes of voluntary agencies, AETC reserved eligibility for participation in the debate to candidates for the Third Congressional District seat (as opposed to some other seat). At that point, just as the Government in *Cornelius* made agency-by-agency determinations as to which of the eligible agencies would participate in the CFC, AETC made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate. "Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Id.*, at 805. Thus the debate was a nonpublic forum.

In addition to being a misapplication of our precedents, the Court of Appeals' holding would result in less speech, not more. In ruling that the debate was a public forum open to all ballot-qualified candidates, 93 F. 3d, at 504, the Court of Appeals would place a severe burden upon public broadcast-

ers who air candidates' views. In each of the 1988, 1992, and 1996 Presidential elections, for example, no fewer than 19 candidates appeared on the ballot in at least one State. See Twentieth Century Fund Task Force on Presidential Debates, Let America Decide 148 (1995); Federal Election Commission, Federal Elections 92, p. 9 (1993); Federal Election Commission, Federal Elections 96, p. 11 (1997). In the 1996 congressional elections, it was common for 6 to 11 candidates to qualify for the ballot for a particular seat. See 1996 Election Results, 54 Congressional Quarterly Weekly Report 3250–3257 (1996). In the 1993 New Jersey gubernatorial election, to illustrate further, sample ballot mailings included the written statements of 19 candidates. See N. Y. Times, Sept. 11, 1993, section 1, p. 26, col. 5. On logistical grounds alone, a public television editor might, with reason, decide that the inclusion of all ballot-qualified candidates would "actually undermine the educational value and quality of debates." Let America Decide, *supra*, at 148.

Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all. A broadcaster might decide "'the safe course is to avoid controversy,' . . . and by so doing diminish the free flow of information and ideas." *Turner Broadcasting System, Inc.*, 512 U. S., at 656 (quoting *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257 (1974)). In this circumstance, a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Ibid.* (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964)).

These concerns are more than speculative. As a direct result of the Court of Appeals' decision in this case, the Nebraska Educational Television Network canceled a scheduled debate between candidates in Nebraska's 1996 United States Senate race. See Lincoln Journal Star, Aug. 24, 1996,

p. 1A, col. 6. A First Amendment jurisprudence yielding these results does not promote speech but represses it.

C

The debate's status as a nonpublic forum, however, did not give AETC unfettered power to exclude any candidate it wished. As JUSTICE O'CONNOR has observed, nonpublic forum status "does not mean that the government can restrict speech in whatever way it likes." *ISKCON*, 505 U. S., at 687. To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property. *Cornelius*, 473 U. S., at 800.

In this case, the jury found Forbes' exclusion was not based on "objections or opposition to his views." App. to Pet. for Cert. 23a. The record provides ample support for this finding, demonstrating as well that AETC's decision to exclude him was reasonable. AETC Executive Director Susan Howarth testified Forbes' views had "absolutely" no role in the decision to exclude him from the debate. App. 142. She further testified Forbes was excluded because (1) "the Arkansas voters did not consider him a serious candidate"; (2) "the news organizations also did not consider him a serious candidate"; (3) "the Associated Press and a national election result reporting service did not plan to run his name in results on election night"; (4) Forbes "apparently had little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission"; and (5) "there [was] no 'Forbes for Congress' campaign headquarters other than his house." *Id.*, at 126–127. Forbes himself described his campaign organization as "bedlam" and the media coverage of his campaign as "zilch." *Id.*, at 91, 96. It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest.

Cf. *Perry*, 460 U. S., at 49 (exclusion from nonpublic forum "based on the *status*" rather than the views of the speaker is permissible (emphasis in original)).

There is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion. Indeed, the very premise of Forbes' contention is mistaken. A candidate with unconventional views might well enjoy broad support by virtue of a compelling personality or an exemplary campaign organization. By the same token, a candidate with a traditional platform might enjoy little support due to an inept campaign or any number of other reasons.

Nor did AETC exclude Forbes in an attempted manipulation of the political process. The evidence provided powerful support for the jury's express finding that AETC's exclusion of Forbes was not the result of "political pressure from anyone inside or outside [AETC]." App. to Pet. for Cert. 22a. There is no serious argument that AETC did not act in good faith in this case. AETC excluded Forbes because the voters lacked interest in his candidacy, not because AETC itself did.

The broadcaster's decision to exclude Forbes was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment. The judgment of the Court of Appeals is

Reversed.

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

The Court has decided that a state-owned television network has no "constitutional obligation to allow every candidate access to" political debates that it sponsors. *Ante,* at 669. I do not challenge that decision. The judgment of the Court of Appeals should nevertheless be affirmed. The official action that led to the exclusion of respondent Forbes

from a debate with the two major-party candidates for election to one of Arkansas' four seats in Congress does not adhere to well-settled constitutional principles. The ad hoc decision of the staff of the Arkansas Educational Television Commission (AETC) raises precisely the concerns addressed by "the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–151 (1969).

In its discussion of the facts, the Court barely mentions the standardless character of the decision to exclude Forbes from the debate. In its discussion of the law, the Court understates the constitutional importance of the distinction between state ownership and private ownership of broadcast facilities. I shall therefore first add a few words about the record in this case and the history of regulation of the broadcast media, before explaining why I believe the judgment should be affirmed.

I

Two months before Forbes was officially certified as an independent candidate qualified to appear on the ballot under Arkansas law,[1] the AETC staff had already concluded that he "should not be invited" to participate in the televised debates because he was "not a serious candidate as determined by the voters of Arkansas."[2] He had, however, been a serious contender for the Republican nomination for Lieutenant Governor in 1986 and again in 1990. Although he was defeated in a runoff election, in the three-way primary race conducted in 1990—just two years before the AETC staff decision—he had received 46.88% of the statewide vote and

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[1] See Ark. Code Ann. § 7–7–103(c)(1) (Supp. 1993).

[2] Record, Letter to Carole Adornetto from Amy Oliver Barnes dated June 19, 1992, attached as Exh. 2 to Affidavit of Amy Oliver Barnes.

had carried 15 of the 16 counties within the Third Congressional District by absolute majorities. Nevertheless, the staff concluded that Forbes did not have "strong popular support." Record, Affidavit of Bill Simmons ¶ 5.[3]

Given the fact that the Republican winner in the Third Congressional District race in 1992 received only 50.22% of the vote and the Democrat received 47.20%,[4] it would have been necessary for Forbes, who had made a strong showing in recent Republican primaries, to divert only a handful of votes from the Republican candidate to cause his defeat. Thus, even though the AETC staff may have correctly concluded that Forbes was "not a serious candidate," their decision to exclude him from the debate may have determined the outcome of the election in the Third District.

If a comparable decision were made today by a privately owned network, it would be subject to scrutiny under the Federal Election Campaign Act of 1971[5] unless the network used "pre-established objective criteria to determine which candidates may participate in [the] debate." 11 CFR § 110.13(c) (1997). No such criteria governed AETC's refusal to permit Forbes to participate in the debate. Indeed, whether that refusal was based on a judgment about "newsworthiness"—as AETC has argued in this Court—or a judgment about "political viability"—as it argued in the Court of Appeals—the facts in the record presumably would have

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[3] Simmons, a journalist working with the AETC staff on the debates, stated that "[a]t the time this decision [to invite only candidates with strong popular support] was made . . . , there were no third party or non-party candidates to evaluate as to the likely extent of their popular support." Record, Affidavit of Bill Simmons ¶ 5. Presumably Simmons meant that there was no other ballot-qualified candidate, because an AETC staff member, Amy Oliver, represented that there was consideration about whether to invite Forbes before he qualified as a candidate. See text accompanying n. 2, *supra.*

[4] See App. 172.

[5] See 2 U. S. C. § 441b(a); see also *Perot* v. *FEC,* 97 F. 3d 553, 556 (CADC 1996), cert. denied *sub nom. Hagelin* v. *FEC,* 520 U. S. 1210 (1997).

provided an adequate basis either for a decision to include Forbes in the Third District debate or a decision to exclude him, and might even have required a cancellation of two of the other debates.[6]

The apparent flexibility of AETC's purported standard suggests the extent to which the staff had nearly limitless discretion to exclude Forbes from the debate based on ad hoc justifications. Thus, the Court of Appeals correctly concluded that the staff's appraisal of "political viability" was "so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment." *Forbes* v. *Arkansas Educational Television Communication Network Foundation*, 93 F. 3d 497, 505 (CA8 1996).

II

AETC is a state agency whose actions "are fairly attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees." *Forbes* v. *Arkansas Educational Television Communication Network Foundation*, 22 F. 3d 1423, 1428 (CA8), cert. denied, 513 U. S. 995 (1994), 514 U. S. 1110 (1995). The AETC staff members therefore "were not ordinary journalists: they

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[6] Although the contest between the major-party candidates in the Third District was a relatively close one, in two of the other three districts in which both major-party candidates had been invited to debate, it was clear that one of them had virtually no chance of winning the election. Democrat Blanche Lambert's resounding victory over Republican Terry Hayes in the First Congressional District illustrates this point: Lambert received 69.8% of the vote compared with Hays' 30.2%. R. Scammon & A. McGillivray, America Votes 20: A Handbook of Contemporary American Election Statistics 99 (1993). Similarly, in the Second District, Democrat Ray Thornton, the incumbent, defeated Republican Dennis Scott and won with 74.2% of the vote. *Ibid.* Note that Scott raised only $6,000, which was less than Forbes raised; nevertheless, Scott was invited to participate in a debate while Forbes was not. See App. 133–134, 175.

were employees of government." 93 F. 3d, at 505. The Court implicitly acknowledges these facts by subjecting the decision to exclude Forbes to constitutional analysis. Yet the Court seriously underestimates the importance of the difference between private and public ownership of broadcast facilities, despite the fact that Congress and this Court have repeatedly recognized that difference.

In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973), the Court held that a licensee is neither a common carrier, *id.*, at 107–109, nor a public forum that must accommodate "'the right of every individual to speak, write, or publish,'" *id.*, at 101 (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 388 (1969)). Speaking for a plurality, Chief Justice Burger expressed the opinion that the First Amendment imposes no constraint on the private network's journalistic freedom. He supported that view by noting that when Congress confronted the advent of radio in the 1920's, it "was faced with a fundamental choice between total Government ownership and control of the new medium—the choice of most other countries—or some other alternative." 412 U. S., at 116.[7]

[7] Interestingly, many countries that formerly relied upon state control of broadcast entities appear to be moving in the direction of deregulation and private ownership of such entities. See, *e. g.*, Bughin & Griekspoor, A New Era for European TV, 3 McKinsey Q. 90, 92–93 (1997) ("Most of Western Europe's public television broadcasters began to lose their grip on the market in the mid-1980s. Only Switzerland, Austria, and Ireland continue to operate state television monopolies . . . . In Europe as a whole (including Eastern Europe, where television remains largely state controlled), the number of private broadcasters holding market-leading positions nearly doubled in the first half of this decade"); Rohwedder, Central Europe's Broadcasters Square Off, Wall Street Journal Europe 4 (May 15, 1995) ("Central Europe's government-run television channels, unchallenged media masters in the days of communist control, are coming under increasingly aggressive attack from upstart private broadcasters"); Lange & Woldt, European Interest in the American Experience in Self-Regulation, 13 Cardozo Arts & Ent. L. J. 657, 658 (1995) ("Over the

Congress chose a system of private broadcasters licensed and regulated by the Government, partly because of our traditional respect for private enterprise, but more importantly because public ownership created unacceptable risks of governmental censorship and use of the media for propaganda. "Congress appears to have concluded . . . that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." *Id.*, at 105.[8]

While noncommercial, educational stations generally have exercised the same journalistic independence as commercial networks, in 1981 Congress enacted a statute forbidding stations that received a federal subsidy to engage in "editorializing."[9] Relying primarily on cases involving the rights of commercial entities, a bare majority of this Court held the restriction invalid. *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984). Responding to the dissenting view that "the interest in keeping the Federal Government out of the propaganda arena" justified the restriction, *id.*, at 415 (opinion of STEVENS, J.), the majority emphasized the broad coverage of the statute and concluded that it "impermissibly sweeps within its prohibition a wide range

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last ten years, in Germany and many other European countries, public broadcasting has been weakened by competition from private television channels").

[8] The Court considered then-Secretary of Commerce Herbert Hoover's statement to a House committee expressing concern about government involvement in broadcasting:

"'We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.'" 412 U. S., at 104 (quoting Hearings on H. R. 7357 before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess., 8 (1924)).

[9] Public Broadcasting Amendments of 1981, Pub. L. 97–35, 95 Stat. 730, amending § 399 of the Public Broadcasting Act of 1967, Pub. L. 90–129, 81 Stat. 365, 47 U. S. C. § 390 *et seq.*

of speech by wholly private stations on topics that . . . have nothing whatever to do with federal, state, or local government." *Id.*, at 395. The Court noted that Congress had considered and rejected a ban that would have applied only to stations operated by state or local governmental entities, and reserved decision on the constitutionality of such a limited ban. See *id.*, at 394, n. 24.

The *League of Women Voters* case implicated the right of "wholly private stations" to express their own views on a wide range of topics that "have nothing whatever to do with . . . government." *Id.*, at 395. The case before us today involves only the right of a state-owned network to regulate speech that plays a central role in democratic government. Because AETC is owned by the State, deference to its interest in making ad hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not.

III

The Court recognizes that the debates sponsored by AETC were "by design a forum for political speech by the candidates." *Ante,* at 675. The Court also acknowledges the central importance of candidate debates in the electoral process. See *ibid.* Thus, there is no need to review our cases expounding on the public forum doctrine to conclude that the First Amendment will not tolerate a state agency's arbitrary exclusion from a debate forum based, for example, on an expectation that the speaker might be critical of the Governor, or might hold unpopular views about abortion or the death penalty. Indeed, the Court so holds today.[10]

[10] The Court correctly rejects the extreme position that the First Amendment simply has no application to a candidate's claim that he or she should be permitted to participate in a televised debate. See Brief for FCC et al. as *Amici Curiae* 14 ("The First Amendment does not constrain the editorial choices of state-entity public broadcasters licensed

It seems equally clear, however, that the First Amendment will not tolerate arbitrary definitions of the scope of the forum. We have recognized that "[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). It follows, of course, that a State's failure to set any meaningful boundaries at all cannot insulate the State's action from First Amendment challenge. The dispositive issue in this case, then, is not whether AETC created a designated public forum or a nonpublic forum, as the Court concludes, but whether AETC defined the contours of the debate forum with sufficient specificity to justify the exclusion of a ballot-qualified candidate.

AETC asks that we reject Forbes' constitutional claim on the basis of entirely subjective, ad hoc judgments about the dimensions of its forum.[11] The First Amendment demands more, however, when a state government effectively wields the power to eliminate a political candidate from all consideration by the voters. All stations must act as editors, see *ante*, at 673, and when state-owned stations participate in the broadcasting arena, their editorial decisions may impact the constitutional interests of individual speakers.[12] A state-owned broadcaster need not plan, sponsor, and conduct political debates, however. When it chooses to do so, the First Amendment imposes important limitations on its control over access to the debate forum.

AETC's control was comparable to that of a local government official authorized to issue permits to use public facilities for expressive activities. In cases concerning ac-

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to operate under the Communications Act"); see also Brief for State of California et al. as *Amici Curiae* 4 ("In its role as speaker, rather than mere forum provider, the state actor is not restricted by speaker-inclusive and viewpoint-neutral rules").

[11] See *supra*, at 685–686.

[12] See n. 17, *infra*.

cess to a traditional public forum, we have found an analogy between the power to issue permits and the censorial power to impose a prior restraint on speech. Thus, in our review of an ordinance requiring a permit to participate in a parade on city streets, we explained that the ordinance, as written, "fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth*, 394 U. S., at 150–151.

We recently reaffirmed this approach when considering the constitutionality of an assembly and parade ordinance that authorized a county official to exercise discretion in setting the amount of the permit fee. In *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992), relying on *Shuttlesworth* and similar cases,[13] we described the breadth of the administrator's discretion thusly:

> "There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official." 505 U. S., at 133 (footnotes omitted).

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[13] After citing *Shuttlesworth*, we explained: "The reasoning is simple: If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940), by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 553 (1975)." 505 U. S., at 131.

Perhaps the discretion of the AETC staff in controlling access to the 1992 candidate debates was not quite as unbridled as that of the Forsyth County administrator. Nevertheless, it was surely broad enough to raise the concerns that controlled our decision in that case. No written criteria cabined the discretion of the AETC staff. Their subjective judgment about a candidate's "viability" or "newsworthiness" allowed them wide latitude either to permit or to exclude a third participant in any debate.[14] Moreover, in exercising that judgment they were free to rely on factors that arguably should favor inclusion as justifications for exclusion. Thus, the fact that Forbes had little financial support was considered as evidence of his lack of viability when that factor might have provided an independent reason for allowing him to share a free forum with wealthier candidates.[15]

The televised debate forum at issue in this case may not squarely fit within our public forum analysis,[16] but its importance cannot be denied. Given the special character of political speech, particularly during campaigns for elected office,

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[14] It is particularly troubling that AETC excluded the only independent candidate but invited all the major-party candidates to participate in the planned debates, regardless of their chances of electoral success. See n. 6, *supra.* As this Court has recognized, "political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson* v. *Celebrezze,* 460 U. S. 780, 794 (1983) (citing *Illinois Bd. of Elections* v. *Socialist Workers Party,* 440 U. S. 173, 186 (1979)).

[15] Lack of substantial financial support apparently was not a factor in the decision to invite a major-party candidate with even less financial support than Forbes. See n. 6, *supra.*

[16] Indeed, a plurality of the Court recently has expressed reluctance about applying public forum analysis to new and changing contexts. See *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727, 741, 749 (1996) (plurality opinion) ("[I]t is not at all clear that the public forum doctrine should be imported wholesale into the area of common carriage regulation").

the debate forum implicates constitutional concerns of the highest order, as the majority acknowledges. *Ante*, at 675. Indeed, the planning and management of political debates by state-owned broadcasters raise serious constitutional concerns that are seldom replicated when state-owned television networks engage in other types of programming.[17] We have recognized that "speech concerning public affairs is . . . the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). The First Amendment therefore "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971). Surely the Constitution demands at least as much from the government when it takes action that necessarily impacts democratic elections as when local officials issue parade permits.

The reasons that support the need for narrow, objective, and definite standards to guide licensing decisions apply directly to the wholly subjective access decisions made by the staff of AETC.[18] The importance of avoiding arbitrary

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[17] The Court observes that "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming." *Ante*, at 675. A rule, such as the one promulgated by the Federal Election Commission, that requires the use of preestablished, objective criteria to identify the candidates who may participate leaves all other programming decisions unaffected. This is not to say that all other programming decisions made by state-owned television networks are immune from attack on constitutional grounds. As long as the State is not itself a "speaker," its decisions, like employment decisions by state agencies and unlike decisions by private actors, must respect the commands of the First Amendment. It is decades of settled jurisprudence that require judicial review of state action that is challenged on First Amendment grounds. See, *e. g.*, *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995).

[18] Ironically, it is the standardless character of the decision to exclude Forbes that provides the basis for the Court's conclusion that the debates were a nonpublic forum rather than a limited public forum. The Court

or viewpoint-based exclusions from political debates militates strongly in favor of requiring the controlling state agency to use (and adhere to) preestablished, objective criteria to determine who among qualified candidates may participate. When the demand for speaking facilities exceeds supply, the State must "ration or allocate the scarce resources on some acceptable neutral principle." *Rosenberger*, 515 U. S., at 835. A constitutional duty to use objective standards—*i. e.*, "neutral principles"—for determining whether and when to adjust a debate format would impose only a modest requirement that would fall far short of a duty to grant every multiple-party request.[19] Such standards would also have the benefit of providing the public with some assurance that state-owned broadcasters cannot select debate participants on arbitrary grounds.[20]

Like the Court, I do not endorse the view of the Court of Appeals that all candidates who qualify for a position on the ballot are necessarily entitled to access to any state-sponsored debate. I am convinced, however, that the constitutional imperatives that motivated our decisions in cases like *Shuttlesworth* command that access to political debates

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explains that "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Ante*, at 679. If, as AETC claims, it did invite either the entire class of "viable" candidates, or the entire class of "newsworthy" candidates, under the Court's reasoning, it created a designated public forum.

[19] The Court expresses concern that as a direct result of the Court of Appeals' holding that all ballot-qualified candidates have a right to participate in every debate, a state-owned network canceled a 1996 Nebraska debate. *Ante*, at 681. If the Nebraska station had realized that it could have satisfied its First Amendment obligations simply by setting out participation standards before the debate, however, it seems quite unlikely that it would have chosen instead to cancel the debate.

[20] The fact that AETC and other state-owned networks have adopted policy statements emphasizing the importance of shielding programming decisions from political influence, see *ante*, at 670, confirms the significance of the risk that would be minimized by the adoption of objective criteria.

planned and managed by state-owned entities be governed by preestablished, objective criteria. Requiring government employees to set out objective criteria by which they choose which candidates will benefit from the significant media exposure that results from state-sponsored political debates would alleviate some of the risk inherent in allowing government agencies—rather than private entities—to stage candidate debates.

Accordingly, I would affirm the judgment of the Court of Appeals.

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MONTANA ET AL. *v.* CROW TRIBE OF INDIANS ET AL.

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

No. 96–1829. Argued February 24, 1998—Decided May 18, 1998

In 1904, the Crow Tribe ceded part of its Montana Reservation to the United States for settlement by non-Indians. The United States holds rights to minerals underlying the ceded strip in trust for the Tribe. In 1972, with the approval of the Department of the Interior and pursuant to the Indian Mineral Leasing Act of 1938 (IMLA), Westmoreland Resources, Inc., a non-Indian company, entered into a mining lease with the Tribe for coal underlying the ceded strip. After executing the lease, Westmoreland signed contracts with its customers, four utility companies, allowing it to pass on to the utilities the cost of valid taxes. Westmoreland and the Tribe renegotiated the lease in 1974. The amended lease had an extendable ten-year term, and set some of the highest royalties in the United States. In 1975, Montana imposed a severance tax and a gross proceeds tax on all coal produced in the State, including coal underlying the reservation proper and the ceded strip. Westmoreland paid these taxes without timely pursuit of the procedures Montana law provides for protests and refunds. Some six months after the State imposed its taxes, the Crow Tribal Council adopted its own severance tax. The Department of the Interior approved the Tribe's tax as applied to coal underlying the reservation proper but, because of a limitation in the Tribe's constitution, did not approve as to coal beneath the ceded strip. The Tribe again enacted a tax for coal mined on the ceded strip in 1982, and again the Department rejected the tax.

In 1978, the Tribe brought a federal action for injunctive and declaratory relief against Montana and its counties, alleging that the State's severance and gross proceeds taxes were preempted by the IMLA and infringed on the Tribe's right to govern itself. The District Court dismissed the complaint. The Ninth Circuit reversed, holding that the Tribe's allegations, if proved, would establish that the IMLA preempted the State's taxes. The Court of Appeals noted, however, that the Tribe had paid none of Westmoreland's taxes and apparently would not be entitled to any refund in the event that the taxes were declared invalid. *Crow Tribe* v. *Montana*, 650 F. 2d 1104, 1113, n. 13 *(Crow I)*. In 1982, the Tribe and Westmoreland entered into an agreement, with Interior Department approval, under which Westmoreland agreed to pay the Tribe a tax equal to the State's then-existing taxes, less any tax pay-

ments Westmoreland was required to pay to the State and its subdivisions. The agreement achieved, prospectively, the federal permission the Tribe had long sought. It allowed the Tribe to have an approved tax in place so that, if successful in the litigation against Montana, the Tribe could claim for itself any tax amounts Westmoreland would be ordered to pay into the District Court's registry *pendente lite*. It also enabled Westmoreland to avoid double taxation, and absolved the company from any tax payment obligation to the Tribe for the 1976–1982 period. In 1983, the District Court granted a motion by the Tribe and Westmoreland to deposit severance tax payments into the District Court's registry, pending resolution of the controversy over Montana's taxing authority. In 1987, the court granted the same interim relief for the gross proceeds taxes. Later that year, the United States intervened on behalf of the Tribe to protect its interests as trustee of the coal upon which Montana's taxes were levied. After trial, the District Court determined that federal law did not preempt the State's taxes on coal mined at the ceded strip. The Ninth Circuit again reversed, concluding that the taxes were both preempted by the IMLA and void for interfering with tribal self-governance. *Crow Tribe* v. *Montana*, 819 F. 2d 895, 903 *(Crow II)*. The Court of Appeals stressed, *inter alia*, that the State's taxes had at least some negative impact on the marketability of the Tribe's coal. *Id.*, at 900. This Court summarily affirmed. When the case returned to the District Court in 1988, the court ordered distribution of the funds in its registry to the United States as trustee for the Tribe. Subsequently, the United States and the Tribe filed amended complaints against Montana and Big Horn County to recover taxes paid by Westmoreland *prior* to the 1983 and 1987 orders directing deposits into the court's registry. Neither the Tribe nor the United States requested, as additional or alternate relief, recovery for the Tribe's actual financial losses attributable to the State's taxes.

After trial, the District Court concluded that the disgorgement remedy sought by the Tribe was not appropriate. Key to the court's decision was this Court's holding in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, that both State and Tribe may impose severance taxes on on-reservation oil and gas production by a non-Indian lessee. *Cotton Petroleum* indicated that Montana's taxes on ceded strip coal were invalidated in *Crow II* not because the State lacked power to tax the coal at all, but because its taxes were "extraordinarily high." 490 U. S., at 186–187, n. 17. The District Court also considered that Westmoreland would not have paid coal taxes to the Tribe before 1983, for Interior Department approval was essential to allow pass-through to the company's customers. Furthermore, under the 1982 lease agreement, the

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Tribe and Westmoreland stipulated that Westmoreland would have no tax liability to the Tribe for the 1976–1982 period. Moreover, the deposited funds, Westmoreland's post-1982 tax payments, had been turned over in full to the United States for the benefit of the Tribe. The court further noted that Westmoreland did not timely endeavor to recover taxes paid to the State and counties, and the Tribe did nothing to prompt Westmoreland to initiate appropriate refund proceedings. The court received additional evidence concerning the effect of Montana's taxes on the marketability of Montana coal and described the parties' conflicting positions on that issue, but made no findings on the matter. The Ninth Circuit again reversed, holding that the District Court had ignored the law of the case and abused its discretion.

Held: The restitution sought for the Tribe is not warranted. Pp. 713–719.

(a) As a rule, a nontaxpayer may not sue for a refund of taxes paid by another. The Ninth Circuit evidently had that rule in mind when it noted, in *Crow I*, that the Tribe was apparently not entitled to any refund of taxes Westmoreland had paid to Montana. The Tribe maintains, however, that the disgorgement remedy it gained does not fall within the "refund" category. The Tribe's disgorgement claim must be examined in light of this Court's pathmarking decision in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163. There, the Court clarified that neither the IMLA, nor any other federal law, categorically preempts state nondiscriminatory severance taxes on all extraction enterprises in a State, including on-reservation operations. Both State and Tribe have taxing jurisdiction over on-reservation production. The Court in *Cotton Petroleum* distinguished *Crow II* in a footnote, indicating that Montana had the power to tax Crow coal, but not at an exorbitant rate. Pp. 713–715.

(b) The Tribe first argues that it, not Montana, should have received Westmoreland's 1975–1982 coal tax payments; therefore the proper remedy is to require the State to turn all taxes it collected from Westmoreland over to the Tribe. However, as *Cotton Petroleum* makes plain, neither the State nor the Tribe enjoys authority to tax to the total exclusion of the other. This situation differs from cases like *Valley County* v. *Thomas*, 109 Mont. 345, 97 P. 2d 345, in which only one jurisdiction could tax a particular activity. Moreover, the Tribe could not have taxed Westmoreland during the period in question, for the Interior Department had withheld the essential permission, further distancing this case from *Valley County*. The District Court correctly took these and other factors into account in holding disgorgement an exorbitant, and therefore inequitable, remedy. Pp. 715–716.

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(c) The Tribe and the United States urge the negative impact of Montana's high taxes on the marketability of the Tribe's coal as an alternative justification for requiring Montana to disgorge the taxes collected from Westmoreland. This claim rests on the concern that, by taxing the coal actually mined and sold, Montana deprived the Tribe of its fair share of the economic rent. Again, however, the Tribe could not have exacted a tax from Westmoreland before 1983, because the Interior Department withheld approval. And no evidence suggests that Westmoreland would have agreed to pay even higher royalties to the Tribe in 1974, but for Montana's tax. It merits emphasis also that under *Cotton Petroleum*, Montana could have imposed a severance tax, albeit not one so extraordinarily high. The District Court did not consider awarding the Tribe, in lieu of all the 1975–1982 taxes Montana collected, damages based on actual losses the Tribe suffered. This was not an oversight. The complaint contained no prayer for compensatory damages. Nor did the proof establish entitlement to such relief. The Tribe concentrated on disgorgement as the desired remedy; it deliberately sought and proved no damages attributable to coal not sold because the State's tax made the price too high. Federal Rule of Civil Procedure 54(c) therefore could not aid the Tribe, for the Tribe had not shown entitlement to actual damages. While not foreclosing the District Court from any course the Federal Rules and that court's thorough grasp on this litigation may lead it to take, this Court is satisfied that the Court of Appeals improperly overturned the District Court's judgment. Pp. 717–719.

92 F. 3d 826, 98 F. 3d 1194, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 719.

Clay R. Smith, Solicitor of Montana, argued the cause for petitioners. With him on the briefs were *Joseph P. Mazurek*, Attorney General, *James E. Torske*, *Carter G. Phillips*, *Paul E. Kalb*, and *Christine A. Cooke*.

Robert S. Pelcyger argued the cause and filed a brief for respondent Crow Tribe of Indians.

Jeffrey A. Lamken argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *As-*

sistant Attorney General Schiffer, *Deputy Solicitor General Kneedler*, and *James C. Kilbourne*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case originated in 1978 when the Crow Tribe sought to enjoin the State of Montana and its counties from taxing coal extracted from mines held by the United States in trust for the Tribe. Having succeeded in that endeavor, the Tribe and the United States now seek to recover coal-related taxes once paid to the State and counties by Westmoreland Resources, Inc., a nontribal enterprise that mined coal under a lease from the Tribe. We hold that the restitution sought for the Tribe is not warranted.

I

A

Just north of the northern surface boundary of the Crow Reservation in Montana lies the "ceded strip," approximately 1,137,500 acres of land that was originally part of the reservation. The Tribe ceded the tract to the United States in 1904 for settlement by non-Indians. Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352; see *Ash Sheep Co.* v. *United States*,

*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Dennis C. Vacco*, Attorney General of New York, *Barbara G. Billet*, Solicitor General, *John W. McConnell*, Deputy Solicitor General, and *John B. Curcio*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Daniel E. Lungren* of California, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Heidi Heitkamp* of North Dakota, *Mark W. Barnett* of South Dakota, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Richard Cullen* of Virginia, *Christine O. Gregoire* of Washington, and *William U. Hill* of Wyoming; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley*.

252 U. S. 159 (1920). Surface interests in the ceded strip were thereafter conveyed to non-Indians, but the United States holds rights to minerals underlying the strip in trust for the Tribe. Since 1904, the State and the Counties of Big Horn, Treasure, and Yellowstone have exercised full legal authority and responsibility for public services on the ceded strip, and the Tribe has not exercised civil jurisdiction over this area. See *Crow Tribe* v. *Montana*, 650 F. 2d 1104, 1107 (CA9 1981) (noting the Court of Appeals' understanding, in *Little Light* v. *Crist*, 649 F. 2d 683, 685 (CA9 1981), that "the ceded area is not a part of the reservation").

In 1972, with the approval of the Department of the Interior and pursuant to the Indian Mineral Leasing Act of 1938 (IMLA), 52 Stat. 347, 25 U. S. C. § 396a *et seq.*, Westmoreland Resources, a non-Indian company, entered into a mining lease with the Tribe for coal underlying approximately 31,000 acres of the ceded strip. After executing the 1972 lease, Westmoreland signed contracts with its customers, four Midwest utility companies, allowing Westmoreland to pass on the cost of valid taxes to the utilities. Westmoreland began mining the coal in the spring of 1974.

In November 1974, Westmoreland and the Tribe renegotiated the 1972 lease. The renegotiated royalties were recognized at the time as being among the highest in the United States. *Crow Tribe* v. *United States*, 657 F. Supp. 573, 587 (Mont. 1985); see App. 376 (testimony of Westmoreland's president that the renegotiated royalty was "by far the highest royalty that was being paid in the nation").[1] A settlement agreement attending the 1974 renegotiation stated that the Tribe found the amended lease and associated documents "satisfactory in that they provide the financial, economic and social protections that the Tribe deems necessary." *Id.*, at

[1] Westmoreland's president contrasted the 35 and 40 cents per ton royalties Westmoreland had agreed to pay the Tribe with federal royalties which were "at that time . . . 17 and a half cents a ton, maybe 20 cents a ton." App. 375–376.

44. The amended lease and the royalties for which it provided had an extendable term of ten years, running from June 14, 1972. *Id.*, at 8. Pursuant to the lease, Westmoreland paid the Tribe almost $18 million in royalties through October 1983. *Crow Tribe* v. *United States*, 657 F. Supp., at 588.

In July 1975, the State imposed a severance tax and a gross proceeds tax on all coal produced in Montana, including coal underlying the reservation proper and the ceded strip. See Mont. Code Ann. §§ 15–23–701 to 15–23–704, 15–35–101 to 15–35–111 (1979). The severance tax rate applicable to the ceded strip coal was 30 percent of the contract sales price of the coal extracted;[2] the gross proceeds tax rate was approximately 5 percent of the contract sales price. During the relevant periods,[3] Westmoreland paid approximately $46.8 million in severance taxes to the State and $11.4 million in gross proceeds taxes to Big Horn County.[4] Westmoreland paid these taxes without timely pursuit of the procedures Montana law provides for protests and refunds. App. to Pet. for Cert. 37; see also Tr. of Oral Arg. 13–14. The company subsequently agreed, in exchange for $50,000, to dismiss with prejudice any claim of entitlement to a refund of the severance or gross proceeds taxes it had paid to the State or Big Horn County. App. to Pet. for Cert. 37; see also App. 294–296.

In January 1976, some six months after the State imposed its coal taxes, the Tribal Council adopted an ordinance setting out a Crow Tribal Coal Taxation Code. *Id.*, at 79–86. The Tribe's code imposed a 25 percent severance tax on "all

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[2] The Montana Legislature, post-1985, incrementally reduced the severance tax rate to 15 percent of the contract sales price. App. to Pet. for Cert. 25.

[3] For the severance tax, the relevant period is 1975–1982, and for the gross proceeds tax, 1975–1987.

[4] Big Horn County collected taxes on its own behalf and for other jurisdictions.

persons engaged in or carrying on the business of coal mining within the boundaries of the Crow Indian Reservatio[n]." *Id.*, at 81; see also *id.*, at 97–98. Reservation boundaries, as described in the code, included the coal beneath the ceded strip. *Id.*, at 81.[5] Under the Tribe's constitution, the tax adopted by the Tribal Council was subject to review by the Department of the Interior. *Id.*, at 329.

In January 1977, the Department approved the Tribe's code "to the extent that it applied to coal underlying the Crow Reservation proper." *Id.*, at 98. Because of a limitation in the Tribe's constitution, however, the Department "disapproved the tax to the extent that it applied to the Crow Tribe's coal in the ceded strip." *Id.*, at 153; see also *id.*, at 217–218, 329.[6] In 1982, the Tribe again enacted a tax for coal mined on the ceded strip, and again the Department rejected the tax. See *Crow Tribe* v. *Montana*, 819 F. 2d 895, 897 (CA9 1987). According to the Superintendent of the Crow Agency, Bureau of Indian Affairs, the Department continued to withhold permission for extension of the Tribe's tax to the ceded area because the Tribe's constitution "disclaimed jurisdiction outside the boundaries of the reservation." App. 218. The Tribe endeavored to amend its constitution to satisfy the Department's objection; it did

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[5] The Tribe's Chairman, in a March 11, 1975, statement opposing an increase in Montana coal taxes, however, observed that the State "has an important governmental responsibility" for development of Indian coal resources, particularly on the ceded strip; the role of the State, the Chairman added, "is substantially reduced where development takes place on the Crow Reservation, for under . . . federal law the Crow Tribe . . . exercises governmental and proprietary jurisdiction over the people and property within its reservation." App. 53.

[6] On March 3, 1978, the Assistant Secretary of the Interior disapproved, on procedural grounds, an amendment to the Crow Constitution that would have had the effect of applying the Tribe's 1976 coal tax code to the removal of coal underlying the ceded area. *Id.*, at 98; see also Defendant's Exhs. 542, 543.

not petition for court review of the Department's refusal to approve extension of the Tribe's tax to the ceded strip.

B

The Tribe brought a federal action against Montana and Montana counties in 1978, seeking declaratory and injunctive relief against imposition of the State's severance and gross proceed taxes on coal belonging to the Tribe. The State's taxes, the Tribe alleged, were preempted by the IMLA and infringed on the Tribe's right to govern itself. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. *Crow Tribe* v. *Montana*, 469 F. Supp. 154 (Mont. 1979). The Court of Appeals for the Ninth Circuit reversed. 650 F. 2d 1104 (1981), amended, 665 F. 2d 1390 (1982) *(Crow I)*. It held that the Tribe's allegations, if proved, would establish that the IMLA preempted Montana's taxes, 650 F. 2d, at 1113–1115, and that the taxes impermissibly infringed upon the Tribe's sovereignty, *id.*, at 1115–1117.

While the Ninth Circuit trained on the nonmonetary claim the Tribe was then pursuing, one for declaratory and injunctive relief to stop the imposition of Montana's taxes, the Court of Appeals noted: "As to the taxes already paid by Westmoreland . . . it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." *Id.*, at 1113, n. 13. The Ninth Circuit further observed that the Tribe's own attempt "to tax its lessees' coal production was partially frustrated by the Secretary of the Interior's refusal to sanction the Tribe's tax ordinances insofar as they applied to coal production on the ceded strip." *Id.*, at 1115, n. 19.

In July 1982, after the *Crow I* decision, the Tribe and Westmoreland entered into an amended lease agreement, approved by the Interior Department that September. Under the amended arrangement, Westmoreland agreed to pay the

Tribe a tax equal to the State's then-existing taxes, less any tax payments Westmoreland was required to make to the State and its subdivisions. See App. 135–141; see also *id.*, at 329–330. The 1982 agreement achieved, prospectively, the federal permission the Tribe had long sought. It allowed the Tribe to have an approved tax in place so that, if successful in the litigation against Montana, the Tribe could claim for itself any tax amounts Westmoreland might be ordered to pay into the District Court's registry *pendente lite*. Correspondingly, the agreement enabled Westmoreland to avoid double taxation, present and future, and it absolved the company from any tax payment obligation to the Tribe for the 1976–1982 period. App. to Pet. for Cert. 32–35.

In November 1982, in keeping with their amended lease agreement, the Tribe and Westmoreland jointly filed a motion to deposit severance tax payments into the District Court's registry, pending resolution of the controversy over Montana's authority to tax coal mined at the ceded strip. *Id.*, at 32. In January 1983, the District Court granted the motion. Thereafter, Westmoreland paid the Montana severance tax into the court's registry in lieu of paying the State. The District Court granted the same interim relief, in November 1987, for the gross proceeds tax. *Id.*, at 35, 36. In ordering the registry deposits, which ultimately would be paid over, with interest, to the prevailing party (Montana or the Tribe), the District Court recalled the Ninth Circuit's observation that "the Tribe is apparently not entitled to any refund of taxes previously paid by Westmoreland to Montana." App. 213 (citing *Crow I*, 650 F. 2d, at 1113, n. 13). The provisional remedy attended to that concern; it "preserve[d the District Court's] power . . . [to give post-1982] tax moneys to their rightful owner after a trial on the merits." App. 215.

In June 1983, the United States intervened on behalf of the Tribe to protect its interests as trustee of the coal upon

which Montana's taxes were levied. Trial took place in January 1984, after which the District Court concluded that federal law did not preempt the State's taxes on coal underlying the ceded strip. *Crow Tribe* v. *United States*, 657 F. Supp. 573 (Mont. 1985). The Ninth Circuit again reversed. *Crow Tribe* v. *Montana*, 819 F. 2d 895 (1987) *(Crow II)*. Montana's taxes, as applied to the ceded strip coal, the Court of Appeals held, were both "preempted by federal law and policies," as reflected in the IMLA, and "void for interfering with tribal self-government." *Id.*, at 903. Explaining its decision, the Ninth Circuit stressed these considerations: The Tribe had a vital interest in the development of its coal resources, *id.*, at 899, 901; the State's taxes had "at least some negative impact on the . . . marketability [of the Tribe's coal]," *id.*, at 900; Montana's coal tax exactions were not "narrowly tailored" to serve only the State's "legitimate" interests, *id.*, at 902. Montana appealed, and this Court summarily affirmed. 484 U. S. 997 (1988).

When the case returned to the District Court in 1988, the Tribe sought an order directing release of the funds held in the court's registry. Montana did not object but, in a new twist, Westmoreland did. The company, for the first time in this protracted litigation, asserted that neither Montana nor the Tribe qualified for receipt of the funds. Montana was out because the Ninth Circuit had declared the State's taxes preempted. The Tribe, according to Westmoreland, did not have a valid tax law in place even in the years following 1982—the fund deposit period—for want of proper Interior Department approval. Therefore, Westmoreland urged, the company should receive back all deposited funds.

Rejecting Westmoreland's novel claim of entitlement to the deposited funds, the District Court observed that the Ninth Circuit, in *Crow I*, 650 F. 2d, at 1117, and *Crow II*, 819 F. 2d, at 898, had characterized the minerals underlying the ceded strip as a " 'component of the Reservation land itself.' "

App. 286. It follows, the District Court next said, that the tax approved for the reservation proper in 1977, see *supra*, at 703, covered the strip as well, and the Interior Department had erred in ever opining otherwise, App. 286. As to Westmoreland's operations on the strip, the District Court further stated, the Crow tax had been modified by the 1982 agreement amending the lease. *Id.*, at 287; see *supra*, at 704–705. That 1982 Tribe-Westmoreland accord controlled, the District Court concluded, rendering the amount deposited payable to the Tribe, and not to Westmoreland. Shortly thereafter, the District Court ordered distribution of funds in its registry to the United States, as trustee for the Tribe. App. 288–291.

Having secured exclusively for the Tribe's benefit Westmoreland's post-1982 tax payments once held in the District Court's registry, the United States and the Tribe commenced the fray now before us. Filing amended complaints against Montana and Big Horn County, they invoked theories of assumpsit and constructive trust in support of prayers to recover some $58.2 million in state and county taxes paid by Westmoreland *prior* to the 1983 and 1987 orders directing deposits into the court's registry. App. to Pet. for Cert. 243–260. These complaints alleged that, because the State and Big Horn County had collected taxes from Westmoreland in violation of federal law, it would be unjust and inequitable to allow them to retain the funds. In "equity and good conscience," the United States and the Tribe urged, Montana should pay over for the benefit of the Tribe all moneys illegally collected, together with interest thereon. See *id.*, at 249–250, 258–259.[7] Neither the Tribe nor the United States requested, as additional or alternate relief, recovery for the

[7] Specifically, the amended complaints sought all moneys paid as severance taxes from 1975 through 1983, and as gross proceeds taxes from 1975 through 1988, together with prejudgment interest. App. to Pet. for Cert. 250–251, 259.

Tribe's actual financial losses attributable to the State's taxes.[8]

Montana moved for summary judgment, arguing, *inter alia*, that any refund right that may have existed belonged to Westmoreland, as payer of the taxes in question. *Id.*, at 72. The District Court, in December 1990, denied Montana's motion on the ground that full airing of the parties' positions was in order. *Id.*, at 67–85.

On Montana's application, the District Court certified for interlocutory appeal, pursuant to 28 U. S. C. § 1292(b), the question whether summary judgment for the State was properly denied. *Id.*, at 61–66. The Ninth Circuit, in 1991, initially granted permission for the interlocutory appeal, but one year later, in 1992, dismissed the appeal as improvidently granted. *Crow Tribe* v. *Montana*, 969 F. 2d 848 *(Crow III)*. In dismissing the appeal, the Ninth Circuit commented that the "sole issue" presented was whether the Tribe and the United States, although they did not pay the Montana taxes, were nevertheless positioned to state a claim for relief in assumpsit and constructive trust. That issue, the Ninth

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[8] An earlier amended complaint filed in November 1982, a year after *Crow I*, sought in addition to the declaratory and injunctive relief originally requested, "restitutionary, tax refunds, money damages, and other relief," including "punitive or exemplary damages." App. 143, 158. The current complaints seek restitution, but do not refer to "refunds" or "money damages."

In 1993, the Tribe sought once again to amend its complaint, *inter alia*, to recover from Westmoreland taxes allegedly due under the Tribe's coal tax ordinance for the period 1976–1982. In a July 1993 order, the District Court denied leave to amend, observing: "This case is now more than fifteen years old"; "defendants have allowed . . . previous motions to amend the complaint to be granted without objection"; "[t]his motion, however, contains additional causes of action . . . [which] could change the nature of the litigation." Record, Doc. No. 637, p. 4. In so ruling, the District Court noted that "[t]he trial court's discretion [to deny tardy amendments] is . . . broadened" when newly alleged facts and theories "have been known to the party seeking amendment since the inception of the cause of action." *Id.*, at 3.

Circuit said, "was already addressed" in *Crow II*. The Court of Appeals then recited passages from *Crow II* indicating why that court had determined that "'the state tax[es] threaten[ed] Congress' overriding objective of encouraging tribal self-government and economic development.'" 969 F. 2d, at 848–849 (quoting *Crow II*, 819 F. 2d, at 903).

C

The District Court conducted a trial in April and May 1994 to determine whether coal taxes paid by Westmoreland to Montana and its counties in the years 1975–1982 unjustly enriched the State and its subdivisions at the expense of the Tribe. In detailed findings and conclusions, that court explained why, in its judgment, the disgorgement remedy sought by the Tribe was not appropriate. App. to Pet. for Cert. 17–38, 42–54.

The Tribe's case rested on three principal points: first, the fact, settled in *Crow I*, that the coal underlying the ceded strip was a mineral resource of the Tribe; second, the federal policy favoring tribal self-government and economic development; finally, the Ninth Circuit's preemption decision. Critical to the preemption decision, the District Court recognized, was the Court of Appeals' determination that "Montana's coal taxes burdened the Tribe's economic interests by increasing the costs of production by coal producers, which reduced royalties received by the Tribe." App. to Pet. for Cert. 45 (citing *Crow II*, 819 F. 2d, at 899).

Counterbalancing the Tribe's case, the District Court observed first that the State and its subdivisions, not the Tribe, provided "[p]ublic services to residents and businesses on the [c]eded [s]trip, many of which facilitate the mining of coal." App. to Pet. for Cert. 47; see *supra*, at 701, 703, n. 5. Key to the District Court's reasoning, however, was the respective taxing authority of State and Tribe.

In a decision rendered two years after the Ninth Circuit's *Crow II* preemption decision, this Court held that both State

and Tribe may impose severance taxes on on-reservation oil and gas production by a non-Indian lessee. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163 (1989). *Cotton Petroleum* indicated that Montana's taxes on ceded strip coal were invalidated, not because the State lacked power to tax the coal at all, but because the taxes at issue were "extraordinarily high." *Id.*, at 186–187, n. 17.

The Tribe's exercise of taxing authority, on the other hand, required approval from the Secretary of the Interior, and that approval had not been obtained in the relevant period, 1975–1982. See *supra*, at 703–704. In 1988, the District Court had determined that the Interior Department's refusal to approve the Tribe's tax on the ceded strip was an error, see *supra*, at 707, but the presence of the state taxes did not cause that error. App. to Pet. for Cert. 36. Rather, the Department initially questioned the Tribe's authority to tax on the ceded strip and later pointed to the Tribe's noncompliance with the proper procedures for amending its constitution to impose the tax. *Id.*, at 36–37.

Accorded weight in the District Court's evaluation, Westmoreland would not have paid coal taxes to the Tribe prior to 1983, for Interior Department approval was essential to allow pass-through to the company's customers. *Id.*, at 35. Furthermore, under the 1982 lease agreement, see *supra*, at 704–705, the Tribe and Westmoreland stipulated that Westmoreland would have no tax liability to the Tribe for the 1976–1982 period. App. to Pet. for Cert. 36.[9] Moreover, the deposited funds, Westmoreland's post-1982 tax payments,

[9] The District Court clarified that its 1988 ruling referring to the Interior Department's error was issued not to suggest any Westmoreland tax obligation to the Tribe in lieu of the State predating the 1982 lease agreement, but "as a basis for ordering that the escrowed funds be released to the Tribe and not Westmoreland by virtue of [that] agreement." App. to Pet. for Cert. 36; see also *id.*, at 53–54.

had been turned over in full to the United States for the benefit of the Tribe. *Ibid.;* see *supra*, at 705–707.

The District Court further noted that Westmoreland did not timely endeavor to recover taxes paid to the State and counties, and that the Tribe did nothing to prompt Westmoreland to initiate appropriate proceedings for refunds. App. to Pet. for Cert. 50–51. In that regard, the District Court recalled the Court of Appeals' statement in *Crow I* that "'as to the taxes already paid by Westmoreland, . . . the Tribe . . . is apparently not entitled to any refund if the tax statutes are declared invalid.'" App. to Pet. for Cert. 53 (quoting *Crow I*, 650 F. 2d, at 1113, n. 13).

Concerning the negative effect of Montana's taxes on the marketability of coal produced in Montana, the District Court entertained additional evidence, supplementing the evidence offered ten years earlier. Westmoreland's president testified that "he could not identify any utility contracts lost during the relevant time period due to Montana's coal taxes," App. to Pet. for Cert. 29, and the parties' economic experts presented conflicting testimony on the impact of Montana's taxes on the sale of Montana coal. The District Court described the conflicting positions, but made no findings on the matter. *Id.*, at 29–30.

Satisfied that the factors justifying preemption did not impel the disgorgement relief demanded by the Tribe, that under *Cotton Petroleum*, the State could impose a reasonably sized severance tax, and that the State, though enriched by Westmoreland's tax payments, did not gain that enrichment unjustly at the expense of the Tribe, the District Court refused to order that Montana coal taxes collected between 1975 and 1982 be remitted to the Tribe.[10]

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[10] The Tribe and the United States also claimed that the State and Big Horn County were unjustly enriched as a result of their tortious interference with the Tribe's contractual and business relationships with the Shell Oil Company. The District Court rejected this claim as not proved, see

The Ninth Circuit again reversed the District Court's judgment; in a *per curiam* opinion, the Court of Appeals read its prior opinions to require the relief the Tribe demanded, *i. e.*, an order directing the State and county to disgorge approximately $58.2 million in coal taxes paid by Westmoreland to Montana and its subdivisions before Westmoreland began making payments into the District Court's registry. 92 F. 3d 826, amended, 98 F. 3d 1194 (1996) *(Crow IV)*. Acknowledging "the absence of traditional requirements for relief under theories of assumpsit or constructive trust," 92 F. 3d, at 828, the Court of Appeals remanded for entry of the disgorgement order. That court left to the District Court only the "unresolved request[s] for prejudgment interest [and attorney's fees]." *Id.*, at 830–831.

In the Ninth Circuit's view, the District Court had not adhered to the "law of this case," *id.*, at 828,[11] and had therefore abused its discretion, *id.*, at 830. In particular, the Court of Appeals faulted the District Court for giving undue weight to the fact that Westmoreland rather than the Tribe had paid the taxes, *id.*, at 828–829,[12] and to the fact, made plain by this Court in *Cotton Petroleum*, 490 U. S., at 176–187, that "similar [state] taxes are not always preempted," *Crow IV*, 92 F. 3d, at 829. Further, the Ninth Circuit discounted the public services Montana provided at the ceded strip because "the State would have provided such services even if the

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id., at 54–57, and the Ninth Circuit affirmed that disposition. 92 F. 3d 826, 830–831, amended, 98 F. 3d 1194 (1996). We denied the Tribe's cross-petition for review of the final judgment disposing of the Shell Oil claim. 522 U. S. 819 (1997).

[11] The Court of Appeals repeatedly referred to "law of the case" made in *Crow III*, see 92 F. 3d, at 828, and n. 2, 829, a decision denying interlocutory review and therefore containing no "holding," see *supra*, at 708–709.

[12] But cf. *Crow I*, 650 F. 2d, at 1110 ("incidence of [Montana's] taxes is on the non-Indian mineral lessee"); *id.*, at 1113, n. 13 ("[a]s to the taxes already paid by Westmoreland, . . . [the Tribe] is apparently not entitled to any refund").

Tribal coal had not been mined." *Ibid.* Finally, the Court of Appeals attributed to the District Court a finding that Westmoreland "would have paid the tribal tax even without [the Interior Department's] approval because [Westmoreland] agreed to do so in its 1982 lease." *Id.*, at 830; see also *ibid.* ("Westmoreland was willing to pay coal taxes to the Tribe as early as 1976, so there was no reason for the [District Court] to distinguish between the taxes collected before and after 1982.").[13]

We granted certiorari, 522 U. S. 912 (1997), and now reverse the judgment of the Court of Appeals.

II

A

The petition for certiorari presents the question whether the Tribe—or the United States as its trustee—may recover state and county taxes imposed on and paid by the Tribe's mineral lessee, Westmoreland, a party who has forfeited entitlement to a tax refund. Taxpayer Westmoreland, it is undisputed, did not qualify for a refund because the company failed to pursue protest and claim procedures within the time Montana law prescribes. Further, Westmoreland entered into a settlement with the State and the county relinquishing any claim it might have had for return of the tax payments in question. See *supra,* at 702.

As a rule, a nontaxpayer may not sue for a refund of taxes paid by another. See, *e. g., Furman Univ.* v. *Livingston*, 136 S. E. 2d 254, 256, 244 S. C. 200, 204 (1964); *Krauss Co.* v. *Develle*, 236 La. 1072, 1077, 110 So. 2d 104, 106 (1959); *Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, 297, 16 N. E. 2d 288, 290 (1938); cf. *United States* v. *California*, 507 U. S. 746, 752 (1993). The Ninth Circuit evidently had that rule in mind

[13] But cf. App. to Pet. for Cert. 35 (District Court found that during the 1975 through 1982 period Westmoreland "would not have paid coal taxes to the Tribe as no Department of Interior approval had been obtained to allow a pass-through to its customers").

when it noted, in *Crow I,* that the Tribe "is apparently not entitled to any refund" of taxes Westmoreland had paid to Montana. 650 F. 2d, at 1113, n. 13.

The Tribe now maintains, however, that the disgorgement remedy approved by the Ninth Circuit does not fall within the "refund" category. The Tribe suggests two ways of analyzing its claim. First, Westmoreland was liable for tax payments, but it paid the wrong sovereign; the Tribe, not the State, should have been the recipient of those payments. Second, the State's taxes adversely affected the Tribe's economy by reducing the demand for the Tribe's coal and the royalties the Tribe could charge; a remedial order transferring Westmoreland's 1975–1982 tax payments from Montana to the Tribe would eliminate the enrichment unjustly gained by the State at the Tribe's expense.

Before inspecting the Tribe's justifications for the disgorgement ordered by the Court of Appeals, we place in clear view a pathmarking decision this Court rendered less than two years after our summary affirmance in *Crow II.*[14] In *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163 (1989), we held that the IMLA did not preempt New Mexico's nondiscriminatory severance taxes on the production of oil and gas on the Jicarilla Apache Reservation by Cotton Petroleum, a non-Indian lessee. *Id.*, at 186–187. In so holding, we acknowledged that the same on-reservation production of oil and gas was subject to tribal severance taxes, *id.*, at 167–169, and that New Mexico's taxes might reduce demand for on-reservation leases, *id.*, at 186–187. *Cotton Petroleum* clarified that neither the IMLA, nor any other federal law, categorically preempts state mineral severance taxes imposed, without discrimination, on *all* extraction enterprises in the State, including on-reservation operations. "Unless and until Congress provides otherwise, each of the

[14] "A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Anderson* v. *Celebrezze*, 460 U. S. 780, 785, n. 5 (1983).

. . . two sovereigns[—State and Tribe—]has taxing jurisdiction over all [on-reservation production]." *Id.*, at 189.

The Court in *Cotton Petroleum* distinguished *Crow II* in a footnote referring to the Solicitor General's representation that Montana's taxes were "extraordinarily high" and the Ninth Circuit's recognition that "the state taxes had a negative effect on the marketability of coal produced in Montana." 490 U. S., at 186–187, n. 17. Montana, *Cotton Petroleum* thus indicates, had the power to tax Crow coal, but not at an exorbitant rate. See *id.*, at 187, n. 17 (according to the Tribe's expert, Montana's rate was " 'more than twice that of any other state's coal taxes' ").[15] We examine the Tribe's disgorgement claim in light of *Cotton Petroleum*, a decision on the books before the Tribe (and the United States) filed their current claims for restitution.

B

We consider first the argument that the Tribe, not Montana, should have received Westmoreland's 1975–1982 coal tax payments; therefore the proper remedy is to require the State to turn all taxes it collected from Westmoreland over to the Tribe. As authority, the Tribe and the United States rely on cases typified by *Valley County* v. *Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939). That case involved a Montana law providing for the licensing of motor vehicles by the county in which the vehicle is owned and taxable. Valley County claimed that McCone County was unlawfully issuing licenses, and collecting license fees, for vehicles owned and taxable within Valley County. Valley sued McCone for both injunctive and monetary relief. The Montana Supreme Court held that if Montana's vehicle licensing law made Valley, not McCone, the county entitled to issue the licenses in question,

[15] Since 1985, the District Court observed, "the Montana legislature has enacted production incentive credits and incrementally reduced the amount of the severance tax"; in November 1994, the rate was 15 percent of the contract sales price. App. to Pet. for Cert. 25.

then Valley could recover from McCone the fees McCone improperly collected. It would make scant sense, the court reasoned, to hold instead that Valley should "exact the . . . license fee anew from the [vehicle] owner, leaving the latter to his remedy, if any, for the illegal exaction." *Id.*, at 385–386, 97 P. 2d, at 366.

As the District Court in this case correctly recognized, App. to Pet. for Cert. 49–50, the *Valley County* pattern is not the one presented here. There, the Montana licensing statute bound both counties. One, and not the other, was the sole subdivision authorized to issue the license and collect the fee. Here, as *Cotton Petroleum* makes plain, neither the State nor the Tribe enjoys authority to tax to the total exclusion of the other. Moreover, dispositively distancing the Tribe's situation from that of the prevailing subdivision in *Valley County*, the Tribe itself could not have taxed lessee Westmoreland during the period in question, for the Interior Department (whether wrongly or rightly) had withheld the essential permission.

It bears repetition that the Department did not approve the Tribe's imposition of a coal tax on ceded strip production until September 1982, see *supra*, at 705, that the Tribe never sought judicial review of the Department's pre-1982 disapprovals, see *supra*, at 703–704, that Westmoreland would pay no tax to the Tribe absent Department approval, see *supra*, at 706, 710, 713, n. 13, that Montana's taxes did not impede the Tribe from gaining the Department's clearance, see *supra*, at 710, and that Montana received no share of the post-1982 tax payments released from the District Court's registry, see *supra*, at 705–707. These were factors the District Court correctly considered significant in holding disgorgement an exorbitant, and therefore inequitable, remedy.[16]

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[16] In view of the evidence diligently canvassed by the District Court, including the Tribe-Westmoreland 1982 agreement that Westmoreland would have no tax liability to the Tribe for the 1976–1982 period, see

C

The negative impact of Montana's high taxes on the marketability of the Tribe's coal, as the District Court correctly comprehended, was the principal basis for the Ninth Circuit's *Crow II* preemption decision. See *supra*, at 709. The Tribe and the United States urge that impact as an alternative justification for requiring Montana to disgorge taxes collected from Westmoreland from 1975 through 1982.

At oral argument, counsel for the Tribe clarified that the impact of concern was not coal that went unsold because the State's tax made the price too high. See Tr. of Oral Arg. 37. Instead, the Tribe's disgorgement claim rested on the coal "actually produced and sold"; by taxing that coal, counsel maintained, Montana "deprived [the Tribe] of its fair share of the economic rent." *Ibid.*

Again, however, the Tribe itself could not have exacted a tax from Westmoreland before 1983, because the Interior Department withheld approval. And the royalty the Tribe and Westmoreland agreed upon in 1974 was both high and long term, running until June 1982. See *supra*, at 701–702. No evidence suggests Westmoreland would have paid higher royalties, but for Montana's tax. It merits emphasis also, as the District Court recognized, App. to Pet. for Cert. 46, 50, that under our *Cotton Petroleum* decision, Montana could have imposed *a* severance tax, albeit not one so extraordinarily high. See *Cotton Petroleum*, 490 U. S., at 186–187 (New Mexico's oil and gas severance taxes imposed on on-reservation production, amounting to about 8 percent of the value of the taxpayer's production, were not preempted by federal law although the taxes could be expected to have "at least a marginal effect on the demand for on-reservation

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supra, at 705, 710–711, we see no substantial basis for believing that Westmoreland "would have paid the tribal tax even without [the Interior Department's] approval" or that "Westmoreland was willing to pay coal taxes to the Tribe as early as 1976," six years before the Department agreed that the Tribe was positioned to tax coal mined at the ceded strip. *Crow IV*, 92 F. 3d, at 830.

leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate").

The District Court did not consider awarding the Tribe, in lieu of all the 1975–1982 taxes Montana collected, damages based on actual losses the Tribe suffered. We cannot call this an oversight. The complaint contained no prayer for compensatory damages. See *supra,* at 707–708, and nn. 7, 8. Nor did the proof establish entitlement to such relief. See *supra,* at 711.[17]

The only testimony homing in on Westmoreland's sales came from the company's president. He could "identify [no] utility contracts lost during the relevant time period due to Montana's coal taxes." App. to Pet. for Cert. 29. While he acknowledged that some customers "exercise[d] the payment option under their contracts rather than continuing to receive coal and that the Montana coal taxes were probably a factor," he identified as other factors "demand, alternative sources, and transportation." *Ibid.* Indeed, as just noted, see *supra* this page, the Tribe concentrated on disgorgement as the desired remedy; it deliberately sought "no damages . . . now" for "coal that was not sold because the price was too high [due to] the State's tax." Tr. of Oral Arg. 37. Federal Rule of Civil Procedure 54(c), therefore, could not aid the Tribe. That Rule instructs that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." The Tribe, however, had not shown entitlement to actual damages.

In sum, the District Court carefully and fairly determined that the disgorgement demanded was not warranted and should not be granted. In so ruling, that court endeavored to heed both *Crow II* and *Cotton Petroleum,* and closely attended to the history of and record in this tangled, long-

[17] The Tribe attempted, unsuccessfully, to show that Montana's high taxes caused the Tribe to lose its lease with Shell Oil Company. See *supra,* at 711–712, n. 10.

pending case. See *supra*, at 708, n. 8. Proceeding as it did, the District Court ignored no tenable "law of the case" and did not indulge in an "abuse of discretion." See *Crow IV*, 92 F. 3d, at 829, 830.

As a result of the District Court's orders for registry deposits, see *supra*, at 705, the Tribe has displaced Montana to this extent: With respect to ceded strip mining operations, all severance taxes have gone to the Tribe since January 1983, and all gross proceeds taxes since November 1987. Montana's retention of preregistry deposit taxes must be assessed in light of the court-ordered distribution of all funds in the registry to the United States, as trustee for the Tribe. See *supra*, at 707. The District Court, best positioned to make that assessment, was obliged to do so based on the case and proof the parties presented. The Tribe and the United States here argued for total disgorgement. They did not develop a case for relief of a different kind or size. While we do not foreclose the District Court from any course the Federal Rules and that court's thorough grasp on this litigation lead it to take, we are satisfied that the Court of Appeals improperly overturned the District Court's judgment.

* * *

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

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

The Court's meticulous treatment of this exhausting litigation, including its discussion of the way *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 186, n. 17 (1989), bears on *Crow Tribe* v. *Montana*, 819 F. 2d 895 (CA9 1987) *(Crow II)*, summarily aff'd, 484 U. S. 997 (1988), shows the error of

requiring disgorgement to the Crow Tribe of all Montana taxes collected from Westmoreland based on coal mined from the ceded strip between 1976 and 1982. As the Court explains, *ante,* at 715, *Cotton Petroleum* makes clear that the taxes were objectionable not because the State was wholly disentitled to tax the Tribe's coal operation, but because the "'extraordinarily high'" taxes affecting the marketability of the Tribe's coal were simply excessive. 490 U. S., at 186–187, n. 17. Since Montana was free to levy and collect the portion of taxes below the threshold of excessiveness, I concur in the Court's decision to reverse the judgment and remand for further proceedings.

If the Court stopped there, the Court of Appeals would be free to set the stage for the District Court to engage in serious weighing of a claim to partial disgorgement under the Tribe's complaint, which, as now amended, seeks disgorgement of all moneys "illegally collected."* Although this request for relief was originally predicated on a reading of *Crow II* that *Cotton Petroleum* shows was too expansive, the Tribe's prayer naturally encompasses the lesser claim to disgorgement of any taxes in excess of the State's limit.

It would be open to the Court of Appeals, further, to indicate that nothing done either by the Department of the Interior or by the Tribe raised a dispositive bar to the Tribe's claim to pre-1983 revenues, contrary to what the District Court had suggested, App. to Pet. for Cert. 35–37, leaving that latter court free to determine what had been excessive and to reweigh the equities. After considering what the Tribe had already received, among the other relevant facts, the District Court might require disgorgement of all, some, or none of the excessive taxes for the period before 1983.

The Court impedes any such exercise of trial court discretion, however, if it does not entirely foreclose it. Although the Court says that it does not "foreclose the District Court

*In December 1990, the United States, as trustee for the Tribe, filed its own amended complaint seeking essentially the same relief.

from any course the Federal Rules and that court's thorough grasp on this litigation lead it to take" when the case is returned to it, *ante*, at 719, the Court's conclusions effectively thwart application of one of the principal rules of restitution that should be brought to bear on this case. It is from the resulting truncation of the District Court's discretion that I respectfully dissent.

Although both Montana and the Tribe may tax the value of the coal on its extraction or severance from the land, *ante*, at 714–715, Montana may tax only to a certain economic point. Beyond that point, as between Montana and the Tribe, only the Tribe may add to the tax burden. When a taxing authority like Montana has taxed unlawfully to the prejudice of another jurisdiction that should have received the revenue in payment of its own lawful tax, accepted principles of restitution entitle the latter government to claim disgorgement of what the former had no business receiving. At the most general level, a "person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1, p. 12 (1937). At a more specific level, there is the rule that "[w]here a person has paid money . . . to another in the erroneous belief, induced by mistake of fact, that he owed a duty to the other so to do, whereas such duty was owed to a third person, the transferee . . . is under a duty of restitution to the third person." *Id.*, § 126(1), at 514. The Supreme Court of Montana has accordingly held, as the majority recognizes, *ante*, at 715–716, that as between two jurisdictions claiming to tax the same transaction, one that collected taxes without lawful authority must surrender them to the other one, entitled to impose them, *Valley County* v. *Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939); see also, *e. g.*, *College Park* v. *Eastern Airlines, Inc.*, 250 Ga. 741, 742–744, 300 S. E. 2d 513, 515–516 (1983) (invoking "general equitable principles of restitution," including § 126(1), to hold that one municipality may recover taxes mistakenly paid to another); *Indian Hill* v. *Atkins*, 153

Ohio St. 562, 566–567, 93 N. E. 2d 22, 25 (1950) (citing § 126(1) and authorizing suit by one town to recover taxes paid to another); *School Dist. No. 6* v. *School Dist. No. 5*, 255 Mich. 428, 429, 238 N. W. 214, 215 (1931) (authorizing suit to recover taxes paid to wrong school district because "[t]hrough breach of the law, plaintiff and its taxpayers have been deprived of their just due, and defendant has money which in equity and good conscience belongs to plaintiff"); *Balkan* v. *Buhl*, 158 Minn. 271, 279, 197 N. W. 266, 269 (1924) ("[T]o permit defendant to retain any of the taxes wrongfully collected by it from its neighbor's territory, would be to permit it to benefit from its own wrong . . . . Such a result is so objectional as to require no discussion beyond its bare statement"). Under Montana's own law, then, reflecting accepted principles of restitution, the Tribe raises at least a facially valid claim when it seeks disgorgement of the excess taxes collected by the State in the period before 1983.

Although the Court seeks to differentiate this case from the ambit of *Valley County*, the proffered distinctions come up short. First, it is not to the point that in *Valley County* only one jurisdiction could validly tax, whereas here both may do so, *ante*, at 716. The remaining element of the Tribe's claim against Montana goes only to the state revenues that might be found to have exceeded the limit of valid state taxation; beyond the point at which state taxation became excessive the State had no authority, while the Tribe did. (It is true, of course, that in this case the respective spheres of the two taxing jurisdictions are bounded by an economic, not a geographic, line. But that distinction does not affect the principle involved, and the Court does not argue otherwise.)

Second, *Valley County* is not distinguishable on the ground that the governmental claimant there had an enforceable licensing and revenue scheme in place, whereas the Tribe "could not have taxed lessee Westmoreland during the period in question, for the Interior Department (whether

wrongly or rightly) had withheld the essential permission," *ante,* at 716. The District Court's original ruling, acknowledged in its most recent opinion and never challenged by Montana, was that the Tribe "at all relevant times . . . had a valid coal mining tax applicable to Westmoreland's mining on the Ceded Strip." App. to Pet. for Cert. 36. After the Ninth Circuit's ruling in *Crow II* that the mineral estate beneath the surface of the ceded strip was a part of the Tribe's reservation, 819 F. 2d, at 898, the District Court observed:

> "This analysis of the Reservation status of the Crow coal compels the conclusion that the approval which the Department of the Interior gave to the 1976 tax ordinance was fully applicable to Westmoreland's mining of Crow Ceded Strip coal because that coal was and is a component of the Reservation land itself. The approval of the Department of Interior of the 1976 Crow Tribal Tax Code as it applied to activities on the Reservation was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal coal. Accordingly, the Interior Department's purported refusal to approve the tax as it might apply to any mining operation on the Ceded Strip was based on what the Ninth Circuit has found to be a mistaken interpretation of the applicable law." App. 286.

Thus, the Tribe's provision must now be recognized as valid for the period in question, and there is no apparent reason why the Tribe should be disqualified from seeking to obtain the State's excess revenues that should have gone to the Tribe under the Tribe's own tax regulation. While the Tribe could not have enforced the tax against Westmoreland without the Interior Department's approval, that is neither here nor there as between the Tribe and the State. And although the Tribe failed to obtain judicial review of the Department's refusal, that has no bearing on the equity of the State's retention of money to which it never had a valid

claim. That is, there is no apparent reason to hold that the originally unlitigated third-party mistake of the Interior Department should affect the restitution claim as between two rival taxing authorities, one of which was clearly entitled to tax but got nothing, the other of which was entitled to nothing by way of excess taxes, but has pocketed the money anyway.

Third, despite a suggestion in the Court's opinion, *ante,* at 710, 716, *Valley County* is not rendered inapposite by the Tribe's 1982 agreement with Westmoreland. So far as it matters here, that agreement simply capped Westmoreland's tax burden at the limit imposed by Montana's then-current taxing scheme and did not purport to govern any claim the Tribe might have against the State.

To reject the Court's attempts to distinguish this case from *Valley County* is not, of course, to deny that any distinction exists. In fact, there is a significant difference between the two situations, and one that may prevent the door from closing entirely against the pre-1983 claim. In *Valley County* and the comparable cases, the disgorgement issue turned on the relative merits of the competing jurisdictions' claims of entitlement to impose a tax; neither rival government had any interest in the property or activity taxed except that of a taxing authority. In this case, however, that is not so, for the Tribe that sought to tax the extraction of the coal was also the owner of the coal before the extraction. Thus, any tribal taxation was merely a way to recover or retain some of the value of the Tribe's own property (a fact unaffected by the favorable terms of the Tribe's royalty agreement with Westmoreland, see *ante,* at 717); so, too, Montana's receipt of the excess taxation (passed on by Westmoreland) was an appropriation of the Tribe's own property, just as it was an invalid counterpart of the tax collection that would have been rightful by the Tribe. The Ninth Circuit recognized this when it found that "Montana made plain its intention to appropriate most of the economic rent" of the

Tribe's coal. See *Crow Tribe* v. *Montana,* 650 F. 2d 1104, 1113 (1981). Because the Tribe's claim may properly be viewed in this light, we can put to one side any questions whether the Court is right, or I am, about the significance of the error by the Department of the Interior or the point-for-point applicability of *Valley County.* We may bypass the principles specific to claims between contending taxing authorities entirely and simply ask whether something in this record would in practical terms defeat the Tribe's claim to disgorgement of its own property taken in the form of excess taxes. The Court's answer to this question is uncertain. The Court endorses the view that some degree of disgorgement would have been "exorbitant," *ante,* at 716, and "compensatory damages" unjustified, *ante,* at 718, and it suggests that the District Court's previous award to the Tribe of all taxes paid into the registry after 1982 amounted to a windfall big enough to provide at least rough restitution for the excessive share of taxes collected in the preceding six years. *Ante,* at 716, 719. At the same time, the Court says it imposes no bar to the possibility of further remedial action in the trial court. Perhaps the Court sees the windfall only when it regards the Tribe as one of two rival taxing authorities, as distinct from the Tribe as a property owner that has suffered as such. I trust that this distinction is open for exploration and development upon remand. Whether the Tribe is equitably entitled to a penny more than it has now, I do not know, but I think it is clear that nothing in this record disentitles the Tribe at least to press for disgorgement of some or all of Montana's pre-1983 excess tax revenues.

Syllabus

OHIO FORESTRY ASSOCIATION, INC. *v.* SIERRA CLUB ET AL.

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

No. 97–16. Argued February 25, 1998—Decided May 18, 1998

Pursuant to the National Forest Management Act of 1976 (NFMA), the United States Forest Service developed a Land and Resource Management Plan (Plan) for Ohio's Wayne National Forest. Although the Plan makes logging in the forest more likely—it sets logging goals, selects the areas suited to timber production, and determines which probable methods of timber harvest are appropriate—it does not itself authorize the cutting of any trees. Before the Service can permit logging, the NFMA and applicable regulations require it to: (a) propose a particular site and specific harvesting method, (b) ensure that the project is consistent with the Plan, (c) provide affected parties with notice and an opportunity to be heard, (d) conduct an environmental analysis of the project, and (e) make a final decision to permit logging, which affected persons may challenge in administrative and court appeals. Furthermore, the Service must revise the Plan as appropriate. When the Plan was first proposed, the Sierra Club and another environmental organization (collectively Sierra Club) pursued various administrative remedies to bring about the Plan's modification, and then brought this suit challenging the Plan's lawfulness on the ground that it permits too much logging and too much clearcutting. The District Court granted the Forest Service summary judgment, but the Sixth Circuit reversed. The latter court found the dispute justiciable because, *inter alia*, it was "ripe for review" and held that the Plan violated the NFMA.

Held: This dispute is not justiciable, because it is not ripe for court review. Pp. 732–739.

(a) In deciding whether an agency decision is ripe, this Court has examined the fitness of the particular issues for judicial decision and the hardship to the parties of withholding review. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149. Such an examination in this case reveals that the relevant factors, taken together, foreclose court review. First, withholding review will not cause the plaintiffs significant "hardship." *Ibid.* The challenged Plan provisions do not create adverse effects of a strictly legal kind; for example, they do not establish a legal right to cut trees or abolish any legal authority to object to trees being cut. Cf. *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309–310.

Syllabus

Nor would delaying review cause the Sierra Club significant practical harm. Given the procedural requirements the Service must observe before it can permit logging, the Sierra Club need not bring its challenge now, but may await a later time when harm is more imminent and certain. Cf. *Abbott Laboratories*, 387 U. S., at 152–154. Nor has the Sierra Club pointed to any other way in which the Plan could now force it to modify its behavior to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions. Cf., *e. g., id.*, at 152–153. Second, court review now could interfere with the system that Congress specified for the Forest Service to reach logging decisions. From that agency's perspective, immediate review could hinder its efforts to refine its policies through revision of the Plan or application of the Plan in practice. Cf., *e. g., id.*, at 149. Here, the possibility that further consideration will actually occur before the Plan is implemented is real, not theoretical. Third, the courts would benefit from further factual development of the issues. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 82. Review now would require time-consuming consideration of the details of an elaborate, technically based Plan, which predicts consequences that may affect many different parcels of land in a variety of ways, and which effects themselves may change over time. That review would have to take place without benefit of the focus that particular logging proposals could provide. And, depending upon the agency's future actions to revise the Plan or modify the expected implementation methods, review now may turn out to have been unnecessary. See *FTC* v. *Standard Oil Co. of Cal.*, 449 U. S. 232, 242. Finally, Congress has not specifically provided for preimplementation judicial review of such plans, unlike certain agency rules, cf., *e. g., Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 891, and forest plans are unlike environmental impact statements prepared pursuant to the National Environmental Policy Act of 1969 because claims involving such statements can never get any riper. Pp. 732–737.

(b) The Court cannot consider the Sierra Club's argument that the Plan will hurt it immediately in many ways not yet mentioned. That argument makes its first appearance in this Court in the briefs on the merits and is, therefore, not fairly presented. Pp. 738–739.

105 F. 3d 248, vacated and remanded.

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

Malcolm L. Stewart argued the cause for the federal respondents in support of petitioner, under this Court's Rule

12.6. With him on the briefs were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, and *Deputy Solicitor General Kneedler*.

Steven P. Quarles argued the cause for petitioner. With him on the briefs were *Clifton S. Elgarten*, *Thomas R. Lundquist*, and *William R. Murray*.

Frederick M. Gittes argued the cause for respondents. With him on the brief were *Patti A. Goldman*, *Todd D. True*, and *Alex Levinson*.*

JUSTICE BREYER delivered the opinion of the Court.

The Sierra Club challenges the lawfulness of a federal land and resource management plan adopted by the United States Forest Service for Ohio's Wayne National Forest on the ground that the plan permits too much logging and too much clearcutting. We conclude that the controversy is not yet ripe for judicial review.

I

The National Forest Management Act of 1976 (NFMA) requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 90 Stat. 2949, as renumbered and amended, 16 U. S. C. § 1604(a). The System itself is vast. It includes 155 national forests, 20 national grasslands, 8 land utilization projects, and other lands that together occupy nearly 300,000 square miles of land located in 44 States, Puerto Rico, and the Virgin Islands. § 1609(a); 36 CFR § 200.1(c)(2) (1997); Office of the

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*Briefs of *amici curiae* urging reversal were filed for the Alabama Forestry Association et al. by *Charles Rothfeld;* for Forest Service Employees for Environmental Ethics et al. by *Michael Axline;* for the Pacific Legal Foundation by *Robin L. Rivett;* for the Southeastern Ohio Oil & Gas Association by *James S. Huggins* and *M. Dale Leeper;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp*.

William V. Luneburg filed a brief for the Institute for Fisheries Resources et al. as *amici curiae*.

Federal Register, United States Government Manual 135 (1997/1998). The National Forest Service, which manages the System, develops land and resource management plans pursuant to NFMA, and uses these forest plans to "guide all natural resource management activities," 36 CFR § 219.1(b) (1997), including use of the land for "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U. S. C. § 1604(e)(1). In developing the plans, the Service must take both environmental and commercial goals into account. See, *e. g.*, § 1604(g); 36 CFR § 219.1(a) (1997).

This case focuses upon a plan that the Forest Service has developed for the Wayne National Forest located in southern Ohio. When the Service wrote the plan, the forest consisted of 178,000 federally owned acres (278 sq. mi.) in three forest units that are interspersed among privately owned lands, some of which the Forest Service plans to acquire over time. See Land and Resource Management Plan, Wayne National Forest, United States Department of Agriculture, Forest Service, Eastern Region (1987) 1–3, 3–1, A–13 to A–17 (hereinafter Plan). The Plan permits logging to take place on 126,000 (197 sq. mi.) of the federally owned acres. *Id.*, at 4–7, 4–180. At the same time, it sets a ceiling on the total amount of wood that can be cut—a ceiling that amounts to about 75 million board feet over 10 years, and which, the Plan projects, would lead to logging on about 8,000 acres (12.5 sq. mi.) during that decade. *Id.*, at 4–180. According to the Plan, logging on about 5,000 (7.8 sq. mi.) of those 8,000 acres would involve clearcutting, or other forms of what the Forest Service calls "even-aged" tree harvesting. *Id.*, at 3–5, 4–180.

Although the Plan sets logging goals, selects the areas of the forest that are suited to timber production, 16 U. S. C. § 1604(k), and determines which "probable methods of timber harvest" are appropriate, § 1604(f)(2), it does not itself authorize the cutting of any trees. Before the Forest Service can permit the logging, it must: (a) propose a specific area in

which logging will take place and the harvesting methods to be used, Plan 4–20 to 4–25; 53 Fed. Reg. 26835–26836 (1988); (b) ensure that the project is consistent with the Plan, 16 U. S. C. § 1604(i); 36 CFR § 219.10(e) (1997); (c) provide those affected by proposed logging notice and an opportunity to be heard, 106 Stat. 1419 (note following 16 U. S. C. § 1612); 36 CFR pt. 215, § 217.1(b) (1997); Plan 5–2; (d) conduct an environmental analysis pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4332 *et seq.;* Plan 4–14, to evaluate the effects of the specific project and to contemplate alternatives, 40 CFR §§ 1502.14, 1508.9(b) (1997); Plan 1–2; and (e) subsequently make a final decision to permit logging, which affected persons may challenge in an administrative appeals process and in court, see 106 Stat. 1419–1420 (note folowing 16 U. S. C. § 1612); 5 U. S. C. § 701 *et seq.* See also 53 Fed. Reg. 26834–26835 (1988); 58 Fed. Reg. 19370–19371 (1993). Furthermore, the statute requires the Forest Service to "revise" the Plan "as appropriate." 16 U. S. C. § 1604(a). Despite the considerable legal distance between the adoption of the Plan and the moment when a tree is cut, the Plan's promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place. See *ibid.* (requiring promulgation of forest plans); § 1604(i) (requiring all later forest uses to conform to forest plans).

When the Forest Service first proposed its Plan, the Sierra Club and the Citizens Council on Conservation and Environmental Control each objected. In an effort to bring about the Plan's modification, they (collectively Sierra Club), pursued various administrative remedies. See Administrative Decision of the Chief of the Forest Service (Nov. 14, 1990), Pet. for Cert. 66a; Appeal Decision, Wayne National Forest Land and Resource Management Plan (Jan. 14, 1992), *id.*, at 78a. The Sierra Club then brought this lawsuit in federal court, initially against the Chief of the Forest Service, the Secretary of Agriculture, the Regional Forester, and the

Forest Supervisor. The Ohio Forestry Association, some of whose members harvest timber from the Wayne National Forest or process wood products obtained from the forest, later intervened as a defendant.

The Sierra Club's second amended complaint sets forth its legal claims. That complaint initially states facts that describe the Plan in detail and allege that erroneous analysis leads the Plan wrongly to favor logging and clearcutting. Second Amended Complaint ¶¶ 13–47 (hereinafter Complaint), App. 16–23. The Complaint then sets forth three claims for relief.

The first claim for relief says that the "defendants in approving the plan for the Wayne [National Forest] and in directing or permitting below-cost timber sales accomplished by means of clearcutting" violated various laws including the NFMA, the NEPA, and the Administrative Procedure Act. Complaint ¶ 49, *id.*, at 24.

The second claim says that the "defendants' actions in directing or permitting below-cost timber sales in the Wayne [National Forest] under the plan violate [their] duties as public trustees." Complaint ¶ 52, *ibid.*

The third claim says that, in selecting the amount of the forest suitable for timber production, the defendants followed regulations that failed properly to identify "economically unsuitable lands." Complaint ¶¶ 54–58, *id.*, at 25–26. It adds that, because the Forest Service's regulations thereby permitted the Service to place "economically unsuitable lands" in the category of land where logging could take place, the regulations violated their authorizing statute, NFMA, 16 U. S. C. § 1600 *et seq.*, and were "arbitrary, capricious, an abuse of discretion, and not in accordance with law," pursuant to the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* Complaint ¶ 60, App. 26.

The Complaint finally requests as relief: (a) a declaration that the Plan "is unlawful as are the below-cost timber sales and timbering, including clearcutting, authorized by the

plan," (b) an "injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales" pending Plan revision, (c) costs and attorney's fees, and (d) "such other further relief as may be appropriate." Complaint ¶¶ (a)–(d), *id.*, at 26–27.

The District Court reviewed the Plan, decided that the Forest Service had acted lawfully in making the various determinations that the Sierra Club had challenged, and granted summary judgment for the Forest Service. *Sierra Club* v. *Robertson*, 845 F. Supp. 485, 503 (SD Ohio 1994). The Sierra Club appealed. The Court of Appeals for the Sixth Circuit held that the dispute was justiciable, finding both that the Sierra Club had standing to bring suit, and that since the suit was "ripe for review," there was no need to wait "until a site-specific action occurs." *Sierra Club* v. *Thomas*, 105 F. 3d 248, 250 (1997). The Court of Appeals disagreed with the District Court about the merits. It held that the Plan improperly favored clearcutting and therefore violated NFMA. *Id.*, at 251–252. We granted certiorari to determine whether the dispute about the Plan presents a controversy that is justiciable now, and if so, whether the Plan conforms to the statutory and regulatory requirements for a forest plan.

II

Petitioner alleges that this suit is nonjusticiable both because the Sierra Club lacks standing to bring this case and because the issues before us—over the Plan's specifications for logging and clearcutting—are not yet ripe for adjudication. We find that the dispute is not justiciable, because it is not ripe for court review. Cf. *Steel Co.* v. *Citizens For Better Environment*, *ante*, at 100–101, n. 3.

As this Court has previously pointed out, the ripeness requirement is designed

> "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract

> disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148–149 (1967).

In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court has examined both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Id.*, at 149. To do so in this case, we must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. These considerations, taken together, foreclose review in the present case.

First, to "withhol[d] court consideration" at present will not cause the parties significant "hardship" as this Court has come to use that term. *Ibid.* For one thing, the provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm. To paraphrase this Court's language in *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309–310 (1927) (opinion of Brandeis, J.), they do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations. Thus, for example, the Plan does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut.

Nor have we found that the Plan now inflicts significant practical harm upon the interests that the Sierra Club advances—an important consideration in light of this Court's

modern ripeness cases. See, *e. g.*, *Abbott Laboratories*, *supra*, at 152–154. As we have pointed out, before the Forest Service can permit logging, it must focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court. *Supra*, at 729–730. The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain. Any such later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, *i. e.*, if the Plan plays a causal role with respect to the future, then-imminent, harm from logging. Hence we do not find a strong reason why the Sierra Club must bring its challenge now in order to get relief. Cf. *Abbott Laboratories*, *supra*, at 152.

Nor has the Sierra Club pointed to any other way in which the Plan could now force it to modify its behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions. Cf. *Abbott Laboratories*, *supra*, at 152–153 (finding challenge ripe where plaintiffs must comply with Federal Drug Administration labeling rule at once and incur substantial economic costs or risk later serious criminal and civil penalties for unlawful drug distribution); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 417–419 (1942) (finding challenge ripe where plaintiffs must comply with burdensome Federal Communications Commission rule at once or risk later loss of license and consequent serious harm).

The Sierra Club does say that it will be easier, and certainly cheaper, to mount one legal challenge against the Plan now, than to pursue many challenges to each site-specific logging decision to which the Plan might eventually lead. It does not explain, however, why one initial site-specific victory (if based on the Plan's unlawfulness) could not, through

preclusion principles, effectively carry the day. See *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 894 (1990). And, in any event, the Court has not considered this kind of litigation cost saving sufficient by itself to justify review in a case that would otherwise be unripe. The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—postimplementation litigation. See, *e. g.*, *ibid.* ("The case-by-case approach . . . is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's . . . forests . . . . But this is the traditional, and remains the normal, mode of operation of the courts"); *FTC* v. *Standard Oil Co. of Cal.*, 449 U. S. 232, 244 (1980); *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 24 (1974); *Petroleum Exploration, Inc.* v. *Public Serv. Comm'n*, 304 U. S. 209, 222 (1938).

Second, from the agency's perspective, immediate judicial review directed at the lawfulness of logging and clearcutting could hinder agency efforts to refine its policies: (a) through revision of the Plan, *e. g.*, in response to an appropriate proposed site-specific action that is inconsistent with the Plan, see 53 Fed. Reg. 23807, 26836 (1988), or (b) through application of the Plan in practice, *e. g.*, in the form of site-specific proposals, which are subject to review by a court applying purely legal criteria. Cf. *Abbott Laboratories*, *supra*, at 149; *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 201 (1983). Cf. *Standard Oil Co.*, *supra*, at 242 (premature review "denies the agency an opportunity to correct its own mistakes and to apply its expertise"). And, here, the possibility that further consideration will actually occur before the Plan is implemented is not theoretical, but real. See, *e. g.*, 60 Fed. Reg. 18886, 18901 (1995) (forest plans often not fully implemented), *id.*, at 18905–18907 (discussing process for amending forest plans); 58 Fed. Reg. 19369, 19370–19371

(1993) (citing administrative appeals indicating that plans are merely programmatic in nature and that plan cannot foresee all effects on forest); Appeal Nos. 92–09–11–0008, 92–09–11–0009 (Lodging II) (successful Sierra Club administrative appeals against Wayne timber harvesting site-specific projects). Hearing the Sierra Club's challenge now could thus interfere with the system that Congress specified for the agency to reach forest logging decisions.

Third, from the courts' perspective, review of the Sierra Club's claims regarding logging and clearcutting now would require time-consuming judicial consideration of the details of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways, and which effects themselves may change over time. That review would have to take place without benefit of the focus that a particular logging proposal could provide. Thus, for example, the court below in evaluating the Sierra Club's claims had to focus upon whether the Plan as a whole was "improperly skewed," rather than focus upon whether the decision to allow clearcutting on a particular site was improper, say, because the site was better suited to another use or logging there would cumulatively result in too many trees being cut. See 105 F. 3d, at 250–251. And, of course, depending upon the agency's future actions to revise the Plan or modify the expected methods of implementation, review now may turn out to have been unnecessary. See *Standard Oil Co.*, *supra*, at 242.

This type of review threatens the kind of "abstract disagreements over administrative policies," *Abbott Laboratories*, 387 U. S., at 148, that the ripeness doctrine seeks to avoid. In this case, for example, the Court of Appeals panel disagreed about whether or not the Forest Service suffered from a kind of general "bias" in favor of timber production and clearcutting. Review where the consequences had been "reduced to more manageable proportions," and where the

"factual components [were] fleshed out, by some concrete action" might have led the panel majority either to demonstrate that bias and its consequences through record citation (which it did not do) or to abandon the claim. *National Wildlife Federation*, *supra*, at 891. All this is to say that further factual development would "significantly advance our ability to deal with the legal issues presented" and would "aid us in their resolution." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 82 (1978).

Finally, Congress has not provided for preimplementation judicial review of forest plans. Those plans are tools for agency planning and management. The Plan is consequently unlike agency rules that Congress has specifically instructed the courts to review "pre-enforcement." Cf. *National Wildlife Federation*, *supra*, at 891; 15 U. S. C. § 2618 (Toxic Substances Control Act) (providing preenforcement review of agency action); 30 U. S. C. § 1276(a) (Surface Mining Control and Reclamation Act of 1977) (same); 42 U. S. C. § 6976 (Resource Conservation and Recovery Act of 1976) (same); § 7607(b) (Clean Air Act) (same); 43 U. S. C. § 1349(c)(3) (Outer Continental Shelf Lands Act); *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592–593 (1980). Nor does the Plan, which through standards guides future use of forests, resemble an environmental impact statement prepared pursuant to NEPA. That is because in this respect NEPA, unlike the NFMA, simply guarantees a particular procedure, not a particular result. Compare 16 U. S. C. § 1604(e) (requiring that forest plans provide for multiple coordinated *use* of forests, including timber and wilderness) with 42 U. S. C. § 4332 (requiring that agencies prepare environmental impact statements where major agency action would significantly affect the environment). Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.

III

The Sierra Club makes one further important contrary argument. It says that the Plan will hurt it in many ways that we have not yet mentioned. Specifically, the Sierra Club says that the Plan will permit "many intrusive activities, such as opening trails to motorcycles or using heavy machinery," which "will go forward without any additional consideration of their impact on wilderness recreation." Brief for Respondents 34. At the same time, in areas designated for logging, "affirmative measures to promote undisturbed backcountry recreation, such as closing roads and building additional hiking trails," will not take place. *Ibid.* These are harms, says the Sierra Club, that will not take place at a distant future time. Rather, they will take place now.

This argument suffers from the legally fatal problem that it makes its first appearance here in this Court in the briefs on the merits. The Complaint, fairly read, does not include such claims. Instead, it focuses on the amount and method of timber harvesting. The Sierra Club has not referred us to any other court documents in which it protests the Plan's approval of motorcycles or machinery, the Plan's failure to close roads or to provide for the building of trails, or other disruptions that the Plan might cause those who use the forest for hiking. As far as we can tell, prior to the argument on the merits here, the harm to which the Sierra Club objected consisted of too much, and the wrong kind of, logging.

The matter is significant because the Government concedes that if the Sierra Club had previously raised these other kinds of harm, the ripeness analysis in this case with respect to those provisions of the Plan that produce the harm would be significantly different. The Government's brief in the Court of Appeals said:

> "If, for example, a plan incorporated a final decision to close a specific area to off-road vehicles, the plan itself

> could result in imminent concrete injury to a party with an interest in the use of off-road vehicles in that area." Brief for Federal Appellees in No. 94–3407 (CA6), p. 20.

And, at oral argument, the Solicitor General agreed that if the Sierra Club's claim was that the "plan was allowing motorcycles into a bird-watching area or something [like that], that would be immediately justiciable." Tr. of Oral Arg. 5. Thus, we believe these other claims that the Sierra Club now raises are not fairly presented here, and we cannot consider them.

IV

For these reasons, we find the respondents' suit not ripe for review. We vacate the judgment of the Court of Appeals, and we remand this case with instructions to dismiss.

It is so ordered.

Syllabus

CALDERON, WARDEN, ET AL. *v.* ASHMUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

No. 97–391. Argued March 24, 1998—Decided May 26, 1998

Chapter 154 of 28 U. S. C., part of the Antiterrorism and Effective Death Penalty Act of 1996, provides, *inter alia*, an expedited review process—including a 180-day filing period, 28 U. S. C. § 2263(a) (1994 ed., Supp. II)—for federal habeas proceedings in capital cases in States that meet certain conditions. Proceedings against other States are governed by Chapter 153, which has a 1-year filing period, § 2244(d)(1), and lacks expedited procedures. After California officials, including petitioner state attorney general, indicated that they would invoke Chapter 154's protections, respondent, a state capital prisoner, sought declaratory and injunctive relief to resolve whether the chapter applied to a class of capital prisoners whose convictions were affirmed after a particular date. The Federal District Court issued a declaratory judgment, holding that California did not qualify for Chapter 154 and therefore the chapter did not apply to the class, and enjoined petitioners from invoking the chapter in any proceedings involving class members. In affirming, the Ninth Circuit rejected petitioners' claim that the Eleventh Amendment barred respondent's suit; determined that the District Court had authority to issue a declaratory judgment under the federal Declaratory Judgment Act; and rejected petitioners' contention that the injunction violated the First Amendment. Before reaching the Eleventh and First Amendment issues on which certiorari was granted, this Court must address whether the action is the type of "Article III" "case or controversy" to which federal courts are limited. See, *e. g.*, *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231.

Held: This action is not a justiciable case under Article III. The Declaratory Judgment Act validly confers jurisdiction on federal courts to enter declaratory judgments in cases where the controversy would admit "of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241. Here, rather than seeking a final or conclusive determination of the underlying controversy—whether respondent is entitled to federal habeas relief—respondent carved out of that claim only the ques-

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tion whether, when he sought habeas relief, California's defense would be governed by Chapter 153 or Chapter 154. He would have obtained such a determination in a habeas action itself, but he seeks instead to have an advance ruling on the collateral issue. The Declaratory Judgment Act cannot be used for this purpose. See, *e. g.*, *Coffman* v. *Breeze Corps.*, 323 U. S. 316. Such an action's disruptive effects are peculiarly great when the underlying claims must be adjudicated in federal habeas, for it would allow respondent to obtain a declaration as to the applicable limitations period without ever having shown that he has met the exhaustion-of-state-remedies requirement. If class members file habeas petitions and the State asserts Chapter 154, they can litigate California's compliance with the chapter at that time. The risk associated with resolving the issue in habeas rather than in a pre-emptive suit is no different from risks associated with choices that litigants commonly face. Respondent mistakenly relies on *Steffel* v. *Thompson*, 415 U. S. 452, for *Steffel* falls within the traditional scope of declaratory judgment actions: It completely resolved a concrete controversy susceptible to conclusive judicial determination. Pp. 745–749.

123 F. 3d 1199, reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court. BREYER, J., filed a concurring opinion, in which SOUTER, J., joined, *post*, p. 749.

Ronald S. Matthias, Supervising Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Daniel E. Lungren*, Attorney General, *pro se*, *George Williamson*, Chief Assistant Attorney General, and *Ronald A. Bass* and *Dane R. Gillette*, Senior Assistant Attorneys General.

Michael Laurence argued the cause for respondent. With him on the brief were *Gary D. Sowards* and *Jean R. Sternberg.**

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*A brief of *amici curiae* urging reversal was filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Andrew H. Baida* and *David P. Kennedy*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Grant Woods* of Arizona, *Gale A. Norton* of Colorado, *John M. Bailey* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Margery S. Bron-*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Chapter 154 of 28 U. S. C., part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2261 *et seq.* (1994 ed., Supp. II), provides certain procedural advantages to qualifying States in federal habeas proceedings. This case requires us to decide whether state death-row inmates may sue state officials for declaratory and injunctive relief limited to determining whether California qualifies under Chapter 154.

Chapter 154 revises procedural rules for federal habeas proceedings in capital cases. Most notably, it provides for an expedited review process in proceedings brought against qualifying States. It imposes a 180-day limitation period for filing a federal habeas petition. § 2263(a). It treats an untimely petition as a successive petition for purposes of obtaining a stay of execution, § 2262(c), and it allows a prisoner to amend a petition after an answer is filed only where the prisoner meets the requirements for a successive petition, § 2266(b)(3)(B). Chapter 154 also obligates a federal district court to render a final judgment on any petition within 180 days of its filing, and a court of appeals to render a final determination within 120 days of the briefing. §§ 2266(a) and (c).

As a general rule, Chapter 153—which has a 1-year filing period, § 2244(d)(1), and lacks expedited review procedures—

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ster of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Michael C. Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *Richard Cullen* of Virginia, and *Tom Udall* of New Mexico.

governs federal habeas proceedings against a State. Chapter 154 will apply in capital cases only if the State meets certain conditions. A State must establish "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" in state postconviction proceedings, and "must provide standards of competency for the appointment of such counsel." § 2261(b) (States with separate postconviction review proceedings); § 2265(a) (States with unitary review procedures).[1] The State must offer counsel to all capital defendants, and the state court must enter an order concerning appointment of counsel. §§ 2261(b), 2265(b). If a State meets these criteria, then it may invoke Chapter 154.

Various California officials, including petitioner Attorney General Lungren, publicly indicated that they thought California qualified under Chapter 154 and that they intended to invoke the chapter's protections. Respondent Troy Ashmus, a state prisoner sentenced to death, filed a class-action suit against petitioners. The class, which included all capital prisoners in California whose convictions were affirmed on direct appeal after June 6, 1989, sought declaratory and injunctive relief to resolve uncertainty over whether Chapter 154 applied.

The District Court issued a declaratory judgment holding that California does not presently qualify for Chapter 154 and that Chapter 154 therefore does not apply to any class members. It also issued a preliminary injunction enjoining petitioners from "trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 . . . in any state or federal proceedings involving any class member." 935 F. Supp. 1048, 1076 (ND Cal. 1996).

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[1] It is undisputed here that California is a unitary review State, which is a State that allows prisoners to raise collateral challenges in the course of direct review of the judgment, such that all claims may be raised in a single state appeal. See 28 U. S. C. § 2265(a) (1994 ed., Supp. II).

The Court of Appeals for the Ninth Circuit affirmed. 123 F. 3d 1199 (1997). As a threshold matter, the Court of Appeals rejected petitioners' claim that the Eleventh Amendment barred respondent's suit as one against the State. The court concluded that the case falls within the *Ex parte Young* exception to Eleventh Amendment immunity, *Ex parte Young*, 209 U. S. 123 (1908), because respondent sufficiently alleged a continuing violation of federal law. 123 F. 3d, at 1204–1206. California's announced intention to invoke Chapter 154, without having complied with its requirements, threatened to violate the class members' right to thorough federal review of their first habeas petitions, pursuant to Chapter 153, and their right to assistance of counsel in federal habeas proceedings, pursuant to 21 U. S. C. § 848(q). By stating its intention to invoke Chapter 154, the Court of Appeals reasoned, California forced inmates to make an unacceptable choice: filing a *pro se* petition within 180 days in order to ensure compliance with Chapter 154, which may fail to raise substantial claims, or waiting until counsel is appointed, which may miss the 180-day filing deadline if Chapter 154 applies. 123 F. 3d, at 1204–1205.

The Court of Appeals also determined that the District Court had authority to issue a declaratory judgment under 28 U. S. C. § 2201(a). 123 F. 3d, at 1206–1207. It noted that a declaratory judgment plaintiff need only demonstrate an independent basis of federal jurisdiction and an actual case or controversy. *Id.*, at 1206. The District Court had federal question jurisdiction under 28 U. S. C. § 1331 because the case challenged the interpretation of a federal Act. And the case-or-controversy requirement was satisfied, the court concluded, because "the State's threats to invoke Chapter 154 will significantly affect the plaintiff-class's ability to obtain habeas corpus review by a federal court." 123 F. 3d, at 1207.

The Court of Appeals agreed in large part with the District Court's conclusion that California does not qualify, and

therefore found Chapter 154 inapplicable. In affirming the grant of injunctive relief, the Court of Appeals rejected petitioners' contention that enjoining their advocacy of a particular legal position violates the First Amendment. It thought the injunction did not interfere with the state officials' rights since they were free to voice their opinion that the decision was wrong—only not in court in order to invoke the benefits of Chapter 154. *Id.*, at 1207–1209.

Petitioners sought review in this Court. We granted certiorari on both the Eleventh Amendment and the First Amendment issues, 522 U. S. 1011 (1997), but in keeping with our precedents, have decided that we must first address whether this action for a declaratory judgment is the sort of "Article III" "case or controversy" to which federal courts are limited. See, *e. g.*, *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231 (1990).[2]

Before the enactment of the federal Declaratory Judgment Act, this Court expressed the view that a "declaratory judgment" was not within that jurisdiction. *Willing* v. *Chicago Auditorium Assn.*, 277 U. S. 274, 289 (1928). But in *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249 (1933), the Court held that it did have jurisdiction to review a declaratory judgment granted by a state court. And in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937), we decided that the federal Declaratory Judgment Act validly conferred jurisdiction on federal courts to issue declaratory judgments in appropriate cases.

That Act provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any inter-

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[2] While the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings, we have recognized that it is not coextensive with the limitations on judicial power in Article III. See *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 267 (1997); *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 515, n. 19 (1982).

ested party seeking such declaration, whether or not further relief is or could be sought." 28 U. S. C. § 2201. See also Fed. Rule Civ. Proc. 57. Thus, in *Aetna Life Ins.*, we held that an insurance company could bring a declaratory judgment action to determine the validity of insurance policies. The company and the insured disputed whether the policies had lapsed and how much was currently payable, but the insured had not brought suit to recover benefits. 300 U. S., at 239–240. We observed that the controversy would admit "of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*, at 241. See also *Wallace*, *supra*, at 262. We have thus recognized the potential for declaratory judgment suits to fall outside the constitutional definition of a "case" in Article III: a claim "'brought before the court(s) for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.'" *Fairchild* v. *Hughes*, 258 U. S. 126, 129 (1922).

The underlying "controversy" between petitioners and respondent is whether respondent is entitled to federal habeas relief setting aside his sentence or conviction obtained in the California courts. But no such final or conclusive determination was sought in this action. Instead, respondent carved out of that claim only the question whether, when he sought habeas relief, California would be governed by Chapter 153 or by Chapter 154 in defending the action. Had he brought a habeas action itself, he undoubtedly would have obtained such a determination, but he seeks to have that question determined in anticipation of seeking habeas so that he will be better able to know, for example, the time limits that govern the habeas action.

We think previous decisions of this Court bar the use of the Declaratory Judgment Act for this purpose. In *Coffman* v. *Breeze Corps.*, 323 U. S. 316 (1945), a patent owner brought suit seeking to have the Royalty Adjustment Act

declared unconstitutional and to enjoin his licensee from paying accrued royalties to the government. The Court held that the action presented no case or controversy. The validity of the Act would properly arise only in a suit by the patent holder to recover the royalties, which could afford complete and adequate relief. In such a suit, if the licensee were to assert compliance with the Act as a defense to an obligation to pay the amounts due, the patent holder's right of recovery would then depend on a determination of the Act's validity. *Id.*, at 322–323. The Court thus concluded that there was no justiciable question "unless and until [the patent owner] seeks recovery of the royalties, and then only if [the licensee] relies on the Act as a defense." *Id.*, at 324. See also *Public Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 245–246 (1952).

As in *Coffman*, respondent here seeks a declaratory judgment as to the validity of a defense the State may, or may not, raise in a habeas proceeding. Such a suit does not merely allow the resolution of a "case or controversy" in an alternative format, as in *Aetna Life Ins.*, *supra*, but rather attempts to gain a litigation advantage by obtaining an advance ruling on an affirmative defense, see *Coffman*, *supra*, at 322–324; *Wycoff Co.*, *supra*, at 245–246. The "case or controversy" actually at stake is the class members' claims in their individual habeas proceedings. Any judgment in this action thus would not resolve the entire case or controversy as to any one of them, but would merely determine a collateral legal issue governing certain aspects of their pending or future suits.

The disruptive effects of an action such as this are peculiarly great when the underlying claim must be adjudicated in a federal habeas proceeding. For we have held that any claim by a prisoner attacking the validity or duration of his confinement must be brought under the habeas sections of Title 28 of the United States Code. *Preiser* v. *Rodriguez*, 411 U. S. 475, 500 (1973). As that opinion pointed out, this means that a state prisoner is required to exhaust state rem-

edies before bringing his claim to a federal court. *Id.*, at 489–491. But if respondent Ashmus is allowed to maintain the present action, he would obtain a declaration as to the applicable statute of limitations in a federal habeas action without ever having shown that he has exhausted state remedies. This aberration illustrates the need, emphasized in *Coffman* and *Wycoff*, to prevent federal-court litigants from seeking by declaratory judgment to litigate a single issue in a dispute that must await another lawsuit for complete resolution.

If the class members file habeas petitions, and the State asserts Chapter 154, the members obviously can litigate California's compliance with Chapter 154 at that time.[3] Any risk associated with resolving the question in habeas, rather than a pre-emptive suit, is no different from risks associated with choices commonly faced by litigants.

When asked at oral argument what authority existed for allowing a declaratory judgment suit on an anticipated defense, respondent replied that *Steffel* v. *Thompson*, 415 U. S. 452 (1974), allows a declaratory judgment action to prevent interference with federal rights. See also Brief for Respondent 16. Although acknowledging that *Steffel* involved a continuing threat of arrest in violation of the First Amendment, respondent argued that the Court's decision did not distinguish types of threats. Here, according to respondent, the State's "threat" to assert Chapter 154 in habeas proceedings and the risk that the class members will thereby lose

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[3] Respondent conceded this point in earlier briefings. Brief in Opposition 7. Respondent now contends, however, that habeas proceedings will not provide an effective remedy because the class members still will be put in the file-or-default dilemma and because a decision in one case will not relieve the other members of their continuing uncertainty. Brief for Respondent 35–36. But as explained, *supra*, at 747, the dilemma the class members face does not establish a case in the constitutional sense. And the inability to bind the government as to the whole class does not affect that determination.

their rights to application of Chapter 153 are sufficient to establish federal court jurisdiction.

Steffel, however, falls within the traditional scope of declaratory judgment actions because it completely resolved a concrete controversy susceptible to conclusive judicial determination. In *Steffel*, protesters had twice been told they would be arrested for handbilling in front of a shopping center, and the plaintiff's companion had in fact been arrested after disregarding instructions to leave. *Id.*, at 455–456. The imminent threat of state criminal prosecution and the consequent deterrence of the plaintiff's exercise of constitutionally protected rights established a case or controversy. *Id.*, at 459. That controversy could have been completely resolved by the declaratory judgment sought by the plaintiff. *Id.*, at 460–462.

The differences between this case and *Steffel* are several. Here, California's assertions on Chapter 154 have no coercive impact on the legal rights or obligations of either party. It is the members of the class, and not the State, who anticipate filing lawsuits. Those habeas actions would challenge the validity of their state court convictions and sentences; the State will oppose such challenges. The present declaratory judgment action would not completely resolve those challenges, but would simply carve out one issue in the dispute for separate adjudication.

We conclude that this action for a declaratory judgment and injunctive relief is not a justiciable case within the meaning of Article III. The judgment of the Court of Appeals accordingly is reversed, and the case is remanded with instructions that respondent's complaint be dismissed.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring.

The Court says that "[respondent class members] can litigate California's compliance with Chapter 154" when they

"file habeas petitions." *Ante*, at 748. In light of the Court of Appeals' concern, echoed by respondent class members, that without declaratory relief, they would be placed in an untenable remedial "dilemma," Brief for Respondent 16–17, 35–37; 123 F. 3d 1199, 1205 (CA9 1997), I would add that it should prove possible for at least some habeas petitioners to obtain a relatively expeditious judicial answer to the Chapter 154 compliance question and thereby provide legal guidance for others. That is because, in at least some cases, whether a petitioner can or cannot amend, say, a "bare bones" habeas petition (filed within 180 days) will likely depend upon whether California does, or does not, qualify as an "opt-in" State. Compare 28 U. S. C. § 2242 (ordinary amendment rules); § 2254 Rule 11 (rules of civil procedure applicable to federal habeas petitions); 1 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 17.2 (2d ed. 1994 and Supp. 1997) (Federal Rule of Civil Procedure 15's liberal standard for amendment applies to habeas petitions in States not eligible for Chapter 154); with 28 U. S. C. § 2266(b)(3)(B) (1994 ed., Supp. II) (setting forth strict standard for amendment applicable where State falls within Chapter 154). And a district court's determination that turned on the legal answer to that question might well qualify for interlocutory appeal. See 28 U. S. C. § 1292(b) (permitting certification, and hence interlocutory appeal, of certain district court determinations). With this understanding, I join the Court's opinion.

Syllabus

KIOWA TRIBE OF OKLAHOMA *v.* MANUFACTURING TECHNOLOGIES, INC.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA, FIRST DIVISION

No. 96–1037. Argued January 12, 1998—Decided May 26, 1998

Petitioner, a federally recognized Indian Tribe, owns land in Oklahoma, and the United States holds land in trust for it there. After the Tribe's industrial development commission agreed to buy from respondent certain stock issued by a third party, the then-chairman of its business committee signed a promissory note, in the Tribe's name, agreeing to pay respondent $285,000 plus interest. The note recites it was signed at Carnegie, Oklahoma, where the Tribe has a complex on trust land. According to respondent, however, the note was executed and delivered in Oklahoma City, beyond tribal lands, and obligated the Tribe to make its payments in that city. The note does not specify a governing law, but provides that nothing in it subjects or limits the Tribe's sovereign rights. The Tribe defaulted on the note; respondent sued in state court; and the Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit. The trial court denied the motion and entered judgment for respondent. The Oklahoma Court of Civil Appeals affirmed, holding that Indian tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct.

Held: Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See, *e. g.*, *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 476 U. S. 877, 890. Respondent's request to confine such immunity to transactions on reservations and to tribal governmental activities is rejected. This Court's precedents have not drawn those distinctions, see, *e. g.*, *Puyallup Tribe, Inc.* v. *Department of Game of Wash.*, 433 U. S. 165, 168, 172, and its cases allowing States to apply their substantive laws to tribal activities occurring outside Indian country or involving nonmembers have recognized that tribes continue to enjoy immunity from suit, see, *e. g.*, *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505, 510. The Okla-

homa Court of Civil Appeals' belief that federal law does not mandate such immunity is mistaken. It is a matter of federal law and is not subject to diminution by the States. *E. g., Three Affiliated Tribes, supra,* at 891. Nevertheless, the tribal immunity doctrine developed almost by accident: The Court's precedents reciting it, see, *e. g., United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512, rest on early cases that assumed immunity without extensive reasoning, see, *e. g., Turner* v. *United States*, 248 U. S. 354, 358. The wisdom of perpetuating the doctrine may be doubted, but the Court chooses to adhere to its earlier decisions in deference to Congress, see *Potawatomi, supra,* at 510, which may wish to exercise its authority to limit tribal immunity through explicit legislation, see, *e. g., Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58. Congress has not done so thus far, nor has petitioner waived immunity, so it governs here. Pp. 754–760.

Reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which THOMAS and GINSBURG, JJ., joined, *post,* p. 760.

R. Brown Wallace argued the cause for petitioner. With him on the briefs was *Shelia D. Tims.*

Edward C. DuMont argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Dellinger, Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler,* and *David C. Shilton.*

John E. Patterson, Jr., argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the Assiniboine and Sioux Tribes of the Fort Peck Reservation et al. by *William R. Perry;* for the Cheyenne-Arapaho Tribes of Oklahoma et al. by *Donald R. Wharton* and *Kim Jerome Gottschalk;* for the Choctaw Nation of Oklahoma et al. by *Bob Rabon;* for the Cow Creek Band of Umpqua Tribe of Indians et al. by *Michael J. Wahoske;* for the Fond Du Lac Band of Lake Superior Chippewa by *Dennis J. Peterson* and *Henry M. Buffalo, Jr.;* for the Navajo Nation et al. by *Paul E. Frye;* for the Seminole Nation of Oklahoma et al. by *D. Michael McBride III* and *David A. Mullon, Jr.;* and for

JUSTICE KENNEDY delivered the opinion of the Court.

In this commercial suit against an Indian Tribe, the Oklahoma Court of Civil Appeals rejected the Tribe's claim of sovereign immunity. Our case law to date often recites the rule of tribal immunity from suit. While these precedents rest on early cases that assumed immunity without extensive reasoning, we adhere to these decisions and reverse the judgment.

I

Petitioner Kiowa Tribe is an Indian Tribe recognized by the Federal Government. The Tribe owns land in Oklahoma, and, in addition, the United States holds land in that State in trust for the Tribe. Though the record is vague about some key details, the facts appear to be as follows: In 1990, a tribal entity called the Kiowa Industrial Development Commission agreed to buy from respondent Manufacturing Technologies, Inc., certain stock issued by Clinton-Sherman Aviation, Inc. On April 3, 1990, the then-chairman of the Tribe's business committee signed a promissory note in the name of the Tribe. By its note, the Tribe agreed to pay Manufacturing Technologies $285,000 plus interest. The face of the note recites it was signed at Carnegie, Oklahoma,

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the Shakopee Mdewakanton Sioux (Dakota) Community et al. by *Steven F. Olson.*

Briefs of *amici curiae* urging affirmance were filed for the State of Oklahoma by *W. A. Drew Edmondson*, Attorney General, and *Neal Leader*, Senior Assistant Attorney General; for the State of South Dakota et al. by *Mark W. Barnett*, Attorney General of South Dakota, and *John Patrick Guhin*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Daniel E. Lungren* of California, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Richard P. Ieyoub* of Louisiana, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Joseph P. Mazurek* of Montana, *Philip T. McLaughlin* of New Hampshire, *Dennis C. Vacco* of New York, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, and *James E. Doyle* of Wisconsin; and for the First National Bank of Altus et al. by *Steven W. Bugg* and *Richard H. Goldberg.*

where the Tribe has a complex on land held in trust for the Tribe. According to respondent, however, the Tribe executed and delivered the note to Manufacturing Technologies in Oklahoma City, beyond the Tribe's lands, and the note obligated the Tribe to make its payments in Oklahoma City. The note does not specify a governing law. In a paragraph entitled "Waivers and Governing Law," it does provide: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." App. 14.

The Tribe defaulted; respondent sued on the note in state court; and the Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit. The trial court denied the motion and entered judgment for respondent. The Oklahoma Court of Civil Appeals affirmed, holding Indian tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct. The Oklahoma Supreme Court declined to review the judgment, and we granted certiorari. 521 U. S. 1117 (1997).

II

As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 476 U. S. 877, 890 (1986); *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58 (1978); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512 (1940) *(USF&G)*. To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. In one case, a state court had asserted jurisdiction over tribal fishing "both on and off its reservation." *Puyallup Tribe, Inc.* v. *Department of Game of Wash.*, 433 U. S. 165, 167 (1977). We held the Tribe's claim of immunity was "well founded," though we did not discuss the relevance of where the fishing had taken place. *Id.*, at 168, 172. Nor have we yet drawn a distinction between governmental

and commercial activities of a tribe. See, *e. g.*, *ibid.* (recognizing tribal immunity for fishing, which may well be a commercial activity); *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505 (1991) (recognizing tribal immunity from suit over taxation of cigarette sales); *USF&G*, *supra*, (recognizing tribal immunity for coal-mining lease). Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. See *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973); see also *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 75 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U. S., at 510. There is a difference between the right to demand compliance with state laws and the means available to enforce them. See *id.*, at 514.

The Oklahoma Court of Civil Appeals nonetheless believed federal law did not mandate tribal immunity, resting its holding on the decision in *Hoover* v. *Oklahoma*, 909 P. 2d 59 (Okla. 1995), cert. denied, 517 U. S. 1188 (1996). In *Hoover*, the Oklahoma Supreme Court held that tribal immunity for off-reservation commercial activity, like the decision not to exercise jurisdiction over a sister State, is solely a matter of comity. 909 P. 2d, at 62 (citing *Nevada* v. *Hall*, 440 U. S. 410, 426 (1979)). According to *Hoover*, because the State holds itself open to breach of contract suits, it may allow its citizens to sue other sovereigns acting within the State. We

have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States. See, *e. g.*, *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775 (1991). In *Blatchford*, we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the "mutuality of . . . concession" that "makes the States' surrender of immunity from suit by sister States plausible." *Id.*, at 782; accord, *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 268–269 (1997). So tribal immunity is a matter of federal law and is not subject to diminution by the States. *Three Affiliated Tribes*, *supra*, at 891; *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 154 (1980).

Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident. The doctrine is said by some of our own opinions to rest on the Court's opinion in *Turner* v. *United States*, 248 U. S. 354 (1919). See, *e. g.*, *Potawatomi*, *supra*, at 510. Though *Turner* is indeed cited as authority for the immunity, examination shows it simply does not stand for that proposition. The case arose on lands within the Creek Nation's "public domain" and subject to "the powers of [the] sovereign people." 248 U. S., at 355. The Creek Nation gave each individual Creek grazing rights to a portion of the Creek Nation's public lands, and 100 Creeks in turn leased their grazing rights to Turner, a non-Indian. He built a long fence around the land, but a mob of Creek Indians tore the fence down. Congress then passed a law allowing Turner to sue the Creek Nation in the Court of Claims. The Court of Claims dismissed Turner's suit, and the Court, in an opinion by Justice Brandeis, affirmed. The Court stated: "The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its

officers to keep the peace." *Id.*, at 358. "No such liability existed by the general law." *Id.*, at 357.

The quoted language is the heart of *Turner*. It is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine. One cannot even say the Court or Congress assumed the congressional enactment was needed to overcome tribal immunity. There was a very different reason why Congress had to pass the Act: "The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent." *Id.*, at 358. The fact of tribal dissolution, not its sovereign status, was the predicate for the legislation authorizing suit. *Turner*, then, is but a slender reed for supporting the principle of tribal sovereign immunity.

Turner's passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit. We so held in *USF&G*, saying: "These Indian Nations are exempt from suit without Congressional authorization." 309 U. S., at 512 (citing *Turner*, *supra*, at 358). As sovereigns or quasi sovereigns, the Indian Nations enjoyed immunity "from judicial attack" absent consent to be sued. 309 U. S., at 513–514. Later cases, albeit with little analysis, reiterated the doctrine. *E. g.*, *Puyallup*, 433 U. S., at 167, 172–173; *Santa Clara Pueblo*, 436 U. S., at 58; *Three Affiliated Tribes*, 476 U. S., at 890–891; *Blatchford*, *supra*, at 782; *Coeur d'Alene*, *supra*, at 268.

The doctrine of tribal immunity came under attack a few years ago in *Potawatomi*, *supra*. The petitioner there asked us to abandon or at least narrow the doctrine because tribal businesses had become far removed from tribal self-governance and internal affairs. We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency. *Id.*, at 510. The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal

enterprises extending well beyond traditional tribal customs and activities. JUSTICE STEVENS, in a separate opinion, criticized tribal immunity as "founded upon an anachronistic fiction" and suggested it might not extend to off-reservation commercial activity. *Id.*, at 514–515 (concurring opinion).

There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973); *Potawatomi*, *supra; Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.

Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. See, *e. g.*, 25 U. S. C. § 450f(c)(3) (mandatory liability insurance); § 2710(d)(7)(A)(ii) (gaming activities). And in other statutes it has declared an intention not to alter it. See, *e. g.*, § 450n (nothing in financial-assistance program is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"); see also *Potawatomi*, 498

U. S., at 510 (discussing Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.*).

In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries. As with tribal immunity, foreign sovereign immunity began as a judicial doctrine. Chief Justice Marshall held that United States courts had no jurisdiction over an armed ship of a foreign state, even while in an American port. *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812). While the holding was narrow, "that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983). In 1952, the State Department issued what came to be known as the Tate Letter, announcing the policy of denying immunity for the commercial acts of a foreign nation. See *id.*, at 486–487. Difficulties in implementing the principle led Congress in 1976 to enact the Foreign Sovereign Immunities Act, resulting in more predictable and precise rules. See *id.*, at 488–489 (discussing the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §§ 1604, 1605, 1607).

Like foreign sovereign immunity, tribal immunity is a matter of federal law. *Verlinden*, *supra*, at 486. Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation. See, *e. g.*, *Santa Clara Pueblo*, *supra*, at 58.

In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." *Potawatomi*, *supra*, at 510. It has not yet done so.

In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case. The contrary decision of the Oklahoma Court of Civil Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE THOMAS and JUSTICE GINSBURG join, dissenting.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973). There is no federal statute or treaty that provides petitioner, the Kiowa Tribe of Oklahoma, any immunity from the application of Oklahoma law to its off-reservation commercial activities. Nor, in my opinion, should this Court extend the judge-made doctrine of sovereign immunity to pre-empt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity.

I

"The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Nevada* v. *Hall*, 440 U. S. 410, 414 (1979). In the former category, the sovereign's power to determine the jurisdiction of its own courts and to define the substantive legal rights of its citizens adequately explains the lesser authority to define its own immunity. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353 (1907). The sovereign's claim to immunity in the courts of a second sovereign,

however, normally depends on the second sovereign's law. *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136 (1812). An Indian tribe's assertion of immunity in a state judicial proceeding is unique because it implicates the law of three different sovereigns: the tribe itself, the State, and the Federal Government.

As the Court correctly observes, the doctrine of tribal immunity from judicial jurisdiction "developed almost by accident." *Ante*, at 756. Its origin is attributed to two federal cases involving three of the Five Civilized Tribes. The former case, *Turner* v. *United States*, 248 U. S. 354 (1919), rejected a claim against the Creek Nation, whose tribal government had been dissolved. The Court explains why that case provides no more than "a slender reed" of support for the doctrine even in federal court. *Ante*, at 757. In the latter case, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506 (1940) *(USF&G)*, the Federal Government sought to recover royalties due under coal leases that the United States had executed on behalf of the Choctaw and Chickasaw Nations. The Court held that the Government's action was not barred by a prior judgment against it entered by a different federal court. The holding that the prior judgment was "void in so far as it undertakes to fix a credit against the Indian Nations," *id.*, at 512, rested on two grounds. First, in a companion case decided that day,[1] the Court ruled that "cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration," *ibid.;* but no statute had authorized the prior adjudication of the cross-claim against the Federal Government. The second ground was the statement, supported by a citation of *Turner* and two Eighth Circuit decisions addressing the immunity of two of the Five Civilized Tribes, that "*[t]hese* Indian Nations are exempt from suit without Congressional authorization." 309 U. S.,

[1] *United States* v. *Shaw*, 309 U. S. 495 (1940).

at 512 (emphasis added). At most, the holding extends only to federal cases in which the United States is litigating on behalf of a tribe. Moreover, both *Turner* and *USF&G* arose out of conduct that occurred on Indian reservations.

In subsequent cases, we have made it clear that the States have legislative jurisdiction over the off-reservation conduct of Indian tribes, and even over some on-reservation activities.[2] Thus, in litigation that consumed more than a decade and included three decisions by this Court, we rejected a Tribe's claim that the doctrine of sovereign immunity precluded the State of Washington from regulating fishing activities on the Puyallup Reservation. *Puyallup Tribe, Inc.* v. *Department of Game of Wash.*, 433 U. S. 165, 175–176 (1977). It is true that as an incident to that important holding, we vacated the portions of the state-court decree that were directed against the Tribe itself. *Id.*, at 172–173. That action, however, had little practical effect because we upheld the portions of the decree granting relief against the entire class of Indians that was represented by the Tribe. Although Justice Blackmun, one of the "strongest supporters of Indian rights on the Court,"[3] wrote separately to express his "doubts . . . about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States* v. *United States Fidelity & Guaranty Co.*," *id.*, at 178, our opinion did not purport to extend or to explain the doctrine. Moreover, as the Tribe's predominant argument was that "the state courts of Washington are without

[2] "The general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia,* 6 Pet. 515, 561; *The Kansas Indians,* 5 Wall. 737, 755–757; and *The New York Indians,* 5 Wall. 761, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations." *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 72 (1962).

[3] Dussias, Heeding the Demands of Justice: Justice Blackmun's Indian Law Opinions, 71 N. D. L. Rev. 41, 43 (1995).

jurisdiction to regulate fishing activities on its reservation," *id.*, at 167, we had no occasion to consider the validity of an injunction relating solely to off-reservation fishing.

In several cases since *Puyallup*, we have broadly referred to the tribes' immunity from suit, but "with little analysis," *ante*, at 757, and only considering controversies arising on reservation territory. In *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978), a Tribe member and her daughter who both lived on the Santa Clara Pueblo reservation sued in federal court to challenge the validity of a tribal membership law. We agreed with the Tribe that the court lacked jurisdiction to decide this "intratribal controvers[y] affecting matters of tribal self-government and sovereignty." *Id.*, at 53. Our decision in *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 476 U. S. 877 (1986), held that North Dakota could not require a Tribe's blanket waiver of sovereign immunity as a condition for permitting the Tribe to sue private parties in state court. That condition was "unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws," because it required "that the Tribe open itself up to the coercive jurisdiction of state courts for *all* matters occurring on the reservation." *Id.*, at 891.[4] Most recently, we held that a federal court lacked authority to entertain Oklahoma's claims for unpaid taxes on cigarette sales made on tribal trust land, which is treated the same as reservation territory. *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505, 509–511 (1991).[5]

[4] The particular counterclaims asserted by the private party, which we assumed would be barred by sovereign immunity, concerned the construction of a water-supply system on the Tribe's reservation. *Three Affiliated Tribes*, 476 U. S., at 881.

[5] The Court cites *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775 (1991), and *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261 (1997), as having "retained the doctrine" of tribal sovereign immunity. *Ante*, at 757. Each of those cases upheld a State's sovereign immunity under

In sum, we have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct. Despite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions. Moreover, none of our opinions has attempted to set forth any reasoned explanation for a distinction between the States' power to regulate the off-reservation conduct of Indian tribes and the States' power to adjudicate disputes arising out of such off-reservation conduct. Accordingly, while I agree with the Court that it is now too late to repudiate the doctrine entirely, for the following reasons I would not extend the doctrine beyond its present contours.

II

Three compelling reasons favor the exercise of judicial restraint.

First, the law-making power that the Court has assumed belongs in the first instance to Congress. The fact that Congress may nullify or modify the Court's grant of virtually unlimited tribal immunity does not justify the Court's performance of a legislative function. The Court is not merely announcing a rule of comity for federal judges to observe; it is announcing a rule that pre-empts state power. The reasons that undergird our strong presumption against construing federal statutes to pre-empt state law, see, *e. g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 516, 518 (1992), apply with added force to judge-made rules.

In the absence of any congressional statute or treaty defining the Indian tribes' sovereign immunity, the creation of

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the Eleventh Amendment from being sued in federal court by an Indian tribe. The passing references to tribes' immunity from suit did not discuss the scope of that immunity and were, of course, dicta.

a federal common-law "default" rule of immunity might in theory be justified by federal interests. By setting such a rule, however, the Court is not deferring to Congress or exercising "caution," *ante*, at 759—rather, it is creating law. The Court fails to identify federal interests supporting its extension of sovereign immunity—indeed, it all but concedes that the present doctrine lacks such justification, *ante*, at 758—and completely ignores the State's interests. Its opinion is thus a far cry from the "comprehensive pre-emption inquiry in the Indian law context" described in *Three Affiliated Tribes* that calls for the examination of "not only the congressional plan, but also 'the nature of the state, federal, and tribal interests at stake . . . .'" 476 U. S., at 884 (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 145 (1980)). Stronger reasons are needed to fill the gap left by Congress.

Second, the rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. See 28 U. S. C. §§ 1346(b), 2674 (Federal Tort Claims Act); §§ 1346(a)(2), 1491 (Tucker Act). Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in the federal and state courts for claims based upon commercial activities carried on in the United States, or such activities elsewhere that have a "direct effect in the United States." § 1605(a)(2). And a State may be sued in the courts of another State. *Nevada* v. *Hall*, 440 U. S. 410 (1979). The fact that the States surrendered aspects of their sovereignty when they joined the Union does not even arguably present a legitimate basis for concluding that the Indian tribes retained—or, indeed, ever had—any sovereign immunity for off-reservation commercial conduct.

Third, the rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.

I respectfully dissent.

Syllabus

NEW JERSEY *v.* NEW YORK

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 120, Orig. Argued January 12, 1998—Decided May 26, 1998

An 1834 compact (hereinafter Compact) between New York and New Jersey, approved by Congress pursuant to the Compact Clause, set the boundary line between the States as the middle of the Hudson River, Article First; provided that Ellis Island, then three acres, was part of New York, despite its location on the New Jersey side of the river, Article Second; and provided that New York had exclusive jurisdiction of submerged lands and waters between the two States to the low-water mark on the New Jersey shore, subject to certain exceptions, including New Jersey's right to submerged lands on its side of the boundary, Article Third. The States agree that Article Second gave New York sovereign authority over the Island, and this Court has determined, *inter alia*, that New Jersey has retained ultimate sovereign rights over submerged lands on its side, *Central R. Co. of N. J.* v. *Jersey City*, 209 U. S. 473, 478–479. After 1891, when the United States decided to use the Island to receive immigrants, the National Government began filling around the Island's shoreline and over the next 42 years added some 24.5 acres to the original Island. In 1954, immigration was diverted from the Island. Since then, the Island has been developed as a national historic site, but New York and New Jersey have asserted rival claims of sovereign authority over its filled land. In 1993, New Jersey invoked this Court's original jurisdiction to try the dispute. After a trial, the Special Master concluded that Article First marks the line of sovereignty between the two States; that although Article Second accords New York some sovereign jurisdiction over the Island as it existed in 1834, the Compact does not address the issue of sovereign authority over the Island's filled portions; and that the filled portions fall under the sovereign authority of New Jersey under the common-law doctrine of avulsion. He rejected New York's affirmative defense of having obtained sovereign authority over the filled portions by prescription and acquiescence and its defense of laches. He pegged the Island's exact dimensions to the mean low-water mark of the original Island, although he recommended that the area covered by a pier extending from the shore at the time of the Compact should be treated as part of the original Island. Finally, he recommended, for reasons of practicality, convenience, and fairness, that this Court adjust the Island boundary line between the States, placing the main immigration building and the land

immediately surrounding it within New York. Both States have filed exceptions.

Held: New Jersey has sovereign authority over the filled land added to the original Island. New Jersey's exception to that portion of the Special Master's report concerning the Court's authority to adjust the original boundary line between the two States is sustained. The other exceptions of New Jersey and New York are overruled. Pp. 780–812.

(a) Article Second did not give New York jurisdiction over the Island's filled land. The absence of any description of the Island in metes and bounds merely shows that in 1834 everybody knew what the Island was. The Compact's failure to address the consequences of landfilling does not support New York's argument that such filling in New York Harbor was so common a practice in 1834 as to render it unnecessary to mention it in Article Second. Rather, under that era's common law, such filling was "avulsion," which has no effect on boundary, *Nebraska* v. *Iowa*, 143 U. S. 359, 361. This rule fills the Compact's silence and leads to the conclusion that the lands surrounding the original Island remained New Jersey's sovereign property when the United States added landfill to them. Neither intuition nor history supports New York's additional argument that the parties would hardly have wanted to divide the Island between the States because any such division would frustrate the Compact's purpose of giving New York control over navigation and commerce in the harbor. Pp. 780–785.

(b) New York has not obtained sovereignty over the filled land through its exercise of prescriptive acts and New Jersey's acquiescence in that exercise. As this is an affirmative defense, New York has a plaintiff's burden of showing by a preponderance of the evidence, *Illinois* v. *Kentucky*, 500 U. S. 380, 384, that it exercised dominion over the made land with New Jersey's consent from 1890, when the United States began to add landfill to the original Island, to 1954, when New Jersey vigorously asserted its sovereignty claim. This task is made difficult by two facts: that New Jersey must be supposed to know that, when New York referred to the Island in its official dealings, it meant something other than the original, concededly New York territory; and that the United States's occupation of the land affected New York's opportunity to act in support of its claim—*e. g.*, by establishing towns, roads, or public buildings—as well as the degree of attention that New Jersey may reasonably have paid to whatever acts New York claims to have performed in asserting its jurisdiction. New York's evidence—the recording of vital statistics of people on the Island; the inclusion of the Island in New York voting districts, together with voting registration lists with names of people living on filled portions; personal impressions

that the filled portions belong to New York; and the United States's understanding of the Island's sovereignty—is too slight to support any finding of prescription. New York's official acts occurred off the Island and were either equivocal in their territorial references or ill calculated to give notice to New Jersey; and they did not leave officials of the Island's actual occupants, the United States, with a settled or consistent understanding that the filled land might be subject to New York's sovereignty. Pp. 785–806.

(c) New Jersey is not chargeable with laches through its delay in bringing this action. Even if New York is correct that there would have been more and better evidence to support its affirmative defense of prescription and acquiescence had New Jersey brought its suit years earlier, it cannot use the defense of laches to relieve it of the plaintiff's burden of proof on its affirmative defense. Pp. 806–807.

(d) New Jersey is sovereign over the filled portions of the Island to the mean low-water line, not, as it argues, the mean high-water line. The Court assumes from the Compact's silence that the parties were well aware of the general rule, recognized by this Court, that the low-water mark is the most appropriate boundary between sovereigns, see, *e. g.*, *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 383, and would have explicitly provided for a high-water mark boundary if that is what they intended. It would be unsound to infer from Article Third's specification of a low-water mark as a jurisdictional boundary on the New Jersey shore that the high-water line was intended elsewhere. Pp. 807–810.

(e) This Court agrees with the Special Master's conclusion that the land covered by the pier in 1834 falls within New York's authority. An 1819 map of the Island, on which the Special Master relied, appears to show a filled area around the pier's location, and New York's expert credibly testified that the use of pilings to create piers was still uncommon by the mid-1800's and that it would have been much easier to add landfill to the shallow waters around the Island than build piers. P. 810.

(f) This Court lacks the authority to adjust the original boundary line between the two States to address considerations of practicality and convenience. Congressional approval "transforms an interstate compact within [the Compact] Clause into a law of the United States," *Cuyler* v. *Adams*, 449 U. S. 433, 438. Unless the compact is unconstitutional, no court may order relief inconsistent with its express terms. *Texas* v. *New Mexico*, 462 U. S. 554, 564. The difficulties created by a boundary line that divides not just an island but some of its buildings are the price of New Jersey's success in litigating under a compact whose fair construction calls for a line so definite. Pp. 810–812.

Exceptions overruled in part and sustained in part, and case recommitted to Special Master.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 812. STEVENS, J., filed a dissenting opinion, *post*, p. 814. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 829.

Joseph L. Yannotti, Assistant Attorney General of New Jersey, argued the cause for plaintiff. With him on the briefs were *Peter Verniero*, Attorney General, and *Robert A. Marshall*, *Patrick DeAlmeida*, and *Rachel Horowitz*, Deputy Attorneys General.

Jeffrey P. Minear argued the cause for the United States as *amicus curiae*. With him on the brief were *Acting Solicitor General Waxman*, *Assistant Attorney General Schiffer*, and *Deputy Solicitor General Kneedler*.

Daniel Smirlock, Assistant Attorney General of New York, argued the cause for defendant. With him on the briefs were *Dennis C. Vacco*, Attorney General, *Barbara G. Billet*, Solicitor General, and *Peter H. Schiff*, Deputy Solicitor General.*

JUSTICE SOUTER delivered the opinion of the Court.

An 1834 compact (hereinafter Compact) between the States of New York and New Jersey provided that Ellis Island, then a modest three acres, was part of New York despite its location on New Jersey's side of the States' common boundary. After 1891, when the United States decided to use the Island to receive immigrants, the National Government began placing fill around its shoreline and over the next

*Briefs of *amici curiae* were filed for the City of New York by *Paul A. Crotty*, *Leonard J. Koerner*, *Stanley Buchsbaum*, and *Kristin M. Helmers;* for the National Trust for Historic Preservation et al. by *Elizabeth S. Merritt*, *Laura S. Nelson*, and *Edward N. Costikyan;* for the New-York Historical Society et al. by *Dennis C. O'Donnell;* and for the New York Landmarks Conservancy et al. by *John J. Kerr, Jr.*

42 years added some 24.5 acres to the area of the original Island. The issue in this case is whether New York or New Jersey has sovereign authority over this filled land. We find that New Jersey does.

I

In April 1993, New Jersey invoked this Court's original jurisdiction to try a dispute over its territorial jurisdiction, see U. S. Const., Art. III, § 2, cl. 2, by seeking leave to file a bill of complaint against New York. We granted New Jersey's petition, 511 U. S. 1080 (1994), and appointed Paul Verkuil as Special Master, 513 U. S. 924 (1994). After denying the parties' cross-motions for summary judgment, he conducted a trial from July 10 to August 15, 1996, and submitted final and supplemental reports to us on June 16, 1997, 520 U. S. 1273, which were then subjected to the exceptions resolved here.

A

Ellis Island lies in New York Harbor 1,300 feet from Jersey City, New Jersey, and one mile from the tip of Manhattan. At the time of the first European settlement it was mostly mud, sand, and oyster shells, which nearly disappeared at high tide. The Mohegan Indians called it "Kioshk," or Gull Island, while the Dutch of New Amsterdam, after its thrifty acquisition, renamed it (along with two other nearby specks) for the oyster, in recognition of the rich surrounding beds. England seized it from the Dutch in 1664, the same year that Charles II included the Island in a grant to his brother, the Duke of York, of the land and water of the present States of New York and New Jersey. The Duke in turn granted part of this territory to Lord Berkeley and Sir George Carteret, the proprietors of New Jersey, whose domain was described as "bounded on the east part by the main sea, and part by Hudson's river."

Having wasted no words, the noble grantor all but guaranteed the succession of legal fees and expenses arising from

interstate boundary disputes, now extending into the fourth century since the conveyance of New Jersey received its seal. After the Revolutionary War, New York and New Jersey began their long disagreement about the common boundary on the lower Hudson and New York Harbor, with New York arguing that the grant to the New Jersey proprietors set the line at New Jersey's shore and so preserved New York's sovereignty over the entire river, and New Jersey contending that as a coequal State emerging after the Revolution it was entitled to a sovereign boundary in the middle of the river. Between the two competing lines, of course, lay the Oyster Islands, one of which, in 1785, came into the private ownership of the eponymous Samuel Ellis, whose heirs would be its last private owners. In 1800, the State of New York ceded "jurisdiction" over the Island to the United States, reserving only the right to serve judicial process there. Act of Feb. 15, 1800, ch. 6 (1797–1800 N. Y. Laws, p. 454). In 1808, after obtaining property title to the Island as well, the State of New York granted all of its "right, title and interest" in it to the United States, "for the purpose of providing for the defense and safety of the city and port of New-York." Act of Mar. 18, 1808, ch. 51 (1808 N. Y. Laws, p. 273); Act of Mar. 20, 1807, ch. 51 (1807 N. Y. Laws, p. 67); Deed to Ellis Island, by State of New York to the United States, June 30, 1808. Before the War of 1812 began, the United States Army had taken over the Island, which it improved with the construction of barracks and a magazine, and fortified with a battery of 20 guns.

In the meantime, the two neighboring States tried to settle their controversy. In 1807, each appointed commissioners to prepare a compromise agreement, and when none was forthcoming the States allowed the controversy to simmer for another 20 years, when new commissioners were appointed. After they, too, had failed to agree, in 1829 New Jersey decided to seek a judicial resolution and filed suit against New York to establish its "rights of property, juris-

diction and sovereignty" west of the midpoint of the waters of the Hudson River and New York Bay. N. J. Exh. 293 (Complaint filed in *New Jersey* v. *New York*, p. 22 (1829)). New Jersey made it clear in its papers, however, that the dispute did not concern the islands in the waters between the two States, by conceding in its Bill in Equity that during the colonial period New York had taken possession of the islands "in the dividing waters between the two States," and "that the possession thus acquired by New York, ha[d] been since that time . . . acquiesced in" by New Jersey. *Id.*, at 22–23.

Although we took jurisdiction over the suit, *New Jersey* v. *New York*, 5 Pet. 284 (1831), it was never tried to judgment. Instead, the States once again negotiated and in 1833 actually reached agreement. Each enacted the terms into law, 1834 N. Y. Laws, ch. 8; 1833–1834 N. J. Laws, pp. 118–121, and jointly they sought the approval of Congress under the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3. Congressional consent came with the Act of June 28, 1834, ch. 126, 4 Stat. 708.

The Compact comprises eight articles, the first three of which directly concern us here. Article First sets the relevant stretch of the "boundary line" between New York and New Jersey as the middle of the Hudson River "except as hereinafter otherwise particularly mentioned." Article Second provides that "New York shall retain its present jurisdiction of and over Bedlow's [1] and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state." Under Article Third, "New York shall have and enjoy exclusive jurisdiction of and over all the waters" between the two States as well as "of and over the lands covered by the said waters to the low watermark on the westerly or New Jersey side thereof." This

[1] The name of this island, which is now commonly referred to as "Liberty Island," was sometimes spelled "Bedloe's."

jurisdiction is, however, "subject to [certain] rights of property and of jurisdiction of the state of New Jersey." That State, for example, "shall have the exclusive right of property in and to the land under water" on its side of the boundary line, as well as "the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state." The terms of the congressional consent to the Compact close with the provision that "nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement."

We have already addressed the meaning of some of these terms in *Central R. Co. of N. J.* v. *Jersey City*, 209 U. S. 473 (1908), where we held that Jersey City, New Jersey, was authorized to tax the submerged lands lying between the middle of New York Harbor and the low-water mark on the New Jersey shore. As expressed in an opinion by Justice Holmes, we determined that the "boundary line" set by Article First is the line of sovereignty between the two States, and that the islands in the waters between them fell on New Jersey's side of the boundary. *Id.*, at 478. We held that even though Article Third grants New York "exclusive jurisdiction" over all the land and water between the States, New Jersey retained "ultimate sovereign rights" over the lands submerged beneath the waters. *Id.*, at 478–479. We noted that the term "jurisdiction" was used in a broader sense in Article Second (relating to the islands) than in Article Third (relating to water and submerged land west of the center line), the purpose of the latter being "to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of Article I." *Id.*, at 479. We said that "[w]hether . . . some power of police regulation also was conferred upon New York [by the third article] . . . need not be decided now." *Ibid.* Finally, we explained that the provision for Ellis and Bedlow's Islands,

"that New York shall retain its 'present' jurisdiction over them, . . . would seem on its face simply to be intended to preserve the *status quo ante*, whatever that may be." *Ibid.* In the current litigation, New York and New Jersey agree that the effect of Article Second was to recognize that New York had obtained sovereign authority over all of the islands in the waters between the two States, including Ellis Island, and that reference to New York's retention of "present" jurisdiction over Ellis Island was a recognition of New York's cession of jurisdiction over the Island to the United States in 1800, save for its right to serve process there.

In the years after the Compact, the National Government continued to use the Island as a fortress until 1861, when it dismantled the fortifications but proceeded to use the Island for a munitions magazine and a berth for ships defending the harbor. In the 1880's, however, came a radical change. Although the National Government had left the control of immigration largely to the States up to that time, the swelling number of immigrants were overwhelming the state systems, to the point of leading Washington to impose national regulation. While immigrants to New York and New Jersey had traditionally come ashore at Castle Garden, located in Manhattan and owned and operated by New York, Congress decided that an island would be an ideal place for a new immigration station "in view of the frauds, robbery, and general crookedness which seemed to be inseparable from the landing of immigrants." N. J. Exh. 488, p. 5 (V. Stafford, Immigration Problems: Personal Experiences of an Official 22 (1925)). Ellis Island turned out to be the one chosen.

The Island also turned out to be too small, and by the time the new Ellis Island immigration station opened in January 1892, the United States had already added enough fill to the surrounding submerged lands to double the original three acres. By 1897, the Island was up to 14 acres and would go on growing for almost 40 years more.

After the original wood and stucco depot burned in 1897, the United States expanded the land for even larger quarters. Although the new depot, which opened in 1900, sat on approximately the same spot on the original Island as the prior main immigration building, it was joined by a hospital placed on a separate island created by landfill in 1899. The National Government often referred to the latter as Island No. 2, which covered about three acres on the southwestern side of a ferry slip. A covered gangway built on piles connected the two islands, which were soon to be joined by one more, though not before the occurrence of another step in the boundary dispute.

Because the hospital of 1900 could not provide sufficiently isolated wards for patients with contagious diseases, these patients were sent to New York City for care and treatment. When, in 1902, the City Health Department announced it would no longer receive such immigrants, the United States had to provide its own contagious disease hospital, which it planned to build on a third island to be joined to Island No. 2 by another gangway. Construction stopped, however, when New Jersey challenged the National Government's appropriation of the submerged lands surrounding the Island. The dispute was not resolved until December 1904, when New Jersey's Riparian Commissioners conveyed to the United States "all the right, title, claim and interest of every kind, of the State of New Jersey" to 48 acres of territory that included and surrounded Ellis Island, in exchange for $1,000. Deed from the State of New Jersey to the United States of America, Recorded, County of Hudson, State of New Jersey, Dec. 23, 1904. The United States then pressed on with construction and in 1906 completed the new island of 4.75 acres, often called Island No. 3. Here the new contagious disease hospital was constructed in 1909 and occupied by 1911.

Two acres more were added in the 1920's when the United States filled the dock basin between Island Nos. 2 and 3, and in 1934 more fill was placed on the northern side of the origi-

nal Island. In the end, the United States enlarged Ellis Island by roughly 24.5 acres, for a total area some nine times the original.

Ironically, however, as the land rose immigration fell. Although more than 12 million people disembarked at Ellis Island from 1892 to 1954, arrivals dropped from a high point of roughly 5,000 daily in 1907 to only 200 a day in 1954, and in November of that year the Immigration and Naturalization Service (INS) closed the Island station.

Soon after immigration was thus diverted from the Island, the United States General Services Administration (GSA) classified the property as surplus and entertained various proposals for using the Island as a home for educational institutions, as a clinic for alcoholics, as a historical site for public recreation, and as a facility for the mentally retarded. Prospects for the Island's future were clouded, however, by the fact that New York and New Jersey each carried the Island on its tax rolls and announced its intention to collect taxes if a private owner took over the Island. Although the GSA noted sanguinely that "[t]he question of whether the property will be subject to taxes by the State of New Jersey when it becomes eligible for taxation is one to be resolved between the State of New Jersey and the grantee after the disposal of the property has been consummated by the United States," N. J. Exh. 117 (letter from Administrator, GSA, to Sen. Clifford P. Case, dated Jan. 28, 1958), there was clear reason to fear that the tax dispute would kill any disposition the United States might like to make. In 1960, the Council of State Governments tried to mediate the jurisdictional dispute, but negotiations simply came to impasse. N. J. Exh. 134 (letter from Regional Director, Council of State Governments, to Associate General Counsel, GSA, dated July 28, 1960).

After the GSA had offered the Island for sale on the commercial market several times, the Secretary of the Interior decided in 1964 that the Government should stop trying to

sell the property and instead develop it as a national historic site, one advantage of such a course being the supposition that "any opening of hostilities between New York and New Jersey" would be obviated. N. J. Exh. 161 (N. Y. Times, Oct. 22, 1964, p. 37, col. 4). But again the optimism was premature, for although the National Park Service was given legal title to the Island and to this day alone exercises jurisdiction over it, and although restoration of the Island began in 1976, New York and New Jersey have continued to assert rival claims of sovereign authority over the filled land of the Island for the purposes of taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, and civil and criminal law generally. In 1986, efforts of the two States to resolve the tax issue came to naught when New York failed to enact a proposed interstate agreement to deposit tax revenues from the Island into a fund for the homeless. Seven years later, New Jersey was prompted to bring the instant action after the United States Court of Appeals for the Second Circuit held in *Collins* v. *Promark Prods., Inc.*, 956 F. 2d 383 (1992), that New York tort law governed the filled portions of the Island. We are now called upon to determine which State has sovereign authority over the filled portion of the Island.

B

In its complaint, the State of New Jersey seeks a declaration that the boundary between the two States on the Island follows the high-water mark of the original Island, that the original Island is within the territory and jurisdiction of New York, and that the balance of the Island, as well as the waters surrounding it, is within the territory and general jurisdiction of New Jersey. New Jersey also asks for a permanent injunction prohibiting New York from enforcing its laws on the filled land or asserting jurisdiction over it.

The Special Master first concluded that Article First of the Compact, which establishes "[t]he boundary line between the two states of New York and New Jersey" at the midpoint of the Hudson River and New York Harbor, marks the line of sovereignty between the two States. Next, he concluded that although Article Second accords New York some sovereign jurisdiction over the Island as it existed in 1834,[2] the Compact does not address the issue of sovereign authority over the filled portions of the Island. The Special Master concluded that the filled portions of the Island are subject to the sovereign authority of New Jersey under the common-law doctrine of avulsion, and he rejected New York's affirmatively defensive claim to have obtained sovereign authority over the filled portions of the Island by prescription and acquiescence. He also rejected New York's defense that laches barred New Jersey's complaint, finding the doctrine inapposite to interstate boundary actions.

After concluding that New York's sovereign authority was limited to the original area of the Island, the Special Master went on to determine its exact dimensions, which he pegged to the mean low-water mark of the original Island, although he recommended that the area covered by a pier extending from the shore at the time of the Compact be treated as part of the original Island. Finally, the Special Master recommended, "[i]n the interest of practicality, convenience, and

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[2] The Special Master did not determine the scope of such jurisdiction and in particular did not determine the present effect of New York's cession of "jurisdiction" to the United States in 1800. Because New Jersey's complaint pleaded only its sovereignty over the filled land, because this is not an action between the United States and the State of New York, and because the United States is only an *amicus curiae* in this proceeding, we have no occasion to declare the extent of New York's sovereign jurisdiction over the original Island. As the United States noted in its *amicus* brief, "the extent to which the federal government exercises legislative jurisdiction over Ellis Island under the Enclave Clause" of the United States Constitution, Art. I, § 8, cl. 17, "is not at issue in this case." Brief for United States as *Amicus Curiae* 4, n. 1.

fairness," that we adjust the Island boundary line between the two States so as to place all of the main immigration building and the land immediately surrounding it within New York. Final Report of Special Master 3.

New York and New Jersey each excepted to the recommendations. New York's exceptions amount to the following claims: (1) under Article Second of the Compact, New York has jurisdiction over the filled portion of the Island; (2) New York has obtained sovereignty over the filled land through its exercise of prescriptive acts and New Jersey's acquiescence in that exercise; and (3) New Jersey is chargeable with laches through its delay in bringing this action. New Jersey's exceptions in effect state the following claims: (1) New Jersey is sovereign over the filled portions of the Island to the mean high-water line, not the mean low-water line, as it was when the Compact was adopted; (2) the record contains no credible evidence to support the Special Master's conclusion that the pier on Ellis Island in 1834 was partially built on landfill, so as to place its area within New York's jurisdiction; and (3) the present boundary across the Island must follow the 1834 line, the Court having no authority to modify that line to address considerations of practicality and convenience.

II

First we address New York's exceptions. Although that State would be entitled to a declaration of its ultimate sovereignty over the filled land if successful on any of the points raised, we find each to be meritless.

A

New York's first exception rests on Article Second of the Compact, the provision that "[t]he state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state."

Neither party takes issue with our holding in *Central R. Co.* that the "boundary line" between the States established in Article First is the line of sovereignty and that Ellis Island is on New Jersey's side of this line.[3] The States also agree that Article Second carves out an exception to the boundary provision as to all of the islands existing at the time of the Compact, including Ellis Island. They agree that the recognition in this Article of "present jurisdiction" over Ellis Island suffices to bar any rival claim by New Jersey over the original portion of the Island. New York's contention is that Article Second also provides for its authority over filled land; New Jersey says it does not.

New York concedes that at the time of the Compact the submerged land around the Island was under the sovereign authority of New Jersey. But New York argues that because the Compact recognized its own sovereign authority over "Ellis Island," without describing that land mass in metes and bounds, the recognition of sovereignty extended to whatever area the Island so called might be enlarged to cover; that is, once any submerged territory was filled and became fast land contiguous to the original Island, it became subject to the New York sovereignty recognized in Article Second. New York rests its position on an allegation that in 1834 adding landfill to subaqueous land adjacent to fast land in New York Harbor was such a common practice as to render it unnecessary to mention it in Article Second of the Compact or otherwise make provision for its legal consequences. New York also argues that the parties who agreed

[3] New York's *amici* New York Historical Society et al. and New York Landmarks Conservancy et al. would indeed take issue, arguing that the Compact's terms "jurisdiction" and "property" as variously employed in Articles Second and Third should be read to preclude the New Jersey claim. But without even relying on *stare decisis* we must pass over the arguments of the named *amici* for the reason that New York, the party to the case, has in effect renounced them, or at least any benefit they might provide. Accordingly, nothing in this opinion is meant to disparage the scholarship those briefs embody.

to the Compact in 1834 would hardly have wanted to divide the Island between New York and New Jersey, since any such division would frustrate one of the driving purposes of the Compact, of giving New York control over navigation and commerce in the harbor.[4]

The arguments are unavailing. To begin with, the absence of any description of the Island in metes and bounds is highly dubious support for any inference beyond the obvi-

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[4] We note that New York does not claim that the recognition in Article Third of its "exclusive jurisdiction" over the submerged lands (which have been filled in part at the Island) includes an element of "police power" to regulate historic preservation, land use, and zoning, as New York's *amici* argue. See Brief for National Trust for Historic Preservation in the United States and Municipal Art Society of New York as *Amici Curiae* 26, n. 12; Brief for New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council as *Amici Curiae* 17–27. Although we left this very issue open in *Central R. Co. of N. J.* v. *Jersey City*, 209 U. S. 473, 479 (1908), counsel for New York said at oral argument that the grant in Article Third of "exclusive jurisdiction" over the submerged lands and waters between the States "is in the nature of police power, over navigation and commerce in the harbor." Tr. of Oral Arg. 34. New York's counsel argued that when the submerged lands around the Island were filled, New York continued to have jurisdiction over these lands when "used as anchorage, used for docking, used as storage areas, used for lighthouses . . . ." *Id.*, at 35. New York does not argue that Article Third gave New York the authority to regulate anything but commerce and navigation; indeed, counsel for New York said at oral argument that "this case isn't about Article [Third]," *id.*, at 36, and conceded that if it lost its Article Second argument and New Jersey was declared sovereign over the filled land, New Jersey law would apply to that area of the island, *id.*, at 46. Both the New York and New Jersey state courts have also concluded that New York's "exclusive jurisdiction" over the harbor concerns only power to regulate commerce and navigation. See *Kowalskie* v. *Merchants & Miners Transp. Co.*, 76 N. Y. S. 2d 699, 700–701 (Sup. Ct. 1947); *In re Gutkowski's Estate*, 135 N. J. Eq. 93, 102–103, 33 A. 2d 361, 365–366 (Prerog. 1943). While we are not bound by state courts' resolution of interstate boundary disputes, *Georgia* v. *South Carolina*, 497 U. S. 376, 392 (1990); *Durfee* v. *Duke*, 375 U. S. 106, 115–116 (1963), we have no occasion to interpret the terms of the Compact more broadly than the parties who signed it.

ous one, that in 1834 everybody knew what Ellis Island was. The drafters' silence, then, can hardly be taken to convert the Island's name into a definitional Proteus for validating sovereignty claims.

Nor can we draw any conclusion in New York's favor from the failure of the Compact to address the consequences of landfilling, however common the practice may have been.[5] There would have been no reason to do so, simply for the reason that the legal consequences were sufficiently clear under the common law as it was understood in 1834.[6] In this case, as in *Georgia* v. *South Carolina*, 497 U. S. 376, 404 (1990), the expansion of the Island "was not caused by either of the adjoining States, but by the United States Army Corps of Engineers." Under the common law, a littoral owner, like the United States in the instant case, "cannot extend [its] own property into the water by landfilling or purposefully causing accretion." *Ibid.* (citing *Seacoast Real Estate Co.* v. *American Timber Co.*, 92 N. J. Eq. 219, 221, 113 A. 489, 490 (1920)); see also *United States* v. *California*, 381 U. S. 139, 177 (1965) (referring to "the rule of property law

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[5] Beyond the language cited already, nothing else in the Compact governs the consequence of expanding the Island. The closest approach to the subject of avulsion comes in Article Third, which carves out an exception to New York's exclusive jurisdiction over all the waters of the New York Harbor by specifically providing that New Jersey shall have "exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state."

[6] Although JUSTICE SCALIA, see *post*, at 831–832, seems to make some of the same mistakes in assessing the evidence that JUSTICE STEVENS makes, JUSTICE SCALIA applies his interpretation of the facts to the 1834 Compact, assuming that the agreement was ambiguous about which State would have sovereignty over any land added to the Island, and concluding that the parties' conduct in the years following the Compact indicates that the filled land belonged to New York. But this is to convert an agreement's utter silence on an issue into contractual ambiguity; no such translation is possible here, for the silence of the Compact was on the subject of settled law governing avulsion, which the parties' silence showed no intent to modify.

that artificial fill belongs to the owner of the submerged land onto which it is deposited" (citing *Marine Railway & Coal Co.* v. *United States*, 257 U. S. 47, 65 (1921))). The littoral owner's act of placing artificial fill is thus treated under the traditional common-law rule governing avulsive littoral changes, "recognized where the boundaries between States or nations are, by prescription or treaty, found in running water." *Nebraska* v. *Iowa*, 143 U. S. 359, 361 (1892). We have long recognized that a sudden shoreline change known as avulsion (as distinct from accretion, or gradual change in configuration) "has no effect on boundary," *ibid*, and that this "'is the received rule of law of nations on this point, as laid down by all the writers of authority,'" *id.*, at 362 (quoting 8 Op. Atty. Gen. 175, 178 (1856)), including Sir William Blackstone, 143 U. S., at 364 (citing 2 Commentaries on the Laws of England 262 (1766)). See also *Mayor of New Orleans* v. *United States*, 10 Pet. 662, 717 (1836) (common-law rule of accretion "is no less just when applied to public, than to private rights"); W. Hall, A Treatise on International Law 122 (J. Atlay 6th ed. 1909) (explaining the application of common-law rules of accretion and avulsion in boundary disputes between States). This common-law rule speaks in the silence of the Compact, and we follow it to conclude that the lands surrounding the original Island remained the sovereign property of New Jersey when the United States added landfill to them.[7]

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[7] Prior to 1891, New Jersey law permitted littoral owners to extend their land artificially by filling in or docking out; in 1891, however, New Jersey repealed that law and enacted a new statement providing that "without the grant or permission of [the New Jersey Riparian Commissioners] no person or corporation shall fill in, build upon or make any erection on or reclaim any of the lands under the tide-waters of this state." Riparian Act, N. J. Comp. Stat., vol. 4, p. 4385, § 10 (1911). Under the new law the Riparian Commissioners were empowered to bring an ejectment action against any person or corporation trespassing or occupying New Jersey lands under water or previously under water. See *Seacoast Real Estate*

Finally, there is no merit in New York's position that depriving it of sovereign authority over the filled land would frustrate the primary purpose of the Compact. The State argues that the Compact's framers must have thought it necessary to recognize New York's sovereign authority over the islands on New Jersey's side of the boundary line in order to assure that New York would be able to regulate commerce and navigation in the New York Harbor. But neither intuition nor history supports its argument. Although it is taken for granted that one object of the Compact was to preserve New York's authority to regulate water-borne commerce in the harbor, a subject addressed in Article Third, the more evident reason that the Compact declared New York's sovereignty over the islands was simply that by 1834 New York had concededly obtained sovereign rights over the islands through prescriptive acts. New Jersey conceded as much when it filed its bill of complaint in *New Jersey* v. *New York*. While Article Third does speak to commerce and navigation, New York's "exclusive jurisdiction" over the water and submerged lands lying between the two States is unaffected in any literal sense by the presence of the fill, and there is no reason to think that recognizing New Jersey as sovereign over the filled portions of the Island would affect New York's ability to regulate navigation and commerce in the harbor.

B

On the assumption that Article Second or some other Compact provision fails to carry the day for New York, the State

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Co. v. *American Timber Co.*, 92 N. J. Eq. 219, 219–220, 113 A. 489, 490 (1920).

New York's *amicus curiae* the City of New York suggests that under *United States* v. *California*, 381 U. S. 139, 176 (1965), a State may unilaterally alter its boundary line by artificially extending its coastline. Brief for City of New York as *Amicus Curiae* 25. That case, however, involved the interpretation of the Submerged Lands Act, 43 U. S. C. §1301 (1958 ed.), which is not involved in the instant case.

falls back to its affirmative defense that it gained sovereign authority over the made land by subjecting it to prescriptive acts for a considerable period. Again, the State's position is unsound.

As between two sovereigns, jurisdiction may be obtained by one through prescriptive action at the other's expense, over the course of a substantial period, during which the latter has acquiesced in the impositions upon it. See *Illinois* v. *Kentucky*, 500 U. S. 380, 384–385 (1991); *Georgia* v. *South Carolina*, 497 U. S., at 389; *Arkansas* v. *Tennessee*, 310 U. S. 563, 570 (1940); *Vermont* v. *New Hampshire*, 289 U. S. 593, 613 (1933); *Louisiana* v. *Mississippi*, 202 U. S. 1, 53 (1906); *Virginia* v. *Tennessee*, 148 U. S. 503, 522–524 (1893). "For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary." *Rhode Island* v. *Massachusetts*, 4 How. 591, 639 (1846). The doctrine of prescription and acquiescence "is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect, of the original defect of his title, or his intention to relinquish it." C. Phillipson, Wheaton's Elements of International Law 269 (5th ed. 1916). From such expectations, in part, have we derived "moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life." *Virginia* v. *Tennessee*, *supra*, at 524.

As the proponent of the defense, New York is in the position it would occupy if it had itself brought an original action claiming title under the doctrine; thus it has the burden to

"show by a preponderance of the evidence . . . a long and continuous possession of, and assertion of sovereignty over," the filled portions of the Island, as well as New Jersey's acquiescence in those acts of possession and jurisdiction. *Illinois* v. *Kentucky*, *supra*, at 384. Because acquiescence presupposes knowledge, New York is bound to present either direct evidence that New Jersey had knowledge that New York acted upon a claim to the added land, or evidence of such open, notorious, visible, and uninterrupted adverse acts that New Jersey's knowledge and acquiescence may be presumed. See *Georgia* v. *South Carolina*, *supra*, at 393 (stating that it is well established "'that open and notorious adverse possession is evidence of notice; not of the adverse holding only, but of the title under which the possession is held'") (quoting *Landes* v. *Brant*, 10 How. 348, 375 (1851)); *Arkansas* v. *Tennessee*, *supra*, at 570 (noting that sovereign rights to land can be won and lost by "open, long-continued and uninterrupted possession of territory"); *Michigan* v. *Wisconsin*, 270 U. S. 295, 307–308 (1926) (rejecting Michigan's claim of "excusable ignorance" on the ground that "[t]he material facts . . . have been so obvious that knowledge of them on the part of the Michigan authorities, if it were not shown, as it is shown, by the evidence, must necessarily be assumed"); *Louisiana* v. *Mississippi*, *supra*, at 53 (noting that "Louisiana has always asserted [ownership of the disputed area]; and that Mississippi has repeatedly recognized it, and not until recently has disputed it"); MacGibon, The Scope of Acquiescence in International Law, in 31 Brit. Y. B. Int'l L. 143, 173 (H. Lauterpacht ed. 1954) ("The proposition that the possession on which title by prescription rests must fulfil *[sic]* the requirement of notoriety is scarcely in doubt").

It is essential to appreciate the extent of this burden that a claimant by prescription must shoulder. Even as to *terra nullius*, like a volcanic island or territory abandoned by its former sovereign, a claimant by right as against all others has more to do than planting a flag or rearing a monument.

Since the 19th century the most generous settled view has been that discovery accompanied by symbolic acts gives no more than "an inchoate title, an option, as against other states, to consolidate the first steps by proceeding to effective occupation within a reasonable time."[8] I. Brownlie, Principles of Public International Law 146 (4th ed. 1990); see also 1 C. Hyde, International Law 329 (rev. 2d ed. 1945); 1 L. Oppenheim, International Law §§ 222–223, pp. 439–441 (H. Lauterpacht 5th ed. 1937); Hall, A Treatise on International Law, at 102–103; 1 J. Moore, International Law 258 (1906); R. Phillimore, International Law 273 (2d ed. 1871); E. Vattel, Law of Nations § 208, p. 99 (J. Chitty 6th Am. ed. 1844). Thus, even on the remote Pacific atoll mentioned in JUSTICE STEVENS's dissent, *post,* at 824, something well beyond "[a] solitary fingerprint," *post,* at 815, will always be necessary to carry the day. This rule underscores the burden on a sovereign claimant to an atoll already subject to clear title, as under the law of avulsion. Hence the law's emphasis on the necessary length and continuity of adverse activity, and the requirement to prove a knowing acquiescence in the claimant's demonstrated design. Conversely, the original titleholder's only obligation is that of refusing to acquiesce in the hostile behavior of a rival sovereign claimant that was or should have been known to be disputing the earlier title.[9] Since the parties do not start out as equals in

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[8] After all, a contrary rule "would be an absolute infringement of the natural rights of men, and repugnant to the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it." E. Vattel, Law of Nations § 208, p. 99 (J. Chitty 6th Am. ed. 1844).

[9] Accordingly, New York cannot meet its burden of proving prescription by pointing to New Jersey's failure to present evidence that it exercised dominion over the filled portions of the Island occupied by the United States or secondary evidence that third parties understood the filled land

sovereign pretension, a single fingerprint that can never suffice for title even when there is only one claimant will fail all the more abjectly when a claim is made against a holder of title independently established.

Before turning to the evidence, a word must be said on one threshold issue, on which the parties agree. As the Special Master thought, the time period during which New York's prescriptive acts ripened into sovereignty, if they did at all, is 1890 to 1954. The United States added no fill to the original Island until 1890, and after 1954 it is undisputed that New Jersey vigorously asserted its own sovereignty over the filled portions of the Island. At most, then, New York may rely upon exercises of dominion over the made land with New Jersey's consent for 64 years,[10] a period that is not insufficient as a matter of general law. To be sure, we have never established a minimum period of prescription necessary to perfect a jurisdictional claim over another State's territory, and it is clear that "no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription. Everything depends upon the merits of the individual case. . . .

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to be in New Jersey. That is, however, what JUSTICE STEVENS would apparently permit New York to do. See, *e. g.*, *post*, at 814–815 ("There is no evidence that any of those people ever believed that any part of Ellis Island was in the State of New Jersey"); *post*, at 818 ("There is no evidence that any [birth or death] certificate was issued by New Jersey"); *post*, at 819 ("There is no evidence of any Ellis Island resident being married under New Jersey law"); *post*, at 821 ("There is no evidence that any of [the Island] residents prepared or received any mail or other documents describing their residence as in New Jersey"); *post*, at 822 (relying upon the lack of evidence that New Jersey provided municipal services on the Island); *post*, at 823 ("Nor is there any evidence that any judge, state or federal, ever held that Ellis Island was a part of New Jersey").

[10] Because the United States continued to expand the Island until 1934, the relevant period for some parts of the Island is much shorter. As will appear, niceties of timing do not affect the outcome here.

There are indeed immeasurable and imponderable circumstances and influences besides the mere lapse of time at work to create the conviction that in the interest of stability of order the present possessor should be considered the rightful owner of a territory." 1 Oppenheim, *supra*, § 242, at 456–457. We have, however, found 60 years adequate in one case, see *Michigan* v. *Wisconsin*, *supra*, and that holding is enough to open the door to litigation of the relevant period here.

The evidence that has come through the door, however, is too slight to support any finding of prescription. At the outset, we note that two facts exact a discount from the probative force of much of the evidence New York presents. First, as between New York and New Jersey, New York is concededly vested with whatever state sovereignty may be exercised over the original portion of the Island. Second, throughout the entire period of arguable prescription, the Island was entirely occupied by the United States.

We have already seen that Article Second of the Compact recognizes New York's then-existing jurisdiction over Ellis Island and Bedlow's Island as well as its exclusive jurisdiction over the other islands then on New Jersey's side of the boundary. So long as the original Island was all that went by the name of Ellis, there was no question about the referent of any indication of jurisdiction over Ellis Island. But after the Island grew, acts expressly pertaining to the Island but falling short of physical occupation became to a degree vague in the absence of further indication that their subject was the new land as well as the original territory.[11] Thus, every reference to "Ellis Island" on a New York tax roll or

[11] For this reason there is no prescriptive significance in the fact pointed out by JUSTICE STEVENS, *post*, at 822, that a New York state court exercised jurisdiction over an assault that took place "upon government property at Ellis Island," *Rettig* v. *John E. Moore Co.*, 90 Misc. 664, 154 N. Y. S. 124 (N. Y. App. Term 1915), there being no indication that the court considered whether the assault took place on the filled portion of the Island.

a statute outlining the confines of a voting district was necessarily sound in part (so far as New Jersey might be concerned) in the absence of a physical description making a claim to the new land as well as the old. So, registrations of vital statistics did not on their face refer to events beyond the original Island (though knowledge of the geography would point to hospitals on the new land in a number of instances). And the use of mailing addresses of the Island in "New York" was likewise equivocal (a point underscored by the fact that the Island was within the New York postal district, whatever the political geography might otherwise be). This vagueness was important, having a significance that stems from the burden to give notice to the adverse party before a prescriptive claim can begin to run. See *supra*, at 786–789. Thus, New Jersey suffers nothing unless New Jersey must at least reasonably be supposed to have known that an attempt by New York to deal officially with "Ellis Island" referred to something more than the original, concededly New York territory (on the assumption that it was subject to the authority of any State at all).

Second, it is well to realize how far the presence of the National Government and its particular activities throughout the period necessarily limited the range of prescriptive acts New York might possibly have performed and the information any acts performed might convey to New Jersey about New York's intentions. Although New Jersey has not argued that the occupation of the filled land exclusively by the United States throughout the prescriptive period precluded any requisite occupation by New York as a matter of law (and we express no opinion on that point, cf. *Georgia* v. *South Carolina,* 497 U. S., at 389 (finding prescription where United States Army Corps of Engineers had performed some work on territory in dispute); *Arkansas* v. *Tennessee*, 310 U. S., at 571–572 (rejecting argument that prescription is not possible where the United States holds title to land)), much of the standard evidence of sovereign prescription is

out of the question in this case. New York, for example, has been in no position to establish towns, roads, or public buildings, see *Michigan* v. *Wisconsin*, 270 U. S., at 306–307; *Maryland* v. *West Virginia*, 217 U. S. 1, 40 (1910), or otherwise actually occupy the area of the Island in dispute, see *Georgia* v. *South Carolina*, *supra*, at 393 (charging Georgia with the knowledge that South Carolina was cultivating the territory in question). Instead, the United States Army Corps of Engineers and the Procurement Division of the Treasury Department controlled all construction and improvements. Nor did New York enjoy any substantial opportunity to assess taxes on the land and activities on the Island, and so generate the kind of evidence of prescription that we have found particularly persuasive in prior cases. See *Illinois* v. *Kentucky*, 500 U. S., at 385; *Georgia* v. *South Carolina*, *supra*, at 392; *Arkansas* v. *Tennessee*, *supra*, at 567; *Maryland* v. *West Virginia*, *supra*, at 40–41; *Virginia* v. *Tennessee*, 148 U. S., at 515. Until the passage of the Buck Act, ch. 787, 54 Stat. 1059,[12] in 1940, no State or municipality could impose taxes in a federal area located within that State or municipality, and there is no evidence that New York collected any taxes from activities taking place on the Island until 1991, long after the possible prescription period was over. Nor was there any significant opportunity for New York to grant land or register deeds to land on the Island, actions that have produced evidence in prior cases

[12] The Buck Act provides that "[n]o person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area." 4 U. S. C. § 105(a). The definition of "Federal area" under the Act includes "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States." § 110(e).

when assessing prescriptive acts, see, *e. g.*, *Vermont* v. *New Hampshire*, 289 U. S., at 614–615; *Indiana* v. *Kentucky*, 136 U. S. 479, 510 (1890); it is undisputed that by 1904 the United States held title to all of the Island. Nor was there the normal opportunity for a claimant State or its agencies to meet the normal governmental responsibility for public protection, as in providing police and fire protection to the disputed area. The National Government had its own firefighting equipment and security force and rarely received any help from New York; the State showed that it furnished assistance on only three isolated occasions, in 1897 when the immigration depot burned to the ground, in 1905, when a cheating federal employee working in the telegraph office was sent off to the Ludlow Street jail in New York City, and in 1916, when German saboteurs set fire to barges that floated to Ellis Island and ignited the Island's seawall.[13]

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[13] Not only are these incidents spotty, they are also consistent with New York's jurisdiction over the harbor waters granted by Article Third of the Compact and with New York's undisputed authority over the original Island. The fire of 1897 involved buildings that were almost entirely on the original Island, and the telegraph official arrested in 1905 was working in the main immigration building, which was also located on the original Island. Finally, as the Port Authority of New York and New Jersey recognized in 1991, "[t]he City of New York has historically provided fireboat protection for the waterfront areas of the New York Harbor." N. Y. Exh. 917 (letter to Norman Steisel, First Deputy Mayor, dated Apr. 12, 1991). Accordingly, putting out the fire on the seawall of the Island in 1916 was not an apparent act of prescription; it was in keeping with New York's exclusive jurisdiction over waters of the harbor. But even leaving New York's harbor jurisdiction aside, the act of one sovereign in helping a neighboring government put out a fire would hardly suggest that territorial aggrandizement was afoot.

There is also evidence that two criminal complaints were filed in New York City Municipal Court involving Ellis Island residents, but, as New York admitted, "it is not clear from those complaints whether the criminal acts occurred on Ellis Island." New York's Response to New Jersey Request for Admission 35 (Request No. 82).

In stating that "[i]n 1942, the New York City Police Department formed a special squad to assist federal officials in questioning immigrants arriv-

The United States' occupation of the land under the cession affected not only New York's opportunity to act in support of its claim but also the degree of attention that New Jersey may reasonably be supposed to have paid to whatever acts New York claims to have performed in asserting its jurisdiction. Thus, for example, a State should well know that the residents of a populated enclave of its land have wholly failed to register or vote; but it is far less likely that New Jersey was aware of such resident population as the United States did maintain on the Island, or that it had any idea that some of those residents were registered to vote in New York instead of some other place where they might vote as absentees. Governor Rockefeller put this point well when he remarked in 1959 that "[f]or more than fifty years, the question [of which State has sovereignty over Ellis Island] has been of relatively little importance because the Federal Government has owned and administered [the Island]." N. J. Exh. 123 (letter from Governor Rockefeller to Louis Harris, dated June 4, 1959).

In sum, the peculiar facts of this case affected New York's capacity to invoke a sovereign's claim as well as the significance of such acts it now adduces as prescriptive in character. New York's position as sovereign of the original Island

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ing at the Island," *post*, at 822, JUSTICE STEVENS presumably relies upon the testimony of New York's expert witness Harlan Unrau. As evidence that New York provided this assistance, however, Unrau relied upon 10 letters from the New York City Police Department to the INS requesting information about aliens originating in Germany. These documents give no indication that members of the New York City Police Department were themselves present on the Island to question immigrants. Indeed, although the INS's 1942 year-end report mentioned that "the Army and Navy intelligence services, the Department of State, the Federal Bureau of Investigation, the Coast Guard, the Customs Service, and the Immigration and Naturalization Service cooperated in a plan whereby all incoming passengers, both aliens and those claiming U. S. citizenship, were carefully investigated," N. J. Exh. 530, pp. 8–9, the report does not mention that any state agency participated in the interrogation.

under the Compact rendered any statement of "Ellis Island, New York" equivocal, without more, for prescriptive purposes, and the National Government's occupation tended to limit the notice to New Jersey of such acts as New York did perform. To weigh New York's evidence with an appreciation of these twin hurdles is not, as JUSTICE STEVENS charges, to resort to hypertechnicality, but to recognize that New York has a substantial burden to establish that it gave good notice to New Jersey of its designs on the made land. We accordingly examine the evidence of prescriptive activity that New York did serve up, which is closer to famine than feast. It falls into four principal categories.

1

There is some evidence that New York recorded vital statistics of people on the Island. The record contains New York certificates recording five births that probably occurred on the filled portions of the Island,[14] 22 New York certificates recording deaths on the Island, all but one of which are from a single 4-month period in 1924, and five[15] marriage certificates, four from 1901 and one from 1914.[16] For a period of

[14] New York also presented evidence of 17 birth certificates recording births before the 1897 fire on the Island. These certificates are not evidence of prescription, however, because New York failed to show that these births took place on the original Island; nothing in the record indicates where the hospital was located in 1897.

[15] There are actually six certificates in evidence, but one is a duplicate.

[16] The marriage certificates are augmented by Edward Corsi's interview of an Island employee named Frank Martocci, who recalled "numberless" weddings on the Island (said to have been solemnized under New York law) until the policy of marrying immigrants on the Island was dropped and the immigrants were brought to City Hall in New York instead. N. Y. Exh. 74, p. 409 (E. Corsi, In the Shadow of Liberty: The Chronicle of Ellis Island 87 (1935)). One of New York's witnesses, Harlan Unrau, the historian for the National Park Service, testified that Fiorello La Guardia's memoirs also describe trips to and from the Island to Manhattan to tie the knot. Tr. 3615–3618 (Aug. 8, 1996). This evidence amounts to little in the absence of recording, and at most would show that immigrants undomi-

64 years, this does not add up to much,[17] and even its meager significance is diminished by the absence of evidence of any regulation of the State or City of New York or the National Government providing for the registration in New York of births and deaths that occurred on the Island. Of the marriage certificates, the one dated 1914 indicates that the marriage took place on Manhattan Island, not Ellis Island, and the 1901 certificates reflect marriages that were probably performed in the Main Building, located on the original Island. There is no evidence that any marriages solemnized under New York law took place on the filled portion of the Island. Immigration officials were apparently concerned about complying with a law passed by New York in 1907 that required couples getting married to obtain a marriage license from the town in which the woman resided. 1907 N. Y. Laws, ch. 742. But that same law also provided that if the woman or both parties were nonresidents of the State, the marriage license could be obtained from the State in which the marriage was to be performed. *Ibid.* Obtaining a New York marriage license therefore carried no necessary implication of residence, and at the times in question the immigrants were, of course, undomiciled in America.[18] In sum, the foregoing evidence cannot possibly be claimed to show any continuous practice, and 32 record entries over more than six decades is not even arguably persuasive as circumstantial evidence that New York was acting on a claim of

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ciled in America were probably married in the Main Building at one time and later were taken to Manhattan.

[17] New York's expert testified that from 1890 to 1954 there were hundreds of births and thousands of deaths on the Island. Tr. 2719–2720, 2740 (July 31, 1996).

[18] The record suggests that all the marriages taking place on the Island and later at City Hall in Manhattan were marriages between immigrants or between a resident of the United States and a person who had just arrived. Immigration officials hoped that requiring young single women to marry their fiancés before they would be admitted to the country would help stem the importation of prostitutes.

right to any part of the Island or that New Jersey's officials must have known about the acts or the claim.

2

New York presented evidence of New York State and New York City statutes and ordinances that included the Island in voting districts, together with voting registration lists with names of people who indicated that they lived on filled portions of the Island. The limited force of this evidence is, however, manifest. The state statutes make no specific reference to the filled land, and even if they are read as doing so, they are evidence of claims made in Albany or Manhattan, not acts of sovereignty on the Island. Nor does the legislation reflect any awareness of changes in the Island's territory over time. The same New York statutes for the establishment of Senate and Assembly districts covering Ellis Island also purport to include another of the so-called Oyster Islands that had been dredged out of existence by 1903, see 1916 N. Y. Laws, ch. 373; 1917 N. Y. Laws, ch. 798; 1943 N. Y. Laws, ch. 359; in fact, the reference to the latter was not deleted from the New York statutes until 1953, see 1953 N. Y. Laws, ch. 893, and the related maps of the First and Second Assembly districts continued to show the missing Oyster Island as late as 1945. The depiction of Ellis Island on these maps remains constant even though throughout the first third of this century the Island continued to change size and shape. N. Y. Exhs. 957–963 (maps of Borough of Manhattan, 1st and 2d Assembly Dists., issued by Bd. of Elections of N. Y. C. (1918, 1926, 1927, 1929, 1930, 1939, 1945)). Since New York made no effort to update its description of voting districts to eliminate the reference to Oyster Island, never specifically indicated an intent to include the filled land in its voting districts, and failed to make any alteration in its representation of the Island on its voting maps, its legislative acts were not overtly prescriptive and furnished no reason for New Jersey to infer that New York intended to include

the filled portions of the Island in its voting districts. To the extent that the registration lists, on the other hand, have at least some tendency to suggest activity on the Island, there are lists for only 10 years out of the prescriptive period (1917, 1918, 1919, 1925, 1926, 1930, 1936, 1939, 1945, and 1953), and why New Jersey might have known about these lists is not addressed by any specific evidence.

3

The third category of New York's proffered prescription evidence covers personal impressions that the filled portions of the Island belong to New York. We have recognized before that the belief of the inhabitants of disputed territory that they are citizens of one of the competing States is "of no inconsiderable importance." *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 384 (1820); see also *Maryland* v. *West Virginia*, 217 U. S., at 41, 44 (noting that people living in the disputed territory gave allegiance to West Virginia); *Virginia* v. *Tennessee*, 148 U. S., at 527 (noting that all but a handful of the residents of the disputed territory considered themselves citizens of Tennessee). New York's strongest items of this sort of circumstantial evidence are the voting registration lists for 10 of the possible 60 years, on which numerous individuals list their residence as "Ellis Island, New York." The significance of the declarations is qualified, however, for the reasons we have already given, and the rest of New York's evidence about the understanding of individuals is hardly worth mentioning. This includes, for example, documents indicating that the same two men who witnessed the Commissioner of Immigration's signature on contracts four different times in 1908 and 1909 listed their residences as "Ellis Island, NY"; that another witness did the same once in 1904, and two others did in 1908. On one petition for naturalization filed in 1911 the applicant listed her residence as "Ellis Island, New York," as did her witness. Finally, one William Hewitt, who lived in the officers' quarters on the Island with

his family from July to September 1940 when he was one year old, testified that although he had "no personal recollection" of living on the Island, he has always thought that at that time he was living in New York. Tr. 3144–3145 (Aug. 5, 1996).[19]

4

The final category of relatively noteworthy evidence covers indications that during the relevant period the United States understood the filled portions of the Island to be part of New York. It is not, of course, that the understanding of officials of the United States, even those on the Island, is itself tantamount to prescriptive activity. The United States was in no sense New York's proxy. See *California* v. *Nevada*, 447 U. S. 125, 131 (1980) (noting that the United States does not have the power to reestablish boundary lines). It may, however, amount to persuasive evidence that a State's prescriptive acts have succeeded in their object.[20]

While the record does indeed contain some such evidence favorable to New York, other indications point the other way.

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[19] JUSTICE STEVENS contends that "[t]he evidence indicates that the millions of immigrants entering the country . . . believed that Ellis Island was located in New York." *Post*, at 820. Because New York presented no testimony to this effect, JUSTICE STEVENS relies upon steamship tickets, certificates of arrival, and landing cards that stated that the holder was going to or had arrived in New York. These various documents are entirely accurate insofar as every immigrant arriving at Ellis Island was processed through the New York Immigration District. But the documents prove nothing for this case, since throughout the period from 1891 to 1956 the New York Immigration District included northern New Jersey.

[20] When the understanding of national officials takes the form of published records, it may help to place a State on notice of an adverse claim and present occasion to protest or acquiesce. See, *e. g.*, *California* v. *Nevada*, 447 U. S., at 129–130 (noting that both States had adopted the United States Coast and Geodetic Survey line by statute and used it for nearly 80 years); *Vermont* v. *New Hampshire*, 289 U. S. 593, 613 (1933) (there was evidence that both States were familiar with congressional resolutions locating the disputed territory in Vermont but New Hampshire did not object); *Louisiana* v. *Mississippi*, 202 U. S. 1, 53–58 (1906).

In fact, the full record reveals not merely one understanding on the part of some United States officials about the Island's sovereignty, but three different understandings on this point, inconsistent with each other and inconstant over time.

First, there is some evidence that officials of the United States may have thought the entire Island was in New York. At various times from 1903 to 1925 the Commissioner of Immigration on Ellis Island used New York wages as a benchmark to show the need to raise the wages of federal workers on the Island. And although federal specifications governed construction projects on the Island, federal inspectors are known to have alluded to New York building codes as if they had been bases for relevant comparisons; a federal inspector would occasionally remark that if a particular building were subject to New York regulations, it would have to be condemned, and once, in 1935, when an official in the Public Works Branch of the Procurement Division recommended accepting a contractor's request to use a particular kind of bolt, the official noted that his New York counterparts had allowed the bolt to be used.[21] References to New York regulations as benchmarks do not, then, necessarily indicate that federal officials actually thought the filled land was part of New York.

After the passage of the Davis-Bacon Act, 46 Stat. 1494, however, comes less equivocal evidence of understanding. As originally enacted, this statute provided that workers on "any public buildings of the United States" be paid at a rate "not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public buildings are located," *ibid.*,

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[21] In 1905, a contract for work on the Island required that the work "must be of the best quality and in strict accordance with the present rules and regulations of the Department of Water Supply, Gas and Electricity, New York, N. Y." N. Y. Exh. 638, p. 47. This is the only contract on record where contractors were required to follow New York regulations as if they were binding.

and there is evidence that from 1931 to 1934 construction contracts for work on filled portions of the Island provided that wages for the City of New York applied.[22] The National Government also treated Ellis Island as part of New York in the 1900, 1910, 1920, and 1940 national censuses, and throughout the prescription period various officials referred to "Ellis Island, New York," in correspondence.[23]

But the National Government was nothing if not pluralistic in its views on the matter. In 1900, when the Government requested proposals for a kitchen and restaurant building on the Island, its announcement stated that "Ellis Island is not under the jurisdiction of the State or City of New York. The New York City and State Building Laws and

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[22] New York also presented evidence that in 1934 New York processed two workmen compensation claims for injuries sustained on filled land; it was not until 1936, however, that Congress permitted the application of state law to federal workmen's compensation claims. See *Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315 (1934). Nor is it clear from the record that the processing of these claims actually involved the application of New York law; the processing may be explained simply by the fact that the contractor for whom the victims worked was located in New York.

[23] In *United States ex rel. Belardi* v. *Day*, 50 F. 2d 816, 817 (1931), the Third Circuit held that Ellis Island was within the territorial jurisdiction of the District Courts of the Eastern and Southern Districts of New York. The court explained that "[w]hen [the Island] was property of New York it was within one or another of the counties of that state or within the waters thereof," and the former 28 U. S. C. § 178 (now 28 U. S. C. § 112) places the waters of the New York counties within the concurrent jurisdiction of the Southern and Eastern Districts. The court held that even though the 1834 Compact placed the Island on New Jersey's side of the boundary, "[t]he running of a boundary line in 1834 through the waters dividing the states of New York and New Jersey cannot disturb the statutory designation of jurisdiction in 1910." 50 F. 2d, at 817. Thus, the Third Circuit simply read the jurisdictional statute as placing any location within the waters subject to New York jurisdiction (as, under the Compact, the harbor waters were, for police purposes, even on the New Jersey side of the line) within the concurrent jurisdiction of the two named federal districts. The Third Circuit explicitly avoided determining anything about state sovereignty over the Island.

City Ordinances will not apply to the same in regard to building matters." N. Y. Exh. 775, sheet OO. From 1890 to 1911, however, the federal spokesmen did not stop at saying merely that the Island was not part of New York; in these years the federal Harbor Line Board prepared surveys of recommended Island pierhead and bulkhead lines for the approval of the Secretary of War, all of which were titled "Pierhead & Bulkhead Lines for Ellis' Island, New Jersey, New York Harbor, as recommended by the New York Harbor Line Board." App. to Exceptions of New Jersey 21a, 22a.[24] In 1904, as said before, the United States made an application to the Riparian Commission of New Jersey for certain lands under water adjacent to Ellis Island. The United States Attorney General, William Moody, at that time explained that the Government had not made the application earlier because it had previously "proceeded upon the theory that the ownership of the lands under water around Ellis Island was in the State of New York," but changed its view because "it would seem from [the Compact] that the ownership of the lands under water west of the middle of the Hudson River and of the Bay of New York is in the State of New Jersey." N. J. Exh. 351 (letter from U. S. Atty. Gen. William Moody to the Riparian Comm'n of New Jersey 1–2, dated July 15, 1904).[25] In 1933, New Jersey got the nod again when the

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[24] JUSTICE STEVENS brands this ascription to New Jersey as "obviously . . . a mistake." *Post*, at 826, n. 17. But the mistake (as to the original Island) was not obvious. See n. 25, *infra*.

[25] The New York Times reported that "[t]he chief interest in the application lies in the fact that it is a recognition of the claim that New Jersey and not New York owns the submerged lands in the vicinity of Ellis Island." N. J. Exh. 5 (N. Y. Times, July 19, 1904).

JUSTICE STEVENS contends that once New Jersey transferred title to the submerged lands to the United States "the parties may reasonably have believed that the State thereafter possessed neither ownership nor jurisdiction over that area, particularly since the Compact had provided that New York was entitled to exercise jurisdiction over the surrounding

INS applied to New Jersey for permission to construct a new seawall on filled land, which it received.[26]

Within a year of that, however, yet another view of the filled land's sovereignty began to develop in two other federal agencies, the view that neither State had a jurisdictional claim. Two Members of Congress from New Jersey, Senator

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surface." *Post*, at 816. On the contrary, the reasonableness of any such belief is belied by the fact that New York, to this day, has never claimed that it had any such understanding, presumably for two very good reasons. First, in transferring "all the right, title, claim and interest of every kind" in certain submerged lands to the United States in 1904, New Jersey's conveyance sounded much like New York's conveyance to the National Government in 1808 of all "right, title, and interest" in the original Island. (While the latter transfer was expressly "for the defense and safety" of the city and port, these words were not treated as limitations on the rights of the United States even when it converted the Island from a military installation to an immigration station.) If, then, New York had believed that New Jersey had no interest left to assert, it would have had to say the same for itself in relation to the original Island. Indeed, New York would have been in an arguably weaker position: in 1800 it had ceded "jurisdiction" to the United States (saving only its right to serve process), the territory subject to its conveyance was within the boundary of New Jersey, and New York had no general territorial right in the area except police jurisdiction over the waters. The arguably comprehensive extent of the New York conveyances is, moreover, the reason that JUSTICE STEVENS is mistaken to label the 1890–1911 federal Harbor Line Board maps as obviously wrong. See *post*, at 826–827, n. 17.

Second, if the United States, and not New Jersey, had sovereign authority over the filled land as a result of the 1904 transfer, New York's prescriptive claim to that territory would fail as a matter of law; the United States is immune to prescription by a domestic entity. *Texas* v. *Louisiana*, 410 U. S. 702, 714 (1973); *United States* v. *California*, 332 U. S. 19, 39–40 (1947).

[26] JUSTICE STEVENS, *post*, at 826, n. 17, contends that Corsi, who made the application on behalf of the INS, must have thought the seawall would be constructed in New York because he entered "New York" in a space on the permit application asking "[w]here work is contemplated." If Corsi truly thought the seawall was going to be constructed in New York, however, he must have been a whimsical soul to apply to New Jersey for a permit.

Hamilton F. Kean and Representative Mary T. Norton, wrote to the Department of Labor expressing concern that federal contractors were not hiring members of New Jersey's union locals even though the Island work site was part of New Jersey. N. J. Exhs. 12, 24–27. The Department of Labor asked the Procurement Division of the Public Works Branch of the Treasury Department for advice on this issue, and the Procurement Division originally decided that "[s]ince Ellis Island is not clearly within the boundary lines of either state and is clearly outside of the jurisdiction of either, workers should be drawn in roughly equal proportions from the two states." N. J. Exhs. 24, 33–35. When the Jersey City, New Jersey, chapter of Bricklayers, Masons, and Plasterers International Union would not settle for this neutrality and pressed the Treasury Department for a statement that Ellis Island was in New Jersey, the Department managed to lob the question back to the Department of Labor, whose solicitor (later Judge) Charles E. Wyzanski, Jr., sent this response: "[I]t seems to me perfectly apparent that your answer is sound: Ellis Island and Bedloe's Island are no more a part of New York or New Jersey than the Philippine Islands or Hawaii are. They are territories of the United States not falling under the jurisdiction of any one of the forty-eight states." N. J. Exh. 43. And yet matters did not rest there for long, for when a Government contractor, the Driscoll Company, later learned that it would have to employ both New York and New Jersey workers, it wrote to the Treasury Department calling attention to the 1834 Compact, of which the agency apparently had been unaware. With skillful evasiveness, the Treasury replied that under the Compact, "[t]he question appears to be one of fact: whether Ellis Island is within the territorial limits of New York or New Jersey. This does not seem to be a matter for determination by the Board of Labor Review." N. J. Exh. 51. When the contractor continued to protest any requirement to hire workers from New Jersey, the Procurement Division

responded that "Article 2 of [the 1834 Compact] seems to indicate clearly that New York has jurisdiction over Ellis Island." N. J. Exh. 52. The union local and Norton protested this decision, arguing that Solicitor Wyzanski was correct and calling attention to New Jersey's 1933 permit to the United States for work on the Island's seawall, as well as the 1904 deed from New Jersey to the United States conveying title to the submerged lands. The Procurement Division, again erroneously citing Article Second of the Compact, refused to budge.

The record does not reveal whether the Compact was ever brought to the notice of the Department of Labor, but if it was it made an impression markedly different from its effect on the Treasury. For in the 1940's, the Secretary of Labor moved from its solicitor's rejection of both States' claims to an acceptance of New Jersey's, issuing several decisions in the 1947–1949 period on proper wage rates for construction projects on the Island, to which he referred as "Ellis Island, New York Harbor, Hudson County, New Jersey." In the same period, the Department of Labor expressly ruled that New York building trade wage rates were not applicable to construction on the Island because "Ellis Island [is in] New York Harbor, in Hudson County, New Jersey." In June 1949, the Secretary declared that once again New York wage rates would apply; the Secretary explained only that "additional data and more current information have been assembled."

At the end of the day, or the possible prescription period, the circumstantial evidence of official federal views of Island sovereignty shows no consistent understanding, but simply a grab bag of opinions shifting back and forth between, and within, the agencies of the Government.

5

After reviewing all the evidence New York has presented, we find that with the arguable exception of maintenance of

some voting lists, New York has shown nothing more than a modest number of sporadic acts that might be regarded as prescriptive. Even the compilations of voting lists from time to time shared the characteristic of New York's other official acts in occurring off the Island, being either equivocal in their territorial references or ill calculated to give notice to New Jersey. Surely it is highly significant that the acts claimed as prescription by New York did not leave officials of the Island's actual occupants, the United States, with a settled or consistent understanding that the filled land might be subject to the sovereignty of New York.

C

New York also asserts the affirmative defense of laches, which "'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Kansas* v. *Colorado*, 514 U. S. 673, 687 (1995) (quoting *Costello* v. *United States*, 365 U. S. 265, 282 (1961)). It presses this defense in spite of our explanation in *Illinois* v. *Kentucky*, 500 U. S., at 388, that "[a]lthough the law governing interstate boundary disputes takes account of the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitations, it does so through the doctrine of prescription and acquiescence." New York seemingly hopes to benefit from the possibility recognized in *Kansas* v. *Colorado*, *supra*, at 687–688, that a laches defense may be available in some cases founded upon interstate compacts. We have no reason to explore that possibility here, however, because New York has made it plain that what it calls the defense of laches is not at all what it really asserts.

The claim of prejudice that New York raises under the guise of a laches defense includes no prejudice in defending against suit insofar as it is based upon the Compact and the doctrine of avulsion. New York does not, for example,

argue that evidence going to the meaning of the Compact's terms has been lost as a result of delay by New Jersey. Indeed, several of New York's *amici* have proffered extensive material bearing on those terms (though to no avail as explained in footnote 3, *supra*), and the State itself has relied upon historical records of littoral filling practices in the Compact period, without suggesting that delay by New Jersey contributed to the loss of any such evidence.

New York claims prejudice, rather, in presenting its affirmative defense of prescription and acquiescence. To establish that defense, as we have seen, New York must prove that it took action to acquire sovereignty independent of the Compact, and that New Jersey failed to protest. When New York thus asserts prescription as an affirmative defense, it is in the same position it would have occupied if it had itself brought an original action against New Jersey claiming sovereignty by prescription. On each of the essential elements of prescription and acquiescence New York has the burden of persuasion, and therefore, though raising a "defense," it is in effect a plaintiff. And it is in aid of this plaintiff's burden of proof that New York claims to have been prejudiced: it argues that if this action had been brought many years ago there would have been more evidence of sovereign acts by its officials, and better evidence of general understanding of where sovereignty lay, to enable it to carry its burden.

New York may be right, as a matter of fact, though it is hard to say. But even if the State is right, it cannot benefit from the defense of laches. This is so because New York is effectively a plaintiff on the issue of prescription and cannot invoke laches to escape the necessity of proving its affirmative case.

III

New Jersey's first and second exceptions go only to the dimensions of the original portion of the Island, the first questioning the Special Master's choice of water levels to

define the shoreline, the second challenging a miniscule detail of that line. Its third exception questions the authority to improve upon that line, once located.

A

As the Special Master saw it, under Article Second, which awarded the Island to New York without further geographical specification, that State's authority extends to the original Island's low-water mark, a conclusion with which we agree, though not for the same reasons that persuaded the Special Master. He relied heavily on the negotiations between New Jersey and New York in 1827, in which New Jersey at one point offered to give New York "the islands called Bedlow's Island, Ellis' Island, Oyster Island and Robbins Reef, to [the] low water mark of the same . . . ." N. J. Exhs. 280–292 (Report of the Commissioners of New York to the New York Legislature, Jan. 26, 1828, p. 3). We rest our own, like conclusion (given the silence of the Compact) on the general rule we have previously recognized, that the low-water mark is the most appropriate boundary between sovereigns. See *Vermont* v. *New Hampshire,* 289 U. S., at 606; *Handly's Lessee* v. *Anthony,* 5 Wheat., at 383. We explained this in *Handly's Lessee:*

> "This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. . . . Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes the boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark." *Id.*, at 380–381.

We assume that the parties to the Compact were well aware of our precedent and would have explicitly provided for a high-water mark boundary if that is what they intended.

Nor is our assumption unsettled by the fact, emphasized by New Jersey, that Article Third gives New York jurisdiction over "lands covered by the . . . waters [of the rivers and the Harbor] to the low-water mark on the westerly or New Jersey side thereof [subject to certain exceptions]." New Jersey argues that specification of a low-water mark as a jurisdictional boundary on the New Jersey shore suggests that some other, or high-water, line was intended elsewhere, as on Ellis Island. But we think any such inference would be unsound.

The jurisdiction bounded at the low-water mark under Article Third was New York's jurisdiction over the waters of the river and harbor. New York was also given jurisdiction over the land submerged by this water. Since jurisdiction over the submerged land followed from jurisdiction over the water, one might question whether the submerged land jurisdiction crept inland at high water. On the assumption that title to fast land generally extended to mean low water, the answer to this question was wholly academic so far as it related to Ellis Island and the other islands, but of potential consequence so far as it concerned the New Jersey shore. If New York's jurisdiction over submerged lands moved inland on Ellis Island with rising water, it would simply extend over land already subject to New York's jurisdiction under the general rule recognized in *Handly's Lessee*, since New York had jurisdiction over the original Island. But that would not be so on the New Jersey shore. If New Jersey's sovereignty extended to mean low water under the general rule, there would be a conflict with New York's jurisdiction over submerged lands on the margin covered by high water. The specification that New York's submerged land jurisdiction would stop at the low-water mark on the New Jersey shore thus resolved a question that would only arise at that

westerly shore, and the fact that the Compact so provides raises no implication that anything but the general rule of sovereignty to mean low water was intended with respect to any shoreline. The provision in question, indeed, confirms the intent of the compacting parties to follow the general, low-water mark rule.

B

New Jersey's second exception takes us to much narrower detail. The State challenges the sufficiency of the evidence for the Special Master's conclusion that the pier extending from the Island in 1834 was built on landfill, with the result that the area covered by it was meant to fall within New York's authority recognized in Article Second. The Special Master relied on a map of the Island from 1819, which appears to show a filled area around the location of the pier, and although New Jersey is correct that "it is possible that the pier was built on pilings," New Jersey Exceptions 47, New York's expert credibly testified that in the mid-1800's the use of pilings to create piers was still uncommon, and that it would have been much easier to add landfill to the shallow waters around the Island. We have to agree with the Special Master that the likely conclusion is that the pier was built on landfill.

C

Finally, New Jersey argues that this Court lacks the authority to adjust the boundary between the States in the manner that the Special Master recommended for reasons of practicality and convenience, and with this we agree. The Compact Clause, Art. I, § 10, cl. 3, provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." As we explained long ago, once a compact between States has been approved, "it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had been never contested." *Rhode Island* v. *Massachu-*

setts, 12 Pet. 657, 727 (1838). Indeed, congressional consent "transforms an interstate compact within [the Compact] Clause into a law of the United States," *Cuyler* v. *Adams*, 449 U. S. 433, 438 (1981); accord, *Texas* v. *New Mexico*, 462 U. S. 554, 564 (1983). Just as if a court were addressing a federal statute, then, the "first and last order of business" of a court addressing an approved interstate compact "is interpreting the compact." *Id.*, at 567–568. "[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms," *id.*, at 564, no matter what the equities of the circumstances might otherwise invite. See *Arizona* v. *California*, 373 U. S. 546, 565–566 (1963) ("[C]ourts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress"); *Washington* v. *Oregon*, 211 U. S. 127, 135 (1908) (noting that Congress had established the boundary between Washington and Oregon in the middle of the north channel, and that "[t]he courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel," even though changes in the waterway over the course of time seemed to indicate the equity of altering the boundary line); cf. *New Jersey* v. *Delaware*, 291 U. S. 361, 385 (1934); *Maryland* v. *West Virginia*, 217 U. S., at 46.

We appreciate the difficulties of a boundary line that divides not just an island but some of the buildings on it, but these drawbacks are the price of New Jersey's success in litigating under a compact whose fair construction calls for a line so definite.[27] See *Texas* v. *New Mexico*, *supra*, at 567, n. 13 (noting that litigation of disputes between States "is obviously a poor alternative to negotiation between the interested States"). A more convenient boundary line must

[27] This is the reason that the contemporary inconvenience of the boundary is no threat to the plausibility of the evaluation of the prescription evidence by the Special Master and the Court, as JUSTICE STEVENS suggests. See *post*, at 828–829.

therefore be "a matter for arrangement and settlement between the States themselves, with the consent of Congress." *Indiana* v. *Kentucky*, 136 U. S., at 508; see *Minnesota* v. *Wisconsin*, 252 U. S. 273, 283 (1920) ("It seems appropriate to repeat the suggestion . . . that the parties endeavor with consent of Congress to adjust their boundaries").

IV

The exception of the State of New Jersey to Part VII of the Special Master's report, which concerns our authority to adjust the original boundary line between the two States, is sustained. The other exceptions of New Jersey and those of the State of New York are overruled. The case will be recommitted to the Special Master for preparation of a proposal for a decree consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, concurring.

Many of us have parents or grandparents who landed as immigrants at "Ellis Island, New York." And when this case was argued, I assumed that history would bear out that Ellis Island was part and parcel of New York. But that is not what the record has revealed. Rather, it contains a set of facts, set forth with care by JUSTICE SOUTER and JUSTICE STEVENS (who do not disagree about the facts), which shows, in my view, that the filled portion of Ellis Island belongs to New Jersey.

I cannot agree with JUSTICE SCALIA that custom, assumption, and late 19th-century history fills in, and explains, an ambiguity in the original Compact between the States, for I do not find sufficient, relevant ambiguity. The word "relevant" is important, for the document, in fact, is highly ambiguous. But what I find the more serious and difficult ambiguity arises in sections upon which New York State does not

rely. See *ante,* at 773–775, 781–782, and nn. 3, 4 (discussing Article Third). The State has basically rested its case upon Article First and Article Second. See Brief for Defendant 11–15; Tr. of Oral Arg. 33, 35–36, 46. Those Articles specify that Ellis Island is in New Jersey waters, for the border between the States lies far to the east. Those Articles do mention an exception for New York's "present jurisdiction of and over Bedlow's and Ellis's islands," but they are silent about what would happen to an Ellis Island "avulsion," *i. e.*, the creation of significant additional territory through landfill. As JUSTICE SOUTER points out, *ante,* at 783, n. 6, silence is not ambiguity; silence means that ordinary background law applies; and that ordinary background law gives an island's avulsion not to the State that owns the island, but to the State in whose waters the avulsion is found. See *Georgia* v. *South Carolina,* 497 U. S. 376, 404 (1990); *Nebraska* v. *Iowa,* 143 U. S. 359, 361–362 (1892); see also *ante,* at 783–784.

Nor can I agree with JUSTICE STEVENS that New Jersey lost through prescription what once rightfully was its own. Too much of the evidence upon which he relies is evidence of events that took place during the time that neither New York nor New Jersey, but the Federal Government, controlled Ellis Island. At that time, Judge Wyzanski expressed the view that:

> "Ellis Island and Bedloe's Island are no more a part of New York or New Jersey than the Philippine Islands or Hawaii are. They are territories of the United States not falling under the jurisdiction of any one of the forty-eight states." N. J. Exh. 43.

The Federal Government's virtually exclusive authority over the Island means that New Jersey could well have thought about the same. Perhaps more specialized property lawyers would have phrased their own conclusions in less ringing terms and with more numerous qualifications. But, still,

one cannot reasonably expect New Jersey to have mounted a major protest against *New York's* assertions of "sovereignty" (modest as they were) over territory that was within the control of the Federal Government. Nor can one expect the immigrants themselves to have taken a particular interest in state boundaries, for most would have thought not in terms of "New York" or "New Jersey," but of a New World that offered them opportunities denied them by the Old. Given this background, any legal rule of "prescription" that found New York to have surmounted its high barrier here would create serious problems of fairness in other cases.

For these reasons, in particular, and others, all spelled out in detail by JUSTICE SOUTER, I must conclude that the filled portion of Ellis Island belongs not to New York, but to New Jersey. I therefore join the Court's opinion.

JUSTICE STEVENS, dissenting.

While I agree with the Court's analysis of the relevant legal issues, I do not agree with its appraisal of the evidence. Because we are in effect sitting as a trial court, and because the relevant evidence is either documentary or uncontradicted oral testimony, we are able to make our own findings of fact and draw appropriate inferences from those findings. In my judgment a preponderance of that evidence supports a finding that all interested parties shared the belief that the filled portions, as well as the original three acres, of Ellis Island were a part of the State of New York for over 60 years. That finding, in turn, supports the conclusion that New York acquired the power to govern the entire Island by prescription.

During the period between 1892 and 1954 Ellis Island served as the Gateway to America for over 12 million immigrants. Thousands of citizens worked on the Island and hundreds resided there during those six decades. There is no evidence that any of those people ever believed that any

part of Ellis Island was in the State of New Jersey. What evidence is available uniformly supports the proposition that whenever a question of state authority was considered by any members of that multitude of immigrants and citizens, both they and the responsible authorities in New York assumed that all of Ellis Island was a part of New York. The relevant facts were sufficiently public and obvious to support a presumption that, with one temporary exception, the authorities in New Jersey shared that belief. The fact that all of the relevant evidence concerning that period points in the same direction is far more significant than the fact that the quantity of evidence supporting certain propositions is not large. A solitary fingerprint may establish a preponderance of the evidence when there is a total absence of evidence pointing in another direction.

I

As a preface to its factfinding, the Court provides us with two reasons for discounting the probative force of much of New York's evidence: the fact that New Jersey concedes that the original Island is in New York and the fact that the Island was occupied by the United States during the relevant period. *Ante*, at 790–794. Neither of those facts undermines the force of the uncontradicted evidence. I believe that a more appropriate preface to our factfinding function is a comment on the probable expectations of the three sovereigns who participated in the decision to enlarge the Island for use as an immigration station.

In 1890, when that decision was made, the 1834 Compact establishing the boundary between the two States had not yet been construed. Article Second of the Compact made it clear that Ellis Island was in New York, but Article Third identified separate interests in the area surrounding the Island. New Jersey was accorded "the exclusive right of property in and to the land under water" but New York was

accorded exclusive jurisdiction over those waters.[1] In 1904, when New Jersey conveyed to the United States its entire "right, title, claim and interest of every kind" in those submerged lands, the parties may reasonably have believed that the State thereafter possessed neither ownership nor jurisdiction over that area, particularly since the Compact had provided that New York was entitled to exercise jurisdiction over the surrounding surface.

It is thus not surprising that during the entire period when the Island was enlarged, and when buildings were constructed on filled land, there appears to have been no discussion of the possibility that the Island might be located in two different States. Indeed, even in 1955 and for several years thereafter when representatives of New Jersey vociferously asserted jurisdiction over Ellis Island, they claimed not just the filled portions but the entire Island. It was not until 1963 that New Jersey first advanced the claim that the state line split the Island (and, consequently, three buildings on the Island). Thus, the preponderance of the evidence supports a finding that during the relevant period between 1890 and 1954 both New Jersey and New York believed that the entire Island was located in one State.

II

Census data collected by both New York and the Federal Government establish that nonimmigrants resided on Ellis Island throughout the relevant period. This population increased from 93 in 1915, to 124 in 1920, and 182 in 1925.[2]

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[1] Article Third also preserved New Jersey's jurisdiction "over the wharves, docks, and improvements, made and to be made on the shore of the said state," but that provision is not relevant because the original additions to Ellis Island were improvements to the shore of New York, not New Jersey. 4 Stat. 710.

[2] These figures refer to nonimmigrants. The 1920 federal census stated that there also were 270 "patients" and 97 "immigrants" on the Island. The 1940 federal census stated that 717 people lived on the Island but does not indicate how many of them were nonimmigrants. Since the 1940

The uncontradicted testimony indicates that these people lived only on the filled portion of the Island. They were employed as cooks, maids, nurses, and hospital attendants. Both the New York and federal censuses counted these people as residents of New York.

The evidence also indicates that these residents voted in New York elections. According to maps prepared by the New York City Board of Elections in 1918, 1926, 1927, 1930, and 1945–1946, Ellis Island was part of a New York State Assembly District. Moreover, both the 1894 and the 1938 New York State Constitutions place Ellis Island in a New York State Senate District. Furthermore, since 1911 New York law has explicitly included Ellis Island in a federal congressional district. Finally, records of the New York City Board of Elections for 1918, 1919, 1925,[3] 1930, and 1953 indicate that Ellis Island residents actually voted during those years. Indeed, an official list of enrolled voters for "1944–1945" identifies the party affiliation of over 50 residents of Ellis Island. It is reasonable to infer that residents of Ellis Island regularly voted in elections for New York offices and for candidates to represent New York in the United States Senate and House of Representatives. Given the public character of that activity it is also reasonable to infer that New Jersey was fully aware of that voting.

The Court fails to give proper weight to the fact that the entire population of the Island was counted as a part of New York in the federal census. The accuracy of the census is a matter of great importance to every State because it determines the size of a State's congressional delegation, as well as providing "the basis for the allocation of various benefits and burdens among the States under a variety of federal

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total was roughly 50% greater than the 1920 total, the number of nonimmigrants may also have risen by a similar percentage.

[3] The 1925 records refer to 25 voters from Ellis Island, 14 of whom gave their addresses as on either Island No. 2 or Island No. 3, both of which are fill.

programs." *Franklin* v. *Massachusetts*, 505 U. S. 788, 814 (1992). Given the fact that a shift of only one or two hundred persons from one State to another might cause a State either to lose one of its seats in Congress or to fail to gain the number warranted by its relative increase in population, the accuracy of the census count is surely a matter of vital importance to the State.[4] The consistent treatment of Ellis Island residents as residents of New York in the federal census is a matter that must have come to the attention of New Jersey and which was clearly of sufficient importance to prompt a vigorous objection if responsible state officials believed that those residents really lived in New Jersey. The fact that the Island was under federal control does not minimize in the slightest the importance of the census figures, or the importance of the other public acts that authorized Ellis Island residents to vote in New York elections.

III

There is uncontradicted testimony that between 1892 and 1954 there were hundreds of births and thousands of deaths on the Island. Since the hospital was located on the filled portions of the Island, virtually all of those births and deaths must have occurred in what is now claimed to be part of New Jersey. Presumably each of those births and each of those deaths was recorded in either a birth certificate or a death certificate. There is no evidence that any such certificate was issued by New Jersey. Given the fact that all of the relevant birth certificates and all of the relevant death certificates that have been found were issued by New York authorities, it is reasonable to infer that New York actually issued hundreds of birth certificates and thousands of death certificates to record events that occurred on Ellis Island. A preponderance of the evidence therefore would support a finding that throughout the relevant period New York per-

[4] See generally *Department of Commerce* v. *Montana*, 503 U. S. 442 (1992).

formed the governmental function of recording the births and deaths on Ellis Island, and that the families of those decedents and newborn infants thought that those events occurred in New York.

IV

There is evidence that hundreds of marriages were performed on Ellis Island from 1892 to 1907. The exact number is uncertain, but it is undisputed that they were solemnized under New York law.[5] Moreover, after a 1907 amendment to New York's domestic relations law, Ellis Island residents obtained their marriage licenses at City Hall in New York City. Fiorello La Guardia, who served as an interpreter on the Island between 1907 and 1910, escorted couples to Manhattan so that they could get married. Presumably similar trips were made by engaged couples throughout the balance of the relevant period.[6] There is no evidence of any Ellis Island resident being married under New Jersey law.

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[5] Although only a few marriage licenses are in the record, they are all New York licenses.

While there is some dispute over where these marriages occurred on the Island, it is fair to conclude, as the Court does, that these marriages were typically performed in the Great Hall of the Main Building, which was located on the original Island. Thus, they were performed in New York. The Court discounts the significance of this evidence because it does not necessarily constitute prescriptive activity on the filled portion of the Island. But if we assume, as the record plainly indicates, that everyone then believed that the entire Island was located in the same State, these marriages provide further confirmation of the proposition that everyone on the Island believed that that State was New York.

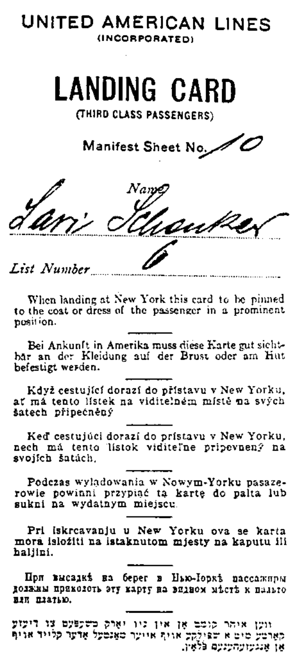
[6] One Ellis Island employee, who worked on the Island during the early part of the century, remembered as follows:

"'Very often brides came over to marry here, and of course we had to act as witnesses. I have no count, but I'm sure I must have helped at hundreds and hundreds of weddings of all nationalities and all types. The weddings were numberless, until they dropped the policy of marrying them at the Island and brought them to City Hall in New York.'" E. Corsi, In the Shadow of Liberty 87 (1969) (hereinafter Corsi).

V

The evidence indicates that the millions of immigrants entering the country, as well as the hundreds of residents of the Island, believed that Ellis Island was located in New York. For many of the immigrants, their journey to America began with a steamship ticket with the destination listed as "New York." Upon arrival, the "certificate of arrival" for each newcomer was marked "Ellis Island, New York"; indeed, hundreds of thousands of such certificates of arrival are on file at the National Archives. Moreover, upon arrival, a federal official pinned a Landing Card on each newcomer; according to a representative card, the Landing Card stated, in eight different languages: "When landing at New York this card is to be pinned to the coat or dress of the passenger in a prominent position."[7] Given this evidence,

[7] One such Landing Card read as follows:


UNITED AMERICAN LINES
(INCORPORATED)

LANDING CARD
(THIRD CLASS PASSENGERS)

Manifest Sheet No. 10

Name

List Number 6

When landing at New York this card to be pinned to the coat or dress of the passenger in a prominent position.

Bei Ankunft in Amerika muss diese Karte gut sichtbar an der Kleidung auf der Brust oder am Hut befestigt werden.

Když cestující dorazí do přístavu v New Yorku, ať má tento lístek na viditelném místě na svých šatech připečněný

Keď cestujúci dorazí do prístavu v New Yorku, nech má tento lístok viditeľne pripevnený na svojích šatách.

Podczas wyladowania w Nowym-Yorku pasażerowie powinni przypiąć tą kartę do palta lub sukni na wydatnym miejscu.

Pri iskrcavanju u New Yorku ova se karta mora isložiti na istaknutom mjesty na kaputu ili haljini.

При высадкѣ на берег в Нью-Іоркѣ пассажиры должны прикoлоть эту карту на видном мѣстѣ к пальто или платью.

ווען איהר קומט אן אין ניו יארק מעקפעם צו דיזע קארטע מיט א שפילקע אויף אייער מאנטעל אדער קלייד אויף אן אנגעזעהענעם פלאץ.

it is certainly fair to infer that the new immigrants believed that they had arrived in New York.

Similarly, residents of Ellis Island—all of whom lived on the filled portions of the Island—believed that they lived in New York. Documents executed by residents of the Island during the relevant period consistently referred to their address either as "Ellis Island, N. Y.," or as "Ellis Island, New York." These references appear not only in voting records, but in other miscellaneous documents as well. Given the fact that the United States Postal Service placed the Island in a New York postal zone, presumably the residents regularly received mail addressed to "Ellis Island, N. Y." There is no evidence that any of those residents prepared or received any mail or other documents describing their residence as in New Jersey.

Thus, the available evidence supports the proposition that the new immigrants, as well as everyone who lived on the Island during that period, thought that all of Ellis Island was a part of New York. Significantly, as far as I am aware, there is not a single indication in the voluminous record[8] that any immigrant or any resident thought that Ellis Island, in whole or in part, was a part of New Jersey.

VI

On the few occasions identified in the record when it was necessary to obtain state or municipal assistance for law enforcement or fire protection on Ellis Island during the relevant period, those services were performed by New York employees. Thus, in the 1897 fire, "New York rushed twenty policemen to keep order among the panic-stricken immigrants."[9] In 1916, New York City firemen extinguished a fire in the seawall cribbing. In 1934, New York police investigated a fatality that resulted from a construc-

[8] The record contains over 2,000 documents (some of which are hundreds of pages long) and over 4,000 pages of trial testimony.

[9] Corsi 114.

tion accident on the Island. In 1942, the New York City Police Department formed a special squad to assist federal officials in questioning immigrants arriving at the Island. Thus, despite the fact that federal officials were in control of the Island, these incidents are consistent with the view that New York retained an interest in the Island, but New Jersey did not.[10]

VII

When courts considered the question, they consistently assumed or decided that Ellis Island was a part of New York. Thus, in 1915 one New York state court assumed that it had jurisdiction over an action for assault allegedly committed on the Island.[11] In 1931, the United States Court of Appeals for the Third Circuit, which includes New Jersey, held that the District Court for the District of New Jersey did not have jurisdiction over a habeas corpus petition filed by an alien detained on the Island.[12] The federal judges sitting in

[10] The Master discounted this evidence by stating that there was evidence that New Jersey also policed the Island. Final Report of Special Master 114. The evidence cited, however, involved a single incident in 1966—over 10 years after the end of the relevant period. Tr. 3636–3637 (Aug. 8, 1996); see also 3 H. Unrau, Ellis Island, Statute of Liberty National Monument, New York-New Jersey 1173 (1984).

[11] *Rettig* v. *John E. Moore Co.*, 90 Misc. 664, 154 N. Y. S. 124 (App. Term 1915).

[12] "The first contention is predicated on the assertion that Ellis Island is in the District of New Jersey and therefore within the jurisdiction of the District Court for that district.

"The island is property of the United States, ceded to the United States by the State of New York in 1808 and since 1891 used by the United States as an Immigration Station for the Port of New York. When it was property of New York it was within one or another of the counties of that state or within the waters thereof. With respect to federal jurisdiction over such counties and their waters, the United States by statute (28 U. S. C. § 178, Judicial Code, § 97) prescribed the territorial limits of the Southern District of New York and the Eastern District of New York as embracing certain counties 'with the waters thereof' and provided that the District Courts for the Southern and Eastern Districts 'shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk. * * *' This it would

the Southern District of New York exercised jurisdiction over cases arising out of the detention or deportation of aliens on Ellis Island. During the relevant period there is no evidence that any judge, state or federal, considered the possibility that Ellis Island might be in two States. Nor is there any evidence that any judge, state or federal, ever held that Ellis Island was a part of New Jersey.[13]

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seem vested federal jurisdiction with respect to Ellis Island in the District Courts of the two named New York districts. But the relator, showing that by the Act of June 28, 1834 (4 Stat. 708) a boundary line between the states of New York and New Jersey had been run down the Hudson River to the sea, 'submitted' that Ellis Island is on the westerly or New Jersey side of the harbor and therefore is in—or 'not entirely' outside—the District of New Jersey and within at least 'the concurrent jurisdiction of the District Court for the District of New Jersey and the District Courts for the Eastern and Southern Districts of New York.' Jurisdiction is determined by statute, not by geography. The statute expressly, and therefore exclusively, placed federal jurisdiction of Ellis Island in the District Courts of the two named New York districts. The running of a boundary line in 1834 through the waters dividing the states of New York and New Jersey cannot disturb the statutory designation of jurisdiction in 1910.

"Therefore we hold that the judge of the District Court for the District of New Jersey had no power to issue the writ of habeas corpus prayed for in this case, to be executed outside of the territorial jurisdiction of his court." *United States ex rel. Belardi* v. *Day*, 50 F. 2d 816, 817 (CA3 1931).

[13] In a more recent case, the Court of Appeals for the Second Circuit reached the same conclusion as the Third:

"Ellis Island remains a part of New York by acknowledgment of the government and without objection (except in this case) by New Jersey. It has been a component of New York Congressional, State Senate and Assembly districts for more than one hundred fifty years. As part of New York County, it lies within the territorial jurisdiction of the United States District Court for the Southern District of New York, 28 U. S. C. § 112, and of New York's first judicial district, N. Y. Const. art. VI, § 6; see *Rettig* v. *John E. Moore Co.*, 90 Misc. 664, 154 N. Y. S. 124 (N. Y. App. Term 1915) (civil suit for assault committed 'upon government property at Ellis Island'). The government treats the entire area of Ellis Island as part of Manhattan for census purposes and has assigned a New York postal zip code to the Island. Those who have resided on Ellis Island, both before and after the Compact, have been treated as citizens of New York. In order to avoid liability in this case, the government asserts for the first time that certain portions of Ellis Island belong to New

VIII

The Court discounts the probative force of most of New York's evidence by repeatedly reminding us that New York has the burden of proving prescription, and in many instances has failed to prove that New Jersey had actual notice of what happened on the Island, or, more narrowly, that the relevant events occurred on the filled portion rather than the original three acres. The discount would be appropriate if we were reviewing the history of a remote atoll in the far Pacific. In fact, Ellis Island was an enclave entirely within the geographic boundaries of New Jersey; a ferry connected it with Jersey City, which is less than a quarter of a mile away. Particularly during the first few decades of the prescriptive period, it teemed with activity that was open and notorious. Moreover, given the fact that 90% of the Island was filled land, it is surely reasonable to infer that whenever the specific location of a prescriptive event was in doubt, it is more likely than not that it occurred in what is now claimed to have been New Jersey.

Not only should we presume notice to New Jersey of what was occurring within the outer boundaries of the State; we must also presume that New Jersey was aware of the official acts of both New York and the United States that were predicated on the understanding that all of Ellis Island was in New York. Judicial districts, legislative districts, postal districts, and census districts all included the entire Island within New York.

IX

The only significant evidence[14] offered by New Jersey to support the proposition that it did not accept New York's

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Jersey. However, long acceptance of the status quo counts for a great deal in matters of territorial disputes between states." *Collins* v. *Promark Products, Inc.*, 956 F. 2d 383, 387–388 (1992).

[14] There was also evidence that Hudson County, New Jersey, had placed Ellis Island on its tax roles. The county, however, did not ever attempt to collect taxes; because the Island was owned by the Federal Government, Ellis Island was marked as "exempt."

prescription of the entire Island relates to Representative Norton's efforts in 1934 and 1935 to persuade federal officials to use New Jersey labor in construction work on Ellis and Bedloe's Islands. In her letter of August 25, 1934, she advised the Division of Procurement of the Treasury Department that a local union in her home city contended[15] that "these islands are part and parcel of the State of New Jersey."[16] On March 19, 1935, she again advanced the position that Ellis Island was in New Jersey. When the Treasury Department ultimately rejected her submission, the matter appears to have been dropped.

Representative Norton's correspondence fails to establish nonacquiescence for several reasons. First, it demonstrates that people in New Jersey were actually aware of what was happening on Ellis Island. Second, when the Treasury Department ultimately rejected Representative Norton's sub-

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[15] In a letter of July 31, 1934, the union wrote to Representative Norton:

"At the present time on Ellis Island there are under the course of erection several buildings and from maps obtained by us of the Department of Conservation and Development of the State of New Jersey, the latest edition of which was printed and revised in 1932 *[sic]* show specifically that this Island is entirely within the boundary lines of the State of New Jersey. This being the case we feel that Unions in New Jersey should have jurisdiction over this work and have protested to our International Union for the right to cover this operation." N. J. Exh. 18 (letter of Thomas F. Moore, Secretary, Bricklayers, Masons & Plasterers International Union, Local No. 10, New Jersey, to Honorable Mary T. Norton).

Similarly, on August 18, 1934, the union wrote to Representative Norton:

"Since the middle part of June this union has sought jurisdiction of those Islands lying in New York Bay, known as Ellis and Bedloes Islands, from the Executive Board of our International Union. It is our contention that these Islands are part and parcel of the State of New Jersey. We have also obtained official maps of the State of New Jersey . . . which shows *[sic]* that these Islands lie within the boundary lines of the State of New Jersey." N. J. Exh. 28 (letter of Thomas F. Moore, Secretary, Bricklayers, Masons & Plasterers International Union, Local No. 10, New Jersey, to Honorable Mary T. Norton).

[16] N. J. Exh. 29 (letter of Honorable Mary T. Norton, House of Representatives, to Division of Procurement, Treasury Department).

mission, she acquiesced in that rejection and the entire State joined in that acquiescence for another 20 years. Finally, the fact that her correspondence espoused the manifestly untenable position that the entire Island belonged to New Jersey makes it rather clear that she was not advancing a serious claim on behalf of the State.[17]

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[17] The Court points to a few incidents when federal officials equivocated over whether Ellis Island belonged to New York or New Jersey. *Ante*, at 801–805. These incidents do not, of course, speak to New Jersey's non-acquiescence; nonetheless, they are relevant to New York's claims of prescription. None of these incidents, however, is significant.

First, maps from the Harbor Line Board from 1890 to 1911 labeled Ellis Island as being part of New Jersey. Yet since only the original Island existed in 1890, the first mapmaker obviously made a mistake; given the fact that the state designation had no practical consequence, it is reasonable to conclude that the mistake was simply carried forward in subsequent maps. Second, the Federal Government purchased the underwater land surrounding the Island from New Jersey in 1904; but because the 1834 Compact gave New Jersey property rights to such land, it is fair to assume that the Federal Government merely saw itself as purchasing this property from its rightful owner. Third, Edward Corsi, the Commissioner of Immigration on Ellis Island, applied to New Jersey's Board of Commerce and Navigation for permission to construct a new seawall in 1933. One of the blanks on the permit application asked "[w]here work is contemplated"; Corsi entered "New York." N. J. Exh. 10. So while it is unclear why Corsi applied to New Jersey for the permit, it is clear from the face of the document that Corsi believed the work was being performed in New York. Fourth, after Representative Norton argued that some of the jobs on Ellis Island should be given to New Jersey residents, federal officials initially proposed a compromise solution, dividing the jobs between New Jersey and New York; as noted, however, the officials eventually concluded that all of Ellis Island belonged to New York. Finally, from 1947 to 1949, the Department of Labor used New Jersey wage rates to determine wages for construction projects on the Island; in 1949, however, the Secretary reversed his decision—because "additional data and more current information ha[d] been assembled." N. J. Exh. 90.

These five incidents do not undermine New York's claim of prescription. Moreover, these isolated incidents are dwarfed by the Federal Government's repeated statements and actions that treated all of Ellis Island as a part of New York. The Immigration Service, the federal agency most intimately involved with the Island, clearly believed that all of Ellis Island

X

JUSTICE BREYER's concurrence merits a separate comment. He places great reliance on Charles Wyzanski's statement that Ellis Island was not a part of either New Jersey or New York during the prescriptive period, but rather was a territory of the United States not falling within the jurisdiction of any of the then 48 States. See *ante*, at 813. Wyzanski, who was then the Solicitor of Labor, made this statement during the Federal Government's consideration of Representative Norton's request. As already noted, after full consideration, the Government rejected her request.

It is true that Wyzanski was an exceptionally able lawyer, but it is perfectly clear that in this instance he was simply wrong. Like numerous other federal enclaves within the United States, Ellis Island was unquestionably subject to the jurisdiction of the State or States in which it was located. Nevertheless, even though Wyzanski was clearly wrong, I would agree with JUSTICE BREYER that Wyzanski's opinion would be relevant if it stated a view that was expressed by others during the prescriptive period. In fact, there is not a shred of evidence that anyone else shared that view, either before or after Wyzanski made the statement. The prevailing view during the relevant period was that shared by the legislators who drew the boundaries of the congressional districts, the census takers who treated Ellis Island residents as citizens of New York, and the New York officials who supervised their voting in New York and recorded the births, marriages, and deaths that occurred on the Island. Indeed,

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was part of New York, as is evidenced by dozens and dozens of documents in the record. Similarly, the Department of Public Health, the Navy Department, the Department of Treasury, and the Justice Department all repeatedly treated Ellis Island as a part of New York. (Although my analysis does not turn on this point, it is worth noting that many of these documents specifically refer to the filled portions of the Island.) In addition, as far as I am aware, every Act of Congress that mentioned the location of Ellis Island gave its location as New York.

one may infer from JUSTICE BREYER's opinion that his grandparents shared that view as well.

XI

In my opinion the conclusion that New York acquired jurisdiction over the entire Island by prescription is supported not merely by a preponderance, but by clear, convincing, and uncontradicted evidence.[18] With all respect, I am persuaded that the Court's contrary conclusion rests on a hypertechnical focus on detail that overlooks the significance of the record as a whole. What I believe was apparent to virtually everyone in New York and New Jersey, as well as to the millions of immigrants who entered our melting pot through the Ellis Island Gateway during the early part of this century, is somehow obscured in a voluminous trial record. The implausibility of the Court's conclusion is underscored by the strange boundary line that it has decreed.

Instead of the entire Island constituting an enclave within the borders of New Jersey, now New York's share of the Island is an enclave within New Jersey's share of the Island. The new state line intersects three buildings—the Main Building, the Baggage and Dormitory Building, and the Boathouse Building. Thin strips of New Jersey's sovereign territory separate New York from the ferry slip where boats operated by the City of New York have been delivering millions of visitors annually. By ending New York's sovereignty over a large portion of the ferry slip in front of the Main Building, well short of the slip's seawall, the decree denies New York access to, and control over, the area of land most intimately and functionally connected to the operation

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[18] Because I think it clear that New York has acquired the power to govern the entire Island by prescription, it is not necessary for me to comment on the eminently sensible approach set forth by JUSTICE SCALIA, *post*, p. 829.

of the Main Building. The Master correctly stated that this result is "neither just nor fair to New York."[19]

In my opinion it is not only the bizarre boundary that is unfair to New York. It is the failure to draw the commonsense inference that neither State could have contemplated such a bizarre division of the Island during the prescriptive period that lasted for over 60 years. During that entire period both States most certainly treated Ellis Island as part of a single State. Unquestionably, that State was New York.

Accordingly, I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I agree with JUSTICE STEVENS that the available evidence supports the conclusion that "all interested parties shared the belief that the filled portions, as well as the original three acres, of Ellis Island were a part of the State of New York for over 60 years," *ante*, at 814 (dissenting opinion). And I agree that New Jersey's claim to the filled portions should be rejected for that reason.

I would not, however, rely upon prescription. Since that doctrine permits a claimant to oust the original, undoubted owner, it justifiably demands a very high burden of proof. Specifically, and in the context of the present case, it requires, as the Court points out, not merely acts of possession and jurisdiction on the part of New York, but also, on the part of New Jersey, "acquiescence in those acts of possession and jurisdiction," which in turn requires "knowledge that New York acted upon a claim to the added land, or evidence of such open, notorious, visible, and uninterrupted adverse acts that New Jersey's knowledge and acquiescence may be presumed." *Ante*, at 787.

I see no reason to climb that mountain in the present case. New Jersey is *not* the original, undoubted owner whose title

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[19] Final Report of Special Master 163.

could have been eliminated only by prescription. The status of Ellis Island is governed by a contract between New York and New Jersey—the Compact of 1834—that is, on this point, poorly drafted and ambiguous.* It is hornbook contracts

*JUSTICE BREYER asserts that there is no "sufficient, relevant ambiguity" because New York has "basically rested its case upon Article First and Article Second" of the Compact, which "are silent about what would happen to an Ellis Island 'avulsion,' " leading JUSTICE BREYER to the conclusion that the normal rules of avulsion apply. *Ante*, at 812, 813 (concurring opinion). It is true that the State of New York did not claim title through Article Third, but it relied heavily upon Article Third in giving meaning to Articles First and Second—as we must do as well, since the Compact was meant to form an integrated whole. JUSTICE BREYER contends that Articles First and Second "specify that Ellis Island is in New Jersey waters, for the [Article First] border between the States lies far to the east." *Ante*, at 813. But Article First establishes a boundary down the middle of the Hudson only "except as hereinafter otherwise particularly mentioned." The exceptions include (in Article Second) New York's jurisdiction over Ellis Island, and its "exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state." New York's claim that the normal rules of avulsion were not meant to apply to this exception rests largely upon its contention that one of the major purposes of the Compact was to "guarante[e] New York's control over commerce and navigation in New York Harbor," which was achieved (1) by Article Second's giving New York "exclusive jurisdiction" over all the islands in the bay, and (2) *by Article Third's* giving New York "exclusive jurisdiction" (the same language) over all the waters and submerged lands of the bay. Exceptions of State of New York to Report of Special Master 16. This major purpose, according to New York, would be defeated if landfill additions to the islands on the New Jersey side of the bay became little enclaves of New Jersey. It is therefore not true that New York did not rest its argument upon Article Third—and not true (when one reads the Compact as a whole) that Article Second unambiguously leaves the question of landfill on Ellis Island to the background law of avulsion.

I may add that even if Article Third were totally unconnected to Articles First and Second, I do not think in a matter of this consequence we should hear only the arguments of the State of New York, and disregard those of New York City, which has a vital interest in this matter and participated actively as an *amicus*, in submitting evidence, examining wit-

law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning. See, *e. g.*, 17A Am. Jur. 2d, Contracts § 357 (1991); Restatement (Second) of Contracts §§ 202(4), 203 (1979); Uniform Commercial Code § 2–208(1), 1 U. L. A. 407 (1989).

We have applied that principle before to treaty cases (the Compact here is of course a treaty). See, *e. g.*, *Air France* v. *Saks*, 470 U. S. 392, 396 (1985) (" '[T]o ascertain [the] meaning [of treaties] we may look beyond the written words to . . . the practical construction adopted by the parties' ") (quoting *Choctaw Nation* v. *United States*, 318 U. S. 423, 431–432 (1943)). We have also applied similar reasoning to the precise area of interstate boundary disputes. See *Vermont* v. *New Hampshire*, 289 U. S. 593, 619 (1933) ("[T]he practical construction of the boundary by the acts of the two states and of their inhabitants tends to support our interpretation of the Order-in-Council of 1764"). I would do so again here.

For a lengthy period of time all the parties to the Compact—New York, New Jersey, and the United States—behaved as though all of Ellis Island belonged to New York. New York provided to the residents of the Island, including the filled portions, privileges and services a sovereign normally provides—the right to vote, civil marriages, birth and death certificates, police and fire protection. As far as appears, New Jersey provided none of them; and whether or not New Jersey knew that New York was behaving like a sovereign, it assuredly knew that *it* was *not*. And the United States, for its part, treated the Island as part of New York for its governmental purposes, including the constitutionally required decennial census, the assignment of postal

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nesses, and presenting argument. The city *did* rely upon Article Third as an independent basis for New York's jurisdiction. It seems to me that JUSTICE BREYER and the Court bend over backward to pronounce clarity in this document where there is none.

zones, and (in the end) application of the Davis-Bacon Act, 46 Stat. 1494. That practical construction suffices, in my view, to establish what the Compact of 1834 meant.

Syllabus

COUNTY OF SACRAMENTO ET AL. *v.* LEWIS, ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF LEWIS, DECEASED

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

No. 96–1337. Argued December 9, 1997—Decided May 26, 1998

After petitioner James Smith, a county sheriff's deputy, responded to a call along with another officer, Murray Stapp, the latter returned to his patrol car and saw a motorcycle approaching at high speed, driven by Brian Willard, and carrying Philip Lewis, respondents' decedent, as a passenger. Stapp turned on his rotating lights, yelled for the cycle to stop, and pulled his car closer to Smith's in an attempt to pen the cycle in, but Willard maneuvered between the two cars and sped off. Smith immediately switched on his own emergency lights and siren and began high-speed pursuit. The chase ended after the cycle tipped over. Smith slammed on his brakes, but his car skidded into Lewis, causing massive injuries and death. Respondents brought this action under 42 U. S. C. § 1983, alleging a deprivation of Lewis's Fourteenth Amendment substantive due process right to life. The District Court granted summary judgment for Smith, but the Ninth Circuit reversed, holding, *inter alia*, that the appropriate degree of fault for substantive due process liability for high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security.

Held: A police officer does not violate substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. Pp. 840–855.

(a) The "more-specific-provision" rule of *Graham* v. *Connor*, 490 U. S. 386, 395, does not bar respondents' suit. *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under substantive due process. *E. g., United States* v. *Lanier*, 520 U. S. 259, 272, n. 7. Substantive due process analysis is therefore inappropriate here only if, as *amici* argue, respondents' claim is "covered by" the Fourth Amendment. It is not. That Amendment covers only "searches and seizures," neither of which took place here. No one suggests that there was a search, and this Court's cases foreclose finding a seizure, since Smith did not terminate Lewis's freedom

of movement through means intentionally applied. *E. g.*, *Brower* v. *County of Inyo*, 489 U. S. 593, 597. Pp. 842–845.

(b) Respondents' allegations are insufficient to state a substantive due process violation. Protection against governmental arbitrariness is the core of due process, *e. g.*, *Hurtado* v. *California*, 110 U. S. 516, 527, including substantive due process, see, *e. g.*, *Daniels* v. *Williams*, 474 U. S. 327, 331, but only the most egregious executive action can be said to be "arbitrary" in the constitutional sense, *e. g.*, *Collins* v. *Harker Heights*, 503 U. S. 115, 129; the cognizable level of executive abuse of power is that which shocks the conscience, *e. g.*, *id.*, at 128; *Rochin* v. *California*, 342 U. S. 165, 172–173. The conscience-shocking concept points clearly away from liability, or clearly toward it, only at the ends of the tort law's culpability spectrum: Liability for negligently inflicted harm is categorically beneath the constitutional due process threshold, see, *e. g.*, *Daniels* v. *Williams*, 474 U. S., at 328, while conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level, see *id.*, at 331. Whether that level is reached when culpability falls between negligence and intentional conduct is a matter for closer calls. The Court has recognized that deliberate indifference is egregious enough to state a substantive due process claim in one context, that of deliberate indifference to the medical needs of pretrial detainees, see *City of Revere* v. *Massachusetts Gen. Hospital*, 463 U. S. 239, 244; cf. *Estelle* v. *Gamble*, 429 U. S. 97, 104, but rules of due process are not subject to mechanical application in unfamiliar territory, and the need to preserve the constitutional proportions of substantive due process demands an exact analysis of context and circumstances before deliberate indifference is condemned as conscience shocking, cf. *Betts* v. *Brady*, 316 U. S. 455, 462. Attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one context is less egregious in the other. In the circumstances of a high-speed chase aimed at apprehending a suspected offender, where unforeseen circumstances demand an instant judgment on the part of an officer who feels the pulls of competing obligations, only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the shocks-the-conscience test. Such chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to substantive due process liability. Cf. *Whitley* v. *Albers*, 475 U. S. 312, 320–321. The fault claimed on Smith's part fails to meet this test. Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood police

Syllabus

authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response. While prudence would have repressed the reaction, Smith's instinct was to do his job, not to induce Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive. Pp. 845–855.

98 F. 3d 434, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 855. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 856. BREYER, J., filed a concurring opinion, *post*, p. 858. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 859. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 860.

Terence J. Cassidy argued the cause and filed briefs for petitioners.

Paul J. Hedlund argued the cause for respondents. With him on the brief was *Michael L. Baum.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *Daniel E. Lungren*, Attorney General of California, *Margaret A. Rodda*, Senior Assistant Attorney General, *Darryl L. Doke*, Supervising Deputy Attorney General, and *Stephen J. Egan*, Deputy Attorney General, joined by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *Michael E. Carpenter* of Maine, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Heidi Heitkamp* of North Dakota, *D. Michael Fisher* of Pennsylvania, *Mark W. Barnett* of South Dakota, *Jan Graham* of Utah, *Richard Cullen* of Virginia, *Darrell V. McGraw, Jr.*, of West Virginia, *James E. Doyle* of Wisconsin, and *William U. Hill* of Wyoming; for the City and County of Denver by *Theodore S. Halaby;* for the County of Riverside et al. by *William C. Katzenstein*, *James K. Hahn*, *Gregory*

JUSTICE SOUTER delivered the opinion of the Court.

The issue in this case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. We answer no, and hold that in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.

I

On May 22, 1990, at approximately 8:30 p.m., petitioner James Everett Smith, a Sacramento County sheriff's deputy, along with another officer, Murray Stapp, responded to a call to break up a fight. Upon returning to his patrol car, Stapp saw a motorcycle approaching at high speed. It was operated by 18-year-old Brian Willard and carried Philip Lewis, respondents' 16-year-old decedent, as a passenger. Neither boy had anything to do with the fight that prompted the call to the police.

Stapp turned on his overhead rotating lights, yelled to the boys to stop, and pulled his patrol car closer to Smith's, attempting to pen the motorcycle in. Instead of pulling over in response to Stapp's warning lights and commands, Willard

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P. Orland, Timothy T. Coates, H. Peter Klein, Alan K. Marks, James B. Lindholm, Jr., Steven M. Woodside, James Rumble, and *James P. Botz;* for the Grand Lodge of the Fraternal Order of Police by *Gary Lightman, Thomas T. Rutherford,* and *William J. Friedman;* for the National Association of Counties et al. by *Richard Ruda* and *Charles Rothfeld;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Howard A. Friedman* and *Richard D. Haley;* for Gabriel Torres et al. by *Stephen Yagman* and *Marion R. Yagman;* and for Solutions to the Tragedies of Police Pursuits (STOPP) by *Andrew C. Clarke.*

slowly maneuvered the motorcycle between the two police cars and sped off. Smith immediately switched on his own emergency lights and siren, made a quick turn, and began pursuit at high speed. For 75 seconds over a course of 1.3 miles in a residential neighborhood, the motorcycle wove in and out of oncoming traffic, forcing two cars and a bicycle to swerve off the road. The motorcycle and patrol car reached speeds up to 100 miles an hour, with Smith following at a distance as short as 100 feet; at that speed, his car would have required 650 feet to stop.

The chase ended after the motorcycle tipped over as Willard tried a sharp left turn. By the time Smith slammed on his brakes, Willard was out of the way, but Lewis was not. The patrol car skidded into him at 40 miles an hour, propelling him some 70 feet down the road and inflicting massive injuries. Lewis was pronounced dead at the scene.

Respondents, Philip Lewis's parents and the representatives of his estate, brought this action under Rev. Stat. § 1979, 42 U. S. C. § 1983, against petitioners Sacramento County, the Sacramento County Sheriff's Department, and Deputy Smith, alleging a deprivation of Philip Lewis's Fourteenth Amendment substantive due process right to life.[1] The District Court granted summary judgment for Smith, reasoning that even if he violated the Constitution, he was entitled to qualified immunity, because respondents could point to no "state or federal opinion published before May, 1990, when the alleged misconduct took place, that supports

[1] Respondents also brought claims under state law. The District Court found that Smith was immune from state tort liability by operation of California Vehicle Code § 17004, which provides that "[a] public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle . . . when in the immediate pursuit of an actual or suspected violator of the law." Cal. Veh. Code Ann. § 17004 (West 1971). The court declined to rule on the potential liability of the county under state law, instead dismissing the tort claims against the county without prejudice to refiling in state court.

[their] view that [the decedent had] a Fourteenth Amendment substantive due process right in the context of high speed police pursuits." App. to Pet. for Cert. 52.[2]

The Court of Appeals for the Ninth Circuit reversed, holding that "the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security," 98 F. 3d 434, 441 (1996), and concluding that "the law regarding police liability for death or injury caused by an officer during the course of a high-speed chase was clearly established" at the time of Philip Lewis's death, *id.*, at 445. Since Smith apparently disregarded the Sacramento County Sheriff's Department's General Order on police pursuits, the Ninth Circuit found a genuine issue of material fact that might be resolved by a finding that Smith's conduct amounted to deliberate indifference:

> "The General Order requires an officer to communicate his intention to pursue a vehicle to the sheriff's department dispatch center. But defendants concede that Smith did not contact the dispatch center. The General Order requires an officer to consider whether the seriousness of the offense warrants a chase at speeds in excess of the posted limit. But here, the only apparent 'offense' was the boys' refusal to stop when another officer told them to do so. The General Order requires an officer to consider whether the need for apprehen-

[2] The District Court also granted summary judgment in favor of the county and the Sheriff's Department on the § 1983 claim, concluding that municipal liability would not lie under *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978), after finding no genuine factual dispute as to whether the county adequately trains its officers in the conduct of vehicular pursuits or whether the pursuit policy of the Sheriff's Department evinces deliberate indifference to the constitutional rights of the public. The Ninth Circuit affirmed the District Court on these points, 98 F. 3d 434, 446–447 (1996), and the issue of municipal liability is not before us.

> sion justifies the pursuit under existing conditions. Yet Smith apparently only 'needed' to apprehend the boys because they refused to stop. The General Order requires an officer to consider whether the pursuit presents unreasonable hazards to life and property. But taking the facts here in the light most favorable to plaintiffs, there existed an unreasonable hazard to Lewis's and Willard's lives. The General Order also directs an officer to discontinue a pursuit when the hazards of continuing outweigh the benefits of immediate apprehension. But here, there was no apparent danger involved in permitting the boys to escape. There certainly was risk of harm to others in continuing the pursuit." *Id.*, at 442.

Accordingly, the Court of Appeals reversed the summary judgment in favor of Smith and remanded for trial.

We granted certiorari, 520 U. S. 1250 (1997), to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case. Compare 98 F. 3d, at 441 ("deliberate indifference" or "reckless disregard"),[3] with *Evans* v. *Avery*, 100 F. 3d 1033, 1038 (CA1 1996) ("shocks the conscience"), cert. denied, 520 U. S. 1210 (1997); *Williams* v. *Denver*, 99 F. 3d 1009, 1014–1015 (CA10 1996) (same); *Fagan* v. *Vineland*, 22 F. 3d 1296, 1306–1307 (CA3 1994) (en banc) (same); *Temkin* v. *Frederick County Commissioners*, 945

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[3] In *Jones* v. *Sherrill*, 827 F. 2d 1102, 1106 (1987), the Sixth Circuit adopted a "gross negligence" standard for imposing liability for harm caused by police pursuit. Subsequently, in *Foy* v. *Berea*, 58 F. 3d 227, 230 (1995), the Sixth Circuit, without specifically mentioning *Jones*, disavowed the notion that "gross negligence is sufficient to support a substantive due process claim." Although *Foy* involved police inaction, rather than police pursuit, it seems likely that the Sixth Circuit would now apply the "deliberate indifference" standard utilized in that case, see 58 F. 3d, at 232–233, rather than the "gross negligence" standard adopted in *Jones*, in a police pursuit situation.

F. 2d 716, 720 (CA4 1991) (same), cert. denied, 502 U. S. 1095 (1992); and *Checki* v. *Webb*, 785 F. 2d 534, 538 (CA5 1986) (same). We now reverse.

II

Our prior cases have held the provision that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law," U. S. Const., Amdt. 14, § 1, to "guarante[e] more than fair process," *Washington* v. *Glucksberg*, 521 U. S. 702, 719 (1997), and to cover a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them," *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986); see also *Zinermon* v. *Burch*, 494 U. S. 113, 125 (1990) (noting that substantive due process violations are actionable under § 1983). The allegation here that Lewis was deprived of his right to life in violation of substantive due process amounts to such a claim, that under the circumstances described earlier, Smith's actions in causing Lewis's death were an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment. Cf. *Collins* v. *Harker Heights*, 503 U. S. 115, 126 (1992) (noting that the Due Process Clause was intended to prevent government officials "'"from abusing [their] power, or employing it as an instrument of oppression"'") (quoting *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989), in turn quoting *Davidson* v. *Cannon*, 474 U. S. 344, 348 (1986)).[4]

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[4] Respondents do not argue that they were denied due process of law by virtue of the fact that California's postdeprivation procedures and rules of immunity have effectively denied them an adequate opportunity to seek compensation for the state-occasioned deprivation of their son's life. We express no opinion here on the merits of such a claim, cf. *Albright* v. *Oliver*, 510 U. S. 266, 281–286 (1994) (KENNEDY, J., concurring in judgment); *Parratt* v. *Taylor*, 451 U. S. 527 (1981), or on the adequacy of California's postdeprivation compensation scheme.

Leaving aside the question of qualified immunity, which formed the basis for the District Court's dismissal of their case,[5] respondents face two principal objections to their

[5] As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. See *Graham* v. *Connor*, 490 U. S. 386, 394 (1989). The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question. See *Siegert* v. *Gilley*, 500 U. S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all," and courts should not "assum[e], without deciding, this preliminary issue").

JUSTICE STEVENS suggests that the rule of *Siegert* should not apply where, as here, the constitutional question presented "is both difficult and unresolved." *Post*, at 859. But the generally sound rule of avoiding determination of constitutional issues does not readily fit the situation presented here; when liability is claimed on the basis of a constitutional violation, even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted. What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law. See Shapiro, Public Officials' Qualified Immunity in Section 1983 Actions Under *Harlow* v. *Fitzgerald* and its Progeny, 22 U. Mich. J. L. Ref. 249, 265, n. 109 (1989). But these avenues would not necessarily be open, and therefore

claim. The first is that its subject is necessarily governed by a more definite provision of the Constitution (to the exclusion of any possible application of substantive due process); the second, that in any event the allegations are insufficient to state a substantive due process violation through executive abuse of power. Respondents can meet the first objection, but not the second.

A

Because we have "always been reluctant to expand the concept of substantive due process," *Collins* v. *Harker Heights*, *supra*, at 125, we held in *Graham* v. *Connor*, 490 U. S. 386 (1989), that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright* v. *Oliver*, 510 U. S. 266, 273 (1994) (plurality opinion of REHNQUIST, C. J.) (quoting *Graham* v. *Connor*, *supra*, at 395) (internal quotation marks omitted). Given the rule in *Graham*, we were presented at oral argument with the threshold issue raised in several *amicus* briefs,[6] whether facts involving a police chase aimed at apprehending suspects can ever support a due process claim. The argument runs that in chasing the motorcycle, Smith was attempting to make a seizure within the meaning of the Fourth Amendment, and, perhaps, even that he succeeded when Lewis was stopped by the fatal collision. Hence, any liability must turn on an application of the reasonableness stand-

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the better approach is to determine the right before determining whether it was previously established with clarity.

[6] See Brief for National Association of Counties et al. as *Amici Curiae* 8–13; Brief for Grand Lodge of the Fraternal Order of Police as *Amicus Curiae* 4–9; Brief for City and County of Denver, Colorado, as *Amici Curiae* 2–7; Brief for County of Riverside et al. as *Amici Curiae* 6–18; Brief for Gabriel Torres et al. as *Amici Curiae* 3–11.

ard governing searches and seizures, not the due process standard of liability for constitutionally arbitrary executive action. See *Graham* v. *Connor*, *supra*, at 395 ("*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach" (emphasis in original)); *Albright* v. *Oliver*, 510 U. S., at 276 (GINSBURG, J., concurring); *id.*, at 288, n. 2 (SOUTER, J., concurring in judgment). One Court of Appeals has indeed applied the rule of *Graham* to preclude the application of principles of generalized substantive due process to a motor vehicle passenger's claims for injury resulting from reckless police pursuit. See *Mays* v. *East St. Louis*, 123 F. 3d 999, 1002–1003 (CA7 1997).

The argument is unsound. Just last Term, we explained that *Graham*

> "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States* v. *Lanier*, 520 U. S. 259, 272, n. 7 (1997).

Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is "covered by" the Fourth Amendment. It is not.

The Fourth Amendment covers only "searches and seizures," neither of which took place here. No one suggests that there was a search, and our cases foreclose finding a seizure. We held in *California* v. *Hodari D.*, 499 U. S. 621,

626 (1991), that a police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment. And in *Brower* v. *County of Inyo*, 489 U. S. 593, 596–597 (1989), we explained that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.*" We illustrated the point by saying that no Fourth Amendment seizure would take place where a "pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit," but accidentally stopped the suspect by crashing into him. *Id.*, at 597. That is exactly this case. See, *e. g.*, *Campbell* v. *White*, 916 F. 2d 421, 423 (CA7 1990) (following *Brower* and finding no seizure where a police officer accidentally struck and killed a fleeing motorcyclist during a high-speed pursuit), cert. denied, 499 U. S. 922 (1991). *Graham*'s more-specific-provision rule is therefore no bar to respondents' suit. See, *e. g.*, *Frye* v. *Akron*, 759 F. Supp. 1320, 1324 (ND Ind. 1991) (parents of a motorcyclist who was struck and killed by a police car during a high-speed pursuit could sue under substantive due process because no Fourth Amendment seizure took place); *Evans* v. *Avery*, 100 F. 3d, at 1036 (noting that "outside the context of a seizure, . . . a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983"); *Pleasant* v. *Zamieski*, 895 F. 2d 272, 276, n. 2 (CA6) (noting that *Graham* "preserve[s] fourteenth amendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right to life through means other than a law enforcement official's arrest, investi-

gatory stop or other seizure"), cert. denied, 498 U. S. 851 (1990).[7]

B

Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action:

> "The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia* v. *Okely*, 4 Wheat. 235–244 [(1819)]: 'As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'" *Hurtado* v. *California*, 110 U. S. 516, 527 (1884).

We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974), whether the fault lies in a denial of funda-

[7] Several *amici* suggest that, for the purposes of *Graham*, the Fourth Amendment should cover not only seizures, but also failed attempts to make a seizure. See, *e. g.*, Brief for National Association of Counties et al. as *Amici Curiae* 10–11. This argument is foreclosed by *California* v. *Hodari D.*, 499 U. S. 621 (1991), in which we explained that "neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions." *Id.*, at 626, n. 2. Attempted seizures of a person are beyond the scope of the Fourth Amendment. See *id.*, at 646 (STEVENS, J., dissenting) (disagreeing with the Court's position that "an attempt to make [a] . . . seizure is beyond the coverage of the Fourth Amendment").

mental procedural fairness, see, *e. g.*, *Fuentes* v. *Shevin*, 407 U. S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, *e. g.*, *Daniels* v. *Williams*, 474 U. S., at 331 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). While due process protection in the substantive sense limits what the government may do in both its legislative, see, *e. g.*, *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and its executive capacities, see, *e. g.*, *Rochin* v. *California*, 342 U. S. 165 (1952), criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.

Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense," *Collins* v. *Harker Heights*, 503 U. S., at 129, thereby recognizing the point made in different circumstances by Chief Justice Marshall, "'that it is *a constitution* we are expounding,'" *Daniels* v. *Williams*, *supra*, at 332 (quoting *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819) (emphasis in original)). Thus, in *Collins* v. *Harker Heights*, for example, we said that the Due Process Clause was intended to prevent government officials "'"from abusing [their] power, or employing it as an instrument of oppression."'" 503 U. S., at 126 (quoting *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S., at 196, in turn quoting *Davidson* v. *Cannon*, 474 U. S., at 348).

To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. We first put the test this way in *Rochin* v. *California*, *supra*, at 172–173, where we found the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct." In the intervening

years we have repeatedly adhered to *Rochin*'s benchmark. See, *e. g.*, *Breithaupt* v. *Abram*, 352 U. S. 432, 435 (1957) (reiterating that conduct that "'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process); *Whitley* v. *Albers*, 475 U. S. 312, 327 (1986) (same); *United States* v. *Salerno*, 481 U. S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty' ") (quoting *Rochin* v. *California*, *supra*, at 172, and *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937)). Most recently, in *Collins* v. *Harker Heights*, *supra*, at 128, we said again that the substantive component of the Due Process Clause is violated by executive action only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, "poin[t] the way." *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2), cert. denied, 414 U. S. 1033 (1973).[8]

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[8] As JUSTICE SCALIA has explained before, he fails to see "the usefulness of 'conscience shocking' as a legal test," *Herrera* v. *Collins*, 506 U. S. 390, 428 (1993), and his independent analysis of this case is therefore understandable. He is, however, simply mistaken in seeing our insistence on the shocks-the-conscience standard as an atavistic return to a scheme of due process analysis rejected by the Court in *Washington* v. *Glucksberg*, 521 U. S. 702 (1997).

Glucksberg presented a disagreement about the significance of historical examples of protected liberty in determining whether a given statute could be judged to contravene the Fourteenth Amendment. The differences of opinion turned on the issues of how much history indicating recognition of the asserted right, viewed at what level of specificity, is necessary to support the finding of a substantive due process right entitled to prevail over state legislation.

As we explain in the text, a case challenging executive action on substantive due process grounds, like this one, presents an issue antecedent to any question about the need for historical examples of enforcing a lib-

It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In *Paul* v. *Davis*, 424 U. S. 693, 701 (1976), for example, we explained that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in *Daniels* v. *Williams*, 474 U. S., at 332, we reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." We have accordingly rejected the lowest common denominator of customary tort lia-

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erty interest of the sort claimed. For executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them. Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways. In none of our prior cases have we considered the necessity for such examples, and no such question is raised in this case.

In sum, the difference of opinion in *Glucksberg* was about the need for historical examples of recognition of the claimed liberty protection at some appropriate level of specificity. In an executive action case, no such issue can arise if the conduct does not reach the degree of the egregious.

bility as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. See *id.*, at 328; see also *Davidson* v. *Cannon*, 474 U. S., at 348 (clarifying that *Daniels* applies to substantive, as well as procedural, due process). It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. See *Daniels* v. *Williams*, 474 U. S., at 331 ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original)).

Whether the point of the conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but "less than intentional conduct, such as recklessness or 'gross negligence,'" *id.*, at 334, n. 3, is a matter for closer calls.[9] To be sure, we have expressly recognized the possibility that some official acts in this range may be actionable under the Fourteenth Amendment, *ibid.*, and our cases have compelled recognition that such conduct is egregious enough to state a substantive due process claim in at least one instance. We held in *City of Revere* v. *Massachusetts Gen. Hospital*, 463 U. S. 239 (1983), that "the due process rights of a [pretrial detainee] are at least as great as the

[9] In *Rochin* v. *California*, 342 U. S. 165 (1952), the case in which we formulated and first applied the shocks-the-conscience test, it was not the ultimate purpose of the government actors to harm the plaintiff, but they apparently acted with full appreciation of what the Court described as the brutality of their acts. *Rochin*, of course, was decided long before *Graham* v. *Connor* (and *Mapp* v. *Ohio*, 367 U. S. 643 (1961)), and today would be treated under the Fourth Amendment, albeit with the same result.

Eighth Amendment protections available to a convicted prisoner." *Id.*, at 244 (citing *Bell* v. *Wolfish*, 441 U. S. 520, 535, n. 16, 545 (1979)). Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, see *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976), it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial, see, *e. g.*, *Barrie* v. *Grand County, Utah*, 119 F. 3d 862, 867 (CA10 1997); *Weyant* v. *Okst*, 101 F. 3d 845, 856 (CA2 1996).[10]

Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking. What we have said of due process in the procedural sense is just as true here:

> "The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Betts* v. *Brady*, 316 U. S. 455, 462 (1942).

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[10] We have also employed deliberate indifference as a standard of culpability sufficient to identify a dereliction as reflective of municipal policy and to sustain a claim of municipal liability for failure to train an employee who causes harm by unconstitutional conduct for which he would be individually liable. See *Canton* v. *Harris*, 489 U. S. 378, 388–389 (1989).

Thus, attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other (even assuming that it makes sense to speak of indifference as deliberate in the case of sudden pursuit). As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical, see *Whitley* v. *Albers*, 475 U. S., at 320,[11] and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

> "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e. g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the . . . Due Process Clause." *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S., at 199–200 (citation and footnote omitted).

Nor does any substantial countervailing interest excuse the State from making provision for the decent care and protection of those it locks up; "the State's responsibility to attend

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[11] By "actual deliberation," we do not mean "deliberation" in the narrow, technical sense in which it has sometimes been used in traditional homicide law. See, *e. g.*, *Caldwell* v. *State*, 84 So. 272, 276 (Ala. 1919) (noting that "'deliberation here does not mean that the man slayer must ponder over the killing for a long time'"; rather, "it may exist and may be entertained while the man slayer is pressing the trigger of the pistol that fired the fatal shot[,] even if it be only for a moment or instant of time").

to the medical needs of prisoners [or detainees] does not ordinarily clash with other equally important governmental responsibilities." *Whitley* v. *Albers*, *supra*, at 320.[12]

But just as the description of the custodial prison situation shows how deliberate indifference can rise to a constitutionally shocking level, so too does it suggest why indifference may well not be enough for liability in the different circumstances of a case like this one. We have, indeed, found that deliberate indifference does not suffice for constitutional liability (albeit under the Eighth Amendment) even in prison circumstances when a prisoner's claim arises not from normal custody but from response to a violent disturbance. Our analysis is instructive here:

> "[I]n making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used. . . . In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley* v. *Albers*, 475 U. S., at 320.

We accordingly held that a much higher standard of fault than deliberate indifference has to be shown for officer liabil-

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[12] *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), can be categorized on much the same terms. There, we held that a severely retarded person could state a claim under § 1983 for a violation of substantive due process if the personnel at the mental institution where he was confined failed to exercise professional judgment when denying him training and habilitation. *Id.*, at 319–325. The combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the patient's welfare.

ity in a prison riot. In those circumstances, liability should turn on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.*, at 320–321 (internal quotation marks omitted). The analogy to sudden police chases (under the Due Process Clause) would be hard to avoid.

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." *Id.*, at 320; cf. *Graham* v. *Connor*, 490 U. S., at 397 ("[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"). A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders.

To recognize a substantive due process violation in these circumstances when only midlevel fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." *Daniels* v. *Wil-*

liams, 474 U. S., at 332. Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.[13]

The fault claimed on Smith's part in this case accordingly fails to meet the shocks-the-conscience test. In the count charging him with liability under § 1983, respondents' complaint alleges a variety of culpable states of mind: "negligently responsible in some manner," App. 11, Count one, ¶ 8, "reckless and careless," *id.*, at 12, ¶15, "recklessness, gross negligence and conscious disregard for [Lewis's] safety," *id.*, at 13, ¶18, and "oppression, fraud and malice," *ibid.* The subsequent summary judgment proceedings revealed that the height of the fault actually claimed was "conscious disregard," the malice allegation having been made in aid of a request for punitive damages, but unsupported either in allegations of specific conduct or in any affidavit of fact offered on the motions for summary judgment. The Court of Appeals understood the claim to be one of deliberate indifference to Lewis's survival, which it treated as equivalent to one of reckless disregard for life. We agree with this reading of respondents' allegations, but consequently part company from the Court of Appeals, which found them sufficient to state a substantive due process claim, and from the District Court, which made the same assumption *arguendo*.[14]

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[13] Cf. *Checki* v. *Webb*, 785 F. 2d 534, 538 (CA5 1986) ("Where a citizen suffers physical injury due to a police officer's *negligent use* of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's *intentional misuse* of his vehicle" (citation omitted)).

[14] To say that due process is not offended by the police conduct described here is not, of course, to imply anything about its appropriate treatment under state law. See *Collins* v. *Harker Heights*, 503 U. S. 115, 128–129 (1992) (decisions about civil liability standards that "involve a host of pol-

Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.

Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983. The judgment below is accordingly reversed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, concurring.

I join the opinion of the Court in this case. The first question presented in the county's petition for certiorari is:

> "Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substan-

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icy choices . . . must be made by locally elected representatives [or by courts enforcing the common law of torts], rather than by federal judges interpreting the basic charter of Government for the entire country"). Cf. *Thomas* v. *City of Richmond*, 9 Cal. 4th 1154, 892 P. 2d 1185 (1995) (en banc) (discussing municipal liability under California law for injuries caused by police pursuits).

> tive due process under the Fourteenth Amendment is 'shocks the conscience'. . . or is 'deliberate indifference' or 'reckless disregard.'" Pet. for Cert. i.

The county's petition assumed that the constitutional question was one of substantive due process, and the parties briefed the question on that assumption. The assumption was surely not without foundation in our case law, as the Court makes clear. *Ante*, at 846–847. The Court is correct in concluding that "shocks the conscience" is the right choice among the alternatives posed in the question presented, and correct in concluding that this demanding standard has not been met here.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring.

I join the opinion of the Court, and write this explanation of the objective character of our substantive due process analysis.

The Court is correct, of course, in repeating that the prohibition against deprivations of life, liberty, or property contained in the Due Process Clause of the Fourteenth Amendment extends beyond the command of fair procedures. It can no longer be controverted that due process has a substantive component as well. See, *e. g.*, *Washington* v. *Glucksberg*, 521 U. S. 702 (1997); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992); *Collins* v. *Harker Heights*, 503 U. S. 115, 125–128 (1992); *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989). As a consequence, certain actions are prohibited no matter what procedures attend them. In the case before us, there can be no question that an interest protected by the text of the Constitution is implicated: The actions of the State were part of a causal chain resulting in the undoubted loss of life. We have no definitional problem, then, in determining whether there is an interest sufficient to invoke due process. Cf. *Ohio Adult Parole Authority* v. *Woodard*, *ante*, p. 272.

What we do confront is the question of the standard of conduct the Constitution requires the State, in this case the local police, to follow to protect against the unintentional taking of life in the circumstances of a police pursuit. Unlike the separate question whether or not, given the fact of a constitutional violation, the state entity is liable for damages, see *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694–695 (1978); *Canton* v. *Harris*, 489 U. S. 378 (1989), which is a matter of statutory interpretation or elaboration, the question here is the distinct, anterior issue whether or not a constitutional violation occurred at all. See *Collins* v. *Harker Heights*, *supra*, at 120, 124.

The Court decides this case by applying the "shocks the conscience" test first recognized in *Rochin* v. *California*, 342 U. S. 165, 172–173 (1952), and reiterated in subsequent decisions. The phrase has the unfortunate connotation of a standard laden with subjective assessments. In that respect, it must be viewed with considerable skepticism. As our opinion in *Collins* v. *Harker Heights* illustrates, however, the test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning. 503 U. S., at 126–128. As JUSTICE SCALIA is correct to point out, we so interpreted the test in *Glucksberg*. *Post*, at 860–861 (opinion concurring in judgment). In the instant case, the authorities cited by JUSTICE SCALIA are persuasive, indicating that we would contradict our traditions were we to sustain the claims of the respondents.

That said, it must be added that history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry. There is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amend-

ment, is bound to respect. I agree with the Court's assessment of the State's interests in this regard. Absent intent to injure, the police, in circumstances such as these, may conduct a dangerous chase of a suspect who disobeys a lawful command to stop when they determine it is appropriate to do so. There is a real danger in announcing a rule, or suggesting a principle, that in some cases a suspect is free to ignore a lawful police command to stop. No matter how narrow its formulation, any suggestion that suspects may ignore a lawful command to stop and then sue for damages sustained in an ensuing chase might cause suspects to flee more often, increasing accidents of the kind which occurred here.

Though I share JUSTICE SCALIA's concerns about using the phrase "shocks the conscience" in a manner suggesting that it is a self-defining test, the reasons the Court gives in support of its judgment go far toward establishing that objective considerations, including history and precedent, are the controlling principle, regardless of whether the State's action is legislative or executive in character. To decide this case, we need not attempt a comprehensive definition of the level of causal participation which renders a State or its officers liable for violating the substantive commands of the Fourteenth Amendment. It suffices to conclude that neither our legal traditions nor the present needs of law enforcement justify finding a due process violation when unintended injuries occur after the police pursue a suspect who disobeys their lawful order to stop.

JUSTICE BREYER, concurring.

I join the Court's judgment and opinion. I write separately only to point out my agreement with JUSTICE STEVENS, *post,* at 859, that *Siegert* v. *Gilley,* 500 U. S. 226 (1991), should not be read to deny lower courts the flexibility, in appropriate cases, to decide 42 U. S. C. § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with

constitutional issues that are either difficult or poorly presented. See *Siegert*, *supra*, at 235 (KENNEDY, J., concurring) (lower court "adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by the parties").

JUSTICE STEVENS, concurring in the judgment.

When defendants in a 42 U. S. C. § 1983 action argue in the alternative (a) that they did not violate the Constitution, and (b) that in any event they are entitled to qualified immunity because the constitutional right was not clearly established, the opinion in *Siegert* v. *Gilley*, 500 U. S. 226 (1991), tells us that we should address the constitutional question at the outset. That is sound advice when the answer to the constitutional question is clear. When, however, the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions. Because I consider this such a case, I would reinstate the judgment of the District Court on the ground that the relevant law was not clearly defined in 1990.

The Court expresses concern that deciding the immunity issue without resolving the underlying constitutional question would perpetuate a state of uncertainty in the law. *Ante*, at 841–842, n. 5. Yet the Court acknowledges, as it must, that a qualified immunity defense is unavailable in an action against the municipality itself. *Ibid.* Sound reasons exist for encouraging the development of new constitutional doctrines in adversarial suits against municipalities, which have a substantial stake in the outcome and a risk of exposure to damages liability even when individual officers are plainly protected by qualified immunity.

In sum, I would hold that Officer Smith is entitled to qualified immunity. Accordingly, I concur in the Court's judgment, but I do not join its opinion.

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

Today's opinion gives the lie to those cynics who claim that changes in this Court's jurisprudence are attributable to changes in the Court's membership. It proves that the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim, "That was then, this is now."

Just last Term, in *Washington* v. *Glucksberg,* 521 U. S. 702, 720–722 (1997), the Court specifically rejected the method of substantive-due-process analysis employed by JUSTICE SOUTER in his concurrence in that case, which is the very same method employed by JUSTICE SOUTER in his opinion for the Court today. To quote the opinion in *Glucksberg:*

> "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty' . . . . Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. . . . Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' . . . that direct and restrain our exposition of the Due Process Clause. . . .
>
> "JUSTICE SOUTER . . . would largely abandon this restrained methodology, and instead ask 'whether [Washington's] statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause . . . ' [citations and footnote omitted]. In our view, however, the development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment . . . have at

> least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due process judicial review." *Id.*, at 720–722.

Today, so to speak, the stone that the builders had rejected has become the foundation stone of our substantive-due-process jurisprudence. The atavistic methodology that JUSTICE SOUTER announces for the Court is the very same methodology that the Court called atavistic when it was proffered by JUSTICE SOUTER in *Glucksberg.* In fact, if anything, today's opinion is even more of a throwback to highly subjective substantive-due-process methodologies than the concurrence in *Glucksberg* was. Whereas the latter said merely that substantive due process prevents "arbitrary impositions" and "purposeless restraints" (without any objective criterion as to what is arbitrary or purposeless), today's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane[1] of subjectivity, th' ol' "shocks-the-conscience" test. According to today's opinion, this is the *measure* of arbitrariness when what is at issue is executive, rather than legislative, action. *Ante*, at 846–847.[2]

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[1] For those unfamiliar with classical music, I note that the exemplars of excellence in the text are borrowed from Cole Porter's "You're the Top," copyright 1934.

[2] The proposition that "shocks-the-conscience" is a test applicable only to executive action is original with today's opinion. That has never been suggested in any of our cases, and in fact "shocks-the-conscience" was recited in at least one opinion involving legislative action. See *United States* v. *Salerno*, 481 U. S. 739, 746 (1987) (in considering whether the Bail Reform Act of 1984 violated the Due Process Clause, we said that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' "). I am of course happy to accept whatever limitations the Court today is willing to impose upon the "shocks-the-conscience" test, though it is a puzzlement why substantive due process protects some liberties against executive officers but not against legislatures.

Glucksberg, of course, rejected "shocks-the-conscience," just as it rejected the less subjective "arbitrary action" test. A 1992 executive-action case, *Collins* v. *Harker Heights*, 503 U. S. 115, which had paid lipservice to "shocks-the-conscience," see *id.*, at 128, was cited in *Glucksberg* for the proposition that "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking.'" 521 U. S., at 721, quoting *Collins*, *supra*, at 125. In fact, even before *Glucksberg* we had characterized the last "shocks-the-conscience" claim to come before us as "nothing more than [a] bald assertio[n]," and had rejected it on the objective ground that the petitioner "failed to proffer any historical, textual, or controlling precedential support for [his alleged due process right], and we decline to fashion a new due process right out of thin air." *Carlisle* v. *United States*, 517 U. S. 416, 429 (1996).

Adhering to our decision in *Glucksberg*, rather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert. The first step of our analysis, of course, must be a "careful description" of the right asserted, *Glucksberg*, *supra*, at 721. Here the complaint alleges that the police officer deprived Lewis "of his Fourteenth Amendment right to life, liberty and property without due process of law when he operated his vehicle with recklessness, gross negligence and conscious disregard for his safety." App. 13. I agree with the Court's conclusion that this asserts a substantive right to be free from "deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Ante*, at 836; see also *ante*, at 853.

Respondents provide no textual or historical support for this alleged due process right, and, as in *Carlisle*, I would "decline to fashion a new due process right out of thin air." 517 U. S., at 429. Nor have respondents identified any precedential support. Indeed, precedent is to the contrary:

"Historically, th[e] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986) (citations omitted); *Collins*, *supra*, at 127, n. 10 (same). Though it is true, as the Court explains, that "deliberate indifference" to the medical needs of pretrial detainees, *City of Revere* v. *Massachusetts Gen. Hospital*, 463 U. S. 239, 244–245 (1983), or of involuntarily committed mental patients, *Youngberg* v. *Romeo*, 457 U. S. 307, 314–325 (1982), may violate substantive due process, it is not the deliberate indifference alone that is the "deprivation." Rather, it is that combined with "the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty," *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 200 (1989). "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and *at the same time* fails to provide for his basic human needs[,] . . . it transgresses the substantive limits on state action set by the . . . Due Process Clause." *Ibid.* (emphasis added). We have expressly left open whether, in a context in which the individual has *not* been deprived of the ability to care for himself in the relevant respect, "something less than intentional conduct, such as recklessness or 'gross negligence,' " can ever constitute a "deprivation" under the Due Process Clause. *Daniels*, 474 U. S., at 334, n. 3. Needless to say, if it is an open question whether recklessness can *ever* trigger due process protections, there is no precedential support for a substantive-due-process right to be free from reckless police conduct during a car chase.

To hold, as respondents urge, that all government conduct deliberately indifferent to life, liberty, or property violates the Due Process Clause would make " 'the Fourteenth Amendment a font of tort law to be superimposed upon whatever

systems may already be administered by the States.'" *Id.*, at 332, quoting *Paul* v. *Davis*, 424 U. S. 693, 701 (1976) (other citation omitted). Here, for instance, it is not fair to say that it was the police officer alone who "deprived" Lewis of his life. Though the police car did run Lewis over, it was the driver of the motorcycle, Willard, who dumped Lewis in the car's path by recklessly making a sharp left turn at high speed. (Willard had the option of rolling to a gentle stop and showing the officer his license and registration.) Surely Willard "deprived" Lewis of his life in every sense that the police officer did. And if Lewis encouraged Willard to make the reckless turn, Lewis himself would be responsible, at least in part, for his own death. Was there contributory fault on the part of Willard or Lewis? Did the police officer have the "last clear chance" to avoid the accident? Did Willard and Lewis, by fleeing from the police, "assume the risk" of the accident? These are interesting questions of tort law, not of constitutional governance. "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels*, *supra*, at 332. As we have said many times, "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, *supra*, at 202 (citations omitted).

If the people of the State of California would prefer a system that renders police officers liable for reckless driving during high-speed pursuits, "[t]hey may create such a system . . . by changing the tort law of the State in accordance with the regular lawmaking process." 489 U. S., at 203. For now, they prefer not to hold public employees "liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle . . . when in the immediate pursuit of an actual or suspected vio-

lator of the law." Cal. Veh. Code Ann. § 17004 (West 1971). It is the prerogative of a self-governing people to make that legislative choice. "Political society," as the Seventh Circuit has observed, "must consider not only the risks to passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee—and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders." *Mays* v. *City of East St. Louis*, 123 F. 3d 999, 1003 (1997). In allocating such risks, the people of California and their elected representatives may vote their consciences. But for judges to overrule that democratically adopted policy judgment on the ground that it shocks *their* consciences is not judicial review but judicial governance.

I would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right. Accordingly, I concur in the judgment of the Court.

Syllabus

AIR LINE PILOTS ASSOCIATION *v.* MILLER ET AL.

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

No. 97–428. Argued March 23, 1998—Decided May 26, 1998

Petitioner Air Line Pilots Association (ALPA or Union), a private-sector labor organization covered by the Railway Labor Act (RLA), represents, as exclusive bargaining agent, pilots employed by Delta Air Lines (Delta). The collective-bargaining agreement between ALPA and Delta includes an "agency shop" clause that requires nonunion Delta pilots to pay ALPA a monthly service charge for representing them. For 1992, the first year ALPA collected an "agency fee" under the agency-shop agreement, the Union ultimately determined that 19 percent of its expenses were not germane to collective bargaining. Accordingly, ALPA collected an agency fee that amounted to 81 percent of its members' dues. Alleging that the Union had overstated the percentage of its expenditures genuinely attributable to "germane" activities, respondents, 153 Delta pilots, challenged in this federal-court action the manner in which ALPA calculated agency fees. Under ALPA's "Policies and Procedures Applicable to Agency Fees," adopted to comply with the "impartial decisionmaker" requirement set forth in *Teachers* v. *Hudson*, 475 U. S. 292, 310, pilots who object to the fee calculation may request arbitration under procedures devised by the American Arbitration Association (AAA). When 174 Delta pilots (including 91 of the respondents) filed timely objections to the 1992 agency-fee calculation, ALPA treated the objects as a request for arbitration and referred them to the AAA for resolution in a single, consolidated proceeding. The arbitrator declined to stay the arbitration in deference to the court proceeding, and sustained ALPA's calculation in substantial part. The District Court then granted ALPA's motion for summary judgment, concluding, *inter alia*, that pilots seeking to challenge the fee calculation must exhaust arbitral remedies before proceeding in court. Reversing, the Court of Appeals found no legal basis for requiring objectors to arbitrate agency-fee challenges when they had not agreed to do so. Having determined that the arbitrator's decision was no longer part of the legal picture, the appellate court remanded the case to the District Court.

Held: When a union adopts an arbitration process to comply with *Hudson*'s "impartial decisionmaker" requirement, agency-fee objectors who have not agreed to the procedure may not be required to exhaust the

arbitral remedy before challenging the union's calculation in a federal-court action. Pp. 872–880.

(a) Section 2, Eleventh, of the RLA allows employers and unions to conclude agency-shop agreements. Under such arrangements, nonmembers must pay their fair share of union expenditures necessarily or reasonably incurred in performing the duties of an exclusive employee representative dealing with the employer on labor-management issues. *Ellis* v. *Railway Clerks*, 466 U. S. 435, 448. To avoid constitutional shoals, however, fee objectors cannot be compelled to pay costs unrelated to those representative duties. See, *e. g.*, *id.*, at 448–455. In *Hudson*, a public-sector case in which limitations on the use of agency fees were prompted directly by the First Amendment, the Court held that unions and employers must provide three procedural protections for nonunion workers who object to the agency-fee calculation: sufficient information to gauge the fee's propriety, 475 U. S., at 306; "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," *id.*, at 310; and the escrowing of any amount of the fee "reasonably in dispute" while the challenge is pending, *ibid.* Pp. 872–874.

(b) The parties have not challenged the Court of Appeals' determination that *Hudson*'s safeguards transfer fully to employment relations governed by the RLA. Accordingly, the Court turns to the question whether agency-fee objectors must exhaust *Hudson*'s "impartial decisionmaker" procedure before pursuing their claims in federal court. The Court answers that question "no," and rejects ALPA's request to extend the discretionary exhaustion-of-remedies doctrine, see *McCarthy* v. *Madigan*, 503 U. S. 140, 144, to agency-fee arbitration. A principal purpose of that doctrine—allowing agencies, not courts, to have primary responsibility for the programs that Congress has charged them to administer, see *id.*, at 145—is not relevant here: ALPA seeks exhaustion of an arbitral remedy established by a private party, not of an administrative remedy established by Congress. As a rule, arbitration is a matter of contract, and a party ordinarily cannot be required to submit to arbitration any dispute which he or she has not agreed so to submit. *E. g.*, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582. ALPA, it is true, acted to comply with *Hudson* rather than out of its own unconstrained choice. But the purpose of *Hudson*'s "impartial decisionmaker" requirement is to advance the swift, fair, and final settlement of objectors' rights, see 475 U. S., at 307, not to compel objectors to pursue arbitration. The Court resists reading *Hudson* in a manner that might frustrate its very purpose. ALPA's assertion of the efficiency served by requiring objectors to proceed first to arbitration, thereby gaining definition of the scope of the dispute, overstates

the difficulties entailed in holding a federal-court hearing without a preparatory arbitration, and is answered by conscientious management of the pretrial process to guard against abuse, not by a judicially imposed exhaustion requirement. Genuine as the Union's interest in avoiding multiple proceedings may be, that interest does not overwhelm objectors' resistance to arbitration to which they did not consent, and their election to proceed immediately to court for adjudication of their federal rights. Pp. 874–880.

108 F. 3d 1415, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 880.

Jerry D. Anker argued the cause and filed briefs for petitioner.

Raymond J. LaJeunesse, Jr., argued the cause for respondents. With him on the brief was *Philip F. Hudock.**

JUSTICE GINSBURG delivered the opinion of the Court.

An "agency-shop" arrangement permits a union, obliged to act on behalf of all employees in the bargaining unit, to charge nonunion workers their fair share of the costs of the representation. The purposes for which a union may spend the "agency fee" paid by nonmembers, however, are circumscribed by the First Amendment (when public employers are involved) and the National Labor Relations Act (NLRA) or Railway Labor Act (RLA) (when private employers subject to their provisions are involved). In *Teachers* v. *Hudson*, 475 U. S. 292 (1986), we held that the First Amendment requires public-employee unions to accord workers who object

*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt, James B. Coppess,* and *Laurence Gold;* and for the National Education Association by *Robert H. Chanin* and *Jeremiah A. Collins.*

Frank T. Mamat, J. Walker Henry, and *George M. Mesrey* filed a brief for the Mackinac Center for Public Policy as *amicus curiae* urging affirmance.

to the agency fee "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." *Id.*, at 310.

Petitioner Air Line Pilots Association (ALPA or Union), a private-sector labor organization covered by the RLA, acknowledges that it is bound by *Hudson*. ALPA endeavored to comply with *Hudson*'s "impartial decisionmaker" requirement by referring all fee disputes to a neutral arbitrator. In the action now before us, nonunion pilots challenged the agency fee collected by the Union in 1992. ALPA urged that the challengers must exhaust the arbitration process before pursuing judicial remedies. The Court of Appeals for the District of Columbia Circuit held that the pilots resisting the agency fee may proceed at once in federal court. We hold, in accord with the Court of Appeals, that employees need not submit fee disputes to arbitration when they have never agreed to do so.

I

ALPA represents, as exclusive bargaining agent, pilots employed by most United States commercial air carriers, including Delta Air Lines (Delta). In November 1991, ALPA and Delta amended their collective-bargaining agreement to include, *inter alia*, an "agency-shop" clause. That clause, similar to provisions in ALPA's agreements with other carriers, required each pilot who was not an ALPA member to pay the Union a monthly "service charge as a contribution for the administration of [the collective-bargaining agreement] and the representation of such employee." App. 31.

On December 12, 1991, five Delta pilots filed this action against ALPA and Delta in the District Court for the District of Columbia. Their complaint charged that the "agency-shop" clause was unlawful on its face. (Three of the original plaintiffs, plus 150 Delta pilots who subsequently intervened, are respondents here; the other two original plaintiffs were dismissed from the case for reasons unrelated to the issue we resolve. Delta was also dismissed from the

case on grounds not pertinent here.) The pilots unsuccessfully moved for a preliminary injunction against implementation of the agency-shop arrangement, and ALPA began collecting agency fees on January 1, 1992.

In 1992, ALPA charged its members monthly dues of 2.35 percent of each pilot's earnings. The Union ultimately determined, in its final, audited "Statement of Germane and Nongermane Expenses" (SGNE) for 1992, that 19 percent of ALPA's expenses for that year were not germane to collective bargaining. Accordingly, the Union adjusted fees charged nonmembers to equal 81 percent of the amount members paid.

On October 8, 1992, some months after the Union had begun to collect agency fees, the pilots moved to amend their complaint to add a count challenging the manner in which ALPA calculated the fee. They alleged, *inter alia*, that ALPA had overstated the percentage of its expenditures genuinely attributable to "germane" activities. The District Court granted the motion to amend on August 2, 1993. The pilots' original facial challenges to the agency-shop clause were later resolved in the Union's favor on summary judgment (a matter the pilots did not contest on appeal). Thus, the challenge to the 1992 agency-fee calculation is the only claim before us.

Under ALPA's "Policies and Procedures Applicable to Agency Fees," pilots who object to the fee calculation may request arbitration under procedures the American Arbitration Association (AAA) devised to resolve such disputes. *Id.*, at 69–70. One hundred seventy-four Delta pilots filed timely objections with the Union after receiving the 1992 SGNE. ALPA treated those objections as requests for arbitration and referred them to the AAA. On October 15, 1993, the AAA appointed an arbitrator to resolve the objections in a single, consolidated proceeding.

The objectors included 91 of the 153 pilots who are respondents here. (The other 62 respondents intervened in

the lawsuit but were not parties to the arbitration.) Preferring to pursue their challenges to ALPA's agency-fee calculation in the context of their ongoing federal-court action, the respondent-objectors asked the AAA to suspend the arbitration. The AAA referred that request to the arbitrator, who declined to defer to the federal-court litigation. *Id.*, at 106. After the District Court denied a motion to enjoin the arbitration, *id.*, at 111–114, respondents' counsel entered a "conditional appearance" in the arbitral proceedings. The arbitrator held hearings in January, February, and March 1994. He ultimately sustained the Union's agency-fee calculation in substantial part, although he concluded that "nongermane" expenses made up 21.49 percent of the union's budget, not 19 percent as the Union had determined. App. to Pet. for Cert. 71a–115a, 158a–161a.

After the arbitrator issued his decision, ALPA moved for summary judgment in the federal-court action. Granting the motion, the District Court concluded that pilots seeking to challenge the Union's agency-fee calculation must exhaust arbitral remedies before proceeding in court. *Id.*, at 26a–31a. Accordingly, the court held, the 62 respondents who did not join the arbitration were bound by the arbitrator's decision. *Id.*, at 32a. The other 91 respondents, the District Court ruled, qualified for clear-error review of the arbitrator's factfindings and *de novo* review of all legal issues. *Id.*, at 31a. Determining that the arbitrator had committed no error of law or clear error of fact, the court sustained his decision.

The Court of Appeals for the District of Columbia Circuit reversed. 108 F. 3d 1415 (1997). That court found "no legal basis" for requiring objectors to arbitrate agency-fee challenges unless they had agreed to do so (as respondents had not). *Id.*, at 1421 (emphasis deleted). It therefore concluded that "the arbitrator's decision [was] no longer a part of the legal picture," and for that reason the case "must be remanded." *Id.*, at 1422. We granted certiorari, 522 U. S.

991 (1997), limited to the question whether an objector must exhaust a union-provided arbitration process before bringing an agency-fee challenge in federal court, a matter on which the Courts of Appeals have reached differing conclusions.[1]

II

A

Because Delta is a "common carrier by air engaged in interstate or foreign commerce," 45 U. S. C. § 181, the RLA governs its bargaining relationship with ALPA. Section 2, Eleventh, of the RLA allows employers and unions to conclude agency-shop agreements.[2] The statutory authorization for such agreements aims to resolve the problem of "free riders—employees in the bargaining unit on whose behalf

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[1] Compare *Lancaster* v. *Air Line Pilots Assn. Int'l*, 76 F. 3d 1509, 1522 (CA10 1996) (exhaustion of arbitral remedy required), with *Knight* v. *Kenai Peninsula Borough School Dist.*, 131 F. 3d 807, 816 (CA9 1997) (exhaustion not required), and *Bromley* v. *Michigan Ed. Assn.-NEA*, 82 F. 3d 686, 694 (CA6 1996) (same).

[2] The RLA, § 2, Eleventh, as added by 64 Stat. 1238, 45 U. S. C. § 152, Eleventh, provides in pertinent part:

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

the union [is] obliged to perform its statutory functions, but who refus[e] to contribute to the cost thereof." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984). Under agency-shop arrangements, nonmembers must pay their fair share of union expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Id.*, at 448. To avoid constitutional questions that might arise were we to adopt a contrary interpretation of the RLA, however, we have held that costs unrelated to those representative duties may not be imposed on objecting employees. See *id.*, at 448–455; see also *Railway Clerks* v. *Allen*, 373 U. S. 113, 121 (1963) (§ 2, Eleventh, distinguishes between "the union's political expenditures," to which nonmembers may not be compelled to contribute, and expenditures "germane to collective bargaining," to which they may); *Machinists* v. *Street*, 367 U. S. 740, 768–769 (1961) ("§ 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes"); see also *Communications Workers* v. *Beck*, 487 U. S. 735, 762–763 (1988) (same limitations apply under NLRA).

A similar rule—based explicitly on the Constitution—applies to public-sector employment. In *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 232 (1977), we upheld the constitutionality of agency-shop agreements made by government employers with their workers' exclusive bargaining representatives. As the Court explained, imposition of agency fees under the RLA "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," and "[t]he same important government interests . . . presumptively support" agency-shop arrangements in the public sector. *Id.*, at 222, 225.

The agency fees assessed from nonmembers, we said in *Abood*, may be "used to finance expenditures by the Union

for the purposes of collective bargaining, contract administration, and grievance adjustment." *Id.*, at 225–226. We cautioned, however, in view of the presence of state action, that objecting employees have a First Amendment right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.*, at 234. In *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519 (1991), we relied on both public-sector and RLA cases to hold that agency fees assessed by public-employee unions "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

In *Hudson*, a public-sector case, we held that the First Amendment required unions and employers to provide procedural protections for nonunion workers who object to the calculation of the agency fee. Three safeguards, we declared, are essential to "minimize the infringement" on nonmembers' rights and provide workers with "a fair opportunity to identify the impact of [the agency-fee assessment] on [their] interests," *Hudson*, 475 U. S., at 303: Employees must receive "sufficient information to gauge the propriety of the union's fee," *id.*, at 306; the union must give objectors "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," *id.*, at 310; and any amount of the objector's fee "reasonably in dispute" must be held in escrow while the challenge is pending, *ibid.*

B

The Court of Appeals held that *Hudson*'s procedural requirements transfer fully to employment relations governed by the RLA, 108 F. 3d, at 1419, and the parties have not

challenged that determination.[3] We therefore turn directly to the question presented: When a union adopts an arbitration process to comply with *Hudson*'s "impartial decisionmaker" requirement, must agency-fee objectors pursue and exhaust the arbitral remedy before challenging the union's calculation in a federal-court action?

In his concurring opinion in *Hudson*, Justice White (joined by Chief Justice Burger) answered that question "yes." He stated: "[I]f the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." 475 U. S., at 311. The Court's opinion did not comment on that unelaborated assertion, however, so the issue remains live for the decision we now reach. The Court of Appeals recognized that "Justice White raised a legitimate *practical* concern," but found "no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process." 108 F. 3d, at 1421 (emphasis in original). We agree, and decline to read *Hudson* as a decision that protects nonunion members at a cost—delayed access to federal court—they do not wish to pay.

ALPA urges extension of the discretionary exhaustion-of-remedies doctrine to agency-fee arbitration. See Brief for Petitioner 19 (citing *McCarthy* v. *Madigan*, 503 U. S. 140, 144 (1992) ("[W]here Congress has not clearly required exhaus-

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[3] See *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 516 (1991) ("[T]he RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments."); *id.*, at 555 (SCALIA, J., concurring in judgment in part and dissenting in part) ("good reason to treat" statutory agency-fee cases as reflecting First Amendment principles articulated in *Abood*). But cf. *Price* v. *International Union, UAW*, 927 F. 2d 88, 92 (CA2 1991) (*Hudson*'s "heightened procedural safeguards" do not apply to agency-fee cases involving private employers governed by the NLRA).

tion, sound judicial discretion governs.")).[4] But a principal purpose of that doctrine is not relevant here. "[T]he exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *Id.*, at 145. ALPA seeks exhaustion not of an administrative remedy established by Congress but of an arbitral remedy established by a private party. Ordinarily, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960); see also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 942 (1995) ("a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute").

The Union, it is true, acted to comply with this Court's decision in *Hudson* rather than out of its own unconstrained choice. But *Hudson*'s requirement of "a reasonably prompt

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[4] *Amicus* National Education Association (NEA) argues that the question before us is one not of exhaustion but of ripeness. Illegality depends on the *spending* of compelled agency fees for ideological purposes, NEA maintains, not simply the initial collection of those fees; hence, an objector has no basis for filing suit until the arbitrator has ruled and the disputed amounts are released from escrow. See Brief for National Education Association as *Amicus Curiae* 18–20. Petitioner, in its reply brief, endorses NEA's argument. See Reply Brief 16–17. The contention, however, is inconsistent with *Teachers* v. *Hudson*, 475 U. S. 292 (1986). There, we rejected the union's position that "because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly, it eliminates any valid constitutional objection to the procedure and thereby provides an adequate remedy." *Id.*, at 309. We held that even if the entire agency fee remained in escrow throughout arbitration, objectors (who are deprived of the use of what may be their property pending the outcome of the dispute) had an independent, enforceable interest in the prompt and proper resolution of their objections.

decision by an impartial decisionmaker," 475 U. S., at 307, aims to protect the interest of objectors by affording them access to a neutral forum in which their objections can be resolved swiftly; nothing in our decision purports to compel objectors to pursue that remedy. See *ibid.* ("The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner."). Indeed, *Hudson*'s emphasis on the need for a speedy remedy weighs against exhaustion, even through an arbitration procedure intended to be expeditious, as an essential prerequisite to federal-court consideration of nonmember challenges. See *McCarthy*, 503 U. S., at 146 ("[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." (internal quotation marks omitted)). We resist reading *Hudson* in a manner that might frustrate its very purpose, to advance the swift, fair, and final settlement of objectors' rights.

Against these concerns, ALPA stresses the asserted efficiency gains of requiring objectors to proceed to arbitration first. The Union asserts: "It is difficult to conceive how a court could fairly try an agency-fee dispute *ab initio*, given that the plaintiffs who challenge an agency-fee calculation are not required to state any grounds whatsoever for their challenge." Reply Brief 6–7. Arbitration, in ALPA's view, will serve a useful, if not essential, role in defining the scope of the dispute. See Brief for Petitioner 21–23; Reply Brief 4–7.

ALPA overstates the difficulties of holding a federal-court hearing without a preparatory arbitration. We have held that "the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof."

Hudson, 475 U. S., at 306. And when pursuing the union's *internal* remedies, an objector may preserve the right to subsequent judicial relief without "indicat[ing] to the Union the *specific* expenditures to which he objects." *Abood*, 431 U. S., at 241 (emphasis in original). In stating that the "nonmember's 'burden' is simply the obligation to make his objection known," *Hudson*, 475 U. S., at 306, n. 16, however, we did not hold that a federal-court plaintiff can file a generally phrased complaint, then sit back and require the union to prove the "germaneness" of its expenditures without a clue as to "which of its thousands of expenditures" the objectors oppose. Reply Brief 4. Agency-fee challengers, like all other civil litigants, must make their objections known with the degree of specificity appropriate at each stage of litigation their case reaches: motion to dismiss; motion for summary judgment; pretrial conference.

The very purpose of *Hudson*'s notice requirement is to provide employees sufficient information to enable them to identify the expenditures that, in their view, the union has improperly classified as germane. See 475 U. S., at 306–307. With the *Hudson* notice, plus any additional information developed through reasonable discovery, an objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable. Although the union must establish that those expenditures were in fact germane, the shifted burden of proof provides no warrant for blocking dissenting employees from bringing their claims in federal court in the first instance, if that is their preference. The answer to ALPA's efficiency concern lies in conscientious management of the pretrial process to guard against abuse, not in a judicially imposed exhaustion requirement.

Moreover, the degree to which an exhaustion requirement would reduce the burden on the courts is uncertain. To the extent that the arbitrator does not sustain an objection to the union's fee calculation, exhaustion would require the ob-

jector to traverse two layers of procedure rather than one.[5] Furthermore, if the union's arbitration process in fact operates to provide an inexpensive, swift, and sure remedy for agency-fee errors, dissenting employees may avail themselves of that process even if not required to do so. Cf. *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 513, n. 15 (1982) (under a " 'free market' system" of no required exhaustion, "litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective").

The Union may, nonetheless, face the prospect of defending its fee calculation simultaneously in judicial and arbitral fora. We note that unions do not lack means to limit the expense and disruption occasioned by multiple fee challenges: objections may be consolidated for consideration in a single arbitration, for example, and agency-fee litigation may be consolidated in a single district court. See 28 U. S. C. §§ 1404, 1407. But genuine as the Union's interest in avoiding multiple proceedings may be, that interest does not overwhelm objectors' resistance to arbitration to which they did not consent, and their election to proceed immediately to court for adjudication of their federal rights.[6] We hold that, unless they agree to the procedure, agency-fee objectors may

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[5] Inevitably limiting the utility of exhaustion in relieving the courts of the task of adjudicating agency-fee disputes is the nonbinding character of *Hudson* arbitration, a characteristic on which the dissent centrally relies. See *post*, at 880, 881, 882, 883–885.

[6] Our recognition of the right of objectors to proceed directly to court does not detract from district courts' discretion to defer discovery or other proceedings pending the prompt conclusion of arbitration. See, *e. g.*, *Landis* v. *North American Co.*, 299 U. S. 248, 254–255 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

not be required to exhaust an arbitration remedy before bringing their claims in federal court.

* * *

For the reasons stated, the judgment of the Court of Appeals for the District of Columbia Circuit is

Affirmed.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

In *Teachers* v. *Hudson*, 475 U. S. 292 (1986), this Court held that

> "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, *a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker*, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.*, at 310 (emphasis added).

The Court added that, if the "impartial decisionmaker" is an arbitrator, that arbitrator's decision would not bind a court in a subsequent court action. *Id.*, at 308, n. 21 ("arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action"). Cf. *ante*, at 874–875, and n. 3 (treating procedural requirements set forth in *Hudson*, a 42 U. S. C. § 1983 case, as "transfer[ing] fully" to Railway Labor Act cases such as this one).

I read *Hudson* as implying approval, not disapproval, of a union rule that would require initial participation in "prompt," but *non*-binding, arbitration. Indeed, Justice White, joined by Chief Justice Burger, concurring in the Court's judgment and opinion in *Hudson*, specifically stated that

> "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should

> be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." 475 U. S., at 311.

I agree with Justice White that the law permits the Union to insist upon compliance with that internal procedure—as long as the required arbitration is nonbinding and conducted expeditiously by an "impartial" arbitrator, as *Hudson* requires. *Id.*, at 310.

The Court majority quotes with approval the Court of Appeals' statement that Justice White's concern, while " 'practical,' " lacked a " 'legal basis.' " *Ante*, at 875 (quoting 108 F. 3d 1415, 1421 (CADC 1997)) (emphasis deleted). But *Hudson* itself, and the case law upon which *Hudson* rests, provide more than adequate legal support for Justice White's basic position. Those cases make clear that *Hudson*'s requirements do not rest solely upon the interests of dissenting employees, but, rather, grow out of a judicial effort to balance two distinct interests.

One interest is the Union's concern that nonmember employees share the cost of the collective bargaining from which they benefit. See *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 222 (1977) (imposition of agency fees "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress"); *Railway Clerks* v. *Allen*, 373 U. S. 113, 122 (1963) ("no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement"); *Machinists* v. *Street*, 367 U. S. 740, 761–764 (1961); see also *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 520–521 (1991). The other interest is that of the nonmember in *not* paying for "nongermane" union activity, which activity may promote ideological or political views that the nonmember does not share. *Lehnert*, *supra*, at 515–519; *Abood*, *supra*, at 233–236; *Allen*, *supra*, at 118–121; *Street*, *supra*, at 765–769.

This Court has interpreted the relevant labor statutes, in light of the Constitution's requirements, as requiring procedures that "protect *both*" these "interests to the maximum extent possible without undue impingement of one on the other." *Street*, *supra*, at 773 (emphasis added). Indeed, *Hudson* itself makes clear that procedural requirements "'must'" seek as their "'objective'" to "'preven[t] compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*'" 475 U. S., at 302 (quoting *Abood*, *supra*, at 237) (emphasis added). The mandatory, but nonbinding, arbitration requirement at issue here satisfies these objectives, for it amounts to a reasonable elaboration of *Hudson*'s own mandate: that the Union provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." 475 U. S., at 310.

First, consider the matter from the Union's perspective. The "arbitration first" requirement seems reasonable because it lowers the costs of resolving agency fee disputes and makes their resolution manageable. As this case illustrates, different groups of nonmember dissenters with different motivations for objecting may proceed in different forums. Without the "arbitration first" rule, they might do so simultaneously. Judge and arbitrator, perhaps subject to different discovery requests, obtaining somewhat different information, hearing different arguments, operating under different rules of procedure and evidence, and exercising different judgments (each without knowledge of the other), could well determine differently costs and complex expenditure relationships, thereby reaching different, even conflicting, conclusions. *Amicus* National Education Association says that this "would be the most expensive and burdensome system imaginable." Brief for National Education Association as *Amicus Curiae* 14. *Amicus* AFL–CIO adds that the "costs of defending such litigation" (which may involve no

more than $50 or so for any individual dissenter, see Tr. of Oral Arg. 10) "can easily consume the union's agency fee receipts." Brief for AFL–CIO as *Amicus Curiae* 14, n. 5. The Court itself recognizes as "[g]enuine" the Union's "concern" about defending "its fee calculation simultaneously in judicial and arbitral fora." *Ante*, at 878, 879.

Second, consider the matter from the perspective of the dissenting employee. The Court's decision, rejecting the Union's rule, may help to protect the ideological interests of a few of those employees, but only a few, and then in a way that does *not* offset the corresponding harm caused the Union. That is because "arbitration first" does not mean serious delay, for the arbitration must begin promptly and proceed expeditiously. See *Hudson*, *supra*, at 307. Moreover, nonbinding arbitration may resolve the dispute to the satisfaction of some dissenting employees, perhaps those whose objections rest less upon ideology and more upon a desire to minimize the fee they must pay. See *Gilpin* v. *AFSCME*, 875 F. 2d 1310, 1313 (CA7 1989) (noting that many objectors are "free riders" seeking representation at the lowest cost possible); *Weaver* v. *University of Cincinnati*, 970 F. 2d 1523, 1530 (CA6 1992) (same); *Kidwell* v. *Transportation Comm. Int'l Union*, 946 F. 2d 283, 304–306 (CA4 1991) (same).

Nor will trying arbitration first prejudice the cause of the remaining unsatisfied objectors. The nonbinding arbitration process may deprive objectors of their money for a brief additional time, but the disputed fees must remain unspent in escrow during the arbitration proceedings. *Hudson*, *supra*, at 305, 310. Nonbinding arbitration also leaves the objectors free to press their claims in a later court action—if the arbitration's result leaves them dissatisfied. And, as the Union conceded at oral argument, the judge in that later action, though informed by the arbitrator's decision, would not accord it any special legal weight. Tr. of Oral Arg. 16, 20–21; see also *Hudson*, *supra*, at 308, n. 21 ("arbitrator's decision would not receive preclusive effect in any subse-

quent § 1983 action"). Cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944) (administrative agency, through its interpretations, may have the "power to persuade, if lacking power to control"). In other words, the objecting dissenter, though briefly delayed, could proceed in court and on a clean slate. See Hensler, Court-Ordered Arbitration: An Alternative View, U. Chi. Legal Forum 399, 401 (1990) (describing differences between mandatory *non*-binding arbitration over agency fee calculations, and traditional mandatory *binding* arbitration).

From the courts' perspective too, nonbinding arbitration can prove helpful. Insofar as it settles matters to the parties' satisfaction, it avoids unnecessary, perhaps time-consuming, judicial investigation of highly complex union accounts and expense allocations. Cf. *Allen*, 373 U. S., at 122 (describing difficulties surrounding "judicially administered relief" for agency fee objectors, as compared with "internal union remedy"); *Abood*, 431 U. S., at 240 (same).

The upshot is that the "arbitration first" rule "prevent[s] compulsory subsidization of ideological activity" without unduly "restricting the Union's ability" to collect a legitimate agency fee. Consequently, neither the First Amendment, nor any statute, as interpreted by this Court, prohibits the Union's insistence upon that rule.

I fear that the majority is led to a different conclusion through use of analogies that, in my view, do not govern the circumstances before us. First, the Court analogizes the arbitration at issue here to binding arbitration often found in contracts, including labor contracts, where arbitration is legally anchored in the consent of the parties. *Ante*, at 876. But "consent" is not relevant to the legal justification for the "arbitration first" rule before us. Rather, that rule finds its legal anchor in the Union's legal authority (indeed, obligation) under *Hudson* to impose internal procedures that permit collection of agency fees, without undue infringement of objectors' constitutional rights. I have explained above

why the rule at issue here satisfies *Hudson*'s requirements. If one needs an analogy, I would find it, not in consensual arbitration, but in court rules that require parties to try nonbinding arbitration before they pursue a case in court. See, *e. g.*, 28 U. S. C. §§ 651–658 (authorizing district courts to refer certain types of civil actions to arbitration); Alternative Dispute Resolution, Local Rules 2–3, 4–2 (ND Cal. 1998); see also B. Meierhoefer, Federal Judicial Center, Court-Annexed Arbitration in Ten District Courts (1990).

Second, the Court describes the Union's proposed "arbitration first" rule as an "extension of the discretionary exhaustion-of-remedies doctrine." *Ante*, at 875. But whether that particular doctrine offers legal justification in this case is beside the point. The "arbitration first" rule amounts to an elaboration of the obligations set forth in *Hudson*. Those obligations rested upon the substantive law that permits collection of agency fees interpreted in light of the competing demands of the First Amendment. *Hudson* decided that this law required the courts to craft a mandatory, nonbinding mechanism for speedy dispute resolution. Exhaustion principles did not prevent the Court from doing so. Why then should those principles prevent the Court from elaborating upon *Hudson*'s requirements, by permitting a union to impose a reasonable "arbitration first" rule of the kind before us?

I note one additional matter. The Court's opinion refers to the "pilots . . . proceed[ing] at once in federal court." *Ante*, at 869. The Court does not decide, however, whether a federal court can await the conclusion of an expeditious arbitration before it proceeds, for example, with discovery. *Ante*, at 879, n. 6. Should it await arbitration's conclusion, the court would be able to take advantage of any settlement or narrowing of issues that the nonmandatory arbitration proceeding produced. Doing so would alleviate many of the concerns that I have expressed in this opinion. See *supra*, at 882–884.

Even so, the question before us is whether the Union can insist upon prior recourse to that form of arbitration. For the reasons stated, I believe such a requirement is consistent with, and a reasonable extension of, this Court's decision in *Hudson*.

I therefore dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 886 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 3 THROUGH
MAY 26, 1998

MARCH 3, 1998

Miscellaneous Order

No. A–657. FRANCIS, WARDEN *v.* FRANKLIN ET AL., NEXT FRIENDS FOR BERRY. Application to vacate stay of execution of sentence of death entered by the United States District Court for the Southern District of Ohio on February 27, 1998, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

MARCH 4, 1998

Dismissal Under Rule 46

No. 97–7427. ALTSCHUL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari dismissed under this Court's 46.

MARCH 6, 1998

Certiorari Denied

No. 97–8069 (A–644). ARNOLD *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

MARCH 9, 1998

Certiorari Granted—Vacated and Remanded

No. 97–669. CITY OF BELLEVILLE *v.* DOE ET AL., BY THEIR PARENTS AND NEXT FRIENDS, DOE ET UX. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oncale* v. *Sundowner Offshore Services, Inc.*, *ante*, p. 75. Reported below: 119 F. 3d 563.

Miscellaneous Orders. (See also No. 97–7300, *ante*, p. 206.)

No. M–46. BENOIT *v.* MEDICAL CENTER OF DELAWARE, INC., CHRISTIANA HOSPITAL; and

No. M–47. BROOKS *v.* MCKINNEY ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. M–48. BETTS *v.* CONTAINER CORPORATION OF AMERICA ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time and for other relief denied.

No. 96–1654. MUSCARELLO *v.* UNITED STATES. C. A. 5th Cir.; and

No. 96–8837. CLEVELAND ET AL. *v.* UNITED STATES. C. A. 1st Cir. [Certiorari granted, 522 U. S. 1023.] Motion of petitioners for divided argument granted.

No. 96–1866. GEBSER ET AL. *v.* LAGO VISTA INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. [Certiorari granted, 522 U. S. 1011.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–156. BRAGDON *v.* ABBOTT ET AL. C. A. 1st Cir. [Certiorari granted, 522 U. S. 991.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–454. UNITED STATES *v.* BESTFOODS ET AL. C. A. 6th Cir. [Certiorari granted *sub nom. United States* v. *CPC International, Inc.*, 522 U. S. 1024.] Motion of respondents Aerojet-General Corp. et al. for divided argument denied. The Court will hear argument from respondent Bestfoods.

No. 97–6789. MOOMCHI *v.* NEW MEXICO CORRECTIONS DEPARTMENT ET AL. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [522 U. S. 1074] denied.

No. 97–7488. CADDY *v.* GOOD SAMARITAN HOSPITAL ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 30, 1998, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 97–7885. IN RE AZUZ. Petition for writ of habeas corpus denied.

No. 97–7786. In re Monge Viveros. Petition for writ of mandamus denied.

No. 97–7384. In re Darden;
No. 97–7434. In re Pearson; and
No. 97–7767. In re Van Hoorelbeke. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 97–1147. Minnesota *v.* Carter; and Minnesota *v.* Johns. Sup. Ct. Minn. Certiorari granted. Reported below: 569 N. W. 2d 169 (first judgment) and 180 (second judgment).

No. 97–1130. Pfaff *v.* Wells Electronics, Inc. C. A. Fed. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 124 F. 3d 1429.

Certiorari Denied

No. 96–1872. Scott-Harris *v.* City of Fall River. C. A. 1st Cir. Certiorari denied. Reported below: 134 F. 3d 427.

No. 97–330. BVP Management Associates *v.* Fredette. C. A. 11th Cir. Certiorari denied. Reported below: 112 F. 3d 1503.

No. 97–746. General Motors Corp. *v.* Grear et al.; and In re General Motors Corp. C. A. 6th Cir. Certiorari denied.

No. 97–834. Pollin et al. *v.* Paralyzed Veterans of America et al. C. A. D. C. Cir. Certiorari denied. Reported below: 117 F. 3d 579.

No. 97–897. United Steelworkers of America, AFL–CIO–CLC, et al. *v.* Bandag, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 121 F. 3d 697.

No. 97–910. Kiker et vir *v.* Miller, Individually and as Circuit Judge of the Circuit Court of Russell County. C. A. 11th Cir. Certiorari denied. Reported below: 110 F. 3d 798.

No. 97–917. Litton Industrial Automation Systems, Inc. *v.* Nationwide Power Corp. et al. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 366.

No. 97–924. HIBBS ET AL. *v.* CITY OF SAN BUENAVENTURA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–984. REMINGTON INVESTMENTS, INC. *v.* HAMEDANI. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 55 Cal. App. 4th 1033, 64 Cal. Rptr. 2d 376.

No. 97–1023. CHAMPION INTERNATIONAL CORP. *v.* SMITH, EXECUTRIX FOR THE ESTATE OF SMITH. C. A. 4th Cir. Certiorari denied. Reported below: 125 F. 3d 848.

No. 97–1055. FINOVA CAPITAL CORP., SUCCESSOR IN INTEREST TO BELL ATLANTIC TRICON LEASING CORP. *v.* LIFECARE X-RAY, INC., ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 456 Pa. Super. 84, 689 A. 2d 924.

No. 97–1091. SUMMIT *v.* S–B POWER TOOL (SKIL CORP.). C. A. 8th Cir. Certiorari denied. Reported below: 121 F. 3d 416.

No. 97–1098. DANCY *v.* HYSTER CO. C. A. 8th Cir. Certiorari denied. Reported below: 127 F. 3d 649.

No. 97–1103. ELEWSKI *v.* CITY OF SYRACUSE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 123 F. 3d 51.

No. 97–1104. FARMER *v.* UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 113 Nev. 90, 930 P. 2d 730.

No. 97–1105. DERZACK ET VIR *v.* ALLEGHENY COUNTY CHILDREN AND YOUTH SERVICES. Super. Ct. Pa. Certiorari denied. Reported below: 456 Pa. Super. 440, 690 A. 2d 1192.

No. 97–1109. LAND & LAKES CO. ET AL. *v.* HENDERSON, COMMISSIONER, ILLINOIS DEPARTMENT OF ENVIRONMENT, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 286 Ill. App. 3d 1113, 709 N. E. 2d 1006.

No. 97–1115. METROPOLITAN DADE COUNTY ET AL. *v.* ENGINEERING CONTRACTORS ASSOCIATION OF SOUTH FLORIDA, INC., ET AL.; and

No. 97–1160. ALLIED MINORITY CONTRACTORS ASSN., INC. *v.* ENGINEERING CONTRACTORS ASSOCIATION OF SOUTH FLORIDA, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 895.

No. 97–1125. SURGIDEV CORP. *v.* NIEHOFF. Sup. Ct. Ky. Certiorari denied. Reported below: 950 S. W. 2d 816.

No. 97–1132. TAYLOR, EXECUTOR OF THE ESTATE OF TAYLOR, DECEASED, ET AL. *v.* JAQUEZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 126 F. 3d 1294.

No. 97–1138. COMENOUT ET AL. *v.* WASHINGTON DEPARTMENT OF COMMUNITY DEVELOPMENT ET AL. Ct. App. Wash. Certiorari denied. Reported below: 85 Wash. App. 1099.

No. 97–1140. WINGFIELD *v.* MASSIE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 122 F. 3d 1329.

No. 97–1150. TRAHAN *v.* BELLSOUTH TELECOMMUNICATIONS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 609.

No. 97–1151. GENDREAU *v.* GENDREAU. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 815.

No. 97–1158. SUMMERS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 119 F. 3d 917.

No. 97–1180. OLDHAM, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF OLDHAM, DECEASED *v.* KOREAN AIR LINES CO., LTD. C. A. D. C. Cir. Certiorari denied. Reported below: 127 F. 3d 43.

No. 97–1182. ELLIS *v.* HILL ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–1186. MIZELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 117 F. 3d 1432.

No. 97–1187. DOBROVOLNY ET AL. *v.* MOORE, SECRETARY OF STATE OF NEBRASKA. C. A. 8th Cir. Certiorari denied. Reported below: 126 F. 3d 1111.

No. 97–1193. REMINGTON INVESTMENTS, INC. *v.* XEP NGUYEN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–1197. NESBITT *v.* WEST VIRGINIA. Cir. Ct. Upshur County, W. Va. Certiorari denied.

No. 97–1198. MOORE *v.* CITY OF WESTMINSTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 116 F. 3d 1486.

No. 97–1221. RING *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 124 F. 3d 208.

No. 97–1237. LOCAL UNION 7107, UNITED MINE WORKERS OF AMERICA, DISTRICT 28 *v.* CLINCHFIELD COAL CO. C. A. 4th Cir. Certiorari denied. Reported below: 124 F. 3d 639.

No. 97–1266. PATENT OFFICE PROFESSIONAL ASSN. *v.* FEDERAL LABOR RELATIONS AUTHORITY. C. A. D. C. Cir. Certiorari denied. Reported below: 128 F. 3d 751.

No. 97–1268. SCHOUMAN *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1265.

No. 97–1270. BIRD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 124 F. 3d 667.

No. 97–1277. HASELOW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 97–1281. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 609.

No. 97–1304. HUGHES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1453.

No. 97–1305. GOLLAPUDI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 130 F. 3d 66.

No. 97–1306. WRIGHT *v.* MASS TRANSIT ADMINISTRATION. Ct. Sp. App. Md. Certiorari denied. Reported below: 114 Md. App. 728.

No. 97–6033. WASHINGTON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 547 Pa. 563, 692 A. 2d 1024.

No. 97–6353. NEWBY *v.* MILLER, GOVERNOR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 114 F. 3d 1203.

No. 97–6410. JACKSON *v.* DAY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 121 F. 3d 705.

No. 97–6691. One Juvenile Male *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 117 F. 3d 1415.

No. 97–6835. Barr *v.* Jones, Warden. C. A. 6th Cir. Certiorari denied.

No. 97–6836. Wee et ux. *v.* Andrews et al. C. A. 2d Cir. Certiorari denied.

No. 97–7038. Stearns et al. *v.* Gregoire, Attorney General of Washington, et al. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 1079.

No. 97–7058. Taylor *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 121 F. 3d 702.

No. 97–7273. Lee *v.* Arizona (two judgments). Sup. Ct. Ariz. Certiorari denied. Reported below: 189 Ariz. 608, 944 P. 2d 1222 (first judgment); 189 Ariz. 590, 944 P. 2d 1204 (second judgment).

No. 97–7278. Kevin B. *v.* New Hampshire. Sup. Ct. N. H. Certiorari denied.

No. 97–7283. Brown *v.* Washington. Sup. Ct. Wash. Certiorari denied. Reported below: 132 Wash. 2d 529, 940 P. 2d 546.

No. 97–7303. Simpson *v.* Phillips, Warden. C. A. 6th Cir. Certiorari denied.

No. 97–7304. Swafford *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7332. Muhammad, aka Garrett *v.* Angelone, Director, Virginia Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1260.

No. 97–7333. Lewis *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 97–7337. McPherson *v.* Vandlen et al. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1264.

No. 97–7338. Jackson *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7339. Lawrence *v.* Evans, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 124 F. 3d 217.

No. 97–7340. TEEL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 607.

No. 97–7342. GARCIA PEREZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 122 F. 3d 1067.

No. 97–7347. STENSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 132 Wash. 2d 668, 940 P. 2d 1239.

No. 97–7348. STEPHEN *v.* ROMANI. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7351. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 699 So. 2d 629.

No. 97–7353. BLEVINS *v.* WATSON, DISTRICT JUDGE, COTTON COUNTY, OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 97–7354. CULLEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 699 So. 2d 1009.

No. 97–7358. VALDEZ ET UX. *v.* ZIONS SECURITIES CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 719.

No. 97–7360. BENTLEY *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–7362. KENDRICK *v.* YOUNG, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 97–7364. MOSTEK *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 97–7366. JAMES *v.* LAMAR. C. A. 11th Cir. Certiorari denied. Reported below: 117 F. 3d 1431.

No. 97–7369. MCCOY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 125 F. 3d 1186.

No. 97–7379. HOLLOWELL *v.* JOHNSON, SHERIFF, PULASKI COUNTY, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 124 F. 3d 208.

No. 97–7382. GUARDADO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–7389. OMEGBU *v.* MEQUON-THIENSVILLE SCHOOL DISTRICT ET AL. C. A. 7th Cir. Certiorari denied.

No. 97–7390. SEIBERT *v.* EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 113 Nev. 1648, 970 P. 2d 1129.

No. 97–7391. COHEN *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–7393. JACKS ET AL. *v.* CRABTREE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 114 F. 3d 983.

No. 97–7394. SHARP *v.* MAKOWSKI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–7398. ALEXANDER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 120 Ohio App. 3d 164, 697 N. E. 2d 255.

No. 97–7399. WHITE *v.* SHEESLEY. C. A. 10th Cir. Certiorari denied.

No. 97–7402. ZANKICH *v.* PHOENIX CARDIOLOGISTS ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–7405. BORNE *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 691 So. 2d 1281.

No. 97–7410. THOMAS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 226 Ga. App. 409, 486 S. E. 2d 673.

No. 97–7411. WOODS *v.* ALEX-BELL OXFORD LIMITED PARTNERSHIP ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 121 F. 3d 711.

No. 97–7426. WHITE *v.* TATE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–7429. COUCH *v.* FEDERAL PAPER BOARD CO., INC. C. A. 11th Cir. Certiorari denied.

No. 97–7430. BREWER *v.* DISTRICT COURT OF TEXAS, DALLAS COUNTY, ET AL. Sup. Ct. Tex. Certiorari denied.

No. 97–7432. SANDS *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7435. BLANCHARD *v.* TULANE UNIVERSITY MEDICAL CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 125 F. 3d 852.

No. 97–7451. SWEET *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 125 F. 3d 1144.

No. 97–7482. MCNEIL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 545 Pa. 42, 679 A. 2d 1253.

No. 97–7483. MIRANDA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 291 Ill. App. 3d 1120, 716 N. E. 2d 879.

No. 97–7499. HENRY *v.* STINSON, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 113.

No. 97–7510. FERGUSON *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 97–7532. WADDY *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 97–7544. PARKS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 698 A. 2d 670.

No. 97–7589. SHELINE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 955 S. W. 2d 42.

No. 97–7614. ESPINOZA *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 949 S. W. 2d 10.

No. 97–7635. KOSYLA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 288 Ill. App. 3d 1102, 711 N. E. 2d 824.

No. 97–7657. HILL *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 48 M. J. 352.

No. 97–7658. MARTINEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–7670. GOFF *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–7682. COLEMAN *v.* MILLER, GOVERNOR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 117 F. 3d 527.

No. 97–7709. REEVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 150.

No. 97–7720. KIBLER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 46 M. J. 160.

No. 97–7722. TARKOWSKI *v.* ILLINOIS DEPARTMENT OF PUBLIC AID. Sup. Ct. Ill. Certiorari denied.

No. 97–7730. LANIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 123 F. 3d 945.

No. 97–7733. S. A. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 129 F. 3d 995.

No. 97–7735. RESTREPO-VALENCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 221.

No. 97–7744. ALPHONSE *v.* UNITED STATES; and
No. 97–7820. HUGHEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–7745. LOCKETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–7756. FITZGERALD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 141.

No. 97–7757. GANNON *v.* COPELAND, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 146.

No. 97–7758. GUSTUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 122 F. 3d 235.

No. 97–7759. BAIRD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 127 F. 3d 1231.

No. 97–7771. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 987.

No. 97–7775. SPINDLE *v.* TILLERY. C. A. 10th Cir. Certiorari denied. Reported below: 124 F. 3d 217.

No. 97–7779. BROWN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 97–7781. CALLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 120 F. 3d 43.

No. 97–7783. IRIARTE-ORTEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 113 F. 3d 1022 and 127 F. 3d 1200.

No. 97–7787. WALDRIP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 125 F. 3d 638.

No. 97–7788. WACASTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 611.

No. 97–7789. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–7794. WOODS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–7795. URENA-COLLADO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–7796. WARREN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 116 Md. App. 749.

No. 97–7799. QUINN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 123 F. 3d 1415.

No. 97–7800. ROGERS *v.* MCCAUGHTRY, WARDEN. Ct. App. Wis. Certiorari denied.

No. 97–7803. FIELDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 698 A. 2d 485.

No. 97–7807. DAVIDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 213.

No. 97–7812. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1261.

No. 97–7813. JOSHUA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 1078.

No. 97–7819. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1260.

No. 97–7826. ALKAZOFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 97–7828. ALLEN J. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 127 F. 3d 1292.

No. 97–7846. RHODEN *v.* WYATT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 124 F. 3d 199.

No. 97–7852. EGGERSDORF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 126 F. 3d 1318.

No. 97–7853. GARRETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 131 F. 3d 155.

No. 97–7855. HUGHES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 127 F. 3d 1132.

No. 97–7872. GARCES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 119 F. 3d 10.

Rehearing Denied

No. 96–9333. CITIZEN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 522 U. S. 842;

No. 97–756. BURGE ET AL. *v.* BEHR ET UX., 522 U. S. 1049;

No. 97–909. MADDOX *v.* CAPITOL BANKERS LIFE INSURANCE CO. ET AL., 522 U. S. 1091;

No. 97–1083. IN RE COLE, 522 U. S. 1088;

No. 97–6678. HARRIS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 522 U. S. 1059;

No. 97–6729. HUGHES *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL., 522 U. S. 1060;

No. 97–6736. ERDMAN *v.* STEGALL, WARDEN, 522 U. S. 1079;

No. 97–6880. BEAVEN *v.* MCBRIDE, SUPERINTENDENT, WESTVILLE CORRECTIONAL FACILITY, 522 U. S. 1062; and

No. 97–6975. GRETZLER *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, 522 U. S. 1081. Petitions for rehearing denied.

MARCH 11, 1998

Certiorari Denied

No. 97–8156 (A–665). HOGUE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 131 F. 3d 466.

MARCH 17, 1998

Rehearing Denied

No. 97–7022. GRIFFIN-EL *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 522 U. S. 1082. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for rehearing denied.

MARCH 18, 1998

Miscellaneous Order

No. A–695. BUCHANAN *v.* GILMORE, GOVERNOR OF VIRGINIA, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

MARCH 20, 1998

Miscellaneous Order

No. 97–679. AMERICAN TELEPHONE & TELEGRAPH CO. *v.* CENTRAL OFFICE TELEPHONE, INC. C. A. 9th Cir. [Certiorari granted, 522 U. S. 1024.] Motion of respondent to permit Ad Hoc Telecommunications Users Committee et al. to present argument as *amici curiae* denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

Certiorari Denied

No. 97–7646. JONES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 701 So. 2d 76.

MARCH 22, 1998

Certiorari Denied

No. 97–8377 (A–704). STANO *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to

JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

MARCH 23, 1998

Dismissal Under Rule 46

No. 96–1925. CATERPILLAR INC. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 3d Cir. [Certiorari granted, 521 U. S. 1152.*] Writ of certiorari dismissed under this Court's Rule 46.1.

Certiorari Granted—Vacated and Remanded

No. 96–7726. LEWIS *v.* UNITED STATES. 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 *Lewis* v. *United States*, *ante*, p. 155. Reported below: 92 F. 3d 1371.

Certiorari Granted—Reversed. (See No. 97–954, *ante*, p. 208.)

Miscellaneous Orders

No. A–691. GRIFFIN-EL *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Application for certificate of probable cause or, in the alternative, a certificate of appealability and stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. D–1880. IN RE DISBARMENT OF JOHNSON. Disbarment entered. [For earlier order herein, see 522 U. S. 1012.]

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*[REPORTER'S NOTE: Argued January 20, 1998. *Columbus R. Gangemi, Jr.*, argued the cause for petitioner. With him on the briefs were *Gerald C. Peterson* and *Joseph J. Torres.*

David M. Silberman argued the cause for respondents. With him on the brief were *Daniel W. Sherrick*, *Jordan Rossen*, and *Wendy L. Kahn.*

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, *Marvin Krislov*, *Allen H. Feldman*, and *Edward D. Sieger.*

James B. Coppess, *Jonathan P. Hiatt*, and *Marsha S. Berzon* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

William J. Rodgers and *Phillip D. Brady* filed a brief for the American Automobile Manufacturers Association as *amicus curiae.*]

No. D–1883. IN RE DISBARMENT OF FIERER. Disbarment entered. [For earlier order herein, see 522 U. S. 1013.]

No. D–1888. IN RE DISBARMENT OF MOORE. Disbarment entered. [For earlier order herein, see 522 U. S. 1026.]

No. D–1892. IN RE DISBARMENT OF PAIRO. Disbarment entered. [For earlier order herein, see 522 U. S. 1040.]

No. D–1894. IN RE DISBARMENT OF CHRISTIE. Disbarment entered. [For earlier order herein, see 522 U. S. 1040.]

No. D–1896. IN RE DISBARMENT OF BARNTHOUSE. Disbarment entered. [For earlier order herein, see 522 U. S. 1040.]

No. D–1897. IN RE DISBARMENT OF HANTMAN. Disbarment entered. [For earlier order herein, see 522 U. S. 1041.]

No. D–1898. IN RE DISBARMENT OF POREDA. Disbarment entered. [For earlier order herein, see 522 U. S. 1041.]

No. D–1899. IN RE DISBARMENT OF GAMMONS. Disbarment entered. [For earlier order herein, see 522 U. S. 1041.]

No. D–1901. IN RE DISBARMENT OF AZORSKY. Disbarment entered. [For earlier order herein, see 522 U. S. 1041.]

No. D–1902. IN RE DISBARMENT OF GARDNER. Disbarment entered. [For earlier order herein, see 522 U. S. 1041.]

No. D–1904. IN RE DISBARMENT OF QUINT. Disbarment entered. [For earlier order herein, see 522 U. S. 1041.]

No. D–1907. IN RE DISBARMENT OF ROME. Disbarment entered. [For earlier order herein, see 522 U. S. 1073.]

No. D–1919. IN RE DISBARMENT OF WHITE. Charles Henry White, Sr., of New Orleans, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1920. IN RE DISBARMENT OF SCHANER. Brian Keith Schaner, of Cleveland Heights, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1921. IN RE DISBARMENT OF BROWN. Robert Kenneth Brown, of Fresno, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1922. IN RE DISBARMENT OF GOLDFLAM. Stanley Z. Goldflam, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1923. IN RE DISBARMENT OF MCGOWEN. Richard Miles McGowen, of Los Altos, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1924. IN RE DISBARMENT OF MONTAGUE. James Paul Montague, of San Diego, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1925. IN RE DISBARMENT OF HINDIN. Arthur Theodore Hindin, of Beverly Hills, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–49. BROWN *v.* GENERAL TELEPHONE COMPANY OF CALIFORNIA; and

No. M–50. TABBYTITE *v.* MUNICIPALITY OF ANCHORAGE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time under this Court's Rule 14.5 denied.

No. M–51. RICH *v.* BRUCE;

No. M–53. MILLER *v.* UNITED STATES; and

No. M–54. WINSETT *v.* WASHINGTON, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. M–52. SANCHEZ-VELASCO *v.* FLORIDA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 97–634. PENNSYLVANIA DEPARTMENT OF CORRECTIONS ET AL. *v.* YESKEY. C. A. 3d Cir. [Certiorari granted, 522 U. S. 1086.] Motion of Republican Caucus of Pennsylvania House of Representatives for leave to file a brief as *amicus curiae* granted.

No. 97–689. GEISSAL, BENEFICIARY AND REPRESENTATIVE OF THE ESTATE OF GEISSAL, DECEASED *v.* MOORE MEDICAL CORP. ET AL. C. A. 8th Cir. [Certiorari granted, 522 U. S. 1086.] Motion of American Association of Retired Persons for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–873. UNITED STATES *v.* BALSYS. C. A. 2d Cir. [Certiorari granted, 522 U. S. 1072.] Motion of World Jewish Congress and Holocaust Survivors et al. for leave to file a brief as *amici curiae* granted.

No. 97–7385. IN RE COOPER;
No. 97–7386. IN RE COOPER;
No. 97–7387. IN RE COOPER; and
No. 97–7388. IN RE COOPER. Motions of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until April 13, 1998, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 97–7821. HUTCHINS *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 13, 1998, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 97–7947. IN RE RONDEAU;
No. 97–8005. IN RE KUKES;
No. 97–8009. IN RE CASTANEDA; and
No. 97–8057. IN RE BARRETT. Petitions for writs of habeas corpus denied.

No. 97–8376 (A–702). IN RE GRIFFIN-EL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 97–8388 (A–705). IN RE JONES. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 97–969. IN RE SAI;
No. 97–7512. IN RE ALSTON; and
No. 97–7542. IN RE PATZLAFF. Petitions for writs of mandamus denied.

No. 97–7731. IN RE JOHNSON. Petition for writ of mandamus and/or prohibition denied.

No. 97–8401 (A–708). IN RE JONES. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of mandamus and/or prohibition denied.

No. 97–7572. IN RE SPRINGER. Petition for writ of prohibition denied.

Certiorari Granted

No. 97–1056. MARQUEZ *v.* SCREEN ACTORS GUILD, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 124 F. 3d 1034.

No. 96–1570. NYNEX CORP. ET AL. *v.* DISCON, INC. C. A. 2d Cir. Motions of Association of the Bar of the City of New York and Consumer Electronics Manufacturers Association for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 93 F. 3d 1055.

No. 97–7597. KNOWLES *v.* IOWA. Sup. Ct. Iowa. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 569 N. W. 2d 601.

No. 97–7213. MOSLEY *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 126 F. 3d 200.

Certiorari Denied

No. 97–872. ROBERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 97–878. CITY OF BIRMINGHAM *v.* MORRO. C. A. 11th Cir. Certiorari denied. Reported below: 117 F. 3d 508.

No. 97–952. PACE INDUSTRIES, INC., DBA PRECISION INDUSTRIES, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 118 F. 3d 585.

No. 97–977. DIAMOND WALNUT GROWERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 113 F. 3d 1259.

No. 97–982. GARNER ET UX. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 1272.

No. 97–990. RILEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 118 F. 3d 1220.

No. 97–993. FLORIDA *v.* SMITH. Sup. Ct. Fla. Certiorari denied. Reported below: 699 So. 2d 629.

No. 97–999. SOFTEL, INC. *v.* DRAGON MEDICAL & SCIENTIFIC COMMUNICATIONS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 118 F. 3d 955.

No. 97–1005. DOYLE ET VIR *v.* VOLKSWAGEN OF AMERICA, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 114 F. 3d 1134.

No. 97–1006. CHURCH OF SCIENTOLOGY INTERNATIONAL ET AL. *v.* CULT AWARENESS NETWORK. Sup. Ct. Ill. Certiorari denied. Reported below: 177 Ill. 2d 267, 685 N. E. 2d 1347.

No. 97–1012. COUPE *v.* FEDERAL EXPRESS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 121 F. 3d 1022.

No. 97–1018. MITCHELL ET VIR *v.* COLLAGEN CORP. C. A. 7th Cir. Certiorari denied. Reported below: 126 F. 3d 902.

No. 97–1032. MEEHAN SEAWAY SERVICE CO. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 125 F. 3d 1163.

No. 97–1035. 440 CO. *v.* BOROUGH OF FORT LEE, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 129 F. 3d 1254.

No. 97–1039. MERRITT ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 716.

No. 97–1041. SMITH ET VIR *v.* MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 115 Md. App. 750.

No. 97–1128. AMERICA WEST AIRLINES, INC. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 119 F. 3d 772.

No. 97–1149. NATIONAL SHIPPING COMPANY OF SAUDI ARABIA *v.* MORAN TRADE CORPORATION OF DELAWARE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1062.

No. 97–1171. ODDINO *v.* ODDINO ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 16 Cal. 4th 67, 939 P. 2d 1266.

No. 97–1173. BATES ET AL. *v.* JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 843.

No. 97–1175. ENTERTAINMENT RESEARCH GROUP, INC. *v.* GENESIS CREATIVE GROUP, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1211.

No. 97–1183. DOVE VALLEY BUSINESS PARK ASSOCIATES, LTD., ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY, COLORADO, ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 945 P. 2d 395.

No. 97–1188. ELLIOTT ET AL. *v.* UNITED CENTER, A JOINT VENTURE FKA METRO-CHICAGO SPORTS STADIUM JOINT VENTURE. C. A. 7th Cir. Certiorari denied. Reported below: 126 F. 3d 1003.

No. 97–1189. SMANIA *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 701 So. 2d 835.

No. 97–1190. YOSHISATO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–1196. BURGESS *v.* LOGAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1070.

No. 97–1200. WHERRY *v.* IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT. Sup. Ct. Iowa. Certiorari denied. Reported below: 569 N. W. 2d 822.

No. 97–1207. MILLET *v.* WOODWARD ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–1208. MAKAREWICZ ET AL. *v.* AMERICAN EXPRESS FINANCIAL ADVISORS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 936.

No. 97–1211. WILLIAMS *v.* YELLOW FREIGHT SYSTEMS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 115.

No. 97–1212. WEBSTER *v.* BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 607.

No. 97–1213. JENKINS *v.* HEINTZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 124 F. 3d 824.

No. 97–1214. CHRISTIAN *v.* ST. ANTHONY'S MEDICAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 117 F. 3d 1051.

No. 97–1219. TORBECK ET AL. *v.* BOZZO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 121 F. 3d 700.

No. 97–1223. TOWNSHIP OF NORTH BERGEN *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–1226. HEWLETT-PACKARD CO. *v.* REPEAT-O-TYPE STENCIL MANUFACTURING CORP., INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 123 F. 3d 1445.

No. 97–1231. TREECE *v.* LYONS TOWNSHIP HIGH SCHOOL ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 229 Ill. App. 3d 1107, 648 N. E. 2d 632.

No. 97–1232. MCDANIEL *v.* APPRAISAL INSTITUTE. C. A. 9th Cir. Certiorari denied. Reported below: 117 F. 3d 421 and 127 F. 3d 1135.

No. 97–1233. PAUL ET AL. *v.* LEVY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1073.

No. 97–1238. BOURGEOIS *v.* AVONDALE SHIPYARDS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 121 F. 3d 219.

No. 97–1240. BERNER *v.* DELAHANTY, JUDGE, SUPERIOR COURT OF MAINE. C. A. 1st Cir. Certiorari denied. Reported below: 129 F. 3d 20.

No. 97–1251. AGAN *v.* VAUGHN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 119 F. 3d 1538.

No. 97–1255. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 127 F. 3d 35.

No. 97–1257. POLYAK *v.* HOADLEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 221.

No. 97–1258. SIMEON ET AL. *v.* HARDIN, DISTRICT ATTORNEY FOR THE FOURTEENTH JUDICIAL DISTRICT. Ct. App. N. C. Certiorari denied. Reported below: 126 N. C. App. 831, 488 S. E. 2d 854.

No. 97–1260. CLEMENTS *v.* BABCOCK & WILCOX CO. ET AL. Sup. Ct. Va. Certiorari denied.

No. 97–1261. NORTHEN *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 126 F. 3d 1024.

No. 97–1273. MILLET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 123 F. 3d 268.

No. 97–1276. JONES *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 97–1279. BROWN *v.* IVES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 129 F. 3d 209.

No. 97–1290. VELEZ *v.* STALDER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 97–1293. TAHA *v.* PORTLAND TAXI CAB CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 127.

No. 97–1309. GILCHRIST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 130 F. 3d 1131.

No. 97–1313. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 957 S. W. 2d 9.

No. 97–1314. DALEY ET AL. *v.* COMMISSIONER, DEPARTMENT OF MARINE RESOURCES OF MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 698 A. 2d 1053.

No. 97–1326. O'STEEN *v.* CSX TRANSPORTATION, INC. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 40.

No. 97–1330. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 126 F. 3d 394.

No. 97–1334. PICKREL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 149.

No. 97–1335. SCOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 108 F. 3d 1380.

No. 97–1339. BUCHBINDER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 97–1352. CHAUDHURI *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 130 F. 3d 232.

No. 97–1373. LLOYD *v.* LEVINE, ASSISTANT UNITED STATES ATTORNEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 127 F. 3d 1095.

No. 97–1383. ROE *v.* BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 1221.

No. 97–5089. BARNES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 345 N. C. 184, 481 S. E. 2d 44.

No. 97–5269. SANIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 113 F. 3d 1230.

No. 97–5388. MARINELLI *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 547 Pa. 294, 690 A. 2d 203.

No. 97–5829. GREEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 115 F. 3d 1479.

No. 97–6126. HELM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 411.

No. 97–6207. BELLAMY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 116 F. 3d 1066.

No. 97–6568. SEGIEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 114 F. 3d 1014.

No. 97–6797. RUDD *v.* FORREST ET AL. C. A. 5th Cir. Certiorari denied.

No. 97–6863. ROMERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 122 F. 3d 1334.

No. 97–6886. JUVENILE A *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 125 F. 3d 852.

No. 97–7065. HORNE *v.* CROZIER ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: 565 N. W. 2d 50.

No. 97–7117. SCOTT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 4th 1188, 939 P. 2d 354.

No. 97–7193. FRALEY *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 113 F. 3d 1234.

No. 97–7448. ROCHON *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 367.

No. 97–7452. CRAIG *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 127 F. 3d 1099.

No. 97–7458. ROBERTS *v.* DISTRICT COURT OF NEVADA, CLARK COUNTY, ET AL. (two judgments). Sup. Ct. Nev. Certiorari denied. Reported below: 113 Nev. 1645, 970 P. 2d 1126.

No. 97–7459. RIDDLE *v.* CITY OF PALMDALE, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7467. COLEMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 97–7474. NOVOSAD *v.* NEW MEXICO BOARD OF PHARMACY ET AL. Sup. Ct. N. M. Certiorari denied.

No. 97–7475. LAMBRIGHT *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied. Reported below: 127 F. 3d 1099.

No. 97–7476. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 97–7480. PEDROSO *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 97–7484. MILIAN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 688 So. 2d 944.

No. 97–7485. BROWN *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 221.

No. 97–7487. BLACKSHAW *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 97–7489. KARAGIANES *v.* KARAGIANES ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 84 Haw. 499, 936 P. 2d 194.

No. 97–7493. HALL *v.* SHELBY COUNTY GOVERNMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 124 F. 3d 197.

No. 97–7500. HARMON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 97–7504. HOWARD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–7505. DAVIS *v.* DUBOIS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL. C. A. 1st Cir. Certiorari denied.

No. 97–7506. GOMEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 97–7513. DECKER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–7515. TEFFETELLER *v.* GRIMES, CHIEF JUSTICE, SUPREME COURT OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 121 F. 3d 722.

No. 97–7520. AL-AMIN *v.* SEITER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 97–7522. BANKS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 700 So. 2d 363.

No. 97–7526. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 16 Cal. 4th 635, 941 P. 2d 752.

No. 97–7531. OWEN-WILLIAMS *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–7533. ANZOATEGUI ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7535. BANDRUP *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–7536. CARTWRIGHT *v.* MICHIGAN. Recorder's Court, City of Detroit, Mich. Certiorari denied.

No. 97–7537. CUNNINGHAM *v.* KITZHABER, GOVERNOR OF OREGON. Sup. Ct. Ore. Certiorari denied.

No. 97–7543. PATZLAFF *v.* E. STEEVES SMITH, P. C. Sup. Ct. S. D. Certiorari denied.

No. 97–7547. RAMOS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 4th 1133, 938 P. 2d 950.

No. 97–7552. WEST *v.* FARBER. Ct. Civ. App. Okla. Certiorari denied.

No. 97–7553. VENTIMIGLIA *v.* WATTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 719.

No. 97–7560. SPREITZ *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 190 Ariz. 129, 945 P. 2d 1260.

No. 97–7565. OIMEN *v.* MCCAUGHTRY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 130 F. 3d 809.

No. 97–7568. SHAW *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–7569. PRESTON *v.* BRADLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 124 F. 3d 199.

No. 97–7570. BROWN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 684 N. E. 2d 529.

No. 97–7576. KIMBROUGH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 700 So. 2d 634.

No. 97–7577. BRODEUR *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–7582. VILLARREAL *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 615.

No. 97–7583. WHITAKER *v.* WHITAKER ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 957 S. W. 2d 834.

No. 97–7584. JACKSON *v.* LEWIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 47.

No. 97–7585. BOUFFORD *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 699 So. 2d 1045.

No. 97–7587. WILKINSON *v.* SUMNER, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. C. A. D. C. Cir. Certiorari denied.

No. 97–7591. SMALLEY *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 611.

No. 97–7595. BENIGNI *v.* COWLES MEDIA CO. ET AL. Ct. App. Minn. Certiorari denied.

No. 97–7601. HENRY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 189 Ariz. 542, 944 P. 2d 57.

No. 97–7604. GOODEN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 329 Ark. 485, 950 S. W. 2d 461.

No. 97–7605. GREEN *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 146.

No. 97–7608. FLANAGAN ET UX. *v.* WELLS FARGO BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 211.

No. 97–7609. GRAY *v.* WHITE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 97–7613. ENGLISH *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 36.

No. 97–7616. MacKenzie *v.* Owens et al. Sup. Ct. Okla. Certiorari denied.

No. 97–7617. Jenkins *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 268 Ga. 468, 491 S. E. 2d 54.

No. 97–7626. Washington *v.* Diesslin, Western Regional Director, Colorado Department of Corrections, et al. C. A. 10th Cir. Certiorari denied.

No. 97–7629. Agadaga *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Reported below: 116 F. 3d 482.

No. 97–7641. Cothren *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 705 So. 2d 861.

No. 97–7648. King *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, et al. C. A. 5th Cir. Certiorari denied. Reported below: 124 F. 3d 194.

No. 97–7650. Spann *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 286 Ill. App. 3d 1125, 709 N. E. 2d 1012.

No. 97–7652. Schwarz *v.* Woodruff, Inc. Sup. Ct. Utah. Certiorari denied.

No. 97–7659. Gasero *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 97–7664. Palmer *v.* Mazurkiewicz, Superintendent, State Correctional Institution at Rockview, et al. C. A. 3d Cir. Certiorari denied.

No. 97–7692. Henry *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 288 Ill. App. 3d 1121, 711 N. E. 2d 832.

No. 97–7695. Altimus *v.* Department of Defense et al. C. A. D. C. Cir. Certiorari denied.

No. 97–7704. Wallace *v.* Shalala, Secretary of Health and Human Services. C. A. 4th Cir. Certiorari denied. Reported below: 112 F. 3d 512.

No. 97–7707. YOUNG *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–7708. STOWE *v.* DALTON, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 148.

No. 97–7710. CHRISTY *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. D. C. Cir. Certiorari denied.

No. 97–7736. COLLINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 37.

No. 97–7748. GRIFFIN *v.* CHARLOTTE MEMORIAL HOSPITAL AND MEDICAL CENTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 121 F. 3d 698.

No. 97–7770. PATTERSON *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 121 F. 3d 728.

No. 97–7773. LOGAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–7792. BREWER *v.* SOUTHERN PILOT INSURANCE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 125 F. 3d 852.

No. 97–7798. SNIDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 1392.

No. 97–7809. HARTSELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 127 F. 3d 343.

No. 97–7818. SCHERZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1108.

No. 97–7823. MANNING *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 135 F. 3d 144.

No. 97–7824. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 97–7827. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1454.

No. 97–7830. MINNIECHESKE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 212 Wis. 2d 645, 570 N. W. 2d 64.

No. 97–7832. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 133 F. 3d 911.

No. 97–7834. NORMAN T. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 1099.

No. 97–7838. PHILLIPS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 615.

No. 97–7839. STORY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 150.

No. 97–7845. PORTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 131.

No. 97–7848. HEATON *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 46 M. J. 175.

No. 97–7851. GRAY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 347 N. C. 143, 491 S. E. 2d 538.

No. 97–7854. HOGAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 133 F. 3d 911.

No. 97–7858. CRAIG *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 1030.

No. 97–7860. WEAVER *v.* SCHOOL BOARD OF LEON COUNTY, FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 699 So. 2d 1377.

No. 97–7870. HURST *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 127 N. C. App. 54, 487 S. E. 2d 846.

No. 97–7871. DALY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 767.

No. 97–7879. WESTMORELAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 130 F. 3d 765.

No. 97–7883. DeWig *v.* Stewart, Director, Arizona Department of Correction, et al. C. A. 9th Cir. Certiorari denied.

No. 97–7886. Nimrod *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 122 F. 3d 660.

No. 97–7897. Taylor *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 613.

No. 97–7899. Antonio Lujan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1455.

No. 97–7900. Moore *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1261.

No. 97–7903. Hochschild *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1266.

No. 97–7905. Francis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 137.

No. 97–7906. Gonzalez *v.* DeTella, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 127 F. 3d 619.

No. 97–7909. Donovan *v.* Strack, Superintendent, Fishkill Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 97–7910. Gallardo *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 97–7911. Escobar-Venzor *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 131.

No. 97–7914. Garcia-Rosell *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 97–7917. Herrera *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 108 F. 3d 1379.

No. 97–7918. Ortega Ramirez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 114.

No. 97–7919. Richmond *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1266.

No. 97–7922. Larry *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 372.

No. 97–7923. McDermott *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 859.

No. 97–7925. Johnson *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 133 F. 3d 911.

No. 97–7927. Mills *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–7929. Anderson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 125 F. 3d 849.

No. 97–7932. Bahe *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 128 F. 3d 1440.

No. 97–7933. Black *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 125 F. 3d 454.

No. 97–7934. Torres-Montalvo et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 121 F. 3d 841.

No. 97–7938. Pappadopoulos *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 860.

No. 97–7939. Reyna *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 130 F. 3d 104.

No. 97–7941. Calderon *v.* United States; and
No. 97–7942. Caderno *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 1314.

No. 97–7943. Coleman *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 125 F. 3d 863.

No. 97–7944. Manson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 131 F. 3d 154.

No. 97–7949. Soumphonphankdy *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 153.

No. 97–7950. Smith *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 122 F. 3d 531.

No. 97–7951. Newman *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 129 F. 3d 1268.

No. 97–7952. Rubio-Barrero *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 97–7954. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1454.

No. 97–7955. TINDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 611.

No. 97–7957. MCINTOSH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 289 Ill. App. 3d 1134, 713 N. E. 2d 831.

No. 97–7963. ANCHICO-MOSQUERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 1299.

No. 97–7967. BRUCE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 144.

No. 97–7971. GROSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 124 F. 3d 200.

No. 97–7972. DESDUNE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 114.

No. 97–7974. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 134 F. 3d 374.

No. 97–7975. DIAZ SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 44.

No. 97–7980. GONZALES, AKA GONZALEZ-JIMENEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 506.

No. 97–7981. HICKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 131 F. 3d 154.

No. 97–7982. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1454.

No. 97–7984. GONZALEZ-DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 128.

No. 97–7987. EVERETTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 131 F. 3d 156.

No. 97–7992. AHRENS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 130 F. 3d 297.

No. 97–7994. ROCHELLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 150.

No. 97–7995. SCIARROTTA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 34.

No. 97–8001. KNIBBS, AKA BOUGLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 137.

No. 97–8003. FITZEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 380.

No. 97–8004. MORA-MEDRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1455.

No. 97–8008. CARRILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 140.

No. 97–8010. AQUILAR-AVELLAVEDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 131 F. 3d 154.

No. 97–8012. BETEMIT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–8018. WACKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 153.

No. 97–8021. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 150.

No. 97–8022. BERGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 149.

No. 97–8024. CAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 130 F. 3d 381.

No. 97–8039. GRAVENS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 129 F. 3d 974.

No. 97–8040. HICKMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1260.

No. 97–8041. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 149.

No. 97–8044. GUTIERREZ-DANIEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 939.

No. 97–8045. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 859.

No. 97–8050. MOUDY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 618.

No. 97–8052. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 110 F. 3d 63.

No. 97–8053. CERCEO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1063.

No. 97–8062. SMITH *v.* UNITED STATES; and
No. 97–8081. BYNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 45.

No. 97–8064. MCGEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 45.

No. 97–8065. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 1298.

No. 97–8066. TOMPKINS, AKA YATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 130 F. 3d 117.

No. 97–8070. HOYLE ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 122 F. 3d 48.

No. 97–8080. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 45.

No. 97–8088. DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1454.

No. 97–8089. GERARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 129 F. 3d 119.

No. 97–715. GUERRA *v.* CARLO. C. A. 9th Cir. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 105 F. 3d 493.

No. 97–934. VOINOVICH, GOVERNOR OF OHIO, ET AL. *v.* WOMEN'S MEDICAL PROFESSIONAL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 130 F. 3d 187.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

In 1995, the Ohio General Assembly passed, by an overwhelming majority, House Bill 135, which, among other things, places certain restrictions on abortions after fetal viability. To that end, it provides that—

> "(A) No person shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman if the unborn human is viable, unless . . .
>
> "(1) The abortion is performed or induced or attempted to be performed or induced by a physician, and that physician determines, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." Ohio Rev. Code Ann. § 2919.17 (1996).

The District Court enjoined the law as unconstitutional on its face, and a divided panel of the United States Court of Appeals for the Sixth Circuit affirmed. 130 F. 3d 187 (1997). The panel majority held that the statute's limitation of postviability abortions is unconstitutionally vague and that it impermissibly lacks an exception for abortions based upon the "mental health" of the mother. Both of these conclusions are unwarranted extensions of our precedents. Moreover, reflecting our recent reaffirmation of the principle that a State's interests in restricting abortions are at their strongest after viability, see *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 879 (1992) (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.), over three-quarters of the States have in place statutes limiting the reasons for which abortions may be performed late in pregnancy. The vast majority of those statutes do not contain an explicit mental health exception. I would therefore grant the State's petition for certiorari to decide the constitutionality of House Bill 135's postviability restrictions.

The panel majority first found unconstitutional the Ohio statute's requirement that a physician's determination of medical necessity be made "in good faith and in the exercise of reasonable

medical judgment." Ohio Rev. Code Ann. § 2919.17(A)(1) (1996).* Relying on our decision in *Colautti* v. *Franklin*, 439 U. S. 379 (1979), the panel held that the "combination of . . . objective and subjective standards without a scienter requirement" renders the medical necessity exception "unconstitutionally vague." 130 F. 3d, at 205. The panel explained that the statute does not "adequately notify a physician that certain conduct is prohibited; rather, a physician may be held criminally and civilly liable for adhering to his or her own best medical judgment." *Id.*, at 206.

This holding is simply not supported by *Colautti*. The statute in that case required physicians to adhere to a standard of care calculated to preserve the life and health of the fetus if the physician determined that "the fetus is viable" or "*if there is sufficient reason to believe* that the fetus may be viable." 439 U. S., at 391 (emphasis added; internal quotation marks omitted). Our conclusion that this formulation was void for vagueness in no way suggests that the Ohio statute's more specific language—"in good faith and in the exercise of reasonable medical judgment"—is unconstitutionally vague. The statutory language in *Colautti* was ambiguous because it could be read as imposing either a purely subjective or a mixed subjective and objective mental requirement, thereby leaving physicians uncertain of the relevant legal standard. *Id.*, at 391–394. House Bill 135, by contrast, plainly imposes both a subjective and an objective mental requirement, and thus its commands are clear.

The panel majority appears to have been concerned not so much with vagueness, but rather with the statute's lack of a scienter requirement relating to physician determinations about the medical necessity of an abortion. See 130 F. 3d, at 205 (stating that the statute was "especially troublesome" for this reason). Yet as the majority opinion implicitly recognized, see *id.*, at 204–205, we have never held that, in the abortion context, a scienter requirement is mandated by the Constitution. To the contrary, in *Colautti* itself, we explicitly declined to address whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held

*If a physician makes such a determination, he must then comply with certain certification requirements, unless he determines, also "in good faith and in the exercise of reasonable medical judgment," that a medical emergency prevents compliance. See Ohio Rev. Code Ann. § 2919.17(B)(2) (1996). The panel majority found this requirement unconstitutional as well.

criminally responsible for an erroneous determination of viability." 439 U. S., at 396. We only stated that the vagueness of the statute at issue was "compounded" by the fact that it lacked a scienter requirement. *Id.*, at 394; cf. 130 F. 3d, at 216 (Boggs, J., dissenting) ("[T]he principle invoked by the Court in *Colautti* . . . is . . . not that the absence of a scienter requirement will 'create' vagueness where it does not otherwise exist"). This Court should grant certiorari rather than allow a constitutional scienter requirement to be imposed under the guise of the void-for-vagueness doctrine.

The panel majority similarly wrenched this Court's prior statements out of context in finding the statute's lack of a mental health exception constitutionally infirm. The panel majority stated that the question whether a maternal health exception may constitutionally be limited to physical health depends upon what we meant in *Casey* by abortions "'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" 130 F. 3d, at 208 (quoting *Planned Parenthood of Southeastern Pa.* v. *Casey*, *supra*, at 879). To answer this question, however, the panel relied on our conclusion in *Doe* v. *Bolton*, 410 U. S. 179 (1973), that an exception in Georgia's abortion statute for abortions performed when a physician determined, "'based upon his best clinical judgment[,] [that] an abortion [was] necessary,'" *id.*, at 183, was not unconstitutionally vague because the phrase had been construed to allow physicians to consider "'all factors—physical, *emotional*, *psychological*, familial, and the woman's age—relevant to the well-being of the patient,'" *id.*, at 192 (emphasis added). Our conclusion that the statutory phrase at issue in *Doe* was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception *is required as a matter of federal constitutional law.* *Doe* simply did not address that question. As with its void-for-vagueness holding, the panel majority's quarrel with the wishes of the Ohio Legislature on this score appears to be grounded in abortion policy, not constitutional law.

The decision below, moreover, may do more than thwart the will of the Ohio Legislature. The vast majority of the 38 States that have enacted postviability abortion restrictions have not specified whether such abortions must be permitted on mental health grounds. See Brief for A Majority of Members of the

Ohio General Assembly as *Amicus Curiae* 3–4. If the decision below stands, it is likely to create needless uncertainty about the constitutionality of many of those statutes as well. When state statutes on matters of significant public concern have been declared unconstitutional, we have not hesitated to review the decisions in question, even in the absence of a circuit split. See, *e. g.*, *Romer* v. *Evans*, 517 U. S. 620 (1996). This case presents not only this compelling reason for certiorari, but also the ground that our failure to review the decision below may cast unnecessary doubt on the validity of other state statutes. I would grant the State's petition.

No. 97–998. UNITED STATES EX REL. RABUSHKA ET AL. *v.* CRANE CO. C. A. 8th Cir. Motion of Taxpayers Against Fraud et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 122 F. 3d 559.

No. 97–1148. AMERISOURCE CORP. ET AL. *v.* HJB, INC., ET AL.; and

No. 97–1152. ABBOTT LABORATORIES ET AL. *v.* HJB, INC., ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 123 F. 3d 599.

No. 97–1177. E. J. CO. ET AL. *v.* SANDVIK AKTIEBOLAG. C. A. Fed. Cir. Motion of Tool Crib, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 121 F. 3d 669.

No. 97–1202. FLORIDA *v.* FRANQUI. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 699 So. 2d 1332.

No. 97–1203. FLORIDA *v.* FRANQUI. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 699 So. 2d 1312.

No. 97–8389 (A–706). JONES *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 709 So. 2d 512.

No. 97–8392 (A–707). JONES *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to

JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 717 So. 2d 533.

No. 97–8412 (A–711). JONES *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 717 So. 2d 533.

No. 97–8413 (A–712). JONES *v.* CROSBY, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 137 F. 3d 1279.

Rehearing Denied

No. 96–8926. CARSON *v.* CHARTER MEDICAL, 522 U. S. 827;

No. 97–365. BRANDT *v.* SHOP 'N SAVE WAREHOUSE FOODS, INC., 522 U. S. 1075;

No. 97–404. FISHER *v.* VASSAR COLLEGE, 522 U. S. 1075;

No. 97–499. FELTMANN *v.* SIEBEN, INC., DBA PLAZA MOTORS, 522 U. S. 1075;

No. 97–602. BANKS *v.* UNITED STATES, 522 U. S. 1075;

No. 97–817. MARTIN *v.* GOODYEAR AUTO SERVICE CENTER, 522 U. S. 1077;

No. 97–5757. GRAVETTE *v.* UNITED STATES, 522 U. S. 999;

No. 97–5823. JORDAN *v.* UNITED STATES, 522 U. S. 923;

No. 97–6082. GAITHER *v.* FRENCH, WARDEN, 522 U. S. 1053;

No. 97–6277. MONROE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 522 U. S. 1003;

No. 97–6472. MOORE *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., 522 U. S. 1078;

No. 97–6486. RODRIGUEZ *v.* WATTS ET AL., 522 U. S. 1032;

No. 97–6567. AKPAETI *v.* FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT; and AKPAETI *v.* TERRANOVA CORP., 522 U. S. 1092;

No. 97–6626. POOLE *v.* WHITEHURST ET AL., 522 U. S. 1057;

No. 97–6682. DENNEY *v.* JONES, 522 U. S. 1059;

No. 97–6696. SIMMONS *v.* GTE NORTH, INC., ET AL., 522 U. S. 1059;

No. 97–6701. VICENTE-GUZMAN *v.* IMMIGRATION AND NATURALIZATION SERVICE, 522 U. S. 1059;

No. 97–6724. CEDILLO *v.* UNITED STATES, 522 U. S. 1060;

No. 97–6762. AKPAETI *v.* KENTUCKY, 522 U. S. 1080;

No. 97–6773. PORTER *v.* GILMORE, WARDEN, 522 U. S. 1093;

No. 97–6792. MCCOY *v.* UNITED STATES, 522 U. S. 1035;

No. 97–6837. TYLER *v.* SCOTT, FORMER DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., 522 U. S. 1093;

No. 97–6842. BANOS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 522 U. S. 1093;

No. 97–6894. DARNE *v.* WEBER, 522 U. S. 1094;

No. 97–7020. SOLIS *v.* UNITED STATES, 522 U. S. 1082;

No. 97–7028. DARNE *v.* WISCONSIN ET AL., 522 U. S. 1096;

No. 97–7055. PALMER *v.* CIRCUIT COURT OF ILLINOIS, COOK COUNTY, 522 U. S. 1096; and

No. 97–7265. CROPP ET AL. *v.* UNITED STATES, 522 U. S. 1098. Petitions for rehearing denied.

No. 97–832. HINES *v.* CALIFORNIA, 522 U. S. 1077. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

MARCH 24, 1998

Certiorari Denied

No. 97–8435 (A–715). GRIFFIN-EL *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MARCH 25, 1998

Certiorari Denied

No. 97–8386 (A–703). WATKINS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. 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 STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 133 F. 3d 920.

MARCH 29, 1998

Miscellaneous Order

No. 97–8497 (A–724). IN RE BUENOANO. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 97–8496 (A–723). BUENOANO *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 708 So. 2d 941.

No. 97–8498 (A–725). BUENOANO *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

No. 97–8499 (A–726). BUENOANO *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

MARCH 30, 1998

Affirmed on Appeal

No. 97–988. QUILTER, SPEAKER PRO TEMPORE OF THE OHIO HOUSE OF REPRESENTATIVES, ET AL. *v.* VOINOVICH, GOVERNOR OF OHIO, ET AL. Affirmed on appeal from D. C. N. D. Ohio. JUSTICE SCALIA would note probable jurisdiction and set case for oral argument. Reported below: 981 F. Supp. 1032.

Miscellaneous Orders

No. A–605 (97–1319). MADDEN CASSELLI *v.* CASSELLI. Ct. App. La., 5th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. A–656. GREEN ET AL. *v.* CARVER STATE BANK ET AL. Super. Ct. Ga., Chatham County. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–1926. IN RE DISBARMENT OF WELLONS. Chloe J. Wellons, of Goldsboro, N. C., is suspended from the practice of law in

this Court, and a rule will 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–1927. IN RE DISBARMENT OF MAYS. W. Roy Mays III, of Atlanta, Ga., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1928. IN RE DISBARMENT OF GOTTLIEB. Michael R. Gottlieb, of Middletown, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1929. IN RE DISBARMENT OF POBINER. Howard J. Pobiner, of White Plains, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1930. IN RE DISBARMENT OF PATTERSON. G. Robert Patterson, of Collingswood, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–56. SMILEY *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. M–57. MCDANIEL, WARDEN, ET AL. *v.* GALLEGO; and
No. M–58. SANCHEZ *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 96–1581. SOUTH DAKOTA *v.* YANKTON SIOUX TRIBE ET AL., 522 U. S. 329. Motion of respondent Yankton Sioux Tribe to retax costs denied.

No. 97–7615. WHITFIELD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until April 20, 1998, within which to pay the docketing fee

required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 97–7672. IN RE WYATT. Petition for writ of mandamus denied.

No. 97–8535 (A–728). IN RE REMETA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 97–1192. SWIDLER & BERLIN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari granted. Reported below: 124 F. 3d 230.

No. 97–1235. CITY OF MONTEREY *v.* DEL MONTE DUNES AT MONTEREY, LTD., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 95 F. 3d 1422.

No. 97–6203. JONES *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.* Reported below: 116 F. 3d 1487.

Certiorari Denied

No. 96–6148. NAJERA-OJEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 48.

No. 96–6234. ROMERO-MOLINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 95 F. 3d 58.

No. 96–6419. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 95 F. 3d 59.

No. 96–6567. KILLORAN, AKA GIBSON, AKA PROBERT *v.* UNITED STATES; and

No. 96–6647. LOPEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 100 F. 3d 970.

No. 96–7437. PADILLA-GALLARDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 701.

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*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 1058.]

No. 96–8426. PLATERO-UMANZOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 F. 3d 699.

No. 96–9131. SANCHEZ MELGAR, AKA RAMIREZ SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 109 F. 3d 767.

No. 97–482. BEHRENS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 684 So. 2d 86.

No. 97–960. K. R., AN INFANT, BY HER PARENTS AND NEXT FRIENDS, ET AL. *v.* ANDERSON COMMUNITY SCHOOL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 125 F. 3d 1017.

No. 97–1040. BARNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 606.

No. 97–1060. MITCHELL & NEELEY, INC. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 39.

No. 97–1064. MADDEN *v.* WEST, ACTING SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 125 F. 3d 1477.

No. 97–1069. HAPGOOD *v.* CITY OF WARREN. C. A. 6th Cir. Certiorari denied. Reported below: 127 F. 3d 490.

No. 97–1072. VIRGINIA STATE CORPORATION COMMISSION ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 117 F. 3d 555 and 123 F. 3d 693.

No. 97–1078. GHIGLIERI, TEXAS BANKING COMMISSIONER *v.* SUN WORLD NATIONAL ASSN. ET AL.; and GHIGLIERI, TEXAS BANKING COMMISSIONER *v.* LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 117 F. 3d 309 (first judgment); 125 F. 3d 941 (second judgment).

No. 97–1220. SVAY ET AL. *v.* CITY OF ATLANTA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 1079.

No. 97–1222. PHINNEY *v.* FIRST AMERICAN NATIONAL BANK ET AL. C. A. 6th Cir. Certiorari denied.

No. 97–1228. Los Angeles Police Department et al. *v.* Perry et al. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 1365.

No. 97–1245. Merrill *v.* Arizona State Bar. Sup. Ct. Ariz. Certiorari denied.

No. 97–1246. Cassan Enterprises, Inc., et al. *v.* Chrysler Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 124.

No. 97–1247. Branson *v.* Greyhound Lines, Inc., Amalgamated Council Retirement and Disability Plan. C. A. 5th Cir. Certiorari denied. Reported below: 126 F. 3d 747.

No. 97–1250. Johnston, a Minor, by His Parents and Natural Guardians, Johnston et vir, et al. *v.* Gallant et al. C. A. 3d Cir. Certiorari denied.

No. 97–1253. Jane Doe #102 *v.* Georgia Department of Corrections. Sup. Ct. Ga. Certiorari denied. Reported below: 268 Ga. 582, 492 S. E. 2d 516.

No. 97–1272. Kent, aka Goichman *v.* City of Carmel et al. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 126.

No. 97–1295. Gibson *v.* National Transportation Safety Board. C. A. 9th Cir. Certiorari denied. Reported below: 118 F. 3d 1312.

No. 97–1299. Williams et ux. *v.* Turk et ux. Ct. Sp. App. Md. Certiorari denied. Reported below: 116 Md. App. 749.

No. 97–1301. Old Republic Union Insurance Co. *v.* Tillis Trucking Co., Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 1258.

No. 97–1307. Regional Transportation District *v.* Elam Construction, Inc., et al. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 1343.

No. 97–1318. Rich, Individually and as Administratrix of the Estate of Rich, Deceased, and as Executrix of the Estate of Rich, Deceased *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 119 F. 3d 447.

No. 97–1328. JAMES BARLOW FAMILY LIMITED PARTNERSHIP ET AL. *v.* DAVID M. MUNSON, INC. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 1316.

No. 97–1338. GRZELAK *v.* UNITED STATES POSTAL SERVICE DESIGNEE. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 1077.

No. 97–1347. CENTRICUT, LLC, ET AL. *v.* ESAB GROUP, INC. C. A. 4th Cir. Certiorari denied. Reported below: 126 F. 3d 617.

No. 97–1355. CROCHIERE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 129 F. 3d 233.

No. 97–1375. NEW *v.* COHEN, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 129 F. 3d 639.

No. 97–1401. TATE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 130 F. 3d 765.

No. 97–1413. LOVE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 144.

No. 97–1416. EARTHLY ET AL. *v.* CITY OF BEVERLY HILLS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 858.

No. 97–1419. HUEREQUE-MERCADO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 43.

No. 97–1434. DOLENZ *v.* AKIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 612.

No. 97–1447. ELECTRONIC PLATING CO. ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 291 Ill. App. 3d 328, 683 N. E. 2d 465.

No. 97–5945. HERNANDEZ-ARIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 119 F. 3d 2.

No. 97–6448. VASQUEZ-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 121 F. 3d 705.

No. 97–6710. MIGUEL-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 612.

No. 97–6775. Rodriguez Ortiz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 125 F. 3d 851.

No. 97–6822. Hernandez-Jasso *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 124 F. 3d 193.

No. 97–6854. Garcia-Torres *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 613.

No. 97–7069. Forrett *v.* Richardson et al. C. A. 9th Cir. Certiorari denied. Reported below: 112 F. 3d 416.

No. 97–7202. Gonzalez Robles *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7203. Ochoa Ochoa *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7204. Aguilar Muniz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 367.

No. 97–7218. Salazar-Navarro *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7241. Vargas-Villa *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7250. Saucedo-Hernandez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7251. Basurto-Gomez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7253. Rodriguez-Aviles *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7288. Torres-Servin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 367.

No. 97–7298. Jones *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 137.

No. 97–7401. Zankich *v.* Goy. C. A. 9th Cir. Certiorari denied. Reported below: 116 F. 3d 1488.

No. 97–7578. Ayala-Fernandez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 613.

No. 97–7588. ROMERO-CALDERON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 612.

No. 97–7649. JURY *v.* STEWART ET AL. Sup. Ct. Va. Certiorari denied.

No. 97–7654. FOWLER *v.* CAMPBELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 129 F. 3d 1254.

No. 97–7655. GILBERT *v.* SANDAGE ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–7656. GILBERT *v.* MOODY ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–7660. HIGGINS *v.* MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7662. HUGHES *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 946 P. 2d 509.

No. 97–7667. OLIVIER-WARD *v.* BLACKWELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1106.

No. 97–7669. DIAZ *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–7673. WINSLOW *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 141.

No. 97–7675. THOMPSON *v.* NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–7678. WATSON *v.* BOONE, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 97–7679. MCLAMB *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 97–7687. MCPHERSON *v.* KELSEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 125 F. 3d 989.

No. 97–7689. MENDOZA-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–7694. OKPARAOCHA *v.* LAZARUS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1264.

No. 97–7697. COLE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 701 So. 2d 845.

No. 97–7700. RIEGER *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 575 N. W. 2d 224.

No. 97–7702. EATON *v.* GERDES. C. A. 8th Cir. Certiorari denied. Reported below: 124 F. 3d 207.

No. 97–7706. ROCHA *v.* PRICE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 125 F. 3d 862.

No. 97–7711. ARVIE *v.* LASTRAPES ET AL. C. A. 5th Cir. Certiorari denied.

No. 97–7712. GRAY *v.* CHESTERFIELD-COLONIAL HEIGHTS DEPARTMENT OF SOCIAL SERVICES. Sup. Ct. Va. Certiorari denied.

No. 97–7721. MACIEL *v.* YARBOROUGH ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–7740. MALUMPHY *v.* RYAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–7760. BOOZ *v.* SHANKS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 130.

No. 97–7777. JOHNS *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 143.

No. 97–7793. MAXWELL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 97–7797. WHITE *v.* SHEARER, SHERIFF, ADAMS COUNTY, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 97–7814. KUCERNAK *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 126.

No. 97–7816. PACE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 714 So. 2d 332.

No. 97–7840. RIVERA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 703 So. 2d 477.

No. 97–7847. ROMAN *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 129 F. 3d 134.

No. 97–7849. HOFFMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 146.

No. 97–7887. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7891. SMITH *v.* DRAGOVICH, CORRECTIONS SUPERINTENDENT 2, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–7896. ALI-BEY *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–7908. ENTRUP ET UX. *v.* COLORADO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 127 F. 3d 1109.

No. 97–7935. WELDON *v.* FERGUSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 127 F. 3d 1110.

No. 97–7936. WILLIAMS *v.* VENTURA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–7958. MCDONALD *v.* MCDANIELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 97–7968. COOPER *v.* PRUNTY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 119 F. 3d 5.

No. 97–7970. CARTER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 955 S. W. 2d 548.

No. 97–7998. STRINGER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 956 S. W. 2d 883.

No. 97–7999. LEWIS *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8006. MAYLES *v.* LECHNER, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 765.

No. 97–8038. FOLEY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 953 S. W. 2d 924.

No. 97–8047. HOLT *v.* GRAY. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1061.

No. 97–8051. HALL *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 955 S. W. 2d 198.

No. 97–8055. KUNZMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 125 F. 3d 1363.

No. 97–8063. PITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 138.

No. 97–8077. GILBERT *v.* WOODS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 1328.

No. 97–8079. GOMEZ *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 46 M. J. 241.

No. 97–8085. MCLAUD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 133 F. 3d 911.

No. 97–8086. LAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 34.

No. 97–8091. GRIZZLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 608.

No. 97–8092. POLLARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 718.

No. 97–8095. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 128 F. 3d 1274.

No. 97–8099. BECKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 372.

No. 97–8100. PRESCOTT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 125 F. 3d 845.

No. 97–8101. BOYLE *v.* UNITED STATES;
No. 97–8111. VAN PELT *v.* UNITED STATES;
No. 97–8149. COOLEY *v.* UNITED STATES; and
No. 97–8158. WACKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 153.

No. 97–8104. LEMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 46.

No. 97–8105. MUSCHETTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 134 F. 3d 386.

No. 97–8106. MARCEAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 930.

No. 97–8108. JONES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 933.

No. 97–8109. MARONEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 153.

No. 97–8114. ALARCON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 148.

No. 97–8115. BACON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 45.

No. 97–8121. WILLIAMS *v.* UNITED STATES PAROLE COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 128 F. 3d 733.

No. 97–8125. HAMILTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 97–8135. RICE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 97–8145. YOUNGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 722.

No. 97–8153. MCCLOUD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 615.

No. 97–8154. MARSH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 162 F. 3d 1149.

No. 97–8162. BIVENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 114 F. 3d 1202.

No. 97–1234. NEWMAN *v.* CONSOLIDATION COAL CO. C. A. 3d Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied. Reported below: 123 F. 3d 126.

No. 97–1239. GONZALEZ TRADING, INC., ET AL. *v.* YALE MATERIALS HANDLING CORP. C. A. 11th Cir. Motion of petitioners to consolidate this case with No. 97–1446, *Baeza et al.* v. *NACCO Industries, Inc., et al.*, denied. Certiorari denied. Reported below: 119 F. 3d 1485.

No. 97–8493 (A–721). REMETA *v.* STOVALL, ATTORNEY GENERAL OF KANSAS, ET AL. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied.

No. 97–8537 (A–729). REMETA *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution. Reported below: 710 So. 2d 543.

No. 97–8546 (A–734). REMETA *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution. Reported below: 717 So. 2d 536.

Rehearing Denied

No. 97–6384. LONGEST *v.* DALTON, SECRETARY OF THE NAVY, ET AL., 522 U. S. 1004;

No. 97–6643. WILLIS *v.* UNIVERSITY OF LOUISVILLE ET AL., 522 U. S. 1058;

No. 97–7239. WHITEHEAD *v.* TENET, DIRECTOR OF CENTRAL INTELLIGENCE, 522 U. S. 1129; and

No. 97–7335. TILLI *v.* SMITH ET AL., 522 U. S. 1132. Petitions for rehearing denied.

No. 97–815. TIMEHIN *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL., 522 U. S. 1050; and

No. 97–6922. WATKIS *v.* THRASHER ET AL., 522 U. S. 1095. Motions for leave to file petitions for rehearing denied.

No. 97–6602. STAFFORD *v.* E. I. DU PONT DE NEMOURS & CO. ET AL., 522 U. S. 1069. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

April 6, 1998

Certiorari Granted—Vacated and Remanded

No. 96–1134. United States *v.* Mobley; United States *v.* Nash; and United States *v.* Lynn. C. A. Armed Forces. Certiorari granted, judgments vacated, and case remanded for further consideration in light of *United States* v. *Scheffer*, *ante*, p. 303. Reported below: 44 M. J. 453 (first judgment) and 456 (second judgment); 45 M. J. 403 (third judgment).

No. 97–6492. Mejia *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 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U. S. C. § 1229a(a). Reported below: 121 F. 3d 722.

Miscellaneous Orders

No. A–722. Philip Morris Inc. et al. *v.* Minnesota et al. Sup. Ct. Minn. Application for stay, presented to Justice Scalia, and by him referred to the Court, denied.

No. D–1876. In re Disbarment of Germain. Disbarment entered. [For earlier order herein, see 522 U. S. 992.]

No. D–1884. In re Disbarment of Bloodworth. Disbarment entered. [For earlier order herein, see 522 U. S. 1013.]

No. D–1889. In re Disbarment of Jamison. Disbarment entered. [For earlier order herein, see 522 U. S. 1026.]

No. D–1903. In re Disbarment of Fisher. Disbarment entered. [For earlier order herein, see 522 U. S. 1041.]

No. D–1905. In re Disbarment of Fiddes. Disbarment entered. [For earlier order herein, see 522 U. S. 1073.]

No. D–1931. In re Disbarment of Southard. Richard C. Southard, of Lockport, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1932. IN RE DISBARMENT OF TAUB. Barry L. Taub, of Eugene, Ore., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1933. IN RE DISBARMENT OF PHILLIPS. Thomas Ewing Phillips, of Chillicothe, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–59. JOHNSON *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. M–60. LUNDGREN ET AL. *v.* STEELE. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 97–501. RICCI *v.* VILLAGE OF ARLINGTON HEIGHTS. C. A. 7th Cir. [Certiorari granted, 522 U. S. 1038.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–704. DOOLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHUAPOCO, ET AL. *v.* KOREAN AIR LINES CO., LTD. C. A. D. C. Cir. [Certiorari granted, 522 U. S. 1038.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1192. SWIDLER & BERLIN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 1045.] Motion of Independent Counsel to expedite the briefing and argument schedule granted. Brief of petitioners and joint appendix are to be filed with the Clerk and served upon Independent Counsel on or before 3 p.m., Wednesday, April 29, 1998. Brief of Independent Counsel is to be filed with the Clerk and served upon petitioners on or before 3 p.m., Wednesday, May 20, 1998. A reply brief, if any, may be filed with the Clerk and served upon Independent Counsel on or before 3 p.m., Monday, June 1, 1998. Briefs may be submitted in compliance with this Court's Rule 33.2 to be replaced with briefs prepared in compliance with Rule 33.1 as soon as possible thereafter. Rule 29.2 does not apply. Argument is set for 10 a.m., Monday, June 8, 1998.

No. 97–1254. PRACTICE MANAGEMENT INFORMATION CORP. *v.* AMERICAN MEDICAL ASSN. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 97–1374. CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. *v.* CITY OF NEW YORK ET AL. D. C. D. C. [Probable jurisdiction noted, 522 U. S. 1144.] Motion of appellees for divided argument granted to be divided as follows: appellants, 30 minutes; New York City appellees, 15 minutes; Snake River appellees, 15 minutes. Request for additional time for oral argument denied.

No. 97–5737. FORNEY *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. [Certiorari granted, 522 U. S. 1072.] Motion of the Solicitor General for divided argument granted to be divided as follows: petitioner, 15 minutes; the Solicitor General, 15 minutes; *amicus curiae* in support of the judgment below, 30 minutes.

No. 97–6203. JONES *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1045.] The order entered March 30, 1998, granting a writ of certiorari is amended as follows: "The writ of certiorari is limited to the following questions: 1. Does 18 U. S. C. §§ 2119(1)–(3) describe sentencing factors or elements of the offense? 2. If 18 U. S. C. §§ 2119(1)–(3) sets forth sentencing factors, is the statute constitutional?"

No. 97–8202. IN RE KENNEDY;

No. 97–8217. IN RE MITCHELL; and

No. 97–8235. IN RE DOYLE. Petitions for writs of habeas corpus denied.

No. 97–1329. IN RE MORRIS; and

No. 97–7741. IN RE MUZAKKIR. Petitions for writs of mandamus denied.

No. 97–8234. IN RE GRIFFIN. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 97–530. PORTER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 241 Conn. 57, 698 A. 2d 739.

No. 97–723. HUNTER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 241 Conn. 165, 694 A. 2d 1317.

No. 97–918. Lovilia Coal Co. et al. *v.* Harvey et al. C. A. 8th Cir. Certiorari denied. Reported below: 109 F. 3d 445.

No. 97–1080. Ohuegbe *v.* Immigration and Naturalization Service. C. A. 6th Cir. Certiorari denied.

No. 97–1101. Barnes *v.* Logan et ux., Trustees for the Logan Inter Vivos Trust. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 820.

No. 97–1118. Bresnahan *v.* California Highway Patrol et al. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1069.

No. 97–1133. Walls *v.* County of Los Angeles, Office of the District Attorney. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 55 Cal. App. 4th 187, 63 Cal. Rptr. 2d 661.

No. 97–1134. Baughans, Inc., et al. *v.* Domino's Pizza, Inc. C. A. 3d Cir. Certiorari denied. Reported below: 124 F. 3d 430.

No. 97–1241. Crawford, Administratrix of the Estates of Kelley et vir, Deceased *v.* Andrew Systems, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 119 F. 3d 925.

No. 97–1242. Kennametal, Inc. *v.* Commissioner of Revenue of Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 426 Mass. 39, 686 N. E. 2d 436.

No. 97–1256. Sinclair Oil Corp. *v.* County of Santa Barbara et al. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 401.

No. 97–1264. Bank One, Texas, National Assn., Trustee of the Red Crest Trust, et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 606.

No. 97–1282. Stetler *v.* Sanders et al. Ct. App. Ky. Certiorari denied.

No. 97–1285. Shephard *v.* Provident Life & Accident Insurance Co. C. A. 9th Cir. Certiorari denied. Reported below: 87 F. 3d 1322.

No. 97–1303. Ross *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 97–1315. STIVENDER *v.* POWELL. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 859.

No. 97–1323. POLLAK ET AL. *v.* COURSHON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 119 F. 3d 9.

No. 97–1358. HADJI-ELIAS ET AL. *v.* LOS ANGELES COUNTY SUPERIOR COURT (SHAHBAZ ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–1359. GOLIA-PALADIN *v.* NEVADA STATE BAR. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1718.

No. 97–1360. SHEPHARD *v.* POMONA FAIRPLEX ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–1392. KIMBALL *v.* CLAUSNTIZER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 1298.

No. 97–1415. BARRON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 859.

No. 97–1428. GRUBBS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 120 F. 3d 1174.

No. 97–1450. CARLSON ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 126 F. 3d 915.

No. 97–1465. SPENCER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 246.

No. 97–1471. HASTINGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 126 F. 3d 310.

No. 97–1474. LEDFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 127 F. 3d 1103.

No. 97–1493. JOHN CONLEE ENTERPRISES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 124 F. 3d 198.

No. 97–6977. WALTERS *v.* MAHONEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1172.

No. 97–7331. NORIEGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 117 F. 3d 1206.

No. 97–7365. MONROE *v.* UNITED STATES; and
No. 97–7606. DURAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 127 F. 3d 911.

No. 97–7685. BEELER *v.* CALDERON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 128 F. 3d 1283.

No. 97–7723. VOGEL *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied.

No. 97–7725. TUCKER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 347 N. C. 235, 490 S. E. 2d 559.

No. 97–7728. JARVI *v.* MCCARTHY ET AL. Ct. App. Mich. Certiorari denied.

No. 97–7729. KREIGER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 97–7732. JACKSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 241 App. Div. 2d 526, 663 N. Y. S. 2d 988.

No. 97–7734. SMOUSE *v.* LYTLE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 131.

No. 97–7742. SULLIVAN *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 688 So. 2d 1245.

No. 97–7743. PAPESH *v.* AMERICAN NATIONAL CAN CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–7749. HETTLER *v.* DODY. Ct. App. Colo. Certiorari denied.

No. 97–7751. GALLOWAY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 97–7755. HUGHES *v.* ABBOTT NORTHWESTERN HOSPITAL SECURITY ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–7763. KNIGHT *v.* YOUMANS. C. A. 11th Cir. Certiorari denied. Reported below: 130 F. 3d 443.

No. 97–7765. BROWN *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 97–7766. WILLIAMS *v.* BOWERS ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–7769. ROBINSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–7774. REYES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 97–7776. BERKOWITZ *v.* STATE OF ISRAEL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 133 F. 3d 907.

No. 97–7778. WOODS *v.* COOK. Ct. App. Ohio, Summit County. Certiorari denied.

No. 97–7780. ARIAS *v.* ARIAS. Ct. App. Neb. Certiorari denied. Reported below: 6 Neb. App. xv.

No. 97–7784. KELLEHER *v.* AEROSPACE COMMUNITY CREDIT UNION. C. A. 8th Cir. Certiorari denied. Reported below: 114 F. 3d 745.

No. 97–7791. WALTON *v.* PRINCETON BAPTIST MEDICAL CENTER. C. A. 11th Cir. Certiorari denied.

No. 97–7804. GRIFFIN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 700 So. 2d 685.

No. 97–7805. DEWITT *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–7806. HEIMERMANN *v.* GLOBAL SECURITIES TRUST CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 36.

No. 97–7808. HOLLAND *v.* LOUISIANA SECRETARY OF REVENUE AND TAXATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 612.

No. 97–7810. GONZALEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 700 So. 2d 1217.

No. 97–7815. BURRELL *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 97–7825. CHAPMAN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 46 Conn. App. 24, 698 A. 2d 347.

No. 97–7831. KEITH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 79 Ohio St. 3d 514, 684 N. E. 2d 47.

No. 97–7833. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 97–7836. JOHNSON *v.* UTAH. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 151.

No. 97–7837. BOGGESS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1454.

No. 97–7850. DAVIS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 97–7862. TATTA *v.* MILLER, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 97–7875. BRUNDIDGE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 97–7878. FULLER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–7902. WARNER *v.* OHIO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 97–7921. STANDISH *v.* NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–7928. KELLY *v.* CALDERON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 782.

No. 97–7940. PHILLIPS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 56 Cal. App. 4th 1307, 66 Cal. Rptr. 2d 380.

No. 97–7961. COUCH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 695 A. 2d 435.

No. 97–7979. HOSKINSON *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 688 N. E. 2d 433.

No. 97–7991. BRIDGES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 268 Ga. 700, 492 S. E. 2d 877.

No. 97–8000. MCNAIR *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 706 So. 2d 828.

No. 97–8017. NWOSUN *v.* GENERAL MILLS RESTAURANTS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 124 F. 3d 1255.

No. 97–8019. ESTRADA RUEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 137 F. 3d 1350.

No. 97–8020. YANEZ PENALOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 137 F. 3d 1352.

No. 97–8049. FLETCHER *v.* WILLIAMS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 179 Ill. 2d 225, 688 N. E. 2d 635.

No. 97–8072. BIVINS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8076. HAYNES *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–8078. FONTAINE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 97–8117. REYNERO-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 137 F. 3d 1352.

No. 97–8119. PILJAK *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1073.

No. 97–8130. MCQUOWN *v.* SAFEWAY, INC. Sup. Ct. Va. Certiorari denied.

No. 97–8138. HORTON *v.* GEE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 116.

No. 97–8139. KARRIEM *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 97–8157. REGANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 125 F. 3d 685.

No. 97–8159. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 121 F. 3d 615.

No. 97–8164. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 1459.

No. 97–8167. BARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 130 F. 3d 711.

No. 97–8168. WOOTEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 124 F. 3d 1309.

No. 97–8170. NATTIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 127 F. 3d 655.

No. 97–8171. CONNOR *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 97–8175. CARDENAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 152.

No. 97–8179. SIMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 136.

No. 97–8190. TRUJILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 486.

No. 97–8197. BEARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 46.

No. 97–8200. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 137.

No. 97–8204. JOHNSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 97–8205. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 128 F. 3d 38.

No. 97–8206. PINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 366.

No. 97–8207. LOZA ROMO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 829.

No. 97–8208. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 365.

No. 97–8209. RIVERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 767.

No. 97–8215. CARLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 705 A. 2d 682.

No. 97–8219. MCKINNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 44.

No. 97–8221. BANKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 130 F. 3d 621.

No. 97–8227. GAYTAN-CARRANZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 366.

No. 97–8231. GRZESCZUK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 128.

No. 97–8232. HARRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 616.

No. 97–8233. DIERLING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 722.

No. 97–8238. HINEBAUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 118.

No. 97–8241. FALLIS, AKA HURD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 152.

No. 97–8243. HAZEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 137.

No. 97–8251. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 367.

No. 97–8253. ZORIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 215.

No. 97–8260. HUDGINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 137.

No. 97–8271. MOORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 129 F. 3d 989.

No. 97–8282. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1108.

No. 97–1263. FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION ET AL. *v.* ROCHAMBEAU WINES & LIQUORS, INC., ET AL. C. A. 11th Cir. Motion of National Alcohol Beverage Control Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 125 F. 3d 1399.

No. 97–1269. FICALORA *v.* INTERNATIONAL BUSINESS MACHINES CORP. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 124 F. 3d 211.

Rehearing Denied

No. 97–6757. RUTHERFORD *v.* ALDERMAN ET AL., 522 U. S. 1079;

No. 97–6934. RIEGER *v.* NORTH DAKOTA, 522 U. S. 1120; and

No. 97–6991. CARSON *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL., 522 U. S. 1121. Petitions for rehearing denied.

No. 97–6869. BROWN *v.* KEARNEY, WARDEN, ET AL., 522 U. S. 1062. Motion for leave to file petition for rehearing denied.

APRIL 7, 1998

Dismissal Under Rule 46

No. 97–6958. WATKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 120 F. 3d 254.

APRIL 8, 1998

Miscellaneous Order

No. 97–1390. REPUBLIC OF PARAGUAY ET AL. *v.* GILMORE, GOVERNOR OF VIRGINIA, ET AL.; and

No. 97–8214. BREARD *v.* GREENE, WARDEN. C. A. 4th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States on or before 5 p.m., Monday, April, 13, 1998.

APRIL 13, 1998

Miscellaneous Order

No. A–753. HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* CROMARTIE ET AL. D. C. E. D. N. C. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay.

APRIL 14, 1998

Miscellaneous Orders. (See Nos. A–732, A–738, A–767, A–771, 97–8660, and 125, Orig., *ante,* p. 371.)

Certiorari Denied. (See Nos. 97–1390 and 97–8214, *ante,* p. 371.)

APRIL 20, 1998

Miscellaneous Orders

No. A–700. GUTERMUTH *v.* DEPARTMENT OF CHILDREN AND FAMILIES. Dist. Ct. App. Fla., 4th Dist. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–1175. IN RE DISBARMENT OF HICKEY. Disbarment entered. [For earlier order herein, see 506 U. S. 913.]

No. D–1895. IN RE DISBARMENT OF JACKSON. Disbarment entered. [For earlier order herein, see 522 U. S. 1040.]

No. D–1908. IN RE DISBARMENT OF TRAMMELL. Disbarment entered. [For earlier order herein, see 522 U. S. 1087.]

No. D–1929. IN RE DISBARMENT OF POBINER. Howard J. Pobiner, of White Plains, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on March 30, 1998 [*ante,* p. 1044], is discharged.

No. D–1934. IN RE DISBARMENT OF SADLER. Gerald A. Sadler, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1935. IN RE DISBARMENT OF AHAM-NEZE. L. Obioma Aham-Neze, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1936. IN RE DISBARMENT OF GREER. Michael Ira Greer, of Poway, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1937. IN RE DISBARMENT OF FEY. Walter Benjamin Fey, of Reno, Nev., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1938. IN RE DISBARMENT OF ROTTER. Seth R. Rotter, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1939. IN RE DISBARMENT OF IRONS. Eugene J. Irons, of Mesa, Ariz., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1940. IN RE DISBARMENT OF LEWINSON. Barbara Kaplan Lewinson, of East Brunswick, N. J., is suspended from the practice of law in this Court, and a rule will 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–1941. IN RE DISBARMENT OF HUBER. Richard Laurence Huber, of Washington, D. C., is suspended from the practice

of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–61. ESPINOSA *v.* WILLIAMS, WARDEN, ET AL.;
No. M–63. MACRI *v.* MAGNA COMMUNITY DEVELOPMENT CORP. ET AL.; and
No. M–64. CELESTINE *v.* FOSTER, GOVERNOR OF LOUISIANA, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. M–62. WIGGINS *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 96–1037. KIOWA TRIBE OF OKLAHOMA *v.* MANUFACTURING TECHNOLOGIES, INC. Ct. Civ. App. Okla. [Certiorari granted, 521 U. S. 1117.] Motion of petitioner for leave to file a supplemental brief after argument denied.

No. 97–371. NATIONAL ENDOWMENT FOR THE ARTS ET AL. *v.* FINLEY ET AL. C. A. 9th Cir. [Certiorari granted, 522 U. S. 991.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 97–569. BURLINGTON INDUSTRIES, INC. *v.* ELLERTH. C. A. 7th Cir. [Certiorari granted, 522 U. S. 1086.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–634. PENNSYLVANIA DEPARTMENT OF CORRECTIONS ET AL. *v.* YESKEY. C. A. 3d Cir. [Certiorari granted, 522 U. S. 1086.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–6146. MONGE *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, 522 U. S. 1072.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1008. CLEVELAND *v.* POLICY MANAGEMENT SYSTEMS CORP. ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 97–1374. CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. *v.* CITY OF NEW YORK ET AL. D. C. D. C. [Probable jurisdiction noted, 522 U. S. 1144.] Motion of John S. Baker, Jr., for leave to file a brief as *amicus curiae* granted.

No. 97–8325. IN RE TURNER. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until May 11, 1998, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 97–8462. IN RE CHATMAN;
No. 97–8478. IN RE ALLEN; and
No. 97–8500. IN RE FLOWERS. Petitions for writs of habeas corpus denied.

No. 97–7841. IN RE ROBINSON;
No. 97–7962. IN RE LONGENETTE; and
No. 97–8276. IN RE MALONE. Petitions for writs of mandamus denied.

Certiorari Granted

No. 97–1121. CITY OF CHICAGO *v.* MORALES ET AL. Sup. Ct. Ill. Motion of respondents Jesus Morales et al. for leave to proceed *in forma pauperis* without affidavits of indigency granted. Certiorari granted. Reported below: 177 Ill. 2d 440, 687 N. E. 2d 53.

Certiorari Denied

No. 97–805. MULDERIG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 120 F. 3d 534.

No. 97–965. BRYANT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 117 F. 3d 1464.

No. 97–1062. PARKER *v.* VIRGINIA. Ct. App. Va. Certiorari denied. Reported below: 24 Va. App. 681, 485 S. E. 2d 150.

No. 97–1095. BECTON DICKINSON VASCULAR ACCESS, INC. *v.* CRITIKON, INC.; and
No. 97–1292. CRITIKON, INC. *v.* BECTON DICKINSON VASCULAR ACCESS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 120 F. 3d 1253.

No. 97–1117. SHULTZ *v.* DEPARTMENT OF THE ARMY. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 1222.

No. 97–1137. CYPRUS BAGDAD COPPER CORP. ET AL. *v.* NELSON ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 119 F. 3d 756.

No. 97–1142. CHEMICAL DISTRIBUTORS, INC. *v.* RESURE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 114 F. 3d 1184.

No. 97–1157. RODRIGUEZ ET AL. *v.* SABATINO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 120 F. 3d 589.

No. 97–1164. GLEASON, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GLEASON, DECEASED *v.* NOYES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 125 F. 3d 855.

No. 97–1165. JONES *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 115 F. 3d 1173.

No. 97–1179. TURNER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF TURNER *v.* FALLON COMMUNITY HEALTH PLAN, INC. C. A. 1st Cir. Certiorari denied. Reported below: 127 F. 3d 196.

No. 97–1191. ANDERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1190.

No. 97–1194. EASTERN KENTUCKY RESOURCES ET AL. *v.* FISCAL COURT OF MAGOFFIN COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 127 F. 3d 532.

No. 97–1204. FLORIDA *v.* ESCOBAR. Sup. Ct. Fla. Certiorari denied. Reported below: 699 So. 2d 988.

No. 97–1244. GIBBS INTERNATIONAL, INC., FKA GIBBS TEXTILES, INC. *v.* INTERNAL REVENUE SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 116.

No. 97–1283. HAYNSWORTH ET AL. *v.* LLOYD'S OF LONDON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 121 F. 3d 956.

No. 97–1284. FAYETTE COUNTY BOARD OF EDUCATION *v.* L. G. P. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1263.

No. 97–1286. ZEHNER *v.* SMITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 121 F. 3d 698.

No. 97–1288. NATIONAL MEDICAL ENTERPRISES, INC. *v.* BLEASDELL. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 210.

No. 97–1289. BARSCH ET UX. *v.* BRANN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1069.

No. 97–1291. SCHMIDT *v.* SHEET METAL WORKERS' NATIONAL PENSION FUND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 128 F. 3d 541.

No. 97–1297. DEBORD ET UX., INDIVIDUALLY AND AS NEXT FRIENDS FOR DEBORD, MINOR *v.* BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 126 F. 3d 1102.

No. 97–1300. MCDONALD ET AL. *v.* HAMMONS, INDIVIDUALLY AND AS COMMISSIONER, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 114.

No. 97–1308. TEXAS LOTTERY COMMISSION ET AL. *v.* WENNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 123 F. 3d 321.

No. 97–1311. BOURQUE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 699 So. 2d 1.

No. 97–1312. PEACE & LOVE, INC., ET AL. *v.* MARSHALL, DBA R. K. MARSHALL CONSTRUCTION. Ct. Civ. App. Okla. Certiorari denied.

No. 97–1316. PANDA-KATHLEEN, L. P. *v.* FLORIDA POWER CORPORATION ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 701 So. 2d 322.

No. 97–1319. CASSELLI *v.* CASSELLI. Ct. App. La., 5th Cir. Certiorari denied.

No. 97–1321. HOLLINGSWORTH & VOSE CO. *v.* HOROWITZ ET UX. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 97–1324. WASHINGTON *v.* SUMMERVILLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 127 F. 3d 552.

No. 97–1325. PALADIN ENTERPRISES, INC., AKA PALADIN PRESS *v.* RICE, GUARDIAN AND NEXT FRIEND OF HORN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 128 F. 3d 233.

No. 97–1327. JORDAN *v.* PLAYTEX FAMILY PRODUCTS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 116 F. 3d 465.

No. 97–1331. UNION SECURITY LIFE INSURANCE CO. *v.* CROCKER. Sup. Ct. Ala. Certiorari denied. Reported below: 709 So. 2d 1118.

No. 97–1332. YEAROUS ET AL. *v.* NIOBRARA COUNTY MEMORIAL HOSPITAL, BY AND THROUGH ITS BOARD OF TRUSTEES. C. A. 10th Cir. Certiorari denied. Reported below: 128 F. 3d 1351.

No. 97–1333. SMITHWICK ET UX. *v.* GREEN TREE FINANCIAL SERVICING CORP. C. A. 5th Cir. Certiorari denied. Reported below: 121 F. 3d 211.

No. 97–1341. KABIR *v.* SILICON VALLEY BANK ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 97–1345. DAXOR CORP. ET AL. *v.* NEW YORK STATE DEPARTMENT OF HEALTH ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 90 N. Y. 2d 89, 681 N. E. 2d 356.

No. 97–1348. WILSON *v.* MARCHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 805.

No. 97–1349. PAINTER *v.* GOLDEN RULE INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 121 F. 3d 436.

No. 97–1350. WALDEN ET AL. *v.* GEORGIA-PACIFIC CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 126 F. 3d 506.

No. 97–1351. MESSAM *v.* MORTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 133 F. 3d 910.

No. 97–1353. FAZIO *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 1328.

No. 97–1361. BRONX HOUSEHOLD OF FAITH ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 127 F. 3d 207.

No. 97–1362. BARRETT *v.* HARRINGTON. C. A. 6th Cir. Certiorari denied. Reported below: 130 F. 3d 246.

No. 97–1363. SCHLOSSBERG, TRUSTEE *v.* MARYLAND COMPTROLLER OF THE TREASURY. C. A. 4th Cir. Certiorari denied. Reported below: 119 F. 3d 1140.

No. 97–1365. UNITED MEXICAN STATES ET AL. *v.* WOODS, ATTORNEY GENERAL OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 126 F. 3d 1220.

No. 97–1366. MATTHEWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1261.

No. 97–1367. ORMAN ET AL. *v.* CHARLES SCHWAB & CO., INC., ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 179 Ill. 2d 282, 688 N. E. 2d 620.

No. 97–1369. IN RE CAPITAL CITY PRESS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 128 F. 3d 267.

No. 97–1370. ZOK *v.* EASTAUGH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 720.

No. 97–1372. WHITLEY ET AL. *v.* ROCHON. C. A. 5th Cir. Certiorari denied. Reported below: 122 F. 3d 319.

No. 97–1377. WATERS ET UX. *v.* FRAZIER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–1379. HIGHTOWER *v.* KENDALL CO. Ct. App. Ga. Certiorari denied. Reported below: 225 Ga. App. 71, 483 S. E. 2d 294.

No. 97–1385. STONE ET UX. *v.* CITY OF LYNN ET AL. App. Ct. Mass. Certiorari denied. Reported below: 43 Mass. App. 1112, 684 N. E. 2d 1212.

No. 97–1387. ROOF *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 97–1391. FORD MOTOR CO. *v.* SPERAU ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 708 So. 2d 111.

No. 97–1393. IN RE DYER. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1455.

No. 97–1398. CROSS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 128 F. 3d 145.

No. 97–1405. SAID *v.* RUNYON, POSTMASTER GENERAL. C. A. 1st Cir. Certiorari denied.

No. 97–1409. KOSKELA ET AL. *v.* KING COUNTY ET AL.; and No. 97–7859. SCANNELL *v.* KING COUNTY ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 133 Wash. 2d 584, 949 P. 2d 1260.

No. 97–1412. MAHER *v.* LONG ISLAND UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 131.

No. 97–1436. ISGRO *v.* NEW YORK STATE FRESHWATER WETLAND APPEALS BOARD. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 239 App. Div. 2d 419, 658 N. Y. S. 2d 893.

No. 97–1437. YOHN *v.* UNIVERSITY OF MICHIGAN REGENTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 438.

No. 97–1438. CLEMENT *v.* VIRGINIA BOARD OF BAR EXAMINERS. C. A. 4th Cir. Certiorari denied. Reported below: 125 F. 3d 847.

No. 97–1457. CENTER FOR STUDY AND APPLICATION OF BLACK ECONOMIC DEVELOPMENT *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 132 F. 3d 1481.

No. 97–1460. UNITED WE STAND, AMERICA, NEW YORK, INC., ET AL. *v.* UNITED WE STAND AMERICA. C. A. 2d Cir. Certiorari denied. Reported below: 128 F. 3d 86.

No. 97–1464. NEWCO, INC. *v.* CESSNA AIRCRAFT CO. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–1466. SALZMAN *v.* BFI TIRE RECYCLERS OF MN, INC., ET AL. Ct. App. Wis. Certiorari denied.

No. 97–1467. PETERSON *v.* WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. Ct. App. Wis. Certiorari denied. Reported below: 212 Wis. 2d 642, 570 N. W. 2d 63.

No. 97–1475. YADAV ET AL. *v.* WEST WINDSOR TOWNSHIP. C. A. 3d Cir. Certiorari denied. Reported below: 129 F. 3d 1257.

No. 97–1476. RICHARDSON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 97–1480. PRO-FOOTBALL, INC., DBA THE WASHINGTON REDSKINS *v.* HARTFORD ACCIDENT & INDEMNITY CO. C. A. D. C. Cir. Certiorari denied. Reported below: 127 F. 3d 1111.

No. 97–1482. CASE FARMS OF NORTH CAROLINA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 128 F. 3d 841.

No. 97–1490. ESTATE OF GORDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 97–1492. WATSON *v.* PACE WEST DIVISION, SUBDIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY. C. A. 7th Cir. Certiorari denied. Reported below: 129 F. 3d 1268.

No. 97–1494. GREB ET AL. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 33.

No. 97–1498. POWELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 321.

No. 97–1499. LUSK *v.* FEDERAL ADJUSTMENT BUREAU, INC. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 97–1500. JOYCE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 243 Conn. 282, 705 A. 2d 181.

No. 97–1502. SCHLEI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 944.

No. 97–1504. THOMPSON *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 47 M. J. 378.

No. 97–1505. CORNISH *v.* COURT OF APPEALS OF MARYLAND ET AL. Ct. App. Md. Certiorari denied.

No. 97–1506. SEALED APPELLEE *v.* SEALED APPELLANT. C. A. 5th Cir. Certiorari denied. Reported below: 130 F. 3d 695.

No. 97–1512. BANKHEAD *v.* MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 119 F. 3d 3.

No. 97–1513. FOX *v.* BANDAG, INC. C. A. 3d Cir. Certiorari denied. Reported below: 124 F. 3d 186.

No. 97–1521. RAZ *v.* BROWN. Ct. App. Wis. Certiorari denied. Reported below: 213 Wis. 2d 296, 570 N. W. 2d 605.

No. 97–1524. FOROOHAR *v.* SUPREME COURT OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 129 F. 3d 119.

No. 97–1525. MITCHELL *v.* MULLIGAN, CHIEF JUSTICE, SUPERIOR COURT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 132 F. 3d 30.

No. 97–1527. RUCK *v.* UNITED TRANSPORTATION UNION, EXECUTIVE BOARD, ET AL. C. A. 6th Cir. Certiorari denied.

No. 97–1529. CAMPBELL *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 132 F. 3d 53.

No. 97–1531. SHETTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 130 F. 3d 1324.

No. 97–1538. ALMANZAR DURAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 132.

No. 97–1542. O'KEEFE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 128 F. 3d 885.

No. 97–1552. STOUGHTON TRAILERS, INC. *v.* PACE DESIGN & FAB, INC. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 39.

No. 97–1559. DOE, INDIVIDUALLY AND IN HER CAPACITY AS ONE OF THE WRONGFUL DEATH BENEFICIARIES OF DOE, DECEASED *v.* MISSISSIPPI BLOOD SERVICES, INC. Sup. Ct. Miss. Certiorari denied. Reported below: 704 So. 2d 1016.

No. 97–1583. REA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 919.

No. 97–1584. SCHMITZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 124 F. 3d 206.

No. 97–1585. AGOSTINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 1183.

No. 97–7024. HARGUS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 128 F. 3d 1358.

No. 97–7039. SKINNER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 956 S. W. 2d 532.

No. 97–7116. AUSTIN *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 126 F. 3d 843.

No. 97–7121. CHAPPELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 114 F. 3d 1192.

No. 97–7137. JETT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 97–7252. WISE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 125 F. 3d 845.

No. 97–7431. CONCEPCION *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied.

No. 97–7465. PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 125 F. 3d 285.

No. 97–7478. BELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 121 F. 3d 712.

No. 97–7492. GREYSON *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 85 Haw. 320, 944 P. 2d 693.

No. 97–7511. LEFKOWITZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 125 F. 3d 608.

No. 97–7514. DUMAS *v.* CHICAGO HOUSING AUTHORITY. C. A. 7th Cir. Certiorari denied.

No. 97–7573. MOORE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 678 N. E. 2d 1258.

No. 97–7738. ROBERTS *v.* BOB EVANS FARMS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1265.

No. 97–7842. CLEARY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 942 P. 2d 736.

No. 97–7843. PLUMMER *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 97–7844. ORIAKHI *v.* PARSONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 125 F. 3d 852.

No. 97–7861. TOEGEMANN *v.* PROCHASKA ET AL. C. A. 1st Cir. Certiorari denied.

No. 97–7863. VILLACRES *v.* KRAMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–7864. WILLIAMS *v.* CARLTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 124 F. 3d 201.

No. 97–7865. WHITE *v.* MCMILLAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 128 F. 3d 732.

No. 97–7866. MCBROOM *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 97–7867. DUBUC *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 97–7873. WHITE *v.* MCMILLAN ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–7874. ARMSTRONG *v.* ROLM A. SIEMANS CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1258.

No. 97–7877. CARGILL *v.* TURPIN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 120 F. 3d 1366.

No. 97–7880. TERRY *v.* VANCE COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–7881. HOUSTON *v.* WOODS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 109 F. 3d 767.

No. 97–7882. GRIFFIN *v.* CITY OF TAMPA, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–7884. VALDEZ ET AL. *v.* FONOIMOANA ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 86 Haw. 17, 946 P. 2d 971.

No. 97–7889. ASPELMEIER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 97–7892. TARR *v.* ESHENBAUGH ET UX. Super. Ct. Pa. Certiorari denied. Reported below: 698 A. 2d 675.

No. 97–7893. ALLARD *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–7894. SAELEE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 97–7895. CONROD *v.* DAVIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 120 F. 3d 92.

No. 97–7898. NIK-KHAH *v.* ZANDI. Ct. App. Kan. Certiorari denied. Reported below: 24 Kan. App. 2d ——, 946 P. 2d 115.

No. 97–7901. MURRAY *v.* UNIVERSITY OF MARYLAND MEDICAL SYSTEMS. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–7904. HEARD *v.* IOWA FINANCE AUTHORITY ET AL. Dist. Ct. Iowa, Polk County. Certiorari denied.

No. 97–7907. HOFFMANN *v.* GSF INVESTMENT CO. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 697 So. 2d 855.

No. 97–7912. HENRY *v.* LANGNER & ASSOCIATES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 112 F. 3d 516.

No. 97–7913. GIBSON *v.* MURRAY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7915. FOLLETT *v.* ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 715.

No. 97–7916. ERDHEIM *v.* THALER. C. A. 2d Cir. Certiorari denied.

No. 97–7920. SAMPSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 97–7924. LINCOLN *v.* HEE ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 86 Haw. 19, 946 P. 2d 973.

No. 97–7926. KARASEK *v.* COURT OF COMMON PLEAS OF OHIO, MONTGOMERY COUNTY. Ct. App. Ohio, Montgomery County. Certiorari denied. Reported below: 119 Ohio App. 3d 615, 695 N. E. 2d 1209.

No. 97–7930. ATWOOD *v.* ARIZONA. Super. Ct. Ariz., Pima County. Certiorari denied.

No. 97–7937. REID *v.* CITY OF FLINT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 121 F. 3d 709.

No. 97–7945. MCDONALD *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 97–7953. BURTON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 86 Wash. App. 1035.

No. 97–7960. LITZENBERG *v.* LITZENBERG. C. A. 4th Cir. Certiorari denied. Reported below: 125 F. 3d 848.

No. 97–7964. AZEEZ *v.* DUNCIL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1060.

No. 97–7965. POLAND *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 117 F. 3d 1094.

No. 97–7966. BEWRY *v.* HARTFORD POLICE DEPARTMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 125 F. 3d 843.

No. 97–7969. CARPENTER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 122 Ohio App. 3d 16, 701 N. E. 2d 10.

No. 97–7973. BERRYMAN *v.* COLBERT. C. A. 6th Cir. Certiorari denied.

No. 97–7977. GATES *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 97–7978. GOODROAD *v.* FITZGERALD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 121 F. 3d 712.

No. 97–7983. HALL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 549 Pa. 269, 701 A. 2d 190.

No. 97–7985. DeBlase *v.* Roth, Warden, et al. C. A. 3d Cir. Certiorari denied.

No. 97–7986. Flanagan *v.* Nevada; and
No. 97–8014. Moore *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 112 Nev. 1409, 930 P. 2d 691.

No. 97–7988. Haynes *v.* Kepka et al. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 151.

No. 97–7989. Evans *v.* Hartwig, Warden. C. A. 7th Cir. Certiorari denied.

No. 97–7990. Hawkins *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 549 Pa. 352, 701 A. 2d 492.

No. 97–7993. Chandler *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 702 So. 2d 186.

No. 97–8002. Tapia *v.* Henigman. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 152.

No. 97–8007. Jackson *v.* Walker, Superintendent, Auburn Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 97–8013. Moore *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 701 So. 2d 545.

No. 97–8023. Baze *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 965 S. W. 2d 817.

No. 97–8029. Mason-Neubarth *v.* Dameron Hospital Assn. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 97–8031. Kaluna *v.* Kaneshiro, Director, Hawaii Department of Public Safety. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 146.

No. 97–8032. Wheatley *v.* Oregon. Ct. App. Ore. Certiorari denied. Reported below: 150 Ore. App. 370, 944 P. 2d 1002.

No. 97–8033. Bland *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 958 S. W. 2d 651.

No. 97–8035. Sparkman *v.* Texas. Ct. App. Tex., 12th Dist. Certiorari denied. Reported below: 968 S. W. 2d 373.

No. 97–8046. HAYES *v.* WESTERN WEIGHING AND INSPECTION BUREAU. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 607.

No. 97–8058. MCLAVEY *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 149 Ore. App. 779, 944 P. 2d 1003.

No. 97–8060. ENOCH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 97–8068. SHELLITO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 701 So. 2d 837.

No. 97–8073. GARCIA *v.* DATILLO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 117 F. 3d 1428.

No. 97–8103. KIDD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 178 Ill. 2d 92, 687 N. E. 2d 945.

No. 97–8124. WEYMAN *v.* MIFFLIN COUNTY, PENNSYLVANIA, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 97–8128. M. L. MC., A MINOR *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 289 Ill. App. 3d 1149, 713 N. E. 2d 838.

No. 97–8137. CAMPBELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 703 So. 2d 475.

No. 97–8146. SANDOVAL MACIAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 16 Cal. 4th 739, 941 P. 2d 838.

No. 97–8147. LEE *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC/CLASSIFICATION CENTER AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 428.

No. 97–8163. SHAUGHNESSY *v.* CITY OF LACONIA. Sup. Ct. N. H. Certiorari denied.

No. 97–8169. CROOKS *v.* WILLIAMS. C. A. 4th Cir. Certiorari denied. Reported below: 121 F. 3d 697.

No. 97–8185. POWELL *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 132 F. 3d 54.

No. 97–8199. UMPHFREY *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 923.

No. 97–8201. BROWN *v.* WILSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–8222. COLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 113 F. 3d 1230.

No. 97–8226. FEENEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 767.

No. 97–8240. DEVER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 80 Ohio St. 3d 1425, 685 N. E. 2d 238.

No. 97–8249. MICHAUD *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 97–8259. HOLLINGSWORTH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1063.

No. 97–8261. FLORY-OUTTEN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 129 F. 3d 135.

No. 97–8263. HESTERLEE *v.* GOODWIN, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 97–8264. CALDWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–8267. AARON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 97–8273. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1155.

No. 97–8277. WARREN *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8283. TERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 919.

No. 97–8285. SMITH *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 97–8290. GUESS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–8292. GASKELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 134 F. 3d 1039.

No. 97–8293. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 137.

No. 97–8294. KEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 132 and 141 F. 3d 394.

No. 97–8296. NADEAU *v.* INTERNAL REVENUE SERVICE. C. A. 1st Cir. Certiorari denied. Reported below: 121 F. 3d 695.

No. 97–8297. KRITZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 367.

No. 97–8300. CROCHRAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 615.

No. 97–8301. MCGRIFF *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 705 A. 2d 282.

No. 97–8310. JOHNSON *v.* CRIST, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 97–8313. CARROLL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 137 F. 3d 1352.

No. 97–8314. SARICH *v.* UNITED STATES; and
No. 97–8363. GUERRIERI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 320.

No. 97–8319. BREWSTER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 127 F. 3d 22.

No. 97–8322. LEACH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 97–8326. WALDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 931.

No. 97–8327. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 97–8331. CHILTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 1392.

No. 97–8333. MODGLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 221.

No. 97–8334. WALLACE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 1460.

No. 97–8336. VENTURA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 44.

No. 97–8337. CONLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 1387.

No. 97–8338. BURNS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 1460.

No. 97–8339. MITCHELL *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 97–8342. BULLOCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 129 F. 3d 1256.

No. 97–8344. SPENCE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 125 F. 3d 1192.

No. 97–8346. PHILLIPS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–8347. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 44.

No. 97–8349. JOOST *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 133 F. 3d 125.

No. 97–8350. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 367.

No. 97–8351. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 124 F. 3d 209.

No. 97–8354. NUNES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 767.

No. 97–8366. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 1460.

No. 97–8369. PERALTA-REYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 131 F. 3d 956.

No. 97–8381. REYNOLDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 608.

No. 97–8391. WICKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 383.

No. 97–8394. MESSINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 36.

No. 97–8396. MOORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 134 F. 3d 386.

No. 97–8399. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 930.

No. 97–8400. MORRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 1136.

No. 97–8403. BRAWNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 653.

No. 97–8404. BAGAROZY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 766.

No. 97–8407. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 112 F. 3d 518.

No. 97–8417. RICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 135 F. 3d 140.

No. 97–8444. GILBERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 130 F. 3d 1458.

No. 97–1112. BELL, WARDEN *v.* AUSTIN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 126 F. 3d 843.

No. 97–1159. BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* CLEMMONS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 124 F. 3d 944.

No. 97–1205. FLORIDA *v.* ESCOBAR. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 699 So. 2d 984.

No. 97–1201. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* ELI LILLY & CO. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 119 F. 3d 1559.

No. 97–1380. ELI LILLY & CO. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 119 F. 3d 1559.

No. 97–1343. LAWVERE ET UX. *v.* EAST LYCOMING SCHOOL DISTRICT ET AL. C. A. 3d Cir. Motion of petitioners Scott Lawvere et ux. to strike a brief in opposition denied. Certiorari denied. Reported below: 133 F. 3d 910.

No. 97–7868. GORE *v.* THE ENTERPRISE. C. A. 11th Cir. Certiorari before judgment denied.

No. 97–8155 (A–658). BROCKMAN *v.* SWEETWATER COUNTY SCHOOL DISTRICT NO. 1. C. A. 10th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Certiorari denied. Reported below: 131 F. 3d 151.

Rehearing Denied

No. 97–944. CRADDOCK ET AL. *v.* CIRCUIT COURT OF VIRGINIA, PRINCE WILLIAM COUNTY, 522 U. S. 1111;

No. 97–1042. HIMBER *v.* POWERS ET AL., 522 U. S. 1092;

No. 97–1046. MCDONALD *v.* ST. LOUIS SOUTHWESTERN RAILROAD, 522 U. S. 1115;

No. 97–1076. AMERICAN RELOCATION NETWORK INTERNATIONAL, INC. *v.* WAL-MART STORES, INC., ET AL., 522 U. S. 1116;

No. 97–1079. STALLWORTH *v.* ALABAMA, 522 U. S. 1116;

No. 97–1093. SHIFMAN *v.* UNITED STATES, 522 U. S. 1116;

No. 97–6173. WELLS *v.* WELLS, 522 U. S. 1001;

No. 97–6382. JACKSON *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, 522 U. S. 1119;

No. 97–6504. MCCLAIN *v.* PRICE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL., 522 U. S. 1055;

No. 97–6610. BISHOP *v.* GEORGIA, 522 U. S. 1119;

No. 97–6697. SCOTT *v.* BRUNDAGE, 522 U. S. 1059;

No. 97–6706. JOZAITIS *v.* FORT DEARBORN LIFE INSURANCE CO., 522 U. S. 1120;

No. 97–6806. MITCHELL *v.* REES, WARDEN, 522 U. S. 1120;

No. 97–6851. SIMPSON *v.* FLORIDA, 522 U. S. 1093;

No. 97–6872. BATES *v.* UNITED STATES, 522 U. S. 1062;

No. 97–7076. RANDALL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 522 U. S. 1123;

No. 97–7147. BRADFORD *v.* LOUISIANA STATE UNIVERSITY MEDICAL CENTER ET AL., 522 U. S. 1125;

No. 97–7157. HOLMAN *v.* PAGE, WARDEN, 522 U. S. 1150;

No. 97–7194. BAADE *v.* COLUMBIA HOSPITAL FOR WOMEN ET AL., 522 U. S. 1127;

No. 97–7240. THOMASON *v.* GEORGIA, 522 U. S. 1129;

No. 97–7277. BROWN *v.* UNITED STATES, 522 U. S. 1130;

No. 97–7293. TAVAKOLI-NOURI *v.* WASHINGTON HOSPITAL CENTER ET AL., 522 U. S. 1150;

No. 97–7323. SOMMERS *v.* KENTUCKY, 522 U. S. 1132;

No. 97–7329. KESELICA *v.* VIRGINIA, 522 U. S. 1132;

No. 97–7394. SHARP *v.* MAKOWSKI, WARDEN, *ante*, p. 1009;

No. 97–7449. RICKS *v.* THOMAS ET AL., 522 U. S. 1136;

No. 97–7587. WILKINSON *v.* SUMNER, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, *ante*, p. 1028; and

No. 97–7610. HAAKE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 522 U. S. 1140. Petitions for rehearing denied.

No. 97–699. COOPER *v.* UNITED STATES, 522 U. S. 1089. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

APRIL 21, 1998

Miscellaneous Orders

No. A–794. SWEET *v.* MISSOURI. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 97–8769 (A–793). IN RE VILLAFUERTE. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 97–8717 (A–785). VILLAFUERTE *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied.

APRIL 22, 1998

Miscellaneous Order

No. 97–8742 (A–784). IN RE CANNON. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

APRIL 24, 1998

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post,* p. 1149; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1223; amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1229; and amendments to the Federal Rules of Evidence, see *post,* p. 1237.)

APRIL 27, 1998

Certiorari Granted—Vacated and Remanded

No. 96–1936. FAIRPORT INTERNATIONAL EXPLORATION, INC. *v.* SHIPWRECKED VESSEL KNOWN AS THE CAPTAIN LAWRENCE, IN REM, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California* v. *Deep Sea Research, Inc., ante,* p. 491. Reported below: 105 F. 3d 1078.

Miscellaneous Orders

No. A–684 (97–1688). COLORADO *v.* ROMERO. Sup. Ct. Colo. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–788. HALE *v.* ARKANSAS. Application for stay of state court proceedings, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. D–1909. IN RE DISBARMENT OF BERNSTEIN. Disbarment entered. [For earlier order herein, see 522 U. S. 1103.]

No. D–1910. In re Disbarment of Caranchini. Further consideration of response to the rule to show cause deferred. [For earlier order herein, see 522 U. S. 1104.]

No. D–1913. In re Disbarment of Sheldrake. Disbarment entered. [For earlier order herein, see 522 U. S. 1104.]

No. D–1914. In re Disbarment of Gurstel. Disbarment entered. [For earlier order herein, see 522 U. S. 1104.]

No. D–1916. In re Disbarment of Campbell. Disbarment entered. [For earlier order herein, see 522 U. S. 1104.]

No. D–1917. In re Disbarment of Barton. Disbarment entered. [For earlier order herein, see 522 U. S. 1145.]

No. D–1942. In re Disbarment of Collins. Ephraim Collins, of Boca Raton, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1943. In re Disbarment of Kantor. Stanley Lewis Kantor, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1944. In re Disbarment of Hall. Sylvia E. Hall, of Deep Water, N. J., is suspended from the practice of law in this Court, and a rule will 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. M–66. Ashiegbu *v.* Gray et al. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 97–8191. Torain *v.* Siemens Rolm Communications, Inc. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 18, 1998, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 97–1633. In re Cossett, dba Cossett Construction Co., Inc. Sup. Ct. Ohio. Petition for writ of common-law certio-

rari denied. Reported below: 81 Ohio St. 3d 1468, 690 N. E. 2d 1288.

No. 97–8542. IN RE WAGNER. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 97–1396. LOPEZ ET AL. *v.* MONTEREY COUNTY ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted.

Certiorari Granted

No. 97–1287. HUGHES AIRCRAFT CO. ET AL. *v.* JACOBSON ET AL. C. A. 9th Cir. Motions of Hughes Aircraft Retirees et al., Chamber of Commerce of the United States et al., and ERISA Industry Committee for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 105 F. 3d 1288 and 128 F. 3d 1305.

No. 97–7164. HOLLOWAY, AKA ALI *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 126 F. 3d 82.

Certiorari Denied. (See also No. 97–1633, *supra.*)

No. 96–1448. BEMIS *v.* RMS LUSITANIA. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 1129.

No. 97–928. BILZERIAN *v.* HSSM #7 LIMITED PARTNERSHIP. C. A. 11th Cir. Certiorari denied. Reported below: 100 F. 3d 886.

No. 97–1025. HESS ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 120 F. 3d 1140.

No. 97–1178. ROCKWELL INTERNATIONAL CORP. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 124 F. 3d 1194.

No. 97–1216. DOWD, FOR HIMSELF AND ALL SIMILARLY SITUATED DISABLED VETERANS *v.* HINCHMAN, ACTING COMPTROLLER

GENERAL, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 124 F. 3d 229.

No. 97–1218. NATIONAL STEEL & SHIPBUILDING CO. *v.* SMITH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 751.

No. 97–1229. UNITED STATES *v.* NEW YORK LIFE INSURANCE CO. C. A. Fed. Cir. Certiorari denied. Reported below: 118 F. 3d 1553.

No. 97–1259. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY *v.* WASTE MANAGEMENT, INC. OF TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 130 F. 3d 731.

No. 97–1298. EASTMAN KODAK CO. *v.* IMAGE TECHNICAL SERVICES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 1195.

No. 97–1342. CULLINAN ET AL. *v.* ABRAMSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 128 F. 3d 301.

No. 97–1364. SPRINGSTON *v.* CONSOLIDATED RAIL CORPORATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 130 F. 3d 241.

No. 97–1381. STARK ET AL. *v.* INDEPENDENT SCHOOL DISTRICT NO. 640. C. A. 8th Cir. Certiorari denied. Reported below: 123 F. 3d 1068.

No. 97–1382. SCHUDEL ET AL. *v.* GENERAL ELECTRIC CO. ET AL.;

No. 97–1386. HOPKINS ET VIR *v.* GENERAL ELECTRIC CO. ET AL.; and

No. 97–1410. CARLSON *v.* GENERAL ELECTRIC CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 120 F. 3d 991.

No. 97–1384. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 F. 3d 1414.

No. 97–1389. DELOREAN ET AL. *v.* MORGANROTH & MORGANROTH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 123 F. 3d 374.

No. 97–1395. PETRO STOPPING CENTERS, L. P. *v.* JAMES RIVER PETROLEUM, INC. C. A. 4th Cir. Certiorari denied. Reported below: 130 F. 3d 88.

No. 97–1406. KIRLIN *v.* IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT. Sup. Ct. Iowa. Certiorari denied. Reported below: 570 N. W. 2d 643.

No. 97–1420. LAMADRID ALVAREZ *v.* LAMADRID ALVAREZ ET AL. Ct. App. P. R. Certiorari denied.

No. 97–1421. WORLEY *v.* PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD. Commw. Ct. Pa. Certiorari denied. Reported below: 689 A. 2d 334.

No. 97–1423. SMITH *v.* KAISER PERMANENTE MEDICAL GROUP, INC. Sup. Ct. Cal. Certiorari denied.

No. 97–1424. TOLERSON *v.* AUBURN STEEL CO., INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 1255.

No. 97–1429. RODITIS ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 122 F. 3d 108.

No. 97–1432. GONZALEZ FIGUEROA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 125 F. 3d 841.

No. 97–1439. OLIVER *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 59 Ark. App. xix.

No. 97–1449. GUZMAN *v.* MILEY, DEPUTY REGIONAL DIRECTOR, DRUG ENFORCEMENT ADMINISTRATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 124 F. 3d 197.

No. 97–1461. LITTLE ROCK NEWSPAPERS, INC. *v.* FITZHUGH. Sup. Ct. Ark. Certiorari denied. Reported below: 330 Ark. 561, 954 S. W. 2d 914.

No. 97–1463. SHELL OFFSHORE, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 122 F. 3d 312.

No. 97–1473. FABRIC ET AL. *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 115 F. 3d 908.

No. 97–1484. GOOD NEWS COMMUNICATIONS, INC. *v.* UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 132 F. 3d 54.

No. 97–1486. GULF PARK WATER CO., INC. *v.* MISSISSIPPI PUBLIC SERVICE COMMISSION. Sup. Ct. Miss. Certiorari denied. Reported below: 700 So. 2d 330.

No. 97–1528. DOE ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 302 N. J. Super. 255, 695 A. 2d 319.

No. 97–1558. SMITH *v.* MCBRAYER, MCGINNIS, LESLIE & KIRKLAND ET AL. Ct. App. Ky. Certiorari denied.

No. 97–1561. ARNOLD *v.* BOATMEN'S TRUST CO. C. A. 8th Cir. Certiorari denied. Reported below: 124 F. 3d 207.

No. 97–1580. TENZER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 127 F. 3d 222.

No. 97–1593. CHAHIL *v.* GLICKMAN, SECRETARY OF AGRICULTURE. C. A. 4th Cir. Certiorari denied. Reported below: 125 F. 3d 847.

No. 97–1595. JOHNSON BROTHERS WHOLESALE LIQUOR CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 922.

No. 97–1596. FERRANTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 135 F. 3d 116.

No. 97–1598. NUNEZ GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1075.

No. 97–1605. LARUE ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 124 F. 3d 204.

No. 97–1607. DIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 192.

No. 97–1611. COUSINO *v.* ELLIOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF COUSINO, DECEASED, ET AL. Ct. App. Mich. Certiorari denied.

No. 97–7677. WILSON *v.* ROGERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 125 F. 3d 856.

No. 97–7762. LOMAX *v.* CITY OF JOPLIN, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 129 F. 3d 122.

No. 97–7822. NARRON *v.* VANCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 610.

No. 97–7856. FRANQUI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 699 So. 2d 1312.

No. 97–7857. FRANQUI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 699 So. 2d 1332.

No. 97–8011. BRADFORD *v.* CAMBRA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8015. MCDONALD *v.* NEVADA. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 126.

No. 97–8027. SAYMAN *v.* NUSSBAUM ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–8028. MCBRIDE *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 97–8030. SIDDEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 347 N. C. 218, 491 S. E. 2d 225.

No. 97–8034. REDD *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 110 F. 3d 69.

No. 97–8036. MARK *v.* EVANS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 130.

No. 97–8037. NICHOLS *v.* HOLT, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–8043. HUGHES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 328 S. C. 146, 493 S. E. 2d 821.

No. 97–8048. HOFFMAN *v.* DAL BELLO. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–8056. JORDAN *v.* ROUSE ET AL. C. A. 7th Cir. Certiorari denied.

No. 97–8059. SATHER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 86 Wash. App. 127, 936 P. 2d 36.

No. 97–8061. ALLS *v.* QUESTCARE, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–8067. CHARLES *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 97–8071. ABIDEKUN *v.* COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 237 App. Div. 2d 294, 654 N. Y. S. 2d 806.

No. 97–8075. DENARD *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 97–8082. BARUCH *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 91 F. 3d 150.

No. 97–8084. MIKKO *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8087. DOVE *v.* DAVIS, CHAIRMAN, MARYLAND PAROLE COMMISSION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1060.

No. 97–8090. ANGEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 97–8102. BRANCH *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 130 F. 3d 305.

No. 97–8107. MADEJ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 177 Ill. 2d 116, 685 N. E. 2d 908.

No. 97–8129. MILLSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 91 N. Y. 2d 877, 691 N. E. 2d 647.

No. 97–8144. VOLKOVA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 97–8151. TELLIER *v.* PETRILLO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 133 F. 3d 907.

No. 97–8177. STOKES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 97–8187. TRAVIS-BARKER *v.* U. S. BANK OF WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 212.

No. 97–8192. MARTINEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 140.

No. 97–8194. MENDOZA *v.* SSC&B LINTAS, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 125 F. 3d 844.

No. 97–8196. JONES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 97–8239. ENGLERT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 132 F. 3d 54.

No. 97–8242. FORT *v.* HOWES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1061.

No. 97–8272. CARTER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 452.

No. 97–8280. NELSON *v.* CORBETT ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–8287. CEMINCHUK *v.* COHEN, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 97–8311. RICHARDSON *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 97–8312. BRAY *v.* WEST, SECRETARY OF THE ARMY. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 133.

No. 97–8318. TATLIS *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 97–8321. ORSINI *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 331 Ark. xxiv.

No. 97–8323. LANDERS *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 24 Kan. App. 2d ——, 945 P. 2d 888.

No. 97–8359. ALADEKOBA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1260.

No. 97–8360. DELGADO *v.* BARRERAS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 42.

No. 97–8365. EVANS *v.* DALTON, SECRETARY OF THE NAVY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 612.

No. 97–8378. RHODEN *v.* SUNDQUIST, GOVERNOR OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 127 F. 3d 1103.

No. 97–8393. BREWER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 134 F. 3d 386.

No. 97–8406. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 920.

No. 97–8414. OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 1332.

No. 97–8418. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 766.

No. 97–8419. PASTRANO *v.* UNITED STATES; and
No. 97–8532. MENDIOLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: No. 97–8419, 129 F. 3d 611; No. 97–8532, 129 F. 3d 611 and 612.

No. 97–8421. CASTRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 129 F. 3d 226.

No. 97–8422. BELHOMME *v.* WIDNALL, SECRETARY OF THE AIR FORCE. C. A. 10th Cir. Certiorari denied. Reported below: 127 F. 3d 1214.

No. 97–8430. MCCORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 41.

No. 97–8433. COOPER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 125 F. 3d 849.

No. 97–8436. HARDWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 139 F. 3d 913.

No. 97–8438. DAVENPORT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1107.

No. 97–8439. DAMM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 636.

No. 97–8440. FINCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 767.

No. 97–8441. HARDEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 135 F. 3d 140.

No. 97–8443. HEBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 514.

No. 97–8445. GANGLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 125 F. 3d 856.

No. 97–8448. MCCOWAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–8449. MAASS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 44.

No. 97–8454. LACY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 119 F. 3d 742.

No. 97–8459. SALLAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 610.

No. 97–8474. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 F. 3d 48.

No. 97–8481. ATKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 437.

No. 97–8483. WYNN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 97–8487. QUEEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 132 F. 3d 991.

No. 97–8488. MALLETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 373.

No. 97–8491. LATOUF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 320.

No. 97–8502. GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 380.

No. 97–8504. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 134 F. 3d 386.

No. 97–8505. GOODE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 41.

No. 97–8508. HENDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 97–8510. SELF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 132 F. 3d 1039.

No. 97–8512. BENITEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 134 F. 3d 385.

No. 97–8516. ENIGWE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1155.

No. 97–8523. SLIGH *v.* RUNYON, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 127 F. 3d 1100.

No. 97–8529. NWANERI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 118.

No. 97–8538. OKORO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 430.

No. 97–8543. UDELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 41.

No. 97–8545. AHMAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 97–8548. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 221.

No. 97–8549. GRAVES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 97–1403. MANOR ET UX. *v.* NESTLE FOOD CO. Sup. Ct. Wash. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 131 Wash. 2d 439, 932 P. 2d 628.

No. 97–1414. CALDERON, WARDEN *v.* MCDOWELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 130 F. 3d 833.

No. 97–1448. RATELLE, WARDEN, ET AL. *v.* FARMER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 131 F. 3d 146.

No. 97–8042. DIAS *v.* BOGINS. C. A. 1st Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 134 F. 3d 361.

Rehearing Denied

No. 97–1107. LAUGHLIN ET AL. *v.* PEROT ET AL., 522 U. S. 1148;
No. 97–1143. IN RE RICHARDSON, 522 U. S. 1118;
No. 97–1186. MIZELL *v.* UNITED STATES, *ante*, p. 1005;
No. 97–6691. ONE JUVENILE MALE *v.* UNITED STATES, *ante*, p. 1007;
No. 97–6836. WEE ET UX. *v.* ANDREWS ET AL., *ante*, p. 1007;
No. 97–6980. YOUNG *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, 522 U. S. 1121;
No. 97–7009. JOHNSON *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL., 522 U. S. 1122;
No. 97–7013. MORRIS *v.* BELL, WARDEN, 522 U. S. 1149;
No. 97–7339. LAWRENCE *v.* EVANS, WARDEN, *ante*, p. 1007;
No. 97–7399. WHITE *v.* SHEESLEY, *ante*, p. 1009;
No. 97–7426. WHITE *v.* TATE, WARDEN, *ante*, p. 1009;
No. 97–7684. ADAMS *v.* UNITED STATES, 522 U. S. 1152; and
No. 97–7686. LOWERY *v.* UNITED STATES, 522 U. S. 1152. Petitions for rehearing denied.

APRIL 28, 1998

Miscellaneous Order

No. A–801. MCFARLAND *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Application for certificate of probable cause and stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution.

Certiorari Denied

No. 97–8397 (A–733). McFarland *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Justice Stevens and Justice Ginsburg would grant the application for stay of execution. Reported below: 137 F. 3d 1352.

May 4, 1998

Miscellaneous Orders

No. D–1945. In re Disbarment of Sanborn. Thomas Herbert Sanborn, of Amherst, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1946. In re Disbarment of Blumenthal. Howard Earl Blumenthal, of Marina Del Rey, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1947. In re Disbarment of Krupa. Stanley Michael Krupa, of Middletown, Conn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1948. In re Disbarment of Perlman. David H. Perlman, of Brooklyn, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1949. In re Disbarment of Meyer. Stanley Marvin Meyer, of Merrick, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1950. IN RE DISBARMENT OF BOXER. Jeffrey V. Boxer, of Wellesley, Mass., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–23. IN RE DOE. Further consideration of motion to unseal the petition for writ of certiorari lodged under seal deferred. [For earlier order herein, see 522 U. S. 946.]

No. M–67. BRUCE *v.* UNITED STATES;
No. M–68. FARRAKHAN ET AL. *v.* N. Y. P. HOLDINGS ET AL.;
No. M–69. GREENBERG *v.* GORDON ET AL.; and
No. M–70. ENGELS *v.* WALDRUP ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 97–7385. IN RE COOPER;
No. 97–7386. IN RE COOPER;
No. 97–7387. IN RE COOPER; and
No. 97–7388. IN RE COOPER. Motions of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1018] denied.

No. 97–7647. IN RE LITZENBERG; and
No. 97–8195. IN RE LITZENBERG. Motions of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until May 26, 1998, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 97–8257. IN RE JOHNSON; and
No. 97–8618. IN RE GREEN. Petitions for writs of habeas corpus denied.

No. 97–8541. IN RE VERBECK. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 97–1230. CITY OF WEST COVINA *v.* PERKINS ET AL. C. A. 9th Cir. Motion of Sixty-seven Cities, Counties, and Towns Within California for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 113 F. 3d 1004.

No. 97–1418. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSN. *v.* 203 NORTH LASALLE STREET PARTNERSHIP. C. A. 7th Cir. Motions of American College of Real Estate Lawyers, American Council of Life Insurance, and American Bankers Association et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 126 F. 3d 955.

Certiorari Denied

No. 97–315. MANGES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 116 F. 3d 1479.

No. 97–1181. PARKER ET AL. *v.* WAKELIN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 123 F. 3d 1.

No. 97–1236. PATTERSON *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 959. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 1345.

No. 97–1249. ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO *v.* "AUTOMATIC" SPRINKLER CORPORATION OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 120 F. 3d 612.

No. 97–1265. MURPHY ET AL. *v.* SOFAMOR DANEK GROUP, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 123 F. 3d 394.

No. 97–1271. VISWANATHAN *v.* FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 125 F. 3d 850.

No. 97–1397. DERZACK ET VIR *v.* ALLEGHENY COUNTY CHILDREN AND YOUTH SERVICES. Super. Ct. Pa. Certiorari denied.

No. 97–1411. NORTH TEXAS STEEL CO., INC. *v.* R. R. DONNELLEY & SONS CO. Ct. App. Ind. Certiorari denied. Reported below: 679 N. E. 2d 513.

No. 97–1417. ALTAI, INC. *v.* COMPUTER ASSOCIATES INTERNATIONAL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 126 F. 3d 365.

No. 97–1425. ROBERTS *v.* UNIDYNAMICS CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 126 F. 3d 1088.

No. 97–1426. CRAWFORD & CO. *v.* SONNIER. C. A. 3d Cir. Certiorari denied.

No. 97–1430. SCANDINAVIAN HEALTH SPA, INC. *v.* FRANKLIN. C. A. 11th Cir. Certiorari denied. Reported below: 128 F. 3d 732 and 733.

No. 97–1431. LINDSAY, EXECUTOR OF THE ESTATE OF SOSA, DECEASED *v.* JEFFERSON COUNTY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 124 F. 3d 197.

No. 97–1433. UIS, INC. *v.* INTERKAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 33.

No. 97–1445. ROLLESTON *v.* CHERRY, EXECUTOR OF THE ESTATE OF SIMS, DECEASED. Ct. App. Ga. Certiorari denied. Reported below: 226 Ga. App. 750, 487 S. E. 2d 354.

No. 97–1446. BAEZA ET AL. *v.* NACCO INDUSTRIES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 1299.

No. 97–1452. FREEDOM COMMUNICATIONS, INC., DBA THE MONITOR *v.* MANCIAS, JUDGE, 93RD JUDICIAL DISTRICT COURT OF HIDALGO COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 609.

No. 97–1510. SKURATOWICZ *v.* TRACY, TAX COMMISSIONER OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 80 Ohio St. 3d 52, 684 N. E. 2d 324.

No. 97–1522. SCHNEIDER *v.* CELESTINO ET VIR. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 97–1545. RHEAMS *v.* MARQUETTE UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied.

No. 97–1554. SNYDER *v.* DEWOSKIN, TRUSTEE. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 750.

No. 97–1563. LUEM *v.* BILLETTER. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 716.

No. 97–1571. ROSMAN ET AL. *v.* GULF INDUSTRIES, INC., ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 694 So. 2d 1247.

No. 97–1576. ACHUSI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 121 F. 3d 705.

No. 97–1614. JAMIESON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 132 F. 3d 1481.

No. 97–1628. COOLMAN *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–1629. COX ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–1637. SANTUCCI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 133 F. 3d 911.

No. 97–5586. LEWIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 113 F. 3d 487.

No. 97–6494. GILLARD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 78 Ohio St. 3d 548, 679 N. E. 2d 276.

No. 97–7727. VENEGAS *v.* HENMAN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 126 F. 3d 760.

No. 97–8074. ELMORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 97–8098. PARKS *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 97–8110. MACIEL *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8112. EVANS *v.* HARTWIG, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 97–8113. EVANS, AKA EVANS-BEY *v.* WASHINGTON, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. Sup. Ct. Ill. Certiorari denied.

No. 97–8116. CUNNINGHAM *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 97–8118. POULLARD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 703 So. 2d 12.

No. 97–8123. WALKOVIAK *v.* DISTRICT COURT OF TEXAS, HARRIS COUNTY. Ct. Crim. App. Tex. Certiorari denied.

No. 97–8126. QUINTERO *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 127 F. 3d 1100.

No. 97–8131. LINDSEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 289 Ill. App. 3d 1134, 713 N. E. 2d 831.

No. 97–8132. FOLEY *v.* BRUMMETT ET AL. Ct. App. Ky. Certiorari denied.

No. 97–8133. WARREN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 347 N. C. 309, 492 S. E. 2d 609.

No. 97–8134. GORNICK *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 97–8136. ANDERSON *v.* PRELESNICK. C. A. 6th Cir. Certiorari denied.

No. 97–8140. WILLIAMS *v.* ANDERSON, WARDEN, ET AL. Ct. App. Ohio, Richland County. Certiorari denied.

No. 97–8141. CUTHBERT *v.* DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 699 So. 2d 1372.

No. 97–8148. CONSALVO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 697 So. 2d 805.

No. 97–8152. HUTCHINS *v.* GEORGIA DEPARTMENT OF CORRECTIONS ET AL. Ct. App. Ga. Certiorari denied.

No. 97–8161. ESPOSITO *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 97–8165. FINK *v.* BUENA PARK POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 125.

No. 97–8166. SHAUGHNESSY *v.* SCHOOL ADMINISTRATIVE UNIT No. 30. Sup. Ct. N. H. Certiorari denied.

No. 97–8172. O'HARE *v.* GOSS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 118 F. 3d 1577.

No. 97–8173. BARRIER *v.* JOHNSON ET AL.; and BARRIER *v.* MARIN GENERAL HOSPITAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 210 (first judgment); 133 F. 3d 925 (second judgment).

No. 97–8213. BEITZEL *v.* LAZAROFF, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 32.

No. 97–8224. ANDERSON *v.* EDWARDS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8252. HUNTER *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 97–8308. PERRY *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 7th Cir. Certiorari denied.

No. 97–8348. SIMONS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 114.

No. 97–8362. J. G. *v.* DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 711 So. 2d 555.

No. 97–8370. SHARP *v.* LOCK, SUPERINTENDENT, CENTRAL MISSOURI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–8372. HARRIS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 97–8379. CARTER *v.* CURRAN, ATTORNEY GENERAL OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 120 F. 3d 260.

No. 97–8384. SCALES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8395. LUCERO *v.* KERBY. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 1299.

No. 97–8432. LEWIS *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–8437. GLOVER *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 36.

No. 97–8442. DOSS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 703 So. 2d 864.

No. 97–8469. NUNEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 133 F. 3d 908.

No. 97–8492. JOHNSON *v.* WYOMING. Dist. Ct. Wyo., Laramie County. Certiorari denied.

No. 97–8503. HAASE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 243 Conn. 324, 702 A. 2d 1187.

No. 97–8506. HAMILTON *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 97–8517. FRANKLIN *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 48 M. J. 413.

No. 97–8524. SASNETT *v.* ENDICOTT, SUPERINTENDENT, COLUMBIA CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 36.

No. 97–8553. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 97–8555. ZEREBNICK *v.* BECKWITH MACHINERY CO. C. A. 3d Cir. Certiorari denied.

No. 97–8557. BOLDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 1353.

No. 97–8567. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 125 F. 3d 1076.

No. 97–8569. BRYAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 437.

No. 97–8575. TINKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 365.

No. 97–8582. WRONKO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 116 F. 3d 488.

No. 97–8585. CROMPTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 97–8587. SANCHO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 97–8589. ROBERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 365.

No. 97–8590. STOKES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 373.

No. 97–8591. PALMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 136.

No. 97–8594. SWINT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 127 F. 3d 1097.

No. 97–8595. PIZZA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1155.

No. 97–8596. SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 119 F. 3d 8.

No. 97–8598. MIGLIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 1330.

No. 97–8600. KEY *v.* UNITED STATES; and
No. 97–8603. JARRETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 133 F. 3d 519.

No. 97–8612. TAMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 129.

No. 97–8613. ADESIDA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 846.

No. 97–49. PORTLAND GENERAL ELECTRIC CO. *v.* COLUMBIA STEEL CASTING CO., INC. C. A. 9th Cir. Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Motion of National Association of Regulatory Utility Commissioners for leave to file a brief as *amicus curiae* denied. Certiorari denied. Reported below: 111 F. 3d 1427.

Rehearing Denied

No. 97–1127. HOTCHKISS *v.* SUPREME COURT OF THE UNITED STATES ET AL., 522 U. S. 1149;

No. 97–1198. MOORE *v.* CITY OF WESTMINSTER ET AL., *ante*, p. 1006;

No. 97–6862. IN RE ROWE, 522 U. S. 1106;

No. 97–7025. GILMOUR *v.* ROGERSON, WARDEN, ET AL., 522 U. S. 1122;

No. 97–7114. DIXON *v.* MARION POLICE DEPARTMENT ET AL., 522 U. S. 1125;

No. 97–7434. IN RE PEARSON, *ante*, p. 1003;

No. 97–7520. AL-AMIN *v.* SEITER, WARDEN, *ante*, p. 1026;

No. 97–7626. WASHINGTON *v.* DIESSLIN, WESTERN REGIONAL DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1029;

No. 97–7748. GRIFFIN *v.* CHARLOTTE MEMORIAL HOSPITAL AND MEDICAL CENTER ET AL., *ante*, p. 1030; and

No. 97–7809. HARTSELL ET AL. *v.* UNITED STATES, *ante*, p. 1030. Petitions for rehearing denied.

MAY 13, 1998

Dismissal Under Rule 46

No. 97–1657. CONTINENTAL MICRONESIA, INC. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 124 F. 3d 211.

MAY 14, 1998

Certiorari Denied

No. 97–8689 (A–817). MUNIZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 132 F. 3d 214.

MAY 15, 1998

Dismissal Under Rule 46

No. 97–288. LEWIS ET VIR, INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS, AND AS ADMINISTRATORS OF THE ESTATE OF

LEWIS, DECEASED *v.* BRUNSWICK CORP. C. A. 11th Cir. [Certiorari granted, 522 U. S. 978.*] Writ of certiorari dismissed under this Court's Rule 46.1.

MAY 18, 1998

Miscellaneous Orders

No. D–1846. IN RE DISBARMENT OF JACKSON. Disbarment entered. [For earlier order herein, see 521 U. S. 1148.]

No. D–1872. IN RE DISBARMENT OF MANNS. Disbarment entered. [For earlier order herein, see 522 U. S. 979.]

No. D–1911. IN RE DISBARMENT OF HOUSTON. Disbarment entered. [For earlier order herein, see 522 U. S. 1104.]

No. D–1912. IN RE DISBARMENT OF GUPTON. Disbarment entered. [For earlier order herein, see 522 U. S. 1104.]

No. D–1915. IN RE DISBARMENT OF SPEERS. Disbarment entered. [For earlier order herein, see 522 U. S. 1104.]

No. D–1918. IN RE DISBARMENT OF BOULDIN. Disbarment entered. [For earlier order herein, see 522 U. S. 1145.]

No. D–1951. IN RE DISBARMENT OF BREEZE. Robert A. Breeze, of San Diego, Cal., is suspended from the practice of law

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*[REPORTER'S NOTE: Argued March 2, 1998. *David E. Hudson* argued the cause for petitioners. With him on the briefs was *R. Ben Hogan III.*

David C. Frederick argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, and *Michael E. Robinson.*

Kenneth S. Geller argued the cause for respondent. With him on the brief were *John J. Sullivan*, *Daniel J. Connolly*, and *James W. Hagan.*

Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White;* for the National Conference of State Legislatures et al. by *Richard Ruda*, *James I. Crowley*, and *D. Bruce La Pierre;* and for Trial Lawyers for Public Justice, P. C., by *Leslie A. Brueckner* and *Arthur H. Bryant.*

Briefs of *amici curiae* urging affirmance were filed for General Motors Corp. by *Kenneth W. Starr*, *Paul T. Cappuccio*, *Richard A. Cordray*, *Brett M. Kavanaugh*, *David M. Heilbron*, and *Leslie G. Landau;* for the Product Liability Advisory Council, Inc., by *Malcolm E. Wheeler;* and for the Washington Legal Foundation by *Daniel J. Popeo.*]

in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1952. IN RE DISBARMENT OF STEWART. Hudson Cary Stewart, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1953. IN RE DISBARMENT OF CHITTIM. Clayton A. Chittim, Jr., of Grandview, Mo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1954. IN RE DISBARMENT OF WILLIAMS. Ricky Edwin Williams, of Tampa, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–65. ANTI-MONOPOLY, INC. *v.* HASBRO, INC.; and
No. M–71. IN RE DOE. Motions for leave to file petitions for writs of certiorari under seal denied.

No. M–72. MARSHALL *v.* FEDERAL EXPRESS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 96–1693. HOPKINS, WARDEN *v.* REEVES. C. A. 8th Cir. [Certiorari granted, 521 U. S. 1151.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 96–8732. EDWARDS ET AL. *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 522 U. S. 931.] Motion of petitioner Joseph Tidwell to reconsider order denying certiorari on Question 2 [522 U. S. 931] denied.

No. 97–918. LOVILIA COAL CO. ET AL. *v.* HARVEY ET AL., *ante*, p. 1059. Motion of respondent Harvey for attorney's fees denied without prejudice to refiling in the United States Court of Appeals for the Eighth Circuit. Motion of petitioners to defer consideration of motion for attorney's fees denied.

No. 97–930. BUCKLEY, SECRETARY OF STATE OF COLORADO *v.* AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., ET AL. C. A. 10th Cir. [Certiorari granted, 522 U. S. 1107.] Motion of Council of State Governments et al. for leave to file a brief as *amici curiae* granted.

No. 97–1121. CITY OF CHICAGO *v.* MORALES ET AL. Sup. Ct. Ill. [Certiorari granted, *ante*, p. 1071.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 97–1485. COATES, DIRECTOR, MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL. *v.* STRAHAN. C. A. 1st Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 97–7615. WHITFIELD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1044] denied.

No. 97–8309. MARTINEZ ET AL. *v.* DOBRA (two judgments). C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until June 8, 1998, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 97–8186. IN RE STEIN;
No. 97–8667. IN RE SANDERS;
No. 97–8727. IN RE CHESTEEN;
No. 97–8735. IN RE FLYNN;
No. 97–8736. IN RE GIBSON; and
No. 97–8747. IN RE PRICE. Petitions for writs of habeas corpus denied.

No. 97–8270. IN RE ADAMS;
No. 97–8304. IN RE WILLIAMS LEWIS;
No. 97–8330. IN RE RICHARDS;
No. 97–8581. IN RE KEEPER; and
No. 97–8614. IN RE BAILEY. Petitions for writs of mandamus denied.

No. 97–8237. IN RE HUGHLEY. Petition for writ of prohibition denied.

Certiorari Granted

No. 96–1793. CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT *v.* GARRET F., A MINOR, BY HIS MOTHER AND NEXT FRIEND, CHARLENE F. C. A. 8th Cir. Certiorari granted. Reported below: 106 F. 3d 822.

No. 97–1536. ARIZONA DEPARTMENT OF REVENUE *v.* BLAZE CONSTRUCTION CO., INC. Ct. App. Ariz. Certiorari granted. Reported below: 190 Ariz. 262, 947 P. 2d 836.

No. 97–475. EL AL ISRAEL AIRLINES, LTD. *v.* TSUI YUAN TSENG. C. A. 2d Cir. Motions of International Air Transport Association and Air Transport Association of America for leave to file briefs as *amici curiae* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 122 F. 3d 99.

Certiorari Denied

No. 96–1963. MCKENNEY ET AL. *v.* WILLIAMS, DECEASED, BY WILLIAMS. C. A. 10th Cir. Certiorari denied.

No. 97–740. SCHWALBE ET AL. *v.* WALKER. C. A. 11th Cir. Certiorari denied. Reported below: 112 F. 3d 1127.

No. 97–1145. CONNICK *v.* UNITED STATES, ON BEHALF OF THE ASSASSINATION RECORDS REVIEW BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 124 F. 3d 718.

No. 97–1195. AEROSPACE CORP. *v.* CAMPBELL. C. A. 9th Cir. Certiorari denied. Reported below: 123 F. 3d 1308.

No. 97–1248. CALLAWAY COUNTY AMBULANCE DISTRICT *v.* PEEPER. C. A. 8th Cir. Certiorari denied. Reported below: 122 F. 3d 619.

No. 97–1267. PROFESSIONAL PILOTS FEDERATION ET AL. *v.* FEDERAL AVIATION ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 118 F. 3d 758.

No. 97–1275. ALVORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 694 So. 2d 704.

No. 97–1280. KAWERAK REINDEER HERDERS ASSN. *v.* WILLIAMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 115 F. 3d 657.

No. 97–1294. CHIARAMONTE *v.* FASHION BED GROUP, INC. C. A. 7th Cir. Certiorari denied. Reported below: 129 F. 3d 391.

No. 97–1310. CUTCLIFFE ET AL. *v.* JENNE, SHERIFF, BROWARD COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 117 F. 3d 1353.

No. 97–1317. WEST BEND CO. *v.* SUNBEAM PRODUCTS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 123 F. 3d 246.

No. 97–1368. AVANT! CORP. ET AL. *v.* CADENCE DESIGN SYSTEMS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 824.

No. 97–1376. CITY OF FLORENCE ET AL. *v.* CHIPMAN, ADMINISTRATOR OF THE ESTATE OF BLACK, DECEASED, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 126 F. 3d 856.

No. 97–1378. SOUTH DAKOTA ET AL. *v.* SDDS, INC. Sup. Ct. S. D. Certiorari denied. Reported below: 569 N. W. 2d 289.

No. 97–1422. COUNTY OF THURSTON ET AL. *v.* STABLER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 129 F. 3d 1015.

No. 97–1455. BRADFORD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 4th 1229, 939 P. 2d 259.

No. 97–1456. BOK *v.* MUTUAL ASSURANCE, INC. C. A. 11th Cir. Certiorari denied. Reported below: 119 F. 3d 927.

No. 97–1458. EASTERN NATURAL GAS CORP. ET AL. *v.* ALUMINUM COMPANY OF AMERICA. C. A. 7th Cir. Certiorari denied. Reported below: 126 F. 3d 996.

No. 97–1459. LORILLARD, INC. *v.* HOROWITZ ET UX. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 97–1468. CAMERON ET AL. *v.* ANHEUSER-BUSCH, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 124.

No. 97–1470. CITY OF COLUMBUS *v.* JONES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 120 F. 3d 248.

No. 97–1478. KOROTKI *v.* ATTORNEY SERVICES CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 135.

No. 97–1479. DIAZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF DIAZ, AND ON BEHALF OF DIAZ ET AL. *v.* CCHC-GOLDEN GLADES, LTD., ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 696 So. 2d 1346.

No. 97–1481. LIBERTY NATIONAL LIFE INSURANCE CO. *v.* DAY. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 1012.

No. 97–1483. BURNSIDES ET AL. *v.* MJ OPTICAL, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 128 F. 3d 700.

No. 97–1487. PLAISANCE DRAGLINE & DREDGING CO., INC. *v.* VERDIN. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 367.

No. 97–1491. ESTATE OF BRAUNSTEIN ET AL. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 238 App. Div. 2d 242, 657 N. Y. S. 2d 12.

No. 97–1495. DAVENPORT *v.* COADY, JUDGE, DISTRICT COURT OF NEBRASKA, THAYER COUNTY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 124 F. 3d 207.

No. 97–1496. RAWSON *v.* TOSCO REFINING CO. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 57 Cal. App. 4th 1520, 67 Cal. Rptr. 2d 790.

No. 97–1501. FRANCISCO ACOSTA *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 951 S. W. 2d 291.

No. 97–1503. MIDLAND EXPORT, LTD. *v.* ELKEM HOLDING, INC., ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–1508. HAVNER ET UX., ON BEHALF OF THEIR MINOR CHILD, HAVNER, ET AL. *v.* MERRELL DOW PHARMACEUTICALS, INC., ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 953 S. W. 2d 706.

No. 97–1516. BERG *v.* SHAPIRO ET AL. Ct. App. Colo. Certiorari denied. Reported below: 948 P. 2d 59.

No. 97–1518. YOUSSEF ET UX. *v.* MORRISON ENTITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1108.

No. 97–1523. MATTEI, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MATTEI, DECEASED, ET AL. *v.* MATTEI. C. A. 6th Cir. Certiorari denied. Reported below: 126 F. 3d 794.

No. 97–1526. MATSUMOTO ET AL. *v.* GOTCHER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–1530. BROWN *v.* SPECTACOR MANAGEMENT GROUP. C. A. 3d Cir. Certiorari denied. Reported below: 131 F. 3d 120.

No. 97–1533. MCDUFFIE, DBA D & M CONTRACTING CO. *v.* FIRST UNION NATIONAL BANK. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 40.

No. 97–1534. HUNT *v.* HAWTHORNE ASSOCIATES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 119 F. 3d 888.

No. 97–1537. BERG *v.* DENTISTS INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 124.

No. 97–1539. JACKSON *v.* OFFICE OF DISCIPLINARY COUNSEL. Sup. Ct. Pa. Certiorari denied. Reported below: 550 Pa. 141, 703 A. 2d 703.

No. 97–1540. WALKER *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 97–1544. M. A. *v.* COLORADO, IN THE INTEREST OF K. A., A CHILD. Ct. App. Colo. Certiorari denied.

No. 97–1546. MUNKATCHY *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 946 S. W. 2d 349.

No. 97–1547. JOHNSON *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 124 F. 3d 204.

No. 97–1548. BAVARO ET AL. *v.* PATAKI, INDIVIDUALLY AND AS GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 130 F. 3d 46.

No. 97–1551. RUSSELL *v.* PLANO BANK & TRUST. C. A. 5th Cir. Certiorari denied. Reported below: 130 F. 3d 715.

No. 97–1555. ARKANSAS CHRISTIAN EDUCATORS ASSN. ET AL. *v.* OZARKS UNLIMITED RESOURCES COOPERATIVE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 921.

No. 97–1556. POLIS *v.* WELD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 132 F. 3d 30.

No. 97–1572. DUGAS *v.* CLAMONT ENERGY CORP. ET AL. (two judgments). C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 140.

No. 97–1577. BRANDT ET AL. *v.* GYGAX REALTOR ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 97–1581. ALASKA CENTER FOR THE ENVIRONMENT ET AL. *v.* ARMBRISTER, DIRECTOR, OFFICE OF PLANNING AND PROGRAM DEVELOPMENT, REGION 10, FEDERAL HIGHWAY ADMINISTRATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 1285.

No. 97–1588. KREUZER *v.* BROWN. C. A. 6th Cir. Certiorari denied. Reported below: 128 F. 3d 359.

No. 97–1590. JOLIGARD *v.* FINDLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 121 F. 3d 698.

No. 97–1591. DAMER *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 97–1597. GAMB *v.* HILTON HOTELS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 46.

No. 97–1601. JONES ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 1327.

No. 97–1602. IN RE BISBEE. C. A. 7th Cir. Certiorari denied. Reported below: 131 F. 3d 1205.

No. 97–1603. TOTAL FOODS ET AL. *v.* ALIX. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1265.

No. 97–1612. WOO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 698 A. 2d 673.

No. 97–1613. LEWIS *v.* TEXTRON AUTOMOTIVE INTERIORS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 132 F. 3d 30.

No. 97–1617. BAYLISS ET AL. *v.* CITY OF TULSA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 124 F. 3d 216.

No. 97–1622. GREENE *v.* CITIBANK, N. A., ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–1644. HASHIMOTO *v.* DALTON, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 118 F. 3d 671.

No. 97–1648. DERBIGNY *v.* GLICKMAN, SECRETARY OF AGRICULTURE. C. A. 5th Cir. Certiorari denied. Reported below: 135 F. 3d 141.

No. 97–1653. ALVAREZ ET AL. *v.* DADE COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 124 F. 3d 1380.

No. 97–1654. WEISSMAN *v.* COHN, LIFLAND, PERLMAN, HERMANN & KNOPF ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 133 F. 3d 912.

No. 97–1655. GUILLORY *v.* REVIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 110 F. 3d 793.

No. 97–1659. HAWKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 124 F. 3d 205.

No. 97–1670. HASTINGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 115 F. 3d 587.

No. 97–1673. WALTERS *v.* METZGER ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 701 A. 2d 790.

No. 97–1675. SOMMERS *v.* MCKINNEY ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 97–1676. SALVO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 133 F. 3d 943.

No. 97–1678. RAHMAN, AKA GRANT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 117 Md. App. 747.

No. 97–1707. BRADSTREET *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 135 F. 3d 46.

No. 97–1713. RUMMEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1454.

No. 97–1716. RUSSELL *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 47 M. J. 412.

No. 97–1722. COMPUWARE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 1285.

No. 97–1727. BISCOE *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 47 M. J. 398.

No. 97–1736. FLIBOTTE *v.* PENNSYLVANIA TRUCK LINES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 131 F. 3d 21.

No. 97–6032. WASHINGTON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 547 Pa. 550, 692 A. 2d 1018.

No. 97–7395. POWELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 125 F. 3d 845.

No. 97–7404. BROWN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 698 A. 2d 661.

No. 97–7782. ANTONIO JIMENEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 703 So. 2d 437.

No. 97–7817. PRATT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 129 F. 3d 54.

No. 97–7821. HUTCHINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–7946. VIRAY *v.* BENEFICIAL CALIFORNIA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 129.

No. 97–7959. LEWIS *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 97–8150. BYERS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 570 N. W. 2d 487.

No. 97–8174. COLLINS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 97–8178. AMRINE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 128 F. 3d 1222.

No. 97–8180. REYNOLDS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 701 A. 2d 782.

No. 97–8181. PARKER *v.* WARD, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 97–8182. SIMON *v.* COLORADO COMPENSATION INSURANCE AUTHORITY ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 946 P. 2d 1298.

No. 97–8183. SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 97–8184. ROGERS *v.* FINESILVER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 42.

No. 97–8198. WEST *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 140.

No. 97–8203. MORGAN *v.* RABUN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 128 F. 3d 694.

No. 97–8210. TURNER *v.* CHAMPION, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 152.

No. 97–8211. VAUGHN *v.* THOMPSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 121 F. 3d 710.

No. 97–8212. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 287 Ill. App. 3d 1116, 710 N. E. 2d 571.

No. 97–8216. MULLEN *v.* COOPER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 97–8218. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 97–8220. TERRALL *v.* CITY OF RENO, NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8223. BEASLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8225. BODDIE *v.* GIANGER ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–8228. FRESCAS *v.* LORAL VOUGHT SYSTEMS CORP. C. A. 5th Cir. Certiorari denied.

No. 97–8236. DUMAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 288 Ill. App. 3d 1110, 711 N. E. 2d 827.

No. 97–8244. GAERTTNER *v.* LOVE ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–8245. FOREMAN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 287 Ill. App. 3d 1134, 710 N. E. 2d 579.

No. 97–8246. ROTHMAN *v.* UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 426 Mass. 1009, 688 N. E. 2d 995.

No. 97–8248. STEPHEN *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 97–8250. LONGCRIER *v.* LAYTON CITY, UTAH. Ct. App. Utah. Certiorari denied. Reported below: 943 P. 2d 655.

No. 97–8254. WOLDE-GIORGIS *v.* DELECKI ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8255. TUNSTALL *v.* SOMERVILLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1063.

No. 97–8256. SMITH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 80 Ohio St. 3d 89, 684 N. E. 2d 668.

No. 97–8262. GLOVER *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 128 F. 3d 900.

No. 97–8265. CUNNINGHAM *v.* WOODS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 141.

No. 97–8266. AZIZ *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–8268. JEFFRESS *v.* JOHNSTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 120 F. 3d 261.

No. 97–8269. CLARK *v.* ST. PAUL POLICE DEPARTMENT, SUED AS CITY OF ST. PAUL POLICE. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 921.

No. 97–8274. MAHDAVI *v.* ONE HUNDRED STATE, COUNTY, AND CITY OFFICIALS ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–8275. NICHOLAS *v.* MILLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 114 F. 3d 17.

No. 97–8278. TESORO *v.* COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 43.

No. 97–8281. MILLER *v.* HUGL ET AL. C. A. 7th Cir. Certiorari denied.

No. 97–8286. SINGLETON *v.* MATTHEWS ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–8288. BILLEMEYER *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–8289. HARRIS *v.* TAYLOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 121 F. 3d 712.

No. 97–8298. LYNCH *v.* OFFICE OF THE MAYOR OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 131.

No. 97–8299. LABANKOFF ET AL. *v.* UNITED STATES BANKRUPTCY COURT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 716.

No. 97–8302. LAMBRIX ET AL. *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 121 F. 3d 721.

No. 97–8303. JORGENSON *v.* RATELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8306. PORTER *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 130 Idaho 772, 948 P. 2d 127.

No. 97–8307. RIGHTER *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 704 A. 2d 262.

No. 97–8315. SAAVEDRA *v.* THOMAS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 43.

No. 97–8316. KENDRICK *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1061.

No. 97–8317. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 97–8320. PONCE-BRAN *v.* SACRAMENTO NATURAL FOODS COOPERATIVE, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8324. WAINWRIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 704 So. 2d 511.

No. 97–8329. ROBERTS *v.* CHAMPION, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 152.

No. 97–8335. CRASE *v.* HUSKEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 715.

No. 97–8340. JOHNSON *v.* MARTIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 39.

No. 97–8343. ARVIE *v.* MCHUGH ET AL. C. A. 5th Cir. Certiorari denied.

No. 97–8352. RUFF *v.* FEDERAL EXPRESS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1265.

No. 97–8353. MCFARLIN *v.* TRENT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 916.

No. 97–8356. VILLEGAS LOPEZ *v.* ARIZONA. Super. Ct. Ariz., Maricopa County. Certiorari denied.

No. 97–8368. CLARK *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 97–8385. RAULERSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 268 Ga. 623, 491 S. E. 2d 791.

No. 97–8408. THOMPSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 97–8423. TODD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8424. WILKERSON *v.* PRUNTY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8450. MEYERS *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–8451. PRICE *v.* BARRERAS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 43.

No. 97–8455. LEVY *v.* FAIRFAX COUNTY, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 135.

No. 97–8458. CLARK *v.* SYNSTELIEN. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 921.

No. 97–8472. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 132.

No. 97–8475. SALINAS BRITO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 397.

No. 97–8477. PAZ-DELGADO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied.

No. 97–8484. TRAINA *v.* NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 97–8494. WEXLER *v.* CITY OF PHOENIX, ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 719.

No. 97–8501. DUMERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 767.

No. 97–8513. BANKS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 347 N. C. 390, 493 S. E. 2d 58.

No. 97–8519. DIXON *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8521. FRAZIER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8526. WOOD *v.* COOK, DIRECTOR, OREGON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 130 F. 3d 373.

No. 97–8530. LAESSIG *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–8531. JOHNSON *v.* HILL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 113 F. 3d 1241.

No. 97–8544. VIRAY *v.* STEUER. C. A. D. C. Cir. Certiorari denied. Reported below: 159 F. 3d 638.

No. 97–8550. FOSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 704.

No. 97–8560. TOLBERT *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8566. COOMBS *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 704 A. 2d 387.

No. 97–8568. BROWN *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 135 F. 3d 141.

No. 97–8583. ANDERSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 283 Ill. App. 3d 1108, 708 N. E. 2d 849.

No. 97–8584. ANDERSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 281 Ill. App. 3d 1124, 701 N. E. 2d 833.

No. 97–8588. SZLOBODA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 117 F. 3d 1417.

No. 97–8599. LAWRENCE *v.* PARKE, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 129 F. 3d 1267.

No. 97–8601. LOEUN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 17 Cal. 4th 1, 947 P. 2d 1313.

No. 97–8609. GARCIA TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 607.

No. 97–8615. BLODGETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–8621. BENAVENTA GAMEZ *v.* UNITED STATES; and
No. 97–8645. ANTONIO DAVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 611 and 612.

No. 97–8622. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 125 F. 3d 454.

No. 97–8623. DECATOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 137.

No. 97–8628. YOUNG *v.* UNITED STATES; and
No. 97–8651. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 365.

No. 97–8640. BOBTAIL BEAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 141 F. 3d 1170.

No. 97–8643. GLASS, AKA BELLECOURT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 132 F. 3d 440.

No. 97–8650. WULFF *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 133 F. 3d 880.

No. 97–8653. GOODWIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 149.

No. 97–8657. THATSAPHONE *v.* WEBER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 137 F. 3d 1041.

No. 97–8661. SOTO-SILVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 340.

No. 97–8663. PEDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 97–8664. REESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 135 F. 3d 145.

No. 97–8671. BUNN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 917.

No. 97–8679. FLOREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 139 F. 3d 913.

No. 97–8680. HEINSOHN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 34.

No. 97–8682. FIGUEROA-LOPEZ, AKA LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 1241.

No. 97–8684. ROTHWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 430.

No. 97–8687. LIPORACE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 133 F. 3d 541.

No. 97–8697. LEANDRE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 132 F. 3d 796.

No. 97–8699. CUNNINGHAM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 1070.

No. 97–8704. HARMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 136.

No. 97–8705. HALPIN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 97–8714. LUSSIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 128 F. 3d 1312.

No. 97–8716. MCGHEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1261.

No. 97–8719. ESPIRITU VILLEGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 129.

No. 97–8720. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 133 F. 3d 993.

No. 97–8725. BERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 767.

No. 97–8726. CAVANAUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 40.

No. 97–8730. TURNER, AKA BRANHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 135 F. 3d 771.

No. 97–8734. SJOGREN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 860.

No. 97–8737. DYE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 215 Wis. 2d 280, 572 N. W. 2d 524.

No. 97–8739. DUNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 933.

No. 97–8743. JOHNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 373.

No. 97–8748. POWERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 127 F. 3d 1097.

No. 97–8749. SABLAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 142.

No. 97–8751. VANN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 933.

No. 97–8755. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 379.

No. 97–8756. CABRERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 917.

No. 97–8765. PIRINA ARGUETA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 379.

No. 97–8782. CANNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 43.

No. 97–1262. CALDERON, WARDEN *v.* FIELDS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 125 F. 3d 757.

No. 97–1441. BELL, WARDEN *v.* GROSECLOSE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 130 F. 3d 1161.

No. 97–1442. BELL, WARDEN *v.* RICKMAN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 131 F. 3d 1150.

No. 97–1509. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL. *v.* CARRIGER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 132 F. 3d 463.

No. 97–1302. COLORADO COMPENSATION INSURANCE AUTHORITY ET AL. *v.* SIMON ET AL. Sup. Ct. Colo. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 946 P. 2d 1298.

No. 97–1320. DAVIS ET AL. *v.* CITY OF HOLLYWOOD. C. A. 11th Cir. Motion of Donald J. Jaret for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 120 F. 3d 1178.

No. 97–1346. CABRAL *v.* HEALY TIBBITS BUILDERS, INC. C. A. 9th Cir. Motion of Southern California-Nevada Regional Council of Carpenters et al. and Inland Boatmen's Union of the Pacific, Columbia River Region, for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 128 F. 3d 1289.

No. 97–8193. MCDONALD *v.* ILLINOIS. C. A. 7th Cir. Certiorari before judgment denied.

No. 97–9101 (A–865). CARTER *v.* BUSH, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari before judgment denied.

Rehearing Denied

No. 96–9086. STOUFFER *v.* OKLAHOMA, 522 U. S. 831;

No. 97–969. IN RE SAI, *ante*, p. 1019;

No. 97–1171. ODDINO *v.* ODDINO ET AL., *ante*, p. 1021;

No. 97–1200. WHERRY *v.* IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT, *ante*, p. 1021;

No. 97–1222. PHINNEY *v.* FIRST AMERICAN NATIONAL BANK ET AL., *ante*, p. 1046;

No. 97–1260. CLEMENTS *v.* BABCOCK & WILCOX CO. ET AL., *ante*, p. 1023;

No. 97–1282. STETLER *v.* SANDERS ET AL., *ante*, p. 1059;

No. 97–1306. WRIGHT *v.* MASS TRANSIT ADMINISTRATION, *ante*, p. 1006;

No. 97–1339. BUCHBINDER *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 1024;

No. 97–5217. DELGADO *v.* UNITED STATES, 522 U. S. 882;

No. 97–6420. SAVAGE *v.* MICHIGAN, 522 U. S. 1054;

No. 97–6769. WARD *v.* RAVENSWOOD VILLAGE NURSING HOME, 522 U. S. 1080;

No. 97–6797. RUDD *v.* FORREST ET AL., *ante*, p. 1025;

No. 97–7502. PELLEGRINO *v.* SOUTH DAKOTA ET AL., 522 U. S. 1138;

No. 97–7515. TEFFETELLER *v.* GRIMES, CHIEF JUSTICE, SUPREME COURT OF FLORIDA, ET AL., *ante*, p. 1026;

No. 97–7542. IN RE PATZLAFF, *ante*, p. 1019;

No. 97–7543. PATZLAFF *v.* E. STEEVES SMITH, P. C., *ante*, p. 1027;

No. 97–7553. VENTIMIGLIA *v.* WATTER ET AL., *ante*, p. 1027;

No. 97–7613. ENGLISH *v.* PAGE, WARDEN, *ante*, p. 1028;

No. 97–7616. MACKENZIE *v.* OWENS ET AL., *ante*, p. 1029;

No. 97–7699. BALL *v.* UNITED STATES, 522 U. S. 1152;

No. 97–7770. PATTERSON *v.* MERIT SYSTEMS PROTECTION BOARD, *ante*, p. 1030;

No. 97–7775. SPINDLE *v.* TILLERY, *ante*, p. 1012;

No. 97–7776. BERKOWITZ *v.* STATE OF ISRAEL ET AL., *ante*, p. 1062;

No. 97–7909. DONOVAN *v.* STRACK, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY, *ante*, p. 1032; and

No. 97–8243. HAZEL *v.* UNITED STATES, *ante*, p. 1066. Petitions for rehearing denied.

No. 97–471. KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM *v.* BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI ET AL., 522 U. S. 1068. Motion for leave to file petition for rehearing denied.

No. 97–8272 (A–864). CARTER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 1099. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for rehearing denied.

MAY 22, 1998

Dismissal Under Rule 46

No. 97–1296. HALL *v.* FIRST UNION NATIONAL BANK OF FLORIDA ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 123 F. 3d 1374.

MAY 26, 1998

Miscellaneous Orders

No. D–1639. IN RE DISBARMENT OF FARRELL. Motion to renew motion to vacate denied. [For earlier order herein, see, *e. g.*, 519 U. S. 802.]

No. M–73. MOORE *v.* PARKE, SUPERINTENDENT, INDIANA STATE PRISON; and

No. M–75. KING *v.* BRYANT ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. M–74. HAMPTON *v.* MISSOURI. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 97–826. AT&T CORP. ET AL. *v.* IOWA UTILITIES BOARD ET AL.; and AT&T CORP. ET AL. *v.* CALIFORNIA ET AL.;

No. 97–829. MCI TELECOMMUNICATIONS CORP. *v.* IOWA UTILITIES BOARD ET AL.; and MCI TELECOMMUNICATIONS CORP. *v.* CALIFORNIA ET AL.;

No. 97–830. ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES ET AL. *v.* IOWA UTILITIES BOARD ET AL.;

No. 97–831. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* IOWA UTILITIES BOARD ET AL.; and FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* CALIFORNIA ET AL.;

No. 97–1075. AMERITECH CORP. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 97–1087. GTE MIDWEST INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 97–1099. U S WEST, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 97–1141. SOUTHERN NEW ENGLAND TELEPHONE CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A.

8th Cir. [Certiorari granted, *ante,* p. 1089.] Motion of local exchange carriers regarding oral argument granted. Two hours are allotted for oral argument; the first hour is limited to the jurisdictional issue, and the second hour is limited to the nonjurisdictional issues. Divided argument is granted with respect to the jurisdictional issue to be divided as follows: petitioners/cross-respondents, 30 minutes; state respondents/cross-petitioners, 15 minutes; private respondents/cross-petitioners, 15 minutes. Motion of respondent California for divided argument and for additional time for oral argument denied. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 97–8325. IN RE TURNER. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1071] denied.

No. 97–8862. IN RE BOUIE;
No. 97–8886. IN RE ROBINSON; and
No. 97–8931. IN RE BELL. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 97–1472. HADDLE *v.* GARRISON ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 132 F. 3d 46.

Certiorari Denied

No. 97–1322. HOFFMAN ET AL. *v.* HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 126 F. 3d 575.

No. 97–1336. CHARLES *v.* CHARLES. Sup. Ct. Conn. Certiorari denied. Reported below: 243 Conn. 255, 701 A. 2d 650.

No. 97–1340. UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL–CIO, CLC *v.* PERFORMANCE FRICTION CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 117 F. 3d 763.

No. 97–1344. BURGO *v.* GENERAL DYNAMICS CORP.; and
No. 97–1582. GENERAL DYNAMICS CORP. *v.* BURGO. C. A. 2d Cir. Certiorari denied. Reported below: 122 F. 3d 140.

No. 97–1354. BARNES *v.* LEVITT, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 118 F. 3d 404.

No. 97–1371. DUFFY *v.* WOLLE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 123 F. 3d 1026.

No. 97–1453. KUIPER ET AL. *v.* AMERICAN CYANAMID CO. C. A. 7th Cir. Certiorari denied. Reported below: 131 F. 3d 656.

No. 97–1557. PLAIN *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 136.

No. 97–1566. DETERESA *v.* AMERICAN BROADCASTING COS., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 460.

No. 97–1568. CLYNES ET UX., AS PARENTS AND NEXT FRIENDS OF CLYNES *v.* FT. ZUMWALT SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 119 F. 3d 607.

No. 97–1570. COMMISSIONER OF REVENUE OF MASSACHUSETTS *v.* NATIONAL PRIVATE TRUCK COUNCIL, INC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 426 Mass. 324, 688 N. E. 2d 936.

No. 97–1573. ELISABETH H. ET AL. *v.* CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 243 Conn. 903, 701 A. 2d 328.

No. 97–1574. CONTAMINATED SOIL CONSULTANTS, INC. *v.* JOSEPH SMITH & SONS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 121 F. 3d 698.

No. 97–1586. HUFNAGEL *v.* MEDICAL BOARD OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–1587. KRIPPENE, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF KRIPPENE, DECEASED *v.* BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 47.

No. 97–1589. ERNST & YOUNG *v.* COMMISSIONER OF INSURANCE OF MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 225 Mich. App. 547, 572 N. W. 2d 21.

No. 97–1592. COLERAIN HILLS INVESTMENT CO. *v.* BOARD OF REVISION OF HAMILTON COUNTY ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 97–1599. GOLDEN *v.* CITY OF GULFPORT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 121 F. 3d 704.

No. 97–1600. BAYER *v.* STANFORD UNIVERSITY SCHOOL OF MEDICINE/MEDICAL CENTER ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 97–1609. OSEI-AFRIYIE *v.* AMPOFOH. Sup. Ct. Del. Certiorari denied. Reported below: 705 A. 2d 244.

No. 97–1615. PROPST, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CHAMBERS, DECEASED *v.* KINGRY ET AL. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 97–1619. GANGOPADHYAY *v.* GANGOPADHYAY. Cir. Ct. Raleigh County, W. Va. Certiorari denied.

No. 97–1621. HALPERN *v.* BRISTOL BOARD OF EDUCATION. Sup. Ct. Conn. Certiorari denied. Reported below: 243 Conn. 435, 703 A. 2d 1144.

No. 97–1624. MCGRAW *v.* BOOTH. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1453.

No. 97–1640. HINCHLIFFE ET AL. *v.* PRUDENTIAL HOME MORTGAGE CO., INC. Super. Ct. Pa. Certiorari denied.

No. 97–1643. PHILLIPS ET AL. *v.* CITY OF HARVEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 36.

No. 97–1665. KAIMOWITZ *v.* CITY OF ORLANDO. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 41 and 131 F. 3d 950.

No. 97–1696. BERGER ET AL. *v.* CUOMO, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1263.

No. 97–1699. TRAVELLERS INTERNATIONAL AG *v.* TRANS WORLD AIRLINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 134 F. 3d 188.

No. 97–1711. DARNELL *v.* FIRST FEDERAL OF ALABAMA ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 723 So. 2d 116.

No. 97–1712. In re O'Regan. C. A. 7th Cir. Certiorari denied.

No. 97–1715. Bevard *v.* Farmers Insurance Exchange. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1147.

No. 97–1725. Member Services Life Insurance Co., dba Member Service Administrators, as Third Party Administrator of the Liberty Glass Co. ERISA Qualified Employee Benefit Plan *v.* American National Bank & Trust Company of Sapulpa, Guardian, et al. C. A. 10th Cir. Certiorari denied. Reported below: 130 F. 3d 950.

No. 97–1726. Criffield *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 47 M. J. 419.

No. 97–1729. Titus et al. *v.* Guzzey. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 244 App. Div. 2d 684, 664 N. Y. S. 2d 163.

No. 97–1753. Sanchez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 1460.

No. 97–1770. Yen *v.* National Labor Relations Board et al. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 132.

No. 97–7320. Thompson *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 117 F. 3d 1033.

No. 97–7948. Staton *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1064.

No. 97–7997. Smith-Stewart *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1454.

No. 97–8016. Nobles *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 127 F. 3d 409.

No. 97–8026. Ledesma Aguilar *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 97–8341. Williams *v.* Moore, Director, South Carolina Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 920.

No. 97–8345. ROBERTSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 268 Ga. 772, 493 S. E. 2d 697.

No. 97–8355. JACKSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 97–8357. DOLENC *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–8358. DARDEN *v.* ALAMEDA COUNTY NETWORK OF MENTAL HEALTH CLIENTS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1070.

No. 97–8367. GOODEN *v.* FAULKNER COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 129 F. 3d 121.

No. 97–8371. HOZAIFEH *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 97–8373. HERRERA *v.* KEATING, GOVERNOR OF OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 130.

No. 97–8375. GARLICK *v.* GOMEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1105.

No. 97–8380. ROCHE *v.* MONTANA. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 125.

No. 97–8387. CLEWIS *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 97–8398. MAALOUF *v.* BUNKER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 120 F. 3d 268.

No. 97–8402. BERNARD *v.* NEW YORK CITY HEALTH AND HOSPITAL CORP. C. A. 2d Cir. Certiorari denied.

No. 97–8405. RODRIGUEZ DELGADILLO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 97–8409. WILSON *v.* STEWART, SUPERINTENDENT, MCNEIL ISLAND CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 97–8410. BOYCE *v.* WOODS, ATTORNEY GENERAL OF ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 97–8411. BAGLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8420. QUARTERMAN *v.* QUARTERMAN. Sup. Ct. Ga. Certiorari denied. Reported below: 268 Ga. 807, 493 S. E. 2d 146.

No. 97–8426. JACKSON *v.* RAY. Sup. Ct. Ga. Certiorari denied.

No. 97–8428. IDE *v.* LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1105.

No. 97–8429. MORAN *v.* MORAN, AKA BRAUN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 126.

No. 97–8431. MANGRUM *v.* HEILIG-MEYERS FURNITURE CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–8434. DEYOUNG *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 268 Ga. 780, 493 S. E. 2d 157.

No. 97–8452. DAVIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 119 F. 3d 1471.

No. 97–8456. HUGHES *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8457. WALTON *v.* JOSLIN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 924.

No. 97–8463. BURGESS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 329 S. C. 88, 495 S. E. 2d 445.

No. 97–8482. CLERMONT *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 348 Md. 419, 704 A. 2d 880.

No. 97–8485. OSUNLANA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied.

No. 97–8552. ASHIEGBU *v.* SIDDENS. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 431.

No. 97–8554. PARKER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 139 F. 3d 891.

No. 97–8565. ANDERSON *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 97–8576. WEST *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–8577. BROWN *v.* METRO-NORTH COMMUTER RAILROAD. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 113.

No. 97–8579. LATEEF *v.* VIRGINIA PAROLE BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 915.

No. 97–8637. RUIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 114.

No. 97–8647. HILL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 347 N. C. 275, 493 S. E. 2d 264.

No. 97–8652. ALLEN *v.* OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 714.

No. 97–8659. MCQUOWN *v.* SAFEWAY, INC. Sup. Ct. Va. Certiorari denied.

No. 97–8665. ROSADO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–8692. MCQUOWN *v.* SAFEWAY, INC. Sup. Ct. Va. Certiorari denied.

No. 97–8693. PARKER *v.* UNITED STATES; and
No. 97–8766. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 133 F. 3d 322.

No. 97–8711. RAWLES *v.* HERZOG ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 97–8713. MARKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–8722. PINEIRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 140.

No. 97–8723. BERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 133 F. 3d 1020.

No. 97–8728. BAKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 134 F. 3d 383.

No. 97–8732. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 235.

No. 97–8746. LINNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 274.

No. 97–8750. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 135 F. 3d 291.

No. 97–8761. TURNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 255 Va. 1, 492 S. E. 2d 447.

No. 97–8764. BUCKLEY *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 925.

No. 97–8773. RUOTOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 133 F. 3d 907.

No. 97–8777. NORWOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 430.

No. 97–8779. MAYS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 149.

No. 97–8783. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 134 F. 3d 374.

No. 97–8784. CARBARCAS-A *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 917.

No. 97–8786. WRUBEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 438.

No. 97–8788. PERKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 138 F. 3d 421.

No. 97–8789. LEVINE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 37.

No. 97–8791. PLATH *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 130 F. 3d 595.

No. 97–8796. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 379.

No. 97–8797. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 1314.

No. 97–8798. DUNCAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 929.

No. 97–8807. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 133 F. 3d 358.

No. 97–8808. LANGLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 920.

No. 97–8814. JENKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 373.

No. 97–8815. WALLACE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 933.

No. 97–8825. MARIN-CASTANEDA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 134 F. 3d 551.

No. 97–8826. LUGMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 130 F. 3d 113.

No. 97–8827. CLAIBORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 253.

No. 97–8831. FUENTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 149.

No. 97–8832. GUTIERREZ-ALBA, AKA CARDONA-ELIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 128 F. 3d 1324.

No. 97–8833. FAJEMIROKUN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 918.

No. 97–8835. HARPER *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 914.

No. 97–8838. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 130 F. 3d 1432.

No. 97–8844. ALBERTO MUNOZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 153.

No. 97–8849. SHEPHERD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 139.

No. 97–1408. FLORIDA *v.* GONZALEZ. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 700 So. 2d 1217.

No. 97–1569. CALDERON, WARDEN *v.* BLOOM. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 132 F. 3d 1267.

No. 97–1562. WHITNER *v.* SOUTH CAROLINA; and CRAWLEY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of National Association of Alcoholism and Drug Abuse Counselors et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 328 S. C. 1, 492 S. E. 2d 777 (first judgment).

No. 97–1579. ZENITH/KREMER WASTE SYSTEMS, INC., ET AL. *v.* WESTERN LAKE SUPERIOR SANITARY DISTRICT. Sup. Ct. Minn. Motions of Waste Management of Minnesota, Inc., National Solid Wastes Management Association, and BFI Waste Systems of North America, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 572 N. W. 2d 300.

No. 97–1749 (A–717). DEDHIA *v.* UNITED STATES. C. A. 6th Cir. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied. Certiorari denied. Reported below: 134 F. 3d 802.

Rehearing Denied

No. 97–6954. JOHNSON *v.* KALOKATHIS, 522 U. S. 1121;

No. 97–7474. NOVOSAD *v.* NEW MEXICO BOARD OF PHARMACY ET AL., *ante,* p. 1025;

No. 97–7493. HALL *v.* SHELBY COUNTY GOVERNMENT ET AL., 522 U. S. 1026;

No. 97–7512. IN RE ALSTON, *ante,* p. 1019;

No. 97–7611. IN RE FOLLETT, 522 U. S. 1106;

No. 97–7675. THOMPSON *v.* NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL., *ante,* p. 1050;

No. 97–7877. CARGILL *v.* TURPIN, WARDEN, *ante,* p. 1080;

No. 97–7896. ALI-BEY *v.* DEPARTMENT OF JUSTICE ET AL., *ante,* p. 1052;

No. 97–7901. MURRAY *v.* UNIVERSITY OF MARYLAND MEDICAL SYSTEMS, *ante*, p. 1081;

No. 97–7968. COOPER *v.* PRUNTY, WARDEN, ET AL., *ante*, p. 1052;

No. 97–8130. MCQUOWN *v.* SAFEWAY, INC., *ante*, p. 1064;

No. 97–8185. POWELL *v.* DEPARTMENT OF THE AIR FORCE, *ante*, p. 1084; and

No. 97–8500. IN RE FLOWERS, *ante*, p. 1071. Petitions for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 24, 1998, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1148. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, and 517 U. S. 1255.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 24, 1998

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code. The present amendments differ in only one respect from those proposed by the Judicial Conference. The Court has revised the proposed amendment to Rule 35(b)(1)(B), which sets forth the criteria for en banc consideration.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 24, 1998

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1–48 and to Form 4.

[See *infra*, pp. 1151–1220.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1998, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

FEDERAL RULES OF APPELLATE PROCEDURE

Table of Contents

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

TITLE I. APPLICABILITY OF RULES

Rule 1. Scope of rules; title.

(*a*) *Scope of rules.*

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(*b*) *Rules do not affect jurisdiction.*—These rules do not extend or limit the jurisdiction of the courts of appeals.

(*c*) *Title.*—These rules are to be known as the Federal Rules of Appellate Procedure.

Rule 2. Suspension of rules.

On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 3. Appeal as of right—how taken.

(*a*) *Filing the notice of appeal.*

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U. S. C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(*b*) *Joint or consolidated appeals.*

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(*c*) *Contents of the notice of appeal.*

(*1*) *The notice of appeal must:*

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(*d*) *Serving the notice of appeal.*

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(*e*) *Payment of fees.*—Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

Rule 3.1. Appeal from a judgment of a magistrate judge in a civil case. [Abrogated.]

Rule 4. Appeal as of right—when taken.

(*a*) *Appeal in a civil case.*

(*1*) *Time for filing a notice of appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(*2*) *Filing before entry of judgment.*—A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(*3*) *Multiple appeals.*—If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(*4*) *Effect of a motion on a notice of appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(*5*) *Motion for extension of time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the

date when the order granting the motion is entered, whichever is later.

(*6*) *Reopening the time to file an appeal.*—The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(*7*) *Entry defined.*—A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(*b*) *Appeal in a criminal case.*

(*1*) *Time for filing a notice of appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(*2*) *Filing before entry of judgment.*—A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(*3*) *Effect of a motion on a notice of appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(*4*) *Motion for extension of time.*—Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction.*—The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(6) *Entry defined.*—A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) *Appeal by an inmate confined in an institution.*

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U. S. C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) *Mistaken filing in the court of appeals.*—If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the

district clerk. The notice is then considered filed in the district court on the date so noted.

Rule 5. Appeal by permission.

(*a*) *Petition for permission to appeal.*

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(*b*) *Contents of the petition; answer or cross-petition; oral argument.*

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(*c*) *Form of papers; number of copies.*—All papers must conform to Rule 32(a)(1). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(*d*) *Grant of permission; fees; cost bond; filing the record.*

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Rule 5.1. Appeal by leave under 28 U. S. C. § 636(c)(5). [Abrogated.]

Rule 6. Appeal in a bankruptcy case from a final judgment, order, or decree of a district court or bankruptcy appellate panel.

(*a*) *Appeal from a judgment, order, or decree of a district court exercising original jurisdiction in a bankruptcy case.*—An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U. S. C. § 1334 is taken as any other civil appeal under these rules.

(*b*) *Appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case.*

(*1*) *Applicability of other rules.*—These rules apply to an appeal to a court of appeals under 28 U. S. C.

§ 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U. S. C. § 158(a) or (b). But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."

(*2*) *Additional rules.*—In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(*A*) *Motion for rehearing.*

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(*B*) *The record on appeal.*

(i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the

record assembled in accordance with Bankruptcy Rule 8006—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(*C*) *Forwarding the record.*

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the

pendency of the appeal that the redesignated record be sent.

(*D*) *Filing the record.*—Upon receiving the record—or a certified copy of the docket entries sent in place of the redesignated record—the circuit clerk must file it and immediately notify all parties of the filing date.

Rule 7. Bond for costs on appeal in a civil case.

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Rule 8. Stay or injunction pending appeal.

(*a*) *Motion for stay.*

(*1*) *Initial motion in the district court.*—A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(*2*) *Motion in the court of appeals; conditions on relief.*—A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(*b*) *Proceeding against a surety.*—If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(*c*) *Stay in a criminal case.*—Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

Rule 9. Release in a criminal case.

(*a*) *Release before judgment of conviction.*

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(*b*) *Release after judgment of conviction.*—A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(*c*) *Criteria for release.*—The court must make its decision regarding release in accordance with the applicable provisions of 18 U. S. C. §§ 3142, 3143, and 3145(c).

Rule 10. The record on appeal.

(*a*) *Composition of the record on appeal.*—The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(*b*) *The transcript of proceedings.*

(*1*) *Appellant's duty to order.*—Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant

considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(*2*) *Unsupported finding or conclusion.*—If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(*3*) *Partial transcript.*—Unless the entire transcript is ordered:

(A) the appellant must—within the 10 days provided in Rule 10(b)(1)—file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(*4*) *Payment.*—At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(*c*) *Statement of the evidence when the proceedings were not recorded or when a transcript is unavailable.*—If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(*d*) *Agreed statement as the record on appeal.*—In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it—together with any additions that the district court may consider necessary to a full presentation of the issues on appeal—must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(*e*) *Correction or modification of the record.*

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Rule 11. Forwarding the record.

(*a*) *Appellant's duty.*—An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.

(*b*) *Duties of reporter and district clerk.*

(*1*) *Reporter's duty to prepare and file a transcript.*—The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk.

(B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties.

(C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing.

(D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

(*2*) *District clerk's duty to forward.*—When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk,

the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(*c*) *Retaining the record temporarily in the district court for use in preparing the appeal.*—The parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.

(*d*) *[Abrogated.]*

(*e*) *Retaining the record by court order.*

(1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.

(2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals.

(3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.

(*f*) *Retaining parts of the record in the district court by stipulation of the parties.*—The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject

to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(*g*) *Record for a preliminary motion in the court of appeals.*—If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

Rule 12. Docketing the appeal; filing a representation statement; filing the record.

(*a*) *Docketing the appeal.*—Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.

(*b*) *Filing a representation statement.*—Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(*c*) *Filing the record, partial record, or certificate.*—Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

Rule 13. Review of a decision of the Tax Court.

(*a*) *How obtained; time for filing notice of appeal.*

(1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the

Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

(*b*) *Notice of appeal; how filed.*—The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(*c*) *Contents of the notice of appeal; service; effect of filing and service.*—Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(*d*) *The record on appeal; forwarding; filing.*

(1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

(2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

Rule 14. Applicability of other rules to the review of a Tax Court decision.

All provisions of these rules, except Rules 4–9, 15–20, and 22–23, apply to the review of a Tax Court decision.

TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

Rule 15. Review or enforcement of an agency order—how obtained; intervention.

(*a*) *Petition for review; joint petition.*

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition—using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(*b*) *Application or cross-application to enforce an order; answer; default.*

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized

to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within 20 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

(3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(*c*) *Service of the petition or application.*—The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

(*d*) *Intervention.*—Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(*e*) *Payment of fees.*—When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Rule 15.1. Briefs and oral argument in a National Labor Relations Board proceeding.

In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

Rule 16. The record on review or enforcement.

(*a*) *Composition of the record.*—The record on review or enforcement of an agency order consists of:

(1) the order involved;

(2) any findings or report on which it is based; and

(3) the pleadings, evidence, and other parts of the proceedings before the agency.

(*b*) *Omissions from or misstatements in the record.*—The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

Rule 17. Filing the record.

(*a*) *Agency to file; time for filing; notice of filing.*—The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(*b*) *Filing—what constitutes.*

(1) The agency must file:

(A) the original or a certified copy of the entire record or parts designated by the parties; or

(B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.

(2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed.

(3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

Rule 18. Stay pending review.

(*a*) *Motion for a stay.*

(*1*) *Initial motion before the agency.*—A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.

(*2*) *Motion in the court of appeals.*—A motion for a stay may be made to the court of appeals or one of its judges.

(A) The motion must:

(i) show that moving first before the agency would be impracticable; or

(ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(*b*) *Bond.*—The court may condition relief on the filing of a bond or other appropriate security.

Rule 19. Settlement of a judgment enforcing an agency order in part.

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 7 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Rule 20. Applicability of rules to the review or enforcement of an agency order.

All provisions of these rules, except Rules 3–14 and 22–23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent.

TITLE V. EXTRAORDINARY WRITS

Rule 21. Writs of mandamus and prohibition, and other extraordinary writs.

(*a*) *Mandamus or prohibition to a court: petition, filing, service, and docketing.*

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)(A) The petition must be titled "In re [name of petitioner]."

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issue presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

(*b*) *Denial; order directing answer; briefs; precedence.*

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The clerk must serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.

(6) The proceeding must be given preference over ordinary civil cases.

(7) The circuit clerk must send a copy of the final disposition to the trial-court judge.

(*c*) *Other extraordinary writs.*—An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

(*d*) *Form of papers; number of copies.*—All papers must conform to Rule 32(a)(1). An original and 3 copies must be

filed unless the court requires the filing of a different number by local rule or by order in a particular case.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

Rule 22. Habeas corpus and section 2255 proceedings.

(*a*) *Application for the original writ.*—An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U. S. C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(*b*) *Certificate of appealability.*

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U. S. C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U. S. C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Rule 23. Custody or release of a prisoner in a habeas corpus proceeding.

(*a*) *Transfer of custody pending review.*—Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(*b*) *Detention or release pending review of decision not to release.*—While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety.

(*c*) *Release pending review of decision ordering release.*—While a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety.

(*d*) *Modification of the initial order on custody.*—An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

Rule 24. Proceeding in forma pauperis.

(*a*) *Leave to proceed in forma pauperis.*

(*1*) *Motion in the district court.*—Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(*2*) *Action on the motion.*—If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs. If the district court denies the motion, it must state its reasons in writing.

(*3*) *Prior approval.*—A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court must state in writing its reasons for the certification or finding.

(*4*) *Notice of district court's denial.*—The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(*5*) *Motion in the court of appeals.*—A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(*b*) *Leave to proceed in forma pauperis on appeal or review of an administrative-agency proceeding.*—When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(*c*) *Leave to use original record.*—A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

TITLE VII. GENERAL PROVISIONS

Rule 25. Filing and service.

(*a*) *Filing.*

(*1*) *Filing with the clerk.*—A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(*2*) *Filing: method and timeliness.*

(*A*) *In general.*—Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(*B*) *A brief or appendix.*—A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days.

(*C*) *Inmate filing.*—A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U. S. C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(*D*) *Electronic filing.*—A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(*3*) *Filing a motion with a judge.*—If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(*4*) *Clerk's refusal of documents.*—The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(*b*) *Service of all papers required.*—Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(*c*) *Manner of service.*—Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(*d*) *Proof of service.*

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mailing addresses or the addresses of the places of delivery.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(*e*) *Number of copies.*—When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Rule 26. Computing and extending time.

(*a*) *Computing time.*—The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(*b*) *Extending time.*—For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(*c*) *Additional time after service.*—When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

Rule 26.1. Corporate disclosure statement.

(*a*) *Who must file.*—Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

(*b*) *Time for filing.*—A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.

(*c*) *Number of copies.*—If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Rule 27. Motions.

(*a*) *In general.*

(*1*) *Application for relief.*—An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise.

(*2*) *Contents of a motion.*

(*A*) *Grounds and relief sought.*—A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(*B*) *Accompanying documents.*

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(*C*) *Documents barred or not required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(*3*) *Response.*

(*A*) *Time to file.*—Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The re-

sponse must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(*B*) *Request for affirmative relief.*—A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

(*4*) *Reply to response.*—Any reply to a response must be filed within 7 days after service of the response. A reply must not present matters that do not relate to the response.

(*b*) *Disposition of a motion for a procedural order.*—The court may act on a motion for a procedural order—including a motion under Rule 26(b)—at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

(*c*) *Power of a single judge to entertain a motion.*—A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

(*d*) *Form of papers; page limits; and number of copies.*

(*1*) *Format.*

(*A*) *Reproduction.*—A motion, response, or reply may be reproduced by any process that yields a clear black

image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(*B*) *Cover.*—A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed.

(*C*) *Binding.*—The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(*D*) *Paper size, line spacing, and margins.*—The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(*2*) *Page limits.*—A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.

(*3*) *Number of copies.*—An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(*e*) *Oral argument.*—A motion will be decided without oral argument unless the court orders otherwise.

Rule 28. Briefs.

(*a*) *Appellant's brief.*—The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(*b*) *Appellee's brief.*—The appellee's brief must conform to the requirements of Rule 28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;
(2) the statement of the issues;
(3) the statement of the case;
(4) the statement of the facts; and
(5) the statement of the standard of review.

(*c*) *Reply brief.*—The appellant may file a brief in reply to the appellee's brief. An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

(*d*) *References to parties.*—In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(*e*) *References to the record.*—References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(*f*) *Reproduction of statutes, rules, regulations, etc.*—If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(*g*) *[Reserved.]*

(*h*) *Briefs in a case involving a cross-appeal.*—If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.

(*i*) *Briefs in a case involving multiple appellants or appellees.*—In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(*j*) *Citation of supplemental authorities.*—If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

Rule 29. Brief of an amicus curiae.

(*a*) *When permitted.*—The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(*b*) *Motion for leave to file.*—The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(*c*) *Contents and form.*—An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities—cases (alphabetically arranged), statutes and other authorities—with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(5) a certificate of compliance, if required by Rule 32(a)(7).

(*d*) *Length.*—Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the

court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(*e*) *Time for filing.*—An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(*f*) *Reply brief.*—Except by the court's permission, an amicus curiae may not file a reply brief.

(*g*) *Oral argument.*—An amicus curiae may participate in oral argument only with the court's permission.

Rule 30. Appendix to the briefs.

(*a*) *Appellant's responsibility.*

(*1*) *Contents of the appendix.*—The appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(*2*) *Excluded material.*—Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(*3*) *Time to file; number of copies.*—Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately repre-

sented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(*b*) *All parties' responsibilities.*

(*1*) *Determining the contents of the appendix.*—The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 10 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 10 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(*2*) *Costs of appendix.*—Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(*c*) *Deferred appendix.*

(*1*) *Deferral until after briefs are filed.*—The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may

be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(*2*) *References to the record.*

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(*d*) *Format of the appendix.*—The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(*e*) *Reproduction of exhibits.*—Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be

filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(*f*) *Appeal on the original record without an appendix.*—The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Rule 31. Serving and filing briefs.

(*a*) *Time to serve and file a brief.*

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(*b*) *Number of copies.*—Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(*c*) *Consequence of failure to file.*—If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the ap-

peal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

Rule 32. Form of briefs, appendices, and other papers.

(*a*) *Form of a brief.*

(*1*) *Reproduction.*

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(*2*) *Cover.*—Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; and any reply brief, gray. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e. g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(*3*) *Binding.*—The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(*4*) *Paper size, line spacing, and margins.*—The brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long

may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(*5*) *Typeface.*—Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(*6*) *Type styles.*—A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(*7*) *Length.*

(*A*) *Page limitation.*—A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(*B*) *Type-volume limitation.*

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(*C*) *Certificate of compliance.*—A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person pre-

paring the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

(i) the number of words in the brief; or

(ii) the number of lines of monospaced type in the brief.

(*b*) *Form of an appendix.*—An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(*c*) *Form of other papers.*

(*1*) *Motion.*—The form of a motion is governed by Rule 27(d).

(*2*) *Other papers.*—Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and

(B) Rule 32(a)(7) does not apply.

(*d*) *Local variation.*—Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Rule 33. Appeal conferences.

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

Rule 34. Oral argument.

(*a*) *In general.*

(*1*) *Party's statement.*—Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(*2*) *Standards.*—Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(*b*) *Notice of argument; postponement.*—The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(*c*) *Order and contents of argument.*—The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(*d*) *Cross-appeals and separate appeals.*—If there is a cross-appeal, Rule 28(h) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(*e*) *Nonappearance of a party.*—If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(*f*) *Submission on briefs.*—The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(*g*) *Use of physical exhibits at argument; removal.*—Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Rule 35. En banc determination.

(*a*) *When hearing or rehearing en banc may be ordered.*—A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(*b*) *Petition for hearing or rehearing en banc.*—A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(*c*) *Time for petition for hearing or rehearing en banc.*—A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(*d*) *Number of copies.*—The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(*e*) *Response.*—No response may be filed to a petition for an en banc consideration unless the court orders a response.

(*f*) *Call for a vote.*—A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

Rule 36. Entry of judgment; notice.

(*a*) *Entry.*—A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion—but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(*b*) *Notice.*—On the date when judgment is entered, the clerk must mail to all parties a copy of the opinion—or the judgment, if no opinion was written—and a notice of the date when the judgment was entered.

Rule 37. Interest on judgment.

(*a*) *When the court affirms.*—Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

(*b*) *When the court reverses.*—If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

Rule 38. Frivolous appeal—damages and costs.

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Rule 39. Costs.

(*a*) *Against whom assessed.*—The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(*b*) *Costs for and against the United States.*—Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(*c*) *Costs of copies.*—Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(*d*) *Bill of costs: objections; insertion in mandate.*

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(*e*) *Costs on appeal taxable in the district court.*—The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Rule 40. Petition for panel rehearing.

(*a*) *Time to file; contents; answer; action by the court if granted.*

(*1*) *Time.*—Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(*2*) *Contents.*—The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(*3*) *Answer.*—Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(*4*) *Action by the court.*—If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(*b*) *Form of petition; length.*—The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

Rule 41. Mandate: contents; issuance and effective date; stay.

(*a*) *Contents.*—Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(*b*) *When issued.*—The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(*c*) *Effective date.*—The mandate is effective when issued.

(*d*) *Staying the mandate.*

(*1*) *On petition for rehearing or motion.*—The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(*2*) *Pending petition for certiorari.*

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

Rule 42. Voluntary dismissal.

(*a*) *Dismissal in the district court.*—Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(*b*) *Dismissal in the court of appeals.*—The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Rule 43. Substitution of parties.

(*a*) *Death of a party.*

(*1*) *After notice of appeal is filed.*—If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(*2*) *Before notice of appeal is filed—potential appellant.*—If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative—or, if there is no personal representative, the decedent's attorney of record—may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(*3*) *Before notice of appeal is filed—potential appellee.*—If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After

the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(*b*) *Substitution for a reason other than death.*—If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(*c*) *Public officer: identification; substitution.*

(*1*) *Identification of party.*—A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(*2*) *Automatic substitution of officeholder.*—When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

Rule 44. Case involving a constitutional question when the United States is not a party.

If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

Rule 45. Clerk's duties.

(*a*) *General provisions.*

(*1*) *Qualifications.*—The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(*2*) *When court is open.*—The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(*b*) *Records.*

(*1*) *The docket.*—The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(*2*) *Calendar.*—Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(*3*) *Other records.*—The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(*c*) *Notice of an order or judgment.*—Upon the entry of an order or judgment, the circuit clerk must immediately serve by mail a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the mailing on the docket. Service on a party represented by counsel must be made on counsel.

(*d*) *Custody of records and papers.*—The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

Rule 46. Attorneys.

(*a*) *Admission to the bar.*

(*1*) *Eligibility.*—An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(*2*) *Application.*—An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(*3*) *Admission procedures.*—On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(*b*) *Suspension or disbarment.*

(*1*) *Standard.*—A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(*2*) *Procedure.*—The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(*3*) *Order.*—The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(*c*) *Discipline.*—A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Rule 47. Local rules by courts of appeals.

(*a*) *Local rules.*

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U. S. C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy

of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(*b*) *Procedure when there is no controlling law.*—A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Rule 48. Masters.

(*a*) *Appointment; powers.*—A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

(1) regulating all aspects of a hearing;

(2) taking all appropriate action for the efficient performance of the master's duties under the order;

(3) requiring the production of evidence on all matters embraced in the reference; and

(4) administering oaths and examining witnesses and parties.

(*b*) *Compensation.*—If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

APPENDIX OF FORMS

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

United States District Court for the _____ District of _____

A. B., Plaintiff

v. Case No. _____

C. D., Defendant

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U. S. C. § 1746; 18 U. S. C. § 1621.)

Signed: _____

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Date: _____

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semi-annually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months	Amount expected next month
	You	You
Employment	$_____	$_____
Self-employment	$_____	$_____
Income from real property (such as rental income)	$_____	$_____
Interest and dividends	$_____	$_____
Gifts	$_____	$_____
Alimony	$_____	$_____
Child support	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____
Unemployment payments	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly income:	$_____	$_____

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$	$
		$	$
		$	$

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	Other real estate (Value)	Motor vehicle #1 (Value)
		Make & year:
		Model:
		Registration #:

Motor vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year:		
Model:		
Registration #:		

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any pay-

ments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real-estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$_____	$_____
Utilities (electricity, heating fuel, water, sewer, and Telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor-vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in Mortgage payments)	$_____	$_____
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in Mortgage payments) (specify): _____	$_____	$_____
Installment payments	$_____	$_____
Motor Vehicle	$_____	$_____
Credit card (name): _____	$_____	$_____
Department store (name): _____	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☐ No If yes, describe on an attached sheet.

10. Have you paid—or will you be paying—an attorney any money for services in connection with this case, including the completion of this form?

☐ Yes ☐ No

If yes, how much? $_____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☐ No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

13. State the address of your legal residence.

_____

_____

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

Your social-security number: _____

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 24, 1998, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1222. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, and 520 U. S. 1305.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 24, 1998

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 24, 1998

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein a new Civil Rule 23(f).

[See *infra*, p. 1225.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1998, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class actions.

. . . . .

(*f*) *Appeals.*—A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 24, 1998, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1228. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, and 520 U. S. 1313.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 24, 1998

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 24, 1998

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43.

[See *infra*, pp. 1231–1233.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1998, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5.1. Preliminary examination.

. . . . .

(*d*) *Production of statements.*

(*1*) *In general.*—Rule 26.2(a)–(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.

(*2*) *Sanctions for failure to produce statement.*—If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

Rule 26.2. Production of witness statements.

. . . . .

(*g*) *Scope of rule.*—This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified:

(1) in Rule 32(c)(2) at sentencing;

(2) in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release;

(3) in Rule 46(i) at a detention hearing;

(4) in Rule 8 of the Rules Governing Proceedings under 28 U. S. C. § 2255; and

(5) in Rule 5.1 at a preliminary examination.

Rule 31. Verdict.

. . . . .

(*d*) *Poll of jury.*—After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct

the jury to deliberate further or may declare a mistrial and discharge the jury.

. . . . .

Rule 33. New trial.

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may—on defendant's motion for new trial—vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Rule 35. Correction or reduction of sentence.

. . . . .

(*b*) *Reduction of sentence for substantial assistance.*—If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U. S. C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.

. . . . .

Rule 43. Presence of the defendant.

. . . . .

(*c*) *Presence not required.*—A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U. S. C. § 18;

(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law; or

(4) when the proceeding involves a reduction or correction of sentence under Rule 35(b) or (c) or 18 U. S. C. § 3582(c).

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 24, 1998, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1236. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, and 520 U. S. 1323.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 24, 1998

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 24, 1998

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Evidence Rule 615.

[See *infra*, p. 1239.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1998, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 615. Exclusion of witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

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2. *Mootness—Habeas corpus petition.*—Expiration of petitioner's sentence rendered moot his habeas petition challenging validity of his parole revocation because petition no longer presented an Article III case or controversy. Spencer v. Kemna, p. 1.

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