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# 538

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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 2002

MARCH 5 THROUGH MAY 27, 2003

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

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FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATUM

536 U. S. 39, line 19: "respodent's" should be "respondent's".

# 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.

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OFFICERS OF THE COURT

JOHN D. ASHCROFT, Attorney General.
THEODORE B. OLSON, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
PAMELA TALKIN, Marshal.
SHELLEY L. DOWLING, Librarian.*

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*Ms. Dowling retired as Librarian effective May 30, 2003.

# 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.

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

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2002

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## CONNECTICUT DEPARTMENT OF PUBLIC SAFETY ET AL. *v.* DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

No. 01–1231. Argued November 13, 2002—Decided March 5, 2003

Among other things, Connecticut's "Megan's Law" requires persons convicted of sexual offenses to register with the Department of Public Safety (DPS) upon their release into the community, and requires DPS to post a sex offender registry containing registrants' names, addresses, photographs, and descriptions on an Internet Website and to make the registry available to the public in certain state offices. Respondent Doe (hereinafter respondent), a convicted sex offender who is subject to the law, filed a 42 U. S. C. § 1983 action on behalf of himself and similarly situated sex offenders, claiming that the law violates, *inter alia*, the Fourteenth Amendment's Due Process Clause. The District Court granted respondent summary judgment, certified a class of individuals subject to the law, and permanently enjoined the law's public disclosure provisions. The Second Circuit affirmed, concluding that such disclosure both deprived registered sex offenders of a "liberty interest," and violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be "currently dangerous."

*Held:* The Second Circuit's judgment must be reversed because due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme. Mere injury to reputation, even if de-

Syllabus

famatory, does not constitute the deprivation of a liberty interest. *Paul* v. *Davis*, 424 U. S. 693. But even assuming, *arguendo*, that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact—that he is not currently dangerous—that is not material under the statute. Cf., *e. g.*, *Wisconsin* v. *Constantineau*, 400 U. S. 433. As the DPS Website explains, the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. Unless respondent can show that the *substantive* rule of law is defective (by conflicting with the Constitution), any hearing on current dangerousness is a bootless exercise. Respondent expressly disavows any reliance on the substantive component of the Fourteenth Amendment's protections, and maintains that his challenge is strictly a procedural one. But States are not barred by principles of "*procedural* due process" from drawing such classifications. *Michael H.* v. *Gerald D.*, 491 U. S. 110, 120 (plurality opinion). Such claims "must ultimately be analyzed" in terms of substantive due process. *Id.*, at 121. Because the question is not properly before the Court, it expresses no opinion as to whether the State's law violates substantive due process principles. Pp. 6–8.

271 F. 3d 38, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 8. SOUTER, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 9. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 110.

*Richard Blumenthal*, Attorney General of Connecticut, argued the cause for petitioners. With him on the briefs were *Gregory T. D'Auria*, Associate Attorney General, and *Lynn D. Wittenbrink*, *Perry Zinn Rowthorn*, and *Mark F. Kohler*, Assistant Attorneys General.

*Solicitor General Olson* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McCallum*, *Deputy Solicitor General Clement*, *Gregory G. Garre*, *Leonard Schaitman*, and *Mark W. Pennak*.

*Shelley R. Sadin* argued the cause for respondents. With her on the brief were *Drew S. Days III*, *Beth S. Brinkmann*, *Seth M. Galanter*, *Philip Tegeler*, and *Steven R. Shapiro*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to determine whether the United States Court of Appeals for the Second Circuit properly en-

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*Briefs of *amici curiae* urging reversal were filed for the District of Columbia et al. by *Robert R. Rigsby*, Corporation Counsel of the District of Columbia, *Charles L. Reischel*, Deputy Corporation Counsel, and *Edward E. Schwab*, Senior Assistant Corporation Counsel, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *Carla J. Stovall* of Kansas, *Albert B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Robert Torres* of the Northern Mariana Islands, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Anabelle Rodríguez* of Puerto Rico, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *James E. Doyle* of Wisconsin; for the National Governors Association et al. by *Richard Ruda* and *James I. Crowley;* for the Center for the Community Interest by *Robert J. Del Tufo;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the Association for the Treatment of Sexual Abusers by *David A. Reiser;* for the Office of the Public Defender for the State of New Jersey by *Peter A. Garcia*, *Michael Z. Buncher*, and *Brian J. Neff;* and for the Public Defender Service for the District of Columbia et al. by *James W. Klein*, *Samia A. Fam*, and *Corinne A. Beckwith*.

*Lucy A. Dalglish* and *Gregg P. Leslie* filed a brief for the Reporters Committee for Freedom of the Press as *amicus curiae*.

joined the public disclosure of Connecticut's sex offender registry. The Court of Appeals concluded that such disclosure both deprived registered sex offenders of a "liberty interest," and violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be "currently dangerous." *Doe* v. *Department of Public Safety ex rel. Lee*, 271 F. 3d 38, 44, 46 (2001) (internal quotation marks omitted). Connecticut, however, has decided that the registry requirement shall be based on the fact of previous conviction, not the fact of current dangerousness. Indeed, the public registry explicitly states that officials have not determined that any registrant is currently dangerous. We therefore reverse the judgment of the Court of Appeals because due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme.

"Sex offenders are a serious threat in this Nation." *McKune* v. *Lile*, 536 U. S. 24, 32 (2002) (plurality opinion). "[T]he victims of sex assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.*, at 32–33. Connecticut, like every other State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders. Connecticut's "Megan's Law" applies to all persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose. Covered offenders must register with the Connecticut Department of Public Safety (DPS) upon their release into the community. Each must provide personal information (including his name, address, photograph, and DNA sample); notify DPS of any change in residence; and periodically submit an updated photograph. The registration requirement runs for 10 years in most cases; those con-

victed of sexually violent offenses must register for life. Conn. Gen. Stat. §§ 54–251, 54–252, 54–254 (2001).

The statute requires DPS to compile the information gathered from registrants and publicize it. In particular, the law requires DPS to post a sex offender registry on an Internet Website and to make the registry available to the public in certain state offices. §§ 54–257, 54–258. Whether made available in an office or via the Internet, the registry must be accompanied by the following warning: "'Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.'" § 54–258a.

Before the District Court enjoined its operation, the State's Website enabled citizens to obtain the name, address, photograph, and description of any registered sex offender by entering a zip code or town name. The following disclaimer appeared on the first page of the Website:

> "'The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. [DPS] has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.'" 271 F. 3d, at 44.

Petitioners include the state agencies and officials charged with compiling the sex offender registry and posting it on the Internet. Respondent Doe (hereinafter respondent) is a convicted sex offender who is subject to Connecticut's Meg-

an's Law. He filed this action pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983, on behalf of himself and similarly situated sex offenders, claiming that the law violates, *inter alia*, the Due Process Clause of the Fourteenth Amendment. Specifically, respondent alleged that he is not a "'dangerous sexual offender,'" and that the Connecticut law "deprives him of a liberty interest—his reputation combined with the alteration of his status under state law—without notice or a meaningful opportunity to be heard." 271 F. 3d, at 45–46. The District Court granted summary judgment for respondent on his due process claim. 132 F. Supp. 2d 57 (Conn. 2001). The court then certified a class of individuals subject to the Connecticut law, and permanently enjoined the law's public disclosure provisions.

The Court of Appeals affirmed, 271 F. 3d 38 (CA2 2001), holding that the Due Process Clause entitles class members to a hearing "to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." *Id.*, at 62. Because Connecticut had not provided such a hearing, the Court of Appeals enjoined petitioners from "'disclosing or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning [class members]'" and from "'identifying [them] as being included in the Registry.'" *Ibid.* The Court of Appeals reasoned that the Connecticut law implicated a "liberty interest" because of: (1) the law's stigmatization of respondent by "implying" that he is "currently dangerous," and (2) its imposition of "extensive and onerous" registration obligations on respondent. *Id.*, at 57. From this liberty interest arose an obligation, in the Court of Appeals' view, to give respondent an opportunity to demonstrate that he was not "likely to be currently dangerous." *Id.*, at 62. We granted certiorari, 535 U. S. 1077 (2002).

In *Paul* v. *Davis*, 424 U. S. 693 (1976), we held that mere injury to reputation, even if defamatory, does not constitute

the deprivation of a liberty interest. Petitioners urge us to reverse the Court of Appeals on the ground that, under *Paul* v. *Davis*, respondent has failed to establish that petitioners have deprived him of a liberty interest. We find it unnecessary to reach this question, however, because even assuming, *arguendo*, that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute.

In cases such as *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), and *Goss* v. *Lopez*, 419 U. S. 565 (1975), we held that due process required the government to accord the plaintiff a hearing to prove or disprove a particular fact or set of facts. But in each of these cases, the fact in question was concededly relevant to the inquiry at hand. Here, however, the fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut's Megan's Law. As the DPS Website explains, the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. 271 F. 3d, at 44 ("'Individuals included within the registry are included *solely* by virtue of their conviction record and state law'" (emphasis added)). No other fact is relevant to the disclosure of registrants' information. Conn. Gen. Stat. §§ 54–257, 54–258 (2001). Indeed, the disclaimer on the Website explicitly states that respondent's alleged nondangerousness simply does not matter. 271 F. 3d, at 44 ("'[DPS] has made no determination that any individual included in the registry is currently dangerous'").

In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed. Unless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any

hearing on current dangerousness is a bootless exercise. It may be that respondent's claim is actually a substantive challenge to Connecticut's statute "recast in 'procedural due process' terms." *Reno* v. *Flores*, 507 U. S. 292, 308 (1993). Nonetheless, respondent expressly disavows any reliance on the substantive component of the Fourteenth Amendment's protections, Brief for Respondents 44–45, and maintains, as he did below, that his challenge is strictly a procedural one. But States are not barred by principles of "*procedural* due process" from drawing such classifications. *Michael H.* v. *Gerald D.*, 491 U. S. 110, 120 (1989) (plurality opinion) (emphasis in original). See also *id.*, at 132 (STEVENS, J., concurring in judgment). Such claims "must ultimately be analyzed" in terms of substantive, not procedural, due process. *Id.*, at 121. Because the question is not properly before us, we express no opinion as to whether Connecticut's Megan's Law violates principles of substantive due process.

Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme. Respondent cannot make that showing here. The judgment of the Court of Appeals is therefore

*Reversed.*

JUSTICE SCALIA, concurring.

I join the Court's opinion, and add that even if the requirements of Connecticut's sex offender registration law implicate a liberty interest of respondents, the categorical abrogation of that liberty interest by a validly enacted statute suffices to provide all the process that is "due"—just as a state law providing that no one under the age of 16 may operate a motor vehicle suffices to abrogate that liberty interest. Absent a claim (which respondents have not made here) that the liberty interest in question is so fundamental as to implicate so-called "substantive" due process, a properly enacted law can eliminate it. That is ultimately why,

as the Court's opinion demonstrates, a convicted sex offender has no more right to additional "process" enabling him to establish that he is not dangerous than (in the analogous case just suggested) a 15-year-old has a right to "process" enabling him to establish that he is a safe driver.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring.

I join the Court's opinion and agree with the observation that today's holding does not foreclose a claim that Connecticut's dissemination of registry information is actionable on a substantive due process principle. To the extent that libel might be at least a component of such a claim, our reference to Connecticut's disclaimer, *ante,* at 5, would not stand in the way of a substantive due process plaintiff. I write separately only to note that a substantive due process claim may not be the only one still open to a test by those in the respondents' situation.

Connecticut allows certain sex offenders the possibility of avoiding the registration and reporting obligations of the statute. A court may exempt a convict from registration altogether if his offense was unconsented sexual contact, Conn. Gen. Stat. § 54–251(c) (2001), or sexual intercourse with a minor aged between 13 and 16 while the offender was more than two years older than the minor, provided the offender was under age 19 at the time of the offense, § 54–251(b). A court also has discretion to limit dissemination of an offender's registration information to law enforcement purposes if necessary to protect the identity of a victim who is related to the offender or, in the case of a sexual assault, who is the offender's spouse or cohabitor. §§ 54–255(a), (b).*

*To mitigate the retroactive effects of the statute, offenders in these categories who were convicted between October 1, 1988, and June 30, 1999, were allowed to petition a court for restricted dissemination of registry information. §§ 54–255(c)(1)–(4). A similar petition was also available to any offender who became subject to registration by virtue of a conviction

Whether the decision is to exempt an offender from registration or to restrict publication of registry information, it must rest on a finding that registration or public dissemination is not required for public safety. §§ 54–251(b), 54–255(a), (b). The State thus recognizes that some offenders within the sweep of the publication requirement are not dangerous to others in any way justifying special publicity on the Internet, and the legislative decision to make courts responsible for granting exemptions belies the State's argument that courts are unequipped to separate offenders who warrant special publication from those who do not.

The line drawn by the legislature between offenders who are sensibly considered eligible to seek discretionary relief from the courts and those who are not is, like all legislative choices affecting individual rights, open to challenge under the Equal Protection Clause. See, *e. g.*, 3 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 17.6 (3d ed. 1999); L. Tribe, American Constitutional Law § 16–34 (2d ed. 1988). The refusal to allow even the possibility of relief to, say, a 19-year-old who has consensual intercourse with a minor aged 16 is therefore a reviewable legislative determination. Today's case is no occasion to speak either to the possible merits of such a challenge or the standard of scrutiny that might be in order when considering it. I merely note that the Court's rejection of respondents' procedural due process claim does not immunize publication schemes like Connecticut's from an equal protection challenge.

[For opinion of JUSTICE STEVENS concurring in the judgment, see *post*, p. 110.]

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prior to October 1, 1998, if he was not incarcerated for the offense, had not been subsequently convicted of a registrable offense, and had properly registered under the law. § 54–255(c)(5).

Syllabus

# EWING *v.* CALIFORNIA

## CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 01–6978. Argued November 5, 2002—Decided March 5, 2003

Under California's three strikes law, a defendant who is convicted of a felony and has previously been convicted of two or more serious or violent felonies must receive an indeterminate life imprisonment term. Such a defendant becomes eligible for parole on a date calculated by reference to a minimum term, which, in this case, is 25 years. While on parole, petitioner Ewing was convicted of felony grand theft for stealing three golf clubs, worth $399 apiece. As required by the three strikes law, the prosecutor formally alleged, and the trial court found, that Ewing had been convicted previously of four serious or violent felonies. In sentencing him to 25 years to life, the court refused to exercise its discretion to reduce the conviction to a misdemeanor—under a state law that permits certain offenses, known as "wobblers," to be classified as either misdemeanors or felonies—or to dismiss the allegations of some or all of his prior relevant convictions. The State Court of Appeal affirmed. Relying on *Rummel* v. *Estelle*, 445 U. S. 263, it rejected Ewing's claim that his sentence was grossly disproportionate under the Eighth Amendment and reasoned that enhanced sentences under the three strikes law served the State's legitimate goal of deterring and incapacitating repeat offenders. The State Supreme Court denied review.

*Held:* The judgment is affirmed.

Affirmed.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that Ewing's sentence is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments. Pp. 20–31.

(a) The Eighth Amendment has a "narrow proportionality principle" that "applies to noncapital sentences." *Harmelin* v. *Michigan*, 501 U. S. 957, 996–997 (KENNEDY, J., concurring in part and concurring in judgment). The Amendment's application in this context is guided by the principles distilled in JUSTICE KENNEDY's concurrence in *Harmelin:* "[T]he primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors" inform the final principle that the "Eighth Amendment does not require strict propor-

tionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.*, at 1001. Pp. 20–24.

(b) State legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional punishment approaches, must be isolated from society to protect the public safety. Though these laws are relatively new, this Court has a longstanding tradition of deferring to state legislatures in making and implementing such important policy decisions. The Constitution "does not mandate adoption of any one penological theory," 501 U. S., at 999, and nothing in the Eighth Amendment prohibits California from choosing to incapacitate criminals who have already been convicted of at least one serious or violent crime. Recidivism has long been recognized as a legitimate basis for increased punishment and is a serious public safety concern in California and the Nation. Any criticism of the law is appropriately directed at the legislature, which is primarily responsible for making the policy choices underlying any criminal sentencing scheme. Pp. 24–28.

(c) In examining Ewing's claim that his sentence is grossly disproportionate, the gravity of the offense must be compared to the harshness of the penalty. Even standing alone, his grand theft should not be taken lightly. The California Supreme Court has noted that crime's seriousness in the context of proportionality review; that it is a "wobbler" is of no moment, for it remains a felony unless the trial court imposes a misdemeanor sentence. The trial judge justifiably exercised her discretion not to extend lenient treatment given Ewing's long criminal history. In weighing the offense's gravity, both his current felony and his long history of felony recidivism must be placed on the scales. Any other approach would not accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. He has been convicted of numerous offenses, served nine separate prison terms, and committed most of his crimes while on probation or parole. His prior strikes were serious felonies including robbery and residential burglary. Though long, his current sentence reflects a rational legislative judgment that is entitled to deference. Pp. 28–31.

JUSTICE SCALIA agreed that petitioner's sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishments, but on the ground that that prohibition was aimed at excluding only certain *modes* of punishment. This case demonstrates why

Syllabus

a proportionality principle cannot be intelligently applied, and why *Solem* v. *Helm*, 463 U. S. 277, should not be given *stare decisis* effect. Pp. 31–32.

JUSTICE THOMAS concluded that petitioner's sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishments because the Amendment contains no proportionality principle. P. 32.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined. SCALIA, J., *post*, p. 31, and THOMAS, J., *post*, p. 32, filed opinions concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 32. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 35.

*Quin Denvir*, by appointment of the Court, 535 U. S. 1076, argued the cause for petitioner. With him on the briefs were *David M. Porter*, *Karyn H. Bucur*, and *Mark E. Haddad*.

*Donald E. De Nicola*, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Pamela C. Hamanaka*, Senior Assistant Attorney General, and *Jaime L. Fuster*, *Kristofer S. Jorstad*, and *David C. Cook*, Deputy Attorneys General.

*Assistant Attorney General Chertoff* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson*, *Deputy Solicitor General Dreeben*, *John P. Elwood*, and *Joel M. Gershowitz*.*

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**Donald M. Falk*, *Andrew H. Schapiro*, and *Mary Price* filed a brief for Families Against Mandatory Minimums as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *William H. Pryor, Jr.*, Attorney General of Alabama, *Nathan A. Forrester*, Solicitor General, and *Michael B. Billingsley*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Carter* of Indiana, *Don Stenberg* of Nebraska,

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

In this case, we decide whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State's "Three Strikes and You're Out" law.

## I

### A

California's three strikes law reflects a shift in the State's sentencing policies toward incapacitating and deterring repeat offenders who threaten the public safety. The law was designed "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." Cal. Penal Code Ann. § 667(b) (West 1999). On March 3, 1993, California Assemblymen Bill Jones and Jim Costa introduced Assembly Bill 971, the legislative version of what would later become the three strikes law. The Assembly Committee on Public Safety defeated the bill only weeks later. Public outrage over the defeat sparked a voter initiative to add Proposition 184, based loosely on the bill, to the ballot in the November 1994 general election.

On October 1, 1993, while Proposition 184 was circulating, 12-year-old Polly Klaas was kidnaped from her home in Petaluma, California. Her admitted killer, Richard Allen Davis, had a long criminal history that included two prior kidnaping convictions. Davis had served only half of his

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*W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *Christine O. Gregoire* of Washington, and *Hoke MacMillan* of Wyoming; and for the Criminal Justice Legal Foundation et al. by *Kent S. Scheidegger* and *Charles L. Hobson.*

*Dennis L. Stout* and *Grover D. Merritt* filed a brief for the California District Attorneys Association as *amicus curiae.*

most recent sentence (16 years for kidnaping, assault, and burglary). Had Davis served his entire sentence, he would still have been in prison on the day that Polly Klaas was kidnaped.

Polly Klaas' murder galvanized support for the three strikes initiative. Within days, Proposition 184 was on its way to becoming the fastest qualifying initiative in California history. On January 3, 1994, the sponsors of Assembly Bill 971 resubmitted an amended version of the bill that conformed to Proposition 184. On January 31, 1994, Assembly Bill 971 passed the Assembly by a 63 to 9 margin. The Senate passed it by a 29 to 7 margin on March 3, 1994. Governor Pete Wilson signed the bill into law on March 7, 1994. California voters approved Proposition 184 by a margin of 72 to 28 percent on November 8, 1994.

California thus became the second State to enact a three strikes law. In November 1993, the voters of Washington State approved their own three strikes law, Initiative 593, by a margin of 3 to 1. U. S. Dept. of Justice, National Institute of Justice, J. Clark, J. Austin, & D. Henry, "Three Strikes and You're Out": A Review of State Legislation 1 (Sept. 1997) (hereinafter Review of State Legislation). Between 1993 and 1995, 24 States and the Federal Government enacted three strikes laws. *Ibid.* Though the three strikes laws vary from State to State, they share a common goal of protecting the public safety by providing lengthy prison terms for habitual felons.

B

California's current three strikes law consists of two virtually identical statutory schemes "designed to increase the prison terms of repeat felons." *People* v. *Superior Court of San Diego Cty. ex rel. Romero*, 13 Cal. 4th 497, 504, 917 P. 2d 628, 630 (1996) *(Romero)*. When a defendant is convicted of a felony, and he has previously been convicted of one or more prior felonies defined as "serious" or "violent" in Cal. Penal Code Ann. §§ 667.5 and 1192.7 (West Supp. 2002), sentencing

is conducted pursuant to the three strikes law. Prior convictions must be alleged in the charging document, and the defendant has a right to a jury determination that the prosecution has proved the prior convictions beyond a reasonable doubt. § 1025; § 1158 (West 1985).

If the defendant has one prior "serious" or "violent" felony conviction, he must be sentenced to "twice the term otherwise provided as punishment for the current felony conviction." § 667(e)(1) (West 1999); § 1170.12(c)(1) (West Supp. 2002). If the defendant has two or more prior "serious" or "violent" felony convictions, he must receive "an indeterminate term of life imprisonment." § 667(e)(2)(A) (West 1999); § 1170.12(c)(2)(A) (West Supp. 2002). Defendants sentenced to life under the three strikes law become eligible for parole on a date calculated by reference to a "minimum term," which is the greater of (a) three times the term otherwise provided for the current conviction, (b) 25 years, or (c) the term determined by the court pursuant to § 1170 for the underlying conviction, including any enhancements. §§ 667(e)(2)(A)(i)–(iii) (West 1999); §§ 1170.12(c)(2)(A)(i)–(iii) (West Supp. 2002).

Under California law, certain offenses may be classified as either felonies or misdemeanors. These crimes are known as "wobblers." Some crimes that would otherwise be misdemeanors become "wobblers" because of the defendant's prior record. For example, petty theft, a misdemeanor, becomes a "wobbler" when the defendant has previously served a prison term for committing specified theft-related crimes. § 490 (West 1999); § 666 (West Supp. 2002). Other crimes, such as grand theft, are "wobblers" regardless of the defendant's prior record. See § 489(b) (West 1999). Both types of "wobblers" are triggering offenses under the three strikes law only when they are treated as felonies. Under California law, a "wobbler" is presumptively a felony and "remains a felony except when the discretion is actually exercised" to make the crime a misdemeanor. *People* v. *Wil-*

*liams*, 27 Cal. 2d 220, 229, 163 P. 2d 692, 696 (1945) (emphasis deleted and internal quotation marks omitted).

In California, prosecutors may exercise their discretion to charge a "wobbler" as either a felony or a misdemeanor. Likewise, California trial courts have discretion to reduce a "wobbler" charged as a felony to a misdemeanor either before preliminary examination or at sentencing to avoid imposing a three strikes sentence. Cal. Penal Code Ann. §§ 17(b)(5), 17(b)(1) (West 1999); *People* v. *Superior Court of Los Angeles Cty. ex rel. Alvarez*, 14 Cal. 4th 968, 978, 928 P. 2d 1171, 1177–1178 (1997). In exercising this discretion, the court may consider "those factors that direct similar sentencing decisions," such as "the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, . . . [and] the general objectives of sentencing." *Ibid.* (internal quotation marks and citations omitted).

California trial courts can also vacate allegations of prior "serious" or "violent" felony convictions, either on motion by the prosecution or *sua sponte*. *Romero*, *supra*, at 529–530, 917 P. 2d, at 647–648. In ruling whether to vacate allegations of prior felony convictions, courts consider whether, "in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes'] scheme's spirit, in whole or in part." *People* v. *Williams*, 17 Cal. 4th 148, 161, 948 P. 2d 429, 437 (1998). Thus, trial courts may avoid imposing a three strikes sentence in two ways: first, by reducing "wobblers" to misdemeanors (which do not qualify as triggering offenses), and second, by vacating allegations of prior "serious" or "violent" felony convictions.

C

On parole from a 9-year prison term, petitioner Gary Ewing walked into the pro shop of the El Segundo Golf

Course in Los Angeles County on March 12, 2000. He walked out with three golf clubs, priced at $399 apiece, concealed in his pants leg. A shop employee, whose suspicions were aroused when he observed Ewing limp out of the pro shop, telephoned the police. The police apprehended Ewing in the parking lot.

Ewing is no stranger to the criminal justice system. In 1984, at the age of 22, he pleaded guilty to theft. The court sentenced him to six months in jail (suspended), three years' probation, and a $300 fine. In 1988, he was convicted of felony grand theft auto and sentenced to one year in jail and three years' probation. After Ewing completed probation, however, the sentencing court reduced the crime to a misdemeanor, permitted Ewing to withdraw his guilty plea, and dismissed the case. In 1990, he was convicted of petty theft with a prior and sentenced to 60 days in the county jail and three years' probation. In 1992, Ewing was convicted of battery and sentenced to 30 days in the county jail and two years' summary probation. One month later, he was convicted of theft and sentenced to 10 days in the county jail and 12 months' probation. In January 1993, Ewing was convicted of burglary and sentenced to 60 days in the county jail and one year's summary probation. In February 1993, he was convicted of possessing drug paraphernalia and sentenced to six months in the county jail and three years' probation. In July 1993, he was convicted of appropriating lost property and sentenced to 10 days in the county jail and two years' summary probation. In September 1993, he was convicted of unlawfully possessing a firearm and trespassing and sentenced to 30 days in the county jail and one year's probation.

In October and November 1993, Ewing committed three burglaries and one robbery at a Long Beach, California, apartment complex over a 5-week period. He awakened one of his victims, asleep on her living room sofa, as he tried to disconnect her video cassette recorder from the television in

that room. When she screamed, Ewing ran out the front door. On another occasion, Ewing accosted a victim in the mailroom of the apartment complex. Ewing claimed to have a gun and ordered the victim to hand over his wallet. When the victim resisted, Ewing produced a knife and forced the victim back to the apartment itself. While Ewing rifled through the bedroom, the victim fled the apartment screaming for help. Ewing absconded with the victim's money and credit cards.

On December 9, 1993, Ewing was arrested on the premises of the apartment complex for trespassing and lying to a police officer. The knife used in the robbery and a glass cocaine pipe were later found in the back seat of the patrol car used to transport Ewing to the police station. A jury convicted Ewing of first-degree robbery and three counts of residential burglary. Sentenced to nine years and eight months in prison, Ewing was paroled in 1999.

Only 10 months later, Ewing stole the golf clubs at issue in this case. He was charged with, and ultimately convicted of, one count of felony grand theft of personal property in excess of $400. See Cal. Penal Code Ann. § 484 (West Supp. 2002); § 489 (West 1999). As required by the three strikes law, the prosecutor formally alleged, and the trial court later found, that Ewing had been convicted previously of four serious or violent felonies for the three burglaries and the robbery in the Long Beach apartment complex. See § 667(g) (West 1999); § 1170.12(e) (West Supp. 2002).

At the sentencing hearing, Ewing asked the court to reduce the conviction for grand theft, a "wobbler" under California law, to a misdemeanor so as to avoid a three strikes sentence. See §§ 17(b), 667(d)(1) (West 1999); § 1170.12(b)(1) (West Supp. 2002). Ewing also asked the trial court to exercise its discretion to dismiss the allegations of some or all of his prior serious or violent felony convictions, again for purposes of avoiding a three strikes sentence. See *Romero*, 13 Cal. 4th, at 529–531, 917 P. 2d, at 647–648. Before sen-

tencing Ewing, the trial court took note of his entire criminal history, including the fact that he was on parole when he committed his latest offense. The court also heard arguments from defense counsel and a plea from Ewing himself.

In the end, the trial judge determined that the grand theft should remain a felony. The court also ruled that the four prior strikes for the three burglaries and the robbery in Long Beach should stand. As a newly convicted felon with two or more "serious" or "violent" felony convictions in his past, Ewing was sentenced under the three strikes law to 25 years to life.

The California Court of Appeal affirmed in an unpublished opinion. No. B143745 (Apr. 25, 2001). Relying on our decision in *Rummel* v. *Estelle*, 445 U. S. 263 (1980), the court rejected Ewing's claim that his sentence was grossly disproportionate under the Eighth Amendment. Enhanced sentences under recidivist statutes like the three strikes law, the court reasoned, serve the "legitimate goal" of deterring and incapacitating repeat offenders. The Supreme Court of California denied Ewing's petition for review, and we granted certiorari, 535 U. S. 969 (2002). We now affirm.

## II

### A

The Eighth Amendment, which forbids cruel and unusual punishments, contains a "narrow proportionality principle" that "applies to noncapital sentences." *Harmelin* v. *Michigan*, 501 U. S. 957, 996–997 (1991) (KENNEDY, J., concurring in part and concurring in judgment); cf. *Weems* v. *United States*, 217 U. S. 349, 371 (1910); *Robinson* v. *California*, 370 U. S. 660, 667 (1962) (applying the Eighth Amendment to the States via the Fourteenth Amendment). We have most recently addressed the proportionality principle as applied to terms of years in a series of cases beginning with *Rummel* v. *Estelle*, *supra*.

In *Rummel*, we held that it did not violate the Eighth Amendment for a State to sentence a three-time offender to life in prison with the possibility of parole. *Id.*, at 284–285. Like Ewing, Rummel was sentenced to a lengthy prison term under a recidivism statute. Rummel's two prior offenses were a 1964 felony for "fraudulent use of a credit card to obtain $80 worth of goods or services," and a 1969 felony conviction for "passing a forged check in the amount of $28.36." *Id.*, at 265. His triggering offense was a conviction for felony theft—"obtaining $120.75 by false pretenses." *Id.*, at 266.

This Court ruled that "[h]aving twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." *Id.*, at 284. The recidivism statute "is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole." *Id.*, at 278. We noted that this Court "has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Id.*, at 271. But "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.*, at 272. Although we stated that the proportionality principle "would . . . come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment," *id.*, at 274, n. 11, we held that "the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments," *id.*, at 285.

In *Hutto* v. *Davis*, 454 U. S. 370 (1982) *(per curiam)*, the defendant was sentenced to two consecutive terms of 20 years in prison for possession with intent to distribute nine

ounces of marijuana and distribution of marijuana. We held that such a sentence was constitutional: "In short, *Rummel* stands for the proposition that federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." *Id.*, at 374 (citations and internal quotation marks omitted).

Three years after *Rummel*, in *Solem* v. *Helm*, 463 U. S. 277, 279 (1983), we held that the Eighth Amendment prohibited "a life sentence without possibility of parole for a seventh nonviolent felony." The triggering offense in *Solem* was "uttering a 'no account' check for $100." *Id.*, at 281. We specifically stated that the Eighth Amendment's ban on cruel and unusual punishments "prohibits . . . sentences that are disproportionate to the crime committed," and that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Id.*, at 284, 286. The *Solem* Court then explained that three factors may be relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.*, at 292.

Applying these factors in *Solem*, we struck down the defendant's sentence of life without parole. We specifically noted the contrast between that sentence and the sentence in *Rummel*, pursuant to which the defendant was eligible for parole. 463 U. S., at 297; see also *id.*, at 300 ("[T]he South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*"). Indeed, we explicitly declined to overrule *Rummel:* "[O]ur conclusion today is not inconsistent with *Rummel* v. *Estelle*." 463 U. S., at 303, n. 32; see also *id.*, at 288, n. 13 ("[O]ur decision

is entirely consistent with this Court's prior cases—including *Rummel* v. *Estelle*").

Eight years after *Solem*, we grappled with the proportionality issue again in *Harmelin*. *Harmelin* was not a recidivism case, but rather involved a first-time offender convicted of possessing 672 grams of cocaine. He was sentenced to life in prison without possibility of parole. A majority of the Court rejected Harmelin's claim that his sentence was so grossly disproportionate that it violated the Eighth Amendment. The Court, however, could not agree on why his proportionality argument failed. Justice Scalia, joined by The Chief Justice, wrote that the proportionality principle was "an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law." 501 U. S. at 994. He would thus have declined to apply gross disproportionality principles except in reviewing capital sentences. *Ibid.*

Justice Kennedy, joined by two other Members of the Court, concurred in part and concurred in the judgment. Justice Kennedy specifically recognized that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences." *Id.*, at 997. He then identified four principles of proportionality review—"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors"—that "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.*, at 1001 (citing *Solem*, *supra*, at 288). Justice Kennedy's concurrence also stated that *Solem* "did not mandate" comparative analysis "within and between jurisdictions." 501 U. S., at 1004–1005.

The proportionality principles in our cases distilled in Justice Kennedy's concurrence guide our application of the

Eighth Amendment in the new context that we are called upon to consider.

B

For many years, most States have had laws providing for enhanced sentencing of repeat offenders. See, *e. g.*, U. S. Dept. of Justice, Bureau of Justice Assistance, National Assessment of Structured Sentencing (1996). Yet between 1993 and 1995, three strikes laws effected a sea change in criminal sentencing throughout the Nation.[1] These laws responded to widespread public concerns about crime by targeting the class of offenders who pose the greatest threat to public safety: career criminals. As one of the chief architects of California's three strikes law has explained: "Three Strikes was intended to go beyond simply making sentences tougher. It was intended to be a focused effort to create a sentencing policy that would use the judicial system to reduce serious and violent crime." Ardaiz, California's Three Strikes Law: History, Expectations, Consequences, 32 McGeorge L. Rev. 1, 12 (2000) (hereinafter Ardaiz).

Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety. Though three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding. *Weems*, 217 U. S., at 379; *Gore* v. *United States*, 357 U. S. 386, 393

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[1] It is hardly surprising that the statistics relied upon by JUSTICE BREYER show that prior to the enactment of the three strikes law, "*no* one like Ewing could have served more than *10* years in prison." *Post*, at 43 (dissenting opinion) (emphasis added). Profound disappointment with the perceived lenity of criminal sentencing (especially for repeat felons) led to passage of three strikes laws in the first place. See, *e. g.*, Review of State Legislation 1.

(1958); *Payne* v. *Tennessee*, 501 U. S. 808, 824 (1991); *Rummel*, 445 U. S., at 274; *Solem*, 463 U. S., at 290; *Harmelin*, 501 U. S., at 998 (Kennedy, J., concurring in part and concurring in judgment).

Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution "does not mandate adoption of any one penological theory." *Id.*, at 999 (Kennedy, J., concurring in part and concurring in judgment). A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, pp. 30–36 (1986) (explaining theories of punishment). Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.

When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice. To the contrary, our cases establish that "States have a valid interest in deterring and segregating habitual criminals." *Parke* v. *Raley*, 506 U. S. 20, 27 (1992); *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962) ("[T]he constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge"). Recidivism has long been recognized as a legitimate basis for increased punishment. See *Almendarez-Torres* v. *United States*, 523 U. S. 224, 230 (1998) (recidivism "is as typical a sentencing factor as one might imagine"); *Witte* v. *United States*, 515 U. S. 389, 400 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense . . . [is] 'a stiffened penalty for the latest crime, which is considered to be an aggravated

offense because a repetitive one'" (quoting *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948))).

California's justification is no pretext. Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one "serious" new crime within three years of their release. See U. S. Dept. of Justice, Bureau of Justice Statistics, P. Langan & D. Levin, Special Report: Recidivism of Prisoners Released in 1994, p. 1 (June 2002). In particular, released property offenders like Ewing had higher recidivism rates than those released after committing violent, drug, or public-order offenses. *Id.*, at 8. Approximately 73 percent of the property offenders released in 1994 were arrested again within three years, compared to approximately 61 percent of the violent offenders, 62 percent of the public-order offenders, and 66 percent of the drug offenders. *Ibid.*

In 1996, when the Sacramento Bee studied 233 three strikes offenders in California, it found that they had an aggregate of 1,165 prior felony convictions, an average of 5 apiece. See Furillo, Three Strikes—The Verdict: Most Offenders Have Long Criminal Histories, Sacramento Bee, Mar. 31, 1996, p. A1. The prior convictions included 322 robberies and 262 burglaries. *Ibid.* About 84 percent of the 233 three strikes offenders had been convicted of at least one violent crime. *Ibid.* In all, they were responsible for 17 homicides, 7 attempted slayings, and 91 sexual assaults and child molestations. *Ibid.* The Sacramento Bee concluded, based on its investigation, that "[i]n the vast majority of the cases, regardless of the third strike, the [three strikes] law is snaring [the] long-term habitual offenders with multiple felony convictions . . . ." *Ibid.*

The State's interest in deterring crime also lends some support to the three strikes law. We have long viewed both incapacitation and deterrence as rationales for recidivism

statutes: "[A] recidivist statute['s] . . . primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *Rummel*, *supra*, at 284. Four years after the passage of California's three strikes law, the recidivism rate of parolees returned to prison for the commission of a new crime dropped by nearly 25 percent. California Dept. of Justice, Office of the Attorney General, "Three Strikes and You're Out"—Its Impact on the California Criminal Justice System After Four Years, p. 10 (1998). Even more dramatically:

> "An unintended but positive consequence of 'Three Strikes' has been the impact on parolees leaving the state. More California parolees are now leaving the state than parolees from other jurisdictions entering California. This striking turnaround started in 1994. It was the first time more parolees left the state than entered since 1976. This trend has continued and in 1997 more than 1,000 net parolees left California." *Ibid.*

See also Janiskee & Erler, Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law, 39 Duquesne L. Rev. 43, 45–46 (2000) ("Prosecutors in Los Angeles routinely report that 'felons tell them they are moving out of the state because they fear getting a second or third strike for a nonviolent offense' " (quoting Sanchez, A Movement Builds Against "Three Strikes" Law, Washington Post, Feb. 18, 2000, p. A3)).

To be sure, California's three strikes law has sparked controversy. Critics have doubted the law's wisdom, cost-efficiency, and effectiveness in reaching its goals. See, *e. g.*, Zimring, Hawkins, & Kamin, Punishment and Democracy: Three Strikes and You're Out in California (2001); Vitiello, Three Strikes: Can We Return to Rationality? 87 J. Crim.

L. & C. 395, 423 (1997). This criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme. We do not sit as a "superlegislature" to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons "advance[s] the goals of [its] criminal justice system in any substantial way." See *Solem*, 463 U. S., at 297, n. 22.

## III

Against this backdrop, we consider Ewing's claim that his three strikes sentence of 25 years to life is unconstitutionally disproportionate to his offense of "shoplifting three golf clubs." Brief for Petitioner 6. We first address the gravity of the offense compared to the harshness of the penalty. At the threshold, we note that Ewing incorrectly frames the issue. The gravity of his offense was not merely "shoplifting three golf clubs." Rather, Ewing was convicted of felony grand theft for stealing nearly $1,200 worth of merchandise after previously having been convicted of at least two "violent" or "serious" felonies. Even standing alone, Ewing's theft should not be taken lightly. His crime was certainly not "one of the most passive felonies a person could commit." *Solem*, *supra*, at 296 (internal quotation marks omitted). To the contrary, the Supreme Court of California has noted the "seriousness" of grand theft in the context of proportionality review. See *In re Lynch*, 8 Cal. 3d 410, 432, n. 20, 503 P. 2d 921, 936, n. 20 (1972). Theft of $1,200 in property is a felony under federal law, 18 U. S. C. § 641, and in the vast majority of States. See App. B to Brief for Petitioner 21a.

That grand theft is a "wobbler" under California law is of no moment. Though California courts have discretion to reduce a felony grand theft charge to a misdemeanor, it remains a felony for all purposes "unless and until the trial

court imposes a misdemeanor sentence." *In re Anderson*, 69 Cal. 2d 613, 626, 447 P. 2d 117, 126 (1968) (Tobriner, J., concurring); see generally 1 B. Witkin & N. Epstein, California Criminal Law § 73 (3d ed. 2000). "The purpose of the trial judge's sentencing discretion" to downgrade certain felonies is to "impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon." *Anderson*, *supra*, at 664–665, 447 P. 2d, at 152 (Tobriner, J., concurring). Under California law, the reduction is not based on the notion that a "wobbler" is "conceptually a misdemeanor." *Necochea* v. *Superior Court*, 23 Cal. App. 3d 1012, 1016, 100 Cal. Rptr. 693, 695 (1972). Rather, it is "intended to extend misdemeanant treatment to a potential felon." *Ibid.* In Ewing's case, however, the trial judge justifiably exercised her discretion not to extend such lenient treatment given Ewing's long criminal history.

In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U. S., at 276; *Solem*, *supra*, at 296. To give full effect to the State's choice of this legitimate penological goal, our proportionality review of Ewing's sentence must take that goal into account.

Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and

amply supported by his own long, serious criminal record.[2] Ewing has been convicted of numerous misdemeanor and felony offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior "strikes" were serious felonies including robbery and three residential burglaries. To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California "was entitled to place upon [Ewing] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." *Rummel*, *supra*, at 284. Ewing's is not "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U. S., at 1005 (KENNEDY, J., concurring in part and concurring in judgment).

We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on

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[2] JUSTICE BREYER argues that including Ewing's grand theft as a triggering offense cannot be justified on *"property-crime-related incapacitation grounds"* because such crimes do not count as prior strikes. *Post*, at 51. But the State's interest in dealing with repeat felons like Ewing is not so limited. As we have explained, the overarching objective of the three strikes law is to prevent serious or violent offenders like Ewing from repeating their criminal behavior. See Cal. Penal Code Ann. § 667(b) (West 1999) ("It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses"). The California Legislature therefore made a "deliberate policy decision . . . that the gravity of the new felony should not be a determinative factor in 'triggering' the application of the Three Strikes Law." Ardaiz 9. Neither the Eighth Amendment nor this Court's precedent forecloses that legislative choice.

cruel and unusual punishments. The judgment of the California Court of Appeal is affirmed.

*It is so ordered.*

JUSTICE SCALIA, concurring in the judgment.

In my opinion in *Harmelin* v. *Michigan*, 501 U. S. 957, 985 (1991), I concluded that the Eighth Amendment's prohibition of "cruel and unusual punishments" was aimed at excluding only certain *modes* of punishment, and was not a "guarantee against disproportionate sentences." Out of respect for the principle of *stare decisis*, I might nonetheless accept the contrary holding of *Solem* v. *Helm*, 463 U. S. 277 (1983)—that the Eighth Amendment contains a narrow proportionality principle—if I felt I could intelligently apply it. This case demonstrates why I cannot.

Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution. "[I]t becomes difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight," *Harmelin*, *supra*, at 989—not to mention giving weight to the purpose of California's three strikes law: incapacitation. In the present case, the game is up once the plurality has acknowledged that "the Constitution does not mandate adoption of any one penological theory," and that a "sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation." *Ante*, at 25 (internal quotation marks omitted). That acknowledgment having been made, it no longer suffices merely to assess "the gravity of the offense compared to the harshness of the penalty," *ante*, at 28; that classic description of the proportionality principle (alone and in itself quite resistant to policy-free, legal analysis) now becomes merely the "first" step of the inquiry, *ibid.* Having completed that step (by a discussion which, in all fairness, does not convincingly establish that 25-years-to-life is a "proportionate" punishment for stealing three golf clubs), the

plurality must then *add* an analysis to show that "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons." *Ante*, at 29.

Which indeed it is—though why that has anything to do with the principle of proportionality is a mystery. Perhaps the plurality should revise its terminology, so that what it reads into the Eighth Amendment is not the unstated proposition that all punishment should be reasonably proportionate to the gravity of the offense, but rather the unstated proposition that all punishment should reasonably pursue the multiple purposes of the criminal law. That formulation would make it clearer than ever, of course, that the plurality is not applying law but evaluating policy.

Because I agree that petitioner's sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishments, I concur in the judgment.

JUSTICE THOMAS, concurring in the judgment.

I agree with JUSTICE SCALIA's view that the proportionality test announced in *Solem* v. *Helm*, 463 U. S. 277 (1983), is incapable of judicial application. Even were *Solem*'s test perfectly clear, however, I would not feel compelled by *stare decisis* to apply it. In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle. See *Harmelin* v. *Michigan*, 501 U. S. 957, 966–985 (1991) (opinion of SCALIA, J.).

Because the plurality concludes that petitioner's sentence does not violate the Eighth Amendment's prohibition on cruel and unusual punishments, I concur in the judgment.

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

JUSTICE BREYER has cogently explained why the sentence imposed in this case is both cruel and unusual.[1] The concur-

[1] For "present purposes," *post*, at 36, 53 (dissenting opinion), JUSTICE BREYER applies the framework established by *Harmelin* v. *Michigan*, 501 U. S. 957, 1004–1005 (1991), in analyzing Ewing's Eighth Amendment

rences prompt this separate writing to emphasize that proportionality review is not only capable of judicial application but also required by the Eighth Amendment.

"The Eighth Amendment succinctly prohibits 'excessive' sanctions." *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002); see also U. S. Const., Amdt. 8 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). Faithful to the Amendment's text, this Court has held that the Constitution directs judges to apply their best judgment in determining the proportionality of fines, see, *e. g.*, *United States* v. *Bajakajian*, 524 U. S. 321, 334–336 (1998), bail, see, *e. g.*, *Stack* v. *Boyle*, 342 U. S. 1, 5 (1951), and other forms of punishment, including the imposition of a death sentence, see, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977). It "would be anomalous indeed" to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment. *Solem* v. *Helm*, 463 U. S. 277, 289 (1983). Rather, by broadly prohibiting excessive sanctions, the Eighth Amendment directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment.

The absence of a black-letter rule does not disable judges from exercising their discretion in construing the outer limits on sentencing authority that the Eighth Amendment imposes. After all, judges are "constantly called upon to draw . . . lines in a variety of contexts," *id.*, at 294, and to exercise their judgment to give meaning to the Constitution's broadly phrased protections. For example, the Due Process Clause directs judges to employ proportionality re-

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claim. I agree with JUSTICE BREYER that Ewing's sentence is grossly disproportionate even under *Harmelin*'s narrow proportionality framework. However, it is not clear that this case is controlled by *Harmelin*, which considered the proportionality of a life sentence imposed on a drug offender who had *no* prior felony convictions. Rather, the three-factor analysis established in *Solem* v. *Helm*, 463 U. S. 277, 290–291 (1983), which specifically addressed recidivist sentencing, seems more directly on point.

view in assessing the constitutionality of punitive damages awards on a case-by-case basis. See, *e. g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 562 (1996). Also, although the Sixth Amendment guarantees criminal defendants the right to a speedy trial, the courts often are asked to determine on a case-by-case basis whether a particular delay is constitutionally permissible or not. See, *e. g.*, *Doggett* v. *United States*, 505 U. S. 647 (1992).[2]

Throughout most of the Nation's history—before guideline sentencing became so prevalent—federal and state trial judges imposed specific sentences pursuant to grants of authority that gave them uncabined discretion within broad ranges. See K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) (hereinafter Stith & Cabranes) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion"); see also *Mistretta* v. *United States*, 488 U. S. 361, 364 (1989). It was not unheard of for a statute to authorize a sentence ranging from one year to life, for example. See, *e. g.*, *State* v. *Perley*, 86 Me. 427, 30 A. 74, 75 (1894) (citing Maine statute that made robbery punishable by imprisonment for life or any term of years); *In re Southard*, 298 Mich. 75, 77, 298 N. W. 457 (1941) ("The offense of 'robbery armed' is punishable by imprisonment for life or any term

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[2] Numerous other examples could be given of situations in which courts—faced with imprecise commands—must make difficult decisions. See, *e. g.*, *Kyles* v. *Whitley*, 514 U. S. 419 (1995) (reviewing whether undisclosed evidence was material); *Arizona* v. *Fulminante*, 499 U. S. 279 (1991) (considering whether confession was coerced and, if so, whether admission of the coerced confession was harmless error); *Strickland* v. *Washington*, 466 U. S. 668 (1984) (addressing whether defense counsel's performance was deficient and whether any deficiency was prejudicial); *Darden* v. *Wainwright*, 477 U. S. 168 (1986) (assessing whether prosecutorial misconduct deprived defendant of a fair trial); *Christensen* v. *Harris County*, 529 U. S. 576, 589 (2000) (SCALIA, J., concurring in part and concurring in judgment) (addressing whether an agency's construction of a statute was " 'reasonable' ").

of years"). In exercising their discretion, sentencing judges wisely employed a proportionality principle that took into account all of the justifications for punishment—namely, deterrence, incapacitation, retribution, and rehabilitation. See Stith & Cabranes 14. Likewise, I think it clear that the Eighth Amendment's prohibition of "cruel and unusual punishments" expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions. It is this broad proportionality principle that would preclude reliance on any of the justifications for punishment to support, for example, a life sentence for overtime parking. See *Rummel* v. *Estelle*, 445 U. S. 263, 274, n. 11 (1980).

Accordingly, I respectfully dissent.

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

The constitutional question is whether the "three strikes" sentence imposed by California upon repeat-offender Gary Ewing is "grossly disproportionate" to his crime. *Ante*, at 14, 30–31 (plurality opinion). The sentence amounts to a real prison term of at least 25 years. The sentence-triggering criminal conduct consists of the theft of three golf clubs priced at a total of $1,197. See *ante*, at 18. The offender has a criminal history that includes four felony convictions arising out of three separate burglaries (one armed). *Ante*, at 18–19. In *Solem* v. *Helm*, 463 U. S. 277 (1983), the Court found grossly disproportionate a somewhat longer sentence imposed on a recidivist offender for triggering criminal conduct that was somewhat less severe. In my view, the differences are not determinative, and the Court should reach the same ultimate conclusion here.

## I

This Court's precedent sets forth a framework for analyzing Ewing's Eighth Amendment claim. The Eighth Amendment forbids, as "cruel and unusual punishments," prison

terms (including terms of years) that are "grossly disproportionate." *Solem*, *supra*, at 303; see *Lockyer* v. *Andrade*, *post*, at 71. In applying the "gross disproportionality" principle, courts must keep in mind that "legislative policy" will primarily determine the appropriateness of a punishment's "severity," and hence defer to such legislative policy judgments. *Gore* v. *United States*, 357 U. S. 386, 393 (1958); see *Harmelin* v. *Michigan*, 501 U. S. 957, 998 (1991) (KENNEDY, J., concurring in part and concurring in judgment); *Solem*, *supra*, at 289–290; *Rummel* v. *Estelle*, 445 U. S. 263, 274–276 (1980); *Weems* v. *United States*, 217 U. S. 349, 373 (1910). If courts properly respect those judgments, they will find that the sentence fails the test only in *rare* instances. *Solem*, *supra*, at 290, n. 16; *Harmelin*, *supra*, at 1004 (KENNEDY, J., concurring in part and concurring in judgment); *Rummel*, *supra*, at 272 ("[S]uccessful challenges to the proportionality of particular sentences have been exceedingly rare"). And they will only "'rarely'" find it necessary to "'engage in extended analysis'" before rejecting a claim that a sentence is "grossly disproportionate." *Harmelin*, *supra*, at 1004 (KENNEDY, J., concurring in part and concurring in judgment) (quoting *Solem*, *supra*, at 290, n. 16).

The plurality applies JUSTICE KENNEDY's analytical framework in *Harmelin*, *supra*, at 1004–1005 (opinion concurring in part and concurring in judgment). *Ante*, at 23–24. And, for present purposes, I will consider Ewing's Eighth Amendment claim on those terms. But see *ante*, at 32–33, n. 1 (STEVENS, J., dissenting). To implement this approach, courts faced with a "gross disproportionality" claim must first make "a threshold comparison of the crime committed and the sentence imposed." *Harmelin*, *supra*, at 1005 (KENNEDY, J., concurring in part and concurring in judgment). If a claim crosses that threshold—itself a *rare* occurrence—then the court should compare the sentence at issue to other sentences "imposed on other criminals" in the same, or in other, jurisdictions. *Solem*, *supra*, at 290–291;

*Harmelin*, 501 U. S., at 1005 (KENNEDY, J., concurring in part and concurring in judgment). The comparative analysis will "validate" or invalidate "an initial judgment that a sentence is grossly disproportionate to a crime." *Ibid.*

I recognize the warnings implicit in the Court's frequent repetition of words such as "rare." Nonetheless I believe that the case before us is a "rare" case—one in which a court can say with reasonable confidence that the punishment is "grossly disproportionate" to the crime.

## II

Ewing's claim crosses the gross disproportionality "threshold." First, precedent makes clear that Ewing's sentence raises a serious disproportionality question. Ewing is a recidivist. Hence the two cases most directly in point are those in which the Court considered the constitutionality of recidivist sentencing: *Rummel* and *Solem*. Ewing's claim falls between these two cases. It is stronger than the claim presented in *Rummel*, where the Court upheld a recidivist's sentence as constitutional. It is weaker than the claim presented in *Solem*, where the Court struck down a recidivist sentence as unconstitutional.

Three kinds of sentence-related characteristics define the relevant comparative spectrum: (a) the length of the prison term in real time, *i. e.*, the time that the offender is likely actually to spend in prison; (b) the sentence-triggering criminal conduct, *i. e.*, the offender's actual behavior or other offense-related circumstances; and (c) the offender's criminal history. See *Rummel*, *supra*, at 265–266, 269, 276, 278, 280–281 (using these factors); *Solem*, *supra*, at 290–303 (same). Cf. United States Sentencing Commission, Guidelines Manual ch. 1, pt. A, intro., n. 5 (Nov. 1987) (USSG) (empirical study of "summary reports of some 40,000 convictions [and] a sample of 10,000 augmented presentence reports" leads to sentences based primarily upon (a) offense characteristics and (b) offender's criminal record); see *id.*, p. s. 3.

In *Rummel*, the Court held constitutional (a) a sentence of life imprisonment *with parole available within 10 to 12 years*, (b) for the offense of obtaining $120 by false pretenses, (c) committed by an offender with two prior felony convictions (involving small amounts of money). 445 U. S. 263; *ante*, at 21. In *Solem*, the Court held unconstitutional (a) a sentence of life imprisonment *without parole*, (b) for the crime of writing a $100 check on a nonexistent bank account, (c) committed by an offender with six prior felony convictions (including three for burglary). 463 U. S. 277; *ante*, at 22–23. Which of the three pertinent comparative factors made the constitutional difference?

The third factor, prior record, cannot explain the difference. The offender's prior record was *worse* in *Solem*, where the Court found the sentence too long, than in *Rummel*, where the Court upheld the sentence. The second factor, offense conduct, cannot explain the difference. The nature of the triggering offense—viewed in terms of the actual monetary loss—in the two cases was about the same. The one critical factor that explains the difference in the outcome is the length of the likely prison term measured in real time. In *Rummel*, where the Court upheld the sentence, the state sentencing statute authorized parole for the offender, Rummel, after 10 or 12 years. 445 U. S., at 280; *id.*, at 293 (Powell, J., dissenting). In *Solem*, where the Court struck down the sentence, the sentence required the offender, Helm, to spend the rest of his life in prison.

Now consider the present case. The third factor, *offender characteristics—i. e.*, prior record—does not differ significantly here from that in *Solem*. Ewing's prior record consists of four prior felony convictions (involving three burglaries, one with a knife) contrasted with Helm's six prior felony convictions (including three burglaries, though none with weapons). The second factor, *offense behavior*, is worse than that in *Solem*, but only to a degree. It would be difficult to say that the actual behavior itself here (shop-

lifting) differs significantly from that at issue in *Solem* (passing a bad check) or in *Rummel* (obtaining money through false pretenses). Rather the difference lies in the *value* of the goods obtained. That difference, measured in terms of the most relevant feature (loss to the victim, *i. e.*, wholesale value) and adjusted for the irrelevant feature of inflation, comes down (in 1979 values) to about $379 here compared with $100 in *Solem*, or (in 1973 values) to $232 here compared with $120.75 in *Rummel*. See USSG §2B1.1, comment., n. 2(A)(i) (Nov. 2002) (loss to victim properly measures value of goods unlawfully taken); U. S. Dept. of Labor, Bureau of Labor Statistics, Inflation and Consumer Spending, Inflation Calculator (Jan. 23, 2003), http://www.bls.gov (hereinafter Inflation Calculator). Alternatively, if one measures the inflation-adjusted value difference in terms of the golf clubs' sticker price, it comes down to $505 here compared to $100 in *Solem*, or $309 here compared to $120.75 in *Rummel*. See Inflation Calculator.

The difference in *length* of the real prison term—the first, and critical, factor in *Solem* and *Rummel*—is considerably more important. Ewing's sentence here amounts, in real terms, to at least 25 years without parole or good-time credits. That sentence is considerably shorter than Helm's sentence in *Solem*, which amounted, in real terms, to life in prison. Nonetheless Ewing's real prison term is more than twice as long as the term at issue in *Rummel*, which amounted, in real terms, to at least 10 or 12 years. And, Ewing's sentence, unlike Rummel's (but like Helm's sentence in *Solem*), is long enough to consume the productive remainder of almost any offender's life. (It means that Ewing himself, seriously ill when sentenced at age 38, will likely die in prison.)

The upshot is that the length of the real prison term—the factor that explains the *Solem*/*Rummel* difference in outcome—places Ewing closer to *Solem* than to *Rummel*, though the greater value of the golf clubs that Ewing stole

moves Ewing's case back slightly in *Rummel*'s direction. Overall, the comparison places Ewing's sentence well within the twilight zone between *Solem* and *Rummel*—a zone where the argument for unconstitutionality is substantial, where the cases themselves cannot determine the constitutional outcome.

Second, Ewing's sentence on its face imposes one of the most severe punishments available upon a recidivist who subsequently engaged in one of the less serious forms of criminal conduct. See *infra*, at 44–45. I do not deny the seriousness of shoplifting, which an *amicus curiae* tells us costs retailers in the range of $30 billion annually. Brief for California District Attorneys Association as *Amicus Curiae* 27. But consider that conduct in terms of the factors that this Court mentioned in *Solem*—the "harm caused or threatened to the victim or society," the "absolute magnitude of the crime," and the offender's "culpability." 463 U. S., at 292–293. In respect to all three criteria, the sentence-triggering behavior here ranks well toward the bottom of the criminal conduct scale.

The Solicitor General has urged us to consider three other criteria: the "frequency" of the crime's commission, the "ease or difficulty of detection," and "the degree to which the crime may be deterred by differing amounts of punishment." Brief for United States as *Amicus Curiae* 24–25. When considered in terms of these criteria—or at least the latter two—the triggering conduct also ranks toward the bottom of the scale. Unlike, say, drug crimes, shoplifting often takes place in stores open to other customers whose presence, along with that of store employees or cameras, can help to detect the crime. Nor is there evidence presented here that the law enforcement community believes lengthy prison terms necessary adequately to deter shoplifting. To the contrary, well-publicized instances of shoplifting suggest that the offense is often punished without any prison sentence at all. On the other hand, shoplifting is a frequently com-

mitted crime; but "frequency," standing alone, cannot make a critical difference. Otherwise traffic offenses would warrant even more serious punishment.

This case, of course, involves shoplifting engaged in by a *recidivist.* One might argue that *any* crime committed by a recidivist is a serious crime potentially warranting a 25-year sentence. But this Court rejected that view in *Solem*, and in *Harmelin*, with the recognition that "no penalty is *per se* constitutional." *Solem*, *supra*, at 290; *Harmelin*, 501 U. S., at 1001 (KENNEDY, J., concurring in part and concurring in judgment). Our cases make clear that, in cases involving recidivist offenders, we must focus upon "the [offense] that triggers the life sentence," with recidivism playing a "relevant," but not necessarily determinative, role. *Solem*, *supra*, at 296, n. 21; see *Witte* v. *United States*, 515 U. S. 389, 402, 403 (1995) (the recidivist defendant is "punished only for the offense of conviction," which "'is considered to be an aggravated offense because a repetitive one'" (quoting *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948))). And here, as I have said, that offense is among the less serious, while the punishment is among the most serious. Cf. *Rummel*, 445 U. S., at 288 (Powell, J., dissenting) (overtime parking violation cannot trigger a life sentence even for a serious recidivist).

Third, some objective evidence suggests that many experienced judges would consider Ewing's sentence disproportionately harsh. The United States Sentencing Commission (having based the federal Sentencing Guidelines primarily upon its review of how judges had actually sentenced offenders) does not include shoplifting (or similar theft-related offenses) among the crimes that might trigger especially long sentences for recidivists, see USSG §4B1.1 (Nov. 2002) (Guideline for sentencing "career offenders"); *id.*, ch. 1, pt. A, intro., n. 5 (sentences based in part upon Commission's review of "summary reports of some 40,000 convictions [and] a sample of 10,000 augmented presentence reports"); see also

*infra*, at 45, nor did Congress include such offenses among triggering crimes when it sought sentences "at or near the statutory maximum" for certain recidivists, S. Rep. No. 98–225, p. 175 (1983); 28 U. S. C. § 994(h) (requiring sentence "at or near the maximum" where triggering crime is crime of "violence" or drug related); 18 U. S. C. § 3559(c) (grand theft not among triggering or "strike" offenses under federal "three strikes" law); see *infra*, at 45–46. But see 28 U. S. C. § 994(i)(1) (requiring "a substantial term of imprisonment" for those who have "a history of two or more prior . . . felony convictions").

Taken together, these three circumstances make clear that Ewing's "gross disproportionality" argument is a strong one. That being so, his claim *must* pass the "threshold" test. If it did not, what would be the function of the test? A threshold test must permit *arguably* unconstitutional sentences, not only *actually* unconstitutional sentences, to pass the threshold—at least where the arguments for unconstitutionality are unusually strong ones. A threshold test that blocked every ultimately invalid constitutional claim—even strong ones—would not be a *threshold* test but a *determinative* test. And, it would be a *determinative* test that failed to take account of highly pertinent sentencing information, namely, comparison with other sentences, *Solem*, *supra*, at 291–292, 298–300. Sentencing comparisons are particularly important because they provide proportionality review with *objective* content. By way of contrast, a threshold test makes the assessment of constitutionality highly subjective. And, of course, so to transform that *threshold* test would violate this Court's earlier precedent. See 463 U. S., at 290, 291–292; *Harmelin*, *supra*, at 1000, 1005 (KENNEDY, J., concurring in part and concurring in judgment).

## III

Believing Ewing's argument a strong one, sufficient to pass the threshold, I turn to the comparative analysis. A

comparison of Ewing's sentence with other sentences requires answers to two questions. First, how would other jurisdictions (or California at other times, *i. e.*, without the three strikes penalty) punish the *same offense conduct?* Second, upon what other conduct would other jurisdictions (or California) impose the *same prison term?* Moreover, since hypothetical punishment is beside the point, the relevant prison time, for comparative purposes, is *real* prison time, *i. e.*, the time that an offender must *actually serve.*

Sentencing statutes often shed little light upon real prison time. That is because sentencing laws normally set *maximum* sentences, giving the sentencing judge discretion to choose an actual sentence within a broad range, and because many States provide good-time credits and parole, often permitting release after, say, one-third of the sentence has been served, see, *e. g.*, Alaska Stat. § 33.20.010(a) (2000); Conn. Gen. Stat. § 18–7a (1998). Thus, the statutory maximum is rarely the sentence imposed, and the sentence imposed is rarely the sentence that is served. For the most part, the parties' briefs discuss sentencing statutes. Nonetheless, that discussion, along with other readily available information, validates my initial belief that Ewing's sentence, comparatively speaking, is extreme.

As to California itself, we know the following: First, between the end of World War II and 1994 (when California enacted the three strikes law, *ante*, at 15), no one like Ewing could have served more than *10* years in prison. We know that for certain because the maximum sentence for Ewing's crime of conviction, grand theft, was for most of that period 10 years. Cal. Penal Code Ann. §§ 484, 489 (West 1970); see Cal. Dept. of Corrections, Offender Information Services, Administrative Services Division, Historical Data for Time Served by Male Felons Paroled from Institutions: 1945 Through 1981, p. 11 (1982) (Table 10) (hereinafter Historical Data for Time Served by California Felons), Lodging of Petitioner. From 1976 to 1994 (and currently, absent application

of the three strikes penalty), a Ewing-type offender would have received a maximum sentence of four years. Cal. Penal Code Ann. § 489 (West 1999), § 667.5(b) (West Supp. 2002). And we know that California's "habitual offender" laws did not apply to grand theft. §§ 644(a), (b) (West 1970) (repealed 1977). We also know that the time that any offender actually served was likely far less than 10 years. This is because statistical data show that the median time actually served for grand theft (other than auto theft) was about two years, and 90 percent of all those convicted of that crime served less than three or four years. Historical Data for Time Served by California Felons 11 (Table 10).

Second, statistics suggest that recidivists *of all sorts* convicted during that same time period in California served a small fraction of Ewing's real-time sentence. On average, recidivists served three to four additional (recidivist-related) years in prison, with 90 percent serving less than an additional real seven to eight years. *Id.*, at 22 (Table 21).

Third, we know that California has reserved, and still reserves, Ewing-type prison time, *i. e.*, at least 25 real years in prison, for criminals convicted of crimes far worse than was Ewing's. Statistics for the years 1945 to 1981, for example, indicate that typical (nonrecidivist) male first-degree murderers served between 10 and 15 real years in prison, with 90 percent of all such murderers serving less than 20 real years. *Id.*, at 3 (Table 2). Moreover, California, which has moved toward a real-time sentencing system (where the statutory punishment approximates the time served), still punishes far less harshly those who have engaged in far more serious conduct. It imposes, for example, upon nonrecidivists guilty of arson causing great bodily injury a maximum sentence of nine years in prison, Cal. Penal Code Ann. § 451(a) (West 1999) (prison term of 5, 7, or 9 years for arson that causes great bodily injury); it imposes upon those guilty of voluntary manslaughter a maximum sentence of 11 years, § 193 (prison term of 3, 6, or 11 years for voluntary man-

slaughter). It reserves the sentence that it here imposes upon (former-burglar-now-golf-club-thief) Ewing for non-recidivist, first-degree murderers. See § 190(a) (West Supp. 2003) (sentence of 25 years to life for first-degree murder).

As to other jurisdictions, we know the following: The United States, bound by the federal Sentencing Guidelines, would impose upon a recidivist, such as Ewing, a sentence that, in any ordinary case, would not exceed 18 months in prison. USSG § 2B1.1(a) (Nov. 1999) (assuming a base offense level of 6, a criminal history of VI, and no mitigating or aggravating adjustments); *id.*, ch. 5, pt. A, Sentencing Table. The Guidelines, based in part upon a study of some 40,000 actual federal sentences, see *supra*, at 37, 41, reserve a Ewing-type sentence for Ewing-type *recidivists* who currently commit such crimes as murder, § 2A1.2; air piracy, § 2A5.1; robbery (involving the discharge of a firearm, serious bodily injury, and about $1 million), § 2B3.1; drug offenses involving more than, for example, 20 pounds of heroin, § 2D1.1; aggravated theft of more than $100 million, § 2B1.1; and other similar offenses. The Guidelines reserve 10 years of real prison time (with good time)—less than 40 percent of Ewing's sentence—for Ewing-type *recidivists* who go on to commit, for instance, voluntary manslaughter, § 2A1.3; aggravated assault with a firearm (causing serious bodily injury and motivated by money), § 2A2.2; kidnaping, § 2A4.1; residential burglary involving more than $5 million, § 2B2.1; drug offenses involving at least one pound of cocaine, § 2D1.1; and other similar offenses. Ewing also would not have been subject to the federal "three strikes" law, 18 U. S. C. § 3559(c), for which grand theft is not a triggering offense.

With three exceptions, see *infra*, at 46–47, we do not have before us information about actual time served by Ewing-type offenders in other States. We do know, however, that the law would make it legally impossible for a Ewing-type offender to serve more than 10 years in prison in 33 jurisdictions, as well as the federal courts, see Appendix,

Part A, *infra*, more than 15 years in 4 other States, see Appendix, Part B, *infra*, and more than 20 years in 4 additional States, see Appendix, Part C, *infra*. In nine other States, the law *might* make it legally possible to impose a sentence of 25 years or more, see Appendix, Part D, *infra*—though that fact by itself, of course, does not mean that judges have actually done so. But see *infra* this page. I say "might" because the law in five of the nine last mentioned States restricts the sentencing judge's ability to impose a term so long that, with parole, it would amount to at least 25 years of actual imprisonment. See Appendix, Part D, *infra*.

We also know that California, the United States, and other States supporting California in this case, despite every incentive to find someone else like Ewing who will have to serve, or who has actually served, a real prison term anywhere approaching that imposed upon Ewing, have come up with precisely three examples. Brief for United States as *Amicus Curiae* 28–29, n. 13. The Government points to *Ex parte Howington*, 622 So. 2d 896 (Ala. 1993), where an Alabama court sentenced an offender with three prior burglary convictions and two prior grand theft convictions to "life" for the theft of a tractor-trailer. The Government also points to *State* v. *Heftel*, 513 N. W. 2d 397 (S. D. 1994), where a South Dakota court sentenced an offender with seven prior felony convictions to 50 years' imprisonment for theft. And the Government cites *Sims* v. *State*, 107 Nev. 438, 814 P. 2d 63 (1991), where a Nevada court sentenced a defendant with three prior felony convictions (including armed robbery) and nine misdemeanor convictions to life without parole for the theft of a purse and wallet containing $476.

The first of these cases, *Howington*, is beside the point, for the offender was eligible for parole after 10 years (as in *Rummel*), not 25 years (as here). Ala. Code § 15–22–28(e) (West 1982). The second case, *Heftel*, is factually on point, but it is not legally on point, for the South Dakota courts did not consider the constitutionality of the sentence. 513 N. W.

2d, at 401. The third case, *Sims*, is on point both factually and legally, for the Nevada Supreme Court (by a vote of 3 to 2) found the sentence constitutional. I concede that example—a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population now approaching two million individuals. U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prison Statistics (Jan. 8, 2003), http://www.ojp.usdoj.gov/bjs/prisons.htm (available in Clerk of Court's case file).

The upshot is that comparison of other sentencing practices, both in other jurisdictions and in California at other times (or in respect to other crimes), validates what an initial threshold examination suggested. Given the information available, given the state and federal parties' ability to provide additional contrary data, and given their failure to do so, we can assume for constitutional purposes that the following statement is true: Outside the California three strikes context, Ewing's recidivist sentence is virtually unique in its harshness for his offense of conviction, and by a considerable degree.

## IV

This is not the end of the matter. California sentenced Ewing pursuant to its "three strikes" law. That law represents a deliberate effort to provide stricter punishments for recidivists. Cal. Penal Code Ann. § 667(b) (West 1999) ("It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses"); *ante*, at 24. And, it is important to consider whether special criminal justice concerns related to California's three strikes policy might justify including Ewing's theft within the class of triggering criminal conduct (thereby imposing a severe punishment), even if Ewing's sentence would otherwise seem disproportionately harsh.

Cf. *Harmelin*, 501 U. S., at 998–999, 1001 (noting "the primacy of the legislature" in making sentencing policy).

I can find no such special criminal justice concerns that might justify this sentence. The most obvious potential justification for bringing Ewing's theft within the ambit of the statute is administrative. California must draw some kind of workable line between conduct that will trigger, and conduct that will not trigger, a "three strikes" sentence. "But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere." *Pearce* v. *Commissioner*, 315 U. S. 543, 558 (1942) (Frankfurter, J., dissenting). The statute's administrative objective would seem to be one of separating more serious, from less serious, triggering criminal conduct. Yet the statute does not do that job particularly well.

The administrative line that the statute draws separates "felonies" from "misdemeanors." See Brief for Respondent 6 ("The California statute relies, fundamentally, on traditional classifications of certain crimes as felonies"). Those words suggest a graduated difference in degree. But an examination of how California applies these labels in practice to criminal conduct suggests that the offenses do not necessarily reflect those differences. See *United States* v. *Watson*, 423 U. S. 411, 438–441 (1976) (Marshall, J., dissenting) (felony/misdemeanor distinction often reflects history, not logic); *Rummel*, 445 U. S., at 284 ("The most casual review of the various criminal justice systems now in force in the 50 States of the Union shows that the line dividing felony theft from petty larceny, a line usually based on the value of the property taken, varies markedly from one State to another"). Indeed, California uses those words in a way unrelated to the seriousness of offense conduct in a set of criminal statutes called "'wobblers,'" see *ante*, at 16, one of which is at issue in this case.

Most "wobbler" statutes classify the same criminal conduct either as a felony or as a misdemeanor, depending upon

the actual punishment imposed, Cal. Penal Code Ann. §§ 17(a), (b) (West 1999); *ante*, at 16–17, which in turn depends primarily upon whether "the rehabilitation of the convicted defendant" either does or does not "require" (or would or would not "be adversely affected by") "incarceration in a state prison as a felon." *In re Anderson*, 69 Cal. 2d 613, 664–665, 447 P. 2d 117, 152 (1968) (Tobriner, J., concurring in part and dissenting in part); *ante*, at 29. In such cases, the felony/misdemeanor classification turns primarily upon the nature of the offender, not the comparative seriousness of the offender's conduct.

A subset of "wobbler" statutes, including the "petty theft with a prior" statute, Cal. Penal Code Ann. § 666 (West Supp. 2002), defining the crime in the companion case, *Lockyer* v. *Andrade*, *post*, p. 63, authorizes the treatment of otherwise misdemeanor conduct, see Cal. Penal Code Ann. § 490 (West 1999), as a felony only when the offender has previously committed a property crime. Again, the distinction turns upon characteristics of the offender, not the specific offense conduct at issue.

The result of importing this kind of distinction into California's three strikes statute is a series of anomalies. One anomaly concerns the seriousness of the triggering behavior. "Wobbler" statutes cover a wide variety of criminal behavior, ranging from assault with a deadly weapon, § 245, vehicular manslaughter, § 193(c)(1), and money laundering, § 186.10(a), to the defacement of property with graffiti, § 594(b)(2)(A) (West Supp. 2002), or stealing more than $100 worth of chickens, nuts, or avocados, § 487(b)(1)(A) (West Supp. 2003); § 489 (West 1999). Some of this behavior is obviously less serious, even if engaged in twice, than other criminal conduct that California statutes classify as pure misdemeanors, such as reckless driving, Cal. Veh. Code Ann. § 23103 (West Supp. 2003); § 23104(a) (West 2000) (reckless driving causing bodily injury), the use of force or threat of force to interfere with another's civil rights, Cal. Penal Code

Ann. § 422.6 (West 1999), selling poisoned alcohol, § 347b, child neglect, § 270, and manufacturing or selling false government documents with the intent to conceal true citizenship, § 112(a) (West Supp. 2002).

Another anomaly concerns temporal order. An offender whose triggering crime is his third crime likely will *not* fall within the ambit of the three strikes statute provided that (a) his *first* crime was chicken theft worth more than $100, and (b) he subsequently graduated to more serious crimes, say, crimes of violence. That is because such chicken theft, when a first offense, will likely be considered a misdemeanor. A similar offender likely *will* fall within the scope of the three strikes statute, however, if such chicken theft was his *third* crime. That is because such chicken theft, as a third offense, will likely be treated as a felony.

A further anomaly concerns the offender's criminal record. California's "wobbler" "petty theft with a prior" statute, at issue in *Lockyer* v. *Andrade*, *post*, p. 63, classifies a petty theft as a "felony" if, but only if, the offender has a prior record that includes at least one conviction for certain theft-related offenses. Cal. Penal Code Ann. § 666 (West Supp. 2002). Thus a violent criminal who has committed two violent offenses and then steals $200 will *not* fall within the ambit of the three strikes statute, for his prior record reveals no similar *property* crimes. A similar offender *will* fall within the scope of the three strikes statute, however, if that offender, instead of having committed two previous violent crimes, has committed one previous violent crime and one previous petty theft. (Ewing's conduct would have brought him within the realm of the petty theft statute prior to 1976 but for inflation.)

At the same time, it is difficult to find any strong need to define the lower boundary as the State has done. The three strikes statute itself, when defining prior "strikes," simply lists the kinds of serious criminal conduct that falls within the definition of a "strike." § 667.5(c) (listing "violent" felon-

ies); § 1192.7(c) (West Supp. 2003) (listing "serious" felonies). There is no obvious reason why the statute could not enumerate, consistent with its purposes, the relevant triggering crimes. Given that possibility and given the anomalies that result from California's chosen approach, I do not see how California can justify on *administrative* grounds a sentence as seriously disproportionate as Ewing's. See Parts II and III, *supra*.

Neither do I see any other way in which inclusion of Ewing's conduct (as a "triggering crime") would further a significant criminal justice objective. One might argue that those who commit several *property* crimes should receive long terms of imprisonment in order to "incapacitate" them, *i. e.*, to prevent them from committing further crimes in the future. But that is not the object of this particular three strikes statute. Rather, as the plurality says, California seeks "'to reduce *serious* and *violent* crime.'" *Ante*, at 24 (quoting Ardaiz, California's Three Strikes Law: History, Expectations, Consequences, 32 McGeorge L. Rev. 1 (2000) (emphasis added)). The statute's definitions of both kinds of crime include crimes against the person, crimes that create danger of physical harm, and drug crimes. See, *e. g.*, Cal. Penal Code Ann. § 667.5(c)(1) (West Supp. 2002), § 1192.7(c)(1) (West Supp. 2003) (murder or voluntary manslaughter); § 667.5(c)(21) (West Supp. 2002), § 1192.7(c)(18) (West Supp. 2003) (first-degree burglary); § 1192.7(c)(24) (selling or giving or offering to sell or give heroin or cocaine to a minor). They do not include even serious crimes against property, such as obtaining large amounts of money, say, through theft, embezzlement, or fraud. Given the omission of vast categories of property crimes—including grand theft (unarmed)—from the "strike" definition, one cannot argue, on *property-crime-related incapacitation grounds,* for inclusion of Ewing's crime among the triggers.

Nor do the remaining criminal law objectives seem relevant. No one argues for Ewing's inclusion within the ambit

of the three strikes statute on grounds of "retribution." Cf. Vitiello, Three Strikes: Can We Return to Rationality? 87 J. Crim. L. & C. 395, 427 (1997) (California's three strikes law, like other "[h]abitual offender statutes[, is] not retributive" because the term of imprisonment is "imposed without regard to the culpability of the offender or [the] degree of social harm caused by the offender's behavior," and "has little to do with the gravity of the offens[e]"). For reasons previously discussed, in terms of "deterrence," Ewing's 25-year term amounts to overkill. See Parts II and III, *supra*. And "rehabilitation" is obviously beside the point. The upshot is that, in my view, the State cannot find in its three strikes law a special criminal justice need sufficient to rescue a sentence that other relevant considerations indicate is unconstitutional.

## V

JUSTICE SCALIA and JUSTICE THOMAS argue that we should not review for gross disproportionality a sentence to a term of years. *Ante*, at 31 (SCALIA, J., concurring in judgment); *ante*, at 32 (THOMAS, J., concurring in judgment). Otherwise, we make it too difficult for legislators and sentencing judges to determine just when their sentencing laws and practices pass constitutional muster.

I concede that a bright-line rule would give legislators and sentencing judges more guidance. But application of the Eighth Amendment to a sentence of a term of years requires a case-by-case approach. And, in my view, like that of the plurality, meaningful enforcement of the Eighth Amendment demands that application—even if only at sentencing's outer bounds.

A case-by-case approach can nonetheless offer guidance through example. Ewing's sentence is, at a minimum, 2 to 3 times the length of sentences that other jurisdictions would impose in similar circumstances. That sentence itself is sufficiently long to require a typical offender to spend virtually all the remainder of his active life in prison. These and the

other factors that I have discussed, along with the questions that I have asked along the way, should help to identify "gross disproportionality" in a fairly objective way—at the outer bounds of sentencing.

In sum, even if I accept for present purposes the plurality's analytical framework, Ewing's sentence (life imprisonment with a minimum term of 25 years) is grossly disproportionate to the triggering offense conduct—stealing three golf clubs—Ewing's recidivism notwithstanding.

For these reasons, I dissent.

## APPENDIX TO OPINION OF BREYER, J.

### A

Thirty-three jurisdictions, as well as the federal courts, have laws that would make it impossible to sentence a Ewing-type offender to more than 10 years in prison:[1]

Federal: 12 to 18 months. USSG §2B1.1 (Nov. 1999); *id.*, ch. 5, pt. A, Sentencing Table.

Alaska: three to five years; presumptive term of three years. Alaska Stat. §§11.46.130(a)(1), (c), 12.55.125(e) (2000).

Arizona: four to six years; presumptive sentence of five years. Ariz. Rev. Stat. Ann. §§13–604(C), 13–1802(E) (West 2001).

Connecticut: 1 to 10 years. Conn. Gen. Stat. §§53a–35a(6), 53a–40(j), 53a–124(a)(2) (2001).

Delaware: not more than two years. Del. Code Ann., Tit. 11, §840(d) (Supp. 2000); §4205(b)(7) (1995). Recidivist offender penalty not applicable. See §4214; *Buckingham* v. *State*, 482 A. 2d 327 (Del. 1984).

District of Columbia: not more than 10 years. D. C. Code Ann. §22–3212(a) (West 2001). Recidivist offender penalty

[1] Throughout Appendix, Parts A–D, the penalties listed for each jurisdiction are those pertaining to imprisonment and do not reflect any possible fines or other forms of penalties applicable under the laws of the jurisdiction.

not applicable. See § 22–1804a(c)(2) (West 2001) (amended 2001).

Florida: not more than 10 years. Fla. Stat. Ann. §§ 775.084(1)(a), (4)(a)(3) (West 2000) (amended 2002); § 812.014(c)(1) (West 2000).

Georgia: 10 years. Ga. Code Ann. § 16–8–12(a)(1) (1996); § 17–10–7(a) (Supp. 1996).

Hawaii: 20 months. Haw. Rev. Stat. §§ 708–831(1)(b), 706–606.5(1)(a)(iv), (7)(a) (Supp. 2001).

Idaho: 1 to 14 years. Idaho Code §§ 18–2403, 18–2407(b)(1), 18–2408(2)(a) (1948–1997). Recidivist/habitual offender penalty of five years to life in prison, § 19–2514, likely not applicable. Idaho has a general rule that "'convictions entered the same day or charged in the same information should count as a single conviction for purposes of establishing habitual offender status.'" *State* v. *Harrington*, 133 Idaho 563, 565, 990 P. 2d 144, 146 (App. 1999) (quoting *State* v. *Brandt*, 110 Idaho 341, 344, 715 P. 2d 1011, 1014 (App. 1986)). However, "the nature of the convictions in any given situation must be examined to make certain that [this] general rule is appropriate." *Ibid.* In this case, Ewing's prior felony convictions stemmed from acts committed at the same apartment complex, and three of the four felonies were committed within a day of each other; the fourth offense was committed five weeks earlier. See App. 6; Tr. 45–46 (Information, Case No. NA018343–01 (Cal. Super. Ct.) (available in Clerk of Court's case file)). A review of Idaho case law suggests that this case is factually distinguishable from cases in which the Idaho courts have declined to adhere to the general rule. See, *e. g.*, *Brandt*, *supra*, at 343, 344, 715 P. 2d, at 1013, 1014 (three separately charged property offenses involving three separate homes and different victims committed "during a two-month period"); *State* v. *Mace*, 133 Idaho 903, 907, 994 P. 2d 1066, 1070 (App. 2000) (unrelated crimes (grand theft and DUI) committed on different dates in different counties); *State* v. *Smith*, 116 Idaho 553, 560, 777

P. 2d 1226, 1233 (App. 1989) (separate and distinguishable crimes committed on different victims in different counties).

Illinois: two to five years. Ill. Comp. Stat., ch. 730, § 5/5–8–1(a)(6) (Supp. 2001); ch. 720, § 5/16–1(b)(4). Recidivist offender penalty not applicable. § 5/33B–1(a) (2000).

Indiana: 18 months (with not more than 18 months added for aggravating circumstances). Ind. Code § 35–43–4–2(a) (1993); § 35–50–2–7(a). Recidivist offender penalty not applicable. See § 35–50–2–8 (amended 2001).

Iowa: three to five years. Iowa Code Ann. §§ 714.2(2), 902.9(5) (West Supp. 2002); § 902.8 (West 1994).

Kansas: 9 to 11 months. Kan. Stat. Ann. §§ 21–3701(b)(2), 21–4704(a) (1995). Recidivist offender penalty not applicable. See § 21–4504(e)(3).

Kentucky: 5 to 10 years. Ky. Rev. Stat. Ann. § 514.030(2) (Lexis Supp. 2002); §§ 532.060(2)(c), (d), 532.080(2), (5) (Lexis 1999).

Maine: less than one year. Me. Rev. Stat. Ann., Tit. 17–A, § 353 (West 1983); § 362(4)(B) (West Supp. 2000) (amended 2001); § 1252(2)(D) (West 1983 and Supp. 2002). Recidivist offender penalty not applicable. See § 1252(4–A) (West Supp. 2000) (amended 2001).

Massachusetts: not more than five years. Mass. Gen. Laws, ch. 266, § 30(1) (West 2000). Recidivist offender penalty not applicable. See ch. 279, § 25 (West 1998); *Commonwealth* v. *Hall*, 397 Mass. 466, 468, 492 N. E. 2d 84, 85 (1986).

Minnesota: not more than five years. Minn. Stat. § 609.52, subd. 3(3)(a) (2002). Recidivist offender penalty not applicable. See § 609.1095, subd. 2.

Mississippi: not more than five years. Miss. Code Ann. § 97–17–41(1)(a) (Lexis 1973–2000). Recidivist offender penalty not applicable. See § 99–19–81.

Nebraska: not more than five years. Neb. Rev. Stat. § 28–105(1) (2000 Cum. Supp.); § 28–518(2) (1995). Recidivist offender penalty not applicable. See § 29–2221(1).

New Jersey: Extended term of between 5 to 10 years (instead of three to five years, N. J. Stat. Ann. § 2C:43–6 (1995)), § 2C:43–7(a)(4) (Supp. 2002), whether offense is treated as theft, § 2C:20–2(b)(2)(a), or shoplifting, §§ 2C:20–11(b), (c)(2), because, even if Ewing's felonies are regarded as one predicate crime, Ewing has been separately convicted and sentenced for at least one other crime for which at least a 6-month sentence was authorized, § 2C:44–3(a); § 2C:44–4(c) (1995).

New Mexico: 30 months. N. M. Stat. Ann. § 30–16–20(B)(3) (1994); § 31–18–15(A)(6) (2000); § 31–18–17(B) (2000) (amended 2002).

New York: three to four years. N. Y. Penal Law § 70.06(3)(e) (West 1998); § 155.30 (West 1999).

North Carolina: 4 to 25 months (with exact sentencing range dependent on details of offender's criminal history). N. C. Gen. Stat. §§ 15A–1340.14, 15A–1340.17(c), (d), 14–72(a) (2001). Recidivist offender penalty not applicable. See §§ 14–7.1, 14–7.6.

North Dakota: not more than 10 years. N. D. Cent. Code § 12.1–23–05(2)(a) (1997); §§ 12.1–32–09(1), (2)(c) (1997) (amended 2001).

Ohio: 6 to 12 months. Ohio Rev. Code Ann. §§ 2913.02(B)(2), 2929.14(A)(5) (West Supp. 2002). No general recidivist statute.

Oregon: not more than five years. Ore. Rev. Stat. § 161.605 (1997); Ore. Rev. Stat. Ann. §§ 164.055(1)(a), (3) (Supp. 1998). No general recidivist statute.

Pennsylvania: not more than five years (if no more than one prior theft was "retail theft"); otherwise, not more than seven years. Pa. Stat. Ann., Tit. 18, §§ 1103(3), 1104(1) (Purdon 1998); §§ 3903(b), 3929(b)(1)(iii)–(iv) (Purdon Supp. 2002); § 3921 (Purdon 1983). Recidivist offender penalty not applicable. See 42 Pa. Cons. Stat. § 9714(a)(1) (1998).

Rhode Island: not more than 10 years. R. I. Gen. Laws § 11–41–5(a) (2002). Recidivist offender penalty not applicable. See § 12–19–21(a).

South Carolina: not more than five years. S. C. Code Ann. §§ 16–13–30, 16–13–110(B)(2) (West 2001 Cum. Supp.). Recidivist offender penalty not applicable. See § 17–25–45.

Tennessee: four to eight years. Tenn. Code Ann. §§ 39–14–105(3), 40–35–106(a)(1), (c), 40–35–112(b)(4) (1997).

Utah: not more than five years. Utah Code Ann. § 76–3–203(3) (1999) (amended 2000); § 76–6–412(1)(b)(i) (1999). Recidivist offender penalty not applicable. See § 76–3–203.5 (Supp. 2002).

Washington: not more than 14 months (with exact sentencing range dependent on details of offender score), Wash. Rev. Code §§ 9A.56.040(1)(a), (2) (2000); §§ 9.94A.510(1), 9.94A.515, 9.94A.525 (2003 Supp. Pamphlet); maximum sentence of five years, §§ 9A.56.040(1)(a), (2), 9A.20.021(1)(c) (2000). Recidivist offender penalty not applicable. See §§ 9.94A.030(27), (31) (2000); § 9.94A.570 (2003 Supp. Pamphlet).

Wyoming: not more than 10 years. Wyo. Stat. Ann. § 6–3–404(a)(i) (Michie 2001). Recidivist offender penalty not applicable. See § 6–10–201(a).

B

In four other States, a Ewing-type offender could not have received a sentence of more than 15 years in prison:

Colorado: 4 to 12 years for "extraordinary aggravating circumstances" (*e. g.*, defendant on parole for another felony at the time of commission of the triggering offense). Colo. Rev. Stat. §§ 18–1–105(1)(a)(V)(A), 18–1–105(9)(a)(II), 18–4–401(2)(c) (2002). Recidivist offender penalty not applicable. See §§ 16–13–101(f)(1.5), (2) (2001).

Maryland: not more than 15 years. Md. Ann. Code, Art. 27, § 342(f)(1) (1996) (repealed 2002). Recidivist offender penalty not applicable. See § 643B.

New Hampshire: not more than 15 years. N. H. Stat. Ann. §§ 637:11(I)(a), 651:2(II)(a) (West Supp. 2002). Recidivist offender penalty not applicable. See § 651:6(I)(c).

Wisconsin: not more than 11 years (at the time of Ewing's offense). Wis. Stat. Ann. § 939.50(3)(e) (West Supp. 2002); §§ 939.62(1)(b), (2), 943.20(3)(b) (West 1996) (amended 2001). Wisconsin subsequently amended the relevant statutes so that a Ewing-type offender would only be eligible for a sentence of up to three years. See §§ 939.51(3)(a), 943.20(3)(a), 939.62(1)(a) (West Supp. 2003). And effective February 1, 2003, such an offender is eligible for a sentence of only up to two years. See §§ 939.51(3)(a), 943.20(3)(a), 939.62(1)(a).

C

In four additional States, a Ewing-type offender could not have been sentenced to more than 20 years in prison:

Arkansas: 3 to 20 years. Ark. Code Ann. § 5–36–103(b)(2)(A) (1997); §§ 5–4–501(a)(2)(D), (e)(1) (1997) (amended 2001). Eligible for parole after serving one-third of the sentence. § 5–4–501 (1997); § 16–93–608 (1987).

Missouri: not more than 20 years. Mo. Rev. Stat. § 558.016(7)(3) (2000); § 570.030(3)(1) (2000) (amended 2002). Eligible for parole after 15 years at the latest. § 558.011(4)(1)(c).

Texas: 2 to 20 years. Tex. Penal Code Ann. §§ 12.33(a), 12.35(c)(2)(A) (1994); §§ 12.42(a)(3), 31.03(e)(4)(D) (Supp. 2003). Eligible for parole after serving one-fourth of sentence. Tex. Govt. Code Ann. § 508.145(f) (Supp. 2003).

Virginia: statutory range of 1 to 20 years (or less than 12 months at the discretion of the jury or court following bench trial), Va. Code Ann. § 18.2–95 (Supp. 2002), but discretionary sentencing guideline ranges established by the Virginia Sentencing Commission, §§ 17.1–805, 19.2–298.01 (2000), with a maximum of 6 years, 3 months, to 15 years, 7 months, see Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines Manual, Larceny—Section C Recommenda-

tion Table (6th ed. 2002) (with petitioner likely falling within the discretionary guideline range of 2 years, 1 month, to 5 years, 3 months, see Brief for Petitioner 33, n. 25). Recidivist offender penalty not applicable. See § 19.2–297.1 (2000).

D

In nine other States, the law *might* make it legally possible to impose a sentence of 25 years or more upon a Ewing-type offender. But in five of those nine States,[2] the offender would be parole-eligible before 25 years:

Alabama: "life or any term of not less than 20 years." Ala. Code § 13A–5–9(c)(2) (Lexis Supp. 2002); §§ 13A–8–3(a), (c) (1994). Eligible for parole after the lesser of one-third of the sentence or 10 years. § 15–22–28(e) (1995).

Louisiana: Louisiana courts could have imposed a sentence of life without the possibility of parole at the time of Ewing's offense. La. Stat. Ann. §§ 14:67.10(B)(1), 14:2(4), (13)(y) (West Supp. 2003); §§ 15:529.1(A)(1)(b)(ii) and (c)(i)–(ii) (West 1992) (amended 2001). Petitioner argues that, despite the statutory authority to impose such a sentence, Louisiana courts would have carefully scrutinized his life sentence, as they had in other cases involving recidivists charged with a nonviolent crime. Brief for Petitioner 35–36, n. 29; see Brief for Families Against Mandatory Minimums as *Amicus Curiae* 24–25, and n. 21; *State* v. *Hayes*, 98–1526, p. 4 (La. App. 6/25/99), 739 So. 2d 301, 303–304 (holding that a life sentence was impermissibly excessive for a defendant convicted of theft of over $1,000, who had a prior robbery conviction). But see Brief for Respondent 45–46, n. 12 (contesting petitioner's argument). Louisiana has amended its recidivist statute to require that the triggering offense be a violent felony, and that the offender have at least two prior violent felony convictions to be eligible for a life sentence. La. Stat.

[2] But see discussion of relevant sentencing and parole-eligibility provisions in Louisiana, Michigan, Oklahoma, and South Dakota, *infra* this page and 60–61.

Ann. § 15:529.1(A)(1)(b)(ii) (West Supp. 2003). Under current law, a Ewing-type offender would face a sentence of 6⅔ to 20 years. §§ 14:67.10(B)(1), 15:529.1(A)(b)(i).

Michigan: "imprisonment for life or for a lesser term," Mich. Comp. Laws Ann. § 769.12(1)(a) (West 2000) (instead of "not more than 15 years," § 769.12(1)(b), as petitioner contends, see Brief for Petitioner 34, n. 26; Brief for Families Against Mandatory Minimums as *Amicus Curiae* 16–17, n. 15, 22–23, n. 20), because the triggering offense is "punishable upon a first conviction by imprisonment for a maximum term of 5 years or more," § 769.12(1)(a) (West 2000). The larceny for which Ewing was convicted was, under Michigan law, "a felony punishable by imprisonment for not more than 5 years." § 750.356(3)(a) (West Supp. 2002). Eligible for parole following minimum term set by sentencing judge. § 769.12(4) (West 2000).

Montana: 5 to 100 years. Mont. Code Ann. § 45–6–301(7)(b) (1999); §§ 46–18–501, 46–18–502(1) (2001). A Ewing-type offender would not have been subject to a minimum term of 10 years in prison (as the State suggests, Brief for Respondent 44) because Ewing does not meet the requirements of § 46–18–502(2) (must be a "persistent felony offender," as defined in § 46–18–501, at the time of the offender's previous felony conviction). See Reply Brief for Petitioner 18, n. 14. Eligible for parole after one-fourth of the term. § 46–23–201(2).

Nevada: "life without the possibility of parole," or "life with the possibility of parole [after serving] 10 years," or "a definite term of 25 years, with eligibility for parole [after serving] 10 years." Nev. Rev. Stat. §§ 207.010(1)(b)(1)–(3) (1995).

Oklahoma: not less than 20 years (at the time of Ewing's offense). Okla. Stat., Tit. 21, § 51.1(B) (West Supp. 2000) (amended in 2001 to four years to life, § 51.1(C) (West 2001)); § 1704 (West 1991) (amended 2001). Eligible for parole after serving one-third of sentence. Tit. 57, § 332.7(B) (West

2001). Thus, assuming a sentence to a term of years of up to 100 years (as in Montana, see *supra*, at 60), parole eligibility could arise as late as after 33 years.

South Dakota: maximum penalty of life imprisonment, with no minimum term. S. D. Codified Laws § 22–7–8 (1998); § 22–30A–17(1) (Supp. 2002). Eligible for parole after serving one-half of sentence. § 24–15–5(3) (1998). Thus, assuming a sentence to a term of years of up to 100 years (as in Montana, see *supra*, at 60), parole eligibility could arise as late as after 50 years.

Vermont: "up to and including life," Vt. Stat. Ann., Tit. 13, § 11 (1998), or not more than 10 years, § 2501; *State* v. *Angelucci*, 137 Vt. 272, 289–290, 405 A. 2d 33, 42 (1979) (court has discretion to sentence habitual offender to the sentence that is specified for grand larceny alone). Eligible for parole after six months. Tit. 28, § 501 (2000) (amended 2001).

West Virginia: Petitioner contends that he would only have been subject to a misdemeanor sentence of not more than 60 days for shoplifting, W. Va. Code §§ 61–3A–1, 61–3A–3(a)(2) (2000); Brief for Petitioner 31, n. 19, 33–34, n. 25. However, a Ewing-type offender could have been charged with grand larceny, see *State ex rel. Chadwell* v. *Duncil*, 196 W. Va. 643, 647–648, 474 S. E. 2d 573, 577–578 (1996) (prosecutor has discretion to charge defendant with either shoplifting or grand larceny), a felony punishable by imprisonment in the state penitentiary for 1 to 10 years (or, at the discretion of the trial court, not more than 1 year in jail). § 61–3–13(a). Under West Virginia's habitual offender statute, a felon "twice before convicted . . . of a crime punishable by confinement in a penitentiary . . . shall be sentenced to . . . life [imprisonment]," § 61–11–18(c), with parole eligibility after 15 years, § 62–12–13(c). *Amicus curiae* on behalf of petitioner notes that, in light of existing state-law precedents, West Virginia courts "would not countenance a sentence of life without the possibility of parole for 25 years for shoplifting golf clubs." Brief for Families Against Mandatory Minimums as *Amicus*

*Curiae* 25–26 (citing *State* v. *Barker*, 186 W. Va. 73, 74–75, 410 S. E. 2d 712, 713–714 (1991) *(per curiam);* and *State* v. *Deal*, 178 W. Va. 142, 146–147, 358 S. E. 2d 226, 230–231 (1987)). But see Brief for Respondent 45, n. 11 (contesting that argument).

Syllabus

# LOCKYER, ATTORNEY GENERAL OF CALIFORNIA *v.* ANDRADE

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

No. 01–1127. Argued November 5, 2002—Decided March 5, 2003

California charged respondent Andrade with two felony counts of petty theft with a prior conviction after he stole approximately $150 worth of videotapes from two different stores. Under California's three strikes law, any felony can constitute the third strike subjecting a defendant to a prison term of 25 years to life. The jury found Andrade guilty and then found that he had three prior convictions that qualified as serious or violent felonies under the three strikes regime. Because each of his petty theft convictions thus triggered a separate application of the three strikes law, the judge sentenced him to two consecutive terms of 25 years to life. In affirming, the California Court of Appeal rejected his claim that his sentence violated the constitutional prohibition against cruel and unusual punishment. It found the *Solem* v. *Helm*, 463 U. S. 277, proportionality analysis questionable in light of *Harmelin* v. *Michigan*, 501 U. S. 957. It then compared the facts in Andrade's case to those in *Rummel* v. *Estelle*, 445 U. S. 263—in which this Court rejected a claim that a life sentence was grossly disproportionate to the felonies that formed the predicate for the sentence, *id.*, at 265—and concluded that Andrade's sentence was not disproportionate. The California Supreme Court denied discretionary review. The Federal District Court denied Andrade's subsequent habeas petition, but the Ninth Circuit granted him a certificate of appealability and reversed. Reviewing the case under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the latter court held that an unreasonable application of clearly established federal law under 28 U. S. C. § 2254(d)(1) occurs when there is clear error; concluded that both *Solem* and *Rummel* remain good law and are instructive in applying *Harmelin;* and found that the California Court of Appeal's disregard for *Solem* resulted in an unreasonable application of clearly established Supreme Court law and was irreconcilable with *Solem*, thus constituting clear error.

*Held:* The Ninth Circuit erred in ruling that the California Court of Appeal's decision was contrary to, or an unreasonable application of, this Court's clearly established law within the meaning of § 2254(d)(1). Pp. 70–77.

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(a) AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law. In this case, this Court does not reach the question whether the state court erred, but focuses solely on whether habeas relief is barred by § 2254(d)(1). Pp. 70–71.

(b) This Court must first decide what constitutes such "clearly established" law. Andrade claims that *Rummel*, *Solem*, and *Harmelin* clearly establish a principle that his sentence is so grossly disproportionate that it violated the Eighth Amendment. Under § 2254(d)(1), "clearly established Federal law" is the governing legal principle or principles set forth by this Court at the time a state court renders its decision. The difficulty with Andrade's position is that the Court has not established a clear or consistent path for courts to follow in determining whether a particular sentence for a term of years can violate the Eighth Amendment. Indeed, the only "clearly established" law emerging from the Court's jurisprudence in this area is that a gross disproportionality principle applies to such sentences. Because the Court's cases lack clarity regarding what factors may indicate gross disproportionality, the principle's precise contours are unclear, applicable only in the "exceedingly rare" and "extreme" case. *Harmelin*, *supra*, at 1001 (KENNEDY, J., concurring in part and concurring in judgment). Pp. 71–73.

(c) The California Court of Appeal's decision was not "contrary to, or involved an unreasonable application of," the clearly established gross disproportionality principle. First, a decision is contrary to clearly established precedent if the state court applied a rule that contradicts the governing law set forth in this Court's cases or confronts facts that are materially indistinguishable from a Court decision and nevertheless arrives at a different result. *Williams* v. *Taylor*, 529 U. S. 362, 405–406. Andrade's sentence implicates factors relevant in both *Rummel* and *Solem*. Because *Harmelin* and *Solem* specifically stated that they did not overrule *Rummel*, it was not contrary to this Court's clearly established law for the state court to turn to *Rummel* in deciding whether the sentence was grossly disproportionate. See *Harmelin*, *supra*, at 998 (KENNEDY, J.). Also, the facts here fall in between *Solem* and *Rummel* but are not materially indistinguishable from either. Thus, the state court did not confront materially indistinguishable facts yet arrive at a different result. Second, under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle but unreasonably applies it to the facts of the prisoner's case. *Williams* v. *Taylor*, 529

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U. S., at 413. The state court decision must be objectively unreasonable, not just incorrect or erroneous. *Id.*, at 409, 410, 412. Here, the Ninth Circuit erred in defining "objectively unreasonable" to mean "clear error." While habeas relief can be based on an application of a governing legal principle to a set of facts different from those of the case in which the principle was announced, the governing legal principle here gives legislatures broad discretion to fashion a sentence that fits within the scope of the proportionality principle—the "precise contours" of which are "unclear." *Harmelin*, *supra*, at 998 (KENNEDY, J.). And it was not objectively unreasonable for the state court to conclude that these "contours" permitted an affirmance of Andrade's sentence. Cf., *e. g.*, *Riggs* v. *California*, 525 U. S. 1114, 1115 (STEVENS, J., dissenting from denial of certiorari). Pp. 73–77.

270 F. 3d 743, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 77.

*Douglas P. Danzig*, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Bill Lockyer*, Attorney General, *pro se*, *Robert R. Anderson*, Chief Assistant Attorney General, *Gary W. Schons*, Senior Assistant Attorney General, and *Carl H. Horst*, Supervising Deputy Attorney General.

*Erwin Chemerinsky* argued the cause for respondent. With him on the brief were *Paul Hoffman*, *Jordan C. Budd*, *Steven R. Shapiro*, *Mark D. Rosenbaum*, *Daniel P. Tokaji*, and *Alan L. Schlosser*.*

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**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the California Public Defenders Association by *Kenneth I. Clayman;* for Families to Amend California's Three Strikes et al. by *Gerald F. Uelmen;* for the National Association of Criminal Defense Lawyers by *Sheryl Gordon McCloud;* and for Donald Ray Hill by *Susan S. Azad* and *Kathryn M. Davis.*

Briefs of *amici curiae* were filed for the California District Attorneys Association by *Dennis L. Stout* and *Grover D. Merritt;* and for Michael P. Judge by *Albert J. Menaster* and *Alex Ricciardulli.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case raises the issue whether the United States Court of Appeals for the Ninth Circuit erred in ruling that the California Court of Appeal's decision affirming Leandro Andrade's two consecutive terms of 25 years to life in prison for a "third strike" conviction is contrary to, or an unreasonable application of, clearly established federal law as determined by this Court within the meaning of 28 U. S. C. § 2254(d)(1).

## I

### A

On November 4, 1995, Leandro Andrade stole five videotapes worth $84.70 from a Kmart store in Ontario, California. Security personnel detained Andrade as he was leaving the store. On November 18, 1995, Andrade entered a different Kmart store in Montclair, California, and placed four videotapes worth $68.84 in the rear waistband of his pants. Again, security guards apprehended Andrade as he was exiting the premises. Police subsequently arrested Andrade for these crimes.

These two incidents were not Andrade's first or only encounters with law enforcement. According to the state probation officer's presentence report, Andrade has been in and out of state and federal prison since 1982. In January 1982, he was convicted of a misdemeanor theft offense and was sentenced to 6 days in jail with 12 months' probation. Andrade was arrested again in November 1982 for multiple counts of first-degree residential burglary. He pleaded guilty to at least three of those counts, and in April of the following year he was sentenced to 120 months in prison. In 1988, Andrade was convicted in federal court of "[t]ransportation of [m]arijuana," App. 24, and was sentenced to eight years in federal prison. In 1990, he was convicted in state court for a misdemeanor petty theft offense and was ordered to serve 180 days in jail. In September 1990, Andrade was convicted again in federal court for the same fel-

ony of "[t]ransportation of [m]arijuana," *ibid.*, and was sentenced to 2,191 days in federal prison. And in 1991, Andrade was arrested for a state parole violation—escape from federal prison. He was paroled from the state penitentiary system in 1993.

A state probation officer interviewed Andrade after his arrest in this case. The presentence report notes:

> "The defendant admitted committing the offense. The defendant further stated he went into the K-Mart Store to steal videos. He took four of them to sell so he could buy heroin. He has been a heroin addict since 1977. He says when he gets out of jail or prison he always does something stupid. He admits his addiction controls his life and he steals for his habit." *Id.*, at 25.

Because of his 1990 misdemeanor conviction, the State charged Andrade in this case with two counts of petty theft with a prior conviction, in violation of Cal. Penal Code Ann. § 666 (West Supp. 2002). Under California law, petty theft with a prior conviction is a so-called "wobbler" offense because it is punishable either as a misdemeanor or as a felony. *Ibid.;* cf. *Ewing* v. *California*, *ante,* at 16–17 (plurality opinion). The decision to prosecute petty theft with a prior conviction as a misdemeanor or as a felony is in the discretion of the prosecutor. See *ante,* at 17. The trial court also has discretion to reduce the charge to a misdemeanor at the time of sentencing. See *People* v. *Superior Court of Los Angeles Cty. ex rel. Alvarez*, 14 Cal. 4th 968, 979, 928 P. 2d 1171, 1177–1178 (1997); see also *Ewing* v. *California*, *ante,* at 17.

Under California's three strikes law, any felony can constitute the third strike, and thus can subject a defendant to a term of 25 years to life in prison. See Cal. Penal Code Ann. § 667(e)(2)(A) (West 1999); see also *Ewing* v. *California*, *ante,* at 16. In this case, the prosecutor decided to charge the two counts of theft as felonies rather than misdemeanors. The trial court denied Andrade's motion to reduce the of-

fenses to misdemeanors, both before the jury verdict and again in state habeas proceedings.

A jury found Andrade guilty of two counts of petty theft with a prior conviction. According to California law, a jury must also find that a defendant has been convicted of at least two serious or violent felonies that serve as qualifying offenses under the three strikes regime. In this case, the jury made a special finding that Andrade was convicted of three counts of first-degree residential burglary. A conviction for first-degree residential burglary qualifies as a serious or violent felony for the purposes of the three strikes law. Cal. Penal Code Ann. §§ 667.5, 1192.7 (West 1999); see also *Ewing* v. *California*, *ante*, at 19. As a consequence, each of Andrade's convictions for theft under Cal. Penal Code Ann. § 666 (West Supp. 2002) triggered a separate application of the three strikes law. Pursuant to California law, the judge sentenced Andrade to two consecutive terms of 25 years to life in prison. See §§ 667(c)(6), 667(e)(2)(B). The State stated at oral argument that under the decision announced by the Supreme Court of California in *People* v. *Garcia*, 20 Cal. 4th 490, 976 P. 2d 831 (1999)—a decision that postdates his conviction and sentence—it remains "available" for Andrade to "file another State habeas corpus petition" arguing that he should serve only one term of 25 years to life in prison because "sentencing courts have a right to dismiss strikes on a count-by-count basis." Tr. of Oral Arg. 24.

B

On direct appeal in 1997, the California Court of Appeal affirmed Andrade's sentence of two consecutive terms of 25 years to life in prison. It rejected Andrade's claim that his sentence violates the constitutional prohibition against cruel and unusual punishment. The court stated that "the proportionality analysis" of *Solem* v. *Helm*, 463 U. S. 277 (1983), "is questionable in light of" *Harmelin* v. *Michigan*, 501 U. S. 957 (1991). App. to Pet. for Cert. 76. The court then ap-

plied our decision in *Rummel* v. *Estelle*, 445 U. S. 263 (1980), where we rejected the defendant's claim that a life sentence was "'grossly disproportionate' to the three felonies that formed the predicate for his sentence." *Id.*, at 265. The California Court of Appeal then examined Andrade's claim in light of the facts in *Rummel:* "Comparing [Andrade's] crimes and criminal history with that of defendant Rummel, we cannot say the sentence of 50 years to life at issue in this case is disproportionate and constitutes cruel and unusual punishment under the United States Constitution." App. to Pet. for Cert. 76–77.

After the Supreme Court of California denied discretionary review, Andrade filed a petition for a writ of habeas corpus in Federal District Court. The District Court denied his petition. The Ninth Circuit granted Andrade a certificate of appealability as to his claim that his sentence violated the Eighth Amendment, and subsequently reversed the judgment of the District Court. 270 F. 3d 743 (2001).

The Ninth Circuit first noted that it was reviewing Andrade's petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Applying its own precedent, the Ninth Circuit held that an unreasonable application of clearly established federal law occurs "when our independent review of the legal question 'leaves us with a "firm conviction" that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous—in other words that clear error occurred.'" 270 F. 3d, at 753 (alteration in original) (quoting *Van Tran* v. *Lindsey*, 212 F. 3d 1143, 1153–1154 (CA9 2000)).

The court then reviewed our three most recent major precedents in this area—*Rummel* v. *Estelle*, *supra*, *Solem* v. *Helm*, *supra*, and *Harmelin* v. *Michigan*, *supra*. The Ninth Circuit "follow[ed] the test prescribed by Justice Kennedy in *Harmelin*," concluding that "both *Rummel* and *Solem* remain good law and are instructive in *Harmelin*'s applica-

tion." 270 F. 3d, at 766. It then noted that the California Court of Appeal compared the facts of Andrade's case to the facts of *Rummel*, but not *Solem*. 270 F. 3d, at 766. The Ninth Circuit concluded that it should grant the writ of habeas corpus because the state court's "disregard for *Solem* results in an unreasonable application of clearly established Supreme Court law," and "is irreconcilable with . . . *Solem*," thus constituting "clear error." *Id.*, at 766–767.

Judge Sneed dissented in relevant part. He wrote that "[t]he sentence imposed in this case is not one of the 'exceedingly rare' terms of imprisonment prohibited by the Eighth Amendment's proscription against cruel and unusual punishment." *Id.*, at 767 (quoting *Harmelin* v. *Michigan*, *supra*, at 1001 (KENNEDY, J., concurring in part and concurring in judgment)). Under his view, the state court decision upholding Andrade's sentence was thus "not an unreasonable application of clearly established federal law." 270 F. 3d, at 772. We granted certiorari, 535 U. S. 969 (2002), and now reverse.

## II

Andrade's argument in this Court is that two consecutive terms of 25 years to life for stealing approximately $150 in videotapes is grossly disproportionate in violation of the Eighth Amendment. Andrade similarly maintains that the state court decision affirming his sentence is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1).

AEDPA circumscribes a federal habeas court's review of a state court decision. Section 2254 provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States."

The Ninth Circuit requires federal habeas courts to review the state court decision *de novo* before applying the AEDPA standard of review. See, *e. g.*, *Van Tran* v. *Lindsey*, *supra*, at 1154–1155; *Clark* v. *Murphy*, 317 F. 3d 1038, 1044, n. 3 (CA9 2003). We disagree with this approach. AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law. See *Weeks* v. *Angelone*, 528 U. S. 225 (2000). In this case, we do not reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim.

## III

### A

As a threshold matter here, we first decide what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). Andrade relies upon a series of precedents from this Court—*Rummel* v. *Estelle*, *supra*, *Solem* v. *Helm*, 463 U. S. 277 (1983), and *Harmelin* v. *Michigan*, 501 U. S. 957 (1991)—that he claims clearly establish a principle that his sentence is so grossly disproportionate that it violates the Eighth Amendment. Section 2254(d)(1)'s "clearly established" phrase "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). In other words, "clearly established Federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state

court renders its decision. See *id.*, at 405, 413; *Bell* v. *Cone*, 535 U. S. 685, 698 (2002). In most situations, the task of determining what we have clearly established will be straightforward. The difficulty with Andrade's position, however, is that our precedents in this area have not been a model of clarity. See *Harmelin* v. *Michigan*, 501 U. S., at 965 (opinion of SCALIA, J.); *id.*, at 996, 998 (KENNEDY, J., concurring in part and concurring in judgment). Indeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow. See *Ewing* v. *California*, *ante*, at 20–23.

B

Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as "clearly established" under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years.

Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality. In *Solem* (the case upon which Andrade relies most heavily), we stated: "It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not." 463 U. S., at 294 (footnote omitted). And in *Harmelin*, both JUSTICE KENNEDY and JUSTICE SCALIA repeatedly emphasized this lack of clarity: that "*Solem* was scarcely the expression of clear . . . constitutional law," 501 U. S., at 965 (opinion of SCALIA, J.), that in "adher[ing] to the narrow proportionality principle . . . our proportionality decisions have not been clear or consistent in all respects," *id.*, at 996 (KENNEDY, J., concurring in part and concurring in judgment), that "we lack clear objective standards to distinguish between sentences for different terms of years," *id.*, at 1001 (KENNEDY, J., concurring in part and concurring in judgment), and that the "precise contours" of the

proportionality principle "are unclear," *id.*, at 998 (KENNEDY, J., concurring in part and concurring in judgment).

Thus, in this case, the only relevant clearly established law amenable to the "contrary to" or "unreasonable application of" framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the "exceedingly rare" and "extreme" case. *Id.*, at 1001 (KENNEDY, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see also *Solem* v. *Helm*, *supra*, at 290; *Rummel* v. *Estelle*, 445 U. S., at 272.

## IV

The final question is whether the California Court of Appeal's decision affirming Andrade's sentence is "contrary to, or involved an unreasonable application of," this clearly established gross disproportionality principle.

First, a state court decision is "contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams* v. *Taylor*, *supra*, at 405–406; see also *Bell* v. *Cone*, *supra*, at 694. In terms of length of sentence and availability of parole, severity of the underlying offense, and the impact of recidivism, Andrade's sentence implicates factors relevant in both *Rummel* and *Solem*. Because *Harmelin* and *Solem* specifically stated that they did not overrule *Rummel*, it was not contrary to our clearly established law for the California Court of Appeal to turn to *Rummel* in deciding whether a sentence is grossly disproportionate. See *Harmelin*, *supra*, at 998 (KENNEDY, J., concurring in part and concurring in judgment); *Solem*, *supra*, at 288, n. 13, 303–304, n. 32. Indeed, *Harmelin* allows a state court to reasonably rely on *Rummel* in determining whether a sentence is grossly disproportionate. The California Court of Appeal's decision

was therefore not "contrary to" the governing legal principles set forth in our cases.

Andrade's sentence also was not materially indistinguishable from the facts in *Solem*. The facts here fall in between the facts in *Rummel* and the facts in *Solem*. *Solem* involved a sentence of life in prison without the possibility of parole. 463 U. S., at 279. The defendant in *Rummel* was sentenced to life in prison with the possibility of parole. 445 U. S., at 267. Here, Andrade retains the possibility of parole. *Solem* acknowledged that *Rummel* would apply in a "similar factual situation." 463 U. S., at 304, n. 32. And while this case resembles to some degree both *Rummel* and *Solem*, it is not materially indistinguishable from either. Cf. *Ewing* v. *California*, *ante*, at 40 (BREYER, J., dissenting) (recognizing a "twilight zone between *Solem* and *Rummel*"). Consequently, the state court did not "confron[t] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arriv[e] at a result different from our precedent." *Williams* v. *Taylor*, 529 U. S., at 406.[1]

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[1] JUSTICE SOUTER argues that the possibility of Andrade's receiving parole in 50 years makes this case similar to the facts in *Solem* v. *Helm*, 463 U. S. 277 (1983). *Post*, at 78–79 (dissenting opinion). Andrade's sentence, however, is also similar to the facts in *Rummel* v. *Estelle*, 445 U. S. 263 (1980), a case that is also "controlling." *Post*, at 78. Given the lack of clarity of our precedents in *Solem*, *Rummel*, and *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), we cannot say that the state court's affirmance of two sentences of 25 years to life in prison was contrary to our clearly established precedent. And to the extent that JUSTICE SOUTER is arguing that the similarity of *Solem* to this case entitles Andrade to relief under the unreasonable application prong of § 2254(d), we reject his analysis for the reasons given *infra*, at 76–77. Moreover, it is not true that Andrade's "sentence can only be understood as punishment for the total amount he stole." *Post*, at 78. To the contrary, California law specifically provides that *each* violation of Cal. Penal Code Ann. § 666 (West Supp. 2002) triggers a separate application of the three strikes law, if the different felony counts are "not arising from the same set of operative facts." § 667(c)(6) (West 1999); see also § 667(e)(2)(B). Here, Andrade was sentenced to two consecutive terms under California law precisely because the two thefts

Second, "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*, at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id.*, at 410, 412. The state court's application of clearly established law must be objectively unreasonable. *Id.*, at 409.

The Ninth Circuit made an initial error in its "unreasonable application" analysis. In *Van Tran* v. *Lindsey*, 212 F. 3d, at 1152–1154, the Ninth Circuit defined "objectively unreasonable" to mean "clear error." These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. See *Williams* v. *Taylor*, *supra*, at 410; *Bell* v. *Cone*, 535 U. S., at 699.

It is not enough that a federal habeas court, in its "independent review of the legal question," is left with a "'firm conviction'" that the state court was "'erroneous.'" 270 F. 3d, at 753 (quoting *Van Tran* v. *Lindsey*, *supra*, at 1153–1154). We have held precisely the opposite: "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that

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of two different Kmart stores occurring two weeks apart were two distinct crimes.

JUSTICE SOUTER, relying on *Robinson* v. *California*, 370 U. S. 660 (1962), also argues that in this case, it is "unrealistic" to think that a sentence of 50 years to life for Andrade is not equivalent to life in prison without parole. *Post*, at 79. This argument, however, misses the point. Based on our precedents, the state court decision was not contrary to, or an unreasonable application of, our clearly established law. Moreover, JUSTICE SOUTER's position would treat a sentence of life without parole for the 77-year-old person convicted of murder as equivalent to a sentence of life with the possibility of parole in 10 years for the same person convicted of the same crime. Two different sentences do not become materially indistinguishable based solely upon the age of the persons sentenced.

court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams* v. *Taylor*, 529 U. S., at 411. Rather, that application must be objectively unreasonable. *Id.*, at 409; *Bell* v. *Cone*, *supra*, at 699; *Woodford* v. *Visciotti*, 537 U. S. 19, 27 (2002) *(per curiam)*.

Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced. See, *e. g.*, *Williams* v. *Taylor*, *supra*, at 407 (noting that it is "an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case"). Here, however, the governing legal principle gives legislatures broad discretion to fashion a sentence that fits within the scope of the proportionality principle—the "precise contours" of which "are unclear." *Harmelin* v. *Michigan*, 501 U. S., at 998 (KENNEDY, J., concurring in part and concurring in judgment). And it was not objectively unreasonable for the California Court of Appeal to conclude that these "contours" permitted an affirmance of Andrade's sentence.

Indeed, since *Harmelin*, several Members of this Court have expressed "uncertainty" regarding the application of the proportionality principle to the California three strikes law. *Riggs* v. *California*, 525 U. S. 1114, 1115 (1999) (STEVENS, J., joined by SOUTER and GINSBURG, JJ., respecting denial of certiorari) ("[T]here is some uncertainty about how our cases dealing with the punishment of recidivists should apply"); see also *id.*, at 1116 ("It is thus unclear how, if at all, a defendant's criminal record beyond the requisite two prior 'strikes' . . . affects the constitutionality of his sentence"); cf. *Durden* v. *California*, 531 U. S. 1184 (2001) (SOUTER, J., joined by BREYER, J., dissenting from denial of certiorari) (arguing that the Court should hear the three strikes gross

disproportionality issue on direct review because of the "potential for disagreement over application of" AEDPA).[2]

The gross disproportionality principle reserves a constitutional violation for only the extraordinary case. In applying this principle for § 2254(d)(1) purposes, it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of 25 years to life in prison.

V

The judgment of the United States Court of Appeals for the Ninth Circuit, accordingly, is reversed.

*It is so ordered.*

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

The application of the Eighth Amendment prohibition against cruel and unusual punishment to terms of years is articulated in the "clearly established" principle acknowledged by the Court: a sentence grossly disproportionate to the offense for which it is imposed is unconstitutional. See *ante*, at 72–73; *Harmelin* v. *Michigan*, 501 U. S. 957 (1991); *Solem* v. *Helm*, 463 U. S. 277 (1983); *Rummel* v. *Estelle*, 445 U. S. 263 (1980). For the reasons set forth in JUSTICE BREYER's dissent in *Ewing* v. *California*, *ante*, at 35, which I joined, Andrade's sentence cannot survive Eighth Amendment review. His criminal history is less grave than Ewing's, and yet he received a prison term twice as long for a less serious triggering offense. To be sure, this is a habeas case and a prohibition couched in terms as general as gross

[2] JUSTICE SOUTER would hold that Andrade's sentence also violates the unreasonable application prong of § 2254(d)(1). *Post*, at 79–82. His reasons, however, do not change the "uncertainty" of the scope of the proportionality principle. We cannot say that the state court decision was an unreasonable application of this principle.

disproportion necessarily leaves state courts with much leeway under the statutory criterion that conditions federal relief upon finding that a state court unreasonably applied clear law, see 28 U. S. C. § 2254(d). This case nonetheless presents two independent reasons for holding that the disproportionality review by the state court was not only erroneous but unreasonable, entitling Andrade to relief. I respectfully dissent accordingly.

The first reason is the holding in *Solem*, which happens to be our most recent effort at proportionality review of recidivist sentencing, the authority of which was not left in doubt by *Harmelin*, see 501 U. S., at 998. Although *Solem* is important for its instructions about applying objective proportionality analysis, see 463 U. S., at 290–292, the case is controlling here because it established a benchmark in applying the general principle. We specifically held that a sentence of life imprisonment without parole for uttering a $100 "no account" check was disproportionate to the crime, even though the defendant had committed six prior nonviolent felonies. In explaining our proportionality review, we contrasted the result with *Rummel*'s on the ground that the life sentence there had included parole eligibility after 12 years, *Solem*, 463 U. S., at 297.

The facts here are on all fours with those of *Solem* and point to the same result. *Id.*, at 279–281. Andrade, like the defendant in *Solem*, was a repeat offender who committed theft of fairly trifling value, some $150, and their criminal records are comparable, including burglary (though Andrade's were residential), with no violent crimes or crimes against the person. The respective sentences, too, are strikingly alike. Although Andrade's petty thefts occurred on two separate occasions, his sentence can only be understood as punishment for the total amount he stole. The two thefts were separated by only two weeks; they involved the same victim; they apparently constituted parts of a single, continuing effort to finance drug sales; their seriousness is measured

by the dollar value of the things taken; and the government charged both thefts in a single indictment. Cf. United States Sentencing Commission, Guidelines Manual §3D1.2 (Nov. 2002) (grouping temporally separated counts as one offense for sentencing purposes). The state court accordingly spoke of his punishment collectively as well, carrying a 50-year minimum before parole eligibility, see App. to Pet. for Cert. 77 ("[W]e cannot say the sentence of 50 years to life at issue in this case is disproportionate"), and because Andrade was 37 years old when sentenced, the substantial 50-year period amounts to life without parole. *Solem*, *supra*, at 287 (when considering whether a punishment is cruel or unusual "'the question cannot be considered in the abstract'" (quoting *Robinson* v. *California*, 370 U. S. 660, 667 (1962))); cf. *Rummel*, *supra*, at 280–281 (defendant's eligibility for parole in 12 years informs a proper assessment of his cruel and unusual punishment claim). The results under the Eighth Amendment should therefore be the same in each case. The only ways to reach a different conclusion are to reject the practical equivalence of a life sentence without parole and one with parole eligibility at 87, see *ante*, at 74 ("Andrade retains the possibility of parole"), or to discount the continuing authority of *Solem*'s example, as the California court did, see App. to Pet. for Cert. 76 ("[T]he current validity of the Solem proportionality analysis is questionable"). The former is unrealistic; an 87-year-old man released after 50 years behind bars will have no real life left, if he survives to be released at all. And the latter, disparaging *Solem* as a point of reference on Eighth Amendment analysis, is wrong as a matter of law.

The second reason that relief is required even under the §2254(d) unreasonable application standard rests on the alternative way of looking at Andrade's 50-year sentence as two separate 25-year applications of the three-strikes law, and construing the challenge here as going to the second, consecutive 25-year minimum term triggered by a petty

theft.[1] To understand why it is revealing to look at the sentence this way, it helps to recall the basic difficulty inherent in proportionality review. We require the comparison of offense and penalty to disclose a truly gross disproportionality before the constitutional limit is passed, in large part because we believe that legislatures are institutionally equipped with better judgment than courts in deciding what penalty is merited by particular behavior. *Solem*, *supra*, at 290. In this case, however, a court is substantially aided in its reviewing function by two determinations made by the State itself.

The first is the State's adoption of a particular penalogical theory as its principal reason for shutting a three-strikes defendant away for at least 25 years. Although the State alludes in passing to retribution or deterrence (see Brief for Petitioner 16, 24; Reply Brief for Petitioner 10), its only serious justification for the 25-year minimum treats the sentence as a way to incapacitate a given defendant from further crime; the underlying theory is the need to protect the public from a danger demonstrated by the prior record of violent and serious crime. See Brief for Petitioner 17 ("significant danger to society such that [defendant] must be imprisoned for no less than twenty-five years to life"); *id.*, at 21 ("statute carefully tailored to address . . . defendants that pose the greatest danger"); *id.*, at 23 ("isolating such a defendant for a substantial period of time"); Reply Brief for Petitioner 11 ("If Andrade's reasoning were accepted, however, California would be precluded from incapacitating him"). See also *Rummel*, 445 U. S., at 284 ("purpose of a recidivist

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[1] This point is independent of the fact, recognized by the Court, *ante*, at 68, that it remains open to Andrade to appeal his sentence under *People* v. *Garcia*, 20 Cal. 4th 490, 976 P. 2d 831 (1999) (holding trial court may dismiss strikes on a count-by-count basis; such discretion is consistent with mandatory consecutive sentencing provision).

statute . . . [is] to segregate").[2] The State, in other words has not chosen 25 to life because of the inherent moral or social reprehensibility of the triggering offense in isolation; the triggering offense is treated so seriously, rather, because of its confirmation of the defendant's danger to society and the need to counter his threat with incapacitation. As to the length of incapacitation, the State has made a second helpful determination, that the public risk or danger posed by someone with the specified predicate record is generally addressed by incapacitation for 25 years before parole eligibility. Cal. Penal Code Ann. § 667(e)(2)(A)(ii) (West 1999). The three-strikes law, in sum, responds to a condition of the defendant shown by his prior felony record, his danger to society, and it reflects a judgment that 25 years of incapacitation prior to parole eligibility is appropriate when a defendant exhibiting such a condition commits another felony.

Whether or not one accepts the State's choice of penalogical policy as constitutionally sound, that policy cannot rea-

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[2] Implicit in the distinction between future dangerousness and repunishment for prior crimes is the notion that the triggering offense must, within some degree, be substantial enough to bear the weight of the sentence it elicits. As triggering offenses become increasingly minor and recidivist sentences grow, the sentences advance toward double jeopardy violations. When defendants are parking violators or slow readers of borrowed library books, there is not much room for belief, even in light of a past criminal record, that the State is permanently incapacitating the defendant because of future dangerousness rather than resentencing for past offenses.

That said, I do not question the legitimacy of repeatedly sentencing a defendant in light of his criminal record: the Federal Sentencing Guidelines provide a prime example of how a sentencing scheme may take into account a defendant's criminal history without resentencing a defendant for past convictions, *Witte* v. *United States*, 515 U. S. 389, 403 (1995) (the triggering offense determines the range of possible sentences, and the past criminal record affects an enhancement of that sentence). The point is merely that the triggering offense must reasonably support the weight of even the harshest possible sentences.

sonably justify the imposition of a consecutive 25-year minimum for a second minor felony committed soon after the first triggering offense. Andrade did not somehow become twice as dangerous to society when he stole the second handful of videotapes; his dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation. Since the defendant's condition has not changed between the two closely related thefts, the incapacitation penalty is not open to the simple arithmetic of multiplying the punishment by two, without resulting in gross disproportion even under the State's chosen benchmark. Far from attempting a novel penal theory to justify doubling the sentence, the California Court of Appeal offered no comment at all as to the particular penal theory supporting such a punishment. App. to Pet. for Cert. 76–79. Perhaps even more tellingly, no one could seriously argue that the second theft of videotapes provided any basis to think that Andrade would be so dangerous after 25 years, the date on which the consecutive sentence would begin to run, as to require at least 25 years more. I know of no jurisdiction that would add 25 years of imprisonment simply to reflect the fact that the two temporally related thefts took place on two separate occasions, and I am not surprised that California has found no such case, not even under its three-strikes law. Tr. of Oral Arg. 52 (State's counsel acknowledging "I have no reference to any 50-year-to-life sentences based on two convictions"). In sum, the argument that repeating a trivial crime justifies doubling a 25-year minimum incapacitation sentence based on a threat to the public does not raise a seriously debatable point on which judgments might reasonably differ. The argument is irrational, and the state court's acceptance of it in response to a facially gross disproportion between triggering offense and penalty was unreasonable within the meaning of § 2254(d).

This is the rare sentence of demonstrable gross disproportionality, as the California Legislature may well have recognized when it specifically provided that a prosecutor may move to dismiss or strike a prior felony conviction "in the furtherance of justice." Cal. Penal Code Ann. § 667(f)(2) (West 1999). In this case, the statutory safeguard failed, and the state court was left to ensure that the Eighth Amendment prohibition on grossly disproportionate sentences was met. If Andrade's sentence is not grossly disproportionate, the principle has no meaning. The California court's holding was an unreasonable application of clearly established precedent.

Syllabus

# SMITH ET AL. *v.* DOE ET AL.

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

No. 01–729. Argued November 13, 2002—Decided March 5, 2003

Under the Alaska Sex Offender Registration Act (Act), any sex offender or child kidnaper incarcerated in the State must register with the Department of Corrections within 30 days before his release, providing his name, address, and other specified information. If the individual is at liberty, he must register with local law enforcement authorities within a working day of his conviction or of entering the State. If he was convicted of a single, nonaggravated sex crime, the offender must provide annual verification of the submitted information for 15 years. If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. The offender's information is forwarded to the Department of Public Safety, which maintains a central registry of sex offenders. Some of the data, such as fingerprints, driver's license number, anticipated change of address, and whether the offender has had medical treatment afterwards, are kept confidential. The offender's name, aliases, address, photograph, physical description, description, license and identification numbers of motor vehicles, place of employment, date of birth, crime, date and place of conviction, length and conditions of sentence, and a statement as to whether the offender is in compliance with the Act's update requirements or cannot be located are, however, published on the Internet. Both the Act's registration and notification requirements are retroactive.

Respondents were convicted of aggravated sex offenses. Both were released from prison and completed rehabilitative programs for sex offenders. Although convicted before the Act's passage, respondents are covered by it. After the initial registration, they are required to submit quarterly verifications and notify the authorities of any changes. Both respondents, along with the wife of one of them, also a respondent here, brought this action under 42 U. S. C. § 1983, seeking to declare the Act void as to them under, *inter alia*, the *Ex Post Facto* Clause, U. S. Const., Art. I, § 10, cl. 1. The District Court granted petitioners summary judgment. The Ninth Circuit disagreed in relevant part, holding that, because its effects were punitive, the Act violates the *Ex Post Facto* Clause.

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*Held:* Because the Alaska Sex Offender Registration Act is nonpunitive, its retroactive application does not violate the *Ex Post Facto* Clause. Pp. 92–106.

(a) The determinative question is whether the legislature meant to establish "civil proceedings." *Kansas* v. *Hendricks*, 521 U. S. 346, 361. If the intention was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, the Court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. *E. g.*, *ibid.* Because the Court ordinarily defers to the legislature's stated intent, *ibid.*, only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty. See, *e. g.*, *ibid.* P. 92.

(b) The Alaska Legislature's intent was to create a civil, nonpunitive regime. The Court first considers the statute's text and structure, *Flemming* v. *Nestor*, 363 U. S. 603, 617, asking whether the legislature indicated either expressly or impliedly a preference for one label or the other, *Hudson* v. *United States*, 522 U. S. 93, 99. Here, the statutory text states the legislature's finding that sex offenders pose a high risk of reoffending, identifies protecting the public from sex offenders as the law's primary interest, and declares that release of certain information about sex offenders to public agencies and the public will assist in protecting the public safety. This Court has already determined that an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective. *Hendricks*, 521 U. S., at 363. Here, as in *Hendricks*, nothing on the statute's face suggests that the legislature sought to create anything other than a civil scheme designed to protect the public from harm. *Id.*, at 361. The contrary conclusion is not required by the Alaska Constitution's inclusion of the need to protect the public as one of the purposes of criminal administration. Where a legislative restriction is an incident of the State's power to protect the public health and safety, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment. *E. g.*, *Flemming* v. *Nestor*, *supra*, at 616. Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent, see, *e. g.*, *Hendricks*, 521 U. S., at 361, but are open to debate in this case. The Act's notification provisions are codified in the State's Health, Safety, and Housing Code, confirming the conclusion that the statute was intended as a nonpunitive regulatory measure. Cf. *ibid.* The fact that the Act's registration provisions are codified in the State's Code of Criminal Procedure is not

dispositive, since a statute's location and labels do not by themselves transform a civil remedy into a criminal one. See *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 364–365, and n. 6. The Code of Criminal Procedure contains many other provisions that do not involve criminal punishment. The Court's conclusion is not altered by the fact that the Act's implementing procedural mechanisms require the trial court to inform the defendant of the Act's requirements and, if possible, the period of registration required. That conclusion is strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Department of Public Safety, an agency charged with enforcing both criminal *and* civil regulatory laws. Also telling is the fact that the Act does not require the procedures adopted to contain any safeguards associated with the criminal process. By contemplating distinctly civil procedures, the legislature indicated clearly that it intended a civil, not a criminal, sanction. *United States* v. *Ursery*, 518 U. S. 267, 289. Pp. 92–96.

(c) Respondents cannot show, much less by the clearest proof, that the Act's effects negate Alaska's intention to establish a civil regulatory scheme. In analyzing the effects, the Court refers to the seven factors noted in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169, as a useful framework. First, the regulatory scheme, in its necessary operation, has not been regarded in the Nation's history and traditions as a punishment. The fact that sex offender registration and notification statutes are of fairly recent origin suggests that the Act was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing. Respondents' argument that the Act, particularly its notification provisions, resembles shaming punishments of the colonial period is unpersuasive. In contrast to those punishments, the Act's stigma results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. The fact that Alaska posts offender information on the Internet does not alter this conclusion. Second, the Act does not subject respondents to an affirmative disability or restraint. It imposes no physical restraint, and so does not resemble imprisonment, the paradigmatic affirmative disability or restraint. *Hudson*, 522 U. S., at 104. Moreover, its obligations are less harsh than the sanctions of occupational debarment, which the Court has held to be nonpunitive. See, *e. g.*, *ibid.* Contrary to the Ninth Circuit's assertion, the record contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred. Also unavailing is that court's assertion that the periodic update requirement imposed an affirmative disability. The

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Act, on its face, does not require these updates to be made in person. The holding that the registration system is parallel to probation or supervised release is rejected because, in contrast to probationers and supervised releasees, offenders subject to the Act are free to move where they wish and to live and work as other citizens, with no supervision. While registrants must inform the authorities after they change their facial features, borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. Third, the Act does not promote the traditional aims of punishment. That it might deter future crimes is not dispositive. See, *e. g.*, *id.*, at 105. Moreover, the Ninth Circuit erred in concluding that the Act's registration obligations were retributive. While the Act does differentiate between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense, these broad categories and the reporting requirement's corresponding length are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective. Fourth, the Act has a rational connection to a legitimate nonpunitive purpose, public safety, which is advanced by alerting the public to the risk of sex offenders in their community. That the Act may not be narrowly drawn to accomplish the stated purpose is not dispositive, since such imprecision does not suggest that the Act's nonpunitive purpose is a "sham or mere pretext." *Hendricks*, *supra*, at 371 (KENNEDY, J., concurring). Fifth, the regulatory scheme is not excessive with respect to the Act's purpose. The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not render the Act punitive. See, *e. g.*, *Hawker* v. *New York*, 170 U. S. 189, 197. *Hendricks*, *supra*, at 357–368, 364, distinguished. Moreover, the wide dissemination of offender information does not render the Act excessive, given the general mobility of the population. The question here is not whether the legislature has made the best choice possible to address the problem it seeks to remedy, but whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard. Finally, the two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case. Pp. 97–106.

259 F. 3d 979, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 106. SOUTER, J., filed an opinion concurring in the judgment, *post*, p. 107. STEVENS, J., filed a dissenting opinion, *post*,

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p. 110. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post,* p. 114.

*John G. Roberts, Jr.*, argued the cause for petitioners. With him on the briefs were *Jonathan S. Franklin*, *Catherine E. Stetson*, *Cynthia M. Cooper*, and *Bruce M. Botelho*, Attorney General of Alaska.

*Solicitor General Olson* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McCallum*, *Deputy Solicitor General Dreeben*, *Patricia A. Millett*, *Leonard Schaitman*, *Mark W. Pennak*, and *Wendy M. Keats.*

*Darryl L. Thompson* argued the cause for respondents. With him on the brief was *Verne E. Rupright.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California *ex rel.* Bill Lockyer by *Mr. Lockyer,* Attorney General of California, *Robert R. Anderson,* Chief Assistant Attorney General, *Jo Graves,* Senior Assistant Attorney General, *Stan Cross,* Supervising Deputy Attorney General, *Janet E. Neeley,* Deputy Attorney General, *Ken Salazar,* Attorney General of Colorado, *Alan Gilbert,* Solicitor General, *Donald S. Quick,* Deputy Attorney General, *Matthew S. Holman,* Assistant Attorney General, and *Robert R. Rigsby, C*orporation Counsel of the District of Columbia, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *Carla J. Stovall* of Kansas, *Albert B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *David Samson* of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Anabelle Rodríguez* of Puerto Rico, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Iver A. Stridiron* of the Virgin Islands, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.,* of

JUSTICE KENNEDY delivered the opinion of the Court.

The Alaska Sex Offender Registration Act requires convicted sex offenders to register with law enforcement authorities, and much of the information is made public. We must decide whether the registration requirement is a retroactive punishment prohibited by the *Ex Post Facto* Clause.

## I

### A

The State of Alaska enacted the Alaska Sex Offender Registration Act (Act) on May 12, 1994. 1994 Alaska Sess. Laws ch. 41. Like its counterparts in other States, the Act is termed a "Megan's Law." Megan Kanka was a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children. The crime gave impetus to laws for mandatory registration of sex offenders and corresponding community notification. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, title 17, 108 Stat. 2038, as amended, 42 U. S. C. § 14071, which conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets

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West Virginia, and *James E. Doyle* of Wisconsin; and for the Council of State Governments et al. by *Richard Ruda* and *James I. Crowley.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Lawrence S. Lustberg*, *Steven R. Shapiro*, and *Joshua L. Dratel;* for Citizens for Penal Reform, Inc., by *W. Andrew McCullough;* for the Electronic Privacy Information Center by *Marc Rotenberg;* for the Massachusetts Committee for Public Counsel Services by *Carol A. Donovan;* for the Office of the Public Defender for the State of New Jersey et al. by *Peter A. Garcia*, *Michael Z. Buncher*, *Brian J. Neff*, *Richard S. Lehrich*, and *Edward Barocas;* and for the Public Defender Service for the District of Columbia by *James W. Klein*, *Samia A. Fam*, and *Corinne A. Beckwith.*

*Lucy A. Dalglish* and *Gregg P. Leslie* filed a brief for the Reporters Committee for Freedom of the Press as *amicus curiae.*

minimum standards for state programs. By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law.

The Alaska law, which is our concern in this case, contains two components: a registration requirement and a notification system. Both are retroactive. 1994 Alaska Sess. Laws ch. 41, § 12(a). The Act requires any "sex offender or child kidnapper who is physically present in the state" to register, either with the Department of Corrections (if the individual is incarcerated) or with the local law enforcement authorities (if the individual is at liberty). Alaska Stat. §§ 12.63.010(a), (b) (2000). Prompt registration is mandated. If still in prison, a covered sex offender must register within 30 days before release; otherwise he must do so within a working day of his conviction or of entering the State. § 12.63.010(a). The sex offender must provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history. § 12.63.010(b)(1). He must permit the authorities to photograph and fingerprint him. § 12.63.010(b)(2).

If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years. §§ 12.63.010(d)(1), 12.63.020(a)(2). If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. §§ 12.63.010(d)(2), 12.63.020(a)(1). The offender must notify his local police department if he moves. § 12.63.010(c). A sex offender who knowingly fails to comply with the Act is subject to criminal prosecution. §§ 11.56.835, 11.56.840.

The information is forwarded to the Alaska Department of Public Safety, which maintains a central registry of sex offenders. § 18.65.087(a). Some of the data, such as fingerprints, driver's license number, anticipated change of address, and whether the offender has had medical treat-

ment afterwards, are kept confidential. §§ 12.63.010(b), 18.65.087(b). The following information is made available to the public: "the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements . . . or cannot be located." § 18.65.087(b). The Act does not specify the means by which the registry information must be made public. Alaska has chosen to make most of the nonconfidential information available on the Internet.

B

Respondents John Doe I and John Doe II were convicted of sexual abuse of a minor, an aggravated sex offense. John Doe I pleaded *nolo contendere* after a court determination that he had sexually abused his daughter for two years, when she was between the ages of 9 and 11; John Doe II entered a *nolo contendere* plea to sexual abuse of a 14-year-old child. Both were released from prison in 1990 and completed rehabilitative programs for sex offenders. Although convicted before the passage of the Act, respondents are covered by it. After the initial registration, they are required to submit quarterly verifications and notify the authorities of any changes. Both respondents, along with respondent Jane Doe, wife of John Doe I, brought an action under Rev. Stat. § 1979, 42 U. S. C. § 1983, seeking to declare the Act void as to them under the *Ex Post Facto* Clause of Article I, § 10, cl. 1, of the Constitution and the Due Process Clause of § 1 of the Fourteenth Amendment. The United States District Court for the District of Alaska granted summary judgment for petitioners. In agreement with the District Court, the Court of Appeals for the Ninth Circuit determined the state legislature had intended the Act to be a nonpunitive, civil

regulatory scheme; but, in disagreement with the District Court, it held the effects of the Act were punitive despite the legislature's intent. In consequence, it held the Act violates the *Ex Post Facto* Clause. *Doe I* v. *Otte*, 259 F. 3d 979 (2001). We granted certiorari. 534 U. S. 1126 (2002).

## II

This is the first time we have considered a claim that a sex offender registration and notification law constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause. The framework for our inquiry, however, is well established. We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas* v. *Hendricks*, 521 U. S. 346, 361 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Ibid.* (quoting *United States* v. *Ward*, 448 U. S. 242, 248–249 (1980)). Because we "ordinarily defer to the legislature's stated intent," *Hendricks*, *supra*, at 361, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *Hudson* v. *United States*, 522 U. S. 93, 100 (1997) (quoting *Ward*, *supra*, at 249); see also *Hendricks*, *supra*, at 361; *United States* v. *Ursery*, 518 U. S. 267, 290 (1996); *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 365 (1984).

### A

Whether a statutory scheme is civil or criminal "is first of all a question of statutory construction." *Hendricks*, *supra*, at 361 (internal quotation marks omitted); see also *Hudson*, *supra*, at 99. We consider the statute's text and its structure to determine the legislative objective. *Flemming* v. *Nestor*, 363 U. S. 603, 617 (1960). A conclusion that the leg-

islature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it.

The courts "must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson*, *supra*, at 99 (internal quotation marks omitted). Here, the Alaska Legislature expressed the objective of the law in the statutory text itself. The legislature found that "sex offenders pose a high risk of reoffending," and identified "protecting the public from sex offenders" as the "primary governmental interest" of the law. 1994 Alaska Sess. Laws ch. 41, § 1. The legislature further determined that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." *Ibid.* As we observed in *Hendricks*, where we examined an *ex post facto* challenge to a postincarceration confinement of sex offenders, an imposition of restrictive measures on sex offenders adjudged to be dangerous is "a legitimate nonpunitive governmental objective and has been historically so regarded." 521 U. S., at 363. In this case, as in *Hendricks*, "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." *Id.*, at 361.

Respondents seek to cast doubt upon the nonpunitive nature of the law's declared objective by pointing out that the Alaska Constitution lists the need for protecting the public as one of the purposes of criminal administration. Brief for Respondents 23 (citing Alaska Const., Art. I, § 12). As the Court stated in *Flemming* v. *Nestor*, rejecting an *ex post facto* challenge to a law terminating benefits to deported aliens, where a legislative restriction "is an incident of the State's power to protect the health and safety of its citizens," it will be considered "as evidencing an intent to exercise that

regulatory power, and not a purpose to add to the punishment." 363 U. S., at 616 (citing *Hawker* v. *New York*, 170 U. S. 189 (1898)). The Court repeated this principle in *89 Firearms*, upholding a statute requiring forfeiture of unlicensed firearms against a double jeopardy challenge. The Court observed that, in enacting the provision, Congress "'was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.'" 465 U. S., at 364 (quoting *Huddleston* v. *United States*, 415 U. S. 814, 824 (1974)). This goal was "plainly more remedial than punitive." 465 U. S., at 364. These precedents instruct us that even if the objective of the Act is consistent with the purposes of the Alaska criminal justice system, the State's pursuit of it in a regulatory scheme does not make the objective punitive.

Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent. See *Hendricks*, *supra*, at 361; *Hudson*, *supra*, at 103; *89 Firearms*, *supra*, at 363. In this case these factors are open to debate. The notification provisions of the Act are codified in the State's "Health, Safety, and Housing Code," § 18, confirming our conclusion that the statute was intended as a nonpunitive regulatory measure. Cf. *Hendricks*, *supra*, at 361 (the State's "objective to create a civil proceeding is evidenced by its placement of the Act within the [State's] probate code, instead of the criminal code" (citations omitted)). The Act's registration provisions, however, are codified in the State's criminal procedure code, and so might seem to point in the opposite direction. These factors, though, are not dispositive. The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one. In *89 Firearms*, the Court held a forfeiture provision to be a civil sanction even though the authorizing statute was in the criminal code. 465 U. S., at 364–365.

The Court rejected the argument that the placement demonstrated Congress' "intention to create an additional criminal sanction," observing that "both criminal and civil sanctions may be labeled 'penalties.'" *Id.*, at 364, n. 6.

The same rationale applies here. Title 12 of Alaska's Code of Criminal Procedure (where the Act's registration provisions are located) contains many provisions that do not involve criminal punishment, such as civil procedures for disposing of recovered and seized property, Alaska Stat. § 12.36.010 *et seq.* (2000); laws protecting the confidentiality of victims and witnesses, § 12.61.010 *et seq.;* laws governing the security and accuracy of criminal justice information, § 12.62.110 *et seq.;* laws governing civil postconviction actions, § 12.72.010 *et seq.;* and laws governing actions for writs of habeas corpus, § 12.75.010 *et seq.*, which under Alaska law are "independent civil proceeding[s]," *State* v. *Hannagan*, 559 P. 2d 1059, 1063 (Alaska 1977). Although some of these provisions relate to criminal administration, they are not in themselves punitive. The partial codification of the Act in the State's criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive.

The procedural mechanisms to implement the Act do not alter our conclusion. After the Act's adoption Alaska amended its Rules of Criminal Procedure concerning the acceptance of pleas and the entering of criminal judgments. The rule on pleas now requires the court to "infor[m] the defendant in writing of the requirements of [the Act] and, if it can be determined by the court, the period of registration required." Alaska Rule Crim. Proc. 11(c)(4) (2002). Similarly, the written judgments for sex offenses and child kidnapings "must set out the requirements of [the Act] and, if it can be determined by the court, whether that conviction will require the offender or kidnapper to register for life or a lesser period." Alaska Stat. § 12.55.148(a) (2000).

The policy to alert convicted offenders to the civil consequences of their criminal conduct does not render the conse-

quences themselves punitive. When a State sets up a regulatory scheme, it is logical to provide those persons subject to it with clear and unambiguous notice of the requirements and the penalties for noncompliance. The Act requires registration either before the offender's release from confinement or within a day of his conviction (if the offender is not imprisoned). Timely and adequate notice serves to apprise individuals of their responsibilities and to ensure compliance with the regulatory scheme. Notice is important, for the scheme is enforced by criminal penalties. See §§ 11.56.835, 11.56.840. Although other methods of notification may be available, it is effective to make it part of the plea colloquy or the judgment of conviction. Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.

Our conclusion is strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety, §§ 12.63.020(b), 18.65.087(d)—an agency charged with enforcement of both criminal *and* civil regulatory laws. See, *e. g.*, § 17.30.100 (enforcement of drug laws); § 18.70.010 (fire protection); § 28.05.011 (motor vehicles and road safety); § 44.41.020 (protection of life and property). The Act itself does not require the procedures adopted to contain any safeguards associated with the criminal process. That leads us to infer that the legislature envisioned the Act's implementation to be civil and administrative. By contemplating "distinctly civil procedures," the legislature "indicate[d] clearly that it intended a civil, not a criminal sanction." *Ursery*, 518 U. S., at 289 (internal quotation marks omitted; alteration in original).

We conclude, as did the District Court and the Court of Appeals, that the intent of the Alaska Legislature was to create a civil, nonpunitive regime.

B

In analyzing the effects of the Act we refer to the seven factors noted in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963), as a useful framework. These factors, which migrated into our *ex post facto* case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses. See *id.*, at 168–169, and nn. 22–28. Because the *Mendoza-Martinez* factors are designed to apply in various constitutional contexts, we have said they are "neither exhaustive nor dispositive," *United States* v. *Ward*, 448 U. S., at 249; *89 Firearms*, 465 U. S., at 365, n. 7, but are "useful guideposts," *Hudson*, 522 U. S., at 99. The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

A historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such. The Court of Appeals observed that the sex offender registration and notification statutes "are of fairly recent origin," 259 F. 3d, at 989, which suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing. Respondents argue, however, that the Act—and, in particular, its notification provisions—resemble shaming punishments of the colonial period. Brief for Respondents 33–34 (citing A. Earle, Curious Punishments of Bygone Days 1–2 (1896)).

Some colonial punishments indeed were meant to inflict public disgrace. Humiliated offenders were required "to stand in public with signs cataloguing their offenses." Hirsch, From Pillory to Penitentiary: The Rise of Criminal

Incarceration in Early Massachusetts, 80 Mich. L. Rev. 1179, 1226 (1982); see also L. Friedman, Crime and Punishment in American History 38 (1993). At times the labeling would be permanent: A murderer might be branded with an "M," and a thief with a "T." R. Semmes, Crime and Punishment in Early Maryland 35 (1938); see also Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L. Rev. 1880, 1913 (1991). The aim was to make these offenders suffer "permanent stigmas, which in effect cast the person out of the community." *Ibid.;* see also Friedman, *supra*, at 40; Hirsch, *supra*, at 1228. The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one. T. Blomberg & K. Lucken, American Penology: A History of Control 30–31 (2000). Respondents contend that Alaska's compulsory registration and notification resemble these historical punishments, for they publicize the crime, associate it with his name, and, with the most serious offenders, do so for life.

Any initial resemblance to early punishments is, however, misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. See Earle, *supra*, at 20, 35–36, 51–52; Massaro, *supra*, at 1912–1924; Semmes, *supra*, at 39–40; Blomberg & Lucken, *supra*, at 30–31. By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the con-

trary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

We next consider whether the Act subjects respondents to an "affirmative disability or restraint." *Mendoza-Martinez*, *supra*, at 168. Here, we inquire how the effects of the

Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.

The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint. *Hudson*, 522 U. S., at 104. The Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive. See *ibid.* (forbidding further participation in the banking industry); *De Veau* v. *Braisted*, 363 U. S. 144 (1960) (forbidding work as a union official); *Hawker* v. *New York*, 170 U. S. 189 (1898) (revocation of a medical license). The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.

The Court of Appeals sought to distinguish *Hawker* and cases which have followed it on the grounds that the disability at issue there was specific and "narrow," confined to particular professions, whereas "the procedures employed under the Alaska statute are likely to make [respondents] *completely unemployable*" because "employers will not want to risk loss of business when the public learns that they have hired sex offenders." 259 F. 3d, at 988. This is conjecture. Landlords and employers could conduct background checks on the criminal records of prospective employees or tenants even with the Act not in force. The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords. The Court of Appeals identified only one incident from the 7-year history of Alaska's law where a sex offender suffered community hostility and damage to his business after the information he submitted to the registry became public. *Id.*, at 987–988. This could have occurred in any event, because the information about the individual's conviction was already in the public domain.

Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant.

The Court of Appeals reasoned that the requirement of periodic updates imposed an affirmative disability. In reaching this conclusion, the Court of Appeals was under a misapprehension, albeit one created by the State itself during the argument below, that the offender had to update the registry in person. *Id.*, at 984, n. 4. The State's representation was erroneous. The Alaska statute, on its face, does not require these updates to be made in person. And, as respondents conceded at the oral argument before us, the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act. Tr. of Oral Arg. 26–28.

The Court of Appeals held that the registration system is parallel to probation or supervised release in terms of the restraint imposed. 259 F. 3d, at 987. This argument has some force, but, after due consideration, we reject it. Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. See generally *Johnson* v. *United States*, 529 U. S. 694 (2000); *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987). By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender

who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense. Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion. It suffices to say the registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause.

The State concedes that the statute might deter future crimes. Respondents seize on this proposition to argue that the law is punitive, because deterrence is one purpose of punishment. Brief for Respondents 37. This proves too much. Any number of governmental programs might deter crime without imposing punishment. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." *Hudson*, *supra*, at 105; see also *Ursery*, 518 U. S., at 292; *89 Firearms*, 465 U. S., at 364.

The Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive because "the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed." 259 F. 3d, at 990. The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense. Alaska Stat. § 12.63.020(a)(1) (2000). The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.

The Act's rational connection to a nonpunitive purpose is a "[m]ost significant" factor in our determination that the statute's effects are not punitive. *Ursery*, *supra*, at 290. As the Court of Appeals acknowledged, the Act has a legit-

imate nonpunitive purpose of "public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y]." 259 F. 3d, at 991. Respondents concede, in turn, that "this alternative purpose is valid, and rational." Brief for Respondents 38. They contend, however, that the Act lacks the necessary regulatory connection because it is not "narrowly drawn to accomplish the stated purpose." *Ibid.* A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance. The imprecision respondents rely upon does not suggest that the Act's nonpunitive purpose is a "sham or mere pretext." *Hendricks*, 521 U. S., at 371 (KENNEDY, J., concurring).

In concluding the Act was excessive in relation to its regulatory purpose, the Court of Appeals relied in large part on two propositions: first, that the statute applies to all convicted sex offenders without regard to their future dangerousness; and, second, that it places no limits on the number of persons who have access to the information. 259 F. 3d, at 991–992. Neither argument is persuasive.

Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune* v. *Lile*, 536 U. S. 24, 34 (2002); see also *id.*, at 33 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U. S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U. S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).

The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory conse-

quences. We have upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. See *De Veau*, 363 U. S., at 160; *Hawker*, 170 U. S., at 197. As stated in *Hawker:* "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application . . . ." *Ibid.* The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.

Our decision in *Hendricks,* on which respondents rely, Brief for Respondents 39, is not to the contrary. The State's objective in *Hendricks* was involuntary (and potentially indefinite) confinement of "particularly dangerous individuals." 521 U. S., at 357–358, 364. The magnitude of the restraint made individual assessment appropriate. The Act, by contrast, imposes the more minor condition of registration. In the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause.

The duration of the reporting requirements is not excessive. Empirical research on child molesters, for instance, has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U. S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997).

The Court of Appeals' reliance on the wide dissemination of the information is also unavailing. The Ninth Circuit

highlighted that the information was available "world-wide" and "[b]roadcas[t]" in an indiscriminate manner. 259 F. 3d, at 992. As we have explained, however, the notification system is a passive one: An individual must seek access to the information. The Web site warns that the use of displayed information "to commit a criminal act against another person is subject to criminal prosecution." http://www.dps.state.ak.us/nSorcr/asp/ (as visited Jan. 17, 2003) (available in the Clerk of Court's case file). Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment. See D. Schram & C. Milloy, Community Notification: A Study of Offender Characteristics and Recidivism 13 (1995) (38% of recidivist sex offenses in the State of Washington took place in jurisdictions other than where the previous offense was committed).

The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard.

The two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case. The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

Our examination of the Act's effects leads to the determination that respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme. The Act is nonpuni-

tive, and its retroactive application does not violate the *Ex Post Facto* Clause. 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 THOMAS, concurring.

I join the Court's opinion upholding the Alaska Sex Offender Registration Act (ASORA) against *ex post facto* challenge. I write separately, however, to reiterate that "there is no place for [an implementation-based] challenge" in our *ex post facto* jurisprudence. *Seling* v. *Young*, 531 U. S. 250, 273 (2001) (THOMAS, J., concurring in judgment). Instead, the determination whether a scheme is criminal or civil must be limited to the analysis of the obligations actually created by statute. See *id.*, at 273–274 *(*"[T]o the extent that the conditions result from the fact that the statute is not being applied according to its terms, the conditions are *not* the effect of the statute, but rather the effect of its improper implementation"). As we have stated, the categorization of a proceeding as civil or criminal is accomplished by examining "the statute on its face." *Hudson* v. *United States*, 522 U. S. 93, 100 (1997) (internal quotation marks omitted).

In this case, ASORA does not specify a means of making registry information available to the public. It states only that

> "[i]nformation about a sex offender . . . that is contained in the central registry . . . is confidential and not subject to public disclosure except as to the sex offender's . . . name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a

> statement as to whether the offender . . . is in compliance with requirements of AS 12.63 or cannot be located." Alaska Stat. § 18.65.087(b) (2000).

By considering whether Internet dissemination renders ASORA punitive, the Court has strayed from the statute. With this qualification, I concur.

JUSTICE SOUTER, concurring in the judgment.

I agree with the Court that Alaska's Sex Offender Registration Act does not amount to an *ex post facto* law. But the majority comes to that conclusion by a different path from mine, and I concur only in the judgment.

As the Court says, our cases have adopted a two-step enquiry to see whether a law is punitive for purposes of various constitutional provisions including the *Ex Post Facto* Clause. At the first step in applying the so-called *Kennedy-Ward* test, we ask whether the legislature intended a civil or criminal consequence; at the second, we look behind the legislature's preferred classification to the law's substance, focusing on its purpose and effects. See *United States* v. *Ward*, 448 U. S. 242, 248–249 (1980); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963). We have said that "'only the clearest proof'" that a law is punitive based on substantial factors will be able to overcome the legislative categorization. *Ward*, *supra*, at 249 (quoting *Flemming* v. *Nestor*, 363 U. S. 603, 617 (1960)). I continue to think, however, that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction. See *Hudson* v. *United States*, 522 U. S. 93, 113–114 (1997) (SOUTER, J., concurring in judgment). This means that for me this is a close case, for I not only agree with the Court that there is evidence pointing to an intended civil characterization of the Act, but also see considerable evidence pointing the other way.

The Act does not expressly designate the requirements imposed as "civil," a fact that itself makes this different from

our past cases, which have relied heavily on the legislature's stated label in finding a civil intent. See *Hudson*, *supra*, at 103; *Kansas* v. *Hendricks*, 521 U. S. 346, 361 (1997); *Allen* v. *Illinois*, 478 U. S. 364, 368 (1986). The placement of the Act in the State's code, another important indicator, see *Hendricks*, *supra*, at 361, also leaves matters in the air, for although the section establishing the registry is among the code's health and safety provisions, which are civil, see Alaska Stat. § 18.65.087 (2000), the section requiring registration occurs in the title governing criminal procedure, see § 12.63.010. What is more, the legislature made written notification of the requirement a necessary condition of any guilty plea, see Alaska Rule Crim. Proc. 11(c)(4) (2002), and, perhaps most significant, it mandated a statement of the requirement as an element of the actual judgment of conviction for covered sex offenses, see Alaska Stat. § 12.55.148 (2000); Alaska Rule Crim. Proc. 32(c) (2002). Finally, looking to enforcement, see *Hudson*, *supra*, at 103, offenders are obliged, at least initially, to register with state and local police, see §§ 12.63.010(b), (c), although the actual information so obtained is kept by the State's Department of Public Safety, a regulatory agency, see § 18.65.087(a). These formal facts do not force a criminal characterization, but they stand in the way of asserting that the statute's intended character is clearly civil.

The substantial indicators relevant at step two of the *Kennedy-Ward* analysis likewise point in different directions. To start with purpose, the Act's legislative history shows it was designed to prevent repeat sex offenses and to aid the investigation of reported offenses. See 1994 Alaska Sess. Laws ch. 41, § 1; Brief for Petitioners 26, n. 13. Ensuring public safety is, of course, a fundamental regulatory goal, see, *e. g.*, *United States* v. *Salerno*, 481 U. S. 739, 747 (1987), and this objective should be given serious weight in the analyses. But, at the same time, it would be naive to look no

further, given pervasive attitudes toward sex offenders, see *infra* this page and 110, n. See *Weaver* v. *Graham*, 450 U. S. 24, 29 (1981) (*Ex Post Facto* Clause was meant to prevent "arbitrary and potentially vindictive legislation"). The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones. See *Kennedy*, *supra*, at 169.

That argument can claim support, too, from the severity of the burdens imposed. Widespread dissemination of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts. It thus bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community. See, *e. g.*, Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L. Rev. 1880, 1913 (1991). While the Court accepts the State's explanation that the Act simply makes public information available in a new way, *ante*, at 99, the scheme does much more. Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.*

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*I seriously doubt that the Act's requirements are "less harsh than the sanctions of occupational debarment" that we upheld in *Hudson* v. *United States*, 522 U. S. 93 (1997), *De Veau* v. *Braisted*, 363 U. S. 144 (1960), and *Hawker* v. *New York*, 170 U. S. 189 (1898). See *ante*, at 100. It is true that the Act imposes no formal proscription against any particular employ-

To me, the indications of punitive character stated above and the civil indications weighed heavily by the Court are in rough equipoise. Certainly the formal evidence of legislative intent does not justify requiring the "'clearest proof'" of penal substance in this case, see *Hudson*, 522 U. S., at 113–114 (SOUTER, J., concurring in judgment), and the substantial evidence does not affirmatively show with any clarity that the Act is valid. What tips the scale for me is the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur in the Court's judgment.

JUSTICE STEVENS, dissenting in No. 01–729 and concurring in the judgment in No. 01–1231.*

These two cases raise questions about statutes that impose affirmative obligations on convicted sex offenders. The question in No. 01–729 is whether the Alaska Sex Offender Registration Act is an *ex post facto* law, and in No. 01–1231

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ment, but there is significant evidence of onerous practical effects of being listed on a sex offender registry. See, *e. g.*, *Doe* v. *Pataki*, 120 F. 3d 1263, 1279 (CA2 1997) (noting "numerous instances in which sex offenders have suffered harm in the aftermath of notification—ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson"); *E. B.* v. *Verniero*, 119 F. 3d 1077, 1102 (CA3 1997) ("The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of 'vigilante justice' are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them"); Brief for Office of the Public Defender for the State of New Jersey et al. as *Amici Curiae* 7–21 (describing specific incidents).

*[This opinion applies also to No. 01–1231, *Connecticut Dept. of Public Safety* v. *Doe*, *ante*, p. 1.]

it is whether Connecticut's similar law violates the Due Process Clause.

The Court's opinions in both cases fail to decide whether the statutes deprive the registrants of a constitutionally protected interest in liberty. If no liberty interest were implicated, it seems clear that neither statute would raise a colorable constitutional claim. Cf. *Meachum* v. *Fano,* 427 U. S. 215 (1976). Proper analysis of both cases should therefore begin with a consideration of the impact of the statutes on the registrants' freedom.

The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply. In Alaska, an offender who has served his sentence for a single, nonaggravated crime must provide local law enforcement authorities with extensive personal information—including his address, his place of employment, the address of his employer, the license plate number and make and model of any car to which he has access, a current photo, identifying features, and medical treatment—at least once a year for 15 years. If one has been convicted of an aggravated offense or more than one offense, he must report this same information at least quarterly for life. Moreover, if he moves, he has *one* working day to provide updated information. Registrants may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities. Much of this registration information is placed on the Internet. In Alaska, the registrant's face appears on a webpage under the label "Registered Sex Offender." His physical description, street address, employer address, and conviction information are also displayed on this page.

The registration and reporting duties imposed on convicted sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole. And there can be no doubt that the "[w]idespread public access," *ante,* at 99 (opinion in No. 01–

729), to this personal and constantly updated information has a severe stigmatizing effect. See Brief for the Office of the Public Defender for the State of New Jersey et al. as *Amici Curiae* 7–21 (providing examples of threats, assaults, loss of housing, and loss of jobs experienced by sex offenders after their registration information was made widely available). In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty. Cf. *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971).

It is also clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a criminal conviction under these statutes provides both a *sufficient* and a *necessary* condition for the sanction.

To be sure, there are cases in which we have held that it was not punishment and thus not a violation of the *Ex Post Facto* Clause to deny future privileges to individuals who were convicted of crimes. See, *e. g.*, *De Veau* v. *Braisted*, 363 U. S. 144 (1960) (upholding prohibition of convicted felons from working for waterfront unions); *Hawker* v. *New York*, 170 U. S. 189 (1898) (upholding prohibition of doctors who had been convicted of a felony from practicing medicine). Those cases are distinguishable because in each the prior conviction was a sufficient condition for the imposition of the burden, but it was not a necessary one. That is, one may be barred from participation in a union because he has not paid fines imposed on him. See *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 191–192 (1967). And a doctor may not be permitted to practice medicine because she is no longer competent to do so. See, *e. g.*, N. J. Stat. Ann. § 45:1–21 (West Supp. 2002).

Likewise, in *Kansas* v. *Hendricks,* 521 U. S. 346 (1997), the Court held that a law that permitted the civil commitment of persons who had committed or had been charged with a sexually violent offense was not an *ex post facto* law. But the fact that someone had been convicted was not sufficient to authorize civil commitment under Kansas law because Kansas required another proceeding to determine if such a person suffered from a "'mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.'" *Id.*, at 352. Nor was the conviction even a necessary predicate for the commitment. See *ibid.* (Kansas' civil commitment procedures also applied to individuals charged with a sexually violent offense but found incompetent to stand for trial, or found not guilty by reason of insanity or by reason of mental disease or defect). While one might disagree in other respects with *Hendricks*, it is clear that a conviction standing alone did not make anyone eligible for the burden imposed by that statute.

No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment.

It is therefore clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted. As the Court recognizes, "recidivism is the statutory concern" that provides the supposed justification for the imposition of such retroactive punishment. *Ante*, at 105 (opinion in No. 01–729). That is the principal rationale that underlies the "three strikes" statute that the Court has up-

held in *Ewing* v. *California, ante,* p. 11. Reliance on that rationale here highlights the conclusion that the retroactive application of these statutes constitutes a flagrant violation of the protections afforded by the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution.

I think it equally clear, however, that the State may impose registration duties and may publish registration information as a part of its punishment of this category of defendants. Looking to the future, these aspects of their punishment are adequately justified by two of the traditional aims of punishment—retribution and deterrence. Moreover, as a matter of procedural fairness, Alaska requires its judges to include notice of the registration requirements in judgments imposing sentences on convicted sex offenders and in the colloquy preceding the acceptance of a plea of guilty to such an offense. See Alaska Rules Crim. Proc. 11(c)(4) and 32(c) (2002). Thus, I agree with the Court that these statutes are constitutional as applied to post-enactment offenses.

Accordingly, I would hold that the Alaska statute violates the constitutional prohibition on *ex post facto* laws. Because I believe registration and publication are a permissible component of the punishment for this category of crimes, however, for those convicted of offenses committed after the effective date of such legislation, there would be no separate procedural due process violation so long as a defendant is provided a constitutionally adequate trial. I therefore concur in the Court's disposition of the Connecticut case, No. 01–1231, and I respectfully dissent from its disposition of the Alaska case, No. 01–729.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

As JUSTICE SOUTER carefully explains, it is unclear whether the Alaska Legislature conceived of the State's Sex Offender Registration Act as a regulatory measure or as a

penal law. See *ante*, at 107–109 (opinion concurring in judgment). Accordingly, in resolving whether the Act ranks as penal for *ex post facto* purposes, I would not demand "the clearest proof" that the statute is in effect criminal rather than civil. Instead, guided by *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), I would neutrally evaluate the Act's purpose and effects. See *id.*, at 168–169 (listing seven factors courts should consider "[a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute"); cf. *Hudson* v. *United States*, 522 U. S. 93, 115 (1997) (BREYER, J., concurring in judgment) ("[I]n fact if not in theory, the Court has simply applied factors of the *Kennedy* variety to the matter at hand.").[1]

Measured by the *Mendoza-Martinez* factors, I would hold Alaska's Act punitive in effect. Beyond doubt, the Act involves an "affirmative disability or restraint." 372 U. S., at 168. As JUSTICE STEVENS and JUSTICE SOUTER spell out, Alaska's Act imposes onerous and intrusive obligations on convicted sex offenders; and it exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism. See *ante*, at 109, and n. (SOUTER, J., concurring in judgment); *ante*, at 111–112 (STEVENS, J., dissenting in No. 01–729 and concurring in judgment in No. 01–1231).

Furthermore, the Act's requirements resemble historically common forms of punishment. See *Mendoza-Martinez*, 372 U. S., at 168. Its registration and reporting provisions are comparable to conditions of supervised release or parole; its

[1] The *Mendoza-Martinez* factors include "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative [nonpunitive] purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." 372 U. S., at 168–169.

public notification regimen, which permits placement of the registrant's face on a webpage under the label "Registered Sex Offender," calls to mind shaming punishments once used to mark an offender as someone to be shunned. See *ante*, at 111–112 (STEVENS, J., dissenting in No. 01–729 and concurring in judgment in No. 01–1231); *ante*, at 109 (SOUTER, J., concurring in judgment).

Telling too, as JUSTICE SOUTER observes, past crime alone, not current dangerousness, is the "touchstone" triggering the Act's obligations. *Ibid.* (opinion concurring in judgment); see *ante*, at 112–113 (STEVENS, J., dissenting in No. 01–729 and concurring in judgment in No. 01–1231). This touchstone adds to the impression that the Act retributively targets past guilt, *i. e.*, that it "revisit[s] past crimes [more than it] prevent[s] future ones." *Ante*, at 109 (SOUTER, J., concurring in judgment); see *Mendoza-Martinez*, 372 U. S., at 168.

Tending the other way, I acknowledge, the Court has ranked some laws civil and nonpunitive although they impose significant disabilities or restraints. See, *e. g.*, *Flemming* v. *Nestor*, 363 U. S. 603 (1960) (termination of accrued disability benefits payable to deported resident aliens); *Kansas* v. *Hendricks*, 521 U. S. 346 (1997) (civil confinement of mentally ill sex offenders). The Court has also deemed some laws nonpunitive despite "punitive aspects." See *United States* v. *Ursery*, 518 U. S. 267, 290 (1996).

What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose. See *Mendoza-Martinez*, 372 U. S., at 169. As respondents concede, see Brief for Respondents 38, the Act has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community. See *ante*, at 102–103 (majority opinion). But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not

to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. See *ante*, at 90. And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.[2] However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

John Doe I, for example, pleaded *nolo contendere* to a charge of sexual abuse of a minor nine years before the Alaska Act was enacted. He successfully completed a treatment program, and gained early release on supervised probation in part because of his compliance with the program's requirements and his apparent low risk of reoffense. Brief for Respondents 1. He subsequently remarried, established a business, and was reunited with his family. *Ibid.* He was also granted custody of a minor daughter, based on a court's determination that he had been successfully rehabilitated. See *Doe I* v. *Otte*, 259 F. 3d 979, 983 (CA9 2001). The court's determination rested in part on psychiatric evaluations concluding that Doe had "a very low risk of re-offending" and is "not a pedophile." *Ibid.* (internal quotation marks omitted). Notwithstanding this strong evidence of rehabilitation, the Alaska Act requires Doe to report personal information to the State four times per year, and permits the State publicly

[2] For the reasons stated by JUSTICE SOUTER, see *ante*, at 109–110, n. (opinion concurring in judgment), I do not find the Court's citations to *Hawker* v. *New York*, 170 U. S. 189 (1898), and *De Veau* v. *Braisted*, 363 U. S. 144 (1960), see *ante*, at 103–104 (majority opinion), convincingly responsive to this point.

to label him a "Registered Sex Offender" for the rest of his life.

Satisfied that the Act is ambiguous in intent and punitive in effect, I would hold its retroactive application incompatible with the *Ex Post Facto* Clause, and would therefore affirm the judgment of the Court of Appeals.

Syllabus

# COOK COUNTY, ILLINOIS *v.* UNITED STATES EX REL. CHANDLER

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

No. 01–1572. Argued January 14, 2003—Decided March 10, 2003

Under the False Claims Act (FCA), "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," 31 U. S. C. § 3729(a)(1), is liable to the Government for a civil penalty, treble damages, and costs, § 3729(a). Although the Attorney General may sue under the FCA, a private person, known as a relator, may also bring a *qui tam* action "in the name of the Government." § 3730(b). The relator must inform the Justice Department of her intentions and keep the pleadings under seal while the Government decides whether to intervene and do its own litigating. § 3730(b)(2). If the claim succeeds, the relator's share may be up to 30 percent of the proceeds of the action, plus reasonable expenses, costs, and attorney's fees. § 3730(d). This case involves a National Institute of Drug Abuse research grant to Cook County Hospital for a study that was later administered by a nonprofit research institute affiliated with the hospital. Respondent Chandler, who ran the study for the institute, filed this *qui tam* action, claiming that Cook County (hereinafter County) and the institute had submitted false statements to obtain grant funds in violation of § 3729(a)(1). After this Court held in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, that States are not "persons" subject to FCA *qui tam* actions, the District Court granted the County's motion to dismiss the claims against it. The court held that the County, like a State, could not be subjected to treble damages, which *Stevens* described as "essentially punitive," *id.*, at 784. The Seventh Circuit distinguished *Stevens* and reversed.

*Held:* Local governments are "persons" amenable to *qui tam* actions under the FCA. Pp. 125–134.

(a) While § 3729 does not define the term "person," its meaning has remained unchanged since the original FCA was passed in 1863. *Stevens*, *supra*, at 783, n. 12. There is no doubt that the term then extended to corporations. Indeed, this Court as early as 1826 in *United States* v. *Amedy*, 11 Wheat. 392, 412, recognized the presumption that "person" also includes "persons politic and incorporate." Essentially conceding that private corporations were taken to be persons when the

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FCA was passed in 1863, the County argues that municipal corporations were not so understood until six years later, when the Court decided *Cowles* v. *Mercer County*, 7 Wall. 118. *Cowles*, however, was not an extension of principle but a natural recognition of the common understanding that municipal corporations and private ones were to be treated alike in terms of their legal status as persons capable of suing and being sued. This explains how the Court in *Cowles* could conclude "automatically and without discussion" that municipal corporations, like private ones, "should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 687–688. Of course, the meaning of "person" recognized in *Cowles* was only a presumptive one, but neither the history nor the text of the original FCA provides contextual evidence that Congress intended to exclude municipalities from the class of "persons" covered by the FCA in 1863. Pp. 125–129.

(b) The False Claims Amendments Act of 1986 did not repeal municipal liability. As part of an effort to modernize the FCA, the 1986 amendments raised the ceiling on damages recoverable under § 3729(a) from double to treble. Relying on the common law presumption against punitive damages for municipalities, see *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 259–260, and n. 21, and on this Court's statement in *Stevens*, *supra*, at 784, 785, that the change from double to treble damages turned what had been a "remedial" provision into an "essentially punitive" one, the County argues that, even if municipalities were covered by the term "person" from 1863 to 1986, Congress's adoption of a "punitive" remedy entailed the elimination of municipal liability in 1986. It does not follow from *Stevens*, however, that the punitive feature of FCA damages has the force to show congressional intent to repeal implicitly the existing definition of "person." To begin with, the FCA's damages multiplier has a compensatory function as well as a punitive one. Most obviously, the statute's *qui tam* feature means that as much as 30 percent of the Government's recovery may go to a private relator who began the action. Even when there is no *qui tam* relator to be paid, liability beyond actual damages may be necessary for full recovery, since the FCA has no separate provision for prejudgment interest or consequential damages. The force of the treble damages remedy's "punitive" nature in arguing against municipal liability is not as robust as it would be if that remedy were a pure penalty in all cases. What is more, treble damages certainly does not equate with classic punitive damages, which leaves the jury with open-ended discretion over the amount, and so raises two concerns specific to municipal defendants: that local government's taxing power will make it an easy target for an unduly generous

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jury and that blameless or unknowing taxpayers will be unfairly taxed for the wrongdoing of local officials. Neither of these concerns is serious in FCA cases. The presumption against punitive damages thus brings only limited vigor to the County's aid. Working against the County's position, however, is a different presumption, this one at full strength: the "cardinal rule . . . that repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U. S. 497, 503. Inferring repeal of municipal liability from the increase in the damages ceiling from double to triple would be difficult in the abstract, but it is impossible given that the basic purpose of the 1986 amendments was to make the FCA a more useful tool against fraud in modern times. Whether or not this was true in 1863, local governments now often administer or receive federal funds. It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims. Pp. 129–134.

277 F. 3d 969, affirmed.

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

*Donna M. Lach* argued the cause for petitioner. With her on the briefs were *Richard A. Devine*, *Patrick T. Driscoll, Jr.*, *Sanjay T. Tailor*, *Jerold S. Solovy*, and *Barry Sullivan.*

*Judson H. Miner* argued the cause for respondent. With him on the brief were *George F. Galland, Jr.*, and *Charlotte Crane.*

*Malcolm L. Stewart* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Clement*, *Douglas N. Letter*, and *Michael E. Robinson.**

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*Briefs of *amici curiae* urging reversal were filed for the City of New York et al. by *Michael A. Cardozo*, *Leonard J. Koerner*, *Gail Rubin*, *Merita A. Hopkins*, *A. Scott Chinn*, and *Grant F. Langley;* for the County of Orange, California, et al. by *Walter Dellinger*, *Jonathan D. Hacker*, and *James R. Asperger;* for 43 Local Governmental Airport Proprietors by *Scott P. Lewis;* for the National Association of Counties et al. by *Richard Ruda*, *Robert K. Huffman*, *Miriam R. Nemetz*, *Charles A. Rothfeld*, and *Robert L. Bronston;* for the National Association of Public Hospitals and

JUSTICE SOUTER delivered the opinion of the Court.

In *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765 (2000), we held that States are not "persons" subject to *qui tam* actions under the False Claims Act (FCA), 31 U. S. C. §§ 3729–3733. Here, the question is whether local governments are amenable to such suits, and we hold that they are.

## I

*Stevens*, *supra*, at 768–770, explains in some detail how the FCA currently provides for civil penalties against "[a]ny person" who (so far as it concerns us here) "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." § 3729(a)(1). Although the Attorney General may sue under the FCA, so may a private person, known as a relator, in a *qui tam* action brought "in the name of the Government," but with the hope of sharing in any recovery. § 3730(b). The relator must inform the Department of Justice of her intentions and keep the pleadings under seal for 60 days while the Government decides whether to intervene and do its own litigating. § 3730(b)(2); see also § 3730(c). If the claim succeeds, the defendant is liable to the Government for a civil penalty between $5,000 and $10,000 for each violation, treble damages (reducible to double damages for cooperative defendants), and costs.

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Health Systems et al. by *Charles Luband;* and by the Texas Association of School Boards Legal Assistance Fund et al. by *William J. Boyce* and *Warren S. Huang.*

Briefs of *amici curiae* urging affirmance were filed for K & R Limited Partnership et al. by *Carl A. S. Coan III* and *Regina D. Poserina;* and for Taxpayers Against Fraud, the False Claims Act Legal Center, by *Charles J. Cooper*, *Brian Stuart Koukoutchos*, and *James Moorman.*

*Michael P. Dignazio* and *Francis X. Crowley* filed a brief as *amicus curiae* for the County of Delaware, Pennsylvania.

§ 3729(a).[1] The relator's share of the "proceeds of the action or settlement" may be up to 30 percent, depending on whether the Government intervened and, if so, how much the relator contributed to the prosecution of the claim. § 3730(d).[2] The relator may also get reasonable expenses, costs, and attorney's fees. *Ibid.*

The fraud in this case allegedly occurred in administering a $5 million grant from the National Institute of Drug Abuse to Cook County Hospital, owned and operated as the name implies, with the object of studying a treatment regimen for pregnant drug addicts. The grant was subject to a variety of conditions, including the terms of a compliance plan meant to assure that the study would jibe with federal regulations for research on human subjects. Administration of the study was later transferred to the Hektoen Institute for Medical Research, a nonprofit research organization affiliated with the hospital. Respondent, Dr. Janet Chandler, ran the study from September 1993 until the institute fired her in January 1995.

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[1] The statutory penalties are adjusted upward for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410, § 5, 104 Stat. 891, note following 28 U. S. C. § 2461. The penalty is currently $5,500 to $11,000. 28 CFR § 85.3(a)(9) (2002).

[2] If the Government does not intervene, the relator is entitled to 25 to 30 percent of the proceeds. 31 U. S. C. § 3730(d)(2). If the Government chooses to intervene, the relator "shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action." § 3730(d)(1). If, however, the court determines that the action was "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds . . . ." *Ibid.* (footnote omitted).

In 1997, Chandler filed this *qui tam* action, claiming that Cook County (hereinafter County) and the institute had submitted false statements to obtain grant funds in violation of § 3729(a)(1).[3] Chandler said that the defendants had violated the grant's express conditions, had failed to comply with the regulations on human-subject research, and had submitted false reports of what she called "ghost" research subjects. Chandler also alleged that she was fired for reporting the fraud to doctors at the hospital and to the granting agency, rendering her dismissal a violation of both state law and the whistle-blower provision of the FCA, § 3730(h).[4] The Government declined to intervene in the action.

The County moved to dismiss the claims against it, arguing, among other things, that it was not a "person" subject to liability under the FCA.[5] The District Court denied the motion, reading the term "person" in the FCA to include state and local governments. *United States ex rel. Chandler* v. *Hektoen Institute for Medical Research*, 35 F. Supp. 2d 1078 (ND Ill. 1999). The Court of Appeals dismissed the County's interlocutory appeal, and we denied certiorari. 528 U. S. 931 (1999). After *Stevens* came down, however, the District Court reconsidered the County's motion and dismissed Chandler's action. Although the court found "no reason to alter its conclusion that the County is a 'person' for purposes of the FCA," it held that the County, like a State, could not be subjected to treble damages, which *Stevens*, *supra*, at 784, described not as "remedial" but as "essentially punitive." 118 F. Supp. 2d 902, 903 (2000). The

[3] The hospital was originally a defendant as well but was dismissed from the case as having no identity independent of the County. 277 F. 3d 969, 971, n. 2 (CA7 2002).

[4] Chandler's retaliation claims against the County were dismissed because the institute, not the County, was her employer. *United States ex rel. Chandler* v. *Hektoen Institute for Medical Research*, 35 F. Supp. 2d 1078, 1087 (ND Ill. 1999).

[5] The institute also moved to dismiss, on different grounds; the denial of that motion is not before us. 277 F. 3d, at 969, n. 1.

Court of Appeals, in conflict with two other Circuits,[6] distinguished *Stevens* and reversed, 277 F. 3d 969 (CA7 2002). We granted certiorari, 536 U. S. 956 (2002), and now affirm the Court of Appeals.

## II

While § 3729 does not define the term "person," we have held that its meaning has remained unchanged since the original FCA was passed in 1863. *Stevens*, 529 U. S., at 783, n. 12. There is no doubt that the term then extended to corporations, the Court in 1826 having expressly recognized the presumption that the statutory term "person" "'extends as well to persons politic and incorporate, as to natural persons whatsoever.'" *United States* v. *Amedy*, 11 Wheat. 392, 412 (1826) (quoting 2 E. Coke, The Second Part of the Institutes of the Laws of England 736 (1787 ed.) (reprinted in 5B 2d Historical Writings in Law and Jurisprudence (1986)); see 11 Wheat., at 412 ("That corporations are, in law, for civil purposes, deemed persons, is unquestionable"); accord, *Beaston* v. *Farmers' Bank of Del.*, 12 Pet. 102, 135 (1838); see also *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 667 (1819) (opinion of Story, J.) (A corporation "is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage"). This position accorded with the common understanding among contemporary commentators that corporations were "persons" in the general enjoyment of the capacity to sue and be sued. See, *e. g.*, 2 J. Bouvier, A Law Dictionary 332 (6th ed. 1856) (def. 2: The term "person" "is also used to denote a corporation which is an artificial person"); 1 S. Kyd, A Trea-

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[6] *United States ex rel. Dunleavy* v. *County of Delaware*, 279 F. 3d 219 (CA3 2002); *United States ex rel. Garibaldi* v. *Orleans Parish School Bd.*, 244 F. 3d 486 (CA5 2001).

tise on the Law of Corporations 13 (1793) ("A CORPORATION then, or a body politic, or body incorporate, is a collection of many individuals, united into one body, . . . and vested, by the policy of the law, with the capacity of acting, in several respects, as an *individual*, particularly of taking and granting property, of contracting obligations, and of suing and being sued . . ."). While it is true that Chief Justice Marshall's opinion in *Bank of United States* v. *Deveaux*, 5 Cranch 61, 86–87 (1809), declined to rely on the presumption when it decided the separate issue whether a corporation was a "citizen" for purposes of federal diversity jurisdiction, by 1844 the *Deveaux* position had been abandoned and a corporation was understood to have citizenship independent of its constituent members by virtue of its status as "a person, although an artificial person." *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497, 558 (1844); see 1 A. Burrill, A Law Dictionary and Glossary 383 (2d ed. 1859) ("A corporation has been declared to be not only a *person*, . . . but to be capable of being considered an *inhabitant* of a state, and even of being treated as a *citizen*, for all purposes of suing and being sued").

Essentially conceding that private corporations were taken to be persons when the FCA was passed in 1863, the County argues that municipal corporations were not so understood until six years later, when *Cowles* v. *Mercer County*, 7 Wall. 118 (1869), applied the *Letson* rule to them. *Cowles*, however, was not an extension of principle but a natural recognition of an understanding going back at least to Coke, *supra*, that municipal corporations and private ones were simply two species of "body politic and corporate," treated alike in terms of their legal status as persons capable of suing and being sued. See, *e. g.*, W. Glover, A Practical Treatise on the Law of Municipal Corporations 41 (1837) (Municipal corporations have, as an attribute "necessarily and inseparably incident to every corporation," the ability "[t]o sue or be sued, . . . and do all other acts as natural

persons may"); see also 1 J. Dillon, The Law of Municipal Corporations 92 (rev. 2d ed. 1873). Indeed, "[t]he archetypal American corporation of the eighteenth century [was] the municipality"; only in the early 19th century did private corporations become widespread. M. Horwitz, The Transformation of American Law, 1780–1860, p. 112 (1977). This history explains how the Court in *Cowles* could conclude "automatically and without discussion" that municipal corporations, like private ones, "should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 687–688 (1978); see *Cowles*, *supra*, at 121 (describing the question as one that "presents but little difficulty").[7]

Of course, the meaning of "person" recognized in *Cowles* is the usual one, but not immutable, see *Monell*, *supra*, at 688, and the County asks us to take a cue from the qualification included in the later definition in the Dictionary Act, Act of Feb. 25, 1871, § 2, 16 Stat. 431, that "the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that [it was] intended to be used in a more limited sense." Cf. J. Angell & S. Ames, A Treatise on the Law of Private Corporations Aggregate 4 (rev. 3d ed. 1846) ("The construction is, that when 'persons' are mentioned in a statute, corporations are included if they fall within the general reason and design of the statute"). The County invokes two points of context that it takes as

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[7] The County and some of its supporting *amici* urge a further distinction between full-fledged municipal corporations such as towns and cities, which were incorporated at the request of their inhabitants, and "*quasi* corporations" such as counties, which were unilateral creations of the State. See *Barnes* v. *District of Columbia*, 91 U. S. 540, 552 (1876). While the liability of quasi corporations at common law may have differed from that of municipal corporations, see *ibid.*, both were treated equally as legal "persons." Indeed, *Cowles* itself applied to an Illinois county like Cook County.

indicating that in the FCA Congress intended a more limited meaning.

First, it says that the statutory text is "inherently inconsistent with local governmental liability," Brief for Petitioner 13, owing to the references of the original enactment to "any person in the land or naval forces of the United States" and "any person not in the military or naval forces of the United States," together with a provision imposing criminal liability, including imprisonment, on defendants in the latter category, see Act of Mar. 2, 1863, ch. 67, §§ 1, 3, 12 Stat. 696, 697, 698.[8] But the old text merely shows that "any person in the land or naval forces" was directed at natural persons. The second phrase, covering all other "persons," could not have been that limited, or even private corporations would be outside the FCA's coverage, a reading that not even the County espouses and one that we seriously doubted in *Stevens*, 529 U. S., at 782. As for the FCA's reference to criminal liability, "[t]he short answer is that it has not been regarded as anomalous to require compliance by municipalities with the substantive standards of . . . federal laws which impose [both civil and criminal] sanctions upon 'persons.'" *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). Municipalities may not be susceptible to every statutory penalty, but that is no reason to exempt them from remedies that sensibly apply. *Id.*, at 400–401; *United States* v. *Union Supply Co.*, 215 U. S. 50, 54–55 (1909).

The other contextual evidence cited by the County is the history of the FCA. We recounted in *Stevens* that Congress's primary concern in 1863 was "'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" 529 U. S., at 781 (quoting *United States* v. *Bornstein*, 423 U. S. 303, 309 (1976), but adding "[private]"). Local governments, the County says, were not players in the

[8] The FCA's civil and criminal provisions were bifurcated in 1878, see *Rainwater* v. *United States*, 356 U. S. 590, 592, n. 8 (1958), and the latter provisions have since been recodified at 18 U. S. C. § 287.

game of war profiteering that the FCA was meant to stop. Of course, this is true, but in no way does it affect the fact that Congress wrote expansively, meaning "to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States* v. *Neifert-White Co.*, 390 U. S. 228, 232 (1968). Whatever municipal corporations may have been doing in 1863, in 2003 local governments are commonly at the receiving end of all sorts of federal funding schemes and thus no less able than individuals or private corporations to impose on the federal fisc and exploit the exercise of the federal spending power. Cf. *Monell*, *supra*, at 685–686 (noting that municipalities can, "equally with natural persons, create the harms intended to be remedied [by 42 U. S. C. § 1983]"). In sum, neither history nor text points to exclusion of municipalities from the class of "persons" covered by the FCA in 1863.

## III

Nor is the application of this reading of the statute affected by the County's alternative position, based on the evolution of the FCA's provisions for relief. The County's argument leads off, at least, with a sound premise about the historical tension between municipal liability and damages imposed as punishment. Although it was well established in 1863 "that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity, . . . this understanding did not extend to the award of punitive or exemplary damages," *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 259–260 (1981). Since municipalities' common law resistance to punitive damages still obtains, "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Id.*, at 260, n. 21.

The County relies on this general statement in asking us to infer a remarkable consequence unstated in the 1986 amendments to the FCA. As part of an effort to modernize

the FCA, Congress then raised the fine from $2,000 to the current range of $5,000 to $10,000, and raised the ceiling on damages recoverable under § 3729(a) from double to treble. False Claims Amendments Act of 1986, Pub. L. 99–562, § 2(7), 100 Stat. 3153. In *Stevens*, we spoke of this change as turning what had been a "remedial" provision into an "essentially punitive" one. 529 U. S., at 784, 785. The County relies on this characterization to argue that, even if municipalities were covered by the term "person" from 1863 to 1986, Congress's adoption of a "punitive" remedy entailed the elimination of municipal liability in 1986.

Although we did indeed find the punitive character of the treble damages provision a reason not to read "person" to include a State, see *id.*, at 785, it does not follow that the punitive feature has the force to show congressional intent to repeal implicitly the existing definition of that word, which included municipalities. To begin with it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives. See, *e. g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 635–636 (1985) (citing *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486 (1977)); *American Soc. of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556, 575 (1982); see also *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 151 (1987). While the tipping point between payback and punishment defies general formulation, being dependent on the workings of a particular statute and the course of particular litigation, the facts about the FCA show that the damages multiplier has compensatory traits along with the punitive.

There is no question that some liability beyond the amount of the fraud is usually "necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims." *Bornstein, supra,* at 315; see *United States* v. *Halper,* 490 U. S. 435, 445 (1989) (noting that the Government's injury includes "not merely the

amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse"). The most obvious indication that the treble damages ceiling has a remedial place under this statute is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator who began the action. In *qui tam* cases the rough difference between double and triple damages may well serve not to punish, but to quicken the self-interest of some private plaintiff who can spot violations and start litigating to compensate the Government, while benefiting himself as well. See *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 547 (1943). The treble feature thus leaves the remaining double damages to provide elements of make-whole recovery beyond mere recoupment of the fraud. Cf. *Bornstein*, 423 U. S., at 315, and n. 11. It may also be necessary for full recovery even when there is no *qui tam* relator to be paid. The FCA has no separate provision for prejudgment interest, which is usually thought essential to compensation, see, *e. g.*, *Kansas* v. *Colorado*, 533 U. S. 1, 10–11 (2001), and might well be substantial given the FCA's long statute of limitations, § 3731(b). Nor does the FCA expressly provide for the consequential damages that typically come with recovery for fraud, see Restatement (Second) of Torts § 549(1)(b), and Comment *d* (1976).[9]

Thus, although *Stevens* recognized that the FCA's treble damages remedy is still "punitive" in that recovery will exceed full compensation in a good many cases, the force of this

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[9] The treble damages provision was, in a way, adopted by Congress as a substitute for consequential damages. The Senate version of the bill proposed consequential damages on top of treble damages, while the House version proposed consequential damages plus double damages. See S. Rep. No. 99–345, p. 39 (1986) (hereinafter S. Rep.); H. R. Rep. No. 99–660, p. 20 (1986). Ultimately, the Senate's treble figure was adopted and the consequential damages provision dropped.

punitive nature in arguing against municipal liability is not as robust as if it were a pure penalty in all cases. Treble damages certainly do not equate with classic punitive damages, which leave the jury with open-ended discretion over the amount and so raises two concerns specific to municipal defendants. One is that a local government's taxing power makes it an easy target for an unduly generous jury. See *Newport*, 453 U. S., at 270–271. But under the FCA, the jury is open to no such temptation; if it finds liability, its instruction is to return a verdict for actual damages, for which the court alone then determines any multiplier, just as the court alone sets any separate penalty. § 3729(a); see 277 F. 3d, at 978. There is mitigation, also, for the second worry, that "blameless or unknowing taxpayers" will be unfairly taxed for the wrongdoing of local officials. *Newport*, 453 U. S., at 267. This very case shows how FCA liability may expose only local taxpayers who have already enjoyed the indirect benefit of the fraud, to the extent that the federal money has already been passed along in lower taxes or expanded services. Cf. *ibid.* The question in such cases is whether the local taxpayer should make up for an undeserved benefit, or the federal taxpayer be permanently out of pocket, a question that can be answered in any given case, not by an opportunistic *qui tam* relator, but by a combination of the judge's discretion and the Government's power to intervene and dismiss or settle an action, see § 3730(c)(2).

The presumption against punitive damages thus brings only limited vigor to the County's aid. Working against the County's position, however, is a different presumption, this one at full strength: the "cardinal rule . . . that repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). Inferring repeal from legislative silence is hazardous at best, and error seems overwhelmingly likely in the notion that the 1986 amendments wordlessly redefined "person" to exclude municipalities. The County's argument, it must be remembered, is not

merely that the treble damages feature of the 1986 amendments was meant to bypass municipal corporations; the argument is that the treble damages amendment must be read to eliminate the FCA's coverage of municipal corporations entirely, after being the statutory law for over a century. This would be a hard case to make in the abstract, but it is impossible when we consider what is known about the object of the amendments in 1986.

The basic purpose of the 1986 amendments was to make the FCA a "more useful tool against fraud in modern times." S. Rep., at 2. Because Congress was concerned about pervasive fraud in "all Government programs," *ibid.*, it allowed private parties to sue even based on information already in the Government's possession, see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 946 (1997); increased the Government's measure of recovery; and enhanced the incentives for relators to bring suit. Yet the County urges that in so doing Congress made local governments, which today often administer or receive federal funds, immune not only from treble damages but from any liability whatsoever under the FCA. Congress could have done that, of course, but it makes no sense to suggest Congress did it under its breath.[10] It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand

[10] Indeed, there is some evidence that Congress affirmatively endorsed municipal liability when it passed the 1986 amendments. See S. Rep., at 8 (noting that "[t]he term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof" (citing, *inter alia*, *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978))). Although in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765 (2000), we considered this evidence insufficient to overcome the background presumption that States are not "persons," in the present case the statement belies the County's argument that Congress meant to change the contrary presumption applicable to local governments and to remove municipal liability.

in fighting false claims. See *Burns* v. *United States*, 501 U. S. 129, 136 (1991).[11]

## IV

The term "person" in § 3729 included local governments in 1863 and nothing in the 1986 amendments redefined it. The judgment of the Court of Appeals is

*Affirmed.*

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[11] The presumption against implied repeal also explains why two of the County's subsidiary arguments cannot succeed here, despite the fact that we gave them credence in *Stevens*. First, the County contrasts § 3729 with the Civil Investigative Demand provision enacted as part of the 1986 amendments, § 3733, which expressly includes both States and local governments in the definition of "person." In *Stevens*, *supra*, at 783–784, we read that express reference in the later § 3733 to confirm the reading of the earlier § 3729, which was based on a common understanding in 1863 that "person" did not include a State; but "person" did presumptively include a municipality in 1863.

The County also argues it is not sensible to expose local governments to FCA liability but not to liability under the Program Fraud Civil Remedies Act of 1986 (PFCRA), Pub. L. 99–509, 100 Stat. 1934 (codified at 31 U. S. C. § 3801 *et seq.*), a statute enacted just before the FCA amendments and "designed to operate in tandem with the FCA." *Stevens*, *supra*, at 786, n. 17. The PFCRA prohibits the same conduct as the FCA and specifically defines a "person" subject to liability as "any individual, partnership, corporation, association, or private organization." § 3801(a)(6). Even assuming the County is correct that local governments are not covered by the PFCRA despite the term "corporation," this is hardly a weighty argument for an implied repeal of municipal liability under the FCA, a separately enacted statute.

Syllabus

# NORFOLK & WESTERN RAILWAY CO. *v.* AYERS ET AL.

## CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

No. 01–963. Argued November 6, 2002—Decided March 10, 2003

Alleging that petitioner Norfolk & Western Railway Company (Norfolk) had negligently exposed them to asbestos and thereby caused them to contract the occupational disease asbestosis, respondents, six former Norfolk employees (asbestosis claimants), brought this suit in a West Virginia state court under the Federal Employers' Liability Act (FELA or Act). Section 1 of the FELA provides: "Every common carrier by railroad while engaging in [interstate commerce], shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the [carrier's] negligence." As an element of their damages, the asbestosis claimants sought recovery for mental anguish based on their fear of developing cancer. The trial court instructed the jury that a plaintiff who demonstrated a reasonable fear of cancer related to proven physical injury from asbestos was entitled to compensation for that fear as a part of the damages awardable for pain and suffering. The court also instructed the jury not to reduce recoveries because of nonrailroad exposures to asbestos, so long as the jury found that Norfolk was negligent and that dust exposures at Norfolk contributed, however slightly, to each plaintiff's injuries. The court rejected Norfolk's proposed instructions, which would have (1) ruled out damages for fear of cancer unless the claimant proved both an actual likelihood of developing cancer and physical manifestations of the alleged fear, and (2) required the jury to apportion damages between Norfolk and other employers alleged to have contributed to an asbestosis claimant's disease. The jury returned damages awards for each claimant. The Supreme Court of Appeals of West Virginia denied discretionary review.

*Held:*

1. Mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos. Pp. 145–159.

(a) The trial judge correctly stated the law when he charged the jury that an asbestosis claimant, upon demonstrating a reasonable fear of cancer stemming from his present disease, could recover for that fear

as part of asbestosis-related pain and suffering damages. In so ruling, this Court follows the path marked by its decisions in *Consolidated Rail Corporation* v. *Gottshall,* 512 U. S. 532, and *Metro-North Commuter R. Co.* v. *Buckley,* 521 U. S. 424. *Gottshall* and *Metro-North* describe two categories of claims for emotional distress damages: Stand-alone emotional distress claims not provoked by any physical injury, for which recovery is sharply circumscribed by the common-law zone-of-danger test; and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted. This case is properly placed in the emotional distress stemming from a physical injury category. The parties agree that the claimants suffer from asbestosis, a cognizable injury under the FELA. As *Metro-North* plainly indicates, when fear of cancer "accompanies a physical injury," pain and suffering damages may include compensation for that fear. *E. g.,* 521 U. S., at 430. The Court adheres to the clear line its recent decisions delineate. Pp. 145–148.

(b) Unlike stand-alone claims for negligently inflicted emotional distress, claims for pain and suffering associated with a physical injury are traditionally compensable. By 1908, when the FELA was enacted, the common law had evolved to encompass apprehension of future harm as a component of pain and suffering. In recent years, of the many courts that have ruled on the question presented here, a clear majority sustain recovery. Arguing against this trend, Norfolk and its *amici* assert that the asbestosis claimants' alleged cancer fears are too remote from asbestosis to warrant inclusion in their pain and suffering awards. *Amicus* United States refers to the "separate disease rule," under which most courts have held that the statute of limitations runs separately for each asbestos-related disease. Because the asbestosis claimants may bring a second action if cancer develops, the Government argues, cancer-related damages are unwarranted here. The question, as the Government frames it, is not *whether* the asbestosis claimants can recover for fear of cancer, but *when.* But those claimants did not seek, and the trial court did not allow, discrete damages for their *increased risk* of future cancer. Instead, they sought damages for their *current* injury, which, they allege, encompasses a *present fear* that the toxic exposure causative of asbestosis may later result in cancer. The Government's "*when,* not *whether,*" argument has a large gap; it excludes recovery for any fear experienced by an asbestosis sufferer who never gets cancer. To be compensable as pain and suffering, Norfolk further urges, a mental or emotional harm must have been "directly brought about by a physical injury." This argument elides over a key connection between Norfolk's conduct and the damages the asbestosis claimants allege as part of their pain and suffering: Once found liable for any bodily harm, a negligent

actor is answerable in damages under the common law for emotional disturbance resulting from that harm or from the conduct which causes it. Given the acknowledgment by Norfolk's expert that asbestosis puts a worker in a heightened risk category for asbestos-related lung cancer, as well as the undisputed testimony of the asbestosis claimants' expert that some ten percent of asbestosis sufferers have died of mesothelioma, the claimants would have good cause for increased apprehension about their vulnerability to cancer. Although *Metro-North* stressed that holding employers liable to workers merely exposed to asbestos would risk "unlimited and unpredictable liability," 521 U. S., at 435, that decision sharply distinguished exposure-only plaintiffs from those who suffer from a disease, and stated, unambiguously, that the common law permits emotional distress recovery for the latter category, *e. g.*, *id.*, at 436. The categorical exclusion of exposure-only claimants reduces the universe of potential claimants to numbers neither "unlimited" nor "unpredictable," for, of those exposed to asbestos, only a small fraction will develop asbestosis. Pp. 148–157.

(c) The Court affirms the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages, but with an important reservation. It is incumbent upon the complainant to prove that his alleged fear is genuine and serious. In this case, proof directed to that matter was notably thin, and might well have succumbed to a straightforward sufficiency-of-the-evidence objection, had Norfolk so targeted its attack. But Norfolk, instead, sought categorical exclusion of cancer-fear damages for asbestosis claimants. This Court, moreover, did not grant review to judge the sufficiency of the evidence or the reasonableness of the damages awards. Pp. 157–159.

2. The FELA's express terms, reinforced by consistent judicial applications of the Act, allow a worker to recover his entire damages from a railroad whose negligence jointly caused an injury, thus placing on the railroad the burden of seeking contribution from other potential tortfeasors. Pp. 159–166.

(a) The statutory language supports the trial court's understanding that the FELA does not provide for apportionment of damages between railroad and nonrailroad causes. Section 1 of the Act makes common carrier railroads "liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of such carrier." 45 U. S. C. § 51. The claimants here suffer from asbestosis (an "injury"), which is linked to their employment with Norfolk and "result[ed] in whole or in part from . . . negligence" by Norfolk. Norfolk is therefore "liable in damages . . . *for such injury.*" Nothing in the statutory text

instructs that the amount of damages payable by a liable employer bears reduction when the negligence of a third party also contributed in part to the injury-in-suit. Norfolk maintains that the statutory language conveying that a railroad is liable only for injuries an employee sustains "while he is employed by such carrier" makes it clear that railroads are not liable for employee injuries resulting from outside causes. Placed in context, however, the clause on which Norfolk relies clarifies that the FELA's reach is limited to injuries sustained by railroad employees while the employees are themselves engaged in interstate commerce; the provision does not speak to cases in which an injury has multiple causes, some related to railroad employment and others unrelated to that employment. Moreover, interpreting § 1 to require apportionment would put that provision in tension with the rest of the statute. Several of the FELA's provisions expand a railroad's liability by abolishing common-law defenses that limited employees' ability to recover against their employers. And although the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault, it expressly prescribes no other apportionment. Pp. 159–161.

(b) Norfolk's view also runs counter to a century of FELA jurisprudence. No FELA decision made by this Court so much as hints that the statute mandates apportionment of damages among potentially liable tortfeasors. Also significant, there is scant lower court authority for the proposition that the FELA contemplates apportionment, and this Court has repeatedly stated that joint and several liability is the traditional rule, see, *e. g.*, *The "Atlas,"* 93 U. S. 302, 315. Norfolk contends that the modern trend is to apportion damages between multiple tortfeasors. The state of affairs when the FELA was enacted, however, is the more important guide. See, *e. g.*, *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 336–339. At any rate, many States retain full joint and several liability, even more retain it in certain circumstances, and most of the recent changes away from the traditional rule have come through legislative enactments rather than judicial development of common-law principles. Congress, however, has not amended the FELA. Finally, reading the FELA to require apportionment would handicap plaintiffs and could vastly complicate adjudications. Once an employer has been adjudged negligent with respect to a given injury, it accords with the FELA's overarching purpose to require the employer to bear the burden of identifying other responsible parties and demonstrating that some of the costs of the injury should be spread to them. Pp. 161–166.

Affirmed.

Syllabus

GINSBURG, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and IV, and the opinion of the Court with respect to Part III, in which STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and O'CONNOR and BREYER, JJ., joined, *post*, p. 166. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 182.

*Carter G. Phillips* argued the cause for petitioner. With him on the briefs were *Stephen B. Kinnaird*, *Fred Adkins*, *Rodney L. Baker II*, and *Laura D. Hunt*.

*David B. Salmons* argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Clement*, *Anthony J. Steinmeyer*, and *Peter R. Maier*.

*Richard J. Lazarus* argued the cause for respondents. With him on the brief were *James A. McKowen*, *James H. Rion, Jr.*, and *Lawrence M. Mann*.*

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*Briefs of *amici curiae* urging reversal were filed for the Association of American Railroads by *Daniel Saphire*, *Randall A. Jordan*, *Mary Helen Moses*, and *William A. Brasher;* for the American Insurance Association by *Seth P. Waxman*, *Edward C. DuMont*, *Kimberly Parker*, *Craig A. Berrington*, and *Lynda S. Mounts;* for the Chamber of Commerce of the United States by *Evan M. Tager*, *Eileen Penner*, *Miriam R. Nemetz*, and *Robin S. Conrad;* and for Trial Lawyers for Public Justice by *Arthur H. Bryant*, *Brent M. Rosenthal*, *Misty A. Farris*, and *Kevin D. McHargue*.

Briefs of *amici curiae* urging affirmance were filed for the State of West Virginia et al. by *Darrell V. McGraw, Jr.*, Attorney General of West Virginia, *Frances Ann Hughes*, Managing Deputy Attorney General, *Silas Taylor*, Senior Deputy Attorney General, and *Robert Kono*, Acting Attorney General of Guam, and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *M. Jane Brady* of Delaware, *Thomas J. Miller* of Iowa, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Philip T. McLaughlin* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Sheldon Whitehouse* of Rhode Island, and *William H. Sorrell* of Vermont; and for the

JUSTICE GINSBURG delivered the opinion of the Court.

The Federal Employers' Liability Act (FELA or Act), 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, makes common carrier railroads liable in damages to employees who suffer work-related injuries caused "in whole or in part" by the railroad's negligence. This case, brought against Norfolk & Western Railway Company (Norfolk) by six former employees now suffering from asbestosis (asbestosis claimants), presents two issues involving the FELA's application. The first issue concerns the damages recoverable by a railroad worker who suffers from the disease asbestosis: When the cause of that disease, in whole or in part, was exposure to asbestos while on the job, may the worker's recovery for his asbestosis-related "pain and suffering" include damages for fear of developing cancer?

The second issue concerns the extent of the railroad's liability when third parties not before the court—for example, prior or subsequent employers or asbestos manufacturers or suppliers—may have contributed to the worker's injury. Is the railroad answerable in full to the employee, so that pursuit of contribution or indemnity from other potentially liable enterprises is the railroad's sole damages-award-sharing recourse? Or is the railroad initially entitled to an apportionment among injury-causing tortfeasors, *i. e.*, a division of

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American Federation of Labor and Congress of Industrial Organizations et al. by *Jonathan P. Hiatt*, *Robert Alexander*, *Leon Dayan*, and *Laurence Gold*.

Briefs of *amici curiae* were filed for American Law Professors by *Ned Miltenberg;* for the American Public Health Association by *Scott L. Nelson*, *David C. Vladeck*, and *Brian Wolfman;* for the Brotherhood of Locomotive Engineers by *William G. Jungbauer* and *Keith A. Queensen;* for the Coalition for Asbestos Justice, Inc., et al. by *Victor E. Schwartz*, *Mark A. Behrens*, *Walter E. Dellinger III*, *Pamela A. Harris*, *Jan S. Amundson*, *David F. Zoll*, *Donald D. Evans*, and *David T. Deal;* for the United Transportation Union by *Clinton J. Miller III;* and for the Washington Legal Foundation by *Griffin B. Bell*, *Jeffrey S. Bucholtz*, *Daniel J. Popeo*, and *Richard A. Samp*.

damages limiting the railroad's liability to the injured employee to a proportionate share?

In resolving the first issue, we follow the line drawn by *Metro-North Commuter R. Co.* v. *Buckley*, 521 U. S. 424 (1997), a decision that relied on and complemented *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532 (1994). In *Metro-North*, we held that emotional distress damages may not be recovered under the FELA by disease-free asbestos-exposed workers; in contrast, we observed, workers who "suffe[r] from a disease" (here, asbestosis) may "recover for related negligently caused emotional distress." 521 U. S., at 432. We decline to blur, blend, or reconfigure our FELA jurisprudence in the manner urged by the petitioner; instead, we adhere to the clear line our recent decisions delineate. Accordingly, we hold that mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos.

As to the second issue, we similarly decline to write new law by requiring an initial apportionment of damages among potential tortfeasors. The FELA's express terms, reinforced by consistent judicial applications of the Act, allow a worker to recover his entire damages from a railroad whose negligence jointly caused an injury (here, the chronic disease asbestosis), thus placing on the railroad the burden of seeking contribution from other tortfeasors.

## I

The asbestosis claimants (plaintiffs below, respondents here) brought this FELA action against their former employer, Norfolk, in the Circuit Court of Kanawha County, West Virginia.[1] Norfolk, they alleged, negligently exposed them to asbestos, which caused them to contract the occupa-

[1] FELA cases may be brought, at plaintiff's option, in federal court or in state court. 45 U. S. C. § 56.

tional disease asbestosis. App. 17–20.[2] As an element of their occupational disease damages, the asbestosis claimants sought recovery for mental anguish based on their fear of developing cancer. *Id.*, at 21.

Before trial, Norfolk moved to exclude all evidence referring to cancer as irrelevant and prejudicial. *Id.*, at 52–53. The trial court denied the motion, Tr. 251 (Apr. 14, 1998), and the asbestosis claimants placed before the jury extensive evidence relating to cancer, including expert testimony that asbestosis sufferers with smoking histories have a significantly increased risk of developing lung cancer.[3] (Of the six asbestosis claimants, five had smoking histories, and two persisted in smoking even after their asbestosis diagnosis. App. 265, 336–337.) Asbestosis sufferers—workers whose exposure to asbestos has manifested itself in a chronic disease—the jury also heard, have a significant (one in ten) risk of dying of mesothelioma, a fatal cancer of the lining of the lung or abdominal cavity. *Id.*, at 92–97 (asbestosis claimants' expert); *id.*, at 472 (Norfolk's expert) (nine or ten percent).[4]

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[2] Asbestosis is a noncancerous scarring of the lungs by asbestos fibers; symptoms include shortness of breath, coughing, and fatigue. Ranging in severity from mild to debilitating, it is a chronic disease that, in rare instances, is fatal. See RAND Institute for Civil Justice, S. Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report 17 (2002), Petitioner's Supplemental Lodging, p. SL82 (hereinafter RAND Institute); U. S. Dept. of Health and Human Services, Agency for Toxic Substances and Disease Registry, Asbestos Toxicity 20 (2000).

[3] The risk of mortality from lung cancer for smokers with asbestosis, the trial evidence showed, is 39 percent. App. 93–94 (asbestosis claimants' expert); *id.*, at 473 (Norfolk's expert). For nonsmokers, the risk is much lower, approximately 2.5 percent. *Ibid.*

[4] While smoking contributes significantly to the risk of lung cancer, it does not bear on the risk of mesothelioma. *Id.*, at 93. Asbestos is the only cause of mesothelioma established thus far, although some instances of the disease are not traceable to asbestos. RAND Institute 17. The latency period for asbestos-related disease is generally 20–40 years from exposure. *Id.*, at 16.

Concluding that no asbestosis claimant had shown he was reasonably certain to develop cancer, the trial court instructed the jury that damages could not be awarded to any claimant "for cancer or any increased risk of cancer." *Id.*, at 573. The testimony about cancer, the court explained, was relevant "only to judge the genuineness of plaintiffs' claims of fear of developing cancer." *Ibid.* On that score, the court charged:

> "[A]ny plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering." *Ibid.*

In so instructing the jury, the court rejected Norfolk's proposed instruction, which would have ruled out damages for an asbestosis sufferer's fear of cancer, unless the claimant proved both "an actual likelihood of developing cancer" and "physical manifestations" of the alleged fear. See *id.*, at 548.

The trial court also refused Norfolk's request to instruct the jury to apportion damages between Norfolk and other employers alleged to have contributed to an asbestosis claimant's disease. *Id.*, at 539.[5] Two of the claimants had significant exposure to asbestos while working for other employers: Carl Butler, exposed to asbestos at Norfolk for only three months, worked with asbestos elsewhere as a pipefitter for 33 years, *id.*, at 250, 252, 375; Freeman Ayers was exposed to asbestos for several years while working at auto-

[5] The apportionment instruction Norfolk proposed stated: "If you find that the plaintiff in this case has a condition or disease which was caused by his employment with employers other than the railroad, plaintiff's recovery must be limited to only such damages as result from his railroad employment and he cannot recover damages which have been or will be caused by his nonrailroad employment. This is so because the railroad can be held responsible only for such of a plaintiff's damages as result from its alleged negligence while the plaintiff was employed at the railroad." App. 539.

body shops, *id.*, at 274–275. In awarding damages, the trial court charged, the jury was "not to make a deduction for the contribution of non-railroad exposures," so long as it found that Norfolk was negligent and that "dust exposures at [Norfolk] contributed, however slightly, to the plaintiff's injuries." *Id.*, at 570.[6]

The jury returned total damages awards for each asbestosis claimant, ranging from $770,000 to $1.2 million. *Id.*, at 578–589. After reduction for three claimants' comparative negligence from smoking and for settlements with non-FELA entities, the final judgments amounted to approximately $4.9 million. *Id.*, at 590–613. It is impossible to look behind those judgments to determine the amount the jury awarded for any particular element of damages. Norfolk, although it could have done so, see W. Va. Rule Civ. Proc. 49 (1998), did not endeavor to clarify the jury's damages determinations; it did not seek a special verdict or interrogatory calling upon the jury to report, separately, its assessments, if any, for fear-of-cancer damages.

The trial court denied Norfolk's motion for a new trial, App. to Pet. for Cert. 4a, and the Supreme Court of Appeals of West Virginia denied Norfolk's request for discretionary review, *id.*, at 1a–2a. We granted certiorari, 535 U. S. 969 (2002), and now affirm.

## II

Section 1 of the FELA renders common carrier railroads "liable in damages to any person suffering injury while . . . employed by [the] carrier" if the "injury or death result-[ed] in whole or in part from the [carrier's] negligence."

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[6] As required by the FELA, the trial court directed the jury to determine whether negligence by any of the asbestosis claimants contributed to their injuries and to compare any such negligence with that of Norfolk "in terms of percentages." *Id.*, at 570–571; see 45 U. S. C. § 53 ("contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee").

45 U. S. C. § 51. Enacted in 1908, Congress designed the FELA to "shif[t] part of the 'human overhead' of doing business from employees to their employers." *Gottshall*, 512 U. S., at 542 (quoting *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 58 (1943)). "[T]o further [the Act's] humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Gottshall*, 512 U. S., at 542. As cataloged in *Gottshall*, the FELA "abolished the fellow servant rule"; "rejected the doctrine of contributory negligence in favor of . . . comparative negligence"; "prohibited employers from exempting themselves from [the] FELA through contract"; and, in a 1939 amendment, "abolished the assumption of risk defense." *Id.*, at 542–543; see 45 U. S. C. §§ 51–55. "Only to the extent of these explicit statutory alterations," however, "is [the] FELA 'an avowed departure from the rules of the common law.'" *Gottshall*, 512 U. S., at 544 (quoting *Sinkler* v. *Missouri Pacific R. Co.*, 356 U. S. 326, 329 (1958)). When the Court confronts a dispute regarding what injuries are compensable under the statute, *Gottshall* instructs, common-law principles "are entitled to great weight in our analysis." 512 U. S., at 544; see *id.*, at 558 (SOUTER, J., concurring) (The Court's duty "is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law.").

## III

### A

We turn first to the question whether the trial judge correctly stated the law when he charged the jury that an asbestosis claimant, upon demonstrating a reasonable fear of cancer stemming from his present disease, could recover for that fear as part of asbestosis-related pain and suffering damages. See *supra*, at 143. In answering this question, we follow the path marked by the Court's decisions in *Consolidated*

*Rail Corporation* v. *Gottshall*, 512 U. S. 532 (1994), and *Metro-North Commuter R. Co.* v. *Buckley*, 521 U. S. 424 (1997).

The FELA plaintiff in *Gottshall* alleged that he witnessed the death of a co-worker while on the job, and that the episode caused him severe emotional distress. 512 U. S., at 536–537. He sought to recover damages from his employer, Conrail, for "mental or emotional harm . . . not directly brought about by a physical injury." *Id.*, at 544.

Reversing the Court of Appeals' judgment in favor of the plaintiff, this Court stated that uncabined recognition of claims for negligently inflicted emotional distress would "hol[d] out the very real possibility of nearly infinite and unpredictable liability for defendants." *Id.*, at 546. Of the "limiting tests . . . developed in the common law," *ibid.*, the Court selected the zone-of-danger test to delineate "the proper scope of an employer's duty under [the] FELA to avoid subjecting its employees to negligently inflicted emotional injury," *id.*, at 554. That test confines recovery for stand-alone emotional distress claims to plaintiffs who: (1) "sustain a physical impact as a result of a defendant's negligent conduct"; or (2) "are placed in immediate risk of physical harm by that conduct"—that is, those who escaped instant physical harm, but were "within the zone of danger of physical impact." *Id.*, at 547–548 (internal quotation marks omitted). The Court remanded *Gottshall* for reconsideration under the zone-of-danger test. *Id.*, at 558.

In *Metro-North*, the Court applied the zone-of-danger test to a claim for damages under the FELA, one element of which was fear of cancer stemming from exposure to asbestos. The plaintiff in *Metro-North* had been intensively exposed to asbestos while working as a pipefitter for Metro-North in New York City's Grand Central Terminal. At the time of his lawsuit, however, he had a clean bill of health. The Court rejected his entire claim for relief. Exposure alone, the Court held, is insufficient to show "physical im-

pact" under the zone-of-danger test. 521 U. S., at 430. "[A] simple (though extensive) contact with a carcinogenic substance," the Court observed, "does not . . . offer much help in separating valid from invalid emotional distress claims." *Id.*, at 434. The evaluation problem would be formidable, the Court explained, "because contacts, even extensive contacts, with serious carcinogens are common." *Ibid.* "The large number of those exposed and the uncertainties that may surround recovery," the Court added, "suggest what *Gottshall* called the problem of 'unlimited and unpredictable liability.' " *Id.*, at 435 (quoting 512 U. S., at 557).

As in *Gottshall*, the Court distinguished stand-alone distress claims from prayers for damages for emotional pain and suffering tied to a physical injury: "Common-law courts," the Court recognized, "*do* permit a plaintiff *who suffers from a disease* to recover for related negligently caused emotional distress . . . ." 521 U. S., at 432 (emphasis added). When a plaintiff suffers from a disease, the Court noted, common-law courts have made "a special effort" to value related emotional distress, "perhaps from a desire to make a physically injured victim whole or because the parties are likely to be in court in any event." *Id.*, at 436–437.

In sum, our decisions in *Gottshall* and *Metro-North* describe two categories: Stand-alone emotional distress claims not provoked by any physical injury, for which recovery is sharply circumscribed by the zone-of-danger test; and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted. Norfolk, whose position the principal dissent embraces, see, *e. g.*, *post*, at 172, 177 (KENNEDY, J., concurring in part and dissenting in part), would have us ally this case with those in the stand-alone emotional distress category, Brief for Petitioner 16–31; the asbestosis claimants urge its placement in the

emotional distress brought on by a physical injury (or disease) category, Brief for Respondents 26.[7]

Relevant to this characterization question, the parties agree that asbestosis is a cognizable injury under the FELA. See *Urie* v. *Thompson*, 337 U. S. 163, 187 (1949) (occupational diseases caused by exposure to hazardous dusts are injuries under the FELA). Norfolk does not dispute that the claimants suffer from asbestosis, see Tr. of Oral Arg. 4, or that asbestosis can be "a clinically serious, often disabling, and progressive disease," Reply Brief 6 (internal quotation marks omitted). As *Metro-North* plainly indicates, pain and suffering damages may include compensation for fear of cancer when that fear "accompanies a physical injury." 521 U. S., at 430; see *id.*, at 436 ("The common law permits emotional distress recovery for that category of plaintiffs who suffer from a disease."). Norfolk, therefore, cannot plausibly maintain that the claimants here, like the plaintiff in *Metro-North*, "are disease and symptom free." *Id.*, at 432. The plaintiffs in *Gottshall* and *Metro-North* grounded their suits on claims of negligent infliction of emotional distress. The claimants before us, in contrast, complain of a negligently inflicted physical injury (asbestosis) and attendant pain and suffering.

B

Unlike stand-alone claims for negligently inflicted emotional distress, claims for pain and suffering associated with, or "parasitic" on, a physical injury are traditionally compensable. The Restatement (Second) of Torts § 456 (1963–1964) (hereinafter Restatement) states the general rule:

> "If the actor's negligent conduct has so caused *any* bodily harm to another as to make him liable for it, the actor is also subject to liability for

[7] JUSTICE BREYER, it appears, would not place this case in either of the two above-described categories, but somewhere in between. See *post*, at 187 (opinion concurring in part and dissenting in part).

> "(a) fright, shock, *or other emotional disturbance* resulting from the bodily harm or from the conduct which causes it . . . ." (Emphases added.)

A plaintiff suffering bodily harm need not allege physical manifestations of her mental anguish. *Id.*, Comment *c*. "The plaintiff must of course present evidence that she has suffered, but otherwise her emotional distress claims, in whatever form, are fully recoverable." D. Dobbs, Law of Torts 822 (2000).

By 1908, when the FELA was enacted, the common law had evolved to encompass apprehension of future harm as a component of pain and suffering. The future harm, genuinely feared, need not be more likely than not to materialize. See Minneman, Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery, 50 A. L. R. 4th 13, 25, § 2[a] (1986) (mental anguish related to physical injury is recoverable even if "the underlying future prospect is not itself compensable inasmuch as it is not sufficiently likely to occur"). Physically injured plaintiffs, it is now recognized, may recover for "reasonable fears" of a future disease. Dobbs, *supra*, at 844. As a classic example, plaintiffs bitten by dogs succeeded in gaining recovery, not only for the pain of the wound, but also for their fear that the bite would someday result in rabies or tetanus. The wound might heal, but "[t]he ghost of hydrophobia is raised, not to down during the life-time of the victim." *The Lord Derby*, 17 F. 265, 267 (ED La. 1883).[8]

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[8] See also *Gamer* v. *Winchester*, 110 S. W. 2d 1190, 1193 (Tex. Civ. App. 1937) (rabies, lockjaw, blood poisoning); *Serio* v. *American Brewing Co.*, 141 La. 290, 299, 74 So. 998, 1001 (1917) (hydrophobia); *Ayers* v. *Macoughtry*, 29 Okla. 399, 402, 117 P. 1088, 1090 (1911) (fear of rabies); *Buck* v. *Brady*, 110 Md. 568, 573, 73 A. 277, 279 (1909) (hydrophobia); *Heintz* v. *Caldwell*, 9 Ohio Cir. Dec. 412 (1898) (hydrophobia and lockjaw); *Warner* v. *Chamberlain*, 12 Del. 18, 21, 30 A. 638, 639 (1884) (hydrophobia); *Godeau* v. *Blood*, 52 Vt. 251 (1880) (apprehension of poison from dog bite).

In the course of the 20th century, courts sustained a variety of other "fear-of" claims.[9] Among them have been claims for fear of cancer. Heightened vulnerability to cancer, as one court observed, "must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles," he knows it is there, but not whether or when it will fall. *Alley* v. *Charlotte Pipe & Foundry Co.*, 159 N. C. 327, 331, 74 S. E. 885, 886 (1912).[10]

Many courts in recent years have considered the question presented here—whether an asbestosis claimant may be compensated for fear of cancer. Of decisions that address

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[9] See, *e. g., Goodmaster* v. *Houser*, 225 Conn. 637, 647, 625 A. 2d 1366, 1371 (1993) (apprehension that motor vehicle accident injury would necessitate future surgery, risking facial nerve paralysis); *Laxton* v. *Orkin Exterminating Co.*, 639 S. W. 2d 431, 434 (Tenn. 1982) (fear of illness from drinking contaminated well water); *Baylor* v. *Tyrrell*, 177 Neb. 812, 824–826, 131 N. W. 2d 393, 401–402 (1964) (fear of deterioration of hip bone following motor vehicle accident); *Schneider* v. *Chalfonte Builders, Inc.*, 11 Bucks 122 (Pa. Ct. Common Pleas 1961) (fear that contaminated water causing gastrointestinal ailments would later cause a more grave disease, *e. g.*, typhoid fever); *Figlar* v. *Gordon*, 133 Conn. 577, 585, 53 A. 2d 645, 648 (1947) (fear that brain injury from motor vehicle accident would lead to epilepsy); *Southern Kansas R. Co. of Texas* v. *McSwain*, 55 Tex. Civ. App. 317, 319, 118 S. W. 874, 875 (1909) (apprehension of blood poisoning from foot injury); *Butts* v. *National Exchange Bank*, 99 Mo. App. 168, 173, 72 S. W. 1083, 1084 (1903) (same).

[10] See also *Sterling* v. *Velsicol Chemical Corp.*, 855 F. 2d 1188, 1206 (CA6 1988) (fear of cancer from ingestion of contaminated well water); *Clark* v. *Taylor*, 710 F. 2d 4, 14 (CA1 1983) (fear of bladder cancer from "benzidine test" on prisoner to detect blood on skin); *Dempsey* v. *Hartley*, 94 F. Supp. 918, 921 (ED Pa. 1951) (injuries to breasts); *Zieber* v. *Bogert*, 565 Pa. 376, 383, 773 A. 2d 758, 762 (2001) (fear of a recurrence of cancer when first cancer was untimely diagnosed as a result of medical malpractice); *Anderson* v. *Welding Testing Laboratory, Inc.*, 304 So. 2d 351, 353 (La. 1974) (handling of radioactive pill); *Lorenc* v. *Chemirad Corp.*, 37 N. J. 56, 76, 179 A. 2d 401, 411 (1962) (toxic chemical spilled on hand); *Ferrara* v. *Galluchio*, 5 N. Y. 2d 16, 20–21, 152 N. E. 2d 249, 252–253 (1958) (radiation burn on shoulder); *Coover* v. *Painless Parker, Dentist*, 105 Cal. App. 110, 115, 286 P. 1048, 1050 (1930) (X-ray burns).

the issue, a clear majority sustain recovery. See, *e. g.*, *Hoerner* v. *Anco Insulations, Inc.*, 2000–2333, p. 49 (La. App. 1/23/02), 812 So. 2d 45, 77 (fear of cancer testimony "appropriately presented in order to prove [asbestosis claimant's] general damage claim"); *Beeman* v. *Manville Corp. Asbestos Disease Compensation Fund*, 496 N. W. 2d 247, 252–253 (Iowa 1993) (cancer evidence held admissible to show reasonableness of asbestosis claimant's fear of cancer); *Denton* v. *Southern R. Co.*, 854 S. W. 2d 885, 888–889 (Tenn. App. 1993) (FELA decision holding erroneous "Trial Court's exclusion of evidence about [asbestosis claimant's] fear of cancer"); *Celotex Corp.* v. *Wilson*, 607 A. 2d 1223, 1229–1230 (Del. 1992) (sustaining jury charge allowing damages for asbestosis claimants' fear of cancer); *Coffman* v. *Keene Corp.*, 257 N. J. Super. 279, 293–294, 608 A. 2d 416, 424–425 (1992) (sustaining award of damages that included compensation for asbestosis claimant's fear of cancer); *Fibreboard Corp.* v. *Pool*, 813 S. W. 2d 658, 666, 675–676 (Tex. App. 1991) (sustaining jury charge allowing fear of cancer damages for plaintiff with "confirmed asbestosis"); *Sorenson* v. *Raymark Industries, Inc.*, 51 Wash. App. 954, 958, 756 P. 2d 740, 742 (1988) (evidence of increased risk of cancer held "admissible to establish, as a damage factor, the reasonableness of [an asbestosis claimant's] *fear* that he would contract cancer"); *Eagle-Picher Industries, Inc.* v. *Cox*, 481 So. 2d 517, 529 (Fla. App. 1985) (asbestosis claimants may recover for fear of cancer); *Devlin* v. *Johns-Manville Corp.*, 202 N. J. Super. 556, 563, 495 A. 2d 495, 499 (1985) (asbestosis claimants, who suffered "substantial bodily harm" from asbestos, may recover for fear of cancer).[11]

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[11] See also *Jackson* v. *Johns-Manville Sales Corp.*, 781 F. 2d 394, 413–414 (CA5 1986) (fear of cancer compensable, but plaintiff established cancer more likely than not to occur); *Bonnette* v. *Conoco, Inc.*, 2001–2767, p. 11 (La. 1/28/03), 837 So. 2d 1219, 1227 (mental anguish accompanied by physical injury is compensable, but mere exposure to asbestos does not

Arguing against the trend in the lower courts, Norfolk and its supporting *amici* assert that the asbestosis claimants' alleged cancer fears are too remote from asbestosis to warrant inclusion in their pain and suffering awards. In support of this contention, the United States, one of Norfolk's *amici*, refers to the "separate disease rule," under which most courts have held that the statute of limitations runs separately for each asbestos-related disease. Brief for United States as *Amicus Curiae* 12. See, *e. g.*, *Wilson* v. *Johns-Manville Sales Corp.*, 684 F. 2d 111, 120–121 (CADC 1982); *Pustejovsky* v. *Rapid-American Corp.*, 35 S. W. 3d 643, 649, n. 3 (Tex. 2000) (listing cases).[12] Because the asbestosis

qualify as a physical injury); *Wolff* v. *A-One Oil, Inc.*, 216 App. Div. 2d 291, 292, 627 N. Y. S. 2d 788, 789–790 (1995) (fear-of-cancer recovery available if a plaintiff has asbestos-induced disease); *Capital Holding Corp.* v. *Bailey*, 873 S. W. 2d 187, 194 (Ky. 1994) (recovery "if *first* the plaintiff can cross the threshold of establishing a harmful change has resulted from exposure to the potentially cancer producing agent"); *Mauro* v. *Raymark Industries, Inc.*, 116 N. J. 126, 137, 561 A. 2d 257, 263 (1989) (claim for fear of future disease held "clearly cognizable where, as here, plaintiff's exposure to asbestos has resulted in physical injury"); *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 14, 507 N. E. 2d 476, 480–481 (Ct. Common Pleas, Cuyahoga Cty. 1987) (asbestosis-afflicted plaintiff could recover for fear of cancer either as pain and suffering damages associated with asbestosis, or as compensable stand-alone claim of negligent infliction of emotional distress).

Contrary precedent is slim in comparison to the heavy weight of authority. See *Fulmore* v. *CSX Transp., Inc.*, 252 Ga. App. 884, 897, 557 S. E. 2d 64, 75 (2001) (denying fear-of-cancer damages to asbestosis claimant based in part on misplaced reliance on *Metro-North Commuter R. Co.* v. *Buckley*, 521 U. S. 424 (1997)); *Cleveland* v. *Johns-Manville Corp.*, 547 Pa. 402, 410, 690 A. 2d 1146, 1150 (1997) (plaintiff asserting noncancer asbestos claims may not recover any cancer-related damages); *Watson* v. *Norfolk & Western R. Co.*, 30 Ohio App. 3d 201, 203–204, 507 N. E. 2d 468, 471–472 (1987) (recovery permissible under the FELA only on showing that plaintiff will probably develop cancer from asbestos exposure).

[12] The rule evolved as a response to the special problem posed by latent-disease cases. Under the single-action rule, a plaintiff who recovered for asbestosis would then be precluded from bringing suit for later developed mesothelioma. Allowing separate complaints for each disease, courts de-

claimants may bring a second action if cancer develops, Norfolk and the Government argue, cancer-related damages are unwarranted in their asbestosis suit. Tr. of Oral Arg. 17–18; Reply Brief 5. The question, as the Government frames it, is not *whether* the asbestosis claimants can recover for fear of cancer, but *when*. Brief for United States as *Amicus Curiae* 15. The principal dissent sounds a similar theme. *Post*, at 174 ("a person with asbestosis will not be without a remedy for pain and suffering caused by cancer").

But the asbestosis claimants did not seek, and the trial court did not allow, discrete damages for their *increased risk* of future cancer. App. 573 ("[Y]ou cannot award damages to plaintiffs for cancer or for any increased risk of cancer."); see *supra*, at 143. Instead, the claimants sought damages for their *current* injury, which, they allege, encompasses a *present fear* that the toxic exposure causative of asbestosis may later result in cancer. The Government's "*when*, not *whether*," argument has a large gap; it excludes recovery for the fear experienced by an asbestosis sufferer who never gets cancer. For such a person, the question is *whether*, not *when*, he may recover for his fear.

Even if the question is *whether*, not simply *when*, an asbestosis sufferer may recover for cancer fear, Norfolk has another string in its bow. To be compensable as pain and suffering, Norfolk maintains, a mental or emotional harm must have been "directly brought about by a physical injury." Brief for Petitioner 15 (emphasis deleted; internal quotation marks omitted) (quoting *Gottshall*, 512 U. S., at 544). Because asbestosis itself, as distinguished from asbestos expo-

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termined, properly balanced a defendant's interest in repose and a plaintiff's interest in recovering adequate compensation for negligently inflicted injuries. See, *e. g.*, *Wilson*, 684 F. 2d, at 119. There is no inevitable conflict between the "separate disease rule" and recovery of cancer *fear* damages by asbestosis claimants. The rule simply allows recovery for successive diseases and would necessarily exclude only double recovery for the same element of damages.

sure, does not generate cancer, Norfolk insists and the principal dissent agrees, "fear of cancer is too unrelated, as a matter of law, to be an element of [an asbestosis sufferer's] pain and suffering." Tr. of Oral Arg. 11; see *post*, at 172.[13] This argument elides over a key connection between Norfolk's conduct and the damages the asbestosis claimants allege as an element of their pain and suffering: Once found liable for "any bodily harm," a negligent actor is answerable in damages for emotional disturbance "resulting from the bodily harm *or from the conduct which causes it.*" Restatement § 456(a) (emphasis added).[14]

There is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestos-related cancer. Norfolk's own expert acknowledged that asbestosis puts a worker in a heightened risk category for asbestos-related lung cancer. App. 470 (affirming that "asbestosis has to be necessary before lung cancer is a problem"). See W. Morgan & A. Seaton, Occupational Lung Diseases 151 (3d ed. 1995) (hereinafter Morgan & Seaton) ("[H]eavy cumulative exposures to asbestos which lead to asbestosis increase the risk of developing lung cancer. . . . [T]here is now considerable evidence which indicates that the risk of lung cancer only increases when asbestosis is present."). See also *id.*, at 341 ("There is no doubt . . . that the presence of asbestosis, at least in smokers, is associated with a significantly in-

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[13] But cf. *post*, at 187 (BREYER, J.) (recovery permissible when fear of cancer "detrimentally affects the plaintiff's ability to carry on with everyday life and work").

[14] See, *e. g.*, *Baltimore & O. R. Co.* v. *McBride*, 36 F. 2d 841, 842 (CA6 1930) ("Where both the physical injury and the nervous shock are proximately caused by the same act of negligence, there is no necessity that the shock result exclusively from the physical injury."); see also Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497, 504 (1922) ("Recovery has been allowed where there has been physical impact, but it has been frankly said that where there has been impact the damages recoverable are not limited to those resulting therefrom."); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1048–1049 (1936).

creased rate of lung cancer."); A. Churg & F. Green, Pathology of Occupational Lung Disease 343 (2d ed. 1998) ("[S]tudies provide strong support for the notion that asbestosis is crucial to the development of asbestos-associated lung cancers.").

Furthermore, the asbestosis claimants' expert testified without contradiction to a risk notably "different in kind from the background risks that all individuals face," *post*, at 187 (BREYER, J.): Some "ten percent of the people who have the disease, asbestosis, have died of mesothelioma." App. 93; see Morgan & Seaton 350 ("The evidence suggests that, once the lungs of the susceptible subject have been primed by a sufficient dose of asbestos, then the development of [mesothelioma] is inevitable.").[15] In light of this evidence, an asbestosis sufferer would have good cause for increased apprehension about his vulnerability to another illness from his exposure, a disease that inflicts "agonizing, unremitting pain," relieved only by death, *post*, at 168 (KENNEDY, J.): Asbestosis is "a chronic, painful and concrete reminder that [a

[15] The evidence at trial, Norfolk suggests, overstated the asbestosis claimants' cancer risk. Brief for Petitioner 22–24, and nn. 18–20. We do not sit to reweigh evidence based on information not presented at trial. See *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35 (1944). We note, however, that none of the studies to which Norfolk refers addresses the risk of cancer for persons with asbestosis. Rather, they home in on the relationship between *asbestos exposure* and cancer. See Morgan, Attitudes About Asbestos and Lung Cancer, 22 Am. J. Indus. Med. 437 (1992); Goodman, Morgan, Ray, Malloy, & Zhao, Cancer in Asbestos-Exposed Occupational Cohorts: A Meta-Analysis, 10 Cancer Causes & Control 453 (1999); Erren, Jacobsen, & Piekarski, Synergy Between Asbestos and Smoking on Lung Cancer Risks, 10 Epidemiology 405 (1999). Norfolk further suggests that cancer risk from asbestos varies by fiber type. Brief for Petitioner 24, and n. 19 (citing Morgan & Seaton 346–347). Even if true, this suggestion is unavailing: Norfolk does not allege that it exposed the asbestosis claimants to the less toxic fiber type. Finally, Norfolk argues that the studies quantifying cancer risk for workers with asbestosis cannot accurately be extrapolated to evaluate the risk for these particular asbestosis claimants. Reply Brief 8–9, and n. 4. Nothing impeded Norfolk from presenting this argument to the jury.

plaintiff] has been *injuriously* exposed to a substantial amount of asbestos, a reminder which may both qualitatively and quantitatively intensify his fear." *Eagle-Picher Industries, Inc.* v. *Cox*, 481 So. 2d, at 529.

Norfolk understandably underscores a point central to the Court's decision in *Metro-North.* Reply Brief 10. The Court's opinion in *Metro-North* stressed that holding employers liable to workers merely exposed to asbestos would risk "unlimited and unpredictable liability." 521 U. S., at 435 (internal quotation marks omitted) (quoting *Gottshall*, 512 U. S., at 557). But as earlier observed, see *supra*, at 147, *Metro-North* sharply distinguished exposure-only plaintiffs from "plaintiffs who suffer from a disease," and stated, unambiguously, that "[t]he common law permits emotional distress recovery for [the latter] category." 521 U. S., at 436; see *id.*, at 432. Commentary similarly distinguishes asymptomatic asbestos plaintiffs from plaintiffs who "developed asbestosis and thus suffered real physical harm." Henderson & Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S. C. L. Rev. 815, 830 (2002); see *id.*, at 830, 833–834 (classifying plaintiffs with pleural thickening as asymptomatic and observing that, unlike asbestosis sufferers, they face no "significantly increased risk of developing cancer" and do not "suffe[r] current pain that serves as a constant reminder that a more serious disease may come upon [them]").[16]

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[16] Unconstrained by "the majority rule or the rule of the Restatement," *post*, at 177 (KENNEDY, J.), the principal dissent would erase the line drawn in *Metro-North* between exposure-only asbestos claimants, and those who "suffe[r] from a disease," 521 U. S., at 432. Repeatedly, that dissent recites as properly controlling here case law governing "stand-alone tort action[s] for negligent infliction of emotional distress." *Post*, at 171 (citing *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532 (1994)); see *post*, at 169 (quoting from *Metro-North*'s justification for disallowing recovery to exposure-only asbestos claimants); 173 (bracketing exposure-only and asbestosis claimants); 177 (asbestosis claimants entitled

The categorical approach endorsed in *Metro-North* serves to reduce the universe of potential claimants to numbers neither "unlimited" nor "unpredictable." Relevant here, and as Norfolk recognizes, of those exposed to asbestos, only a fraction will develop asbestosis. Brief for Petitioner 22, n. 16 (quoting *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1570 (Haw. 1990) ("A reasonable person, exercising due diligence, should know that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment.")); cf. Morgan & Seaton 319 (study showed that of persons exposed to asbestos after 1959, only 2 percent had asbestosis when first examined; for those exposed from 1950–1959, that figure is 18 percent).

C

Norfolk presented the question "[w]hether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the [FELA] without proof of physical manifestations of the claimed emotional distress." Brief for Petitioner (i). Our answer is yes, with an important reservation. We affirm only the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages. It is incumbent upon such a complainant, however, to prove that his alleged fear is genuine and serious. See, *e. g.*, *Smith* v. *A. C. & S., Inc.*, 843 F. 2d 854, 859 (CA5 1988) ("general

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to recover for fear of cancer only if they "make out a claim for negligent infliction of emotional distress; and they cannot do so"); 180 (quoting from *Gottshall*). But see *Metro-North*, 521 U. S., at 437 ("emotional distress damages sought by asbestosis-afflicted plaintiff" found to fit "within a category where the law already permitted recovery for mental distress").

The principal dissent gains no genuine aid from *Barron* v. *Martin-Marietta Corp.*, 868 F. Supp. 1203 (ND Cal. 1994), a decision it cites as authority for equating exposure-only and asbestosis claimants. See *post*, at 175. The *Barron* plaintiffs "adduced no evidence of exposure to a toxic substance which threatens cancer." 868 F. Supp., at 1205. When that is the case, we agree, cancer-fear damages are unavailable.

concern for [one's] future health" held insufficient to support recovery for an asbestosis sufferer's fear of cancer); *Coffman* v. *Keene*, 257 N. J. Super., at 293–294, 608 A. 2d, at 424–425 (sustaining a verdict including fear-of-cancer damages where trial judge found plaintiff "ha[d] a genuine, real believable fear of cancer" (internal quotation marks omitted)). See also Minneman, 50 A. L. R. 4th, § 5, at 54–56, (discussing cases affirming the view that "apprehension must be genuine").[17] In this case, proof directed to that matter was notably thin,[18] and might well have succumbed to a straightforward sufficiency-of-the-evidence objection, had Norfolk so targeted its attack.

Norfolk, however, sought a larger shield. In the trial court and in its unsuccessful petition to the Supreme Court

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[17] The asbestosis claimants here acknowledged that "a jury is entitled to consider the absence of physical manifestations [of alleged emotional disturbances] as evidence that a mental injury is less severe and therefore less deserving of a significant award." Brief for Respondents 17.

Considering the dissents' readiness to "develop a federal common law" to contain jury verdicts under the FELA, see *post*, at 170, 177, 181 (KENNEDY, J.); *post*, at 187 (BREYER, J.), it is curious that the principal dissent nevertheless questions the "basis in our FELA jurisprudence" for the requirement that claimants prove their alleged fear to be "genuine and serious," see *post*, at 180 (internal quotation marks omitted). In contrast to the principal dissent, JUSTICE BREYER appears ultimately to advance only an elaboration of the requirement that the plaintiff prove fear that is "genuine and serious." He would specify, additionally, that the fear "significantly and detrimentally affec[t] the plaintiff's ability to carry on with everyday life and work." *Post*, at 187. That elaboration, JUSTICE BREYER maintains, is "consistent with the sense of the common law." *Ibid.* The definition JUSTICE BREYER would give to the terms "genuine and serious" in this context was not aired in the trial court or in this Court. See *supra*, at 143, 148, and this page. We therefore resist ruling on it today.

[18] As Norfolk noted, one of the claimants did not testify to having any concern about cancer; another testified that he was more afraid of shortness of breath from his asbestosis than of cancer. Others testified to varying degrees of concern over developing the disease; no claimant presented corroborative objective evidence of his fear. Brief for Petitioner 9 (citing App. 116–117, 255, 277, 298–299, 332).

of Appeals of West Virginia, Norfolk urged that fear of cancer could figure in the recovery only if the claimant proved both a likelihood of developing cancer and physical manifestations of the alleged fear. See App. 548 (Norfolk's charge request); *id.*, at 634 (amended petition for appeal). And although Norfolk submitted proposed verdict forms, *id.*, at 549–560, those forms did not call for jury specification of the amount of damages, if any, awarded for fear of cancer. Thus, as earlier observed, *supra*, at 144, it is impossible to tell from the verdicts returned whether the jury ascribed any part of the damages awards to the alleged cancer fear, and if so, how much.[19]

We did not grant review, in any event, to judge the sufficiency of the evidence or the reasonableness of the damages awards. We rule, specifically and only, on the question whether this case should be aligned with those in which fear of future injury stems from a current injury, or with those presenting a stand-alone claim for negligent infliction of emotional distress. We hold that the former categorization is the proper one under the FELA.

## IV

We turn next to Norfolk's contention that the trial court erred in instructing the jury "not to make a deduction [from damages awards] for the contribution of non-railroad [asbestos] exposures" to the asbestosis claimants' injuries. App. 570. The statutory language, however, supports the trial court's understanding that the FELA does not authorize ap-

[19] In their prediction that adhering to the line drawn in *Gottshall* and *Metro-North* will, in this setting, bankrupt defendants, see *post*, at 168–169 (KENNEDY, J.); *post*, at 186 (BREYER, J.), the dissents largely disregard, *inter alia*, the verdict control devices available to the trial court. These include, on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious, review of the evidence on damages for sufficiency, and particularized verdict forms. Norfolk chose not to seek control measures of this order; instead, Norfolk sought to place cancer-fear damages entirely outside the jury's ken. See *supra*, at 143, 147.

portionment of damages between railroad and nonrailroad causes. Section 1 of the Act, to which we earlier referred, see *supra,* at 144–145, provides:

> "Every common carrier by railroad while engaging in [interstate commerce], shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of . . . such carrier . . . ." 45 U. S. C. § 51.

The claimants here suffer from asbestosis (an "injury"), which is linked to their employment with Norfolk and "result[ed] in whole or in part from . . . negligence" by Norfolk. Norfolk is therefore "liable in damages . . . *for such injury.*" *Ibid.* (emphasis added). Nothing in the statutory text instructs that the amount of damages payable by a liable employer bears reduction when the negligence of a third party also contributed in part to the injury-in-suit.

Resisting this reading, Norfolk trains on the statutory language conveying that a railroad is liable only for injuries an employee sustains "while he is employed by such carrier." *Ibid.* That language, Norfolk maintains, "makes clear that railroads are not liable for employee injuries that result from outside causes." Brief for Petitioner 32. Norfolk's argument uncouples the statutory language from its context, and thereby obscures its meaning.

The FELA applies to railroads only "while [they are] engaging in" interstate commerce. 45 U. S. C. § 51. The clause on which Norfolk relies clarifies that the statute's reach is correspondingly limited to injuries sustained *by railroad employees* while the employees are themselves engaged "*in such commerce.*" *Ibid.* (emphasis added); cf. *The Employers' Liability Cases,* 207 U. S. 463, 504 (1908) (predecessor statute declared unconstitutional because it regulated employee injuries not sufficiently related to interstate commerce). Placed in context, the clause does not speak to

cases in which an injury has multiple causes, some related to railroad employment and others unrelated to that employment. Such cases, we think, are controlled by the language just noted, which states that the railroad is "liable in damages" so long as the injury was caused "in whole or in part" by its "negligence." 45 U. S. C. § 51.

The statutory context bolsters our reading, for interpreting § 1 to require apportionment would put that provision in tension with the rest of the statute. As recounted earlier, see *supra,* at 145, several of the FELA's provisions expand a railroad's liability by abolishing common-law defenses that limited employees' ability to recover against their employers. Among the innovations, the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault. See § 53 (set out in relevant part *supra,* at 144, n. 6). The statute expressly prescribes no other apportionment.

Essentially, then, Norfolk asks us to narrow employer liability without a textual warrant. Reining in employer liability as Norfolk proposes, however, is both unprovided for by the language of the FELA and inconsistent with the Act's overall recovery facilitating thrust. Accordingly, we find Norfolk's plea an untenable reading of the congressional silence. Cf. *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S. 256, 268, n. 23 (1979) ("It would be particularly curious for Congress to refer expressly to the established principle of comparative negligence, yet say not a word about adopting a new rule limiting the liability of the [defendant] on the basis of [another party's] negligence.").

Norfolk's view also runs counter to a century of FELA jurisprudence. No FELA decision made by this Court so much as hints that the statute mandates apportionment of damages among potentially liable tortfeasors. Indeed, *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500 (1957), suggests the opposite. In *Rogers,* we described as "irrelevant" the question "whether the immediate reason" for an employee's

injury was the proven negligence of the defendant railroad or "some cause not identified from the evidence." *Id.*, at 503; see *id.*, at 508 ("[T]he inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit."). But if the FELA required apportionment among potentially liable tortfeasors, the existence of contributing causes would be highly relevant.

Also significant is the paucity of lower court authority for the proposition that the FELA contemplates apportionment. The federal and state reporters contain numerous FELA decisions stating that railroad employers may be held jointly and severally liable for injuries caused in part by the negligence of third parties,[20] and even more recognizing that FELA defendants may bring indemnification and contribution actions against third parties under otherwise applicable state or federal law.[21] Those third-party suits would have

[20] See, *e. g.*, *Jenkins* v. *Southern Pac. Co.*, 17 F. Supp. 820, 824–825 (SD Cal. 1937), rev'd on other grounds, 96 F. 2d 405 (CA9 1938); *Gilbert* v. *CSX Transp., Inc.*, 197 Ga. App. 29, 32, 397 S. E. 2d 447, 450 (1990); *Lewis* v. *National R. Passenger Corp.*, 176 Misc. 2d 947, 948–951, 675 N. Y. S. 2d 504, 505–507 (Civil Ct. 1998); *Gaulden* v. *Burlington No., Inc.*, 232 Kan. 205, 210–211, 654 P. 2d 383, 389 (1982); *Southern R. Co.* v. *Blanton*, 63 Ga. App. 93, 100, 10 S. E. 2d 430, 436 (1940); *Demopolis Tel. Co.* v. *Hood*, 212 Ala. 216, 218, 102 So. 35, 37 (1924); *Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367, 376, 190 N. W. 275, 278 (1922); *Louisville & Nashville R. Co.* v. *Allen*, 67 Fla. 257, 269–272, 65 So. 8, 12 (1914).

[21] See, *e. g.*, *Mills* v. *River Term. R. Co.*, 276 F. 3d 222, 224 (CA6 2002); *Gaines* v. *Illinois Central R. Co.*, 23 F. 3d 1170, 1171 (CA7 1994); *Ellison* v. *Shell Oil Co.*, 882 F. 2d 349, 352–354 (CA9 1989); *Alabama Great Southern R. Co.* v. *Chicago & Northwestern R. Co.*, 493 F. 2d 979, 983 (CA8 1974); *Southern R. Co.* v. *Foote Mineral Co.*, 384 F. 2d 224, 227–228 (CA6 1967); *Kennedy* v. *Pennsylvania R. Co.*, 282 F. 2d 705, 708–709 (CA3 1960); *Ft. Worth & Denver R. Co.* v. *Threadgill*, 228 F. 2d 307, 311–312 (CA5 1955); *Patterson* v. *Pennsylvania R. Co.*, 197 F. 2d 252, 253 (CA2 1952); *Stephens* v. *Southern Pacific Transp. Co.*, 991 F. Supp. 618, 620 (SD Tex. 1998); *Tucker* v. *Reading Co.*, 335 F. Supp. 1269, 1271 (ED Pa. 1971); *Reynolds* v. *Southern R. Co.*, 320 F. Supp. 1141, 1142–1143 (ND Ga. 1969); *Spielman* v. *New York, New Haven & Hartford R. Co.*, 147 F. Supp. 451, 453–454

been unnecessary had the FELA itself authorized apportionment. Norfolk identifies only one FELA decision supporting its position: *Dale* v. *Baltimore & Ohio R. Co.*, 520 Pa. 96, 105–107, 552 A. 2d 1037, 1041–1042 (1989). But *Dale* cited no previous decisions on point and has not been followed by any other court. It is therefore a reed too slim to overcome the statutory language and the otherwise consistent historical practice in the lower courts.

The conclusion that the FELA does not mandate apportionment is also in harmony with this Court's repeated statements that joint and several liability is the traditional rule. In an 1876 admiralty case, for example, we wrote:

> "Nothing is more clear than the right of a plaintiff, having suffered . . . a loss [of cargo], to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for *the full amount of his loss.*" *The "Atlas,"* 93 U. S. 302, 315 (1876) (emphasis added).

See 42 Cong. Rec. 4536 (1908) (remarks of Sen. Dolliver) (the FELA was intended to "brin[g] our jurisprudence up to the liberal interpretations that . . . now prevail in the admiralty courts of the United States"). See also *Miller* v. *Union Pacific R. Co.*, 290 U. S. 227, 236 (1933) (describing joint and several liability as "settled by innumerable authorities" and

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(EDNY 1956); *Engvall* v. *Soo Line R. Co.*, 632 N. W. 2d 560, 568 (Minn. 2001); *Freeman* v. *Norfolk Southern R. Co.*, 97–2013 (La. App. 5/13/98), 714 So. 2d 832, 835; *In re Bean*, 171 Ill. App. 3d 620, 623, 525 N. E. 2d 1231, 1234 (1988); *Narcise* v. *Illinois Central Gulf R. Co.*, 427 So. 2d 1192, 1195 (La. 1983); *Walter* v. *Dow Chemical Co.*, 37 Mich. App. 728, 729–732, 195 N. W. 2d 323, 324–325 (1972); *Gulf, Mobile & Ohio R. Co.* v. *Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 153–155, 98 N. E. 2d 783, 785–786 (1951); *Seaboard Air Line R. Co.* v. *American Dist. Elec. Protective Co.*, 106 Fla. 330, 333, 143 So. 316, 317 (1932); Lewter, Right of Railroad, Charged with Liability for Injury to or Death of Employee Under Federal Employers' Liability Act, to Claim Indemnity or Contribution from Other Tortfeasor, 19 A. L. R. 3d 928 (1968 and Supp. 2002).

citing federal decisions from 1883, 1893, 1894, 1895, 1902, 1904, 1906, 1910, and 1913); *Edmonds*, 443 U. S., at 260 (joint and several liability remains the rule in admiralty).

Norfolk nonetheless maintains that "[a]pportionment was the common-law rule at the time of FELA's enactment" in 1908. Brief for Petitioner 32. This Court's repeated statements concerning joint and several liability refute that contention. Many of Norfolk's historical authorities, moreover, address the *procedural* question whether two defendants may be sued in one action, rather than the *substantive* one whether each negligent defendant is liable in full for a plaintiff's injury. These "separate problems," Dean Prosser cautioned, "require separate consideration, and have very little in common." Joint Torts and Several Liability, 25 Calif. L. Rev. 413 (1937). While "[t]he common law rules as to [procedural] joinder were extremely strict," *id.*, at 414, "the common law [also] developed . . . a distinct and altogether unrelated principle: a defendant might be liable for the entire loss sustained by the plaintiff, even though his negligence concurred or combined with that of another to produce the result" and even where "no [procedural] joinder would have been possible," *id.*, at 418.

Looking beyond historical practice, Norfolk contends that the modern trend is to apportion damages between multiple tortfeasors. Brief for Petitioner 40–43. The state of affairs when the FELA was enacted, however, is the more important inquiry. See, *e. g.*, *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 336–339 (1988) (prejudgment interest is not available under the FELA because it was unavailable at common law when the statute was enacted). At any rate, many States retain full joint and several liability, see Restatement (Third) of Torts, Apportionment of Liability § 17, Reporters' Note, table, pp. 151–152 (1999), even more retain it in certain circumstances, *id.*, tables, at 153–159, and most of the recent changes away from the traditional rule have come through legislative enactments rather than judicial de-

velopment of common-law principles, see *id.*, § B18, Reporters' Note. Congress, however, has not amended the FELA. Cf. *Edmonds*, 443 U. S., at 273 ("Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them.").[22]

Finally, reading the FELA to require apportionment would handicap plaintiffs and could vastly complicate adjudications, all the more so if, as Norfolk sometimes suggests, see Brief for Petitioner 50, Reply Brief 20, manufacturers and suppliers, as well as other employers, should come within the apportionment pool. See *Sinkler*, 356 U. S., at 329 ("The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier."). Once an employer has been adjudged negligent with respect to a given injury, it accords with the FELA's overarching purpose to require the employer to bear the burden of identifying other responsible parties and demonstrating that some of the costs of the injury should be spread to them.[23]

Under the FELA, an employee who suffers an "injury" caused "in whole or in part" by a railroad's negligence may

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[22] Norfolk also suggests an analogy between the FELA and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U. S. C. § 9601 *et seq.*, under which many courts have held that apportionment is available in some circumstances. Brief for Petitioner 44–45. But CERCLA's structure, purpose, and more recent vintage may differentiate that measure from the FELA in ways relevant to the question presented. See Brief for United States as *Amicus Curiae* 6, n. 1. We need not and do not express any view on apportionment in the CERCLA context.

[23] Norfolk submits that requiring employers to sue for contribution will be "wasteful," Brief for Petitioner 47, but FELA defendants may be able to implead third parties and thus secure resolution of their contribution actions in the same forum as the underlying FELA actions. See, *e. g.*, *Ellison* v. *Shell Oil Co.*, 882 F. 2d, at 350 (railroad sued by employee under the FELA filed a third-party complaint against another party); *Engvall* v. *Soo Line R. Co.*, 632 N. W. 2d, at 563 (same).

recover his or her full damages from the railroad, regardless of whether the injury was also caused "in part" by the actions of a third party. Because the asbestosis claimants suffer such an "injury," we conclude that the instruction challenged here was not erroneous.

* * *

The "elephantine mass of asbestos cases" lodged in state and federal courts, we again recognize, "defies customary judicial administration and calls for national legislation." *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 821 (1999); see Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3, 27–35 (Mar. 1991) (concluding that effective reform requires federal legislation creating a national asbestos dispute-resolution scheme); *id.*, at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). Courts, however, must resist pleas of the kind Norfolk has made, essentially to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis. Cf. *Metro-North*, 521 U. S., at 438 ("[C]ourts . . . must consider the general impact . . . of the general liability rules they . . . create.").

For the reasons stated, the judgment of the Circuit Court of Kanawha County is

*Affirmed.*

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE BREYER join, concurring in part and dissenting in part.

The Court is correct, in my view, in rejecting the claim that damages awarded under the Federal Employers' Liability Act (FELA or Act) must be apportioned according to causal contribution among even absent joint tortfeasors. Parts I, II, and IV of its opinion have my full assent.

It is otherwise as to Part III. The Court allows compensation for fear of cancer to those who manifest symptoms of some other disease, not itself causative of cancer, though stemming from asbestos exposure. The Court's precedents interpreting FELA neither compel nor justify this result. The Court's ruling is not based upon a sound application of the common-law principles that should inform our decisions implementing FELA. On the contrary, those principles call for a different rule, one which does not yield such aberrant results in asbestos exposure cases. These reasons require my respectful dissent.

I

It is common ground that the purpose of FELA is to provide compensation for employees protected under the Act. *Ante*, at 144–145. The Court's decision is a serious threat to that objective. Although a ruling that allows compensation for fear of a disease might appear on the surface to be solicitous of employees and thus consistent with the goals of FELA, the realities of asbestos litigation should instruct the Court otherwise.

Consider the consequences of allowing compensation for fear of cancer in the cases now before the Court. The respondents are between 60 and 77 years old. All except one have a long history of tobacco use, and three have smoked for more than 50 years. They suffer from shortness of breath, but only one testified that it affects his daily activities. As for emotional injury, one of the respondents complained that his shortness of breath caused him to become depressed; the others stated, in response to questions from their attorneys, that they have some "concern" about their health and about cancer. For this, the jury awarded each respondent between $770,640 and $1,230,806 in damages, reduced by the trial court to between $523,605 and $1,204,093 to account for the comparative negligence of the respondents' cigarette use.

Contrast this recovery with the prospects of an employee who does not yet have asbestosis but who in fact will develop asbestos-related cancer. Cancers caused by asbestos have long periods of latency. Their symptoms do not become manifest for decades after exposure. See Selikoff et al., Latency of Asbestos Disease Among Insulation Workers in the United States and Canada, 46 Cancer 2736, 2740 (1980) (lung cancer becomes manifest 15–24 years after exposure); A. Churg & F. Green, Pathology of Occupational Lung Disease 350 (2d ed. 1998) ("The latency period for asbestos-induced mesothelioma is long, with a mean value of 30 to 40 years"); see generally Mustacchi, Lung Cancer Latency and Asbestos Liability, 17 J. Legal Med. 277 (June 1996) (discussing the pathogenesis of asbestos-related carcinomata). These cancers inflict excruciating pain and distress—pain more severe than that associated with asbestosis, distress more harrowing than the fear of developing a future illness.

One who has mesothelioma, in particular, faces agonizing, unremitting pain in the lungs, which spreads throughout the thoracic cavity as tumors expand and metastasize. See W. Morgan & A. Seaton, Occupational Lung Diseases 353 (3d ed. 1995). The symptoms do not subside. Their severity increases, with death the only prospect for relief. And death is almost certain within a short time from the onset of mesothelioma. See *ibid.* ("Death usually occurs within 18 months to 2 years . . . . A minority of patients, somewhere around 15%, survive 3 to 4 years"). Yet the majority's decision endangers this employee's chances of recovering any damages for the simple reason that, by the time the worker is entitled to sue for the cancer, the funds available for compensation in all likelihood will have disappeared, depleted by verdicts awarding damages for unrealized fear, verdicts the majority is so willing to embrace.

This Court has recognized the danger that no compensation will be available for those with severe injuries caused by asbestos. See *Amchem Products, Inc.* v. *Windsor*, 521

U. S. 591, 598 (1997) ("'[E]xhaustion of assets threatens and distorts the process; and future claimants may lose altogether'" (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991))); 521 U. S., at 632 (BREYER, J., concurring in part and dissenting in part). In fact the Court already has framed the question that should guide its resolution of this case:

> "In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?" *Metro-North Commuter R. Co.* v. *Buckley*, 521 U. S. 424, 435–436 (1997).

The Court ignores this question and its warning. It is only a matter of time before inability to pay for real illness comes to pass. The Court's imprudent ruling will have been a contributing cause to this injustice.

Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000. See RAND Institute for Civil Justice, S. Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report 71 (2002), Petitioner's Supplemental Lodging, p. SL82. With each bankruptcy the remaining defendants come under greater financial strain, see Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 392 (1993); M. Plevin & P. Kalish, What's Behind the Recent Wave of Asbestos Bankruptcies? 16 Mealey's Litigation Report: Asbestos 35 (Apr. 20, 2001), and the funds available for compensation become closer to exhaustion, see Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J. L. & Pub. Pol'y 541, 547 (1992).

In this particular universe of asbestos litigation, with its fast diminishing resources, the Court's wooden determina-

tion to allow recovery for fear of future illness is antithetical to FELA's goals of ensuring compensation for injuries. Cf. *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532, 555 (1994) (describing FELA's "central focus on physical perils"); *Metro-North*, *supra*, at 430 (noting that *Gottshall* relied upon cases involving "a threatened physical contact that caused, or might have caused, immediate traumatic harm"). As a consequence of the majority's decision, it is more likely that those with the worst injuries from exposure to asbestos will find they are without remedy because those with lesser, and even problematic, injuries will have exhausted the resources for payment. Today's decision is not employee protecting; it is employee threatening.

## II

When the Court asks whether the rule it adopts has been settled by the common law, the answer, in my view, must be no. The issue before us is new and unsettled, as is evident from the diverse approaches of state and federal courts to this problem. In its comprehensive discussion, the majority cites some authorities that, it must be acknowledged, could be interpreted to support the Court's position. The result it reaches, however, is far from inevitable, and the rule the majority derives does not comport with our responsibility to develop a federal common law that administers FELA in an effective, principled way.

### A

I disagree with the Court's conclusion that damages for fear of cancer may be recovered as part of the pain and suffering caused by asbestosis. *Ante*, at 148. The majority observes that a person who suffers from "a disease" may recover for all "related" emotional distress. *Ante*, at 147 (courts "'*do* permit a plaintiff *who suffers from a disease* to recover for related negligently caused emotional distress'" (quoting *Metro-North*, *supra*, at 432)). While that may be true as a general matter, it begs the question: What relation-

ship between a disease and associated emotional distress should entitle a person to compensation for the distress as pain and suffering?

The Court's precedent applying FELA provides the answer. To qualify as compensable pain and suffering, a person's emotional distress must be the direct consequence of an injury or condition. See *Gottshall*, 512 U. S., at 544 ("[T]hese terms traditionally have been used to describe sensations stemming directly from a physical injury or condition" (internal quotation marks omitted)). Damages for emotional harms that are less direct may be recovered only pursuant to a stand-alone tort action for negligent infliction of emotional distress. *Ibid.* (defining negligently inflicted emotional distress as "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury").

The common law accords with this rule. The weight of authority defines pain and suffering as emotional distress that is the direct consequence of an injury. See Minneman, Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery, 50 A. L. R. 4th 13, 25 (1986) ("[T]he fear that an existing injury will lead to the future onset of an as yet unrealized disease or condition is an element of recovery only where such distress . . . is the natural consequence of, or reasonably expected to flow from, the injury"); see also Restatement (Second) of Torts § 456(a) (1963–1964) (hereinafter Restatement) (tortfeasor liable for "fright, shock, or other emotional disturbance resulting from the bodily harm or from the conduct which causes it").

This category of emotional distress includes certain types of fears. The fright that accompanies a dog bite or a radiation burn, for example, may be said to result from an injury because it arises without any intervening cause, such as a medical examination. See *The Lord Derby*, 17 F. 265, 267 (ED La. 1883) ("To many people the shock to the system resulting from the most insignificant bite of a dog drawing

blood is such that no money compensation is adequate"). The passage in the Restatement deeming compensable "emotional disturbance resulting from the bodily harm or from the conduct which causes it," § 456(a), refers, as the official commentary makes clear, to this sort of instantaneous emotional trauma arising from the tortious act. See *id.*, Comment *e* ("Thus one who is struck by a negligently driven automobile and suffers a broken leg may recover not only for his pain, grief, or worry resulting from the broken leg, but also for his fright at seeing the car about to hit him").

Other, less immediate fears also might qualify as pain and suffering, but only if they are the direct result of an injury. See *id.*, § 456, Comment *d* (clarifying that recovery is "not limited to immediate emotional disturbance accompanying the bodily harm, or following at once from it, but includes also subsequent emotional disturbance brought about by the bodily harm itself").

Applying these standards to the instant case, I do not think the brooding, contemplative fear the respondents allege can be called a direct result of their asbestosis. Unlike shortness of breath or other discomfort asbestosis may cause, their fear does not arise from the presence of disease in their lungs. Instead, the respondents' fear is the product of learning from a doctor about their asbestosis, receiving information (perhaps at a much later time) about the conditions that correlate with this disease, and then contemplating how these possible conditions might affect their lives.

The majority nevertheless would permit recovery because "[t]here is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestos-related cancer." *Ante*, at 154. To state that some relationship exists without examining whether the relationship is enough to support recovery, however, ignores the central issue in this case. There is a fundamental premise in this case—conceded, as I understand it, by all parties—and it is this: There is no demonstrated causal link between asbestosis and can-

cer. See Churg & Green, Pathology of Occupational Lung Disease, at 313. The incidence of asbestosis correlates with the less-frequent incidence of cancer among exposed workers, *ibid.*, but this does not suffice. Correlation is not causation. Absent causation, it is difficult to conceive why asbestosis is any more than marginally more suitable a predicate for recovering for fear of cancer than the fact of mere exposure. This correlation the Court relies upon does not establish a direct link between asbestosis and asbestos-related cancer, and it does not suffice under common-law precedents as a predicate condition for recovery of damages based upon fear.

It must be conceded that courts in some common-law jurisdictions have ruled that fear of cancer is compensable as pain and suffering before the cancer is diagnosed, but the majority's extensive citations are not that persuasive. The Court collects cases from 12 jurisdictions that comport with its result, but only 5 of these were decided by the high court of a State. *Ante*, at 150–151, and n. 11. Moreover, three would allow recovery for fear of cancer predicated upon mere exposure to asbestos, see *Denton* v. *Southern R. Co.*, 854 S. W. 2d 885, 889 (Tenn. App. 1993) (citing *Hagerty* v. *L & L Marine Servs., Inc.*, 788 F. 2d 315, 318 (CA5 1986)); *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 14, 507 N. E. 2d 476, 480 (Ct. Common Pleas, Cuyahoga Cty. 1987); *Devlin* v. *Johns-Manville Corp.*, 202 N. J. Super. 556, 563, 495 A. 2d 495, 499 (1985), a result contrary to our own holding in *Metro-North.* Five more appear to allow recovery with the onset of pleurisy, see *Capital Holding Corp.* v. *Bailey*, 873 S. W. 2d 187, 194 (Ky. 1994); *Beeman* v. *Manville Corp. Asbestos Disease Compensation Fund*, 496 N. W. 2d 247, 250 (Iowa 1993); *Celotex Corp.* v. *Wilson*, 607 A. 2d 1223, 1229–1230 (Del. 1992); *Mauro* v. *Raymark Industries, Inc.*, 116 N. J. 126, 129–130, 561 A. 2d 257, 258–259 (1989); *Wolff* v. *A-One Oil, Inc.*, 216 App. Div. 2d 291, 292, 627 N. Y. S. 2d 788, 789–790 (1995), again a result even today's Court would

reject, *ante,* at 153–156, and n. 14. In the end, cases from only five of those jurisdictions support the majority's analysis, none of them decided by a state high court.

On the other hand, as the majority acknowledges, some courts have ruled that fear of cancer should not be compensable as pain and suffering. *Ante,* at 151–152, n. 11. These decisions are based, in part, upon the "separate disease rule," which allows a person who has recovered for injuries resulting from asbestosis to bring a new lawsuit—notwithstanding the traditional common-law proscription against splitting a cause of action—if cancer develops. See *Wilson* v. *Johns-Manville Sales Corp.,* 684 F. 2d 111, 120–121 (CADC 1982) (Ginsburg, J.). The rule has been adopted by a majority of jurisdictions, see Henderson & Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S. C. L. Rev. 815, 821, and n. 22 (2002) (collecting cases), and the Court does not suggest that it would not apply in cases brought under FELA.

The separate disease rule is pertinent for at least two reasons. First, it illustrates that courts have found it necessary to construct fair and sensible common-law rules for resolving the problems particular to asbestos litigation. Second, it establishes that a person with asbestosis will not be without a remedy for pain and suffering caused by cancer. That person can and will be compensated if the cancer develops. This eliminates the need courts might otherwise perceive to avert the danger that relief might be foreclosed in the future.

The Supreme Court of Pennsylvania reached this conclusion, and its reasoning deserves attention when the Court suggests the common law is so well settled:

> "[D]amages for fear of cancer are speculative. The awarding of such damages would lead to inequitable results since those who never contract cancer would obtain damages even though the disease never came into fruition.
>
> . . . . .

> "In any case, Appellants are not left without a remedy for their mental anguish. [Pennsylvania case law] permits an action to be commenced if cancer develops. It is in this action that Appellants can assert their emotional distress or mental anguish claims. To allow the asbestos plaintiff in a non-cancer claim to recover for any part of the damages relating to cancer, including the fear of contracting cancer, erodes the integrity of and purpose behind the [separate] disease rule." *Simmons* v. *Pacor, Inc.*, 543 Pa. 664, 677–678, 674 A. 2d 232, 238–239 (1996).

This analysis is persuasive because it accounts, in a way that the majority's decision does not, for changes already underway in common-law rules for compensating victims of a disease with a long latency period. This approach surely is more likely to result in an equitable allotment of compensation than the decision of the Court; and this is the rule the Court should adopt to govern the availability of damages for fear of cancer under FELA.

Pennsylvania is not alone in rejecting the majority's view. In a careful opinion applying California law, the United States District Court for the Northern District of California held that parasitic damages for fear of cancer may be recovered only where there is a verifiable causal nexus between the injury suffered and the cancer feared. *Barron* v. *Martin-Marietta Corp.*, 868 F. Supp. 1203, 1211–1212 (1994). The court recognized that California courts had not yet addressed the type of physical injury that would permit compensation for fear of cancer, see *id.*, at 1210, n. 9, but it determined that the requirement of a causal nexus was a clear implication of recent California Supreme Court precedent, see *id.*, at 1212 (citing *Potter* v. *Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 863 P. 2d 795 (1993)). The justification for this prerequisite is significant in this case as well:

> "If no nexus were required between cancer and an alleged injury, an injury akin to a spinal puncture, serious but unrelated to cancer, would admit recovery of parasitic damages for fear of cancer. Indeed, any serious physical injury, however unrelated to cancer, would permit fear-of-cancer damages." 868 F. Supp., at 1211.

The proofs offered by the claimants in *Barron* were insufficient on summary judgment to meet that burden under California law, and the respondents in today's case also would be incapable of recovering under that standard.

Other common-law authorities the majority cites do not compel a contrary result. It is of no help to the respondents that "mental anguish related to a physical injury is recoverable even if 'the underlying future prospect is not itself compensable inasmuch as it is not sufficiently likely to occur.'" *Ante*, at 149 (quoting Minneman, 50 A. L. R. 4th, at 25). This principle cannot sustain an award when, as here, there is a tangential, and no causal, relationship between the present injury suffered and the future disease feared. *Ibid.* ("Thus, damages for mental anguish concerning the chance that a future disease or condition will result from an original injury are generally not recoverable where the connection between the anxiety and the existing injury is too remote or tenuous").

The respondents' characterization, furthermore, finds no support in the part of the Restatement quoted by the majority. *Ante*, at 154 ("[A] negligent actor is answerable in damages for emotional disturbance 'resulting from the bodily harm *or from the conduct which causes it*'" (quoting Restatement § 456(a))). As described *supra*, at 171–172, the commentary suggests that this statement would allow recovery for direct or immediate emotional trauma resulting from a tortious act, see Restatement § 456(a), Comment *e*. The respondents do not claim to have experienced any shock or trauma arising from their exposure to asbestos or from the onset of their asbestosis. With almost no variation, they

complained only of concern, for which the Restatement provides no guidance as to whether damages should be awarded.

More important, while the disagreement among state courts about how to address this problem is telling, it is important to keep in mind the nature of the Court's responsibility under FELA. The implementation of the Act is a matter of federal common law, see *Urie* v. *Thompson*, 337 U. S. 163, 173 (1949), and it is for the Court to develop and administer a fair and workable rule of decision, see *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479 (1943) ("[T]he question must be determined by this Court finally"); see also *Gottshall*, 512 U. S., at 558 (SOUTER, J., concurring) ("That duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law"). State-court precedent is not dispositive. See *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361 (1952) ("State laws are not controlling in determining what the incidents of this federal right shall be"). Instead, the Court is bound only by the terms of FELA and its own precedent giving meaning to the Act. Within those constraints, the Court must endeavor to arrive at the correct rule—a rule that is just and practical—rather than the majority rule or the rule of the Restatement.

These considerations establish the proper rule for the case. Although the anxiety generated by an increased awareness about a disease may be real and painful, it lacks the direct link to a physical injury that suffices for recovery. Cf. *Metro-North*, 521 U. S., at 432 (denying fear-of-cancer recovery where condition "causes emotional distress only because the worker learns that he may become ill after a substantial period of time"). The respondents' entitlement to compensation for their fear of cancer turns upon their ability to make out a claim for negligent infliction of emotional distress; and they cannot do so.

B

If viewed as alleging negligent infliction of emotional distress, the respondents' claims fail for the same reasons the Court disallowed recovery in *Metro-North.* There, the employee was exposed to massive amounts of asbestos for one hour of each working day for three years. See *id.*, at 427. He presented testimony about his fear of developing cancer. *Ibid.* Two expert witnesses testified that the employee's fear was at least reasonable because his exposure to asbestos increased the likelihood of contracting cancer, after discounting for a 15-year tobacco habit, by between one and five percent. *Ibid.*

Despite these indications of genuine emotional distress, the Court held the exposure did not satisfy the "zone of danger" test and denied any recovery for fear of cancer. *Id.*, at 430. The Court explained that the claim implicated the traditional concerns underlying common-law restrictions upon recovery for emotional distress. See *id.*, at 433. The distress the employee alleged, including his emotional reaction to an incremental, increased risk of dying from cancer, was beyond the ability of a jury to evaluate with precision, heightening the danger that damages would be based upon speculation or caprice, see *id.*, at 435.

The respondents' claims implicate these considerations to the same or greater degree than in *Metro-North.* Each respondent seeks damages for his emotional response to being told he has an increased likelihood of dying. *Ibid.* The extent of the distress the respondents suffered is not calculable with a precision sufficient to permit juries to award damages, for the distress is simply incremental from the fears already shared by the general population.

The respondents observe, with extensive support in the medical literature, that a person with asbestosis has a 10 percent chance of developing mesothelioma, and that 39 percent of smokers with asbestosis develop fatal lung cancer; that cohort, however, drops to 5 percent, at most, for non-

smokers with asbestosis. While these statistics might at first appear to provide the beginning of an argument for giving asbestosis sufferers recovery for fear, the average American male has a 44 percent chance of developing cancer during the course of his life, and his chance of dying from some form of cancer is more than 21 percent. See L. Ries et al., National Cancer Institute, SEER Cancer Statistics Rev., 1973–1999, Tables I–15, I–16 (2002), available at http://seer.cancer.gov/csr/1973_1999/overview.pdf (as visited Feb. 10, 2003) (available in Clerk of Court's case file). This literature also suggests that a person who smokes has more than a 50 percent chance of dying from a disease caused by tobacco use, see National Cancer Institute, Changes in Cigarette-Related Disease Risks & Their Implication for Prevention and Control, Smoking & Tobacco Control Monograph, No. 8, 1997, p. xi, Table 1, a risk that all but one of the respondents has incurred that is wholly separate from their exposure to asbestos.

It is beyond the ability of juries to derive from statistics like these a fair estimate of the danger caused by negligent exposure to asbestos. See *Metro-North*, *supra*, at 435. For this reason, the trial judge was correct to instruct the jury that they could not award the respondents any damages for cancer or for an increased risk of cancer. In disallowing recovery for risk but allowing recovery for fear based on that risk, however, the trial judge attempted to avoid speculation at the outset but succumbed to added speculation in the end. If instructing a jury to calculate an increased risk of cancer invites speculation, then asking the jury to infer from its estimate a rough sense of the fear based on the risk invites speculation compounded.

The damages the jury awarded in this case indicate the legitimacy of these concerns. As described above, *supra*, at 167, the respondents received damages of between $500,000 and $1.2 million despite having complained only that they suffered shortness of breath and experienced varying de-

grees of concern about cancer. This evidence of injury and the compensation awarded is recited here not "to reweigh evidence based on information not presented at trial," *ante*, at 155, n. 15, or "to judge the sufficiency of the evidence or the reasonableness of the damages awards," *ante*, at 159. Rather, it is instructive as to what results in a single case when a jury is charged with translating into dollar amounts confusing and contested evidence about the nature of a complicated harm. It demonstrates the speculative, unreasoned kind of award generated when a jury is presented vivid testimony about the agony of cancer, provided expert evidence that a person's chances of developing that cancer have increased, but admonished that only the fear of that cancer—and not the cancer itself, or a heightened risk of developing cancer—is compensable.

The majority would allow such awards, but with the "important reservation" that a plaintiff must "prove that his alleged fear is genuine and serious." *Ante*, at 157. There is no basis in our FELA jurisprudence for establishing this burden of proof, and it would be a difficult standard for judges to enforce. The Court has rejected the notion that review for "genuineness" could ameliorate the threat of unlimited and unpredictable liability. See *Gottshall*, 512 U. S., at 552. In explaining its skepticism, the Court observed:

> "Such a fact-specific test . . . would be bound to lead to haphazard results. Judges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts. To the extent the genuineness test could limit potential liability, it could do so only inconsistently. . . . In the context of claims for intangible harms brought under a negligence statute, we find such an arbitrary result unacceptable." *Ibid.*

The Court's response to the possibility of speculative awards is instead to adopt common-law rules restricting the classes of plaintiffs eligible to seek recovery and the types of emotional distress for which recovery is available. See *ibid.;* see also *Metro-North*, 521 U. S., at 436. This is not to say that allegations of emotional distress need not be genuine and serious in order to warrant compensation, but review for genuineness alone does little or nothing to prevent capricious outcomes. Instead, the responsibility of today's Court is not to review whether an individual claim alleging fear of cancer is genuine and severe, but to adopt a rule that reconciles the need to provide compensation for deserving claimants with the concerns that speculative damages awards will exhaust the resources available for recovery.

## III

The Court, to be sure, does refer to the admonition in *Metro-North* that common-law rules must be adopted to avoid the risk of "'unlimited and unpredictable liability.'" *Id.*, at 433 (quoting *Gottshall*, *supra*, at 557). Yet the rule it adopts is an unreasoned rule of limitation—a rule that does not advance the goal of ensuring that fair and sensible principles will govern recovery for injuries caused by asbestos.

The majority ends its opinion with a plea for legislative intervention, *ante*, at 166, an entreaty made before, see *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 821 (1999); *id.*, at 865 (REHNQUIST, C. J., concurring); *id.*, at 866–867 (BREYER, J., dissenting). This case arises under FELA, however, by which Congress has directed the courts, and ultimately this Court, to use their resources to develop equitable rules of decision. It is regrettable that the Court today does not accept that responsibility.

These reasons explain my dissent from Part III of the Court's opinion.

JUSTICE BREYER, concurring in part and dissenting in part.

I join Parts I, II, and IV of the Court's opinion. I agree with JUSTICE KENNEDY, however, that the law does not permit recovery for "fear of cancer" in this case. And I join his opinion dissenting from Part III. Because the issue is a close and difficult one, I mention several considerations that, in my mind, tip the balance.

Unlike the majority, I do not believe that the Restatement (Second) of Torts (1963–1964) (hereinafter Second Restatement) comes close to determining the correct answer to the legal question before us. Cf. *ante,* at 148–149, 154 (majority opinion). The Second Restatement sets forth a general rule of recovery for "fright, shock, or other emotional disturbance" where an "actor's negligent conduct has so caused any bodily harm to another as to make him liable for" it. § 456. But the Second Restatement neither gives a definition of the *kind* of "emotional disturbance" for which recovery is available nor otherwise states that recovery is available for *any* kind of emotional disturbance whatsoever. *Ibid.*

The underlying history underscores the openness of the legal question and the consequent uncertainty as to the answer. When Congress enacted the Federal Employers' Liability Act (FELA) in 1908, 45 U. S. C. §§ 51–60, the kinds of injury that it primarily had in mind were those resulting directly from physical accidents, such as railway collisions and entanglement with machinery. See *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532, 542 (1994). And (where negligent conduct was at issue) the Restatement nearest in time to FELA's enactment (and therefore presumably likely to be more reflective of the background rules that FELA then assumed, cf. *id.*, at 554–555) limited recovery for related emotional distress to concrete harm resulting from that distress. Restatement of Torts § 456 (1934) (hereinafter Restatement). In particular, this earlier Restatement restricted recovery to "physical harm resulting . . . from

fright or shock or other similar and immediate emotional disturbance" substantially caused by the underlying injury or negligent conduct. *Ibid.*

The later Second Restatement reflects subsequent court decisions that liberalized this rule—(in the earlier Restatement's words) by extending recovery beyond "physical harm" produced by "emotional disturbance," and by removing the words "similar and immediate." § 456. Linguistically speaking, these changes to the Restatement *might* reflect judicial extension of the scope of "emotional disturbance" far beyond "expectable" or "intended" fears that normally accompany, say, a collision or other machinery-related accident, Second Restatement § 905, Comment *e*, p. 458 (1977). They *might* reflect judicial extension of liability to the kind of "brooding, contemplative fear" at issue here, *ante*, at 172 (KENNEDY, J., concurring in part and dissenting in part). But they also *might* reflect more limited judicial holdings—say, holdings that extend liability to fears that arise directly from the compensable injury itself (*e. g.*, the fear of "shortness of breath," App. 298–299) or which arise directly from the conduct that caused the injury (say, the fear of inhaling asbestos fibers in a visible cloud of dust). The Second Restatement does not say.

Nor do the Second Restatement's examples resolve the problem. The most expansive example of recovery involves not worry connected with toxic torts or the like, but a considerably more restricted, directly connected worry "about the securing of shelter for [one's self] and family" after "wanto[n]" eviction—the wantonness of the eviction being a *special factor* warranting particularly broad recovery. Second Restatement § 905, Illustration 8, at 458; see also *id.*, § 905, Comment *e*, at 458.

Most important, different courts have come to different conclusions about recovery for fear of cancer itself (even when triggered by physical injury). The Restatements are not statutes. They simply reflect predominant judicial

views. And the variety of answers courts have given to the question at issue here demonstrates that courts have not reached a consensus. See *ante*, at 150–151, and n. 11 (majority opinion); *ante*, at 173–174 (opinion of KENNEDY, J.).

Given the legal uncertainty, this Court, acting like any court interpreting the common law, see *ante*, at 177 (opinion of KENNEDY, J.), should determine the proper rule of law through reference to the underlying factors that have helped to shape related "emotional distress" rules. Those factors argue for the kind of liability limitation that JUSTICE KENNEDY has described, *ibid.*

First, the law in this area has sought to impose limitations that separate valid, important emotional distress claims from less important, trivial, or invalid claims. See *Metro-North Commuter R. Co.* v. *Buckley*, 521 U. S. 424, 433 (1997). The presence of physical harm often provides a central touchstone in this regard. But that does not work here. That is because, given ordinary background risks, the increment in a person's fear of cancer due to diagnosis of a condition such as asbestosis seems virtually impossible to evaluate. See *ante*, at 178–179 (opinion of KENNEDY, J.). The evidence (viewed in the plaintiffs' favor) indicates that, for a nonsmoker, a diagnosis of asbestosis may increase the perceived risk of dying of cancer from something like the ordinary background risk of about 22% (about two chances in nine) to about one chance in three. See *ante*, at 155 (majority opinion); *ante*, at 178–179 (opinion of KENNEDY, J.). See also L. Ries et al., National Cancer Institute, SEER Cancer Statistics Rev., 1973–1999, Table I–16 (2002), available at http://seer.cancer.gov/csr/1973_1999/overview.pdf (as visited Mar. 3, 2003) (available in Clerk of Court's case file). Would a reasonable person who is not already afraid of cancer when the odds of dying are about two in nine suddenly develop a "genuine and serious" and "reasonable" fear when those odds change to one in three? Would a smoker, a risktaker whose conduct has already increased the chance of cancer death to,

say, about one in four, compare Cagle, Criteria for Attributing Lung Cancer to Asbestos Exposure, 117 Am. J. Clin. Path. 9 (2002), with Ries, *supra*, at Table I–16, and whose chance of dying of a smoking-related disease is already about 50–50, Centers for Disease Control and Prevention, Projected Smoking-Related Deaths Among Youth—United States, 45 Morbidity and Mortality Weekly Report 971 (1996), suddenly develop a reasonable, genuine, and serious fear of cancer when the chance of cancer or smoking-related death rises even further? There is simply no way to know, and it is close to impossible, in the ordinary case, to evaluate a plaintiff's affirmative answer.

Second, the law's recovery-limiting rules have sought to avoid pure jury speculation, speculation that can produce "unlimited and unpredictable liability." *Metro-North*, *supra*, at 433 (internal quotation marks omitted). How is the jury, without speculation, to measure compensation for the augmentation of a cancer fear from, say, two in nine to one in three? Given the fact that most of us lead our lives without compensation for fear of a 22% risk of cancer death, Ries, *supra*, at Table I–16, what monetary value can one attach to an incrementally increased fear due to a risk, say, of 30%? The problem here is not the unreality or lack of seriousness of the fear. It may be all too real. The problem is the impossibility of knowing an appropriate compensation for asbestosis insofar as its appearance tears away that veil of disregard that ordinarily shelters most of us from fear of cancer, if not fear of death itself. The majority's verdict control measures, *ante*, at 159, n. 19, will not help much in this respect.

Third, it would be perverse to apply tort law's basic compensatory objectives in a way that compensated less serious injuries at the expense of more serious harms. Yet, as JUSTICE KENNEDY points out, the majority's broad interpretation of the scope of compensable fears threatens to do precisely that. The kind of fear at issue here—a "brooding,

contemplative fear," *ante,* at 172 (opinion of KENNEDY, J.), brought about by knowledge of exposure to a substance, or of a present condition, correlated with an elevated cancer risk—is associated quite generally with negligent exposure to toxic substances. In addition to generating fear of cancer, such exposure may well produce large numbers of plaintiffs, serious injuries, and large monetary awards—all against limited funds available for compensation. And, as the history of asbestos litigation shows, such a combination of circumstances can occur despite a threshold requirement of physical harm.

In such cases, as JUSTICE KENNEDY points out, a rule that allows everyone who suffers some physical harm to recover damages for fear of correlated cancer threatens, in practice, to exhaust the funds available for those who develop cancer in the future, including funds available to compensate for fear of cancer that has actually developed. *Ante,* at 168–170. It is estimated, for example, that asbestos litigation has already consumed over $50 billion and that the eventual cost may substantially exceed $200 billion. RAND Institute for Civil Justice, S. Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report 81 (2002), Petitioner's Supplemental Lodging, p. SL82 (hereinafter RAND Institute). The costs have driven dozens of companies into bankruptcy. *Ante,* at 169 (opinion of KENNEDY, J.). They have also largely exhausted certain funds set aside for asbestos claimants—reducing the Johns-Manville Trust for asbestos claimants, for example, from a fund that promised to pay 100% of the value of liquidated claims to a fund that now pays only 5%. RAND Institute 79–80. The concern that tomorrow's actual cancer victims will recover nothing—for medical costs, pain, or fear—is genuine. Cf. *ante,* at 170 (opinion of KENNEDY, J.). And that genuine concern requires this Court to make hard choices. Members of this Court have indicated that Congress should enact legislation to help resolve the asbestos problem. See, *e. g., Ortiz* v. *Fi-*

*breboard Corp.*, 527 U. S. 815, 865 (1999) (REHNQUIST, C. J., concurring). Congress has not responded. But that lack of response does not require the courts to ignore the practical problems that threaten the achievement of tort law's basic compensatory objectives. In this case, those concerns favor a legal rule that will permit future cancer victims to recover for their injuries, including emotional suffering, even if that recovery comes at the expense of limiting the recovery for fear of cancer available to those suffering some present harm.

For these reasons, I would accept the majority's limitations on recovery, *ante*, at 157, while adding further restrictions to rule out recovery for fear of disease when the following conditions are met: (1) actual development of the disease can neither be expected nor ruled out for many years; (2) fear of the disease is separately compensable if the disease occurs; *and* (3) fear of the disease is based upon risks not significantly different in kind from the background risks that all individuals face. Where these conditions hold, I believe the law generally rules out recovery for fear of cancer. This is not to say that fear of cancer is never reimbursable. The conditions above may not hold. Even when they do, I would, consistent with the sense of the common law, permit recovery where the fear of cancer is unusually severe—where it significantly and detrimentally affects the plaintiff's ability to carry on with everyday life and work. Cf. *Ferrara* v. *Galluchio*, 5 N. Y. 2d 16, 19, 152 N. E. 2d 249, 251 (1958) (awarding damages for a psychiatrist-confirmed case of "severe cancerophobia" from a radiation burn). However, because I believe that the above limitations create a rule more restrictive than the jury charge here, *ante*, at 143 (majority opinion), and, indeed, would bar recovery as a matter of law in this case, I too respectfully dissent from Part III of the Court's opinion.

Syllabus

# CITY OF CUYAHOGA FALLS, OHIO, ET AL. *v.* BUCKEYE COMMUNITY HOPE FOUNDATION ET AL.

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

No. 01–1269. Argued January 21, 2003—Decided March 25, 2003

After the City Council of Cuyahoga Falls, Ohio (hereinafter City), passed a site-plan ordinance authorizing construction of a low-income housing complex by respondents—a nonprofit corporation dedicated to developing affordable housing and related parties—a group of citizens filed a formal petition requesting that the ordinance be repealed or submitted to a popular vote. Pursuant to the City's charter, the referendum petition stayed the site plan's implementation until its approval by the voters. An Ohio court denied respondents an injunction against the petition, and the city engineer, on advice from the city law director, denied their request for building permits. The voters eventually passed the referendum, thus repealing the ordinance. Subsequently, the Ohio Supreme Court declared the referendum invalid under Ohio's Constitution, the City issued the building permits, and construction commenced. While the state litigation was still pending, respondents filed a federal suit against the City and its officials, seeking an injunction ordering the City to issue the building permits, as well as declaratory and monetary relief. They claimed that by submitting the site plan to voters, the City and its officials violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as the Fair Housing Act. The District Court, *inter alia*, denied the City's summary judgment motion. After the Ohio Supreme Court invalidated the referendum, thus reducing the federal action to a claim for damages for the construction delay, the District Court granted the City and its officials summary judgment. In reversing, the Sixth Circuit found that respondents had produced sufficient evidence to go to trial on the allegation that the City, by allowing the petition to stay the site plan's implementation, gave effect to the racial bias reflected in the public's opposition to the project; that respondents had stated a valid Fair Housing Act claim because the City's actions had a disparate impact based on race and family status; and that a genuine issue of material fact existed as to whether the City had engaged in arbitrary and irrational government conduct in violation of substantive due process.

Syllabus

*Held:*

1. Respondents have not presented an equal protection claim that can survive summary judgment. Proof of racially discriminatory intent is required to show an Equal Protection Clause violation. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265. Because respondents claim injury from the referendum petitioning process, not from the referendum itself—which never went into effect—cases in which this Court has subjected enacted, discretionary measures to equal protection scrutiny and treated decisionmakers' statements as evidence of intent, see, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 448, are inapposite. Neither of the official acts respondents challenge reflects the intent required to support equal protection liability. In submitting the referendum petition to the public, the City acted pursuant to the requirement of its charter, which sets out a facially neutral petitioning procedure, and the city engineer, in refusing to issue the permits, performed a nondiscretionary, ministerial act consistent with the City Charter. Respondents point to no evidence suggesting that these acts were themselves motivated by racial animus. While they and the Sixth Circuit cite evidence of allegedly discriminatory voter sentiment, statements made by private individuals during a citizen-driven petition drive do not, in and of themselves, constitute state action for Fourteenth Amendment purposes. And respondents did not offer evidence that the private motives behind the referendum drive are fairly attributable to the State. See *Blum* v. *Yaretsky*, 457 U. S. 991, 1004. In fact, by adhering to charter procedures, city officials enabled public debate on the referendum to take place, thus advancing significant First Amendment interests. Respondents' alternative theory—that city officials acted in concert with private citizens to prevent the complex from being built because of the race and family status of the likely residents—was not addressed below and apparently was disavowed by respondents at oral argument. Moreover, respondents never articulated a cognizable legal claim on such grounds. Pp. 194–198.

2. Subjecting the ordinance to the City's referendum process did not constitute arbitrary government conduct in violation of substantive due process. Both of respondents' due process claims lack merit. First, the city engineer's refusal to issue the building permits while the petition was pending in no sense constituted egregious or arbitrary government conduct denying respondents the benefit of the site plan. In light of the charter's provision that no challenged ordinance can go into effect until approved by the voters, the law director's instruction to the engineer represented an eminently rational directive. Indeed, the site plan, by law, could not be implemented until the voters passed on the referen-

dum. Respondents' second theory—that the city's submission of an administrative land-use determination to the charter's referendum procedures constituted *per se* arbitrary conduct—has no basis in this Court's precedent. The people retain the power to govern through referendum with respect to any matter, legislative or administrative, within the realm of local affairs. *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 674, n. 9. Though a referendum's substantive result may be invalid if it is arbitrary or capricious, respondents do not challenge the referendum itself. Pp. 198–199.

3. Because respondents have abandoned their Fair Housing Act disparate impact claim, the Sixth Circuit's disparate impact holding is vacated, and the case is remanded with instructions to dismiss the relevant portion of the complaint. Pp. 199–200.

263 F. 3d 627, reversed in part, vacated in part, and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 200.

*Glen D. Nager* argued the cause for petitioners. With him on the briefs were *Virgil Arrington, Jr.*, *Michael A. Carvin*, and *Michael S. Fried.*

*David B. Salmons* argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Boyd*, *Deputy Solicitor General Clement*, *Mark L. Gross*, and *Teresa Kwong.*

*Edward G. Kramer* argued the cause for respondents. With him on the brief were *Diane E. Citrino*, *Kenneth Kowalski*, and *Michael P. Seng.**

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*Briefs of *amici curiae* urging reversal were filed for the City of Athens, Ohio, et al. by *Barry M. Byron*, *John E. Gotherman*, and *Garry E. Hunter;* and for the International Municipal Lawyers Association et al. by *Henry W. Underhill, Jr.*, *Charles M. Hinton, Jr.*, and *Brad Neighbor.*

Briefs of *amici curiae* urging affirmance were filed for the Lawyers' Committee for Civil Rights Under Law et al. by *Barbara Arnwine*, *Thomas J. Henderson*, *Cheryl L. Ziegler*, *Eva Jefferson Paterson*, *Javier N. Maldonado*, and *Michael Churchill;* for the National Association of Home Builders by *Thomas Jon Ward;* for the National Fair Housing Alliance et al. by *Joseph R. Guerra*, *Thomas Healy*, *John P. Relman*, *Meera*

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1995, the city of Cuyahoga Falls, Ohio (hereinafter City), submitted to voters a facially neutral referendum petition that called for the repeal of a municipal housing ordinance authorizing construction of a low-income housing complex. The United States Court of Appeals for the Sixth Circuit found genuine issues of material fact with regard to whether the City violated the Equal Protection Clause, the Due Process Clause, and the Fair Housing Act, 82 Stat. 81, as amended, 42 U. S. C. § 3601 *et seq.*, by placing the petition on the ballot. We granted certiorari to determine whether the Sixth Circuit erred in ruling that respondents' suit against the City could proceed to trial.

## I

### A

In June 1995, respondents Buckeye Community Hope Foundation, a nonprofit corporation dedicated to developing affordable housing through the use of low-income tax credits, and others (hereinafter Buckeye or respondents), purchased land zoned for apartments in Cuyahoga Falls, Ohio. In February 1996, Buckeye submitted a site plan for Pleasant Meadows, a multifamily, low-income housing complex, to the city planning commission. Residents of Cuyahoga Falls immediately expressed opposition to the proposal. See 263 F. 3d 627, 630 (CA6 2001). After respondents agreed to various conditions, including that respondents build an earthen wall surrounded by a fence on one side of the complex, the commission unanimously approved the site plan and submitted it to the city council for final authorization.

As the final approval process unfolded, public opposition to the plan resurfaced and eventually coalesced into a refer-

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*Trehan,* and *Robert G. Schwemm;* and for the National Multi Housing Council et al. by *Leo G. Rydzewski* and *Clarine Nardi Riddle.*

*John H. Findley* and *Meriem L. Hubbard* filed a brief for the Pacific Legal Foundation et al. as *amici curiae.*

endum petition drive. See Cuyahoga Falls City Charter, Art. 9, §2, App. 14 (giving voters "the power to approve or reject at the polls any ordinance or resolution passed by the Council" within 30 days of the ordinance's passage). At city council meetings and independent gatherings, some of which the mayor attended to express his personal opposition to the site plan, citizens of Cuyahoga Falls voiced various concerns: that the development would cause crime and drug activity to escalate, that families with children would move in, and that the complex would attract a population similar to the one on Prange Drive, the City's only African-American neighborhood. See, *e. g.*, 263 F. 3d, at 636–637; App. 98, 139, 191; Tr. 182–185, 270, 316. Nevertheless, because the plan met all municipal zoning requirements, the city council approved the project on April 1, 1996, through City Ordinance No. 48–1996.

On April 29, a group of citizens filed a formal petition with the City requesting that the ordinance be repealed or submitted to a popular vote. Pursuant to the charter, which provides that an ordinance challenged by a petition "shall [not] go into effect until approved by a majority" of voters, the filing stayed the implementation of the site plan. Art. 9, §2, App. 15. On April 30, respondents sought an injunction against the petition in state court, arguing that the Ohio Constitution does not authorize popular referendums on administrative matters. On May 31, the Court of Common Pleas denied the injunction. Civ. No. 96–05–1701 (Summit County), App. to Pet. for Cert. 255a. A month later, respondents nonetheless requested building permits from the City in order to begin construction. On June 26, the city engineer rejected the request after being advised by the city law director that the permits "could not be issued because the site plan ordinance 'does not take effect' due to the petitions." 263 F. 3d, at 633.

In November 1996, the voters of Cuyahoga Falls passed the referendum, thus repealing Ordinance No. 48–1996. In

a joint stipulation, however, the parties agreed that the results of the election would not be certified until the litigation over the referendum was resolved. See Stipulation and Jointly Agreed upon Preliminary Injunction Order in No. 5:96 CV 1458 (ND Ohio, Nov. 25, 1996). In July 1998, the Ohio Supreme Court, having initially concluded that the referendum was proper, reversed itself and declared the referendum unconstitutional. 82 Ohio St. 3d 539, 697 N. E. 2d 181 (holding that the Ohio State Constitution authorizes referendums only in relation to legislative acts, not administrative acts, such as the site-plan ordinance). The City subsequently issued the building permits, and Buckeye commenced construction of Pleasant Meadows.

B

In July 1996, with the state-court litigation still pending, respondents filed suit in federal court against the City and several city officials, seeking an injunction ordering the City to issue the building permits, as well as declaratory and monetary relief. Buckeye alleged that "in allowing a site plan approval ordinance to be submitted to the electors of Cuyahoga Falls through a referendum and in rejecting [its] application for building permits," the City and its officials violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as the Fair Housing Act, 42 U. S. C. § 3601. Complaint in No. 5:96 CV 1458 ¶ 1 (ND Ohio, July 5, 1996) (hereinafter Complaint). In June 1997, the District Court dismissed the case against the mayor in his individual capacity but denied the City's motion for summary judgment on the equal protection and due process claims, concluding that genuine issues of material fact existed as to both claims. 970 F. Supp. 1289, 1308 (ND Ohio 1997). After the Ohio Supreme Court declared the referendum invalid in 1998, thus reducing respondents' action to a claim for damages for the delay in construction, the City and its officials again moved for summary judgment. On November

19, 1999, the District Court granted the motion on all counts. Civ. No. 5:96 CV 1458, App. to Pet. for Cert. 35a.

The Court of Appeals for the Sixth Circuit reversed. As to respondents' equal protection claim, the court concluded that they had produced sufficient evidence to go to trial on the allegation that the City, by allowing the referendum petition to stay the implementation of the site plan, gave effect to the racial bias reflected in the public's opposition to the project. See 263 F. 3d, at 639. The court then held that even if respondents failed to prove intentional discrimination, they stated a valid claim under the Fair Housing Act on the theory that the City's actions had a disparate impact based on race and family status. See *id.*, at 640. Finally, the court concluded that a genuine issue of material fact existed as to whether the City, by denying respondents the benefit of the lawfully approved site plan, engaged in arbitrary and irrational government conduct in violation of substantive due process. *Id.*, at 644. We granted certiorari, 536 U. S. 938 (2002), and now reverse the constitutional holdings and vacate the Fair Housing Act holding.

## II

Respondents allege that by submitting the petition to the voters and refusing to issue building permits while the petition was pending, the City and its officials violated the Equal Protection Clause. See Complaint ¶ 41. Petitioners claim that the Sixth Circuit went astray by ascribing the motivations of a handful of citizens supportive of the referendum to the City. We agree with petitioners that respondents have failed to present sufficient evidence of an equal protection violation to survive summary judgment.

We have made clear that "[p]roof of racially discriminatory intent or purpose is required" to show a violation of the Equal Protection Clause. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265 (1977) (citing *Washington* v. *Davis*, 426 U. S. 229 (1976)). In decid-

ing the equal protection question, the Sixth Circuit erred in relying on cases in which we have subjected enacted, discretionary measures to equal protection scrutiny and treated decisionmakers' statements as evidence of such intent. See 263 F. 3d, at 634–635 (citing *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 448 (1985); *Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* at 268; and *Hunter* v. *Erickson*, 393 U. S. 385, 392 (1969)). Because respondents claim injury from the referendum petitioning *process* and not from the referendum itself—which never went into effect—these cases are inapposite. Ultimately, neither of the official acts respondents challenge reflects the intent required to support equal protection liability.

First, in submitting the referendum petition to the voters, the City acted pursuant to the requirements of its charter, which sets out a facially neutral petitioning procedure. See Art. 9, §2. By placing the referendum on the ballot, the City did not enact the referendum and therefore cannot be said to have given effect to voters' allegedly discriminatory motives for supporting the petition. Similarly, the city engineer, in refusing to issue the building permits while the referendum was still pending, performed a nondiscretionary, ministerial act. He acted in response to the city law director's instruction that the building permits "could not . . . issue" because the charter prohibited a challenged site-plan ordinance from going into effect until "approved by a majority of those voting thereon," App. 16. See 263 F. 3d, at 633. Respondents point to no evidence suggesting that these official acts were themselves motivated by racial animus. Respondents do not, for example, offer evidence that the City followed the obligations set forth in its charter *because of* the referendum's discriminatory purpose, or that city officials would have selectively refused to follow standard charter procedures in a different case.

Instead, to establish discriminatory intent, respondents and the Sixth Circuit both rely heavily on evidence of alleg-

edly discriminatory voter sentiment. See *id.*, at 635–637. But statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant to equal protection analysis, see *supra,* at 194, do not, in and of themselves, constitute state action for the purposes of the Fourteenth Amendment. Cf. *Blum* v. *Yaretsky,* 457 U. S. 991, 1002–1003 (1982) ("'[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States'" (quoting *Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948))). Moreover, respondents put forth no evidence that the "private motives [that] triggered" the referendum drive "can fairly be attributed to the State." *Blum* v. *Yaretsky, supra,* at 1004.

In fact, by adhering to charter procedures, city officials enabled public debate on the referendum to take place, thus advancing significant First Amendment interests. In assessing the referendum as a "basic instrument of democratic government," *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 679 (1976), we have observed that "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice," *James* v. *Valtierra,* 402 U. S. 137, 141 (1971). And our well established First Amendment admonition that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas* v. *Johnson,* 491 U. S. 397, 414 (1989), dovetails with the notion that all citizens, regardless of the content of their ideas, have the right to petition their government. Cf. *Meyer* v. *Grant,* 486 U. S. 414, 421–422 (1988) (describing the circulation of an initiative petition as "'core political speech'"); *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"). Again, statements made by decisionmakers or referendum sponsors during deliberation over a

referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative. See, *e. g., Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457, 471 (1982) (considering statements of initiative sponsors in subjecting enacted referendum to equal protection scrutiny); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S., at 268. But respondents do not challenge an enacted referendum.

In their brief to this Court, respondents offer an alternative theory of equal protection liability: that city officials, including the mayor, acted in concert with private citizens to prevent Pleasant Meadows from being built because of the race and family status of its likely residents. See Brief for Respondents 12–26; Tr. of Oral Arg. 33–34, 36–40, 43. Respondents allege, among other things, that the city law director prompted disgruntled voters to file the petition, that the city council intentionally delayed its deliberations to thwart the development, and that the mayor stoked the public opposition. See Brief for Respondents 17. Not only did the courts below not directly address this theory of liability, but respondents also appear to have disavowed this claim at oral argument, focusing instead on the denial of the permits. See Tr. of Oral Arg. 37–38.

What is more, respondents never articulated a cognizable legal claim on these grounds. Respondents fail to show that city officials exercised any power over voters' decisionmaking during the drive, much less the kind of "coercive power" either "overt or covert" that would render the voters' actions and statements, for all intents and purposes, state action. *Blum* v. *Yaretsky*, 457 U. S., at 1004. Nor, as noted above, do respondents show that the voters' sentiments can be attributed in any way to the state actors against which it has brought suit. See *ibid.* Indeed, in finding a genuine issue of material fact with regard to intent, the Sixth Circuit relied almost entirely on apparently independent statements by private citizens. See 263 F. 3d, at

635–637. And in dismissing the claim against the mayor in his individual capacity, the District Court found no evidence that he orchestrated the referendum. See 970 F. Supp., at 1321. Respondents thus fail to present an equal protection claim sufficient to survive summary judgment.

## III

In evaluating respondents' substantive due process claim, the Sixth Circuit found, as a threshold matter, that respondents had a legitimate claim of entitlement to the building permits, and therefore a property interest in those permits, in light of the city council's approval of the site plan. See 263 F. 3d, at 642. The court then held that respondents had presented sufficient evidence to survive summary judgment on their claim that the City engaged in arbitrary conduct by denying respondents the benefit of the plan. *Id.*, at 644. Both in their complaint and before this Court, respondents contend that the City violated substantive due process, not only for the reason articulated by the Sixth Circuit, but also on the grounds that the City's submission of an administrative land-use determination to the charter's referendum procedures constituted *per se* arbitrary conduct. See Complaint ¶¶ 39, 43; Brief for Respondents 32–49. We find no merit in either claim.

We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998) (noting that in our evaluations of "abusive executive action," we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' "). In light of the charter's provision that "[n]o such ordinance [challenged by a petition] shall go into effect until approved by a majority of those voting

thereon," Art. 9, §2, App. 15, the law director's instruction to the engineer to not issue the permits represented an eminently rational directive. Indeed, the site plan, by law, could not be implemented until the voters passed on the referendum.

Respondents' second theory of liability has no basis in our precedent. As a matter of federal constitutional law, we have rejected the distinction that respondents ask us to draw, and that the Ohio Supreme Court drew as a matter of state law, between legislative and administrative referendums. In *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S., at 672, 675, we made clear that because all power stems from the people, "[a] referendum cannot . . . be characterized as a delegation of power," unlawful unless accompanied by "discernible standards." The people retain the power to govern through referendum "'with respect to any matter, legislative or administrative, within the realm of local affairs.'" *Id.*, at 674, n. 9. Cf. *James* v. *Valtierra*, 402 U. S. 137. Though the "substantive result" of a referendum may be invalid if it is "arbitrary and capricious," *Eastlake* v. *Forest City Enterprises*, *supra*, at 676, respondents do not challenge the referendum itself. The subjection of the site-plan ordinance to the City's referendum process, regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute *per se* arbitrary government conduct in violation of due process.

## IV

For the reasons detailed above, we reverse the Sixth Circuit's judgment with regard to respondents' equal protection and substantive due process claims. The Sixth Circuit also held that respondents' disparate impact claim under the Fair Housing Act could proceed to trial, 263 F. 3d, at 641, but respondents have now abandoned the claim. See Brief for Respondents 31. We therefore vacate the Sixth Circuit's

disparate impact holding and remand with instructions to dismiss, with prejudice, the relevant portion of the complaint. See *Deakins* v. *Monaghan*, 484 U. S. 193, 200 (1988).

The judgment of the United States Court of Appeals for the Sixth Circuit is, accordingly, reversed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the Court's opinion, including Part III, which concludes that respondents' assertions of arbitrary government conduct must be rejected. I write separately to observe that, *even if* there had been arbitrary government conduct, that would not have established the substantive-due-process violation that respondents claim.

It would be absurd to think that all "arbitrary and capricious" government action violates substantive due process—even, for example, the arbitrary and capricious cancellation of a public employee's parking privileges. The judicially created substantive component of the Due Process Clause protects, we have said, certain "fundamental liberty interest[s]" from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997). Freedom from delay in receiving a building permit is not among these "fundamental liberty interests." To the contrary, the Takings Clause allows government *confiscation* of private property so long as it is taken for a public use and just compensation is paid; mere *regulation* of land use need not be "narrowly tailored" to effectuate a "compelling state interest." Those who claim "arbitrary" deprivations of nonfundamental liberty interests must look to the Equal Protection Clause, and *Graham* v. *Connor*, 490 U. S. 386, 395 (1989), precludes the use of " 'substantive due proc-

ess'" analysis when a more specific constitutional provision governs.

As for respondents' assertion that referendums may not be used to decide whether low-income housing may be built on their land: that is not a substantive-due-process claim, but rather a challenge to the *procedures* by which respondents were deprived of their alleged liberty interest in building on their land. There is nothing procedurally defective about conditioning the right to build low-income housing on the outcome of a popular referendum, cf. *James* v. *Valtierra*, 402 U. S. 137 (1971), and the delay in issuing the permit was prescribed by a duly enacted provision of the Cuyahoga Falls City Charter (Art. 9, § 2), which surely constitutes "due process of law," see *Connecticut Dept. of Public Safety* v. *Doe*, *ante*, p. 8 (SCALIA, J., concurring).

With these observations, I join the Court's opinion.

Syllabus

# WOODFORD, WARDEN *v.* GARCEAU

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

No. 01–1862. Argued January 21, 2003—Decided March 25, 2003

Amendments made to 28 U. S. C., ch. 153, by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) do not apply to cases pending in federal court on April 24, 1996—AEDPA's effective date. *Lindh* v. *Murphy*, 521 U. S. 320. Respondent was convicted of first-degree murder and sentenced to death in California state court. After his petition for state postconviction relief was denied, he moved for the appointment of federal habeas counsel and a stay of execution in Federal District Court on May 12, 1995, and later filed a federal habeas application on July 2, 1996. Although he filed the habeas application *after* AEDPA's effective date, the District Court concluded, *inter alia*, that it was not subject to AEDPA because his motions for counsel and a stay were filed prior to that date. The Ninth Circuit agreed that the application was not subject to AEDPA, but reversed for reasons not relevant here.

*Held:* For purposes of applying the *Lindh* rule, a case does not become "pending" until an actual application for habeas relief is filed in federal court. Respondent's application is subject to AEDPA's amendments because it was not filed until after AEDPA's effective date. Pp. 205–210.

(a) Because of AEDPA's heavy emphasis on the standards governing the review of a habeas application's *merits*, the Court interprets the *Lindh* rule in view of that emphasis. Thus, whether AEDPA applies to a state prisoner turns on what was before a federal court on AEDPA's effective date. If, on that date, the state prisoner had before a federal court a habeas application seeking an adjudication on the *merits* of the prisoner's claims, then AEDPA does not apply. Otherwise, an application filed after AEDPA's effective date should be reviewed under AEDPA, even if other filings by that same applicant—*e. g.*, a request for the appointment of counsel or a motion for a stay of execution—were presented to a federal court prior to AEDPA's effective date. A review of the amended chapter 153 supports this conclusion. For example, 28 U. S. C. § 2254(e)(1) provides that, "[i]n a proceeding *instituted by an application for a writ of habeas corpus* by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." (Emphasis added.)

Syllabus

Under the Ninth Circuit's view, that presumption would rarely apply in a capital case, as § 2254(e)(1) would be applicable only to those capital prisoners who did not need counsel and did not seek a stay. AEDPA's text, however, contains no indication that § 2254(e)(1) was intended to have such a limited scope. Nor is it reasonable to believe that Congress meant for a capital prisoner to avoid application of § 2254(e)(1)'s stringent requirements simply by filing a request for counsel or a motion for a stay before filing an actual habeas application. Finally, the procedural rules governing § 2254 cases reinforce the Court's view. The Federal Rules of Civil Procedure apply in the habeas context to the extent that they are not inconsistent with the Habeas Corpus Rules. Because nothing in the Habeas Rules contradicts Federal Rule of Civil Procedure 3—"[a] civil action is commenced by filing a complaint"—the logical conclusion is that a habeas suit begins with the filing of a habeas application, the equivalent of a complaint in an ordinary civil case. Pp. 205–208.

(b) As the task here is to apply *Lindh* to an action under chapter 153, respondent's request to look at provisions in chapter 154 is inapposite. Moreover, his reliance on *McFarland* v. *Scott*, 512 U. S. 849, which involved the interpretation of § 2251, not § 2254, and must be understood in light of the Court's concern to protect the right to counsel contained in 18 U. S. C. § 848(q)(4)(B), and *Hohn* v. *United States*, 524 U. S. 236, which says nothing about whether a request for counsel or motion for a stay suffices to create a "case" that is "pending" within the *Lindh* rule's meaning, is misplaced. Pp. 208–210.

275 F. 3d 769, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 210. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 213.

*Janis S. McLean*, Supervising Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Bill Lockyer*, Attorney General of California, *Robert R. Anderson*, Chief Assistant Attorney General, *Jo Graves*, Senior Assistant Attorney General, and *Clayton S. Tanaka*, Deputy Attorney General.

*Lynne S. Coffin* argued the cause for respondent. With her on the brief were *Andrew S. Love* and *Denise Kendall.**

JUSTICE THOMAS delivered the opinion of the Court.

In *Lindh* v. *Murphy*, 521 U. S. 320 (1997), we held that amendments made to chapter 153 of Title 28 of the United States Code by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, do not apply to cases pending in federal court on April 24, 1996—AEDPA's effective date. In this case we consider when a capital habeas case becomes "pending" for purposes of the rule announced in *Lindh*.

I

Respondent Robert Garceau brutally killed his girlfriend Maureen Bautista and her 14-year-old son, Telesforo Bautista. He was convicted of first-degree murder and sentenced to death. The California Supreme Court affirmed respondent's conviction and sentence, *People* v. *Garceau*, 6 Cal. 4th 140, 862 P. 2d 664 (1993), and denied on the merits his petition for state postconviction relief. We denied certiorari. 513 U. S. 848 (1994).

On May 12, 1995, respondent filed a motion for the appointment of federal habeas counsel and an application for a stay of execution in the United States District Court for the Eastern District of California. The District Court promptly issued a 45-day stay of execution. On June 26, 1995, the District Court appointed counsel and extended the stay of execution for another 120 days. On August 1, 1995, the State filed a motion to vacate the stay, in part because respondent had failed to file a "specification of nonfrivolous issues," as required by local court rules. Brief for Respond-

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

*Leon Friedman*, *Jeffrey L. Kirchmeier*, and *Joshua L. Dratel* filed a brief for the Association of the Bar of the City of New York as *amicus curiae* urging affirmance.

ent 2. Respondent cured that defect, and, on October 13, 1995, the District Court denied the State's motion and ordered that the habeas petition be filed within nine months. Respondent filed his application for habeas relief on July 2, 1996.

Although respondent's habeas application was filed *after* AEDPA's effective date, the District Court, following Circuit precedent, concluded that the application was not subject to AEDPA. See App. to Pet. for Cert. 31–32 (citing *Lindh, supra; Calderon* v. *United States Dist. Ct. for the Central Dist. of Cal.*, 163 F. 3d 530, 540 (CA9 1998) (en banc), cert. denied, 526 U. S. 1060 (1999)). On the merits, however, the District Court ruled that respondent was not entitled to habeas relief. The Court of Appeals for the Ninth Circuit reversed. Like the District Court, the Ninth Circuit concluded AEDPA does not apply to respondent's application. 275 F. 3d 769, 772, n. 1 (2001). Unlike the District Court, however, the Ninth Circuit granted habeas relief for reasons that are not relevant to our discussion here. *Id.*, at 777–778. We granted certiorari. 536 U. S. 990 (2001).

## II

As already noted, we held in *Lindh* that the new provisions of chapter 153 of Title 28 do not apply to cases pending as of the date AEDPA became effective. *Lindh*, however, had no occasion to elaborate on the precise time when a case becomes "pending" for purposes of chapter 153 because in that case petitioner's habeas application had been filed prior to AEDPA's effective date. See *Lindh*, *supra*, at 323 (noting that petitioner filed his federal habeas application on July 9, 1992). Since *Lindh*, the Courts of Appeals have divided on the question whether AEDPA applies to a habeas application filed *after* AEDPA's effective date if the applicant sought the appointment of counsel or a stay of execution (or both) prior to that date. Five Courts of Appeals have ruled that AEDPA applies, see, *e. g.*, *Isaacs* v. *Head*, 300 F. 3d 1232,

1245–1246 (CA11 2002); *Moore* v. *Gibson*, 195 F. 3d 1152, 1160–1163 (CA10 1999); *Gosier* v. *Welborn*, 175 F. 3d 504, 506 (CA7 1999); *Williams* v. *Coyle*, 167 F. 3d 1036, 1037–1040 (CA6 1999); *Williams* v. *Cain*, 125 F. 3d 269, 273–274 (CA5 1997), while the Court of Appeals for the Ninth Circuit has held it does not, *Calderon*, *supra*, at 539–540. For the reasons stated below, we agree with the majority of the Courts of Appeals.

Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, see *Williams* v. *Taylor*, 529 U. S. 362, 386 (2000) (opinion of STEVENS, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"); see also *id.*, at 404 (majority opinion), and "to further the principles of comity, finality, and federalism," *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000). One of the methods Congress used to advance these objectives was the adoption of an amended 28 U. S. C. § 2254(d). *Williams*, 529 U. S., at 404 ("It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved"). As we have explained before, § 2254(d) places "new constraint[s] on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Id.*, at 412. Our cases make clear that AEDPA in general and § 2254(d) in particular focus in large measure on revising the standards used for evaluating the merits of a habeas application. See *id.*, at 412–413; *Lindh*, *supra*, at 329 (noting that "amended § 2254(d) . . . governs standards affecting entitlement to relief"); see also *Early* v. *Packer*, 537 U. S. 3 (2002) *(per curiam)* (applying AEDPA's standards); *Woodford* v. *Visciotti*, 537 U. S. 19 (2002) *(per curiam)* (same).

Because of AEDPA's heavy emphasis on the standards governing the review of the *merits* of a habeas application,

we interpret the rule announced in *Lindh* in view of that emphasis, as have the majority of the Courts of Appeals. See, *e. g.*, *Holman* v. *Gilmore*, 126 F. 3d 876, 880 (CA7 1997) ("[T]he motion for counsel is not itself a petition, because it does not call for (or even permit) a decision on the merits. And it is 'the merits' that the amended § 2254(d)(1) is all about"); *Isaacs*, *supra*, at 1245 (same); *Coyle*, *supra*, at 1040 (same). Thus, whether AEDPA applies to a state prisoner turns on what was before a federal court on the date AEDPA became effective. If, on that date, the state prisoner had before a federal court an application for habeas relief seeking an adjudication on the *merits* of the petitioner's claims, then amended § 2254(d) does not apply. Otherwise, an application filed after AEDPA's effective date should be reviewed under AEDPA, even if other filings by that same applicant—such as, for example, a request for the appointment of counsel or a motion for a stay of execution—were presented to a federal court prior to AEDPA's effective date.

A review of the amended chapter 153 supports our conclusion. For instance, § 2254(e)(1) provides that, "[i]n a proceeding *instituted by an application for a writ of habeas corpus* by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." (Emphasis added.) Under the Ninth Circuit's view, the presumption established in § 2254(e)(1) would rarely apply in a capital case. If, as the Ninth Circuit held, a capital habeas case can be commenced (and, therefore, may become pending for purposes of *Lindh*) with the filing of a request for the appointment of counsel or a motion for a stay, then § 2254(e)(1), which by its terms applies only to a proceeding "instituted" by "an *application* for a writ of habeas corpus," would not apply to any capital prisoners whose first filing in federal court is a request for the appointment of counsel or a motion for a stay. This would make § 2254(e)(1) applicable only to those capital prisoners who did not need counsel and did not

seek a stay. AEDPA's text, however, contains no indication that § 2254(e)(1) was intended to have such a limited scope. Nor is it reasonable to believe that Congress meant for a capital prisoner to avoid the application of the stringent requirements of § 2254(e)(1) simply by filing a request for counsel or a motion for a stay before filing an actual application for habeas relief. Other provisions of chapter 153 likewise support our view. See, *e. g.*, 28 U. S. C. § 2241(d) (indicating that the power to grant a writ is not triggered except by "application for a writ of habeas corpus"); § 2244(a) (providing that federal judges are not required to "entertain" a second or successive "application for a writ of habeas corpus" except as provided for by statute).

Finally, our conclusion is reinforced by the procedural rules governing § 2254 cases. Federal Rule of Civil Procedure 3 explains that "[a] civil action is commenced by filing a complaint." The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules. See 28 U. S. C. § 2254 Rule 11; Fed. Rule Civ. Proc. 81(a)(2); *Pitchess* v. *Davis*, 421 U. S. 482, 489 (1975) *(per curiam)*. Nothing in the Habeas Corpus Rules contradicts Rule 3. The logical conclusion, therefore, is that a habeas suit begins with the filing of an application for habeas corpus relief—the equivalent of a complaint in an ordinary civil case.

## III

Respondent asks us to determine the scope of the rule announced in *Lindh* by looking at some of the provisions of chapter 154 of Title 28. But our task in this case is to apply *Lindh* to an action under chapter 153; thus, the precise phrasing of provisions in chapter 154 is inapposite to our inquiry here.

Moreover, respondent's argument that our holding in *McFarland* v. *Scott*, 512 U. S. 849 (1994), should inform our decision here is unpersuasive. To begin with, *McFarland* in-

volved the interpretation of § 2251, not § 2254, which is at issue here. And, as the Courts of Appeals have recognized, see *Isaacs*, 300 F. 3d, at 1242–1246 (collecting and discussing authorities), the Court's ruling in *McFarland* must be understood in light of the Court's concern to protect the right to counsel contained in 21 U. S. C. § 848(q)(4)(B). *McFarland*, 512 U. S., at 855 ("This interpretation is the only one that gives meaning to the statute as a practical matter"); *id.*, at 856 ("Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel thus would expose him to the substantial risk that his habeas claims never would be heard on the merits. Congress legislated against this legal backdrop in adopting § 848(q)(4)(B), and we safely assume that it did not intend for the express requirement of counsel to be defeated in this manner"); *id.*, at 857 ("Even if the District Court had granted McFarland's motion for appointment of counsel and had found an attorney to represent him, this appointment would have been meaningless unless McFarland's execution also was stayed"). Thus, *McFarland* cannot carry the day for respondent.

Similarly, the Ninth Circuit's and respondent's reliance on *Hohn* v. *United States*, 524 U. S. 236 (1998), is misplaced. In *Hohn*, we considered whether this Court has jurisdiction to review a court of appeals' denial of a certificate of appealability (COA). To answer that question we focused on the text of 28 U. S. C. § 1254, which "confines our jurisdiction to '[c]ases in' the courts of appeals." *Hohn*, *supra*, at 241 (citing *Nixon* v. *Fitzgerald*, 457 U. S. 731, 741–742 (1982)). Although we concluded that an application for a COA constituted a case within the meaning of § 1254, we did not provide an all-purpose definition of the term "case." Thus, while *Hohn* might support an argument that respondent's request for appointment of counsel and his motion for a stay of execution began a "case" that could be reviewed on appeal, see, *e. g.*, *Gosier*, 175 F. 3d, at 506 ("[A] request for counsel is a 'case' in the sense that it is subject to appellate review (and,

if need be, review by the Supreme Court)"), it says nothing about whether a request for counsel or motion for a stay suffices to create a "case" that is "pending" within the meaning of the *Lindh* rule.

* * *

In sum, we hold that, for purposes of applying the rule announced in *Lindh*, a case does not become "pending" until an actual application for habeas corpus relief is filed in federal court. Because respondent's federal habeas corpus application was not filed until after AEDPA's effective date, that application is subject to AEDPA's amendments.[1] Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.[2]

*It is so ordered.*

JUSTICE O'CONNOR, concurring in the judgment.

The Court today holds that the post-Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) version of 28

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[1] JUSTICE O'CONNOR contends that we may have misapplied our test because a filing labeled "Specification of Non-Frivolous Issues" placed the *merits* of respondent's claims before the District Court before AEDPA's effective date. *Post*, at 211 (opinion concurring in judgment). That is simply not so. Respondent's "Specification of Non-Frivolous Issues" plainly stated that "[b]ased on a preliminary review of case materials, counsel believes the following federal constitutional issues exist in this case and are among the issues that *may* be raised on [Garceau's] behalf in a petition for habeas corpus." App. to Brief in Opposition 227 (emphasis added). The clear import of this language is that the filing itself did not seek any relief on the merits or place the merits of respondent's claims before the District Court for decision. Rather, the document simply alerted the District Court as to some of the possible claims that might be raised by respondent in the future. Indeed, the habeas corpus application respondent eventually filed contained numerous issues that were not mentioned in the "Specification of Non-Frivolous Issues."

[2] In view of the question on which we granted certiorari, we decline petitioner's request to rule on the merits of respondent's habeas application.

U. S. C. § 2254 applies to respondent Robert Garceau's habeas corpus application because Garceau did not file his application until after AEDPA's effective date. I agree with that holding. I concur only in the judgment, however, because in my view the Court's reasoning is broader than necessary.

The Court states that if "the state prisoner had before a federal court an application for habeas relief seeking an adjudication on the *merits* of the petitioner's claims, then amended § 2254(d) does not apply." *Ante*, at 207. Under the facts of this case, however, the Court may have misapplied its own rule. As the Court concedes, *ante*, at 204–205, the District Court had a pre-AEDPA filing setting forth the merits of Garceau's claims. After Garceau filed a motion for the appointment of counsel, motion for a stay, and motion for leave to file a habeas application, the District Court stayed Garceau's execution. Over the objection of the State, the District Court held that Garceau had identified nonfrivolous issues so that a stay of the execution was appropriate. It is difficult to see how the "merits" were not in front of the District Court at that time, which was well before AEDPA's effective date.

In addition, the Court does not adequately distinguish *McFarland* v. *Scott*, 512 U. S. 849 (1994). Although I dissented from that case, I also recognize that "the doctrine of *stare decisis* is most compelling" when the Court confronts "a pure question of statutory construction." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 205 (1991). The Court here, however, appears to adopt the reasoning of the dissent in *McFarland*. Compare *ante*, at 208 ("Finally, our conclusion is reinforced by the procedural rules governing § 2254 cases"), with *McFarland*, *supra*, at 862 (O'CONNOR, J., dissenting in relevant part) ("The rules governing § 2254 cases confirm this conclusion"). I see no need to question the underpinnings of *McFarland* in this case, and I accept the holding of *McFarland* that an application for a writ

of habeas corpus is not necessary to trigger the beginning of a habeas proceeding. See, *e. g.*, 28 U. S. C. §§ 2251, 2262.

I agree, however, with the Court's conclusion that the post-AEDPA version of § 2254 is applicable to Garceau's case. The text of § 2254 itself provides the answer. Both before and after AEDPA, § 2254 has concerned *only* applications for a writ of habeas corpus. Compare § 2254(a) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain *an application for a writ of habeas corpus* . . ." (emphasis added)) with 28 U. S. C. § 2254(a) (1994 ed.) (same). Indeed, only the filing of an application for a writ of habeas corpus triggered the former version of § 2254(d). See 28 U. S. C. § 2254(d) (1994 ed.) ("In any proceeding instituted in a Federal court by an application for a writ of habeas corpus . . ."). Thus, although Garceau's pre-application filings trigger a habeas corpus proceeding sufficient to permit the District Court to grant a stay under 28 U. S. C. § 2251 and to engage in other activity related to the case, these filings do not answer whether the pre- or post-AEDPA version of § 2254(d) applies here. Because § 2254 has always spoken in terms of "applications," a case is pending for § 2254 purposes only when the prisoner files an *application* for a writ of habeas corpus.

I acknowledge that some language in *Lindh* v. *Murphy*, 521 U. S. 320 (1997), and in *McFarland*, *supra*, can be read to say that if a habeas case is pending before AEDPA, none of AEDPA's amendments apply—including the amendments to § 2254. But these statements do not answer the question in this case. If § 2254 applied to habeas proceedings other than applications for a writ of habeas corpus, the answer might well be different. Compare 28 U. S. C. § 2251 (a judge, "before whom a habeas corpus proceeding is pending, may . . . stay any proceeding") with § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus . . ."). But as the Court correctly points out, *ante*, at 207–208, § 2254 applies only once a prisoner has filed "an application for a

writ of habeas corpus." § 2254(a). See also §§ 2254(b)(1), 2254(b)(2), 2254(d), 2254(e)(1).

It does not follow from our case law, nor does it follow from the text of § 2254 or any other habeas provision, that a habeas applicant can receive the benefit of the pre-AEDPA version of § 2254 when § 2254 itself cannot be triggered until the prisoner files an application for a writ of habeas corpus. A "case" simply could not have existed for purposes of § 2254 until Garceau filed the application itself. Finally, Garceau has no reliance interest here. The pre-AEDPA version of § 2254(d) specifically acknowledged that a habeas applicant was entitled to the then-existing less-restrictive version of § 2254(d) only when the prisoner "instituted" a "proceeding . . . by an application for a writ of habeas corpus." 28 U. S. C. § 2254(d) (1994 ed.).

Because 28 U. S. C. § 2254 is triggered only when a prisoner files an application for a writ of habeas corpus, and because Garceau filed his petition after AEDPA's date, I concur in the judgment of the Court that the post-AEDPA version of § 2254(d) governs his claim.

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

In modifying 28 U. S. C. § 2254, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, did not specifically identify the state habeas cases that the amended statute would govern, except in certain capital cases subject to special rules not applicable here. *Lindh* v. *Murphy*, 521 U. S. 320, 326 (1997), held that in the statute's general application, the amendments cover only cases filed after AEDPA's effective date. Here we have to take the further step of deciding when a case is filed for purposes of the *Lindh* rule.

The majority focuses on 28 U. S. C. § 2254 alone, which is fair enough where a habeas petitioner's first encounter with the district court occurs in filing the petition for habeas relief

itself. But this is not such a case. Garceau first entered the federal court to seek appointment of habeas counsel under 21 U. S. C. § 848(q)(4)(B), and his subsequently appointed lawyer then petitioned under 28 U. S. C. § 2251 for a stay of execution while preparing a habeas petition. I therefore think this case calls for the principle that related statutory provisions are to be read together, see, *e. g.*, *Coit Independence Joint Venture* v. *FSLIC*, 489 U. S. 561, 573 (1989) (citing *Brown* v. *Duchesne*, 19 How. 183, 194 (1857)). AEDPA's amendment of § 2254 ought to be understood in light of § 2251.

When counsel, appointed to prepare and litigate a habeas petition under § 2254, seeks a stay of execution under § 2251, the district court will at some point condition the continuation of any stay on its assessment of the substantiality of the issues counsel expects to raise in the petition yet to be filed, a judgment that will call for some consideration of standards for federal relief in cases governed by § 2254. When a district court's exercise of jurisdiction for habeas purposes occurs during the transition from an earlier to a later version of § 2254, it makes sense to hold that the version to be applied in a given case is the one in effect when the habeas court first takes account of § 2254 standards for habeas relief. A case should thus be considered filed for purposes of the *Lindh* rule by the time the habeas court makes a determination that takes standards for federal relief into consideration.

When the District Court took its initial look at anticipated claims in this case, for example, it was clear that the habeas petition might well be filed before the effective date of the amendment to § 2254; it was thus appropriate for the District Court to consider the possible merit of the claim in light of the earlier, existing law. As a consequence, it would be reasonable to apply that law throughout. There would not be much point, after all, in relying on existing law to judge the merits of a stay, if counsel could not rely on existing law in preparing the case. Otherwise the court could be staying

a case that might be hopeless under the later, more restrictive, law; or conversely, would be forcing counsel to stint on responsible preparation, in order to assure that a petition subject to the earlier law be filed before AEDPA's general effective date. I would therefore hold that the earlier version of § 2254 should apply throughout a habeas proceeding if the habeas court that issued a § 2251 stay took its preliminary look at the prospects for habeas success prior to AEDPA's effective date.

In this case, that first look occurred six months before the amendment's effective date, and I would accordingly hold the pre-AEDPA law applicable here. I respectfully dissent.

Syllabus

# BROWN ET AL. *v.* LEGAL FOUNDATION OF WASHINGTON ET AL.

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

No. 01–1325. Argued December 9, 2002—Decided March 26, 2003

Every State uses interest on lawyers' trust accounts (IOLTA) to pay for legal services for the needy. In promulgating Rules establishing Washington's program, the State Supreme Court required that: (a) *all* client funds be deposited in interest-bearing trust accounts, (b) funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) lawyers direct banks to pay the net interest on the IOLTA accounts to the Legal Foundation of Washington (Foundation), and (d) the Foundation use all such funds for tax-exempt law-related charitable and educational purposes. It seems apparent from the court's explanation of its IOLTA Rules that a lawyer who mistakenly uses an IOLTA account for money that could earn interest for the client would violate the Rule. That court subsequently made its IOLTA Rules applicable to Limited Practice Officers (LPOs), nonlawyers who are licensed to act as escrowees in real estate closings. Petitioners, who have funds that are deposited by LPOs in IOLTA accounts, and others sought to enjoin respondent state official from continuing this requirement, alleging, among other things, that the taking of the interest earned on their funds in IOLTA accounts violates the Just Compensation Clause of the Fifth Amendment, and that the requirement that client funds be placed in such accounts is an illegal taking of the beneficial use of those funds. The record suggests that petitioners' funds generated some interest that was paid to the Foundation, but that without IOLTA they would have produced no net interest for either petitioner. The District Court granted respondents summary judgment, concluding, as a factual matter, that petitioners could not make any net returns on the interest accrued in the accounts and, if they could, the funds would not be subject to the IOLTA program; and that, as a legal matter, the constitutional issue focused on what an owner has lost, not what the taker has gained, and that petitioners had lost nothing. While the case was on appeal, this Court decided in *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 172, that interest generated by funds held in IOLTA accounts is the private property of the owner of the principal. Relying on that case, a Ninth Circuit panel held that Washington's program caused an unconstitutional taking of petitioners' property and remanded

the case for a determination whether they are entitled to just compensation. On reconsideration, the en banc Ninth Circuit affirmed the District Court's judgment, reasoning that, under the ad hoc approach applied in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, there was no taking because petitioners had suffered neither an actual loss nor an interference with any investment-backed expectations, and that if there were such a taking, the just compensation due was zero.

*Held:*

1. A state law requiring that client funds that could not otherwise generate net earnings for the client be deposited in an IOLTA account is not a "regulatory taking," but a law requiring that the interest on those funds be transferred to a different owner for a legitimate public use could be a *per se* taking requiring the payment of "just compensation" to the client. Pp. 231–235.

(a) The Fifth Amendment imposes two conditions on the State's authority to confiscate private property: the taking must be for a "public use" and "just compensation" must be paid to the owner. In this case, the overall, dramatic success of IOLTA programs in serving the compelling interest in providing legal services to literally millions of needy Americans qualifies the Foundation's distribution of the funds as a "public use." Pp. 231–232.

(b) The Court first addresses the type of taking that this case involves. The Court's jurisprudence concerning condemnations and physical takings involves the straightforward application of *per se* rules, while its regulatory takings jurisprudence is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all relevant circumstances. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 322. Petitioners separately challenged (1) the requirement that their funds must be placed in an IOLTA account and (2) the later transfers of interest to the Foundation. The former is merely a transfer of principal and therefore does not effect a confiscation of any interest. Even if viewed as the first step in a regulatory taking which should be analyzed under the *Penn Central* factors, it is clear that there would be no taking because the transaction had no adverse economic impact on petitioners and did not interfere with any investment-backed expectation. 438 U. S., at 124. A *per se* approach is more consistent with the Court's reasoning in *Phillips* than *Penn Central*'s ad hoc analysis. Because interest earned in IOLTA accounts "is the 'private property' of the owner of the principal," *Phillips*, 524 U. S., at 172, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto* v. *Teleprompter Manhattan CATV Corp.*,

Syllabus

458 U. S. 419, which was a physical taking subject to *per se* rules. The Court therefore assumes that petitioners retained the beneficial ownership of at least a portion of their escrow deposits until the funds were disbursed at closings, that those funds generated interest in the IOLTA accounts, and that their interest was taken for a public use when it was turned over to the Foundation. This does not end the inquiry, however, for the Court must now determine whether any "just compensation" is due. Pp. 233–235.

2. Because "just compensation" is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause. Pp. 235–241.

(a) This Court's consistent and unambiguous holdings support the conclusion that the "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. *E. g., Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195. Applying the teachings of such cases to the question here, it is clear that neither petitioner is entitled to any compensation for the nonpecuniary consequences of the taking of the interest on his deposited funds, and that any pecuniary compensation must be measured by his net losses rather than the value of the public's gain. Thus, if petitioners' net loss was zero, the compensation that is due is also zero. Pp. 235–237.

(b) Although lawyers and LPOs may occasionally deposit client funds in an IOLTA account when those funds could have produced net interest for their clients, it does not follow that there is a need for further hearings to determine whether petitioners are entitled to compensation from respondents. The Washington Supreme Court's Rules unambiguously require lawyers and LPOs to deposit client funds in non-IOLTA accounts whenever those funds could generate net earnings for the client. If petitioners' money could have generated net income, the LPOs violated the court's Rules, and any net loss was the consequence of the LPOs' incorrect private decisions rather than state action. Such mistakes may give petitioners a valid claim against the LPOs, but would provide no support for a compensation claim against the State or respondents. Because Washington's IOLTA program mandates a non-IOLTA account when net interest can be generated for the client, the compensation due petitioners for any taking of their property would be nil, and there was therefore no constitutional violation when they were not compensated. Pp. 237–240.

271 F. 3d 835, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissent-

ing opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, *post,* p. 241. KENNEDY, J., filed a dissenting opinion, *post,* p. 253.

*Charles Fried* argued the cause for petitioners. With him on the briefs were *Daniel J. Popeo*, *Richard A. Samp*, *James J. Purcell*, and *Donald B. Ayer.*

*David J. Burman* argued the cause for respondents Legal Foundation of Washington et al. With him on the brief were *Nicholas P. Gellert*, *Kathleen M. O'Sullivan*, *Carter G. Phillips*, and *Stephen B. Kinnaird.*

*Walter Dellinger* argued the cause for respondent Justices of the Washington Supreme Court. With him on the brief were *Christine O. Gregoire*, Attorney General of Washington, and *Maureen Hart*, Senior Assistant Attorney General.*

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**James S. Burling* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Richard M. Frank*, Chief Assistant Attorney General, *J. Matthew Rodriquez*, Senior Assistant Attorney General, *Daniel L. Siegel*, Supervising Deputy Attorney General, *Christiana Tiedemann*, Deputy Attorney General, *Thomas F. Reilly*, Attorney General of Massachusetts, and *William W. Porter* and *Amy Spector*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Janet Napolitano* of Arizona, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Mike McGrath* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *David Samson* of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charlie Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Darrell V. McGraw, Jr.*, of West Virginia, and *Anabelle Rodríguez* of Puerto Rico; for the City and County of San Francisco by *Andrew W.*

JUSTICE STEVENS delivered the opinion of the Court.

The State of Washington, like every other State in the Union, uses interest on lawyers' trust accounts (IOLTA) to pay for legal services provided to the needy. Some IOLTA programs were created by statute, but in Washington, as in most other States, the IOLTA program was established by the State Supreme Court pursuant to its authority to regulate the practice of law. In *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156 (1998), a case involving the Texas IOLTA program, we held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id.*, at 172. We did not, however, express any opinion on the question whether the income had been "taken" by the State or "as to the amount of 'just compensation,' if any, due respondents." *Ibid.* We now confront those questions.

## I

As we explained in *Phillips*, *id.*, at 160–161, in the course of their legal practice, attorneys are frequently required to hold clients' funds for various lengths of time. It has long been recognized that they have a professional and fiduciary obligation to avoid commingling their clients' money with

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*Schwartz* and *John D. Echeverria;* for AARP et al. by *John H. Pickering*, *Seth P. Waxman*, *Stephen W. Preston*, *Jody Manier Kris*, *Stuart R. Cohen*, *Rochelle Bobroff*, *Michael Schuster*, *Donald M. Saunders*, *Burt Neuborne*, *David S. Udell*, and *Laura K. Abel;* for the American Bar Association by *Alfred P. Carlton, Jr.*, *Paul M. Smith*, and *Stephen M. Rummage;* for the Conference of Chief Justices by *Brian J. Serr*, *Drew S. Days III*, *Beth S. Brinkmann*, and *Seth M. Galanter;* for the National League of Cities et al. by *Timothy J. Dowling;* for 49 State Bar Associations et al. by *Richard A. Cordray*, *Joanne M. Garvey*, *Charles N. Freiberg*, and *Thomas P. Brown;* and for the Chief Justice and Justices of the Supreme Court of Texas et al. by *John Cornyn*, Attorney General of Texas, *Robert A. Long, Jr.*, *Caroline M. Brown*, *Julie Caruthers Parsley*, *John M. Hohengarten*, *Darrell E. Jordan*, and *David J. Schenck*.

*Christopher G. Senior* filed a brief for the National Association of Home Builders as *amicus curiae*.

their own, but it is not unethical to pool several clients' funds in a single trust account. Before 1980 client funds were typically held in non-interest-bearing federally insured checking accounts. Because federal banking regulations in effect since the Great Depression prohibited banks from paying interest on checking accounts, the value of the use of the clients' money in such accounts inured to the banking institutions.

In 1980, Congress authorized federally insured banks to pay interest on a limited category of demand deposits referred to as "NOW accounts." See 87 Stat. 342, 12 U. S. C. § 1832. This category includes deposits made by individuals and charitable organizations, but does not include those made by for-profit corporations or partnerships unless the deposits are made pursuant to a program under which charitable organizations have "the exclusive right to the interest."[1]

In response to the change in federal law, Florida adopted the first IOLTA program in 1981 authorizing the use of NOW accounts for the deposit of client funds, and providing that all of the interest on such accounts be used for charitable purposes. Every State in the Nation and the District of Columbia have followed Florida's lead and adopted an IOLTA program, either through their legislatures or their highest courts.[2] The result is that, whereas before 1980 the banks

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[1] Letter from Federal Reserve Board General Counsel Michael Bradfield to Donald Middlebrooks (Oct. 15, 1981), reprinted in Middlebrooks, The Interest on Trust Accounts Program: Mechanics of Its Operation, 56 Fla. B. J. 115, 117 (1982).

[2] Five IOLTA programs were adopted by state legislatures. See Cal. Bus. & Prof. Code Ann. § 6211(a) (West 1990); Conn. Gen. Stat. § 51–81c (Supp. 2002); Md. Bus. Occ. & Prof. Code Ann. § 10–303 (2000); N. Y. Jud. Law § 497 (West Supp. 2003); Ohio Rev. Code Ann. § 4705.09(A)(1) (Anderson 2000). The remaining programs are governed by rules adopted by the highest court in the State. See Ala. Rule Prof. Conduct 1.15(g) (1996); Alaska Rule Prof. Conduct 1.15(d) (2001); Ariz. Sup. Ct. Rule 44(c)(2) (2002); Ark. Rule Prof. Conduct 1.15(d)(2) (1987–2002); Colo. Rule

retained the value of the use of the money deposited in non-interest-bearing client trust accounts, today, because of the adoption of IOLTA programs, that value is transferred to

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Prof. Conduct 1.15(e) (2002); Del. Rule Prof. Conduct 1.15(h) (2002); D. C. Rules of Court, App. B(a) (2002); Fla. Bar Rule 5–1.1 (2002 Supp.); Ga. Bar Rule 1.15(II) (2002); Haw. Sup. Ct. Rule 11 (2002); Idaho Rule Prof. Conduct 1.15(d) (2003); Ill. Rule Prof. Conduct 1.15(d) (2002); Ind. Rule Prof. Conduct 1.15(d) (2000); Iowa Code Prof. Responsibility DR 9–102 (rev. ed. 2002); Kan. Rule Prof. Conduct 1.15(d)(3) (2002); Ky. Sup. Ct. Rule 3.130, Rule Prof. Conduct 1.15 (2002); La. Stat. Ann., Tit. 37, ch. 4, App., Art. 16, Rule Prof. Conduct 1.15(d) (West Supp. 2003); Me. Code Prof. Responsibility 3.6(e)(4) (2002); Mass. Rule Prof. Conduct 1.15 (2002); Mich. Rule Prof. Conduct 1.15(d) (2002); Minn. Rule Prof. Conduct 1.15(d) (2002); Miss. Rule Prof. Conduct 1.15(d) (2002); Mo. Sup. Ct. Rule Prof. Conduct 4–1.15 (2002); Mont. Rule Prof. Conduct 1.18(b) (2002); Neb. Code Prof. Responsibility DR 9–102 (2000); Nev. Sup. Ct. Rule 217 (2000); N. H. Sup. Ct. Rule 50 (2002); N. J. Rules Gen. Application 1:28A–2 (2003); N. M. Rule Prof. Conduct 16–115(D) (June 2002 Supp.); N. C. Rule Prof. Conduct 1.15–4 (2001); N. D. Rule Prof. Conduct 1.15(d)(1) (2002); Okla. Rule Prof. Conduct 1.15(d) (2002); Ore. Code Prof. Responsibility DR9–101(D)(2) (2002); Pa. Rule Prof. Conduct 1.15(d) (2002); R. I. Rule Prof. Conduct, Art. V, 1.15(d) (2001); S. C. App. Ct. Rule 412 (1990); S. D. Tit. 16, ch. 16–18, App., Rule Prof. Conduct 1.15(e) (1995); Tenn. Sup. Ct. Rule 8, Code Prof. Responsibility DR 9–102(C)(2) (2002); Tex. Rule Prof. Conduct 1.14 (2002); Utah Sup. Ct. Rule, Rule Prof. Conduct 1.15 (2002); Vt. Rule, Code Prof. Responsibility DR 9–103 (2002); Va. Sup. Ct. Rules, pt. 6, § II, Rule Prof. Conduct 1.15 (2002); Wash. Rule Prof. Conduct 1.14 (2002); W. Va. Rule Prof. Conduct 1.15(d) (2002); Wis. Sup. Ct. Rule 20:1.15 (2002); Wyo. Rule Prof. Conduct 1.15(d) (2002).

In Virginia, the legislature has overridden the State Supreme Court's IOLTA Rules. See 1995 Va. Acts ch. 93 (making lawyer participation in the IOLTA program optional rather than mandatory by adding Va. Code Ann. § 54.1–3915.1 (2002)). In Indiana, the program was created by legislation but was struck down by the Indiana Supreme Court as an impermissible encroachment on the court's power to regulate the practice of law. See *In re Public Law No. 154–1990*, 561 N. E. 2d 791 (1990). Later, the Indiana Supreme Court adopted an IOLTA program. See Ind. Rule Prof. Conduct 1.15(d) (2000); Remondini, IOLTA Arrives in Indiana: Trial Judges to Play Key Role in Pro Bono Plan, 41 Res Gestae 9 (1998). Likewise, in Pennsylvania, the state legislature passed the original program but the Pennsylvania Supreme Court took over the program in 1996, suspending the state statute and amending the Rules of Professional Con-

charitable entities providing legal services for the poor. The aggregate value of those contributions in 2001 apparently exceeded $200 million.[3]

In 1984, the Washington Supreme Court established its IOLTA program by amending its Rules of Professional Conduct. *IOLTA Adoption Order*, 102 Wash. 2d 1101. The amendments were adopted after over two years of deliberation, during which the court received hundreds of public comments and heard oral argument from the Seattle-King County Bar Association, designated to represent the proponents of the Rule, and the Walla Walla County Bar Association, designated to represent the opponents of the Rule.

In its opinion explaining the order, the court noted that earlier Rules had required attorneys to hold client trust funds "in accounts separate from their own funds," *id.*, at 1102, and had prohibited the use of such funds for the lawyer's own pecuniary advantage, but did not address the question whether or how such funds should be invested. Commenting on then-prevalent practice the court observed:

> "In conformity with trust law, however, lawyers usually invest client trust funds in separate interest-bearing accounts and pay the interest to the clients whenever the trust funds are large enough in amount or to be held for a long enough period of time to make such investments economically feasible, that is, when the amount of interest earned exceeds the bank charges and costs of setting up the account. However, when trust funds are so nom-

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duct to require attorney participation in IOLTA. See Azen, Building a Base for Pro Bono in Pennsylvania, 24 Pa. Law. 28 (Mar.–Apr. 2002).

Petitioners appear to suggest that a different constitutional analysis might apply to a legislative program than to one adopted by the State's judiciary. See Brief for Petitioners 23, n. 7; Tr. of Oral Arg. 50–51. We assume, however, that the procedure followed by the State when promulgating its IOLTA Rules is irrelevant to the takings issue.

[3] See Brief for AARP et al. as *Amici Curiae* 11 (citing ABA Commission on Interest on Lawyers' Trust Accounts, IOLTA Handbook 98, 208 (Jan. 1995, updated July 2002)).

> inal in amount or to be held for so short a period that the amount of interest that could be earned would not justify the cost of creating separate accounts, most attorneys simply deposit the funds in a single noninterest-bearing trust checking account containing all such trust funds from all their clients. The funds in such accounts earn no interest for either the client or the attorney. The banks, in contrast, have received the interest-free use of client money." *Ibid.*

The court then described the four essential features of its IOLTA program: (a) the requirement that *all* client funds be deposited in interest-bearing trust accounts, (b) the requirement that funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) the requirement that the lawyers direct the banks to pay the net interest on the IOLTA accounts to the Legal Foundation of Washington (Foundation), and (d) the requirement that the Foundation must use all funds received from IOLTA accounts for tax-exempt law-related charitable and educational purposes. It explained:

> "1. *All* client funds paid to any Washington lawyer or law firm must be deposited in identifiable interest-bearing trust accounts separate from any accounts containing non-trust money of the lawyer or law firm. The program is mandatory for all Washington lawyers. New CPR DR 9–102(A).
>
> "2. The new rule provides for two kinds of interest-bearing trust accounts. The first type of account bears interest to be paid, net of any transaction costs, to the client. This type of account may be in the form of either separate accounts for each client or a single pooled account with subaccounting to determine how much interest is earned for each client. The second type of account is a pooled interest-bearing account with the interest to be paid directly by the financial institu-

tion to the Legal Foundation of Washington (hereinafter the Foundation), a nonprofit entity to be established pursuant to the order following this opinion. New CPR DR 9–102(C)(1), (2).

"3. Determining whether client funds should be deposited in accounts bearing interest for the benefit of the client or the Foundation is left to the discretion of each lawyer, but the new rule specifies that the lawyer shall base his decision solely on whether the funds could be invested to provide a positive net return to the client. This determination is made by considering several enumerated factors: the amount of interest the funds would earn during the period they are expected to be deposited, the cost of establishing and administering the account, and the capability of financial institutions to calculate and pay interest to individual clients. New CPR DR 9–102(C)(3).

. . . . .

"5. Lawyers and law firms must direct the depository institution to pay interest or dividends, net of any service charges or fees, to the Foundation, and to send certain regular reports to the Foundation and the lawyer or law firm depositing the funds. New CPR DR 9–102(C)(4).

"The Foundation must use all funds received from lawyers' trust accounts for tax-exempt law-related charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, as directed by this court. See Articles of Incorporation and Bylaws of the Legal Foundation of Washington, 100 Wash. 2d, Advance Sheet 13, at ii, vi (1984)." *Id.*, at 1102–1104.

In its opinion the court responded to three objections that are relevant to our inquiry in this case. First, it rejected the contention that the new program "constitutes an uncon-

stitutional taking of property without due process or just compensation." *Id.*, at 1104. Like other State Supreme Courts that had considered the question, it distinguished our decision in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980), on the ground that the new "'program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances.'" 102 Wash. 2d, at 1108 (quoting *In re Interest on Trust Accounts*, 402 So. 2d 389, 395 (Fla. 1981)).

Second, it rejected the argument that it was unethical for lawyers to rely on any factor other than the client's best interests when deciding whether to deposit funds in an IOLTA account rather than an account that would generate interest for the client. The court endorsed, and added emphasis to, the response to that argument set forth in the proponents' reply brief:

> "'Although the proposed amendments list several factors an attorney should consider in deciding how to invest his clients' trust funds, . . . all of these factors are really facets of a single question: Can the client's money be invested so that it will produce a net benefit for the client? If so, the attorney must invest it to earn interest for the client. Only if the money cannot earn net interest for the client is the money to go into an IOLTA account.'
>
> "Reply Brief of Proponents, at 14. This is a correct statement of an attorney's duty under trust law, as well as a proper interpretation of the proposed rule as published for public comment. However, in order to make it even clearer that IOLTA funds are only those funds that *cannot, under any circumstances*, earn *net* interest (after deducting transaction and administrative costs and bank fees) for the client, we have amended the proposed rule accordingly. *See* new CPR DR 9–102(C)(3). The new rule makes it absolutely clear that the enumer-

> ated factors are merely facets of the ultimate question of whether client funds could be invested profitably for the benefit of clients. If they can, then investment for the client is mandatory." 102 Wash. 2d, at 1113–1114.

The court also rejected the argument that it had failed to consider the significance of advances in computer technology that, in time, may convert IOLTA participation into an unconstitutional taking of property that could have been distributed to the client. It pointed to the fact that the Rule expressly requires attorneys to give consideration to the capability of financial institutions to calculate and pay interest on individual accounts, and added: "Thus, as cost effective subaccounting services become available, making it possible to earn net interest for clients on increasingly smaller amounts held for increasingly shorter periods of time, more trust money will have to be invested for the clients' benefit under the new rule. The rule is therefore self-adjusting and is adequately designed to accommodate changes in banking technology without running afoul of the state or federal constitutions." *Id.*, at 1114.

Given the court's explanation of its Rule, it seems apparent that a lawyer who mistakenly uses an IOLTA account as a depositary for money that could earn interest for the client would violate the Rule. Hence, the lawyer will be liable to the client for any lost interest, however minuscule the amount might be.

In 1995, the Washington Supreme Court amended its IOLTA Rules to make them applicable to Limited Practice Officers (LPOs) as well as lawyers. LPOs are nonlawyers who are licensed to act as escrowees in the closing of real estate transactions. Like lawyers, LPOs often temporarily control the funds of clients.

## II

This action was commenced by a public interest law firm and four citizens to enjoin state officials from continuing to

require LPOs to deposit trust funds into IOLTA accounts. Because the Court of Appeals held that the firm and two of the individuals do not have standing,[4] *Washington Legal Foundation* v. *Legal Foundation of Washington*, 271 F. 3d 835, 848–850 (CA9 2001), and since that holding was not challenged in this Court, we limit our discussion to the claims asserted by petitioners Allen Brown and Greg Hayes. The defendants, respondents in this Court, are the justices of the Washington Supreme Court, the Foundation, which receives and redistributes the interest on IOLTA accounts, and the president of the Foundation.

In their amended complaint, Brown and Hayes describe the IOLTA program, with particular reference to its application to LPOs and to some of the activities of recipient organizations that have received funds from the Foundation. Brown and Hayes also both allege that they regularly purchase and sell real estate and in the course of such transactions they deliver funds to LPOs who are required to deposit them in IOLTA accounts. They object to having the interest on those funds "used to finance the Recipient Organizations" and "to anyone other than themselves receiving the interest derived from those funds." App. 25. The first count of their complaint alleges that "being forced to associate with the Recipient Organizations" violates their First Amendment rights, *id.*, at 25, 27–28; the second count alleges that the "taking" of the interest earned on their funds in the IOLTA accounts violates the Just Compensation Clause of

[4] The firm is the Washington Legal Foundation, "a nonprofit public interest law and policy center with members and supporters nationwide, [that] devotes a substantial portion of its resources to protecting the speech and property rights of individuals from undue government interference." App. 13. The two individuals found to have no standing are LPOs who alleged that the 1995 amendment adversely affected their earnings because banks that had previously provided them with special services no longer did so; they did not allege that any of their own funds had been "taken."

the Fifth Amendment, *id.*, at 28–29; and the third count alleges that the requirement that client funds be placed in IOLTA accounts is "an illegal taking of the beneficial use of those funds," *id.*, at 29. The prayer for relief sought a refund of interest earned on the plaintiffs' money that had been placed in IOLTA accounts, a declaration that the IOLTA Rules are unconstitutional, and an injunction against their enforcement against LPOs. See *id.*, at 30.

Most of the pretrial discovery related to the question whether the 1995 Amendment to the IOLTA Rules had indirectly lessened the earnings of LPOs because LPOs no longer receive certain credits that the banks had provided them when banks retained the interest earned on escrowed funds. Each of the petitioners, however, did identify a specific transaction in which interest on his escrow deposit was paid to the Foundation.

Petitioner Hayes and a man named Fossum made an earnest money deposit of $2,000 on August 14, 1996, and a further payment of $12,793.32 on August 28, 1996, in connection with a real estate purchase that was closed on August 30, 1996. *Id.*, at 117–118. The money went into an IOLTA account. Presumably those funds, half of which belonged to Fossum, were used to pay the sales price, "to pay off liens and obtain releases to clear the title to the property being conveyed." *Id.*, at 98. The record does not explain exactly how or when the ultimate recipients of those funds received or cashed the checks issued to them by the escrowee, but the parties apparently agree that the deposits generated some interest on principal that was at least in part owned by Hayes during the closing.

In connection with a real estate purchase that closed on May 1, 1997, petitioner Brown made a payment of $90,521.29 that remained in escrow for two days, see *id.*, at 53; he estimated that the interest on that deposit amounted to $4.96, but he did not claim that he would have received any interest

if the IOLTA Rules had not been in place.[5] The record thus suggests, although the facts are not crystal clear, that funds deposited by each of the petitioners generated some interest that was ultimately paid to the Foundation. It also seems clear that without IOLTA those funds would not have produced any net interest for either of the petitioners.

After discovery, the District Court granted the defendants' motion for summary judgment. As a factual matter the court concluded "that in no event can the client-depositors make any net returns on the interest accrued in these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program." *Washington Legal Foundation* v. *Legal Foundation of Washington*, No. C97–0146C (WD Wash., Jan. 30, 1998), App. to Pet. for Cert. 94a. As a legal matter, the court concluded that the constitutional issue focused on what an owner has lost, not what the "'taker'" has gained, and that petitioners Hayes and Brown had "lost nothing." *Ibid.*

While the case was on appeal, we decided *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156 (1998). Relying on our opinion in that case, a three-judge panel of the Ninth Circuit decided that the IOLTA program caused a taking of petitioners' property and that further proceedings were necessary to determine whether they are entitled to just compensation. The panel concluded: "In sum, we hold that the interest generated by IOLTA pooled trust accounts is property of the clients and customers whose money is deposited into trust, and that a government appropriation of that interest for public purposes is a taking entitling them to just compensation under the Fifth Amendment. But just compensation for the takings may be less than the amount

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[5] "Q Are you saying that without IOLTA in place you would have earned $4.96 on this transaction?

"A Without IOLTA in place I may not have earned anything but it would have been earned in the sense of earning credits for the title company in this case." *Id.*, at 130.

of the interest taken, or nothing, depending on the circumstances, so determining the remedy requires a remand." *Washington Legal Foundation* v. *Legal Foundation of Washington*, 236 F. 3d 1097, 1115 (2001).

The Court of Appeals then reconsidered the case en banc. 271 F. 3d 835 (CA9 2001). The en banc majority affirmed the judgment of the District Court, reasoning that, under the ad hoc approach applied in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), there was no taking because petitioners had suffered neither an actual loss nor an interference with any investment-backed expectations, and that the regulation of the use of their property was permissible. Moreover, in the majority's view, even if there were a taking, the just compensation due was zero.

The three judges on the original panel, joined by Judge Kozinski, dissented. In their view, the majority's reliance on *Penn Central* was misplaced because this case involves a "per se" taking rather than a regulatory taking. 271 F. 3d, at 865–866. The dissenters adhered to the panel's view that a remand is necessary in order to decide whether any compensation is due.

In their petition for certiorari, Brown and Hayes asked us not only to resolve the disagreement between the majority and the dissenters in the Ninth Circuit about the taking issue, but also to answer a question that none of those judges reached, namely, whether injunctive relief is available because the small amounts to which they claim they are entitled render recovery through litigation impractical. We granted certiorari. 536 U. S. 903 (2002).

## III

While it confirms the State's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a "public use" and "just compensation" must be paid

to the owner.[6] In this case, the first condition is unquestionably satisfied. If the State had imposed a special tax, or perhaps a system of user fees, to generate the funds to finance the legal services supported by the Foundation, there would be no question as to the legitimacy of the use of the public's money.[7] The fact that public funds might pay the legal fees of a lawyer representing a tenant in a dispute with a landlord who was compelled to contribute to the program would not undermine the public character of the "use" of the funds. Provided that she receives just compensation for the taking of her property, a conscientious pacifist has no standing to object to the government's decision to use the property she formerly owned for the production of munitions. Even if there may be occasional misuses of IOLTA funds, the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a "public use" within the meaning of the Fifth Amendment.

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[6] Often referred to as the Just Compensation Clause, the final Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." It applies to the States as well as the Federal Government. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 239 (1897).

[7] As the dissenters in the Ninth Circuit observed in their original panel opinion: "IOLTA programs spread rapidly because they were an exceedingly intelligent idea. Money that lawyers deposited in bank trust accounts always produced earnings, but before IOLTA, the clients who owned the money did not receive any of the earnings that their money produced. IOLTA extracted the earnings from the banks and gave it to charities, largely to fund legal services for the poor. That is a very worthy purpose." 236 F. 3d 1097, 1115 (2001).

In his dissent from the en banc opinion, Judge Kozinski wrote: "It is no doubt true that the IOLTA program serves a salutary purpose, one worthy of our support. As a citizen and former member of the bar, I applaud the state's effort to provide legal services for the poor and disadvantaged." 271 F. 3d 835, 867 (CA9 2001).

Before moving on to the second condition, the "just compensation" requirement, we must address the type of taking, if any, that this case involves. As we made clear just last term:

> "The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central*, 438 U. S., at 124, designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo* [v. *Rhode Island*], 533 U. S. [606,] 636 [2001] (O'Connor, J., concurring).
>
> "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945), *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for

> apartment tenants, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); or when its planes use private airspace to approach a government airport, *United States* v. *Causby*, 328 U. S. 256 (1946), it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, *Block* v. *Hirsh*, 256 U. S. 135 (1921); that bans certain private uses of a portion of an owner's property, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470 (1987); or that forbids the private use of certain airspace, *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), does not constitute a categorical taking. 'The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.' *Yee* v. *Escondido*, 503 U. S. 519, 523 (1992). See also *Loretto*, 458 U. S., at 440; *Keystone*, 480 U. S., at 489, n. 18." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 321–323 (2002).

In their complaint, Brown and Hayes separately challenge (1) the requirement that their funds must be placed in an IOLTA account (Count III) and (2) the later transfers to the Foundation of whatever interest is thereafter earned (Count II). The former is merely a transfer of principal and therefore does not effect a confiscation of any interest. Conceivably it could be viewed as the first step in a "regulatory taking" which should be analyzed under the factors set forth in our opinion in *Penn Central*. Under such an analysis, however, it is clear that there would be no taking because the transaction had no adverse economic impact on petitioners and did not interfere with any investment-backed expectation. See 438 U. S., at 124.

Even the dissenters in the Court of Appeals did not disagree with the proposition that *Penn Central* forecloses the conclusion that there was a regulatory taking effected by the Washington IOLTA program. In their view, however, the proper focus was on the second step, the transfer of interest from the IOLTA account to the Foundation. It was this step that the dissenters likened to the kind of "*per se*" taking that occurred in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982).

We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal." 524 U. S., at 172. If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.

We therefore assume that Brown and Hayes retained the beneficial ownership of at least a portion of their escrow deposits until the funds were disbursed at the closings, that those funds generated some interest in the IOLTA accounts, and that their interest was taken for a public use when it was ultimately turned over to the Foundation. As the dissenters in the Ninth Circuit explained, though, this does not end our inquiry. Instead, we must determine whether any "just compensation" is due.

## IV

"The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985). All of the Circuit Judges and District Judges who have confronted the compensation question, both in this case and in *Phillips*, have agreed that the "just compensation" required by the Fifth Amendment is measured by the property owner's loss

rather than the government's gain. This conclusion is supported by consistent and unambiguous holdings in our cases.

Most frequently cited is Justice Holmes' characteristically terse statement that "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195 (1910). Also directly in point is Justice Brandeis' explanation of why a mere technical taking does not give rise to an obligation to pay compensation:

> "We have no occasion to determine whether in law the President took possession and assumed control of the Marion & Rye Valley Railway. For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss." *Marion & Rye Valley R. Co.* v. *United States*, 270 U. S. 280, 282 (1926).

A few years later we again noted that the private party "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S. 246, 255 (1934).

In *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 (1949), although there was disagreement within the Court concerning the proper measure of the owner's loss when a leasehold interest was condemned, it was common ground that the government should pay "not for what it gets but for what the owner loses." *Id.*, at 23 (Douglas, J., dissenting). Moreover, in his opinion for the majority, Justice Frankfurter made it clear that, given "the liability of all property to condemnation for the common good," an owner's nonpecuniary losses attributable to "his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of

the police power, is properly treated as part of the burden of common citizenship." *Id.*, at 5.

Applying the teaching of these cases to the question before us, it is clear that neither Brown nor Hayes is entitled to any compensation for the nonpecuniary consequences of the taking of the interest on his deposited funds, and that any pecuniary compensation must be measured by his net losses rather than the value of the public's gain. For that reason, both the majority[8] and the dissenters[9] on the Court of Appeals agreed that if petitioners' net loss was zero, the compensation that is due is also zero.

## V

Posing hypothetical cases that explain why a lawyer might mistakenly deposit funds in an IOLTA account when those funds might have produced net earnings for the client, the Ninth Circuit dissenters concluded that a remand of this case is necessary to decide whether petitioners are entitled to any compensation.

> "Even though when funds are deposited into IOLTA accounts, the lawyers expect them to earn less than it would cost to distribute the interest, that expectation can turn out to be incorrect, as discussed above. Several hypothetical cases illustrate the complexities of the remedies, which need further factual development on remand. Suppose $2,000 is deposited into a lawyer's trust account paying 5% and stays there for two days. It earns about $.55, probably well under the cost of a stamp and envelope, along with clerical expenses, needed to send the $.55 to the client. In that case, the client's financial loss from the taking, if a reasonable charge is

[8] "We therefore hold that even if the IOLTA program constituted a taking of Brown's and Hayes's private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." 271 F. 3d, at 864.

[9] *Id.*, at 883–884.

made for the administrative expense, is nothing. The fair market value of a right to receive $.55 by spending perhaps $5.00 to receive it would be nothing. On the other hand, suppose, hypothetically, that the amount deposited into the trust account is $30,000, and it stays there for 6 days. The client's loss here would be about $29.59 if he does not get the interest, which may well exceed the reasonable administrative expense of paying it to him out of a common fund. It is hard to see how just compensation could be zero in this hypothetical taking, even though it would be in the $2,000 for 2 days hypothetical taking. It may be that the difference between what a pooled fund earns, and what the individual clients and escrow companies lose, adds up to enough to sustain a valuable IOLTA program while not depriving any of the clients and customers of just compensation for the takings. This is a practical question entirely undeveloped on this record. We leave it for the parties to consider during the remedial phase of this litigation." 271 F. 3d, at 883.[10]

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[10] The first hypothetical posed by the Ninth Circuit dissenters illustrates the fundamental flaw in JUSTICE SCALIA's approach to this case. Under his view that just compensation should be measured by the gross amount of the interest taken by the State, the client should recover the $.55 of interest earned on a 2-day deposit even when the transaction costs amount to $2.00. Thus, in this case, under JUSTICE SCALIA's approach, even if it is necessary to incur substantial legal and accounting fees to determine how many pennies of interest were earned while petitioners' funds remained in escrow and how much of that interest belonged to them rather than to the sellers, the Constitution would require that they be paid the gross amount of that interest, rather than an amount equal to their net loss (which, of course, is zero). As explained above, this is inconsistent with the Court's just compensation precedents. See *supra*, at 235–237.

Ironically, JUSTICE SCALIA seems to believe that our holding in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980), would support such a bizarre result. In *Webb's*, however, the transaction cost that is comparable to the postage in the Ninth Circuit's hypothetical (and to the potential professional fees in this case) is the clerk's fee of $9,228.74,

These hypotheticals persuade us that lawyers and LPOs may occasionally deposit client funds in an IOLTA account when those funds could have produced net interest for their clients. It does not follow, however, that there is a need for further hearings to determine whether Brown or Hayes is entitled to any compensation from the respondents.

The Rules adopted and administered by the Washington Supreme Court unambiguously require lawyers and LPOs to deposit client funds in non-IOLTA accounts whenever those funds could generate net earnings for the client. See *supra*, at 224–225. Thus, if the LPOs who deposited petitioners' money in IOLTA accounts could have generated net income, the LPOs violated the court's Rules. Any conceivable net loss to petitioners was the consequence of the LPOs' incorrect private decisions rather than any state action. Such mistakes may well give petitioners a valid claim against the LPOs, but they would provide no support for a claim for compensation from the State, or from any of the respondents. The District Court was therefore entirely correct when it made the factual finding "that in no event can the client-depositors make any net return on the interest accrued in

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which was deducted from the amount held in the interpleader fund. See *id.*, at 157, 160. The creditors in *Webb's* recovered an amount equal to their net loss. Indeed, in *Webb's* we expressly limited our holding to "the narrow circumstances of this case," *id.*, at 164, and reserved decision on the question whether any compensation would have been due if the clerk had not charged a separate fee. See *id.*, at 164–165.

JUSTICE SCALIA is mistaken in stating that we hold that just compensation is measured by the amount of interest "petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts." *Post*, at 244 (dissenting opinion). We hold (1) that just compensation is measured by the net value of the interest that was actually earned by petitioners and (2) that, by operation of the Washington IOLTA Rules, no net interest can be earned by the money that is placed in IOLTA accounts in Washington. See *IOLTA Adoption Order*, 102 Wash. 2d 1101, 1114 (1984) ("IOLTA funds are only those funds that *cannot, under any circumstances*, earn *net* interest (after deducting transaction and administrative costs and bank fees) for the client").

these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program." No. C97–0146C (WD Wash., Jan. 30, 1998), App. to Pet. for Cert. 94a.

The categorical requirement in Washington's IOLTA program that mandates the choice of a non-IOLTA account when net interest can be generated for the client provided an independent ground for the en banc court's judgment. It held that the program did "not work a constitutional violation with regard to Brown's and Hayes's property: Even if their property was taken, the Fifth Amendment only protects against a taking without just compensation. Because of the way the IOLTA program operates, the compensation due Brown and Hayes for any taking of their property would be nil. There was therefore no constitutional violation when they were not compensated." 271 F. 3d, at 861–862.

We agree with that holding.[11]

## VI

To recapitulate: It is neither unethical nor illegal for lawyers to deposit their clients' funds in a single bank account. A state law that requires client funds that could not otherwise generate net earnings for the client to be deposited in an IOLTA account is not a "regulatory taking." A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of "just compensation" to the client. Because that compensation is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case. It is therefore unnecessary to discuss the reme-

[11] Contrary to JUSTICE SCALIA's assertion, this conclusion does not depend on the fact that interest "was created by the beneficence of a state regulatory program." *Post*, at 241. It rests instead on the fact that just compensation for a net loss of zero is zero.

dial question presented in the certiorari petition. Accordingly, the judgment of the Court of Appeals is affirmed.

*It is so ordered.*

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

The Court today concludes that the State of Washington may seize private property, without paying compensation, on the ground that the former owners suffered no "net loss" because their confiscated property was created by the beneficence of a state regulatory program. In so holding the Court creates a novel exception to our oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken. What is more, the Court embraces a line of reasoning that we explicitly rejected in *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156 (1998). Our precedents compel the conclusion that petitioners are entitled to the fair market value of the interest generated by their funds held in interest on lawyers' trust accounts (IOLTA). I dissent from the Court's judgment to the contrary.

## I

In 1984 the Supreme Court of Washington issued an order requiring lawyers to place all client trust funds in "identifiable interest-bearing trust accounts." App. 150. If a client's funds can be invested to provide a "positive net return" to the client, the lawyer must place the funds in an account that pays interest to the client. If the client's funds cannot earn a "positive net return" for the client, the funds are to be deposited in a pooled interest-bearing IOLTA account with the interest payable to the Legal Foundation of Washington (LFW), a nonprofit organization that provides legal services for the indigent. A lawyer is not required to obtain his client's consent, or even notify his client, regarding the

use of client funds in IOLTA accounts or the payment of interest to LFW. *Id.*, at 151. The Supreme Court of Washington dismissed all constitutional objections to its 1984 order on the now-discredited ground that any interest that might be earned on IOLTA accounts would not be "property" of the clients. *Id.*, at 158; cf. *Phillips*, *supra*.

As the Court correctly notes, Washington's IOLTA program comprises two steps: First, the State mandates that certain client trust funds be placed in an IOLTA account, where those funds generate interest. Second, the State seizes the interest earned on those accounts to fund LFW. *Ante*, at 234. With regard to step one, we held in *Phillips*, *supra*, that any interest earned on client funds held in IOLTA accounts belongs to the owner of the principal, not the State or the State's designated recipient of the interest. As to step two, the Court assumes, *arguendo*, that the appropriation of petitioners' interest constitutes a "taking,"[1] but holds that just compensation is zero because without the mandatory pooling arrangements (step one) of IOLTA, petitioners' funds could not have generated any interest in the first place.[2] *Ante*, at 239–240. This holding contravenes our

[1] Although the Ninth Circuit concluded that Washington's IOLTA scheme did not constitute a "taking" of petitioners' property, *Washington Legal Foundation* v. *Legal Foundation of Wash.*, 271 F. 3d 835, 861 (2001), the Court does not attempt to defend this aspect of the decision. *Ante*, at 235.

[2] The Court's ruminations on whether the State's IOLTA program satisfies the Fifth Amendment's "public use" requirement, *ante*, at 231–232, come as a surprise, inasmuch as they address a nonjurisdictional constitutional issue raised by neither the parties nor their *amici*. Petitioners' sole contention in this Court is that the State's IOLTA program violates the just compensation requirement of the Takings Clause. Brief for Petitioners 18–48; Reply Brief for Petitioners 1–20.

In needlessly addressing this issue, the Court announces a new criterion for "public use": The requirement is "unquestionably satisfied" if the State could have raised funds for the same purpose through a "special tax" or a "system of user fees," *ante*, at 232. This reduces the "public use" requirement to a negligible impediment indeed, since I am unaware of *any* use

decision in *Phillips*—effectively refusing to treat the interest as the property of petitioners we held it to be—and brushes aside 80 years of precedent on determining just compensation.

## II

When a State has taken private property for a public use, the Fifth Amendment requires compensation in the amount of the market value of the property on the date it is appropriated. See *United States* v. *50 Acres of Land*, 469 U. S. 24, 29 (1984) (holding that just compensation is "'market value of the property *at the time of the taking*'" (emphasis added) (quoting *Olson* v. *United States*, 292 U. S. 246, 255 (1934))); *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 10 (1984); *United States* v. *564.54 Acres of Monroe and Pike County Land*, 441 U. S. 506, 511 (1979); *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U. S. 470, 474 (1973); *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 130 (1950); *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344 (1923). As we explained in *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377 (1946), "just compensation . . . is not the value to the owner for his particular purposes or to the condemnor for some special use

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to which state taxes cannot constitutionally be devoted. The money thus derived may be given to the poor, or to the rich, or (insofar as the Federal Constitution is concerned) to the girlfriend of the retiring Governor. Taxes and user fees, since they are not "takings," see *United States* v. *Sperry Corp.*, 493 U. S. 52, 63 (1989), are simply not subject to the "public use" requirement, and so their constitutional legitimacy is entirely irrelevant to the existence *vel non* of a public use.

By raising the analogy of a tax or user fee the Court does, however, usefully call attention to one of the more offensive features of the takings scheme devised by the Washington Supreme Court: A tax or user fee would be enacted by a democratically elected legislature. The IOLTA scheme, by contrast, circumvents politically accountable decisionmaking, and effects a taking of clients' funds through application of a rule purportedly regulating professional ethics, promulgated by the Washington Supreme Court. (The taking has nothing to do with ethics, of course.)

but a so-called 'market value.'" Our cases have recognized only two situations in which this standard is not to be used: when market value is too difficult to ascertain, and when payment of market value would result in "'manifest injustice'" to the owner or the public. See *Kirby Forest Industries, Inc.*, *supra*, at 10, n. 14.

In holding that any just compensation that might be owed is zero, the Court neither pretends to ascertain the market value of the confiscated property nor asserts that the case falls within one of the two exceptions where market value need not be determined. Instead, the Court proclaims that just compensation is to be determined by the former property owner's "net loss," and endorses simultaneously two competing and irreconcilable theories of how that loss should be measured. The Court proclaims its agreement with the Ninth Circuit majority that just compensation is the interest petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts. *Ante*, at 239–240. See also 271 F. 3d 835, 862 (CA9 2001) ("[W]ithout IOLTA, neither Brown nor Hayes would have earned interest on his principal because by regulatory definition, their funds would have not otherwise been placed in an IOLTA account"). At the same time, the Court approves the view of the Ninth Circuit *dissenters* that just compensation is the amount of interest *actually earned* in petitioners' IOLTA accounts, minus the amount that would have been lost in transaction costs had petitioners sought to keep the money for themselves. *Ante*, at 238–239, n. 10. The Court cannot have it both ways—as the Ninth Circuit itself realized—but even if it could, neither of the two options from which lower courts may now choose is consistent with *Phillips* or our precedents that equate just compensation with the fair market value of the property taken.

A

Under the Court's first theory, just compensation is zero because, under the State Supreme Court's Rules, the only

funds placed in IOLTA accounts are those which could not have earned net interest for the client *in a non-IOLTA* savings account. App. 150. This approach defines petitioners' "net loss" as the amount of interest they would have received had their funds been deposited in separate, non-IOLTA accounts. See *ante*, at 239 ("[I]f the [Limited Practice Officers (LPOs)] who deposited petitioners' money in IOLTA accounts could have generated net income, the LPOs violated the court's Rules. Any conceivable net loss to petitioners was the consequence of the LPOs' incorrect private decisions rather than any state action").

This definition of just compensation has no foundation in reason. Once interest is earned on petitioners' funds held in IOLTA accounts, that money is petitioners' property. See *Phillips*, 524 U. S., at 168 ("[A]ny interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal"). It is at *that* point that the State appropriates the interest to fund LFW—*after* the interest has been generated in the pooled accounts—and it is at *that* point that just compensation for the taking must be assessed. It may very well be, as the Court asserts, that petitioners could not have earned money on their funds absent IOLTA's mandatory pooling arrangements, but just compensation is not to be measured by what would have happened in a hypothetical world in which the State's IOLTA program did not exist. When the State takes possession of petitioners' property—petitioners' money—and transfers it to LFW, the property obviously has *value*. The conclusion that it is devoid of value because of the circumstances giving rise to its creation is indefensible.

Consider the implications of the Court's approach for a case such as *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980), which involved a Florida statute that allowed the clerk of a court, in his discretion, to invest interpleader funds deposited with that court in interest-bearing certificates, the interest earned to be deemed " 'income of

the office of the clerk of the circuit court.'" *Id.*, at 156, n. 1 (quoting Fla. Stat. § 28.33 (1977)). The appellant in *Webb's* had tendered nearly $2 million to a state court after filing an interpleader action, and we held that the state court's retention of the more than $100,000 in interest generated by those funds was an uncompensated taking of private property.[3] 449 U. S., at 164.

But what would have been just compensation for the taking in *Webb's* under today's analysis? It would consist not of the amount of interest *actually earned* by the principal, but rather of the amount that *would have been earned* had the State not provided for the clerk of court to generate the interest in the first place. That amount would have been zero since, as we noted in *Webb's*, Florida law did not require that interest be earned on a registry deposit, *id.*, at 161. Section 28.33's authorization for the clerk of court to invest the interpleader funds, like the Washington Supreme Court's IOLTA scheme, was a state-created opportunity to generate interest on moneys that would otherwise lie fallow. As the Florida Supreme Court observed, "[i]nterest accrues *only because of section 28.33*. In this sense the statute takes only what it creates." *Beckwith* v. *Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 953 (1979) (emphasis added).

In *Webb's* this Court *unanimously* rejected the contention that a state regulatory scheme's generation of interest that

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[3] A *separate* Florida statute, Fla. Stat. § 28.24 (1977), which was not even challenged in *Webb's*, 449 U. S., at 158, provided that the Clerk of the Circuit Court would make "charges for services rendered," including charges for receiving money into the registry of court, § 28.24(14). These charges were *not* deducted from the gross interest earned, as the Court suggests, *ante*, at 238–239, n. 10, but from the *principal*, before any interest had been generated on the interpleader fund. See 449 U. S., at 157–158. The creditors in *Webb's* sued to recover the *entire interest* that had been earned on the fund pursuant to § 28.33, *id.*, at 158, and we held that "*any interest* on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal," *id.*, at 162.

would otherwise not have come into existence gave license for the State to claim the interest for itself. What can possibly explain the contrary holding today? Surely it cannot be that the Justices look more favorably upon a nationally emulated uncompensated taking of clients' funds to support (hurrah!) legal services to the indigent than they do upon a more local uncompensated taking of clients' funds to support nothing more inspiring than the Florida circuit courts. That were surely an unprincipled distinction. But the real, principled basis for the distinction remains to be disclosed. And until it is disclosed, today's endorsement of the proposition that there is no taking when "the State giveth, and the State taketh away," has potentially far-reaching consequences. May the government now seize welfare benefits, without paying compensation, on the ground that there was no "net los[s]," *ante*, at 237, to the recipient? Cf. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).[4]

What is more, the Court's reasoning calls into question our holding in *Phillips* that interest generated on IOLTA accounts is the "private property" of the owners of the principal. An ownership interest encumbered by the right of the government to seize moneys for itself or transfer them to the nonprofit organization of its choice is not compatible with any notion of "private property." True, the Fifth Amendment allows the government to appropriate private property without compensation if the market value of the property is zero (and if it is taken for a "public use"). But

[4] The Court claims that its holding "does not depend on the fact that interest was created by a state regulatory program," and "rests instead on the fact that just compensation for a net loss of zero is zero." *Ante*, at 240, n. 11 (internal quotation marks omitted). This simply disclaims the ultimate ground by appealing to the proximate ground: The *reason* the Court finds there has been a "a net loss of zero" is that the interest on petitioners' funds is entirely attributable to the merging of those funds into the IOLTA account—*but for* IOLTA, they would have earned no interest at all. That is to say, no compensation is due on the interest because the "interest was created by a state regulatory program."

the Court does not defend the State's action on the ground that the money taken is worthless, but instead on the ground that the interest would not have been created but for IOLTA's mandatory pooling arrangements. The Court thereby embraces precisely the line of argument we rejected in *Phillips:* that the interest earned on client funds in IOLTA accounts could not be deemed "private property" of the clients because those funds "cannot reasonably be expected to generate interest income on their own." 524 U. S., at 169 (internal quotation marks omitted); cf. *id.*, at 183 (BREYER, J., dissenting).

B

The Court's rival theory for explaining why just compensation is zero fares no better. Contrary to its aforementioned description of petitioners' "net loss" as the amount their funds would have earned in non-IOLTA accounts, *ante,* at 239–240, the Court declares that just compensation is "the *net value* of the interest that was *actually earned* by petitioners," *ante,* at 239, n. 10 (emphasis added)—net value consisting of the value of the funds, *less* "transaction and administrative costs and bank fees" that would be expended in extracting the funds from the IOLTA accounts, *ibid.* To support this concept of "net value," the Court cites nothing but the cases discussed earlier in its opinion, *ante,* at 235–237, which establish that just compensation consists of the value the owner has lost rather than the value the government has gained. In this case, however, there is *no difference* between the two. Petitioners have lost the interest that *Phillips* says rightfully belongs to them—which is precisely what the government has gained. The Court's apparent fear that following the Constitution in this case will provide petitioners a "windfall" in the amount of transaction costs saved is based on the unfounded assumption that the State must return the interest directly to petitioners. The State could satisfy its obligation to pay just compensation by simply returning petitioners' money to the IOLTA account

from which it was seized, leaving others to incur the accounting costs in the event petitioners seek to extract their interest from the account.

In any event, our cases that have distinguished the "property owner's loss" from the "government's gain" say *nothing whatever* about reducing this value to some "net" amount. Remarkably, the Court does not cite the recent case of ours that *specifically addresses* this issue, and that does so in the very context of an IOLTA-type scheme. *Phillips* flatly rejected the notion that just compensation may be reduced by transaction costs the former owner would have sustained in retaining his property. See 524 U. S., at 170 ("The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected");[5] see also *Olson* v. *United States*, 292 U. S., at 255 ("It is the property and not the cost of it that is safeguarded by [the] Constitutio[n]").

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[5] All the Court can muster in response to *Phillips*' rejection of its view that the government may seize property for which the administrative costs of retention exceed market value is a hypothetical posed by the Ninth Circuit dissenters in support of their suggestion to remand. *Ante*, at 238–239, n. 10. The doctrine of *stare decisis* adopts a different hierarchy: This Court's precedents are to be followed over dissenting opinions in the Courts of Appeals.

The Court also suggests that the confiscation of petitioners' property is "comparable to" the clerk's fee under Fla. Stat. §28.24 (1977), which we discussed in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980). *Ante*, at 238–239, n. 10. The clerk's fee imposed pursuant to §28.24(14) had nothing to do with "transaction costs" but was a fee *for services rendered by the State itself.* 449 U. S., at 157. Here, the State does not even attempt to characterize its retention of petitioners' interest in that fashion. While petitioners, their escrow companies, and the banks holding their funds may very well incur costs in returning the IOLTA-generated interest to the clients, this does not convert the State's seizure into a fee. In any event, as noted earlier, *supra*, at 246, n. 3, we neither approved nor disapproved the State's retention of fees pursuant to §28.24(14) in *Webb's* because the parties did not challenge it. 449 U. S., at 158.

And if the Federal Government seizes someone's paycheck, it may not deduct from its obligation to pay just compensation the amount that state and local governments would have taxed, on the ground that it need only compensate the "net los[s]," *ante*, at 237, to the former owner. That is why we have repeatedly held that just compensation is the "market value" of the confiscated property, rather than the "net loss" to the owner. "Market value" is not reduced by what the owner would have lost in taxes or other exactions. "'[J]ust compensation' means the full monetary equivalent of the property taken." *United States* v. *Reynolds*, 397 U. S. 14, 16 (1970).

But the irrationality of this aspect of the Court's opinion does not end with its blatant contradiction of a precedent *(Phillips)* promulgated by a Court consisting of the same Justices who sit today. Even if "net value" (rather than "market value") *were* the appropriate measure of just compensation, the Court has no basis whatsoever for pronouncing the "net value" of petitioners' interest to be zero. While the Court is correct that under the State's IOLTA rules, petitioners' funds could not have earned net interest *in separate, non-IOLTA accounts*, *ante*, at 238–239, n. 10, that has no bearing on the transaction costs that petitioners would sustain in removing their earned interest from the IOLTA accounts.[6] The Court today arbitrarily forecloses clients from

[6] The Court quotes the Washington Supreme Court's definition of IOLTA funds as "only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client." *Ante*, at 239, n. 10 (quoting *IOLTA Adoption Order*, 102 Wash. 2d 1101, 1114 (1984) (emphasis deleted)). It is true that IOLTA funds cannot earn net interest for the client *in non-IOLTA accounts*, and, prior to our decision in *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156 (1998), also could not earn net interest for the client in IOLTA accounts because state law declared such interest to be the property of LFW. After *Phillips*, however, IOLTA funds *can* earn net interest for the client when placed in IOLTA accounts—because all interest earned by funds in IOLTA accounts is the client's property. See *id.*, at 160.

recovering the "net interest" to which (even under the Court's definition of just compensation) they are entitled. What is more, there is no reason to believe that petitioners themselves do not fall within the class of clients whose funds, though unable to earn interest in non-IOLTA accounts, nevertheless generate "net interest" in IOLTA accounts. That is why the Ninth Circuit dissenters (who shared the Court's second theory of just compensation but not the first) voted to remand to the District Court for a factual determination of what the "net value" of petitioners' interest actually is.

To confuse confusion yet again, the Court justifies its decision *not* to remand by simply falling back upon the *different* theory of just compensation espoused by the Ninth Circuit *majority*—namely, that just compensation will always be zero because the funds would not have earned interest for the clients in a *non-IOLTA* savings account. *Ante,* at 239–240. See also 271 F. 3d, at 862 ("Brown and Hayes are in actuality seeking compensation for the value added to their property by Washington's IOLTA program"). That does not conform, of course, with the Court's previously announced standard for just compensation: "the net value of the interest that was *actually earned* by petitioners." *Ante,* at 239, n. 10 (emphasis added).[7] Assessing the "net value" of inter-

[7] In this *reprise* of its first theory, designed to cover the embarrassing fact that its second theory does not support its disposition, the Court makes the assertion that, even if some lawyer mistakenly placed into the IOLTA account client funds that *could* have generated net earnings independently (thus rendering even the Court's first theory factually inapplicable), compensation would *still* not be required, because "[a]ny conceivable net loss [would be] the consequence of the [lawyer's] incorrect private decisio[n] rather than any state action." *Ante,* at 239. That is surely not correct. Even on the Court's own misbegotten theory, the taking occurs when the IOLTA interest is transferred to LFW, and compensation is not payable only if the principal generating that interest could not have earned interest otherwise. How the principal got into the IOLTA account—mistakenly or otherwise—has nothing to do with whether there has been a "taking" of "value." The government would owe just compensation for a taking of real property even if the action of some third party

est "actually earned" requires a factual determination of the costs petitioners would incur if they sought to keep the IOLTA-generated interest for themselves. By refusing to undertake this inquiry, the Court reveals that its contention that the value of interest "actually earned" is the measure of just compensation is a facade. The Court's affirmance of the decision below can only rest on the reasoning adopted by the Ninth Circuit majority (notwithstanding its rejection in *Phillips*): that property created by virtue of a state regulatory program may be taken without compensation.

* * *

Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended. One must hope that that is the case. For to extend to the entire run of Compensation Clause cases the rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous.

The Court's judgment that petitioners are not entitled to the market value of their confiscated property has no basis in law. I respectfully dissent.

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had caused the property mistakenly to be included on the list of properties scheduled for condemnation. The notion that the government can keep the property without compensation, and relegate the owner to his remedies against the private party, is nothing short of bizarre. Imagine the fruitful application of this principle of "intervening private fault" in other fields: "Yes, you were subjected to a brutally unlawful search and seizure in connection with our raid upon a street corner where drugs were being distributed. But since the only reason you were at that corner is that a taxi dropped you at the wrong address, you must look to Yellow Cab for your remedy."

JUSTICE KENNEDY, dissenting.

The principal dissenting opinion, authored by JUSTICE SCALIA, sets forth a precise, complete, and convincing case for rejecting the holding and analysis of the Court. I join the dissent in full.

It does seem appropriate to add this further observation. By mandating that the interest from these accounts serve causes the justices of the Washington Supreme Court prefer, the State not only takes property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States but also grants to itself a monopoly which might then be used for the forced support of certain viewpoints. Had the State, with the help of Congress, not acted in violation of its constitutional responsibilities by taking for itself property which all concede to be that of the client, *ante*, at 235; *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 172 (1998), the free market might have created various and diverse funds for pooling small interest amounts. These funds would have allowed the true owners of the property the option to express views and policies of their own choosing. Instead, as these programs stand today, the true owner cannot even opt out of the State's monopoly.

The First Amendment consequences of the State's action have not been addressed in this case, but the potential for a serious violation is there. See *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990). Today's holding, then, is doubly unfortunate. One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course.

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# BRANCH ET AL. *v.* SMITH ET AL.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 01–1437. Argued December 10, 2002—Decided March 31, 2003*

After the 2000 census caused Mississippi to lose one congressional seat, the state legislature failed to pass a new redistricting plan. Anticipating a state-law deadline for qualifying candidates, appellants and cross-appellees (state plaintiffs) filed suit in October 2001, asking the State Chancery Court to issue a redistricting plan for the 2002 elections. In a similar action, appellees and cross-appellants (federal plaintiffs) asked the Federal District Court to enjoin the current plan and any state-court plan, and to order at-large elections pursuant to Miss. Code Ann. § 23–15–1039 and 2 U. S. C. § 2a(c)(5) or, alternatively, to devise its own redistricting plan. The three-judge District Court permitted the state plaintiffs to intervene and concluded that it would assert jurisdiction if it became clear by January 7, 2002, that no state plan would be in place by March 1. On the eve of the state trial, the State Supreme Court ruled that the Chancery Court had jurisdiction to issue a redistricting plan. The Chancery Court adopted such a plan. On December 21, 2001, the state attorney general submitted that plan and the Supreme Court's decision to the Department of Justice (DOJ) for preclearance pursuant to § 5 of the Voting Rights Act of 1965. DOJ requested additional information from the State, noting that the 60-day review period would commence once that information was received. The information was provided on February 20, 2002. Meanwhile, the Federal District Court promulgated a plan that would fix the State's congressional districts for the 2002 elections should the state-court plan not be precleared by February 25. When that date passed, the District Court enjoined the State from using the state-court plan and ordered that its own plan be used in 2002 and until the State produced a precleared, constitutional plan. The court based the injunction on the failure of the timely preclearance of the state-court plan, but found, in the alternative, that the state-court plan was unconstitutional. The State did not appeal. DOJ declined to make a determination about the preclearance submission because the District Court's injunction rendered the state-court plan incapable of administration.

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*Together with No. 01–1596, *Smith et al.* v. *Branch et al.*, also on appeal from the same court.

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*Held:* The judgment is affirmed.

189 F. Supp. 2d 548, affirmed.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II, and III–A, holding:

1. The District Court properly enjoined enforcement of the state-court plan. Pp. 261–266.

(a) There are two critical distinctions between these cases and *Growe* v. *Emison*, 507 U. S. 25. First, there is no suggestion here that the District Court failed to allow the state court adequate opportunity to develop a redistricting plan. Second, the state-court plan here was subject to § 5 of the Voting Rights Act. The controversy over whether the state-court plan was precleared centers on § 5's proviso that whenever a covered jurisdiction "shall enact or seek to administer" a voting change, the change may be enforced if the Attorney General does not object within 60 days. Pp. 261–263.

(b) DOJ's failure to object within 60 days of the state attorney general's original submission did not render the state-court plan enforceable on February 25. A jurisdiction seeking preclearance must provide the Attorney General with information sufficient to prove that the change is nondiscriminatory. DOJ regulations—which are "wholly reasonable and consistent with the Act," *Georgia* v. *United States*, 411 U. S. 526, 541—provide that incomplete state submissions do not start the 60-day clock, and that the clock begins to run from the date that requested information is received. DOJ's request here, which was neither frivolous nor unwarranted, postponed the 60-day period. Pp. 263–264.

(c) The state-court plan was also not precleared 60 days after the state attorney general submitted the requested information. The State was "seek[ing] to administer" the changes within § 5's meaning when its attorney general made his initial submission to DOJ and when he provided additional information. However, when the State failed to appeal the District Court's injunction, it ceased "seek[ing] to administer" the state-court plan. The 60-day period was no longer running, so the plan was not rendered enforceable by operation of law. Because a private party's actions are not those of a State, the state plaintiffs' appeal is insufficient to demonstrate that the State still "seek[s] to administer" the plan. Pp. 264–265.

(d) Since this Court affirms the injunction on the ground that the state-court plan was not precleared and could not be precleared in time for the 2002 election, the Court vacates the District Court's alternative holding that such plan was unconstitutional. Pp. 265–266.

2. The District Court properly fashioned its own congressional reapportionment plan under 2 U. S. C. § 2c. The tension between

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§§ 2a(c)(5) and 2c is apparent: Pending redistricting, § 2a(c)(5) requires at-large elections if a State loses a congressional seat, while § 2c, which was enacted 26 years later, requires States with more than one Representative to use single-member districts. Contrary to the federal plaintiffs' contention, § 2c is not limited to legislative action, but also applies to action by state and federal courts when the prescribed legislative action has not been forthcoming. When § 2c was adopted in 1967, the issue was precisely the courts' involvement in fashioning electoral plans. The Voting Rights Act had recently been enacted, and this Court's decisions in, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186, had ushered in a new era in which federal courts were overseeing efforts by badly malapportioned States to conform their congressional districts to one-person, one-vote standards. Given the risk that judges would simply order at-large elections, it is most unlikely that § 2c was directed solely at legislative apportionment. Nor has any court found § 2c to be so limited. In addition, § 2c's language is most susceptible of this interpretation. Pp. 266–272.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE GINSBURG, concluded in Part III–B that § 2a(c)—where what it prescribes is constitutional (as it is in paragraph (5))—applies when a state legislature and the state and federal courts have all failed to redistrict pursuant to § 2c. This interpretation allows both §§ 2a(c) and 2c to be given effect. Section 2a(c) governs the manner of any election held "[u]ntil a State is redistricted in the manner provided by [state] law after any apportionment." When a court redistricts pursuant to § 2c, it necessarily does so in such a manner because it must follow the State's "policies and preferences" for districting. *White* v. *Weiser*, 412 U. S. 783, 795. A court may invoke § 2a(c)'s stopgap provision only when an election is so imminent that redistricting pursuant to state law (including § 2c's mandate) cannot be completed without disrupting the election process. Mississippi's at-large provision should be deemed operative when §§ 2a(c)(2) and (5) would be: The state provision envisions both legislatively and judicially prescribed change and does not come into play as long as it is feasible for a state or federal court to complete redistricting. Pp. 273–276.

JUSTICE STEVENS, joined by JUSTICE SOUTER and JUSTICE BREYER, while agreeing that the District Court properly enjoined the state-court plan's enforcement and promulgated its own plan under 2 U. S. C. § 2c, concluded that § 2c impliedly repealed § 2a(c) and that the 1967 federal Act pre-empted Mississippi's statutory authorization for at-large congressional elections. The presumption against implied repeals, like that against pre-emption, is overcome if there is an irreconcilable conflict between the two provisions or if the later Act was clearly intended

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to "cove[r] the whole subject of the earlier one." *Posadas* v. *National City Bank*, 296 U. S. 497, 503. By prohibiting States with more than one Representative from electing Representatives at-large, the 1967 Act unambiguously forbids elections that § 2a(c)(5) would otherwise authorize. Thus, under either of *Posadas*' standards, the 1967 Act repealed the earlier § 2a(c)(5) and pre-empted Mississippi's law. Any fair reading of the history leading to the 1967 Act's passage shows that the parties believed that the changes they were debating would completely replace § 2a(c). The statute was the final gasp in a protracted legislative process. Four versions of the original bill expressly repealed § 2a(c), and there was no disagreement about that provision. When that bill did not pass, its less controversial parts, including what is now § 2c, were attached to a private bill. The absence of any discussion, debate, or reference to the repeal provision in the legislative process prevents its omission from the final private bill as being seen as a deliberate choice by Congress. Pp. 285–292.

SCALIA, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and II, the opinion of the Court with respect to Part III–A, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts III–B and IV, in which REHNQUIST, C. J., and KENNEDY and GINSBURG, JJ., joined. KENNEDY, J., filed a concurring opinion, in Part II of which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 282. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER and BREYER, JJ., joined, *post*, p. 285. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 292.

*Robert B. McDuff* argued the cause for appellants in No. 01–1437 and cross-appellees in No. 01–1596. With him on the briefs was *Pamela S. Karlan.*

*James A. Feldman* argued the cause for the United States as *amicus curiae* supporting cross-appellees. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Boyd*, *Deputy Solicitor General Clement*, *Mark L. Gross*, and *Kevin Russell.*

*Michael B. Wallace* argued the cause for appellees in No. 01–1437 and cross-appellants in No. 01–1596. With him

on the briefs were *Arthur F. Jernigan, Jr.*, and *Grant M. Fox*.†

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Parts III–B and IV, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE GINSBURG join.

In these cases, we decide whether the District Court properly enjoined a Mississippi state court's proposed congressional redistricting plan and whether it properly fashioned its own congressional reapportionment plan rather than order at-large elections.

## I

The 2000 census caused Mississippi to lose one congressional seat, reducing its representation in the House of Representatives from five Members to four. The state legislature, however, failed to pass a new redistricting plan after the decennial census results were published in 2001. In anticipation of the March 1, 2002, state-law deadline for the qualification of candidates, see Miss. Code Ann. § 23–15–299 (Lexis 2001), appellant and cross-appellee Beatrice Branch and others (state plaintiffs) filed suit in a Mississippi State Chancery Court in October 2001, asking the state court to issue a redistricting plan for the 2002 congressional elections. In November 2001, appellee and cross-appellant John Smith and others (federal plaintiffs) filed a similar action under Rev. Stat. § 1979, 42 U. S. C. § 1983, in the United States District Court for the Southern District of Mississippi, claiming that the current districting plan, Miss. Code Ann. § 23–15–

†Briefs of *amici curiae* urging reversal in No. 01–1437 were filed for the National Association for the Advancement of Colored People et al. by *J. Gerald Hebert* and *Robert Rubin;* and for the Nationalist Movement by *Richard Barrett.*

*John P. Krill, Jr.*, filed a brief for Robert C. Jubelirer et al. as *amici curiae* urging affirmance in No. 01–1437.

1037 (Lexis 2001), dividing the State into five, rather than four, congressional districts, was unconstitutional and unenforceable. The federal plaintiffs asked the District Court to enjoin the current redistricting plan, and subsequently asked it to enjoin any plan developed by a state court (which they asserted would violate Article I, § 4, of the Constitution, and, in any event, could not be enforced until the state court's assertion of redistricting authority was precleared under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c), and asked that it order at-large elections pursuant to Miss. Code Ann. § 23–15–1039 (2001) and 46 Stat. 26, 2 U. S. C. § 2a(c)(5), or, alternatively, devise its own redistricting plan.

A three-judge District Court was convened pursuant to 28 U. S. C. § 2284. Initially the District Court did not interfere with the State Chancery Court's efforts to develop a redistricting plan. In an order filed on December 5, 2001, *Smith* v. *Clark*, 189 F. Supp. 2d 502 (SD Miss.), the District Court permitted the state plaintiffs to intervene and deferred ruling on the federal plaintiffs' motion for a preliminary injunction. In staying its hand, the District Court recognized that "'the Constitution leaves with the States primary responsibility for apportionment of their federal congressional . . . districts,'" *id.*, at 503 (quoting *Growe* v. *Emison*, 507 U. S. 25, 34 (1993)), but concluded that "if it is not clear to this court by January 7, 2002 that the State authorities can have a redistricting plan in place by March 1, we will assert our jurisdiction . . . and if necessary, we will draft and implement a plan for reapportioning the state congressional districts," 189 F. Supp. 2d, at 503; see also 189 F. Supp. 2d 503, 505–506 (SD Miss. 2002).

On the eve of the State Chancery Court trial, the Mississippi Supreme Court denied petitions for writs of prohibition and mandamus filed by a state defendant and others challenging the Chancery Court's jurisdiction to engage in congressional redistricting. It held that the Chancery Court

had jurisdiction to issue a redistricting plan. *In re Mauldin*, Civ. No. 2001–M–01891 (Dec. 13, 2001), App. to Juris. Statement 110a. Following trial, on December 21, 2001, the State Chancery Court adopted a redistricting plan submitted by the state plaintiffs. On December 26, the state attorney general submitted that plan, along with the Mississippi Supreme Court's *Mauldin* decision (which arguably changed the process for drawing congressional districts by authorizing the Chancery Court to create a redistricting plan), to the Department of Justice (DOJ) for preclearance. On February 14, 2002, DOJ sent a letter to the state attorney general requesting additional information about the *Mauldin* decision, because "the information sent to date regarding this change in voting procedure is insufficient . . . ." App. to Juris. Statement 193a. The letter advised that the "sixty-day review period will begin when we receive the information specified." *Id.*, at 196a. The state attorney general provided additional information on February 19 and 20, 2002.

Meanwhile, in January 2002, the District Court, expressing "serious doubts whether the Mississippi Supreme Court's Order and the plan adopted by the Chancery Court pursuant to that order will be precleared prior to the March 1 candidate qualification deadline," 189 F. Supp. 2d, at 508, had begun to develop its own redistricting plan, *id.*, at 511. On February 4, 2002, it promulgated a redistricting plan to be used absent the timely preclearance of the Chancery Court plan. 189 F. Supp. 2d 512 (SD Miss.). On February 19, it ordered that, if the Chancery Court redistricting plan was not "precleared before the close of business on Monday, February 25, 2002," then the District Court's plan would fix the Mississippi congressional districts for the 2002 elections. 189 F. Supp. 2d 529, 548. February 25th came and went with no action by DOJ. On February 26, the District Court enjoined the State from using the Chancery Court plan and ordered use of the District Court's own plan in the 2002 elections and all succeeding elections until the State produced

a constitutional redistricting plan that was precleared. 189 F. Supp. 2d 548, 559. The court said that the basis for its injunction and order was "reflected in our opinion of February 19, that is, the failure of the timely preclearance under § 5 of the Voting Rights Act of the Hinds County Chancery Court's plan." *Id.*, at 549. However, "in the event that on appeal it is determined that we erred in our February 19 ruling," the court put forth as its "alternative holding" that Article I, § 4, of the United States Constitution prohibited the State Chancery Court from issuing a redistricting plan without express authorization from the state legislature. *Ibid.*

The State did not file a notice of appeal. On April 1, 2002, DOJ informed the State in a letter that "it would be inappropriate for the Attorney General to make a determination concerning [the State's preclearance] submission now" because the District Court's injunction rendered the state-court plan incapable of administration. App. 29.

The state plaintiffs—intervenors in the District Court—filed a timely notice of appeal from the District Court and a jurisdictional statement. The federal plaintiffs filed a jurisdictional statement on conditional cross-appeal. We noted probable jurisdiction in both appeals and consolidated them. 536 U. S. 903 (2002).

## II

At the outset we should observe two critical distinctions between these cases and the one that was before us in *Growe* v. *Emison*, 507 U. S. 25 (1993). In *Growe*, the Federal District Court had refused to abstain or defer to state-court redistricting proceedings. *Id.*, at 30–31. In reversing, we reminded the federal courts of " 'what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' " *Id.*, at 34 (quoting *Chapman* v. *Meier*, 420 U. S. 1, 27 (1975)). We held that "[a]bsent evidence that these state branches will fail *timely* to perform

that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." 507 U. S., at 34 (emphasis added). In the present cases, unlike in *Growe*, there is no suggestion that the District Court failed to allow the state court adequate opportunity to develop a redistricting plan. The second distinction is that the state-court plan here, unlike that in *Growe*, was subject to § 5 of the Voting Rights Act, 42 U. S. C. § 1973c. The District Court rested its injunction of the state-court plan on the ground that necessary preclearance had not been obtained. It is that challenged premise that we examine first.

Section 5 of the Voting Rights Act provides that whenever a covered jurisdiction, such as Mississippi, see 30 Fed. Reg. 9897 (1965), "shall enact or seek to administer" a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure," the State must obtain preclearance from the District Court for the District of Columbia or the Attorney General before the change may be enforced. 42 U. S. C. § 1973c. The Act requires preclearance of *all* voting changes, *ibid.;* see *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32, 38–39 (1978), and there is no dispute that this includes voting changes mandated by order of a state court, see, *e. g.*, *In re McMillin*, 642 So. 2d 1336, 1339 (Miss. 1994). Rather, the controversy pertains to the proviso in § 1973c to the effect that, where the preclearance submission is made to the Attorney General, the voting change may be enforced if "the Attorney General has not interposed an objection within sixty days after such submission . . . ."

Appellants in No. 01–1437 (originally the state plaintiffs) assert that the District Court erred in believing that the Chancery Court's plan lacked preclearance. It was automatically rendered enforceable, they contend, by DOJ's failure to object within the 60-day period running from the state attorney general's initial submission on December 26, 2001—or, in the alternative, it was subsequently rendered enforce-

able by DOJ's failure to object within the 60-day period running from the state attorney general's submission of additional information on February 20, 2002. We consider each of these contentions in turn.

## A

Under § 5, a jurisdiction seeking administrative preclearance must prove that the change is nondiscriminatory in purpose and effect. *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 328 (2000). It bears the burden of providing the Attorney General information sufficient to make that proof, *Georgia* v. *United States*, 411 U. S. 526, 537–539 (1973), and failure to do so will cause the Attorney General to object, see *ibid.;* 28 CFR § 51.52(c) (2002). In DOJ's view, however, incomplete state submissions do not start the 60-day clock for review. See §§ 51.27, 51.37. The regulations implementing § 5 authorize a DOJ request for additional information from a jurisdiction that has initially "omitted information considered necessary for the evaluation of the submission." § 51.37(a). If the jurisdiction responds by supplying the additional information (or stating that it is unavailable), the 60-day clock begins to run from the date the response is received. § 51.37(c). We have upheld these regulations as being "wholly reasonable and consistent with the Act." *Georgia* v. *United States*, *supra*, at 541; accord, *Morris* v. *Gressette*, 432 U. S. 491, 504, n. 19 (1977).

DOJ's February 14 request for additional information was within the Attorney General's discretion under 28 CFR § 51.37, thereby postponing the 60-day time period for objections until the requested information was received. The request was neither frivolous nor unwarranted. See *Georgia* v. *United States*, *supra*, at 541, n. 13. DOJ believed that the Mississippi Supreme Court's *Mauldin* order, holding that the Chancery Court had jurisdiction to engage in redistricting, was a change in voting procedures, and it sought additional information demonstrating that this change would not have

the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under § 5. The fact that the District Court identified the same issue as posing a hurdle to preclearance further suggests that DOJ's request was not frivolous. 189 F. Supp. 2d, at 508–509. The request for more information was not frivolous or unwarranted at the time it was made, regardless of whether it ultimately develops that *Mauldin* and the Chancery Court's assertion of jurisdiction to redistrict are not voting changes that required preclearance.

B

Appellants contend that even if the State Chancery Court's plan was not precleared by operation of law on February 25, 2002, it was precleared on April 22, 60 days after the state attorney general submitted the additional information requested. We think not.

Section 5 provides that "[w]henever a [covered jurisdiction] shall *enact or seek to administer*" a voting change, such a change may be enforced if it is submitted to the Attorney General and there is no objection by the Attorney General within 60 days. 42 U. S. C. § 1973c (emphasis added). Clearly the State Chancery Court's redistricting plan was not "enacted" by the State of Mississippi. An "enactment" is the product of legislation, not adjudication. See Webster's New International Dictionary 841 (2d ed. 1949) (defining "enact" as "[t]o make into an act or law; esp., to perform the legislative act with reference to (a bill) which gives it the validity of law"); Black's Law Dictionary 910 (7th ed. 1999) (defining "legislate" as "[t]o make or enact laws"). The web of state and federal litigation before us is the consequence of the Mississippi Legislature's *failure* to enact a plan. The Chancery Court's redistricting plan, then, could be eligible for preclearance only if the State was "seek[ing] to administer" it.

There is no doubt that the State was "seek[ing] to administer" the changes for which preclearance was sought when the Mississippi attorney general made his initial submission to DOJ on December 26, 2001, and when he provided additional information regarding the state-court plan on February 20, 2002. On February 26, 2002, however, the District Court "enjoined [the State] from implementing the congressional redistricting plan adopted by the [state court]," 189 F. Supp. 2d, at 559, and the State *never appealed* that injunction. Uncontrovertibly, the State was no longer "seek[ing] to administer" the state-court plan, and thus the 60-day time period for DOJ review was no longer running. The passing of 60 days from the date of the State's February 20, 2002, submission of the additional requested information had no legal significance, and the state-court plan was not rendered enforceable by operation of law.

Appellants' argument—that their appeal, as *intervenors*, is sufficient to demonstrate that the State still "seek[s] to administer" the state-court plan—is invalid on its face. The actions of a private party are not the actions of a State and cannot satisfy the prerequisite to § 5 preclearance.

C

Since we affirm the injunction on the basis of the District Court's principal stated ground that the state-court plan had not been precleared and had no prospect of being precleared in time for the 2002 election, we have no occasion to address the District Court's alternative holding that the State Chancery Court's redistricting plan was unconstitutional—a holding that the District Court specified was set forth to cover the eventuality of the principal stated ground's being rejected on appeal—and therefore we vacate it as a basis for the injunction. The District Court's alternative holding is not to be regarded as supporting the injunction we have affirmed on the principal ground, or as binding upon state and

federal officials should Mississippi seek in the future to administer a redistricting plan adopted by the Chancery Court.

## III

Having determined that the District Court properly enjoined enforcement of the state-court redistricting plan, we turn to the propriety of the redistricting plan that the District Court itself adopted. Cross-appellees in No. 01–1596 (originally the state plaintiffs) and the United States, as *amicus curiae,* argue that the District Court was required to draw (as it did) single-member congressional districts; cross-appellants in No. 01–1596 (originally the federal plaintiffs) contend that it was required to order at-large elections for the congressional seats. We must decide whether, as cross-appellees contend, the District Court was governed by the provisions of 2 U. S. C. § 2c; or, as cross-appellants contend, by the provisions of 2 U. S. C. § 2a(c)(5).

### A

Article I, § 4, cl. 1, of the Constitution provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." It reserves to Congress, however, the power "at any time by Law [to] make or alter such Regulations, except as to the Places of chusing Senators." *Ibid.* Pursuant to this authority, Congress in 1929 enacted the current statutory scheme governing apportionment of the House of Representatives. 2 U. S. C. §§ 2a(a), (b). In 1941, Congress added to those provisions a subsection addressing what is to be done pending redistricting:

> "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then

> prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large." § 2a(c).

In 1967, 26 years after § 2a(c) was enacted, Congress adopted § 2c, which provides, as relevant here:

> "In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . . ."

The tension between these two provisions is apparent: Section 2c requires States entitled to more than one Repre-

sentative to elect their Representatives from single-member districts, rather than from multimember districts or the State at large. Section 2a(c), however, requires multimember districts or at-large elections in certain situations; and with particular relevance to the present cases, in which Mississippi, by reason of the 2000 census, lost a congressional seat, § 2a(c)(5) requires at-large elections. Cross-appellants would reconcile the two provisions by interpreting the introductory phrase of § 2a(c) ("Until a State is redistricted in the manner provided by the law thereof after any apportionment") and the phrase "established by law" in § 2c to refer exclusively to *legislative* redistricting—so that § 2c tells the legislatures what to do (single-member districting) and § 2a(c) provides what will happen *absent* legislative action—in the present cases, the mandating of at-large elections.

The problem with this reconciliation of the provisions is that the limited role it assigns to § 2c (governing legislative apportionment but not judicial apportionment) is contradicted both by the historical context of § 2c's enactment and by the consistent understanding of all courts in the almost 40 years since that enactment. When Congress adopted § 2c in 1967, the immediate issue was precisely the involvement of the courts in fashioning electoral plans. The Voting Rights Act of 1965 had recently been enacted, assigning to the federal courts jurisdiction to involve themselves in elections. See 79 Stat. 439 (as amended and codified at 42 U. S. C. § 1973 *et seq.*). Even more significant, our decisions in *Baker* v. *Carr*, 369 U. S. 186 (1962), *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), had ushered in a new era in which federal courts were overseeing efforts by badly malapportioned States to conform their congressional electoral districts to the constitutionally required one-person, one-vote standards. In a world in which the role of federal courts in redistricting disputes had been transformed from spectating, see *Colegrove* v. *Green*, 328 U. S. 549 (1946) (opinion of Frankfurter, J.), to directing,

the risk arose that judges forced to fashion remedies would simply order at-large elections.

At the time Congress enacted § 2c, at least six District Courts, two of them specifically invoking 2 U. S. C. § 2a(c)(5), had suggested that if the state legislature was unable to redistrict to correct malapportioned congressional districts, they would order the State's entire congressional delegation to be elected at large. On March 26, 1964, a three-judge District Court ordered that, pending enactment of a constitutional redistricting plan by the Michigan Legislature, all Michigan Representatives would be elected at large. *Calkins* v. *Hare*, 228 F. Supp. 824, 830 (ED Mich. 1964). On October 19, 1964, a three-judge District Court entered a similar order for the State of Texas. See *Bush* v. *Martin*, 251 F. Supp. 484, 489, and n. 11, 490, and n. 17 (SD Tex. 1966). On February 3, 1965, a three-judge District Court in Arkansas, whose House delegation had decreased from six to four Members after the 1960 census, stated that under § 2a(c)(5), "if the Legislature . . . had taken no action [after the 1960 apportionment] the congressmen would have been required to run at large," and that the same reasoning would compel the court to require at-large elections if the legislature adopted malapportioned congressional districts. *Park* v. *Faubus*, 238 F. Supp. 62, 66 (ED Ark. 1965). On August 5, 1966, a three-judge District Court in Missouri, whose House delegation had decreased from 11 to 10 Members after the 1960 census, informed the State that if it was unable to redistrict in accordance with the Constitution, then pursuant to the "command of Section 2(a)(c) *[sic]*," "the congressional elections for Missouri will be ordered conducted at large until new and constitutional districts are created." *Preisler* v. *Secretary of State of Missouri*, 257 F. Supp. 953, 981, 982 (WD Mo. 1966), aff'd, 385 U. S. 450 (1967) *(per curiam)*. In *Meeks* v. *Anderson*, 229 F. Supp. 271, 273–274 (Kan. 1964), and *Baker* v. *Clement*, 247 F. Supp. 886, 897–898 (MD Tenn. 1965), three-judge District Courts stayed their hands but

held forth the possibility of requiring at-large elections. With all this threat of judicially imposed at-large elections, and (as far as we are aware) no threat of a legislatively imposed change to at-large elections, it is most unlikely that § 2c was directed solely at legislative reapportionment.

Nor have the courts ever thought so. To the contrary, every court that has addressed the issue has held that § 2c requires courts, when they are remedying a failure to redistrict constitutionally, to draw single-member districts whenever possible. The first court to examine § 2c, just two weeks after the statute was enacted, was the three-judge District Court in Missouri that had previously threatened to order at-large elections in accordance with § 2a(c)(5). In its decision on December 29, 1967, that court observed that the enactment of § 2c had "relieved [it] of the prior existing Congressional command to order that the 1968 and succeeding congressional elections in Missouri be held at large," *Preisler* v. *Secretary of State of Missouri,* 279 F. Supp. 952, 969 (WD Mo. 1967), aff'd, 394 U. S. 526 (1969), and accordingly reversed its prior position and stated that it would fashion a districting plan if the State failed to fulfill its duty. Four years later, the Supreme Court of Virginia denied a writ of mandamus directing at-large elections to replace an allegedly unconstitutional Redistricting Act, on the ground that by reason of § 2c "we cannot legally issue the writ." *Simpson* v. *Mahan,* 212 Va. 416, 417, 185 S. E. 2d 47, 48 (1971). The next year the Supreme Court of California reached the same conclusion that § 2c required it to establish single-member districts, see *Legislature* v. *Reinecke,* 6 Cal. 3d 595, 602–603, 492 P. 2d 385, 390 (1972), a conclusion that it reaffirmed in 1982, see *Assembly of State of Cal.* v. *Deukmejian,* 30 Cal. 3d 638, 664, 639 P. 2d 939, 955 (1982). In *Shayer* v. *Kirkpatrick,* 541 F. Supp. 922, 926 (WD Mo.), aff'd *sub nom. Schatzle* v. *Kirkpatrick,* 456 U. S. 966 (1982), the District Court concluded that "nothing in section 2c suggests any limitation on its applicability," and declined to order at-large elections

pursuant to § 2a(c)(5) because § 2c "appears to prohibit at-large elections." And in *Carstens* v. *Lamm*, 543 F. Supp. 68 (Colo. 1982), the District Court reached a substantially identical result, although contemplating that § 2a(c) provided a "stop-gap measure" in the "event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan," *id.*, at 77, and n. 23.

It bears noting that this Court affirmed two of the District Court decisions described above, see *Preisler*, *supra*, and *Shayer*, *supra*, one without discussing § 2c, and one summarily. And in 1971 we observed in dictum that "[i]n 1967, Congress reinstated the single-member district requirement" that had existed before the enactment of § 2a(c). *Whitcomb* v. *Chavis*, 403 U. S. 124, 159, n. 39 (1971).

Of course the implausibility (given the circumstances of its enactment) that § 2c was meant to apply only to legislative reapportionment, and the unbroken unanimity of state and federal courts in opposition to that interpretation, would be of no consequence if the text of § 2c (and of § 2a(c)) unmistakably demanded that interpretation. But it does not. Indeed, it is more readily susceptible of the opposite interpretation.

The clause "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled" could, to be sure, be so interpreted that the phrase "by law" refers only to legislative action. Its more common meaning, however, encompasses judicial decisions as well. See, *e. g.*, *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002) (referring to judicial decisions as "established law" in qualified immunity context); *Swidler & Berlin* v. *United States*, 524 U. S. 399, 407 (1998) (referring to judicial decisions as "established law" in the attorney-client privilege context); *United States* v. *Frady*, 456 U. S. 152, 166 (1982) (referring to the judicially established standard of review for a 28 U. S. C. § 2255 motion as "long-established law"); see

also § 2254(d)(1) ("clearly established Federal law, as determined by the Supreme Court of the United States"); *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) (it is "the province and duty of the judicial department to say what the law is").

We think, therefore, that while § 2c assuredly envisions legislative action, it also embraces action by state and federal courts when the prescribed legislative action has not been forthcoming. We might note that giving "by law" its less common meaning would cause the immediately following clause of § 2c ("and Representatives shall be elected only from districts *so established*" (emphasis added)) to exclude *all* courts from redistricting, including even state courts acting pursuant to state legislative authorization in the event of legislative default. It is hard to see what plausible congressional purpose this would serve. When, as here, the situation (a decrease in the number of Representatives, all of whom were formerly elected from single-member districts) enables courts to prescribe at-large elections under paragraph (5) of § 2a(c) (assuming that section subsists, see *infra*, at 273), it can be said that there is a constitutional fallback. But what would occur if the situation called for application of paragraphs (1) to (4) of § 2a(c), none of which is constitutionally enforceable when (as is usual) the decennial census has shown a proscribed degree of disparity in the voting population of the established districts? The absolute prohibition of § 2c ("Representatives shall be elected only from [single-member] districts [legislatively] established") would be subject to no exception, and courts would (despite *Baker* v. *Carr*) be congressionally forbidden to act when the state legislature has not redistricted. Only when it is utterly unavoidable should we interpret a statute to require an unconstitutional result—and that is far from the situation here.

In sum, § 2c is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—federal or state—as it is on legislatures.

B

Having determined that in enacting 2 U. S. C. § 2c, Congress mandated that States are to provide for the election of their Representatives from single-member districts, and that this mandate applies equally to courts remedying a state legislature's failure to redistrict constitutionally, we confront the remaining question: what to make of § 2a(c)? As observed earlier, the texts of § 2c and § 2a(c)(5) are in tension. Representatives cannot be "elected only from districts," § 2c, while being elected "at large," § 2a(c). Some of the courts confronted with this conflict have concluded that § 2c repeals § 2a(c) by implication. See *Shayer* v. *Kirkpatrick*, 541 F. Supp., at 927; *Assembly of State of Cal.* v. *Deukmejian*, 30 Cal. 3d, at 663–664, 639 P. 2d, at 954. There is something to be said for that position—especially since paragraphs (1) through (4) of § 2a(c) have become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional. (The unlikely exception is the situation in which the decennial census makes no districting change constitutionally necessary.) Eighty percent of the section being a dead letter, why would Congress adhere to the flotsam of paragraph (5)?

We have repeatedly stated, however, that absent "a clearly expressed congressional intention," *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974), "repeals by implication are not favored," *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U. S. 186, 193 (1968). An implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute." *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). So while there is a strong argument that § 2c was a substitute for § 2a(c), we think the better answer is that § 2a(c)—where what it prescribes is constitutional (as it is with regard to paragraph (5))—continues to apply.

Section 2a(c) is, of course, only *provisionally* applicable. It governs the manner of election for Representatives in any election held "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment." That language clashes with § 2c only if it is interpreted to forbid judicial redistricting unless the state legislature has first acted. On that interpretation, whereas § 2c categorically instructs courts to redistrict, § 2a(c)(5) forbids them to do anything but order at-large elections unless the state legislature has acted. But there is of course no need for such an interpretation. "Until a State is redistricted" can certainly refer to redistricting by courts as well as by legislatures. Indeed, that interpretation would seem the preferable one even if it were not a necessary means of reconciling the two sections. Under prior versions of § 2a(c), its default or stopgap provisions were to be invoked for a State "until the *legislature* of such State . . . [had] redistrict[ed] such State." Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734 (emphasis added); see Act of Feb. 7, 1891, ch. 116, § 4, 26 Stat. 736 ("until such State be redistricted as herein prescribed by the *legislature* of said State" (emphasis added)); Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 6 ("shall be elected at large, unless the *Legislatures* of said States have provided or shall otherwise provide" (emphasis added)). These provisions are in stark contrast to the text of the current § 2a(c): "[u]ntil a State is redistricted in the manner provided by the law thereof."

If the more expansive (and more natural) interpretation of § 2a(c) is adopted, its condition can be met—and its demand for at-large elections suspended—by the very court that follows the command of § 2c. For when a court, state or federal, redistricts pursuant to § 2c, it necessarily does so "in the manner provided by [state] law." It must follow the "policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature," except, of course,

when "adherence to state policy . . . detract[s] from the requirements of the Federal Constitution." *White* v. *Weiser*, 412 U. S. 783, 795 (1973). Federal constitutional prescriptions, and federal statutory commands such as that of § 2c, are appropriately regarded, for purposes of § 2a(c), as a part of the state election law.

Thus, § 2a(c) is inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to § 2c. How long is a court to await that redistricting before determining that § 2a(c) governs a forthcoming election? Until, we think, the election is so imminent that no entity competent to complete redistricting pursuant to state law (including the mandate of § 2c) is able to do so without disrupting the election process. Only then may § 2a(c)'s stopgap provisions be invoked. Thus, § 2a(c) cannot be properly applied—neither by a legislature nor a court—as long as it is feasible for federal courts to effect the redistricting mandated by § 2c. So interpreted, § 2a(c) continues to function as it always has, as a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one. Cf. *Carstens* v. *Lamm*, 543 F. Supp., at 77–78.

There remains to be considered Mississippi's at-large election provision, which reads as follows:

> "Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made by Congress, and before the districts shall have been changed to conform to the new apportionment, representatives shall be chosen as follows: In case the number of representatives to which the state is entitled be increased, then one (1) member shall be chosen in each district as organized, and the additional member or members shall be chosen by the electors of the state at large; and if the number of repre-

> sentatives shall be diminished, then the whole number shall be chosen by the electors of the state at large." Miss. Code Ann. §23–15–1039 (Lexis 2001).

There has been no interpretation of this provision by the Mississippi courts. We believe it was designed to track 2 U. S. C. §§2a(c)(2) and (5), and should be deemed operative when those provisions would be. That is to say, (1) the phrase "and before the districts shall have been changed to conform to the new apportionment" envisions both legislatively and judicially prescribed change, and (2) the statute does not come into play as long as it remains feasible for a state or federal court to complete redistricting. In these cases, the District Court properly completed the redistricting of Mississippi pursuant to 2 U. S. C. §2c and thus neither Mississippi Code §23–15–1039 nor 2 U. S. C. §2a(c) was applicable.

## IV

JUSTICE O'CONNOR's opinion concurring in part and dissenting in part (hereinafter dissent) agrees that the District Court properly acted to remedy a constitutional violation, see *post*, at 300–301, but contends that it should have looked to §2a(c) rather than §2c in selecting an appropriate remedy. We think not. We have explained why it *makes sense* for §2c to apply until there is no longer any reasonable prospect for redistricting according to state law—whereupon §2a(c) applies. If, like the dissent, we were to forgo such analysis and simply ask, in the abstract, which of the two provisions has primacy, we would probably *still* select §2c—the only one cast in absolute, rather than conditional, terms. The dissent gives not the hint of a reason why *it* believes §2a(c) has primacy. It says that "[t]he text of §2a(c) directs federal courts to order at-large elections '[u]ntil a State is redistricted in the manner provided by the law thereof.'" *Post*, at 301. But it is *equally* true that §2c directs federal courts to redistrict *absolutely and without qualification.*

The dissent does contemplate a role for federal courts in redrawing congressional districts, but only "*after* a State has been redistricted" in the first instance. *Post*, at 300. It is not entirely clear which entities the dissent considers competent to do this initial redistricting—certainly the legislature, and perhaps also state courts, but only if such "courts are part of the 'manner provided by the law thereof.'" *Post*, at 300, n. 1. But the dissent also says that "a court should enforce § 2a(c) *before* a 'State is redistricted in the manner provided by the law thereof,' and a court should enforce § 2c *after* a State" has been initially redistricted, *post*, at 300—which (if one takes the words at face value) leaves no room for any court to do the initial redistricting. We assume the dissent does not mean precisely what it has said.

The dissent implicitly differentiates between federal and state courts—effectively holding that *state* courts may undertake the initial redistricting that would satisfy § 2a(c)'s prerequisite, but *federal* courts may not. It presumably rests this distinction upon the belief that state courts are capable of redistricting "'in the manner provided by the law thereof,'" whereas federal courts are not. See *post*, at 300, n. 1. To read that phrase as potentially including state—but not federal—courts, the dissent takes the word "manner" to refer to *process* or *procedures*, rather than *substantive requirements*. See *ibid.* (If the State's *process* for redistricting includes courts, then and only then may courts redistrict, rendering § 2a(c) inapplicable.) But such a reading renders the phrase "in the manner provided by the law thereof" redundant of the requirement that the State be "redistricted." *Of course* the State has not been redistricted if districts have been drawn by someone without authority to redistrict. Should an ambitious county clerk or individual legislator sit down and draw up a districting map, no one would think that the State has, within the meaning of the statute, been "redistricted." In our view, the word "manner" refers to the State's substantive "policies and prefer-

ences" for redistricting, *White* v. *Weiser*, 412 U. S., at 795, as expressed in a State's statutes, constitution, proposed reapportionment plans, see *ibid.*, or a State's "traditional districting principles," *Abrams* v. *Johnson*, 521 U. S. 74, 86 (1997); see also *Upham* v. *Seamon*, 456 U. S. 37, 42–43 (1982) *(per curiam)*. Thus, when a federal court redistricts a State in a manner that complies with that State's substantive districting principles, it does so "'in the manner provided by the law thereof.'" See *supra*, at 274–275.* While it certainly remains preferable for the State's legislature to complete its constitutionally required redistricting pursuant to the requirements of § 2c, see *Abrams*, *supra*, at 101, or for the state courts to do so if they can, see *Growe*, 507 U. S., at 34, we have long since crossed the Rubicon that seems to impede the dissent, see, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186 (1962). When the State, through its legislature or other authorized body, cannot produce the needed decision, then federal courts are "left to embark on [the] delicate task" of redistricting, *Abrams*, *supra*, at 101.

The dissent claims that we have read the statutory phrase "[u]ntil a State is redistricted" to mean "[u]ntil . . . the election is so imminent that no entity competent to complete redistricting pursuant . . . to the mandate of § 2c . . . is able to do so without disrupting the election process." *Post*, at 298. From that premise, it proceeds to mount a vigorous (and, in the principles it espouses, highly edifying) "plain meaning" attack upon our holding. Unfortunately, the premise is patently false. We, no less than the dissent, acknowledge that

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*Contrary to the dissent's assertion, *post*, at 300, n. 1, our reading creates no conflict with *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984). Here a federal court granted relief on the basis of *federal* law—specifically, the Federal Constitution. The District Court did not "instruc[t] state officials on how to conform their conduct to state law," *id.*, at 106; rather, it deferred to the State's "policies and preferences" for redistricting, *White* v. *Weiser*, 412 U. S. 783, 795 (1973). Far from intruding on state sovereignty, such deference respects it.

"the text tells us 'how long' § 2a(c) should govern: '*until* a State is redistricted in the manner provided by the law thereof,' " *post*, at 299. The issue is not how long § 2a(c) governs, but how long a court (under the continuing mandate of § 2a(c)) should wait before ordering an at-large election. The dissent treats § 2a(c) as though it prescribes (in its application to the facts of the present case) the immediate establishment of statewide districts (*i. e.*, an at-large election) for all Representatives. It prescribes no such thing. All it says is that "[u]ntil [the] State is redistricted in the manner provided by the law thereof," Representatives "shall be elected from the State at large." The only point at which § 2a(c) issues a command—the only point at which it bites—is at *election time*. Only if, *at election time*, redistricting "in the manner provided by [state] law" has not occurred, does § 2a(c) become operative.

So despite the dissent's ardent protestations to the contrary, see *ibid.*, the dissent, no less than we, must confront the question "[h]ow long is a court to await that redistricting before determining that § 2a(c) governs a forthcoming election?" Surely the dissent cannot possibly believe that, since "the text tells us 'how long' § 2a(c) should govern," *ibid.*, a court can declare, immediately after congressional reapportionment, and before the state legislature has even had a chance to act, that the State's next elections for Representatives will be at large. We say that the state legislature (and the state and federal courts) should be given the full time available—right up until the time when further delay will disrupt the election process—to reapportion according to state law. Since the dissent disagrees with that, we wonder what its own timeline might be. But to claim that there is no timeline—simply to assert that "[§ ]2a(c) contains *no* imminence requirement," *ibid.*—is absurd.

The dissent suggests that our reading of § 2c runs afoul of the Court's anticommandeering jurisprudence, see *post*, at 301–302, but in doing so the dissent fails to recognize that

the state legislature's obligation to prescribe the "Times, Places and Manner" of holding congressional elections is grounded in Article I, § 4, cl. 1, of the Constitution itself and not any mere statutory requirement. Here, as acknowledged by the dissent, the federal plaintiffs "alleged a constitutional violation"—failure to provide for the election of the proper number of Representatives in accordance with Article I, § 2, cl. 1—"and the federal court drew a plan to remedy that violation," *post,* at 301. In crafting its remedy, the District Court appropriately followed the "Regulations" Congress prescribed in § 2c—"Regulations" that Article I, § 4, cl. 1, of the Constitution expressly permits Congress to make, see *supra,* at 266. To be sure, § 2c "envisions legislative action," *supra,* at 272, but in the context of Article I, § 4, cl. 1, such "Regulations" are *expressly* allowed. In enacting § 2c (and § 2a(c), for that matter), Congress was not placing a statutory obligation on the state legislatures as it was in *New York* v. *United States,* 505 U. S. 144 (1992); rather, it was regulating (as the Constitution specifically permits) the manner in which a State is to fulfill its pre-existing constitutional obligations under Article I, §§ 2 and 4. Our interpretation of § 2c no more permits a commandeering of the machinery of state government than does the dissent's understanding of § 2a(c). Under our view, if the State fails to redistrict, then federal courts may do so. Under the dissent's view, if the State fails to redistrict (and loses congressional seats), then the federal courts *must* order at-large elections pursuant to § 2a(c)(5). See, *e. g., post,* at 299–300. If our reading of § 2c runs afoul of any anticommandeering principles, then the dissent commits the same sin.

Another straw man erected by the dissent is to be found in its insistence—as though in response to an argument of ours—that "[s]ince § 2a(c) was enacted decades before the *Baker* line of cases, this subsequent development cannot change the interpretation of § 2a(c)." *Post,* at 307. But we have never said that those cases changed the meaning of

§ 2a(c); we have said that they help to explain the meaning of § 2c, which *was* enacted after they were decided. And it is, of course, the most rudimentary rule of statutory construction (which one would have thought familiar to dissenters so prone to preachment on that subject, see, *e. g.*, *post*, at 298, 304, 307) that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes:

> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them . . . . If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute . . . ; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman*, 3 How. 556, 564–565 (1845).

That is to say, the meaning of § 2c (illuminated by the *Baker* v. *Carr* line of cases) sheds light upon the meaning of § 2a(c).

Finally, the dissent gives the statutory phrase "redistricted in the manner provided by the law thereof" a meaning that is highly unusual. It means, according to the dissent, "redistricted as state law requires," *even when state law is unconstitutional*—so that even an unconstitutional redistricting satisfies the "until" clause of § 2a(c), and enables § 2c to be applied. We know of no other instance in which a federal statute acknowledges to be "state law" a provision that violates the Supremacy Clause and is therefore a legal nullity. It is particularly peculiar for the dissent to allow an unconstitutional redistricting to satisfy the "until" clause when it will *not allow* a nonprecleared redistricting to satisfy the "until" clause (in those States subject to § 5 of the

Voting Rights Act, 42 U. S. C. § 1973c). See *post*, at 310–312. That is to say, in the dissent's view a redistricted State is not "redistricted" within the meaning of § 2a(c) if the districts have not been precleared, but it is "redistricted" even if the districts are patently unconstitutional (so long as they have been precleared, or the State is not subject to the preclearance requirement). Section 2a(c), of course, has no "preclearance exception." If redistricting "in the manner provided by [state] law" is ineffective when a federal statute (§ 5 preclearance) has been disregarded, surely it is also ineffective when the Federal Constitution has been disregarded. It is not we but the dissent that reads into the text of § 2a(c) ("redistricted in the manner provided by [state] law") distinctions that have no basis in reality.

* * *

The judgment of the District Court is

*Affirmed.*

JUSTICE KENNEDY, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join as to Part II, concurring.

I

I join the Court's opinion and the plurality opinion in Parts III–B and IV. The Court's opinion makes clear why the District Court was correct to enjoin the redistricting plan developed by the Mississippi State Chancery Court as not precleared under § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c. *Ante*, at 261–265. The Court then vacates the District Court's alternative holding that the state-court plan violated Article I, § 4, of the United States Constitution. *Ante*, at 265–266.

II

It seems appropriate to explain why, in my view, our ruling vacating the judgment is mandated by our earlier cases. There is precedent for our ruling. See *Connor* v. *Waller*,

421 U. S. 656 (1975) *(per curiam); United States* v. *Board of Supervisors of Warren Cty.*, 429 U. S. 642, 646–647 (1977) *(per curiam); Connor* v. *Finch*, 431 U. S. 407, 412 (1977); *Wise* v. *Lipscomb*, 437 U. S. 535, 542 (1978) (opinion of White, J.); see also *post*, at 292 (O'CONNOR, J., concurring in part and dissenting in part). Once the District Court found no preclearance, it was premature, given this statutory scheme, for the court to consider the constitutional question. Where state reapportionment enactments have not been precleared in accordance with § 5, the district court "err[s] in deciding the constitutional challenges" to these acts. *Connor* v. *Waller*, *supra*, at 656.

The rule prescribed by *Connor* reflects the purposes behind the Voting Rights Act. Concerned that "covered jurisdictions would exercise their ingenuity to devise new and subtle forms of discrimination, Congress prohibited those jurisdictions from implementing any change in voting procedure without obtaining preclearance under § 5." *Hathorn* v. *Lovorn*, 457 U. S. 255, 268 (1982). A jurisdiction covered by § 5 must seek approval of either the Attorney General of the United States or the United States District Court for the District of Columbia. See, *e. g.*, *Clark* v. *Roemer*, 500 U. S. 646, 652 (1991); *Lopez* v. *Monterey County*, 519 U. S. 9, 12 (1996). Absent preclearance, a voting change is neither effective nor enforceable as a matter of federal law. *Connor* v. *Waller*, *supra*, at 656; *Board of Supervisors*, *supra*, at 645; *Finch*, *supra*, at 412; *Wise*, *supra*, at 542; *Hathorn*, *supra*, at 269; *Clark*, *supra*, at 652; *post*, at 311–312 (O'CONNOR, J., concurring in part and dissenting in part). The process, in particular the administrative scheme, is designed to "'giv[e] the covered State a rapid method of rendering a new state election law enforceable.'" *Georgia* v. *United States*, 411 U. S. 526, 538 (1973) (quoting *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 549 (1969)). To be consistent with the statutory scheme, the district courts should not entertain constitutional challenges to nonprecleared voting changes and in

this way anticipate a ruling not yet made by the Executive. The proposed changes are not capable of implementation, and the constitutional objections may be resolved through the preclearance process.

The constitutional challenge presented to the District Court here fell within the ambit of the *Connor* rule. Our previous cases addressed contentions that the state reapportionment plan violated the one-person, one-vote principle or diluted minority voting strength. *Connor* v. *Waller*, 396 F. Supp. 1308, 1309 (SD Miss. 1975), rev'd, 421 U. S. 656 (1975) *(per curiam); Board of Supervisors*, *supra*, at 643–644; *Wise*, *supra*, at 538–539. In this litigation, appellees objected to the constitutionality of the state court's assumption of authority to devise a redistricting plan. The fact that appellees framed their constitutional argument to the state court's authority to pass a redistricting plan rather than to the plan's components does not make their claim reviewable. The plan was not yet precleared and so could not cause appellees injury through enforcement or implementation.

In deciding to address the constitutional challenge the District Court was motivated by the commendable purpose of enabling this Court to examine all the issues presented by the litigation in one appeal. This approach, however, forces the federal courts to undertake unnecessary review of complex constitutional issues in advance of an Executive determination and so risks frustrating the mechanism established by the Voting Rights Act. In these cases, for instance, the District Court's decision led to a delay in preclearance because the United States Attorney General (whether or not authorized to do so by the statute) refused to consider the state-court plan while the constitutional injunction remained in place. App. 28–29. The advance determination, moreover, can risk at least the perception that the Executive is revising the judgment of an Article III court. Adherence to the rule of *Connor* provides States covered by § 5 with time

to remedy constitutional defects without the involvement of federal courts. Given the statutory command of direct review to this Court, it also helps to ensure that only constitutional issues necessary to the resolution of the electoral dispute are brought to us.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring in part and concurring in the judgment.

In 1967 Congress enacted a brief statutory provision that banned at-large elections for Representatives. In my opinion the portion of that statute that is codified at 2 U. S. C. § 2c impliedly repealed § 2a(c). The reasons that support that conclusion also persuade me that the 1967 federal Act pre-empted Mississippi's statutory authorization of at-large election of Representatives in Congress. Accordingly, while I join Parts I, II, and III–A of the Court's opinion, I do not join Parts III–B or IV.

The question whether an Act of Congress has repealed an earlier federal statute is similar to the question whether it has pre-empted a state statute. When Congress clearly expresses its intent to repeal or to pre-empt, we must respect that expression. When it fails to do so expressly, the presumption against implied repeals, like the presumption against pre-emption, can be overcome in two situations: (1) if there is an irreconcilable conflict between the provisions in the two Acts; or (2) if the later Act was clearly intended to "cove[r] the whole subject of the earlier one." *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936).[1]

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[1] Compare *Posadas*, 296 U. S., at 503 ("There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act"), with *Freightliner*

As I read the 1967 statute it entirely prohibits States that have more than one congressional district from adopting either a multimember district or electing their Representatives in at-large elections, with one narrow exception that applied to the 1968 election in two States. After a rather long and contentious legislative process, Congress enacted this brief provision:

> "AN ACT
>
> "For the relief of Doctor Ricardo Vallejo Samala and to provide for congressional redistricting.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, for the purposes of the Immigration and Nationality Act, Doctor Ricardo Vallejo Samala shall be held and considered to have been lawfully admitted to the United States for permanent residence as of August 30, 1959.
>
> "In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled 'An Act to provide for apportionment of Representatives' (46 Stat. 26), as amended, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, *and Representatives shall be elected only from districts so established*, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representa-

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*Corp.* v. *Myrick*, 514 U. S. 280, 287 (1995) ("[A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English* v. *General Elec. Co.*, 496 U. S. 72, 78–79 (1990), or when state law is in actual conflict with federal law").

> tives at Large to the Ninety-first Congress)." Pub. L. 90–196, 81 Stat. 581 (emphasis added).

The second paragraph of this statute enacts a general rule prohibiting States with more than one congressional Representative from electing their Representatives to Congress in at-large elections.[2] That the single exception to this congressional command applied only to Hawaii and New Mexico, and only to the 1968 election, emphasizes the fact that the Act applies to every other State and every other election. Thus, it unambiguously forbids elections that would otherwise have been authorized by § 2a(c)(5). It both creates an "irreconcilable conflict" with the 1941 law and it "covers the whole subject" of at-large congressional elections. *Posadas*, 296 U. S., at 503. Under either of the accepted standards for identifying implied repeals, it repealed the earlier federal statute. In addition, this statute pre-empts the Mississippi statute setting the default rule as at-large elections.

The first paragraph of the 1967 statute suggests an answer to the question why Congress failed to enact an express repeal of the 1941 law when its intent seems so obvious. The statute that became law in December 1967 was the final gasp in a protracted legislative process that began on January 17, 1967, when Chairman Celler of the House Judiciary Committee introduced H. R. 2508, renewing efforts made in the preceding Congress to provide legislative standards responsive to this Court's holding in *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), that the one-person, one-vote principle applies to congressional elections.[3] The bill introduced by Representative Celler in 1967 contained express language replacing

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[2] The States of Hawaii and New Mexico were the only two States that met the statutory exception because they were "entitled to more than one Representative" and had "in all previous elections elected [their] Representatives at Large." Pub. L. 90–196, 81 Stat. 581.

[3] In 1965, the House of Representatives passed a bill identical, in all relevant respects, to the bill Representative Celler introduced in January 1967. See H. R. 5505, 89th Cong., 1st Sess. (1965).

§ 2a(c) in its entirety.[4] H. R. 2508, as introduced, had three principal components that are relevant to the implied repeal analysis. First, the bill required single-member district elections: "[T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled; and Representatives shall be elected only from districts so established, no district to elect more than one Representative." H. R. 2508, 90th Cong., 1st Sess., 2 (1967). Second, the bill limited gerrymandering, requiring each district to "at all times be composed of contiguous territory, in as compact form as practicable." *Ibid.* Third, the bill required proportional representation: "[N]o district established in any State for the Ninetieth or any subsequent Congress shall contain a number of persons, excluding Indians not taxed, more than 15 per centum greater or less than the average obtained" by dividing the population by the number of Representatives. *Ibid.*

This bill generated great controversy and discussion. Importantly for present purposes, however, only two of the three components were discussed in depth at all. At no point, either in any of the numerous Conference Reports or lengthy floor debates, does any disagreement regarding the language expressly repealing § 2a(c) or the single-member district requirement appear. Rather, the debate was confined to the gerrymandering requirement, the proportionality rule, and the scope and duration of the temporary exceptions to the broad prohibition against at-large elections.

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[4] Specifically, § 2a(c) would have been expressly repealed by the following language, present in all but the final version of H. R. 2508: "That section 22 of the Act of June 18, 1929, entitled 'An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives' (46 Stat. 26), as amended, is amended as follows:

"Subsection (c) is amended by striking out all of the language in that subsection and inserting in place thereof the following: . . . ." H. R. 2508, 90th Cong., 1st Sess., 1 (1967).

The House Judiciary Committee amended the bill, limiting the proportional differences between districts in all States to not exceed 10 percent and creating an exception to the general rule for the 91st and 92d Congresses (1968 and 1970 elections) that allowed for "the States of Hawaii and New Mexico [to] continue to elect their Representatives at large" and for the proportional differences to be as large as 30 percent. H. R. Rep. No. 191, 90th Cong., 1st Sess., 1–2 (1967). The House then passed this amended bill. The Senate Judiciary Committee then amended this bill, striking Hawaii from the exception and allowing for 35 percent, rather than 30 percent, variation between districts during the 91st and 92d Congresses. S. Rep. No. 291, 90th Cong., 1st Sess., 1 (1967). The bill went to conference twice, and the conference recommended two sets of amendments. The first Conference Report, issued June 27, 1967, recommended striking any exception to the general rule and limiting proportional variation to 10 percent or less. See H. R. Conf. Rep. No. 435, 90th Cong., 1st Sess., 1–2 (1965). After this compromise failed to pass either the House or the Senate, the conference then recommended a measure that was very similar to the second paragraph of the private bill eventually passed—a general rule requiring single-member districts with an exception, of unlimited duration, for Hawaii and New Mexico. H. R. Conf. Rep. No. 795, 90th Cong., 1st Sess., 1 (1965). Importantly, every version of the bill discussed in the House Report, the Senate Report, and both Conference Reports contained a provision expressly repealing § 2a(c). In spite of these several modifications, the bill, as recommended by the last conference, failed to pass either chamber.

The decision to attach what is now § 2c to the private bill reflected this deadlock. Indeed, proponents of this attachment remarked that they sought to take the uncontroversial components of the prior legislation to ensure that Congress would pass some legislation in response to *Wesberry* v. *Sand-*

*ers*, 376 U. S. 1 (1964).[5] The absence of any discussion, debate, or reference to the provision expressly repealing § 2a(c) in the private bill prevents its omission from the final bill as being seen as a deliberate choice by Congress. Any fair reading of the history leading up to the passage of this bill demonstrates that all parties involved were operating under the belief that the changes they were debating would completely replace § 2a(c).

JUSTICE O'CONNOR has provided us with a convincing exposition of the flaws in JUSTICE SCALIA's textual interpretation of § 2a(c)(5). See *post*, at 298–301 (opinion concurring in part and dissenting in part). Ironically, however, she has been misled by undue reliance on the text of statutes enacted in 1882, 1891, 1901, and 1911—a period in our history long before the 1950's and 1960's when Congress enacted the voting rights legislation that recognized the central importance of protecting minority access to the polls. It was only then

[5] Senator Bayh introduced one amendment to the private bill that excluded Hawaii and New Mexico while Senator Baker offered another that had no exceptions. Senator Bayh characterized his amendment as follows: "What I have tried to do is to take that part of the conference report over which there was no dispute, or a minimal amount of dispute, and attach that part to the bill which is now the pending business." 113 Cong. Rec. 31719 (1967). Senator Baker described his amendment as follows: "The measure makes no other provision. It has nothing to do with gerrymandering. It has nothing to do with compactness. It has nothing to do with census. It strictly provides in a straightforward manner that when there is more than one Member of the House of Representatives from a State, the State must be districted, and that the Members may not run at large. . . . I believe that my amendment is the most straightforward and direct and simple way to get at the most urgent need in the entire field of redistricting, and that is to prevent the several States of the Union from being under the threat of having their Representatives to the U. S. House of Representatives stand for election at large." *Id.*, at 31718.

In a colloquy between Senators Bayh and Baker on the floor, they both agreed that the final amendment left no doubt as to its effect: "This will make it mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by State legislatures or by a Federal court." *Id.*, at 31720 (remarks of Sen. Bayh).

that an important federal interest in prohibiting at-large voting, particularly in States like Mississippi, became a matter of congressional concern. This intervening and dramatic historical change significantly lessens the relevance of these earlier statutes to the present analysis.

Moreover, her analysis of the implied repeal issue apparently assumes that if two provisions could coexist in the same statute, one could not impliedly repeal the other if they were enacted in successive statutes. Thus, she makes no comment on the proviso in the 1967 statute that preserved at-large elections in New Mexico and Hawaii for 1968. This proviso surely supports the conclusion that it was the only exception intended by Congress from the otherwise total prohibition of at-large elections. The authorization of at-large elections in the 1882 statute cited by JUSTICE O'CONNOR was also set forth in a proviso; although the words "provided that" are omitted from the 1891, 1901, and 1911 statutes, they just contain examples of differently worded exceptions from a general rule. It is also important to note that the text of the 1967 statute, unlike the four earlier statutes, uses the word "only" to create a categorical prohibition against at-large elections. As a matter of plain English, the conflict between that prohibition and § 2a(c), which permitted at-large elections, is surely irreconcilable.

JUSTICE O'CONNOR's consideration of the legislative history of the 1967 statute fails to give appropriate consideration to the four bills that would have expressly repealed § 2a(c)(5). See *supra*, at 287–289. Those bills, coupled with the absence of any expression by anyone involved in the protracted legislative process of an intent to preserve at-large elections anywhere except in New Mexico and Hawaii, provide powerful support for the conclusion that, as a literal reading of the text of § 2c plainly states, Congress intended to enact a categorical prohibition of at-large elections. The odd circumstance that the final version of the prohibition was added to a private bill makes it quite clear that the omission

of a clause expressly repealing § 2a(c) was simply an inadvertence. Canons of statutory construction—such as the presumption against implied repeals or the presumption against pre-emption—are often less reliable guides in the search for congressional intent than a page or two of history.

* * *

The history of the 1967 statute, coupled with the plain language of its text, leads to only one conclusion—Congress impliedly repealed § 2a(c). It is far wiser to give effect to the manifest intent of Congress than, as the plurality attempts, to engage in tortured judicial legislation to preserve a remnant of an obsolete federal statute and an equally obsolete state statute. Accordingly, while I concur in the Court's judgment and opinion, I do not join Parts III–B or IV of the plurality opinion.

Justice O'Connor, with whom Justice Thomas joins, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion because I agree that the Mississippi Chancery Court's redistricting plan lacks preclearance. I join Part II–C because it is consistent with our decisions holding that federal courts should not rule on a constitutional challenge to a nonprecleared voting change when the change is not yet capable of implementation. See, *e. g.*, *Connor* v. *Waller*, 421 U. S. 656 (1975) *(per curiam);* see also *ante*, p. 282 (Kennedy, J., concurring). I cannot join Part III or Part IV, however, because I disagree with the Court that 2 U. S. C. § 2c is a command to the States and I disagree with the plurality regarding the proper statutory construction of § 2a(c)(5).

I

First, I agree with the plurality's somewhat reluctant conclusion that § 2c does not impliedly repeal § 2a(c)(5). Here, it is quite easy to read §§ 2c and 2a(c) together. A natural statutory reading of § 2a(c) gives force to both §§ 2c and 2a(c):

Section 2a(c) applies "[u]ntil a State is redistricted in the manner provided by the law thereof." Section 2c applies *after* a State has "redistricted in the manner provided by the law thereof."

As both the plurality and Justice Stevens recognize, an implied repeal can exist only if the "provisions in the two acts are in irreconcilable conflict" or if "the later act covers the whole subject of the earlier one and is clearly intended as a substitute." *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). See also *ante*, at 273 (plurality opinion); *ante*, at 285 (Stevens, J., concurring in part and concurring in judgment). Indeed, "'when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.'" *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 155 (1976) (quoting *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974)). We have not found *any* implied repeal of a statute since 1975. See *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659. And outside the antitrust context, we appear not to have found an implied repeal of a statute since 1917. See *Lewis* v. *United States*, 244 U. S. 134. Because it is not difficult to read §§ 2a(c) and 2c in a manner that gives force to both statutes, § 2c cannot impliedly repeal § 2a(c). See, *e. g.*, *United States* v. *Burroughs*, 289 U. S. 159, 164 (1933) ("[I]f effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force"); *Radzanower* v. *Touche Ross & Co.*, *supra*, at 155 ("Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes" (alteration in original and internal quotation marks omitted)).

The previous versions of §§ 2c and 2a(c) confirm that an implied repeal does not exist here. Since 1882, versions of §§ 2c and 2a(c) have coexisted. Indeed, the 1882, 1891, 1901, and 1911 apportionment statutes all contained the single-member district requirement as well as the at-large default

requirement. Compare Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 6 ("[T]he number to which such State may be entitled . . . *shall be elected by Districts* . . . , no one District electing more than one Representative" (emphasis added)), with *ibid.* (". . . *shall be elected at large*, unless the Legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein" (emphasis added)); Act of Feb. 7, 1891, ch. 116, § 3, 26 Stat. 735 ("[T]he number to which such State may be entitled . . . *shall be elected by districts*" and "[t]he *said districts shall be equal* to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative" (emphasis added)), with § 4, 26 Stat. 736 ("[S]uch additional Representative or Representatives *shall be elected by the State at large*" (emphasis added)); Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 734 ("[T]he number to which such State may be entitled . . . *shall be elected by districts*" and "[t]he *said districts shall be equal* to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative" (emphasis added)), with § 4, 31 Stat. 734 ("[I]f the number hereby provided for shall in any State be less than it was before the change hereby made, then the whole number to such State hereby provided for *shall be elected at large*, unless the legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein" (emphasis added)); Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 14 ("[T]he Representatives . . . *shall be elected by districts*" and "[t]he *said districts shall be equal* to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative" (emphasis added)), with § 4, 37 Stat. 14 ("[S]uch additional Representative or Representatives *shall be elected by the State at large* . . . until such State shall be redistricted in the manner provided by the laws thereof").

Justice Stevens attempts to distinguish the prior versions of § 2a(c) because they contained slightly different language from the present version of § 2a(c). See *ante*, at 291. Even assuming, however, that the 1882 version of § 2a(c) is slightly different from the present version, the versions of § 2a(c) in effect in 1891, 1901, and 1911 are materially indistinguishable from the present version. Indeed, the 1911 statute—the one in effect at the time Congress enacted the present version of § 2a(c)—is almost word for word the same as the current statute. Compare Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 14 ("until such State shall be redistricted in the manner provided by the laws thereof"), with 2 U. S. C. § 2a(c) ("[u]ntil a State is redistricted in the manner provided by the law therof"). See also *Smiley* v. *Holm*, 285 U. S. 355, 374 (1932) (noting that the 1911 version of § 2a(c) would apply "unless and until new districts are created").

Given this history of the two provisions coexisting in the same statute, I would not hold that § 2c impliedly repeals § 2a(c). The two statutes are "capable of co-existence" because each covers a different subject matter. *Morton* v. *Mancari*, *supra*, at 551. Section 2c was not intended to cover the whole subject of § 2a(c) and was not "clearly intended as a substitute" for § 2a(c). *Posadas* v. *National City Bank*, *supra*, at 503. Section 2a(c) (requiring at-large elections) applies unless or until the State redistricts, and § 2c (requiring single-member districts) applies once the State has completed the redistricting process.

This Court has in fact read the prior versions of §§ 2c and 2a(c) so that the two did not conflict. In *Smiley* v. *Holm*, *supra*, we recognized that under the 1911 version of these provisions, at-large elections were an appropriate remedy if the State was not properly redistricted in the first instance. See *id.*, at 374 ("[U]nless and until new districts are created, all representatives allotted to the State must be elected by the State at large").

When the 1911 statute expired in 1929, Congress did not reenact it. Instead, Congress passed § 2a(c), which took effect in 1941. Because § 2a(c) concerned only at-large elections, no complementary single-member district requirement existed from 1941 until 1967. In 1967, Congress enacted § 2c, which states in relevant part: "[T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . . ." The relevant language of this statute tracks the language of the prior versions of § 2c. JUSTICE STEVENS' only distinction between the prior versions of § 2c and this version of § 2c is that Congress added the word "only" to the latest version of § 2c. See *ante,* at 288. But this one word is a thin reed on which to rest an implied repeal. JUSTICE STEVENS would hold that instead of expressly repealing § 2a(c), Congress added the word "only" to § 2c. This one-word addition that does not change the meaning of the statute is no basis for finding an implied repeal.

JUSTICE STEVENS argues that Congress intended to "'cove[r] the whole subject'" of at-large redistricting when it enacted § 2c in 1967. *Ante,* at 287 (quoting *Posadas* v. *National City Bank,* 296 U. S., at 503). But the 1967 enactment of § 2c simply restored the prior balance between the at-large mandate and the single-member district mandate that had existed since 1882. To hold that an implied repeal exists, one would have to conclude that Congress repeatedly enacted two completely conflicting provisions in the same statute. The better reading is to give each provision a separate sphere of influence, with § 2a(c) applying until a "State is redistricted in the manner provided by the law thereof," and § 2c applying after the State is redistricted. Because the 1967 version of § 2c parallels the prior versions of § 2c, and because of the longstanding coexistence between the prior versions of §§ 2a(c) and 2c, JUSTICE STEVENS' argu-

ment that Congress "'clearly intended'" § 2c "'as a substitute'" for § 2a(c) is untenable. *Ante*, at 285, n. 1; *Posadas* v. *National City Bank*, *supra*, at 503. Cf. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974) ("'Presumably Congress had given serious thought to the earlier statute . . . . Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end'").

Justice Stevens' strongest argument is that the legislative history indicates that "all parties involved were operating under the belief that the changes they were debating would completely replace § 2a(c)." *Ante*, at 290. Yet Justice Stevens acknowledges that Congress *could have* expressly repealed § 2a(c). See *ante*, at 287–288, 291–292. Justice Stevens thinks the evidence that Congress tried to expressly repeal § 2a(c) four times cuts strongly in favor of an implied repeal here. See *ante*, at 292. But these four attempts to repeal § 2a(c) were unsuccessful. It is difficult to conclude that Congress can impliedly repeal a statute when it deliberately chose not to expressly repeal that statute. In this case, where the two provisions have co-existed historically, and where Congress explicitly rejected an express repeal of § 2a(c), I would not find an implied repeal of § 2a(c).

I would hold instead that Congress passed § 2c in 1967 to restore redistricting law to its pre-1941 status, when § 2a(c) became effective without any complementary provision regarding single-member districts. The floor statements and colloquy by Senators Baker and Bayh cited by Justice Stevens, see *ante*, at 290, n. 5, cannot overcome the strong presumption against implied repeals, especially given the historical evidence that §§ 2c and 2a(c) had peacefully coexisted since the 19th century. And as explained in more detail in Part II–B, *infra*, the circumstances leading up to the passage of § 2c in 1967 do not support a finding of implied repeal.

In short, because §§ 2a(c)(5) and 2c are capable of coexistence, and because the history shows that § 2c does not cover the whole subject of § 2a(c), I agree with the plurality that § 2c does not impliedly repeal § 2a(c), and therefore that § 2a(c) "continues to apply." *Ante*, at 273.

## II

### A

Although the plurality acknowledges that § 2a(c) remains in full force, it inexplicably adopts a reading of § 2a(c) that has no textual basis. Under § 2a(c)(5), the State must conduct at-large elections "[u]ntil a State is redistricted in the manner provided by the law thereof." Instead of simply reading the plain text of the statute, however, the plurality invents its own version of the text of § 2a(c). The plurality holds that "[u]ntil a State is redistricted . . ." means "[u]ntil . . . the election is so imminent that no entity competent to complete redistricting pursuant to . . . the mandate of § 2c [ ] is able to do so without disrupting the election process." *Ante*, at 274, 275. But such a reading is not faithful to the text of the statute. Like Justice Stevens, I believe that the Court's interpretation of § 2a(c) is nothing more than "tortured judicial legislation." *Ante*, at 292. See also Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1185 (1989) ("[W]hen one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation").

Dictionary definitions confirm what the plain text says: "Until a State is redistricted in the manner provided by the law thereof" means "[u]ntil a State is redistricted in the manner provided by the law thereof." The meaning of the word "until" is not difficult to understand, nor is it some specialized term of art. See Webster's New International Dictionary 2794 (2d ed. 1957) (defining "until" to mean "[d]uring the whole time before"); Webster's Collegiate Dictionary 1297

(10th ed. 1993) (defining "until" to mean "up to such time as" or "[b]efore"). The word "redistricted" also is not hard to comprehend. *Id.*, at 980 (defining "redistrict" to mean "to divide anew into districts"); Black's Law Dictionary 1283 (7th ed. 1999) (defining "redistrict" to mean "[t]o organize into new districts, esp. legislative ones; reapportion"). While the Court employs dictionary definitions to interpret § 5 of the Voting Rights Act of 1965, see *ante*, at 264, it notably refrains from using any dictionary definition for § 2a(c).

Section 2a(c) contains *no* imminence requirement. It is not credible to say that "until a State is redistricted in the manner provided by the law thereof after any apportionment" means: "[u]ntil . . . the election is so imminent that no entity competent to complete redistricting pursuant to . . . the mandate of § 2c [ ] is able to do so without disrupting the election process." *Ante*, at 275. The plurality characterizes § 2a(c) as a "stopgap provisio[n]," but the text of § 2a(c) is not so limited. *Ibid.* The plurality asks "[h]ow long is a court to await that redistricting before determining that § 2a(c) governs a forthcoming election?" *Ibid.* Yet the text provides *no basis* for why the plurality would ask such a question. Indeed, the text tells us "how long" § 2a(c) should govern: "*[u]ntil* a State is redistricted in the manner provided by the law thereof." (Emphasis added.) Under the plurality's reading, however, § 2a(c) would not apply even though § 2a(c) by its terms *should* apply, as the State has not yet "redistricted in the manner provided by the law thereof." The language of the statute cannot bear such a reading. Cf. *Holloway* v. *United States*, 526 U. S. 1, 14 (1999) (Scalia, J., dissenting) ("No amount of rationalization can change the reality of this normal (and as far as I know exclusive) English usage. The word in the statute simply will not bear the meaning that the Court assigns").

The dispositive question is what the text says it is: Has a State "redistricted in the manner provided by the law thereof"? 2 U. S. C. § 2a(c). "*Until* a State is redistricted

in the manner provided by the law thereof after any apportionment," a court cannot draw single-member districts. *Ibid.* (emphasis added). The court must apply the terms of § 2a(c) and order at-large elections. If, however, the State is redistricted "in the manner provided by the law thereof," § 2c applies. Thus, *after* a State has been redistricted, if a court determines that the redistricting violates the Constitution or the Voting Rights Act, the correct remedy for such a violation is the § 2c procedure of drawing single-member districts that comport with federal statutory law and the Constitution. But "[u]ntil a State is redistricted in the manner provided by the law thereof," § 2a(c)(5) mandates that a court order at-large elections. In short, a court should enforce § 2a(c) *before* a "State is redistricted in the manner provided by the law thereof," and a court should enforce § 2c *after* a State has been "redistricted in the manner provided by the law thereof."

The plurality seems to forget that in cases such as this one, a federal court has the power to redistrict only because private parties have alleged a violation of the Constitution or the Voting Rights Act. Sections 2a(c) and 2c do not create independently enforceable private rights of action themselves. Rather, both these provisions address the *remedy* that a federal court must order if it finds a violation of a constitutional or statutory right.[1] The federal plaintiffs in

[1] It does not matter whether § 2a(c) applies exclusively to legislative redistricting. Under the terms of § 2a(c), courts can be involved in the redistricting process. To the extent that courts are part of the "manner provided by the law thereof," courts may redistrict. 2 U. S. C. § 2a(c). And contrary to the plurality's interpretation, the text of § 2a(c) makes clear that this "manner" refers exclusively to state law. The *manner* in which a State redistricts can only refer to the *process* by which a State redistricts. Moreover, the plurality's conflation of state and federal law is in substantial tension with this Court's opinion in *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984) (delineating a distinction between state and federal law when a federal court enters an injunction).

this litigation alleged a constitutional violation, and the federal court drew a plan to remedy that violation. Having found a constitutional violation, the federal court was required to fashion the appropriate remedy of § 2c or § 2a(c) depending on whether the "State is redistricted in the manner provided by the law thereof." 2 U. S. C. § 2a(c).

The plurality's reading of § 2a(c) also fails on its own terms. As the plurality appears to acknowledge, *ante,* at 277, the plain text of § 2a(c) requires courts to apply § 2a(c) before applying § 2c. Yet the plurality never justifies why, when it is interpreting § 2a(c), it looks to § 2c instead of reading the plain language of § 2a(c) itself. If state law really includes federal law, as the Court maintains, both §§ 2c and 2a(c) are equally applicable. The text of § 2a(c) directs federal courts to order at-large elections "[u]ntil a State is redistricted in the manner provided by the law thereof." In deciding whether § 2c or § 2a(c) is applicable, it is no answer to escape the directive of § 2a(c) by pointing to the text of § 2c. Indeed, if one takes at face value the plurality's statement that § 2a(c) "continues to apply," *ante,* at 273, a court should not look at § 2c until the State complies with the terms of § 2a(c). Section 2a(c) is antecedent to § 2c, since § 2a(c) defines when at-large elections are appropriate.

Moreover, the Court's interpretation of the interplay between §§ 2a(c) and 2c calls into question this Court's anticommandeering jurisprudence. See, *e. g.*, *New York* v. *United States,* 505 U. S. 144, 166 (1992) ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts"); and *Printz* v. *United States,* 521 U. S. 898, 912 (1997) (Scalia, J.) ("[S]tate legislatures are *not* subject to federal direction"). The plurality states that the anticommandeering jurisprudence is inapplicable to Article I, § 4, because that section gives Congress the power to "Regulat[e]" the times, places, and manner of

holding congressional elections. But of course, Article I, § 8, uses similar language when it authorizes Congress to "regulate Commerce . . . among the several States." Whether the anticommandeering principle of *New York* and *Printz* is as robust in the Article I, § 4, context (the font of congressional authority here) as it is in the Article I, § 8, context (the source of congressional authority in those cases) is a question that need not be definitively resolved here. In any event, the canon of constitutional avoidance counsels strongly against the reading of §§ 2c and 2a(c) adopted in Parts III and IV of the principal opinion. The Court's reading of § 2c, see *ante*, at 271–272—also adopted by Justice Stevens—invites a future facial attack to the constitutional validity of § 2c.[2]

The history of the prior versions of § 2c shows that § 2c has *never* been treated as an absolute command. States routinely used at-large elections under the previous iterations of § 2c, even though those versions of § 2c also stated that Representatives "shall be elected by districts." Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491; Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Feb. 2, 1872, 17 Stat. 28; cf. *supra*, at 293–294 (documenting the 1882, 1891, 1901, and 1911 versions of § 2c). See also K. Martis, Historical Atlas of United

[2] It is just as coercive for Congress to say that if the State does not comply with a legislative command, a federal court will enter an injunction making the State conform with Congress' command. See, *e. g.*, *New York* v. *United States*, 505 U. S. 144, 174–177 (1992) (striking down Congress' "take title" provision because the choice between two unconstitutional choices is "no choice at all"). If § 2c is not a command, however, a State has the choice between passing redistricting legislation or using at-large elections. Section 2c merely limits the type of remedies that a federal court may adopt in response to a pre-existing violation of federal law. Neither it nor § 2a(c) affirmatively provides courts the authority to draw districts absent a violation. Rather, § 2a(c) specifies which remedy is appropriate for the constitutional violation. See 2 U. S. C. § 2a(c) (a court must order at-large elections "[u]ntil a State is redistricted in the manner provided by the law thereof").

States Congressional Districts 1789–1983, pp. 4, 6 (1982) (hereinafter Martis) (documenting 36 States that used at-large elections from the 28th Congress—after Congress passed the first version of § 2c in 1842—through the 70th Congress, when the last version of § 2c expired in 1929).[3] Indeed, in *every* Congress from 1843 until 1929, at least one State used some form of at-large representation.

Unless the Court is willing to say that these States openly flouted federal law, the only way to read this history is to acknowledge that § 2c is not a statutory command. But see *ante*, at 275 (plurality opinion) (§ 2c is a "statutory comman[d]"). Rather, § 2c and its predecessors tell States what type of redistricting legislation they are allowed to pass (all others being prohibited). This reading also comports with the pre-1842 history of congressional elections. Before Congress passed its first version of § 2c in 1842, States routinely would elect more than one individual from a specific district. See Martis 4–5 (listing five States—Maryland, Massachusetts, New Jersey, New York, and Pennsylvania—that used multimember districts from the 3d Congress in 1793 through the 27th Congress in 1842). After the first version of § 2c

[3] Alabama (43d, 44th, 63d, 64th Congresses), Arkansas (43d, 48th Congresses), California (31st–38th, 48th Congresses), Colorado (58th–63d Congresses), Connecticut (58th–62d Congresses), Florida (43d, 63d Congresses), Georgia (28th, 48th Congresses), Iowa (29th Congress), Kansas (43d, 48th, 53d–57th, 59th, 60th Congresses), Idaho (63d–65th Congresses), Illinois (37th–42d, 53d, 63d–70th Congresses), Indiana (43d Congress), Louisiana (43d Congress), New York (43d, 48th Congresses), Maine (48th Congress), Michigan (63d Congress), Minnesota (35th–37th, 63d Congresses), Mississippi (28th, 29th, 33d Congresses), Missouri (28th, 29th Congresses), Montana (63d–65th Congresses), New Hampshire (28th, 29th Congresses), New Mexico (62d Congress), North Carolina (48th Congress), North Dakota (58th–62d Congresses), Ohio (63d Congress), Oklahoma (63d Congress), Pennsylvania (43d, 48th–50th, 53d–57th, 63d–67th Congresses), South Carolina (43d Congress), South Dakota (51st–62d Congresses), Tennessee (43d Congress), Texas (43d, 63d–65th Congresses), Utah (63d Congress), Virginia (48th Congress), Washington (53d–60th, 63d Congresses), West Virginia (63d, 64th Congresses), Wisconsin (30th Congress).

went into effect, however, States could no longer use multimember districts. Rather, States could either redistrict using single-member districts or use at-large elections. In short, § 2c does not tell States that they must pass redistricting legislation. Section 2c is instead a restriction on the *type* of legislation that a State may pass—a restriction completely consistent with *New York* and *Printz*. And § 2a(c) provides that at-large elections will be the default mechanism if States choose not to pass redistricting legislation.

An interpretation of § 2a(c) which mandates that courts order at-large elections "[u]ntil a State is redistricted in the manner provided by the law thereof" does not mean that once a redistricting plan is in effect, § 2a(c) applies if a court later deems the apportionment plan invalid. The words of § 2a(c) specifically refer to the process in which the State redistricts: "in the manner provided by the law thereof." Section 2a(c) is no longer implicated after the State finishes its process of redistricting "in the manner provided by the law thereof after any apportionment." When all required action by the State is complete, and when the state plan first becomes effective, the "State is redistricted in the manner provided by the law thereof." *Ibid.*

B

Because the plurality's construction of § 2a(c) has no statutory basis, the only way to understand the Court's opinion is that the Court is overlooking the words of the statute for nontextual prudential reasons. Cf. A. Scalia, A Matter of Interpretation 18–23 (1997) (discussing the case of *Church of Holy Trinity* v. *United States*, 143 U. S. 457 (1892), and noting that "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former").

The only other prudential reason why the plurality would distort the plain text of § 2a(c) is to hold *sub silentio* that

§ 2c impliedly repeals § 2a(c). Why else would the plurality note the "tension" between the two statutes, *ante*, at 273, note that "[t]here is something to be said for [the implied repeal] position," *ibid.*, and engage in such a long exegesis about the historical context surrounding the enactment of § 2c? See *ante*, at 268–271 (majority opinion). The plurality adopts the reading of § 2a(c) proposed by one District Court in a 1982 decision. See *Carstens* v. *Lamm*, 543 F. Supp. 68 (Colo. 1982). As the United States recognizes in its brief, the reasoning of *Carstens* is nothing less than a *partial implied repeal* of § 2a(c). See Brief for United States as *Amicus Curiae* 29. ("Section 2c's unequivocal mandate that Members of the House of Representatives should be elected from single-member districts (except where exigencies of time render that impracticable, see *Carston [sic]* v. *Lamm*, *supra*) resolves that problem. It creates a workable and sensible regime that faithfully fulfills Congress's purpose when it enacted Section 2c in 1967"); see also *id.*, at 10 ("While . . . repeal by implication is disfavored, so is failure to give a later-enacted statute the full scope that its terms require").

Moreover, neither the plurality nor Justice Stevens can rely on the historical context of the pre-1967 cases to support their interpretations of §§ 2a(c) and 2c. This history in fact cuts against them. It is true that before 1967, some district courts threatened to impose at-large elections if the state redistricting plan were ruled unconstitutional. See *ante*, at 269–270 (majority opinion) (citing cases). In all these cases, however, a legislature had already redistricted "in the manner provided by the law thereof." 2 U. S. C. § 2a(c).[4]

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[4] See, *e. g.*, *Calkins* v. *Hare*, 228 F. Supp. 824, 825 (ED Mich. 1964) ("The plaintiffs have challenged the constitutionality of the congressional districting in this state"); *Bush* v. *Martin*, 251 F. Supp. 484, 488 (SD Tex. 1966) ("The question is whether the Texas 1965 Congressional Redistricting Act . . . is constitutional"); *Park* v. *Faubus*, 238 F. Supp. 62, 63 (ED

Thus, Congress' response in enacting § 2(c) cannot be read to target anything more than situations in which a State had already "redistricted in the manner provided by the law thereof." And of course, once a State was redistricted in this manner, § 2a(c) by its terms would not apply. If anything, the enactment of § 2c in 1967 clarified that the statutory balance between §§ 2c and 2a(c) that had existed in prior versions of the statute would continue to exist.

The cases cited by the Court do not resolve the question of what happens when a State *fails* to redistrict "in the manner provided by the law thereof." 2 U. S. C. § 2a(c). The Court itself describes these pre-1967 cases as decisions where the courts "are remedying a failure to redistrict constitutionally." *Ante*, at 270. I agree with the Court that when a court strikes down a State's apportionment plan, § 2c mandates that a court "draw single-member districts whenever possible." *Ibid.* The historical context confirms that once a State is redistricted, and the court rules that the plan is unconstitutional, § 2c ensures that courts not order at-large elections. Because in these pre-1967 cases the legislature had redistricted "in the manner provided by the law thereof," § 2a(c) was not applicable. Thus, the Court cannot rely on these pre-1967 cases to support the notion that the

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Ark. 1965) ("It is alleged that Act 5 of the Second Extraordinary Session of the Acts of the General Assembly of the State of Arkansas for the year of 1961, being the Act which divides the State of Arkansas into congressional districts, deprives plaintiff and others similarly situated of their right to vote" (citation omitted)); *Preisler* v. *Secretary of State*, 257 F. Supp. 953, 955 (WD Mo. 1966) (The "plaintiffs contest the constitutional validity of Missouri's 1965 Congressional Redistricting Act"); *Meeks* v. *Anderson*, 229 F. Supp. 271, 272 (Kan. 1964) ("The action was brought by qualified voters in four of the five Congressional Districts of Kansas, seeking to have Kansas Statutes, which is the last congressional reapportionment by the Kansas Legislature, declared unconstitutional" (citation omitted)); *Baker* v. *Clement*, 247 F. Supp. 886, 888 (MD Tenn. 1965) ("This case presents the question of whether the statute creating Tennessee's nine congressional districts violates Article 1, Section 2 of the Constitution of the United States").

historical context surrounding the enactment of § 2c renders § 2a(c) toothless. Indeed, it is unclear why the Court examines this historical context at all. Cf. *Bank One Chicago, N. A.* v. *Midwest Bank & Trust Co.*, 516 U. S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in judgment) ("In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have 'intended.' The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it").

The Court also implies that it reads § 2a(c) in the way it does because our decisions in *Baker* v. *Carr*, 369 U. S. 186 (1962), *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), "ushered in a new era in which federal courts were overseeing efforts by badly malapportioned States to conform their congressional electoral districts to the constitutionally required one-person, one-vote standards." *Ante*, at 268. For Justice Stevens, these decisions explain why Congress passed § 2c. See *ante*, at 287, 289–290. But these watershed opinions cannot change the meaning of § 2a(c). First, a later development cannot change an unamended statute. See *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 780–784 (2000) (Scalia, J.). Since § 2a(c) was enacted decades before the *Baker* line of cases, this subsequent development cannot change the interpretation of § 2a(c).

Second, the Court's decision in *Baker* v. *Carr*, *supra*, rested in large part on the fact that courts were *already* involved in overseeing apportionment cases. Courts had been "directing" redistricting disputes since well before *Baker*. *Ante*, at 268. Indeed, the Court in *Baker* specifically acknowledged that "[a]n unbroken line of our precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature." 369 U. S., at 201–202 (citing cases, including *Colegrove* v. *Green*, 328 U. S. 549 (1946)). In *Smiley* v. *Holm*, 285 U. S., at 375, for exam-

ple, we specifically reached the redistricting question, and held that the prior versions of §§ 2c and 2a(c) mandated at-large elections "in the absence of a redistricting act." We held that at-large elections were required "in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import." *Ibid.*

In *Wood* v. *Broom*, 287 U. S. 1 (1932), the Court ruled on an issue strikingly similar to that in front of the Court today: the effect of the prior versions of §§ 2c and 2a(c) when the Mississippi congressional delegation was reduced by one seat. In fact, the District Court in *Wood* made a ruling on statutory grounds that would mirror the post-*Baker* constitutional review: "The District Court held that the new districts, created by the redistricting act, were not composed of compact and contiguous territory, having as nearly as practicable the same number of inhabitants, and hence failed to comply with the mandatory requirements of § 3 of the Act of August 8, 1911." 287 U. S., at 5. See also *Hume* v. *Mahan*, 1 F. Supp. 142 (ED Ky. 1932). Likewise, before *Baker*, state courts had enforced prior versions of §§ 2c and 2a(c). See, *e. g.*, *Moran* v. *Bowley*, 347 Ill. 148, 179 N. E. 526 (1932); *State ex rel. Carroll* v. *Becker*, 329 Mo. 501, 45 S. W. 2d 533 (1932). In short, while *Baker* and its progeny expanded the *scope* of federal court review, these cases did not change the fact that this Court recognized federal court jurisdiction over this subject matter at the time of § 2a(c)'s enactment. Therefore, the *Baker* line of cases could not have caused § 2a(c) to magically change meaning.

The plurality also seems to base its *sub silentio* holding of implied repeal on the fact that "[e]ighty percent" of § 2a(c) is "dead letter." *Ante*, at 273. But even assuming that the first four parts of § 2a(c) are currently unconstitutional, they were not necessarily unconstitutional when Congress passed § 2c in 1967. For instance, § 2a(c)(1) specifies that "[i]f there is no change in the number of Representatives, they shall be

elected from the districts then prescribed by the law of such State." While it is true today that no district could in all probability remain exactly the same after an apportionment, it was not true in 1967.

This Court did not hold that a strict zero-deviation rule applied to redistricting cases until the 1983 decision of *Karcher* v. *Daggett*, 462 U. S. 725. Indeed, the decision of this Court in *Wesberry* v. *Sanders*, *supra*, stated only that congressional districts must be equal to each other "as nearly as is practicable." *Id.*, at 7–8. As Justice Stevens points out, after *Wesberry*, the House passed a bill in 1965 permitting congressional districts to deviate by as much as 15%. See *ante*, at 287–288. In 1967, in the same Congress that passed § 2c, the House passed a bill permitting congressional districts to deviate by as much as 10%. See *ante*, at 289. And it appears that at least with the State of New Mexico, the congressional apportionment plan did not change after the 1970 census. See Martis 247 (noting that New Mexico used its 1968 districting plan from the 91st through the 97th Congresses—in other words, from 1968 through 1983). These same principles also explain why as of 1967, §§ 2a(c)(2), 2a(c)(3), and 2a(c)(4) were similarly constitutional.

Even if parts of § 2a(c) would be unconstitutional today, a court can redistrict the existing district lines to make the districts constitutional while ordering an at-large election for the additional Representatives. Indeed, this approach best accords with the principle that a federal court's "modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Upham* v. *Seamon*, 456 U. S. 37, 43 (1982) *(per curiam)*. And even if only § 2a(c)(5) were constitutional, the plurality correctly recognizes that § 2a(c)(5) is easily severable from the rest of the statute. See *ante*, at 273.

Finally, the fact that a court must enter an order under § 2a(c)(5) mandating at-large elections does not necessarily mean that the plan would violate §§ 2 or 5 of the Voting

Rights Act, 42 U. S. C. §§ 1973, 1973c, or that traditional winner-take-all elections are required on a statewide basis. Rather, as cross-appellants acknowledge, Brief for Cross-Appellants in No. 01–1596, pp. 27–28; Tr. of Oral Arg. 47–48, a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act. Cf. *Growe* v. *Emison*, 507 U. S. 25, 40 (1993); *Rogers* v. *Lodge*, 458 U. S. 613, 616–617 (1982); *Holder* v. *Hall*, 512 U. S. 874, 897–898, 908–912 (1994) (Thomas, J., concurring in judgment); *Dillard* v. *Chilton County Bd. of Ed.*, 699 F. Supp. 870 (MD Ala. 1988); see also S. Issacharoff, P. Karlan, & R. Pildes, The Law of Democracy 1091–1151 (rev. 2d ed. 2002); Pildes & Donoghue, Cumulative Voting in the United States, 1995 U. Chi. Legal F. 241, 251–257.

In short, I cannot agree that the phrase "[u]ntil a State is redistricted in the manner provided by the law thereof" contains any sort of "imminence" requirement, a requirement without any statutory mooring. And although the plurality claims to hold that § 2c does not impliedly repeal § 2a(c), the plurality's opinion makes sense only if § 2c serves as a partial implied repeal of § 2a(c). It is difficult to say, as the plurality does, that § 2a(c) "continues to apply," *ante*, at 273, and also to say, as the plurality does, that § 2a(c) applies only if "the election is so imminent that no entity competent to complete redistricting pursuant to . . . the mandate of § 2c [ ] is able to do so without disrupting the election process." *Ante*, at 275. Unless and until Congress expressly repeals § 2a(c), I would hold that federal courts are required to order some form of at-large elections "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment."

## III

Having concluded that § 2a(c) applies "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," it is necessary to consider the question

that the Court intentionally avoids: whether the State of Mississippi here has been "redistricted in the manner provided by the law thereof." If it has not, § 2a(c) applies, and the District Court should have ordered at-large elections. If it has been "redistricted," the District Court was correct to draw single-member districts under § 2c. Under this Court's consistent case law, and under Mississippi state law, a State is not "redistricted" until the apportionment plan has been precleared under § 5 of the Voting Rights Act, 42 U. S. C. § 1973c. Because Mississippi's plan has not been precleared, I would hold that § 2a(c) applies.

We have held that a "new reapportionment plan enacted by a State . . . will not be considered 'effective as law,' until it has been submitted and has received clearance under § 5." *Wise* v. *Lipscomb*, 437 U. S. 535, 542 (1978) (plurality opinion) (quoting *Connor* v. *Finch*, 431 U. S. 407, 412 (1977)) (citation omitted). Accord, *Connor* v. *Waller*, 421 U. S., at 656 (an apportionment plan is "not now and will not be effective as laws until and unless cleared pursuant to § 5"); *Morris* v. *Gressette*, 432 U. S. 491, 501–502 (1977) ("Section 5 requires covered jurisdictions to delay implementation of validly enacted state legislation until federal authorities have had an opportunity to determine whether that legislation conforms to the Constitution and to the provisions of the Voting Rights Act"); *Clark* v. *Roemer*, 500 U. S. 646, 652 (1991); *Hathorn* v. *Lovorn*, 457 U. S. 255, 269 (1982) ("Our opinions repeatedly note that failure to follow [the preclearance procedures] renders the change unenforceable"). Indeed, in *Hathorn* v. *Lovorn*, we held that Mississippi itself could "not further implement [a] change until the parties comply with § 5." *Id.*, at 270.

Preclearance is the final step in the process of redistricting. If the apportionment plan is not precleared, it is not "effective as law," and cannot be implemented. Under our case law, then, a State is only redistricted once the clearance process is complete. Before a covered jurisdiction receives

clearance, the Federal Government may force the State to make changes to the redistricting plan. Once a State receives preclearance, it may implement a voting change.

The Mississippi Supreme Court has recognized that the redistricting process is not complete until the apportionment plan is cleared: "Voting changes subject to § 5 'will not be effective as law until and unless cleared.'" *In re McMillin*, 642 So. 2d 1336, 1339 (Miss. 1994) (quoting *Connor* v. *Waller*, *supra*, at 656). In *McMillin*, the Mississippi Supreme Court held that a plan for nonpartisan judicial elections passed by the legislature was not yet effective because it had not been precleared. 642 So. 2d, at 1339. Consequently, the court ordered elections to occur under the *old* plan, which required partisan judicial elections. See *ibid.* ("Consequently, the statutes currently governing primary judicial elections and setting such elections for Tuesday, June 7, 1994, are the only enforceable provisions regarding said primaries"). Thus, despite the fact that the legislature had passed a law mandating nonpartisan judicial elections, despite the fact that the new law *expressly repealed* the old law, despite the fact that the Governor had signed the law, and despite the fact that the State had submitted the new law to the United States Attorney General for preclearance under § 5, this new law was not operative for one reason: The United States Attorney General had not precleared this new law by the time of the new primary elections. See *id.*, at 1338. Thus, at least in Mississippi, the old voting plan remains in effect *until the new plan has been precleared.*

Accordingly, the terms of § 2a(c)(5) should apply here, and the District Court should have ordered at-large elections for the entire state congressional delegation. Congress can expressly repeal § 2a(c) quite easily. But it has not done so. This Court should not presume to act in Congress' stead. And this Court should not read § 2a(c) in a manner divorced from any semblance of textual fidelity in order for it to reach what it deems to be the "correct" or more unintrusive re-

sult. I therefore respectfully dissent from Part III–A of the Court's opinion and Parts III–B and IV of the plurality opinion.

Syllabus

# ARCHER ET UX. *v.* WARNER

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

No. 01–1418. Argued January 13, 2003—Decided March 31, 2003

A debt is not dischargeable in bankruptcy "to the extent" it is "for money . . . obtained by . . . fraud." 11 U. S. C. § 523(a)(2)(A). Petitioners, the Archers, sued respondent Warner and her former husband in state court for (among other things) fraud connected with the sale of the Warners' company to the Archers. In settling the lawsuit, the Archers executed releases discharging the Warners from all present and future claims, except for obligations under a $100,000 promissory note and related instruments. The Archers then voluntarily dismissed the lawsuit with prejudice. After the Warners failed to make the first payment on the promissory note, the Archers sued in state court. The Warners filed for bankruptcy, and the Bankruptcy Court ordered liquidation under Chapter 7. The Archers brought the present claim, asking the Bankruptcy Court to find the $100,000 debt nondischargeable, and to order the Warners to pay the sum. Respondent Warner contested nondischargeability. The Bankruptcy Court denied the Archers' claim. The District Court and the Fourth Circuit affirmed. The latter court held that the settlement agreement, releases, and promissory note worked a kind of "novation" that replaced (1) an original potential debt to the Archers for money obtained by fraud with (2) a new debt for money promised in a settlement contract that was dischargeable in bankruptcy.

*Held:* A debt for money promised in a settlement agreement accompanied by the release of underlying tort claims can amount to a debt for *money obtained by fraud*, within the nondischargeability statute's terms. Pp. 318–323.

(a) The outcome here is governed by *Brown* v. *Felsen*, 442 U. S. 127, in which (1) Brown filed a state-court suit seeking money that he said Felsen had obtained through fraud; (2) the court entered a consent decree based on a stipulation providing that Felsen would pay Brown a certain amount; (3) neither the decree nor the stipulation indicated the payment was for fraud; (4) Felsen did not pay; (5) Felsen entered bankruptcy; and (6) Brown asked the Bankruptcy Court to look behind the decree and stipulation and hold that the debt was nondischargeable because it was a debt for money obtained by fraud. *Id.*, at 128–129. This Court found that, although claim preclusion would bar Brown from making any claim " 'based on the same cause of action' " that he had brought

in state court, *id.*, at 131, it did not prevent the Bankruptcy Court from looking beyond the state-court record and the documents terminating the state-court proceeding to decide whether the debt was a debt for money obtained by fraud, *id.*, at 138–139. As a matter of logic, *Brown*'s holding means that the Fourth Circuit's novation theory cannot be right. If reducing a fraud claim to settlement definitively changed the nature of the debt for dischargeability purposes, the nature of the debt in *Brown* would have changed similarly, thereby rendering that debt dischargeable. This Court's instruction that the Bankruptcy Court could "weigh all the evidence," *id.*, at 138, would have been pointless, as there would have been nothing for the court to examine. Moreover, the Court's statement in *Brown* that "the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt," *ibid.*, strongly favors the Archers' position. Finally, *Brown*'s basic reasoning applies here. The Court noted that a change in the Bankruptcy Code's nondischargeability provision indicated that "Congress intended the fullest possible inquiry" to ensure that "all debts arising out of" fraud are "excepted from discharge," no matter their form. *Ibid.* Congress also intended to allow the determination whether a debt arises out of fraud to take place in bankruptcy court, not to force it to occur earlier in state court when nondischargeability concerns "are not directly in issue and neither party has a full incentive to litigate them." *Id.*, at 134. The only difference between *Brown* and this case—that the relevant debt here is embodied in a settlement, not in a stipulation and consent judgment—is not determinative, since the dischargeability provision applies to all debts that "aris[e] out of" fraud. *Id.*, at 138. Pp. 318–322.

(b) The Fourth Circuit remains free, on remand, to determine whether Warner's additional arguments were properly raised or preserved, and, if so, to decide them. Pp. 322–323.

283 F. 3d 230, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion, in which STEVENS, J., joined, *post,* p. 323.

*Craig Goldblatt* argued the cause for petitioners. With him on the briefs was *Seth P. Waxman.*

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

*McCallum*, *Deputy Solicitor General Clement*, *William Kanter*, and *Robert Kamenshine*.

*Donald B. Ayer* argued the cause for respondent. With him on the brief were *Jack W. Campbell IV* and *Rayford K. Adams III*.*

JUSTICE BREYER delivered the opinion of the Court.

The Bankruptcy Code provides that a debt shall not be dischargeable in bankruptcy "to the extent" it is "for money . . . obtained by . . . false pretenses, a false representation, or actual fraud." 11 U. S. C. § 523(a)(2)(A). Can this language cover a debt embodied in a settlement agreement that settled a creditor's earlier claim "for money . . . obtained by . . . fraud"? In our view, the statute can cover such a debt, and we reverse a lower court judgment to the contrary.

## I

This case arises out of circumstances that we outline as follows: (1) *A* sues *B* seeking money that (*A* says) *B* obtained

*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *David M. Gormley*, State Solicitor, and *Marcus J. Glasgow* and *John K. McManus*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Frankie Sue Del Papa* of Nevada, *David Samson* of New Jersey, *Eliot Spitzer* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Robert Tenorio Torres* of the Northern Mariana Islands, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Anabelle Rodríguez* of Puerto Rico, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *Christine O. Gregoire* of Washington, and *Hoke MacMillan* of Wyoming; for AARP by *Walter Dellinger*, *Jonathan D. Hacker*, *Stacy J. Canan*, *Deborah M. Zuckerman*, and *Michael R. Schuster;* and for G. Eric Brunstad, Jr., by *Mr. Brunstad*, *pro se*, and *Rheba Rutkowski*.

through fraud; (2) the parties settle the lawsuit and release related claims; (3) the settlement agreement does not resolve the issue of fraud, but provides that *B* will pay *A* a fixed sum; (4) *B* does not pay the fixed sum; (5) *B* enters bankruptcy; and (6) *A* claims that *B*'s obligation to pay the fixed settlement sum is nondischargeable because, like the original debt, it is for "money . . . obtained by . . . fraud."

This outline summarizes the following circumstances: In late 1991, Leonard and Arlene Warner bought the Warner Manufacturing Company for $250,000. About six months later they sold the company to Elliott and Carol Archer for $610,000. A few months after that the Archers sued the Warners in North Carolina state court for (among other things) fraud connected with the sale.

In May 1995, the parties settled the lawsuit. The settlement agreement specified that the Warners would pay the Archers "$300,000.00 less legal and accounting expenses" "as compensation for emotional distress/personal injury type damages." App. 61. It added that the Archers would "execute releases to any and all claims . . . arising out of this litigation, except as to amounts set forth in [the] Settlement Agreement." *Id.*, at 63. The Warners paid the Archers $200,000 and executed a promissory note for the remaining $100,000. The Archers executed releases "discharg[ing]" the Warners "from any and every right, claim, or demand" that the Archers "now have or might otherwise hereafter have against" them, "excepting only obligations under" the promissory note and related instruments. *Id.*, at 67; see also *id.*, at 70. The releases, signed by all parties, added that the parties did not "admi[t] any liability or wrongdoing," that the settlement was "the compromise of disputed claims, and that payment [was] not to be construed as an admission of liability." *Id.*, at 67–68, 71. A few days later the Archers voluntarily dismissed the state-court lawsuit with prejudice.

In November 1995, the Warners failed to make the first payment on the $100,000 promissory note. The Archers

sued for the payment in state court. The Warners filed for bankruptcy. The Bankruptcy Court ordered liquidation under Chapter 7 of the Bankruptcy Code. And the Archers brought the present claim, asking the Bankruptcy Court to find the $100,000 debt nondischargeable, and to order the Warners to pay the $100,000. Leonard Warner agreed to a consent order holding his debt nondischargeable. Arlene Warner contested nondischargeability. The Archers argued that Arlene Warner's promissory note debt was nondischargeable because it was for "money . . . obtained by . . . fraud."

The Bankruptcy Court, finding the promissory note debt dischargeable, denied the Archers' claim. The District Court affirmed the Bankruptcy Court. And the Court of Appeals for the Fourth Circuit, dividing two to one, affirmed the District Court. 283 F. 3d 230 (2002). The majority reasoned that the settlement agreement, releases, and promissory note had worked a kind of "novation." This novation replaced (1) an original potential debt to the Archers for money obtained by fraud with (2) a new debt. The new debt was not for money obtained by fraud. It was for money promised in a settlement contract. And it was consequently dischargeable in bankruptcy.

We granted the Archers' petition for certiorari, 536 U. S. 938 (2002), because different Circuits have come to different conclusions about this matter, compare *In re West*, 22 F. 3d 775, 778 (CA7 1994) (supporting the novation theory), with *United States* v. *Spicer*, 57 F. 3d 1152, 1155 (CADC 1995) ("The weight of recent authority rejects" the novation theory), cert. denied, 516 U. S. 1043 (1996).

## II

We agree with the Court of Appeals and the dissent, *post*, at 324–325 (opinion of THOMAS, J.), that "[t]he settlement agreement and promissory note here, coupled with the broad language of the release, completely addressed and released

each and every underlying state law claim." 283 F. 3d, at 237. That agreement left only one relevant debt: a debt for money promised in the settlement agreement itself. To recognize that fact, however, does not end our inquiry. We must decide whether that same debt can *also* amount to a debt for *money obtained by fraud*, within the terms of the nondischargeability statute. Given this Court's precedent, we believe that it can.

*Brown* v. *Felsen*, 442 U. S. 127 (1979), governs the outcome here. The circumstances there were the following: (1) Brown sued Felsen in state court seeking money that (Brown said) Felsen had obtained through fraud; (2) the state court entered a consent decree embodying a stipulation providing that Felsen would pay Brown a certain amount; (3) neither the decree nor the stipulation indicated the payment was for fraud; (4) Felsen did not pay; (5) Felsen entered bankruptcy; and (6) Brown asked the Bankruptcy Court to look behind the decree and stipulation and to hold that the debt was nondischargeable because it was a debt for money obtained by fraud. *Id.*, at 128–129.

The lower courts had held against Brown. They pointed out that the relevant debt was for money owed pursuant to a consent judgment; they noted that the relevant judgment-related documents did not refer to fraud; they added that the doctrine of res judicata prevented the Bankruptcy Court from looking behind those documents to uncover the nature of the claim that had led to their creation; and they consequently concluded that the relevant debt could not be characterized as one for money obtained by fraud. *Id.*, at 130–131.

This Court unanimously rejected the lower court's reasoning. The Court conceded that the state law of claim preclusion would bar Brown from making any claim " 'based on the same cause of action' " that Brown had brought in state court. *Id.*, at 131 (quoting *Montana* v. *United States*, 440 U. S. 147, 153 (1979)). Indeed, this aspect of res judicata would prevent Brown from litigating "all grounds for . . .

recovery" previously available to Brown, whether or not Brown had previously "asserted" those grounds in the prior state-court "proceeding." 442 U. S., at 131. But all this, the Court held, was beside the point. Claim preclusion did not prevent the Bankruptcy Court from looking beyond the record of the state-court proceeding and the documents that terminated that proceeding (the stipulation and consent judgment) in order to decide whether the debt at issue (namely, the debt embodied in the consent decree and stipulation) was a debt for money obtained by fraud. *Id.*, at 138–139.

As a matter of logic, *Brown*'s holding means that the Fourth Circuit's novation theory cannot be right. The reduction of Brown's state-court fraud claim to a stipulation (embodied in a consent decree) worked the same kind of novation as the "novation" at issue here. (Despite the dissent's suggestions to the contrary, *post*, at 327, it did so by an agreement of the parties that would seem to have "sever[ed] the causal relationship," *ibid.*, between liquidated debt and underlying fraud no more and no less than did the settlement and releases at issue here.) Yet, in *Brown*, this Court held that the Bankruptcy Court should look behind that stipulation to determine whether it reflected settlement of a valid claim for fraud. If the Fourth Circuit's view were correct—if reducing a fraud claim to settlement definitively changed the nature of the debt for dischargeability purposes—the nature of the debt in *Brown* would have changed similarly, thereby rendering the debt dischargeable. This Court's instruction that the Bankruptcy Court could "weigh all the evidence," 442 U. S., at 138, would have been pointless. There would have been nothing for the Bankruptcy Court to examine.

Moreover, the Court's language in *Brown* strongly favors the Archers' position here. The Court said that "the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the

true nature of the debt." *Ibid.;* accord, *Grogan* v. *Garner*, 498 U. S. 279, 290 (1991) (assuming that the Bankruptcy Code seeks to "permit exception from discharge of all fraud claims creditors have successfully reduced to judgment"). If we substitute the word "settlement" for the word "judgment," the Court's statement describes this case.

Finally, the Court's basic reasoning in *Brown* applies here. The Court pointed out that the Bankruptcy Code's nondischargeability provision had originally covered "only 'judgments' sounding in fraud." 442 U. S., at 138. Congress later changed the language so that it covered all such "'liabilities.'" *Ibid.* This change indicated that "Congress intended the fullest possible inquiry" to ensure that "all debts arising out of" fraud are "excepted from discharge," no matter what their form. *Ibid.;* see also 11 U. S. C. § 523(a) (current "any debt" language). Congress also intended to allow the relevant determination (whether a debt arises out of fraud) to take place in bankruptcy court, not to force it to occur earlier in state court at a time when nondischargeability concerns "are not directly in issue and neither party has a full incentive to litigate them." *Brown*, 442 U. S., at 134.

The only difference we can find between *Brown* and the present case consists of the fact that the relevant debt here is embodied in a settlement, not in a stipulation and consent judgment. But we do not see how that difference could prove determinative. The dischargeability provision applies to all debts that "aris[e] out of" fraud. *Id.*, at 138; see also *Cohen* v. *de la Cruz*, 523 U. S. 213, 215 (1998). A debt embodied in the settlement of a fraud case "arises" no less "out of" the underlying fraud than a debt embodied in a stipulation and consent decree. Policies that favor the settlement of disputes, like those that favor "repose," are neither any more nor any less at issue here than in *Brown.* See 442 U. S., at 133–135. In *Brown*, the doctrine of res judicata itself ensured "a blanket release" of the underlying claim of fraud, just as the contractual releases did here, *post*, at 324.

See *supra*, at 318–319. Despite the dissent's protests to the contrary, *post*, at 323–327, what has *not* been established here, as in *Brown*, is that the parties meant to resolve the *issue* of fraud or, more narrowly, to resolve that issue for purposes of a later claim of nondischargeability in bankruptcy. In a word, we can find no significant difference between *Brown* and the case now before us.

Arlene Warner argues that we should affirm the Court of Appeals' decision on alternative grounds. She says that the settlement agreement and releases not only worked a novation by converting potential tort liabilities into a contract debt, but also included a promise that the Archers would not make the present claim of nondischargeability for fraud. She adds that, in any event, because the Archers dismissed the original fraud action with prejudice, North Carolina law treats the fraud issue as having been litigated and determined in her favor, thereby barring the Archers from making their present claim on grounds of collateral estoppel. But cf. *Arizona* v. *California*, 530 U. S. 392, 414 (2000) ("[S]ettlements ordinarily occasion no *issue preclusion* . . . unless it is clear . . . that the parties intend their agreement to have such an effect").

Without suggesting that these additional arguments are meritorious, we note that the Court of Appeals did not determine the merits of either argument, both of which are, in any event, outside the scope of the question presented and insufficiently addressed below. See *Roberts* v. *Galen of Va., Inc.*, 525 U. S. 249, 253–254 (1999) *(per curiam)*. We choose to leave initial evaluation of these arguments to "[t]he federal judges who deal regularly with questions of state law in their respective districts and circuits," and who "are in a better position than we," *Butner* v. *United States*, 440 U. S. 48, 58 (1979), to determine, for example, whether the parties intended their agreement and dismissal to have issue-preclusive, as well as claim-preclusive, effect, and to what extent such preclusion applies to enforcement of a debt spe-

cifically excepted from the releases, *supra*, at 317; *post*, at 325. The Court of Appeals remains free, on remand, to determine whether such questions were properly raised or preserved, and, if so, to decide them.

We conclude that the Archers' settlement agreement and releases may have worked a kind of novation, but that fact does not bar the Archers from showing that the settlement debt arose out of "false pretenses, a false representation, or actual fraud," and consequently is nondischargeable, 11 U. S. C. § 523(a)(2)(A). We reverse the Court of Appeals' judgment to the contrary. And we remand this case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE STEVENS joins, dissenting.

Section 523(a)(2) of the Bankruptcy Code excepts from discharge "any debt . . . for money, property, [or] services, . . . to the extent *obtained by* . . . false pretenses, a false representation, or actual fraud." 11 U. S. C. § 523(a)(2)(A) (emphasis added). The Court holds that a debt owed under a settlement agreement was "obtained by" fraud even though the debt resulted from a contractual arrangement pursuant to which the parties agreed, using the broadest language possible, to release one another from "any and every right, claim, or demand . . . arising out of" a fraud action filed by petitioners in North Carolina state court. App. 67. Because the Court's conclusion is supported neither by the text of the Bankruptcy Code nor by any of the agreements executed by the parties, I respectfully dissent.

The Court begins its description of this case with the observation that "the settlement agreement does not *resolve* the issue of fraud, but provides that *B* will pay *A* a fixed sum." *Ante*, at 317 (emphasis added). Based on that erroneous premise, the Court goes on to find that there is "no significant difference between *Brown* [v. *Felsen*, 442 U. S. 127

(1979),] and [this case]." *Ante,* at 322. The only distinction, the Court explains, is that "the relevant debt here is embodied in a settlement, not in a stipulation and consent judgment" as in *Brown* v. *Felsen*, 442 U. S. 127 (1979). *Ante*, at 321.

Remarkably, however, the Court fails to address the critical difference between this case and *Brown:* The parties here executed a blanket release, rather than entered into a consent judgment. And, in my view, "if it is shown that [a] note was given and received as payment or waiver of the original debt and the parties agreed that the note was to substitute a new obligation for the old, the note fully discharges the original debt, and the nondischargeability of the original debt does not affect the dischargeability of the obligation under the note." *In re West*, 22 F. 3d 775, 778 (CA7 1994). That is the case before us, and, accordingly, *Brown* does not control our disposition of this matter.

In *Brown,* Brown sued Felsen in state court, alleging that Felsen had fraudulently induced him to act as guarantor on a bank loan. 442 U. S., at 128. The suit was settled by stipulation, which was incorporated by the court into a consent judgment, but "[n]either the stipulation nor the resulting judgment indicated the cause of action on which respondent's liability to petitioner was based." *Ibid.* The Court held that principles of res judicata did not bar the Bankruptcy Court from looking behind the consent judgment and stipulation to determine the extent to which the debt was "obtained by" fraud. The Court concluded that it would upset the policy of the Bankruptcy Code for "state courts to decide [questions of nondischargeability] at a stage when they are not directly in issue and neither party has a full incentive to litigate them." *Id.*, at 134. *Brown* did not, however, address the question presented in this case—whether a creditor may, *without the participation of the state court,* completely release a debtor from "any and every right, claim, or demand . . . relating to" a state-court fraud action. App. 67.

Based on the sweeping language of the general release, it is inaccurate for the Court to say that the parties did not "resolve the issue of fraud." *Ante*, at 317. To be sure, as in *Brown*, there is no legally controlling document stating that respondent did (or did not) commit fraud. But, unlike in *Brown*, where it was not clear which claims were being resolved by the consent judgment, the release in this case clearly demonstrates that the parties intended to resolve conclusively not only the issue of fraud, but also any other "right[s], claim[s], or demand[s]" related to the state-court litigation, "excepting only obligations under [the] Note and deeds of trust."[1] App. 67. See *McNair* v. *Goodwin*, 262 N. C. 1, 7, 136 S. E. 2d 218, 223 (1964) ("'[A] compromise agreement is conclusive between the parties as to the matters compromised'" (quoting *Penn Dixie Lines* v. *Grannick*, 238 N. C. 552, 556, 78 S. E. 2d 410, 414 (1953))).

The fact that the parties intended, by the language of the general release, to replace an "old" fraud debt with a "new" contract debt is an important distinction from *Brown*, for the text of the Bankruptcy Code prohibits discharge of any debt "to the extent *obtained by*" fraud. 11 U. S. C. § 523(a)(2) (emphasis added). In interpreting this provision, the Court has recognized that, in order for a creditor to establish that a debt is not dischargeable, he must demonstrate that there is a causal nexus between the fraud and the debt. See *Cohen* v. *de la Cruz*, 523 U. S. 213, 218 (1998) (describing § 523(a)(2)(A) as barring discharge of debts "'resulting from'" or "'traceable to'" fraud (quoting *Field* v. *Mans*, 516 U. S. 59, 61, 64 (1995))). Indeed, petitioners conceded at oral argument that the "obtained by" language of § 523(a)(2) requires a creditor to prove that a debtor's fraud is the proximate cause of the debt. Tr. of Oral Arg. 10, 12; see also 1 Am. Jur. 2d, Actions § 57, p. 760 (1994) ("What is essential is that the wrongful act charged be the proximate cause of the

[1] There are no allegations that petitioners were fraudulently induced to execute the settlement agreement or the general release.

damage; the loss must be *the direct result of, or proximately traceable to,* the breach of an obligation owing to the plaintiff" (emphasis added)).

This Court has been less than clear with respect to the requirements for establishing proximate cause. In the past, the Court has applied the term "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992). The Court has explained that, "[a]t bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Ibid.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984) (hereinafter Keeton)); see also *Palsgraf* v. *Long Island R. R. Co.*, 248 N. Y. 339, 352, 162 N. E. 99, 103 (1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"). While the concept of proximate cause is somewhat amorphous, see Keeton 279, the common law is clear that certain intervening events—otherwise called "superseding causes"—are sufficient to sever the causal nexus and cut off all liability. See *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 837 (1996) ("'The doctrine of superseding cause is . . . applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable'" (quoting 1 T. Schoenbaum, Admiralty and Maritime Law § 5–3, pp. 165–166 (2d ed. 1994))); 57A Am. Jur. 2d, Negligence § 790, p. 701 (1989) ("The intervention, between the negligence of the defendant and the occurrence of an injury to the plaintiff, of a new, independent, and efficient cause, or of a superseding cause, of the injury renders the negligence of the defendant a remote cause of

the injury, and he cannot be held liable, notwithstanding the existence of some connection between his negligence and the injury").

In this case, we are faced with the novel situation where the parties have, by agreement, attempted to sever the causal relationship between the debtor's fraudulent conduct and the debt.[2] In my view, the "intervening" settlement and release create the equivalent of a superseding cause, no different from the intervening negligent acts of a third party in a negligence action. In this case, the parties have made clear their intent to replace the old "fraud" debt with a new "contract" debt. Accordingly, the only debt that remains intact for bankruptcy purposes is the one "obtained by" voluntary agreement of the parties, not by fraud.

Petitioners' own actions in the course of this litigation support this conclusion. Throughout the proceedings below and continuing in this Court, petitioners have sought to recover only the amount of the debt set forth in the settlement agreement, which is lower than the total damages they allegedly suffered as a result of respondent's alleged fraud. See Brief for Petitioners 21 ("[T]he nondischargeability action was brought solely in order to enforce the agreement to pay [the amount in the settlement agreement]"). This crucial fact demonstrates that petitioners seek to recover a debt based only in contract, not in fraud.

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[2] Petitioners argue that *any* prepetition waiver of nondischargeability protections should be deemed unenforceable because it is inconsistent with the Bankruptcy Code and impairs the rights of third-party creditors. Brief for Petitioners 24. As respondent points out, however, a creditor forfeits the right to contest dischargeability if it fails to affirmatively request a hearing within 60 days after the first date set for the meeting of the creditors. See 11 U. S. C. § 523(c)(1); Fed. Rule Bkrtcy. Proc. 4007(c). Thus, presumably, creditors may choose, for any or no reason at all, to forgo an assertion of nondischargeability under § 523(a)(2). Indeed, petitioners have failed to point to *any* provision of the Bankruptcy Code that specifically bars a creditor from entering into an agreement that impairs its right to contest dischargeability.

The Court concludes otherwise. The Court, however, does not explain why it permits petitioners to look at the settlement agreement for the amount of the debt they seek to recover but not for the character of that debt. Neither this Court's precedents nor the text of the Bankruptcy Code permits such a selective implementation of a valid agreement between the parties.

* * *

The Court today ignores the plain intent of the parties, as evidenced by a properly executed settlement agreement and general release, holding that a debt owed by respondent under a contract was "obtained by" fraud. Because I find no support for the Court's conclusion in the text of the Bankruptcy Code, or in the agreements of the parties, I respectfully dissent.

Syllabus

# KENTUCKY ASSOCIATION OF HEALTH PLANS, INC., ET AL. *v.* MILLER, COMMISSIONER, KENTUCKY DEPARTMENT OF INSURANCE

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

No. 00–1471. Argued January 14, 2003—Decided April 2, 2003

Petitioner health maintenance organizations (HMOs) maintain exclusive "provider networks" with selected doctors, hospitals, and other health-care providers. Kentucky has enacted two "Any Willing Provider" (AWP) statutes, which prohibit "[a] health insurer [from] discriminat-[ing] against any provider who is . . . willing to meet the terms and conditions for participation established by the . . . insurer," and require a "health benefit plan that includes chiropractic benefits [to] . . . [p]ermit any licensed chiropractor who agrees to abide by the terms [and] conditions . . . of the . . . plan to serve as a participating primary chiropractic provider." Petitioners filed this suit against respondent, the Commissioner of Kentucky's Department of Insurance, asserting that the AWP laws are pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), which pre-empts all state laws "insofar as they . . . relate to any employee benefit plan," 29 U. S. C. § 1144(a), but saves from pre-emption state "law[s] . . . which regulat[e] insurance . . . ," § 1144(b)(2)(A). The District Court concluded that although both AWP statutes "relate to" employee benefit plans under § 1144(a), each law "regulates insurance" and is therefore saved from pre-emption by § 1144(b)(2)(A). The Sixth Circuit affirmed.

*Held:* Kentucky's AWP statutes are "law[s] . . . which regulat[e] insurance" under § 1144(b)(2)(A). Pp. 334–342.

(a) For these statutes to be "law[s] . . . which regulat[e] insurance," they must be "specifically directed toward" the insurance industry; laws of general application that have some bearing on insurers do not qualify. *E. g., Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 50. However, not all state laws "specifically directed toward" the insurance industry will be covered by § 1144(b)(2)(A), which saves laws that regulate *insurance*, not insurers. Insurers must be regulated "with respect to their insurance practices." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U. S. 355, 366. P. 334.

Syllabus

(b) Petitioners argue that the AWP laws are not "specifically directed" toward the insurance industry. The Court disagrees. Neither of these statutes, by its terms, imposes any prohibitions or requirements on providers, who may still enter exclusive networks with insurers who conduct business outside the Commonwealth or who are otherwise not covered by the AWP laws. The statutes are transgressed only when a "health insurer," or a "health benefit plan that includes chiropractic benefits," excludes from its network a provider who is willing and able to meet its terms. Pp. 334–336.

(c) Also unavailing is petitioners' contention that Kentucky's AWP laws fall outside § 1144(b)(2)(A)'s scope because they do not regulate an insurance practice but focus upon the relationship between an insurer and *third-party providers.* Petitioners rely on *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 210, which held that third-party provider arrangements between insurers and pharmacies were not "the 'business of insurance'" under § 2(b) of the McCarran-Ferguson Act. ERISA's saving clause, however, is not concerned (as is the McCarran-Ferguson Act provision) with how to characterize *conduct* undertaken by private actors, but with how to characterize *state laws* in regard to what they "regulate." Kentucky's laws "regulate" insurance by imposing conditions on the right to engage in the business of insurance. To come within ERISA's saving clause those conditions must also substantially affect the risk pooling arrangement between insurer and insured. Kentucky's AWP statutes pass this test by altering the scope of permissible bargains between insurers and insureds in a manner similar to the laws we upheld in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358, and *Rush Prudential*, *supra.* Pp. 337–339.

(d) The Court's prior use, to varying degrees, of its cases interpreting §§ 2(a) and 2(b) of the McCarran-Ferguson Act in the ERISA saving clause context has misdirected attention, failed to provide clear guidance to lower federal courts, and, as this case demonstrates, added little to the relevant analysis. The Court has never held that the McCarran-Ferguson factors are an essential component of the § 1144(b)(2)(A) inquiry. Today the Court makes a clean break from the McCarran-Ferguson factors in interpreting ERISA's saving clause. Pp. 339–342.

227 F. 3d 352, affirmed.

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

*Robert N. Eccles* argued the cause for petitioners. With him on the brief were *Karen M. Wahle*, *Jonathan D. Hacker*, and *Barbara Reid Hartung.*

*Elizabeth A. Johnson* argued the cause for respondent. With her on the brief were *Julie Mix McPeak* and *William J. Nold.*

*James A. Feldman* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Clement*, *Deputy Solicitor General Kneedler*, *Howard M. Radzely*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Gary K. Stearman.**

JUSTICE SCALIA delivered the opinion of the Court.

Kentucky law provides that "[a] health insurer shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and who is willing to meet the terms and conditions for participation

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*Briefs of *amici curiae* urging reversal were filed for the American Association of Health Plans, Inc., et al. by *Daly D. E. Temchine*, *Stephanie W. Kanwit*, *Jan S. Amundson*, and *Quentin Riegel;* for Community Health Partners et al. by *Thomas C. Goldstein* and *Amy Howe;* and for the Society for Human Resource Management by *Mark A. Casciari*, *Deborah S. Davidson*, and *James M. Nelson.*

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *John Cornyn*, Attorney General of Texas, *Howard G. Baldwin, Jr.*, First Assistant Attorney General, *Jeffrey S. Boyd*, Deputy Attorney General, *Julie Parsley*, Solicitor General, and *David C. Mattax* and *Christopher Livingston*, Assistant Attorneys General, and by the Attorneys General and other officials for their respective jurisdictions as follows: *Bill Lockyer*, Attorney General of California, *Gregory D'Auria*, Associate Attorney General of Connecticut, *M. Jane Brady*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Earl I. Anzai*, Attorney General of Hawaii, *James E. Ryan*, Attorney General of Illinois, *Albert B. Chandler III*, Attorney General of Kentucky, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *W. A. Drew Edmondson*, Attorney General of Oklahoma, *Annina M. Mitchell*, Solicitor General of Utah, *Darrell V. McGraw, Jr.*, Attorney General of West Virginia, and *Anabelle Rodríguez*, Attorney General of Puerto Rico; for the American College of Legal Medicine by *Miles J. Zaremski*, *Gary Birnbaum*, and *Bruce A. Brightwell;* for the American Medical Association et al. by *Mark E. Rust* and *Stanley C. Fickle;* and for the Council of State Governments et al. by *Richard Ruda* and *Steven H. Goldblatt.*

established by the health insurer, including the Kentucky state Medicaid program and Medicaid partnerships." Ky. Rev. Stat. Ann. §304.17A–270 (West 2001). Moreover, any "health benefit plan that includes chiropractic benefits shall . . . [p]ermit any licensed chiropractor who agrees to abide by the terms, conditions, reimbursement rates, and standards of quality of the health benefit plan to serve as a participating primary chiropractic provider to any person covered by the plan." §304.17A–171(2). We granted certiorari to decide whether the Employee Retirement Income Security Act of 1974 (ERISA) pre-empts either, or both, of these "Any Willing Provider" (AWP) statutes.

## I

Petitioners include several health maintenance organizations (HMOs) and a Kentucky-based association of HMOs. In order to control the quality and cost of health-care delivery, these HMOs have contracted with selected doctors, hospitals, and other health-care providers to create exclusive "provider networks." Providers in such networks agree to render health-care services to the HMOs' subscribers at discounted rates and to comply with other contractual requirements. In return, they receive the benefit of patient volume higher than that achieved by nonnetwork providers who lack access to petitioners' subscribers.

Kentucky's AWP statutes impair petitioners' ability to limit the number of providers with access to their networks, and thus their ability to use the assurance of high patient volume as the *quid pro quo* for the discounted rates that network membership entails. Petitioners believe that AWP laws will frustrate their efforts at cost and quality control, and will ultimately deny consumers the benefit of their cost-reducing arrangements with providers.

In April 1997, petitioners filed suit against respondent, the Commissioner of Kentucky's Department of Insurance, in the United States District Court for the Eastern District

of Kentucky, asserting that ERISA, 88 Stat. 832, as amended, pre-empts Kentucky's AWP laws. ERISA pre-empts all state laws "insofar as they may now or hereafter relate to any employee benefit plan," 29 U. S. C. § 1144(a), but state "law[s] . . . which regulat[e] insurance, banking, or securities" are saved from pre-emption, § 1144(b)(2)(A). The District Court concluded that although both AWP statutes "relate to" employee benefit plans under § 1144(a), each law "regulates insurance" and is therefore saved from pre-emption by § 1144(b)(2)(A). App. to Pet. for Cert. 64a–84a. In affirming the District Court, the Sixth Circuit also concluded that the AWP laws "regulat[e] insurance" and fall within ERISA's saving clause. *Kentucky Assn. of Health Plans, Inc.* v. *Nichols*, 227 F. 3d 352, 363–372 (2000). Relying on *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358 (1999), the Sixth Circuit first held that Kentucky's AWP laws regulate insurance "as a matter of common sense," 227 F. 3d, at 364, because they are "specifically directed toward 'insurers' and the insurance industry . . . ," *id.*, at 366. The Sixth Circuit then considered, as "checking points or guideposts" in its analysis, the three factors used to determine whether a practice fits within "the business of health insurance" in our cases interpreting the McCarran-Ferguson Act. *Id.*, at 364. These factors are: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 129 (1982). The Sixth Circuit found all three factors satisfied. 227 F. 3d, at 368–371. Notwithstanding its analysis of the McCarran-Ferguson factors, the Sixth Circuit reiterated that the "basic test" under ERISA's saving clause is whether, from a commonsense view, the Kentucky AWP laws regulate insurance. *Id.*, at 372. Finding that the laws passed both the "common sense" test and the

McCarran-Ferguson "checking points," the Sixth Circuit upheld Kentucky's AWP statutes. *Ibid.*

We granted certiorari, 536 U. S. 956 (2002).

## II

To determine whether Kentucky's AWP statutes are saved from pre-emption, we must ascertain whether they are "law[s] . . . which regulat[e] insurance" under § 1144(b)(2)(A).

It is well established in our case law that a state law must be "specifically directed toward" the insurance industry in order to fall under ERISA's saving clause; laws of general application that have some bearing on insurers do not qualify. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 50 (1987); see also *Rush Prudential HMO, Inc.* v. *Moran*, 536 U. S. 355, 366 (2002); *FMC Corp.* v. *Holliday*, 498 U. S. 52, 61 (1990). At the same time, not all state laws "specifically directed toward" the insurance industry will be covered by § 1144(b)(2)(A), which saves laws that regulate *insurance*, not insurers. As we explained in *Rush Prudential*, insurers must be regulated "with respect to their insurance practices," 536 U. S., at 366. Petitioners contend that Kentucky's AWP laws fall outside the scope of § 1144(b)(2)(A) for two reasons. First, because Kentucky has failed to "specifically direc[t]" its AWP laws toward the insurance industry; and second, because the AWP laws do not regulate an insurance practice. We find neither contention persuasive.

### A

Petitioners claim that Kentucky's statutes are not "specifically directed toward" insurers because they regulate not only the insurance industry but also doctors who seek to form and maintain limited provider networks with HMOs. That is to say, the AWP laws equally prevent *providers* from entering into limited network contracts with *insurers*, just as they prevent insurers from creating exclusive networks in the first place. We do not think it follows that Kentucky

has failed to specifically direct its AWP laws at the insurance industry.

Neither of Kentucky's AWP statutes, by its terms, imposes any prohibitions or requirements on health-care providers. See Ky. Rev. Stat. Ann. § 304.17A–270 (West 2001) (imposing obligations only on "health insurer[s]" not to discriminate against any willing provider); § 304.17A–171 (imposing obligations only on "health benefit plan[s] that includ[e] chiropractic benefits"). And Kentucky health-care providers are still capable of entering exclusive networks with insurers who conduct business outside the Commonwealth of Kentucky or who are otherwise not covered by §§ 304.17A–270 or 304.17A–171. Kentucky's statutes are transgressed only when a "health insurer," or a "health benefit plan that includes chiropractic benefits," excludes from its network a provider who is willing and able to meet its terms.

It is of course true that as a *consequence* of Kentucky's AWP laws, entities outside the insurance industry (such as health-care providers) will be unable to enter into certain agreements with Kentucky insurers. But the same could be said about the state laws we held saved from pre-emption in *FMC Corp.* and *Rush Prudential.* Pennsylvania's law prohibiting insurers from exercising subrogation rights against an insured's tort recovery, see *FMC Corp.*, *supra,* at 55, n. 1, also prevented insureds from entering into enforceable contracts with insurers allowing subrogation. Illinois' requirement that HMOs provide independent review of whether services are "medically necessary," *Rush Prudential, supra,* at 372, likewise excluded insureds from joining an HMO that would have withheld the right to independent review in exchange for a lower premium. Yet neither case found the effects of these laws on noninsurers, significant though they may have been, inconsistent with the requirement that laws saved from pre-emption by § 1144(b)(2)(A) be "specifically directed toward" the insurance industry. Regulations "directed toward" certain entities will almost always disable

other entities from doing, with the regulated entities, what the regulations forbid; this does not suffice to place such regulation outside the scope of ERISA's saving clause.[1]

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[1] Petitioners also contend that Ky. Rev. Stat. Ann. § 304.17A–270 (West 2001) is not "specifically directed toward" insurers because it applies to "self-insurer or multiple employer welfare arrangement[s] not exempt from state regulation by ERISA." § 304.17A–005(23). We do not think § 304.17A–270's application to self-insured non-ERISA plans forfeits its status as a "law . . . which regulates insurance" under 29 U. S. C. § 1144(b)(2)(A). ERISA's saving clause does not require that a state law regulate "insurance *companies*" or even "*the business of insurance*" to be saved from pre-emption; it need only be a "law . . . which regulates *insurance*," *ibid.* (emphasis added), and self-insured plans engage in the same sort of risk pooling arrangements as separate entities that provide insurance to an employee benefit plan. Any contrary view would render superfluous ERISA's "deemer clause," § 1144(b)(2)(B), which provides that an employee benefit plan covered by ERISA may not "be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts. . . ." That clause has effect only on state laws saved from pre-emption by § 1144(b)(2)(A) that would, in the absence of § 1144(b)(2)(B), be allowed to regulate self-insured employee benefit plans. Under petitioners' view, such laws would never be saved from pre-emption in the first place. (The deemer clause presents no obstacle to Kentucky's law, which reaches only those employee benefit plans "not exempt from state regulation by ERISA.")

Both of Kentucky's AWP laws apply to all HMOs, including HMOs that do not act as insurers but instead provide only administrative services to self-insured plans. Petitioners maintain that the application to noninsuring HMOs forfeits the laws' status as "law[s] . . . which regulat[e] insurance." § 1144(b)(2)(A). We disagree. To begin with, these noninsuring HMOs would be administering self-insured plans, which we think suffices to bring them within the activity of insurance for purposes of § 1144(b)(2)(A). Moreover, we think petitioners' argument is foreclosed by *Rush Prudential HMO, Inc.* v. *Moran*, 536 U. S. 355, 372 (2002), where we noted that Illinois' independent-review laws contained "some overbreadth in the application of [215 Ill. Comp. Stat., ch. 125,] § 4–10 [(2000)] beyond orthodox HMOs," yet held that "there is no reason to think Congress would have meant such minimal application to noninsurers to remove a state law entirely from the category of insurance regulation saved from preemption."

B

Petitioners claim that the AWP laws do not regulate insurers with respect to an insurance practice because, unlike the state laws we held saved from pre-emption in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985), *UNUM*, and *Rush Prudential*, they do not control the actual terms of insurance policies. Rather, they focus upon the relationship between an insurer and *third-party providers*—which in petitioners' view does not constitute an "insurance practice."

In support of their contention, petitioners rely on *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 210 (1979), which held that third-party provider arrangements between insurers and pharmacies were not "the 'business of insurance'" under § 2(b) of the McCarran-Ferguson Act.[2] ERISA's saving clause, however, is not concerned (as is the McCarran-Ferguson Act provision) with how to characterize *conduct* undertaken by private actors, but with how to characterize *state laws* in regard to what they "regulate." It does not follow from *Royal Drug* that a law mandating certain insurer-provider relationships fails to "regulate insurance." Suppose a state law required all licensed attorneys to participate in 10 hours of continuing legal education (CLE) each year. This statute "regulates" the practice of law—

[2] Section 2 of the McCarran-Ferguson Act provides:

"(a) *The business of insurance*, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede *any law enacted by any State for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 59 Stat. 34, 15 U. S. C. § 1012 (emphasis added).

even though sitting through 10 hours of CLE classes does not constitute the practice of law—because the State has *conditioned* the right to practice law on certain requirements, which substantially affect the product delivered by lawyers to their clients. Kentucky's AWP laws operate in a similar manner with respect to the insurance industry: Those who wish to provide health insurance in Kentucky (any "health insurer") may not discriminate against any willing provider. This "regulates" insurance by imposing conditions on the right to engage in the business of insurance; whether or not an HMO's contracts with providers constitute "the business of insurance" under *Royal Drug* is beside the point.

We emphasize that conditions on the right to engage in the business of insurance must also substantially affect the risk pooling arrangement between the insurer and the insured to be covered by ERISA's saving clause. Otherwise, any state law aimed at insurance companies could be deemed a law that "regulates insurance," contrary to our interpretation of § 1144(b)(2)(A) in *Rush Prudential*, 536 U. S., at 364. A state law requiring all insurance companies to pay their janitors twice the minimum wage would not "regulate insurance," even though it would be a prerequisite to engaging in the business of insurance, because it does not substantially affect the risk pooling arrangement undertaken by insurer and insured. Petitioners contend that Kentucky's AWP statutes fail this test as well, since they do not alter or affect the terms of insurance policies, but concern only the relationship between insureds and third-party providers, Brief for Petitioners 29. We disagree. We have never held that state laws must alter or control the actual terms of insurance policies to be deemed "laws . . . which regulat[e] insurance" under § 1144(b)(2)(A); it suffices that they substantially affect the risk pooling arrangement between insurer and insured. By expanding the number of providers from whom an insured may receive health services, AWP laws alter the scope

of permissible bargains between insurers and insureds in a manner similar to the mandated-benefit laws we upheld in *Metropolitan Life*, the notice-prejudice rule we sustained in *UNUM*,[3] and the independent-review provisions we approved in *Rush Prudential*. No longer may Kentucky insureds seek insurance from a closed network of health-care providers in exchange for a lower premium. The AWP prohibition substantially affects the type of risk pooling arrangements that insurers may offer.

## III

Our prior decisions construing § 1144(b)(2)(A) have relied, to varying degrees, on our cases interpreting §§ 2(a) and 2(b) of the McCarran-Ferguson Act. In determining whether certain practices constitute "the *business of* insurance" under the McCarran-Ferguson Act (emphasis added), our cases have looked to three factors: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Pireno*, 458 U. S., at 129.

We believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed

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[3] While the Ninth Circuit concluded in *Cisneros* v. *UNUM Life Ins. Co. of America*, 134 F. 3d 939, 945–946 (1998), aff'd in part, rev'd and remanded in part, *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358 (1999), that "the notice-prejudice rule does not spread the policyholder's risk within the meaning of the first McCarran-Ferguson factor," our test requires only that the state law substantially *affect* the risk pooling arrangement between the insurer and insured; it does not require that the state law actually spread risk. See *supra*, at 337–338. The notice-prejudice rule governs whether or not an insurance company must cover claims submitted late, which dictates to the insurance company the conditions under which it must pay for the risk that it has assumed. This certainly qualifies as a substantial effect on the risk pooling arrangement between the insurer and insured.

to provide clear guidance to lower federal courts, and, as this case demonstrates, added little to the relevant analysis. That is unsurprising, since the statutory language of § 1144(b)(2)(A) differs substantially from that of the McCarran-Ferguson Act. Rather than concerning itself with whether certain practices constitute "[t]he business of insurance," 15 U. S. C. § 1012(a), or whether a state law was "enacted . . . *for the purpose of* regulating the business of insurance," § 1012(b) (emphasis added), 29 U. S. C. § 1144(b)(2)(A) asks merely whether a state law is a "law . . . which regulates insurance, banking, or securities." What is more, the McCarran-Ferguson factors were developed in cases that characterized *conduct* by private actors, not state laws. See *Pireno*, *supra*, at 126 ("The only issue before us is *whether petitioners' peer review practices* are exempt from antitrust scrutiny as part of the 'business of insurance' " (emphasis added)); *Royal Drug*, 440 U. S., at 210 ("The only issue before us is whether the Court of Appeals was correct in concluding that *these Pharmacy Agreements* are not the 'business of insurance' within the meaning of § 2(b) of the McCarran-Ferguson Act" (emphasis added)).

Our holdings in *UNUM* and *Rush Prudential*—that a state law may fail the first McCarran-Ferguson factor yet still be saved from pre-emption under § 1144(b)(2)(A)—raise more questions than they answer and provide wide opportunities for divergent outcomes. May a state law satisfy *any* two of the three McCarran-Ferguson factors and still fall under the saving clause? Just one? What happens if two of three factors are satisfied, but not "securely satisfied" or "clearly satisfied," as they were in *UNUM* and *Rush Prudential?* 526 U. S., at 374; 536 U. S., at 373. Further confusion arises from the question whether the *state law itself* or the *conduct regulated by that law* is the proper subject to which one applies the McCarran-Ferguson factors. In *Pilot Life*, we inquired whether Mississippi's *law of bad faith* has the effect of transferring or spreading risk, 481 U. S., at 50,

whether *that law* is integral to the insurer-insured relationship, *id.*, at 51, and whether *that law* is limited to the insurance industry, *ibid.*[4] *Rush Prudential*, by contrast, focused the McCarran-Ferguson inquiry on the *conduct regulated* by the state law, rather than the state law itself. 536 U. S., at 373 ("It is obvious enough that the independent review requirement *regulates* 'an integral part of the policy relationship between the insurer and insured' " (emphasis added)); *id.*, at 374 ("The final factor, that the law be aimed at *a 'practice* . . . limited to entities within the insurance industry' is satisfied . . ." (emphasis added; citation omitted)).

We have never held that the McCarran-Ferguson factors are an essential component of the § 1144(b)(2)(A) inquiry. *Metropolitan Life* initially used these factors only to buttress its previously reached conclusion that Massachusetts' mandated-benefit statute was a "law . . . which regulates insurance" under § 1144(b)(2)(A). 471 U. S., at 742–743. *Pilot Life* referred to them as mere "considerations [to be] weighed" in determining whether a state law falls under the saving clause. 481 U. S., at 49. *UNUM* emphasized that the McCarran-Ferguson factors were not " 'require[d]' " in the saving clause analysis, and were only "checking points" to be used after determining whether the state law regulates insurance from a "common-sense" understanding. 526 U. S., at 374. And *Rush Prudential* called the factors "guideposts," using them only to "confirm our conclusion" that Illinois' statute regulated insurance under § 1144(b)(2)(A). 536 U. S., at 373.

Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a "law . . . which regulates insurance" under § 1144(b)(2)(A),

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[4] This approach rendered the third McCarran-Ferguson factor a mere repetition of the prior inquiry into whether a state law is "specifically directed toward" the insurance industry under the "common-sense view." *UNUM Life Ins. Co. of America* v. *Ward*, *supra*, at 375; *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 50 (1987).

it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. See *Pilot Life*, *supra*, at 50, *UNUM*, *supra*, at 368; *Rush Prudential*, *supra*, at 366. Second, as explained above, the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky's law satisfies each of these requirements.

* * *

For these reasons, we affirm the judgment of the Sixth Circuit.

*It is so ordered.*

Syllabus

# VIRGINIA *v.* BLACK ET AL.

## CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 01–1107. Argued December 11, 2002—Decided April 7, 2003

Respondents were convicted separately of violating a Virginia statute that makes it a felony "for any person . . . , with the intent of intimidating any person or group . . . , to burn . . . a cross on the property of another, a highway or other public place," and specifies that "[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group." When respondent Black objected on First Amendment grounds to his trial court's jury instruction that cross burning by itself is sufficient evidence from which the required "intent to intimidate" could be inferred, the prosecutor responded that the instruction was taken straight out of the Virginia Model Instructions. Respondent O'Mara pleaded guilty to charges of violating the statute, but reserved the right to challenge its constitutionality. At respondent Elliott's trial, the judge instructed the jury as to what the Commonwealth had to prove, but did not give an instruction on the meaning of the word "intimidate," nor on the statute's prima facie evidence provision. Consolidating all three cases, the Virginia Supreme Court held that the cross-burning statute is unconstitutional on its face; that it is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V.* v. *St. Paul*, 505 U. S. 377; that it discriminates on the basis of content and viewpoint since it selectively chooses only cross burning because of its distinctive message; and that the prima facie evidence provision renders the statute overbroad because the enhanced probability of prosecution under the statute chills the expression of protected speech.

*Held:* The judgment is affirmed in part, vacated in part, and remanded.

262 Va. 764, 553 S. E. 2d 738, affirmed in part, vacated in part, and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, and III, concluding that a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate. Pp. 352–363.

(a) Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which, following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites. The Klan has often used cross burnings as a tool of intimidation and a threat of impending vio-

lence, although such burnings have also remained potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings. To this day, however, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 771. While cross burning does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful. Pp. 352–357.

(b) The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e. g.*, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572. For example, the First Amendment permits a State to ban "true threats," *e. g.*, *Watts* v. *United States*, 394 U. S. 705, 708 *(per curiam)*, which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, see, *e. g.*, *ibid.* The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. *R. A. V.*, *supra*, at 388. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As the history of cross burning in this country shows, that act is often intimidating, intended to create a pervasive fear in victims that they are a target of violence. Pp. 358–360.

(c) The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. A ban on cross burning carried out with the intent to intimidate is fully consistent with this Court's holding in *R. A. V.* Contrary to the Virginia Supreme Court's ruling, *R. A. V.* did not hold that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, the Court specifically stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists

entirely of the very reason its entire class of speech is proscribable. 505 U. S., at 388. For example, it is permissible to prohibit only that obscenity that is most patently offensive in its prurience—*i. e.*, that which involves the most lascivious displays of sexual activity. *Ibid.* Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.*, at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. Pp. 360–363.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER, concluded in Parts IV and V that the Virginia statute's prima facie evidence provision, as interpreted through the jury instruction given in respondent Black's case and as applied therein, is unconstitutional on its face. Because the instruction is the same as the Commonwealth's Model Jury Instruction, and because the Virginia Supreme Court had the opportunity to expressly disavow it, the instruction's construction of the prima facie provision is as binding on this Court as if its precise words had been written into the statute. *E. g., Terminiello* v. *Chicago*, 337 U. S. 1, 4. As construed by the instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The provision permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. It permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. As so interpreted, it would create an unacceptable risk of the suppression of ideas. *E. g., Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 965, n. 13. The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech. The prima facie evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut. Thus, Black's conviction cannot stand, and the judgment as

to him is affirmed. Conversely, Elliott's jury did not receive any instruction on the prima facie provision, and the provision was not an issue in O'Mara's case because he pleaded guilty. The possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under the statute, is left open. Also left open is the theoretical possibility that, on remand, the Virginia Supreme Court could interpret the prima facie provision in a manner that would avoid the constitutional objections described above. Pp. 363–368.

JUSTICE SCALIA agreed that this Court should vacate and remand the judgment of the Virginia Supreme Court with respect to respondents Elliott and O'Mara so that that court can have an opportunity authoritatively to construe the cross-burning statute's prima-facie-evidence provision. Pp. 368, 379.

JUSTICE SOUTER, joined by JUSTICE KENNEDY and JUSTICE GINSBURG, concluded that the Virginia statute is unconstitutional and cannot be saved by any exception under *R. A. V.* v. *St. Paul*, 505 U. S. 377, and therefore concurred in the Court's judgment insofar as it affirms the invalidation of respondent Black's conviction. Pp. 380–381, 387.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, in which REHNQUIST, C. J., and STEVENS, SCALIA, and BREYER, JJ., joined, and an opinion with respect to Parts IV and V, in which REHNQUIST, C. J., and STEVENS and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 368. SCALIA, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which THOMAS, J., joined as to Parts I and II, *post*, p. 368. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which KENNEDY and GINSBURG, JJ., joined, *post*, p. 380. THOMAS, J., filed a dissenting opinion, *post*, p. 388.

*William H. Hurd*, State Solicitor of Virginia, argued the cause for petitioner. With him on the brief were *Jerry W. Kilgore*, Attorney General, *Maureen Riley Matsen* and *William E. Thro*, Deputy State Solicitors, and *Alison P. Landry*, Assistant Attorney General.

*Deputy Solicitor General Dreeben* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Boyd*, *Barbara McDowell*, *Jessica Dunsay Silver*, and *Linda F. Thome*.

*Rodney A. Smolla* argued the cause for respondents. With him on the brief were *James O. Broccoletti*, *David P. Baugh*, and *Kevin E. Martingayle.**

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER join.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. Va. Code Ann. §18.2–423 (1996). We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any

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*Briefs of *amici curiae* urging reversal were filed for the State of California by *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, and *Angela Sierra*, Deputy Attorney General; for the State of New Jersey et al. by *David Samson*, Attorney General of New Jersey, and *Carol Johnston*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Richard Blumenthal* of Connecticut, *Thomas J. Miller* of Iowa, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mark L. Shurtleff* of Utah, and *William H. Sorrell* of Vermont; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the Council of Conservative Citizens by *Edgar J. Steele;* for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden;* and for the Thomas Jefferson Center for the Protection of Free Expression by *Robert M. O'Neil* and *J. Joshua Wheeler*.

*Martin E. Karlinsky, Howard W. Goldstein, Steven M. Freeman, Frederick M. Lawrence,* and *Elliot M. Mincberg* filed a brief for the Anti-Defamation League et al. as *amici curiae*.

cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

## I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, § 18.2–423. That statute provides:

> "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a "few" of which stopped to ask the sheriff what was happening on the property. App. 71. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, "sat and watched to see wha[t] [was] going on" from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself. *Id.*, at 103.

During the rally, Sechrist heard Klan members speak about "what they were" and "what they believed in." *Id.*,

at 106. The speakers "talked real bad about the blacks and the Mexicans." *Id.*, at 109. One speaker told the assembled gathering that "he would love to take a .30/.30 and just random[ly] shoot the blacks." *Ibid.* The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to . . . the black people." *Ibid.* Sechrist testified that this language made her "very . . . scared." *Id.*, at 110.

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross "then all of a sudden . . . went up in a flame." *Id.*, at 71. As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel "awful" and "terrible." *Id.*, at 110.

When the sheriff observed the cross burning, he informed his deputy that they needed to "find out who's responsible and explain to them that they cannot do this in the State of Virginia." *Id.*, at 72. The sheriff then went down the driveway, entered the rally, and asked "who was responsible for burning the cross." *Id.*, at 74. Black responded, "I guess I am because I'm the head of the rally." *Ibid.* The sheriff then told Black, "[T]here's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this." *Ibid.*

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of § 18.2–423. At his trial, the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." *Id.*, at 146. The trial court also instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Ibid.* When Black objected to this last instruction on First Amendment grounds,

the prosecutor responded that the instruction was "taken straight out of the [Virginia] Model Instructions." *Id.*, at 134. The jury found Black guilty, and fined him $2,500. The Court of Appeals of Virginia affirmed Black's conviction. Rec. No. 1581–99–3 (Va. App., Dec. 19, 2000), App. 201.

On May 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott's next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott's mother to inquire about shots being fired from behind the Elliott home. Elliott's mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee's property, planted a cross, and set it on fire. Their apparent motive was to "get back" at Jubilee for complaining about the shooting in the backyard. *Id.*, at 241. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard . . . tells you that it's just the first round." *Id.*, at 231.

Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O'Mara to 90 days in jail and fined him $2,500. The judge also suspended 45 days of the sentence and $1,000 of the fine.

At Elliott's trial, the judge originally ruled that the jury would be instructed "that the burning of a cross by itself is

sufficient evidence from which you may infer the required intent." *Id.*, at 221–222. At trial, however, the court instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning," that "the defendant did a direct act toward the commission of the cross burning," and that "the defendant had the intent of intimidating any person or group of persons." *Id.*, at 250. The court did not instruct the jury on the meaning of the word "intimidate," nor on the prima facie evidence provision of § 18.2–423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a $2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O'Mara. *O'Mara* v. *Commonwealth*, 33 Va. App. 525, 535 S. E. 2d 175 (2000).

Each respondent appealed to the Supreme Court of Virginia, arguing that § 18.2–423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. 262 Va. 764, 553 S. E. 2d 738 (2001). It held that the Virginia cross-burning statute "is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V.* [v. *St. Paul*, 505 U. S. 377 (1992)]." *Id.*, at 772, 553 S. E. 2d, at 742. The Virginia statute, the court held, discriminates on the basis of content since it "selectively chooses only cross burning because of its distinctive message." *Id.*, at 774, 553 S. E. 2d, at 744. The court also held that the prima facie evidence provision renders the statute overbroad because "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech." *Id.*, at 777, 553 S. E. 2d, at 746.

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that constitutes a true threat. The justices noted that unlike the ordinance found unconstitutional in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), the Virginia

statute does not just target cross burning "on the basis of race, color, creed, religion or gender." 262 Va., at 791, 553 S. E. 2d, at 753. Rather, "the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate." *Ibid.* The dissenters also disagreed with the majority's analysis of the prima facie provision because the inference alone "is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate." *Id.*, at 795, 553 S. E. 2d, at 756. The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari. 535 U. S. 1094 (2002).[1]

## II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. See M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia 145 (1991). Sir Walter Scott used cross burnings for dramatic effect in The Lady of the Lake, where the burning cross signified both a summons and a call to arms. See W. Scott, The Lady of The Lake, canto third. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process.

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[1] After we granted certiorari, the Commonwealth enacted another statute designed to remedy the constitutional problems identified by the state court. See Va. Code Ann. § 18.2–423.01 (2002). Section 18.2–423.01 bans the burning of "an object" when done "with the intent of intimidating any person or group of persons." The statute does not contain any prima facie evidence provision. Section 18.2–423.01, however, did not repeal § 18.2–423, the cross-burning statute at issue in this case.

Soon the Klan imposed "a veritable reign of terror" throughout the South. S. Kennedy, Southern Exposure 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, The Fiery Cross: The Ku Klux Klan in America 48–49 (1987) (hereinafter Wade). The Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, "President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure." *Jett* v. *Dallas Independent School Dist.*, 491 U. S. 701, 722 (1989) (internal quotation marks and alterations omitted). In response, Congress passed what is now known as the Ku Klux Klan Act. See "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," 17 Stat. 13 (now codified at 42 U. S. C. §§ 1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's The Clansmen: An Historical Romance of the Ku Klux Klan. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. *Id.*, at 324–326; see also *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 770–771 (1995) (THOMAS, J., concurring). Cross burning thereby became associated with the first Ku Klux Klan. When D. W. Griffith turned Dixon's book into the movie The Birth of a Nation in 1915,

the association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Wade 127. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. See Kennedy 163. This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain that was "visible throughout" Atlanta. Wade 144 (internal quotation marks omitted).

The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, "We avow the distinction between [the] races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things." *Id.*, at 147–148 (internal quotation marks omitted). Violence was also an elemental part of this new Klan. By September 1921, the New York World newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings. Wade 160.

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. See Kennedy 175. After one cross burning at a synagogue, a Klan member noted that if the cross burning did not "shut the Jews up, we'll cut a few

throats and see what happens." *Ibid.* (internal quotation marks omitted). In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, "We are here to keep niggers out of your town . . . . When the law fails you, call on us." *Id.*, at 176 (internal quotation marks omitted). And in Alabama in 1942, in "a whirlwind climax to weeks of flogging and terror," the Klan burned crosses in front of a union hall and in front of a union leader's home on the eve of a labor election. *Id.*, at 180. These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American "school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police . . . after the burning of a cross in his front yard." Richmond News Leader, Jan. 21, 1949, p. 19, App. 312. And after a cross burning in Suffolk, Virginia, during the late 1940's, the Virginia Governor stated that he would "not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization." D. Chalmers, Hooded Americanism: The History of the Ku Klux Klan 333 (1980) (hereinafter Chalmers). These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. See, *e. g.*, Chalmers 349–350; Wade 302–303. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites

whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." The Ku Klux Klan Hearings before the House Committee on Rules, 67th Cong., 1st Sess., 114, Exh. G (1921); see also Wade 419. And the Klan has often published its newsletters and magazines under the name The Fiery Cross. See *id.*, at 226, 489.

At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross. See N. MacLean, Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan 142–143 (1994). Typically, a cross burning would start with a prayer by the "Klavern" minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang The Old Rugged Cross. Wade 185. Throughout the Klan's history, the Klan continued to use the burning cross in their ritual ceremonies.

For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who "were married in full Klan regalia beneath a blazing cross." *Id.*, at 271. In response to antimasking bills introduced in state legislatures after World War II, the Klan burned crosses in protest. See Chalmers 340. On March 26, 1960, the Klan engaged in rallies and cross burnings throughout the South in an attempt to recruit 10 million members. See Wade 305. Later in 1960, the Klan became

an issue in the third debate between Richard Nixon and John Kennedy, with both candidates renouncing the Klan. After this debate, the Klan reiterated its support for Nixon by burning crosses. See *id.*, at 309. And cross burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration. See *id.*, at 323; cf. Chalmers 368–369, 371–372, 380, 384. In short, a burning cross has remained a symbol of Klan ideology and of Klan unity.

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S., at 771 (THOMAS, J., concurring). And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

## III

### A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting. *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting); see also *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney* v. *California*, 274 U. S. 357, 374 (1927) (Brandeis, J., concurring). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. See, *e. g.*, *R. A. V.* v. *City of St. Paul*, 505 U. S., at 382; *Texas* v. *Johnson*, *supra*, at 405–406; *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505 (1969).

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e. g.*, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem"). The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value

as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *R. A. V.* v. *City of St. Paul*, *supra*, at 382–383 (quoting *Chaplinsky* v. *New Hampshire*, *supra*, at 572).

Thus, for example, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire*, *supra*, at 572; see also *R. A. V.* v. *City of St. Paul*, *supra*, at 383 (listing limited areas where the First Amendment permits restrictions on the content of speech). We have consequently held that fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"—are generally proscribable under the First Amendment. *Cohen* v. *California*, 403 U. S. 15, 20 (1971); see also *Chaplinsky* v. *New Hampshire*, *supra*, at 572. Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)*. And the First Amendment also permits a State to ban a "true threat." *Watts* v. *United States*, 394 U. S. 705, 708 (1969) *(per curiam)* (internal quotation marks omitted); accord, *R. A. V.* v. *City of St. Paul*, *supra*, at 388 ("[T]hreats of violence are outside the First Amendment"); *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 774 (1994); *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 373 (1997).

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts* v. *United States*, *supra*, at 708 ("political hyberbole" is not a true threat); *R. A. V.* v. *City of St. Paul*, 505 U. S., at 388. The

speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

B

The Supreme Court of Virginia ruled that in light of *R. A. V.* v. *City of St. Paul*, *supra*, even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. 262 Va., at 771–776, 553 S. E. 2d, at 742–745. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.[2]

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[2] JUSTICE THOMAS argues in dissent that cross burning is "conduct, not expression." *Post*, at 394. While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech. See *supra*, at 358. As JUSTICE THOMAS has previously recognized, a burning cross is a "symbol of hate," and a

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R. A. V.* v. *City of St. Paul*, *supra*, to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

In *R. A. V.*, we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would " 'arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender' " was unconstitutional. *Id.*, at 380 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law. 505 U. S., at 391. The ordinance did not cover "[t]hose who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality." *Ibid.* This content-based discrimination was unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects." *Ibid.*

We did not hold in *R. A. V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment:

> "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or

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"a symbol of white supremacy." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 770–771 (1995) (concurring opinion).

> viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Id.*, at 388.

Indeed, we noted that it would be constitutional to ban only a particular type of threat: "[T]he Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." *Ibid.* And a State may "choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i. e.*, that which involves the most lascivious displays of sexual activity." *Ibid.* (emphasis in original). Consequently, while the holding of *R. A. V.* does not permit a State to ban only obscenity based on "offensive *political* messages," *ibid.*, or "only those threats against the President that mention his policy on aid to inner cities," *ibid.*, the First Amendment permits content discrimination "based on the very reasons why the particular class of speech at issue . . . is proscribable," *id.*, at 393.

Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.*, at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. See, *e. g.*, *supra*, at 355 (noting the instances of cross burnings directed at union members); *State* v. *Miller*, 6 Kan. App. 2d 432, 629 P. 2d 748 (1981) (describing

the case of a defendant who burned a cross in the yard of the lawyer who had previously represented him and who was currently prosecuting him). Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus. See 262 Va., at 791, 553 S. E. 2d, at 753 (Hassell, J., dissenting) (noting that "these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliott's yard, not because of any racial animus").

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment.

## IV

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2–423 (1996). The Commonwealth added the prima facie provision to the statute in 1968. The court below did not reach whether this provision is severable from the rest of the cross-burning statute under Virginia law. See § 1–17.1 ("The provisions of all statutes are severable unless . . . it is

apparent that two or more statutes or provisions must operate in accord with one another"). In this Court, as in the Supreme Court of Virginia, respondents do not argue that the prima facie evidence provision is unconstitutional as applied to any one of them. Rather, they contend that the provision is unconstitutional on its face.

The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S. E. 2d, at 746. The jury in the case of Richard Elliott did not receive any instruction on the prima facie evidence provision, and the provision was not an issue in the case of Jonathan O'Mara because he pleaded guilty. The court in Barry Black's case, however, instructed the jury that the provision means: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." App. 196. This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia. See Virginia Model Jury Instructions, Criminal, Instruction No. 10.250 (1998 and Supp. 2001).

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. Because this jury instruction is the Model Jury Instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction's construction of the prima facie provision "is a ruling on a question of state law that is as binding on us as though the precise words had been written into" the statute. *E. g.*, *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949) (striking down an ambiguous statute on facial grounds based upon the instruction given to the jury); see also *New York* v. *Ferber*, 458 U. S. 747, 768, n. 21 (1982) (noting that *Terminiello* involved a facial challenge to the statute); *Secretary of State*

*of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 965, n. 13 (1984); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 845–846, n. 8 (1970); Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 10–12; Blakey & Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 B. Y. U. L. Rev. 829, 883, n. 133. As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "'would create an unacceptable risk of the suppression of ideas.'" *Secretary of State of Md.* v. *Joseph H. Munson Co.*, *supra*, at 965, n. 13 (quoting *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 797 (1984)). The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group

solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "[b]urning a cross at a political rally would almost certainly be protected expression." *R. A. V.* v. *St. Paul*, 505 U. S., at 402, n. 4 (White, J., concurring in judgment) (citing *Brandenburg* v. *Ohio*, 395 U. S., at 445). Cf. *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam)*. Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as Mississippi Burning, and in plays such as the stage adaptation of Sir Walter Scott's The Lady of the Lake.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with JUSTICE SOUTER that the prima facie evidence provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Post*, at 385 (opinion concurring in judgment in part and dissenting in part).

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn

from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 Stan. L. Rev. 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike Justice Scalia, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment. Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under § 18.2–423.

## V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O'Mara, we vacate the judgment

of the Supreme Court of Virginia, and remand the case for further proceedings.

*It is so ordered.*

JUSTICE STEVENS, concurring.

Cross burning with "an intent to intimidate," Va. Code Ann. § 18.2–423 (1996), unquestionably qualifies as the kind of threat that is unprotected by the First Amendment. For the reasons stated in the separate opinions that Justice White and I wrote in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), that simple proposition provides a sufficient basis for upholding the basic prohibition in the Virginia statute even though it does not cover other types of threatening expressive conduct. With this observation, I join JUSTICE O'CONNOR's opinion.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to Parts I and II, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that, under our decision in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate. Accordingly, I join Parts I–III of the Court's opinion. I also agree that we should vacate and remand the judgment of the Virginia Supreme Court so that that court can have an opportunity authoritatively to construe the prima-facie-evidence provision of Va. Code Ann. § 18.2–423 (1996). I write separately, however, to describe what I believe to be the correct interpretation of § 18.2–423, and to explain why I believe there is no justification for the plurality's apparent decision to invalidate that provision on its face.

I

Section 18.2–423 provides that the burning of a cross in public view "shall be prima facie evidence of an intent to intimidate." In order to determine whether this component

of the statute violates the Constitution, it is necessary, first, to establish precisely what the presentation of prima facie evidence accomplishes.

Typically, "prima facie evidence" is defined as:

> "Such evidence as, in the judgment of the law, is sufficient to establish a given fact . . . and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence." Black's Law Dictionary 1190 (6th ed. 1990).

The Virginia Supreme Court has, in prior cases, embraced this canonical understanding of the pivotal statutory language. *E. g.*, *Babbitt* v. *Miller*, 192 Va. 372, 379–380, 64 S. E. 2d 718, 722 (1951) ("*Prima facie* evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted"). For example, in *Nance* v. *Commonwealth*, 203 Va. 428, 124 S. E. 2d 900 (1962), the Virginia Supreme Court interpreted a law of the Commonwealth that (1) prohibited the possession of certain "burglarious" tools "with intent to commit burglary, robbery, or larceny . . . ," and (2) provided that "[t]he possession of such burglarious tools . . . shall be prima facie evidence of an intent to commit burglary, robbery or larceny." Va. Code Ann. § 18.1–87 (1960). The court explained that the prima-facie-evidence provision "cuts off no defense nor interposes any obstacle to a contest of the facts, and 'relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence.' " *Nance* v. *Commonwealth*, 203 Va., at 432, 124 S. E. 2d, at 903–904; see also *ibid.*, 124 S. E. 2d, at 904 (noting that the prima-facie-evidence provision " 'is merely a rule of evidence and not the determination of a fact . . .' ").

The established meaning in Virginia, then, of the term "prima facie evidence" appears to be perfectly orthodox: It

is evidence that suffices, on its own, to establish a particular fact. But it is hornbook law that this is true only to the extent that the evidence goes unrebutted. "Prima facie evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact; and, *if not rebutted,* remains sufficient for the purpose." 7B Michie's Jurisprudence of Virginia and West Virginia § 32 (1998) (emphasis added).

To be sure, Virginia is entirely free, if it wishes, to discard the canonical understanding of the term "prima facie evidence." Its courts are also permitted to interpret the phrase in different ways for purposes of different statutes. In this case, however, the Virginia Supreme Court has done nothing of the sort. To the extent that tribunal has spoken to the question of what "prima facie evidence" means for purposes of § 18.2–423, it has not deviated a whit from its prior practice and from the ordinary legal meaning of these words. Rather, its opinion explained that under § 18.2–423, "the act of burning a cross alone, with no evidence of intent to intimidate, will . . . suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va. 764, 778, 553 S. E. 2d 738, 746 (2001). Put otherwise, where the Commonwealth has demonstrated through its case in chief that the defendant burned a cross in public view, this is sufficient, at least until the defendant has come forward with rebuttal evidence, to create a jury issue with respect to the intent element of the offense.

It is important to note that the Virginia Supreme Court did not suggest (as did the trial court's jury instructions in respondent Black's case, see *infra,* at 377) that a jury may, in light of the prima-facie-evidence provision, ignore any rebuttal evidence that has been presented and, solely on the basis of a showing that the defendant burned a cross, find that he intended to intimidate. Nor, crucially, did that court say that the presentation of prima facie evidence is always sufficient to get a case to a jury, *i. e.*, that a court may never

direct a verdict for a defendant who has been shown to have burned a cross in public view, even if, by the end of trial, the defendant has presented rebuttal evidence. Instead, according to the Virginia Supreme Court, the effect of the prima-facie-evidence provision is far more limited. It suffices to "insulate the Commonwealth from a motion to strike the evidence *at the end of its case-in-chief*," but it does nothing more. 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added). That is, presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate *only until* the defendant comes forward with some evidence in rebuttal.

## II

The question presented, then, is whether, given this understanding of the term "prima facie evidence," the cross-burning statute is constitutional. The Virginia Supreme Court answered that question in the negative. It stated that "§ 18.2–423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech." *Ibid.* "The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad." *Id.*, at 777, 553 S. E. 2d, at 746.

This approach toward overbreadth analysis is unprecedented. We have never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad. Rather, our overbreadth jurisprudence has consistently focused on whether *the prohibitory terms* of a particular statute extend to protected conduct; that is, we have inquired whether individuals who engage in protected conduct can be *convicted* under a statute, not whether they might be subject to arrest and prosecution. *E. g.*, *Houston* v. *Hill*, 482 U. S. 451, 459 (1987) (a statute "that *make[s] unlawful* a substantial amount of constitutionally protected conduct may be held facially invalid" (emphasis added)); *Grayned* v. *City of Rock-*

*ford*, 408 U. S. 104, 114 (1972) (a statute may be overbroad "if in its reach it *prohibits* constitutionally protected conduct" (emphasis added)); *R. A. V.* v. *St. Paul*, 505 U. S., at 397 (White, J., concurring in judgment) (deeming the ordinance at issue "fatally overbroad because it *criminalizes* . . . expression protected by the First Amendment" (emphasis added)).

Unwilling to embrace the Virginia Supreme Court's novel mode of overbreadth analysis, today's opinion properly focuses on the question of who may be convicted, rather than who may be arrested and prosecuted, under § 18.2–423. Thus, it notes that "[t]he prima facie evidence provision permits a jury *to convict* in every cross-burning case in which defendants exercise their constitutional right not to put on a defense."[1] *Ante*, at 365 (emphasis added). In such cases, the plurality explains, "[t]he provision permits the Commonwealth to arrest, prosecute, *and convict* a person based solely on the fact of cross burning itself." *Ibid.* (emphasis added). And this, according to the plurality, is constitutionally problematic because "a burning cross is not always intended to intimidate," and nonintimidating cross burning cannot be prohibited. *Ibid.* In particular, the opinion notes that cross burning may serve as "a statement of ideology" or "a symbol of group solidarity" at Ku Klux Klan rituals, and may even serve artistic purposes as in the case of the film Mississippi Burning. *Ante*, at 365–366.

The plurality is correct in all of this—and it means that some individuals who engage in protected speech may, be-

[1] The plurality also asserts that "even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." *Ante*, at 365. There is no basis for this assertion. The Virginia Supreme Court's opinion in *Nance* v. *Commonwealth*, 203 Va. 428, 432, 124 S. E. 2d 900, 903–904 (1962), states, in no uncertain terms, that the presentation of a prima facie case " 'relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of *the whole evidence.*' " (Emphasis added.)

cause of the prima-facie-evidence provision, be subject to conviction. Such convictions, assuming they are unconstitutional, could be challenged on a case-by-case basis. The plurality, however, with little in the way of explanation, leaps to the conclusion that the *possibility* of such convictions justifies facial invalidation of the statute.

In deeming § 18.2–423 facially invalid, the plurality presumably means to rely on some species of overbreadth doctrine.[2] But it must be a rare species indeed. We have noted that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494 (1982). If one looks only to the core provision of § 18.2–423—"[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross . . ."—it appears *not* to capture any protected conduct; that language is limited in its reach to con-

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[2] Overbreadth was, of course, the framework of analysis employed by the Virginia Supreme Court. See 262 Va. 764, 777–778, 553 S. E. 2d 738, 745–746 (2001) (examining the prima-facie-evidence provision in a section labeled "OVERBREADTH ANALYSIS" and holding that the provision "is overbroad"). Likewise, in their submissions to this Court, the parties' analyses of the prima-facie-evidence provision focus on the question of overbreadth. Brief for Petitioner 41–50 (confining its discussion of the prima-facie-evidence provision to a section titled "THE VIRGINIA STATUTE IS NOT OVERBROAD"); Brief for Respondents 39–41 (arguing that "[t]he prima facie evidence provision . . . render[s] [the statute] overbroad"); Reply Brief for Petitioner 13–20 (dividing its discussion of the prima-facie-evidence provision into sections titled "There Is No Real Overbreadth" and "There Is No Substantial Overbreadth"). This reliance on overbreadth doctrine is understandable. This Court has made clear that to succeed in a facial challenge *without* relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). As the Court's opinion concedes, some of the speech covered by § 18.2–423 can constitutionally be proscribed, *ante*, at 363.

duct which a State is, under the Court's holding, *ante*, at 363, allowed to prohibit. In order to identify *any* protected conduct that is affected by Virginia's cross-burning law, the plurality is compelled to focus not on the statute's core prohibition, but on the prima-facie-evidence provision, and hence on *the process* through which the prohibited conduct may be found by a jury.[3] And even in that context, the plurality cannot claim that improper convictions will result from the operation of the prima-facie-evidence provision *alone*. As the plurality concedes, the only persons who might impermissibly be convicted by reason of that provision are those who adopt a particular trial strategy, to wit, abstaining from the presentation of a defense.

The plurality is thus left with a strikingly attenuated argument to support the claim that Virginia's cross-burning statute is facially invalid. The class of persons that the plurality contemplates could impermissibly be convicted under § 18.2–423 includes only those individuals who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense. *Ante*, at 365 ("The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense").

Conceding (quite generously, in my view) that this class of persons exists, it cannot possibly give rise to a viable facial challenge, not even with the aid of our First Amendment

[3] Unquestionably, the process through which elements of a criminal offense are established in a jury trial may raise serious constitutional concerns. Typically, however, such concerns sound in due process, not First Amendment overbreadth. *E. g.*, *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 156–157 (1979); *Barnes* v. *United States*, 412 U. S. 837, 838 (1973); *In re Winship*, 397 U. S. 358, 359 (1970). Respondents in this case have not challenged § 18.2–423 under the Due Process Clause, and neither the plurality nor the Virginia Supreme Court relies on due process in declaring the statute invalid.

overbreadth doctrine. For this Court has emphasized repeatedly that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Osborne* v. *Ohio*, 495 U. S. 103, 112 (1990) (internal quotation marks omitted; emphasis added). See also *Houston* v. *Hill*, 482 U. S., at 458 ("Only a statute that is substantially overbroad may be invalidated on its face"); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"); *New York* v. *Ferber*, 458 U. S. 747, 771 (1982) ("[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications . . ."). The notion that the set of cases identified by the plurality in which convictions might improperly be obtained is sufficiently large to render the statute *substantially* overbroad is fanciful. The potential improper convictions of which the plurality complains are more appropriately classified as the sort of "marginal applications" of a statute in light of which "facial invalidation is inappropriate." *Parker* v. *Levy*, 417 U. S. 733, 760 (1974).[4]

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[4] Confronted with the incontrovertible fact that this statute easily passes overbreadth analysis, the plurality is driven to the truly startling assertion that a statute which is not invalid in all of its applications may nevertheless be facially invalidated *even if it is not overbroad.* The *only expression* of that proposition that the plurality can find in our jurisprudence appears in footnote dictum in the 5-to-4 opinion in *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 965–966, n. 13 (1984). See *id.*, at 975 (REHNQUIST, J., joined by Burger, C. J., and Powell and O'CONNOR, JJ., dissenting). *Stare decisis* cannot explain the newfound affection for this errant doctrine (even if *stare decisis* applied to dictum), because the holding of a *later* opinion (joined by six Justices) flatly repudiated it. See *United States* v. *Salerno*, *supra*, at 745 (REHNQUIST, C. J., joined by

Perhaps more alarming, the plurality concedes, *ante*, at 364, 365, that its understanding of the prima-facie-evidence provision is premised on the jury instructions given in respondent Black's case. This would all be well and good were it not for the fact that the plurality *facially invalidates* § 18.2–423. *Ante*, at 367 ("[T]he prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face"). I am aware of no case—and the plurality cites none—in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction.[5] And it is alto-

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White, Blackmun, Powell, O'CONNOR, and SCALIA, JJ.) (to succeed in a facial challenge without relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid").

Even if I were willing, as the plurality apparently is, to ignore our repudiation of the *Munson* dictum, that case provides no foundation whatever for facially invalidating a statute under the conditions presented here. Our willingness facially to invalidate the statute in *Munson* without reliance on First Amendment overbreadth was premised on our conclusion that the challenged provision was invalid *in all of its applications.* We explained that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Munson*, 467 U. S., at 965–966. And we stated that "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.*, at 966. Unless the Court is prepared to abandon a contention that it takes great pains to establish—that "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence," *ante*, at 360—it is difficult to see how *Munson* has any bearing on the constitutionality of the prima-facie-evidence provision.

[5] The plurality's reliance on *Terminiello* v. *Chicago*, 337 U. S. 1 (1949), is mistaken. In that case the Court deemed only the jury instruction, rather than the ordinance under review, to be constitutionally infirm. To be sure, it held that such a jury instruction could *never* support a constitutionally valid conviction, but that is quite different from holding the *ordinance* to be facially invalid. Insofar as the ordinance was concerned, *Terminiello* made repeated references to the as-applied nature of the

gether unsurprising that there is no precedent for such a holding. For where state law is ambiguous, treating jury instructions as binding interpretations would cede an enormous measure of power over state law to trial judges. A single judge's idiosyncratic reading of a state statute could trigger its invalidation. In this case, the troubling instruction—"The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent," App. 196—was taken verbatim from Virginia's Model Jury Instructions. But these Model Instructions have been neither promulgated by the legislature nor formally adopted by the Virginia Supreme Court. And it is hornbook law, in Virginia as elsewhere, that "[p]roffered instructions which do not correctly state the law . . . are erroneous and should be refused." 10A Michie's Jurisprudence of Virginia and West Virginia, Instructions § 15, p. 35 (Supp. 2000).

The plurality's willingness to treat this jury instruction as binding (and to strike down § 18.2–423 on that basis) would be shocking enough had the Virginia Supreme Court offered no guidance as to the proper construction of the prima-facie-evidence provision. For ordinarily we would decline to pass upon the constitutionality of an ambiguous state statute until that State's highest court had provided a binding construc-

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challenge. *Id.*, at 3 (noting that the defendant "maintained at all times that the ordinance *as applied to his conduct* violated his right of free speech . . ." (emphasis added)); *id.*, at 5 (noting that *"[a]s construed and applied* [the provision] at least contains parts that are unconstitutional" (emphasis added)); *id.*, at 6 ("The pinch of the statute is in *its application*" (emphasis added)); *ibid.* ("The record makes clear that petitioner at all times challenged the constitutionality of the ordinance *as construed and applied to him*" (emphasis added)). See also Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 433, n. 333 (1998) (characterizing *Terminiello* as "adopting a court's jury instruction as an authoritative narrowing construction of a breach of the peace ordinance but ultimately confining its decision to overturning the defendant's conviction rather than invalidating the statute on its face").

tion. *E. g., Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 78 (1997). If there is any exception to that rule, it is the case where one of two possible interpretations of the state statute would clearly render it unconstitutional, and the other would not. In that situation, applying the maxim "*ut res magis valeat quam pereat*" we would do *precisely the opposite* of what the plurality does here—that is, we would adopt the alternative reading that renders the statute constitutional rather than unconstitutional. The plurality's analysis is all the more remarkable given the dissonance between the interpretation of § 18.2–423 implicit in the jury instruction and the one suggested by the Virginia Supreme Court. That court's opinion did not state that, once proof of public cross burning is presented, a jury is permitted to infer an intent to intimidate *solely* on this basis and regardless of whether a defendant has offered evidence to rebut any such inference. To the contrary, in keeping with the black-letter understanding of "prima facie evidence," the Virginia Supreme Court explained that such evidence suffices only to "insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S. E. 2d, at 746. The court did not so much as hint that a jury is permitted, under § 18.2–423, to ignore rebuttal evidence and infer an intent to intimidate strictly on the basis of the prosecution's prima facie case. And unless and until the Supreme Court of Virginia tells us that the prima-facie-evidence provision permits a jury to infer intent under such conditions, this Court is entirely unjustified in facially invalidating § 18.2–423 on this basis.

As its concluding performance, in an apparent effort to paper over its unprecedented decision facially to invalidate a statute in light of an errant jury instruction, the plurality states:

> "We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. . . . We also recognize the

> theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility." *Ante,* at 367.

Now this is truly baffling. Having declared, in the immediately preceding sentence, that § 18.2–423 is "unconstitutional *on its face,*" *ibid.* (emphasis added), the plurality holds out the possibility that the Virginia Supreme Court will offer some saving construction of the statute. It should go without saying that if a saving construction of § 18.2–423 is possible, then facial invalidation is inappropriate. *E. g., Harrison* v. *NAACP,* 360 U. S. 167, 176 (1959) ("[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them"). So, what appears to have happened is that the plurality has facially invalidated not § 18.2–423, but its own hypothetical interpretation of § 18.2–423, and has then remanded to the Virginia Supreme Court to learn the *actual* interpretation of § 18.2–423. Words cannot express my wonderment at this virtuoso performance.

## III

As the analysis in Part I, *supra,* demonstrates, I believe the prima-facie-evidence provision in Virginia's cross-burning statute is constitutionally unproblematic. Nevertheless, because the Virginia Supreme Court has not yet offered an authoritative construction of § 18.2–423, I concur in the Court's decision to vacate and remand the judgment with respect to respondents Elliott and O'Mara. I also agree that respondent Black's conviction cannot stand. As noted above, the jury in Black's case was instructed that "[t]he burning of a cross, *by itself,* is sufficient evidence from which you may infer the required intent." App. 196 (emphasis

added). Where this instruction has been given, it is impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it—*including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate—or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross.[6] Still, I cannot go along with the Court's decision to affirm the judgment with respect to Black. In that judgment, the Virginia Supreme Court, having erroneously concluded that § 18.2–423 is overbroad, not only vacated Black's conviction, but dismissed the indictment against him as well. 262 Va., at 779, 553 S. E. 2d, at 746. Because I believe the constitutional defect in Black's conviction is rooted in a jury instruction and not in the statute itself, I would not dismiss the indictment and would permit the Commonwealth to retry Black if it wishes to do so. It is an interesting question whether the plurality's willingness to let the Virginia Supreme Court resolve the plurality's make-believe facial invalidation of the statute extends as well to the facial invalidation insofar as it supports dismissal of the indictment against Black. Logically, there is no reason why it would not.

JUSTICE SOUTER, with whom JUSTICE KENNEDY and JUSTICE GINSBURG join, concurring in the judgment in part and dissenting in part.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of dis-

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[6] Though the jury may well have embraced the former (constitutionally permissible) understanding of its duties, that possibility is not enough to dissipate the cloud of constitutional doubt. See *Sandstrom* v. *Montana*, 442 U. S. 510, 517 (1979) (refusing to assume that the jury embraced a constitutionally sound understanding of an ambiguous instruction: "[W]e cannot discount the possibility that the jury may have interpreted the instruction [improperly]").

tinction we considered in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992). I disagree that any exception should save Virginia's law from unconstitutionality under the holding in *R. A. V.* or any acceptable variation of it.

## I

The ordinance struck down in *R. A. V.*, as it had been construed by the State's highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative "'on the basis of race, color, creed, religion or gender.'" *Id.*, at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)). Although the Virginia statute in issue here contains no such express "basis of" limitation on prohibited subject matter, the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone, as was apparently the choice of respondents Elliott and O'Mara. *Ante,* at 354–357, 363.

The issue is whether the statutory prohibition restricted to this symbol falls within one of the exceptions to *R. A. V.*'s general condemnation of limited content-based proscription

within a broader category of expression proscribable generally. Because of the burning cross's extraordinary force as a method of intimidation, the *R. A. V.* exception most likely to cover the statute is the first of the three mentioned there, which the *R. A. V.* opinion called an exception for content discrimination on a basis that "consists entirely of the very reason the entire class of speech at issue is proscribable." 505 U. S., at 388. This is the exception the majority speaks of here as covering statutes prohibiting "particularly virulent" proscribable expression. *Ante*, at 363.

I do not think that the Virginia statute qualifies for this virulence exception as *R. A. V.* explained it. The statute fits poorly with the illustrative examples given in *R. A. V.*, none of which involves communication generally associated with a particular message, and in fact, the majority's discussion of a special virulence exception here moves that exception toward a more flexible conception than the version in *R. A. V.* I will reserve judgment on that doctrinal development, for even on a pragmatic conception of *R. A. V.* and its exceptions the Virginia statute could not pass muster, the most obvious hurdle being the statute's prima facie evidence provision. That provision is essential to understanding why the statute's tendency to suppress a message disqualifies it from any rescue by exception from *R. A. V.*'s general rule.

## II

*R. A. V.* defines the special virulence exception to the rule barring content-based subclasses of categorically proscribable expression this way: prohibition by subcategory is nonetheless constitutional if it is made "entirely" on the "basis" of "the very reason" that "the entire class of speech at issue is proscribable" at all. 505 U. S., at 388. The Court explained that when the subcategory is confined to the most obviously proscribable instances, "no significant danger of idea or viewpoint discrimination exists," *ibid.*, and the expla-

nation was rounded out with some illustrative examples. None of them, however, resembles the case before us.[1]

The first example of permissible distinction is for a prohibition of obscenity unusually offensive "in its prurience," *ibid.* (emphasis deleted), with citation to a case in which the Seventh Circuit discussed the difference between obscene depictions of actual people and simulations. As that court noted, distinguishing obscene publications on this basis does not suggest discrimination on the basis of the message conveyed. *Kucharek* v. *Hanaway*, 902 F. 2d 513, 517–518 (1990). The opposite is true, however, when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning. The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. Thus, there is no kinship between the cross-burning statute and the core prurience example.

Nor does this case present any analogy to the statute prohibiting threats against the President, the second of *R. A. V.*'s examples of the virulence exception and the one the majority relies upon. *Ante*, at 362. The content discrimination in that statute relates to the addressee of the threat and reflects the special risks and costs associated with threatening the President. Again, however, threats against the President are not generally identified by reference to the content of any message that may accompany the threat, let alone any viewpoint, and there is no obvious correlation in fact between victim and message. Millions of statements are made about the President every day on every subject

[1] Although three examples are given, the third may be skipped here. It covers misleading advertising in a particular industry in which the risk of fraud is thought to be great, and thus deals with commercial speech with its separate doctrine and standards. *R. A. V.*, 505 U. S., at 388–389.

and from every standpoint; threats of violence are not an integral feature of any one subject or viewpoint as distinct from others. Differential treatment of threats against the President, then, selects nothing but special risks, not special messages. A content-based proscription of cross burning, on the other hand, may be a subtle effort to ban not only the intensity of the intimidation cross burning causes when done to threaten, but also the particular message of white supremacy that is broadcast even by nonthreatening cross burning.

I thus read *R. A. V.*'s examples of the particular virulence exception as covering prohibitions that are not clearly associated with a particular viewpoint, and that are consequently different from the Virginia statute. On that understanding of things, I necessarily read the majority opinion as treating *R. A. V.*'s virulence exception in a more flexible, pragmatic manner than the original illustrations would suggest. *Ante*, at 363. Actually, another way of looking at today's decision would see it as a slight modification of *R. A. V.*'s third exception, which allows content-based discrimination within a proscribable category when its "nature" is such "that there is no realistic possibility that official suppression of ideas is afoot." *R. A. V.*, *supra*, at 390. The majority's approach could be taken as recognizing an exception to *R. A. V.* when circumstances show that the statute's ostensibly valid reason for punishing particularly serious proscribable expression probably is not a ruse for message suppression, even though the statute may have a greater (but not exclusive) impact on adherents of one ideology than on others, *ante*, at 362–363.

## III

My concern here, in any event, is not with the merit of a pragmatic doctrinal move. For whether or not the Court should conceive of exceptions to *R. A. V.*'s general rule in a more practical way, no content-based statute should survive even under a pragmatic recasting of *R. A. V.* without a high probability that no "official suppression of ideas is afoot,"

505 U. S., at 390. I believe the prima facie evidence provision stands in the way of any finding of such a high probability here.

Virginia's statute provides that burning a cross on the property of another, a highway, or other public place is "prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2–423 (1996). While that language was added by amendment to the earlier portion of the statute criminalizing cross burning with intent to intimidate, *ante*, at 363 (plurality opinion), it was a part of the prohibitory statute at the time these respondents burned crosses, and the whole statute at the time of respondents' conduct is what counts for purposes of the First Amendment.

As I see the likely significance of the evidence provision, its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. To understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten. *Ante*, at 354–357. One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance. In the real world, of course, and in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more than the isolated fact of cross burning. Sometimes those circumstances will show an intent to intimidate, but sometimes they will be at least equivocal, as in cases where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public. In such a case, if the factfinder is aware of the prima facie evidence provision, as the jury was in respondent Black's case, *ante*, at 349–350, the provision will have the practical effect of tilting the jury's thinking in favor of the prosecution. What is significant is not that the provision

permits a factfinder's conclusion that the defendant acted with proscribable and punishable intent without any further indication, because some such indication will almost always be presented. What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. The effect of such a distortion is difficult to remedy, since any guilty verdict will survive sufficiency review unless the defendant can show that, "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U. S. 307, 319 (1979). The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression, as JUSTICE O'CONNOR notes. *Ante*, at 365–366 (plurality opinion).

To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. Thus, the appropriate way to consider the statute's prima facie evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute's terms show that suppression of ideas may be afoot. Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute's prohibition some expression that is doubtfully threatening though certainly distasteful.

It is difficult to conceive of an intimidation case that could be easier to prove than one with cross burning, assum-

ing any circumstances suggesting intimidation are present. The provision, apparently so unnecessary to legitimate prosecution of intimidation, is therefore quite enough to raise the question whether Virginia's content-based statute seeks more than mere protection against a virulent form of intimidation. It consequently bars any conclusion that an exception to the general rule of *R. A. V.* is warranted on the ground "that there is no realistic [or little realistic] possibility that official suppression of ideas is afoot," 505 U. S., at 390.[2] Since no *R. A. V.* exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, *id.*, at 395–396, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content.

## IV

I conclude that the statute under which all three of the respondents were prosecuted violates the First Amendment, since the statute's content-based distinction was invalid at the time of the charged activities, regardless of whether the prima facie evidence provision was given any effect in any respondent's individual case. In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct. I would therefore affirm the judgment of the Supreme Court of Virginia vacating the respondents' convictions and dismissing the indictments. Accordingly, I concur in the Court's judgment as to respondent Black and dissent as to respondents Elliott and O'Mara.

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[2] The same conclusion also goes for the second *R. A. V.* exception relating to "'secondary effects.'" 505 U. S., at 389 (citing *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986)). Our "secondary effects" jurisprudence presupposes that the regulation at issue is "unrelated to the suppression of free expression." *Ibid.*

JUSTICE THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas* v. *Johnson*, 491 U. S. 397, 422–429 (1989) (REHNQUIST, C. J., dissenting) (describing the unique position of the American flag in our Nation's 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

## I

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban . . . cross burning carried out with the intent to intimidate," *ante*, at 363, I believe that the majority errs in imputing an expressive component to the activity in question, see *ante*, at 362 (relying on one of the exceptions to the First Amendment's prohibition on content-based discrimination outlined in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992)). In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

### A

"In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic.'" *Texas* v. *Johnson*, *supra*, at 421 (REHNQUIST, C. J., dissenting) (quoting *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921)).

> "The world's oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was orga-

> nized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing, and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States." M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia vii (1991) (hereinafter Newton & Newton).

To me, the majority's brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods.

Such methods typically include cross burning—"a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 770 (1995) (THOMAS, J., concurring). For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder. J. Williams, Eyes on the Prize: America's Civil Rights Years, 1954–1965, p. 39 (1987). As the Government points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Brief for United States as *Amicus Curiae* 3–4, and n. 2.[1]

[1] *United States* v. *Guest*, 383 U. S. 745, 747–748, n. 1 (1966) (quoting indictment charging conspiracy under 18 U. S. C. § 241 (1964 ed.) to interfere with federally secured rights by, *inter alia*, "burning crosses at night in public view," "shooting Negroes," "beating Negroes," "killing Negroes," "damaging and destroying property of Negroes," and "pursuing Negroes in automobiles and threatening them with guns"); *United States* v. *Pospisil*, 186 F. 3d 1023, 1027 (CA8 1999) (defendants burned a cross in victims' yard, slashed their tires, and fired guns), cert. denied, 529 U. S. 1089 (2000); *United States* v. *Stewart*, 65 F. 3d 918, 922 (CA11 1995) (cross burning precipitated an exchange of gunfire between victim and perpetrators), cert. denied *sub nom. Daniel* v. *United States*, 516 U. S. 1134 (1996); *United States* v. *McDermott*, 29 F. 3d 404, 405 (CA8 1994) (defendants

Indeed, the connection between cross burning and violence is well ingrained, and lower courts have so recognized:

> "After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: 'Nothing good. Murder, hanging, rape, lynching. Just anything bad

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sought to discourage blacks from using public park by burning a cross in the park, as well as by "waving baseball bats, axe handles, and knives; throwing rocks and bottles; veering cars towards black persons; and physically chasing black persons out of the park"); *Cox* v. *State*, 585 So. 2d 182, 202 (Ala. Crim. App. 1991) (defendant participated in evening of cross burning and murder), cert. denied, 503 U. S. 987 (1992); R. Caro, The Years of Lyndon Johnson: Master of the Senate 847 (2002) (referring to a wave of "southern bombings, beatings, sniper fire, and cross-burnings" in late 1956 in response to efforts to desegregate schools, buses, and parks); Newton & Newton 21 (observing that "Jewish merchants were subjected to boycotts, threats, cross burnings, and sometimes acts of violence" by the Klan and its sympathizers); *id.*, at 361–362 (describing cross burning and beatings directed at a black family that refused demands to sell the home); *id.*, at 382 (describing incident of cross burning and brick throwing at home of Jewish officeholder); *id.*, at 583 (describing campaign of cross burning and property damage directed at Vietnamese immigrant fishermen); W. Wade, The Fiery Cross: The Ku Klux Klan in America 262–263 (1987) (describing incidents of cross burning, beatings, kidnaping, and other "terrorism" directed against union organizers in the South); *id.*, at 376 (cross burnings associated with shooting into cars); *id.*, at 377 (cross burnings associated with assaults on blacks); 1 R. Kluger, Simple Justice 378 (1975) (describing cross burning at, and subsequent shooting into, home of federal judge who issued desegregation decisions); Rubinowitz & Perry, Crimes Without Punishment: White Neighbors' Resistance to Black Entry, 92 J. Crim. L. & C. 335, 342, 354–355, 388, 408–410, 419, 420, 421, 423 (Fall 2001–Winter 2002) (noting that an "escalating campaign to eject a [minority] family" from a white neighborhood could begin with "cross burnings, window breaking, or threatening telephone calls," and culminate with bombings; describing other incidents of cross burning accompanied by violence); Cross Burned at Manakin, Third in Area, Richmond Times-Dispatch, Feb. 26, 1951, p. 4, App. 318 (describing 1951 Virginia cross burning accompanied by gunfire).

> that you can name. It is the worst thing that could happen to a person.' . . . Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. . . . *Seven months after the incident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this criminal conduct.*" *United States* v. *Skillman*, 922 F. 2d 1370, 1378 (CA9 1991) (emphasis added).

But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks. Because the modern Klan expanded the list of its enemies beyond blacks and "radical[s]" to include Catholics, Jews, most immigrants, and labor unions, Newton & Newton ix, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly agree with the observation made by the Commonwealth of Virginia:

> "A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police." Brief for Petitioner 26.

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

## B

Virginia's experience has been no exception. In Virginia, though facing widespread opposition in the 1920's, the Klan developed localized strength in the southeastern part of the Commonwealth, where there were reports of scattered raids and floggings. Newton & Newton 585. Although the Klan was disbanded at the national level in 1944, *ibid.*, a series of

cross burnings in Virginia took place between 1949 and 1952. See 262 Va. 764, 771, n. 2, 553 S. E. 2d 738, 742, n. 2 (2001) (collecting newspaper accounts of cross burnings in Virginia during that time period); see also Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, Richmond Times-Dispatch, Jan. 23, 1949, section 2, p. 1, App. 313, 314–315 (The second reported cross burning within a week in 1949 "brought to eight the number which have occurred in Virginia during the past year. Six of the incidents have occurred in Nansemond County. Four crosses were burned near Suffolk last Spring, and about 150 persons took part in the December 11 cross burning near Whaleyville. No arrests have been made in connection with any of the incidents").

Most of the crosses were burned on the lawns of black families, who either were business owners or lived in predominantly white neighborhoods. See Police Aid Requested by Teacher, Cross is Burned in Negro's Yard, Richmond News Leader, Jan. 21, 1949, p. 19, App. 312; Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, *supra*, at 313; Cross is Burned at Reedville Home, Richmond News Leader, Apr. 14, 1951, p. 1, App. 321. At least one of the cross burnings was accompanied by a shooting. Cross Burned at Manakin, Third in Area, *supra* n. 1, at 318. The crosses burned near residences were about five to six feet tall, while a "huge cross reminiscent of the Ku Klux Klan days" that burned "atop a hill" as part of the initiation ceremony of the secret organization of the Knights of Kavaliers was 12 feet tall. Huge Cross is Burned on Hill Just South of Covington, Richmond Times-Dispatch, Apr. 14, 1950, p. 6, App. 316. These incidents were, in the words of the time, "*terroristic [sic]*" and "un-American act[s], designed to *intimidate* Negroes from seeking their rights as citizens." Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, *supra*, at 315 (emphasis added).

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, "long considered dead in Virginia, is being revitalized in Richmond," Governor Battle announced that "Virginia 'might well consider passing legislation' to restrict the activities of the Ku Klux Klan." "State Might Well Consider" Restrictions on Ku Klux Klan, Governor Battle Comments, Richmond Times-Dispatch, Feb. 6, 1952, p. 7, App. 321. As newspapers reported at the time, the bill was "to ban the burning of crosses and other similar evidences of *terrorism*." Name Rider Approved by House, Richmond News Leader, Feb. 23, 1952, p. 1, App. 325 (emphasis added). The bill was presented to the House of Delegates by a former FBI agent and future two-term Governor, Delegate Mills E. Godwin, Jr. "Godwin said law and order in the State were impossible if organized groups could *create fear by intimidation*." Bill to Curb KKK Passed By the House, Action is Taken Without Debate, Richmond Times-Dispatch, Mar. 8, 1952, p. 5, App. 325 (emphasis added).

That in the early 1950's the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function "as an instrument of intimidation." W. Wade, The Fiery Cross: The Ku Klux Klan in America 185, 279 (1987).

Strengthening Delegate Godwin's explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia.[2] And, just two years

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[2] See, *e. g.*, Va. Code Ann. § 18–327 (1950) (repealed 1960) (required separation of "white" and "colored" at any place of entertainment or other public assemblage; violation was misdemeanor); Va. Code Ann. § 20–54 (1960) (repealed 1968) (prohibited racial intermarriage); Va. Code Ann. § 22–221 (1969) (repealed 1972) ("White and colored persons shall not be

after the enactment of this statute, Virginia's General Assembly embarked on a campaign of "massive resistance" in response to *Brown* v. *Board of Education*, 347 U. S. 483 (1954). See generally *Griffin* v. *School Bd. of Prince Edward Cty.*, 377 U. S. 218, 221 (1964); *Harrison* v. *Day*, 200 Va. 439, 448–454, 106 S. E. 2d 636, 644–648 (1959) (describing massive resistance as legislatively mandated attempt to close public schools rather than desegregate).

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that

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taught in the same school"); Va. Code Ann. § 24–120 (1969) (repealed 1970) (required separate listings for "white and colored persons" who failed to pay poll tax); Va. Code Ann. § 38–281 (1950) (repealed 1952) (prohibited fraternal associations from having "both white and colored members"); Va. Code Ann. § 53–42 (1967) (amended to remove "race" 1968) (required racial separation in prison); Va. Code Ann. § 56–114 (1974) (repealed 1975) (authorized State Corporation Commission to require "separate waiting rooms" for "white and colored races"); Va. Code Ann. § 56–326 (1969) (repealed 1970) (required motor carriers to "separate" their "white and colored passengers," violation was misdemeanor); §§ 56–390 and 56–396 (repealed 1970) (same for railroads); § 58–880 (repealed 1970) (required separate personal property tax books for "white[s]" and "colored").

the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

## II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

### A

"The threshold inquiry in ascertaining the constitutional analysis applicable to [a jury instruction involving a presumption] is to determine the nature of the presumption it describes." *Francis* v. *Franklin*, 471 U. S. 307, 313–314 (1985) (internal quotation marks omitted). We have categorized the presumptions as either permissive inferences or mandatory presumptions. *Id.*, at 314.

To the extent we do have a construction of this statute by the Virginia Supreme Court, we know that both the majority and the dissent agreed that the presumption was "a statutorily supplied *inference*," 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added); *id.*, at 795, 553 S. E. 2d, at 755 (Hassell, J., dissenting) ("Code § 18.2–423 creates a statutory *inference*" (emphasis added)). Under Virginia law, the term "inference" has a well-defined meaning and is distinct from the term "presumption." *Martin* v. *Phillips*, 235 Va. 523, 526, 369 S. E. 2d 397, 399 (1988).

> "A presumption is a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts.[1] The primary significance of a presumption is that it operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption.[2] No presumption, however, can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast.

> "[1]In contrast, *an inference*, sometimes loosely referred to as a presumption of fact, *does not compel a specific conclusion. An inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best.* 9 J. Wigmore, Evidence in Trials at Common Law § 2491(1), at 304 (Chad. rev. 1981).
>
> "[2]*An inference, on the other hand, does not invoke this procedural consequence of shifting the burden of production. Id.*"

*Ibid.* (some citations omitted; emphasis added).

Both the majority and the dissent below classified the clause in question as an "inference," and I see no reason to disagree, particularly in light of the instructions given to the jury in Black's case, requiring it to find guilt beyond a reasonable doubt both as to the fact that "the defendant burned or caused to be burned a cross in a public place," and that "he did so with the intent to intimidate any person or group of persons," 262 Va., at 796, 553 S. E. 2d, at 756 (Hassell, J., dissenting) (quoting jury instructions in Black's case).

Even though under Virginia law the statutory provision at issue here is characterized as an "inference," the Court must still inquire whether the label Virginia attaches corresponds to the categorization our cases have given such clauses. In this respect, it is crucial to observe that what Virginia law calls an "inference" is what our cases have termed a "permissive inference or presumption." *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 157 (1979).[3] Given that this

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[3] As the Court explained in *Allen*, a permissive inference or presumption "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact. . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permit-

Court's definitions of a "permissive inference" and a "mandatory presumption" track Virginia's definitions of "inference" and "presumption," the Court should judge the Virginia statute based on the constitutional analysis applicable to "inferences": they raise no constitutional flags unless there is "no rational way the trier could make the connection permitted by the inference." *Ibid.* As explained in Part I, *supra*, *not* making a connection between cross burning and intimidation would be irrational.

But even with respect to statutes containing a mandatory irrebuttable presumption as to intent, the Court has not shown much concern. For instance, there is no scienter requirement for statutory rape. See, *e. g.*, Tenn. Code Ann. § 39–13–506 (1997); Ore. Rev. Stat. Ann. § 163.365 (1989); Mo. Rev. Stat. § 566.032 (2000); Ga. Code Ann. § 16–6–3 (1996). That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, "[f]or purposes of the child molesting statute . . . consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16)." *Warrick* v. *State*, 538 N. E. 2d 952, 954 (Ind. App. 1989) (citing Ind. Code § 35–42–4–3 (1988)). The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering

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ted by the inference." 442 U. S., at 157 (citations omitted). By contrast, "[a] mandatory presumption . . . may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Ibid.*

the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

Statutes prohibiting possession of drugs with intent to distribute operate much the same way as statutory rape laws. Under these statutes, the intent to distribute is effectively satisfied by possession of some threshold amount of drugs. See, *e. g.*, Del. Code Ann., Tit. 16, § 4753A (1987); Mass. Gen. Laws, ch. 94C, § 32E (West 1997); S. C. Code Ann. § 44–53–370 (West 2000). As with statutory rape, the presumption of intent in such statutes is irrebuttable—not only can a person be arrested for the crime of possession with intent to distribute (or "trafficking") without any evidence of intent beyond quantity of drugs, but such person cannot even mount a defense to the element of intent. However, as with statutory rape statutes, our cases do not reveal any controversy with respect to the presumption of intent in these drug statutes.

Because the prima facie clause here is an inference, not an irrebuttable presumption, there is all the more basis under our due process precedents to sustain this statute.

## B

The plurality, however, is troubled by the presumption because this is a First Amendment case. The plurality laments the fate of an innocent cross burner who burns a cross, but does so without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits "the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *Ante*, at 365. First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still re-

quires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable ultimately results in dismissed charges. A regulation of pornography is one such example. While possession of child pornography is illegal, *New York* v. *Ferber*, 458 U. S. 747, 764 (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller* v. *California*, 413 U. S. 15 (1973). As a result, those pornographers trafficking in images of adults who look like minors may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This "chilling" effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the Members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality's analysis, the determination whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill* v. *Colorado*, 530 U. S. 703 (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments from "unwanted advice" and "unwanted communication," *id.*, at 708, 716, 717, 729. In so concluding, the Court placed heavy reliance on the "vulnerable physical and emotional conditions" of patients. *Id.*, at 729. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on "unwanted advice," which, notably, can be given only from a distance of at least eight feet from a prospective patient, justified by the countervailing interest in obtaining an abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross,

but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience, see 262 Va., at 782, 553 S. E. 2d, at 748–749 (Hassell, J., dissenting); see also App. 93–97, to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

## III

Because I would uphold the validity of this statute, I respectfully dissent.

Syllabus

# PACIFICARE HEALTH SYSTEMS, INC., ET AL. *v.* BOOK ET AL.

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

No. 02–215. Argued February 24, 2003—Decided April 7, 2003

Respondent physicians filed suit alleging that managed-health-care organizations, including petitioners, violated, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act (RICO) by failing to reimburse them for health-care services that they had provided to patients covered by the organizations' plans. Petitioners moved to compel arbitration. The District Court refused to compel arbitration of the RICO claims on the ground that the arbitration clauses in the parties' agreements prohibited awards of "punitive damages," and hence an arbitrator lacked authority to award treble damages under RICO. Accordingly, the court deemed the arbitration agreements unenforceable with respect to those claims. The Eleventh Circuit affirmed.

*Held:* It is unclear whether the agreements actually prevent an arbitrator from awarding treble damages under RICO. This Court's cases have placed different statutory treble damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards. In particular, the Court has repeatedly acknowledged that RICO's treble-damages provision is remedial in nature, and it is not clear that the parties intended the term "punitive" to encompass claims for treble damages under RICO. Since the Court does not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreement unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. It would be premature for the Court to address them; the proper course is to compel arbitration. Pp. 403–407.

285 F. 3d 971, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which all other Members joined, except THOMAS, J., who took no part in the consideration or decision of the case.

*William E. Grauer* argued the cause for petitioners. With him on the briefs were *Christopher R. J. Pace*, *James W. Quinn*, *Jeffrey S. Klein*, *Edward Soto*, and *Gregory S. Coleman*.

*Joe R. Whatley, Jr.*, argued the cause for respondents. With him on the brief were *Charlene P. Ford* and *James B. Tilghman, Jr.**

JUSTICE SCALIA delivered the opinion of the Court.

In this case, we are asked to decide whether respondents can be compelled to arbitrate claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*, notwithstanding the fact that the parties' arbitration agreements may be construed to limit the arbitrator's authority to award damages under that statute.

## I

Respondents are members of a group of physicians who filed suit against managed-health-care organizations including petitioners PacifiCare Health Systems, Inc., and PacifiCare Operations, Inc. (collectively, PacifiCare), and UnitedHealthcare, Inc., and UnitedHealth Group Inc. (collectively, United). These physicians alleged that the defendants unlawfully failed to reimburse them for health-care services that they had provided to patients covered by defendants' health plans. They brought causes of action under RICO, the Employee Retirement Income Security Act of 1974 (ERISA), and federal and state prompt-pay statutes, as well as claims for breach of contract, unjust enrichment, and *in*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Evan M. Tager*, *Miriam R. Nemetz*, and *Robin S. Conrad;* for the National Association of Manufacturers et al. by *Miguel A. Estrada*, *Andrew S. Tulumello*, *Jan S. Amundson*, *Quentin Riegel*, and *Stephanie Kanwit;* and for the Washington Legal Foundation by *Christopher Landau*, *Ashley C. Parrish*, *Daniel J. Popeo*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the National Association of Consumer Advocates by *Craig Jordan;* for Public Citizen, Inc., by *Scott L. Nelson* and *Brian Wolfman;* and for Trial Lawyers for Public Justice by *F. Paul Bland, Jr.*

*quantum meruit*. *In re: Managed Care Litigation*, 132 F. Supp. 2d 989, 992 (SD Fla. 2000).

Of particular concern here, PacifiCare and United moved the District Court to compel arbitration, arguing that provisions in their contracts with respondents required arbitration of these disputes, including those arising under RICO. *Ibid.* Respondents opposed the motion on the ground that, because the arbitration provisions prohibit an award of punitive damages, see App. 107, 147, 168, 212, respondents could not obtain "meaningful relief" in arbitration for their claims under the RICO statute, which authorizes treble damages, 18 U. S. C. § 1964(c). See *Paladino* v. *Avnet Computer Technologies, Inc.*, 134 F. 3d 1054, 1062 (CA11 1998) (holding that where a remedial limitation in an arbitration agreement prevents a plaintiff from obtaining "meaningful relief" for a statutory claim, the agreement to arbitrate is unenforceable with respect to that claim).

The District Court denied petitioners' request to compel arbitration of the RICO claims. 132 F. Supp. 2d, at 1007. The court concluded that given the remedial limitations in the relevant contracts, it was, indeed, "faced with a potential *Paladino* situation . . . , where the plaintiff may not be able to obtain meaningful relief for allegations of statutory violations in an arbitration forum." *Id.*, at 1005. Accordingly, it found the arbitration agreements unenforceable with respect to respondents' RICO claims. *Id.*, at 1007. The Eleventh Circuit affirmed "for the reasons set forth in [the District Court's] comprehensive opinion," *In re: Humana Inc. Managed Care Litigation*, 285 F. 3d 971, 973 (2002), and we granted certiorari, 537 U. S. 946 (2002).

## II

Petitioners argue that whether the remedial limitations render their arbitration agreements unenforceable is not a question of "arbitrability," and hence should have been decided by an arbitrator, rather than a court, in the first in-

stance. They also claim that even if this question is one of arbitrability, and is therefore properly within the purview of the courts at this time, the remedial limitations at issue do not require invalidation of their arbitration agreements. Either way, petitioners contend, the lower courts should have compelled arbitration. We conclude that it would be premature for us to address these questions at this time.

Our decision in *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528 (1995), supplies the analytic framework for assessing the ripeness of this dispute. In *Vimar*, we dealt with a bill of lading concerning a shipment of goods from Morocco to Massachusetts. Upon receipt of the goods, the purchaser discovered that they had been damaged, and, along with its insurer (Vimar), filed suit against the shipper. The shipper sought to compel arbitration, relying on choice-of-law and arbitration clauses in the bill of lading under which disputes arising out of the parties' agreement were to be governed by Japanese law and resolved through arbitration before the Tokyo Maritime Arbitration Commission. Vimar countered by arguing that the arbitration clause violated the Carriage of Goods by Sea Act (COGSA), 46 U. S. C. App. § 1300 *et seq.*, and hence was unenforceable. 515 U. S., at 531–532. In particular, Vimar claimed that "there is no guarantee foreign arbitrators will apply COGSA"; that the foreign arbitrator was likely to apply rules of Japanese law under which respondents' liability might be less than what it would be under COGSA; and that this would violate "[t]he central guarantee of [COGSA] § 3(8) . . . that the terms of a bill of lading may not relieve the carrier of obligations or diminish the legal duties specified by the Act." *Id.*, at 539.

Notwithstanding Vimar's insistence that the arbitration agreement violated federal policy as embodied in COGSA, we declined to reach the issue and held that the arbitration clause was, at least initially, enforceable. "At this interlocutory stage," we explained, "it is not established what law the arbitrators will apply to petitioner's claims or that petitioner

will receive diminished protection as a result. The arbitrators may conclude that COGSA applies of its own force or that Japanese law does not apply so that, under another clause of the bill of lading, COGSA controls." *Id.*, at 540. We further emphasized that "mere speculation that the foreign arbitrators *might* apply Japanese law which, depending on the proper construction of COGSA, *might* reduce respondents' legal obligations, does not in and of itself lessen liability under COGSA § 3(8)," nor did it provide an adequate basis upon which to declare the relevant arbitration agreement unenforceable. *Id.*, at 541 (emphases added). We found that "[w]hatever the merits of petitioner's comparative reading of COGSA and its Japanese counterpart, its claim is premature." *Id.*, at 540.

The case at bar arrives in a similar posture. Two of the four arbitration agreements at issue provide that "punitive damages shall not be awarded [in arbitration]," App. 107, 147; one provides that "[t]he arbitrators . . . shall have no authority to award any punitive or exemplary damages," *id.*, at 212; and one provides that "[t]he arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages . . . ," *id.*, at 168. Respondents insist, and the District Court agreed, 132 F. Supp. 2d, at 1000–1001, 1005, that these provisions preclude an arbitrator from awarding treble damages under RICO. We think that neither our precedents nor the ambiguous terms of the contracts make this clear.

Our cases have placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards. Thus, in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 784 (2000), we characterized the treble-damages provision of the False Claims Act, 31 U. S. C. §§ 3729–3733, as "essentially punitive in nature." In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485 (1977), on the other hand, we explained that the treble-

damages provision of § 4 of the Clayton Act, 15 U. S. C. § 15, "is in essence a remedial provision." Likewise in *American Soc. of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556, 575 (1982), we noted that "the antitrust private action [which allows for treble damages] was created primarily as *a remedy* for the victims of antitrust violations." (Emphasis added.) And earlier this Term, in *Cook County* v. *United States ex rel. Chandler*, *ante*, at 130, we stated that "it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives." Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature. In *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 151 (1987), we stated that "[b]oth RICO and the Clayton Act are designed *to remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees." (Emphasis added.) And in *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 241 (1987) we took note of the "remedial function" of RICO's treble-damages provision.

In light of our case law's treatment of statutory treble damages, and given the uncertainty surrounding the parties' intent with respect to the contractual term "punitive,"[1] the application of the disputed language to respondents' RICO claims is, to say the least, in doubt. And *Vimar* instructs that we should not, on the basis of "mere speculation" that an arbitrator might interpret these ambiguous agreements

[1] Contrary to respondents' contention, the prohibition in Dr. Manual Porth's contract against an arbitrator's awarding "extracontractual" damages is likewise ambiguous. This language might mean, as respondents would have it, that an arbitrator is prohibited from awarding any damages other than for breach of contract. Brief for Respondents 20–21. But it might only mean that an arbitrator cannot award noneconomic damages such as punitive or mental-anguish damages. See 3 D. Dobbs, Law of Remedies: Damages-Equity-Restitution § 12.1(1), p. 8 (2d ed. 1993) ("Punitive damages and mental anguish damages are thus considered 'extracontractual,' and usually denied in pure contract cases").

in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved.[2] 515 U. S., at 541. In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. As in *Vimar*, the proper course is to compel arbitration. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS took no part in the consideration or decision of this case.

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[2] If the contractual ambiguity could itself be characterized as raising a "gateway" question of arbitrability, then it would be appropriate for a court to answer it in the first instance. But we noted just this Term that "the phrase 'question of arbitrability' has a . . . limited scope." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002). Indeed, we have "found the phrase [question of arbitrability] applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.*, at 83–84. Given our presumption in favor of arbitration, *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24–25 (1983), we think the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability.

Syllabus

# STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* CAMPBELL ET AL.

## CERTIORARI TO THE SUPREME COURT OF UTAH

No. 01–1289. Argued December 11, 2002—Decided April 7, 2003

Although investigators and witnesses concluded that Curtis Campbell caused an accident in which one person was killed and another permanently disabled, his insurer, petitioner State Farm Mutual Automobile Insurance Company (State Farm), contested liability, declined to settle the ensuing claims for the $50,000 policy limit, ignored its own investigators' advice, and took the case to trial, assuring Campbell and his wife that they had no liability for the accident, that State Farm would represent their interests, and that they did not need separate counsel. In fact, a Utah jury returned a judgment for over three times the policy limit, and State Farm refused to appeal. The Utah Supreme Court denied Campbell's own appeal, and State Farm paid the entire judgment. The Campbells then sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. The trial court's initial ruling granting State Farm summary judgment was reversed on appeal. On remand, the court denied State Farm's motion to exclude evidence of dissimilar out-of-state conduct. In the first phase of a bifurcated trial, the jury found unreasonable State Farm's decision not to settle. Before the second phase, this Court refused, in *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, to sustain a $2 million punitive damages award which accompanied a $4,000 compensatory damages award. The trial court denied State Farm's renewed motion to exclude dissimilar out-of-state conduct evidence. In the second phase, which addressed, *inter alia*, compensatory and punitive damages, evidence was introduced that pertained to State Farm's business practices in numerous States but bore no relation to the type of claims underlying the Campbells' complaint. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. Applying *Gore*, the Utah Supreme Court reinstated the $145 million punitive damages award.

*Held:* A punitive damages award of $145 million, where full compensatory damages are $1 million, is excessive and violates the Due Process Clause of the Fourteenth Amendment. Pp. 416–429.

(a) Compensatory damages are intended to redress a plaintiff's concrete loss, while punitive damages are aimed at the different purposes

of deterrence and retribution. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeaser. *E. g., Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 433. Punitive damages awards serve the same purpose as criminal penalties. However, because civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute danger of arbitrary deprivation of property, which is heightened when the decisionmaker is presented with evidence having little bearing on the amount that should be awarded. Thus, this Court has instructed courts reviewing punitive damages to consider (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Gore, supra,* at 575. A trial court's application of these guideposts is subject to *de novo* review. *Cooper Industries, supra,* at 424. Pp. 416–418.

(b) Under *Gore*'s guideposts, this case is neither close nor difficult. Pp. 418–428.

(1) To determine a defendant's reprehensibility—the most important indicium of a punitive damages award's reasonableness—a court must consider whether: the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident. *Gore*, 517 U. S., at 576–577. It should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.*, at 575. In this case, State Farm's handling of the claims against the Campbells merits no praise, but a more modest punishment could have satisfied the State's legitimate objectives. Instead, this case was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. However, a State cannot punish a defendant for conduct that may have been lawful where it occurred, *id.*, at 572. Nor does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction. The Campbells argue that such evidence was used merely to demonstrate, generally, State Farm's motives against its insured. Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to

the specific harm suffered by the plaintiff. More fundamentally, in relying on such evidence, the Utah courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. Due process does not permit courts to adjudicate the merits of other parties' hypothetical claims under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct, for nonparties are not normally bound by another plaintiff's judgment. For the same reasons, the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. To justify punishment based upon recidivism, courts must ensure the conduct in question replicates the prior transgressions. There is scant evidence of repeated misconduct of the sort that injured the Campbells, and a review of the decisions below does not convince this Court that State Farm was only punished for its actions toward the Campbells. Because the Campbells have shown no conduct similar to that which harmed them, the only relevant conduct to the reprehensibility analysis is that which harmed them. Pp. 419–424.

(2) With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award; but, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. See, *e. g.*, 517 U. S., at 581. Single-digit multipliers are more likely to comport with due process, while still achieving the State's deterrence and retribution goals, than are awards with 145-to-1 ratios, as in this case. Because there are no rigid benchmarks, ratios greater than those that this Court has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages, *id.*, at 582, but when compensatory damages are substantial, then an even lesser ratio can reach the outermost limit of the due process guarantee. Here, there is a presumption against an award with a 145-to-1 ratio; the $1 million compensatory award for a year and a half of emotional distress was substantial; and the distress caused by outrage and humiliation the Campbells suffered is likely a component of both the compensatory and punitive damages awards. The Utah Supreme Court sought to justify the massive award based on premises bearing no relation to the award's reasonableness or proportionality to the harm. Pp. 424–428.

(3) The Court need not dwell on the third guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of grand fraud, which

Syllabus

is dwarfed by the $145 million punitive damages award. The Utah Supreme Court's references to a broad fraudulent scheme drawn from out-of-state and dissimilar conduct evidence were insufficient to justify this amount. P. 428.

(c) Applying *Gore*'s guideposts to the facts here, especially in light of the substantial compensatory damages award, likely would justify a punitive damages award at or near the compensatory damages amount. The Utah courts should resolve in the first instance the proper punitive damages calculation under the principles discussed here. P. 429.

65 P. 3d 1134, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. SCALIA, J., *post*, p. 429, THOMAS, J., *post*, p. 429, and GINSBURG, J., *post*, p. 430, filed dissenting opinions.

*Sheila L. Birnbaum* argued the cause for petitioner. With her on the briefs were *Barbara Wrubel*, *Douglas W. Dunham*, and *Ellen P. Quackenbos*.

*Laurence H. Tribe* argued the cause for respondents. With him on the brief were *Kenneth Chesebro*, *Jonathan S. Massey*, *Roger P. Christensen*, and *Karra J. Porter*.*

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*Briefs of *amici curiae* urging reversal were filed for the Alliance of American Insurers et al. by *Mark F. Horning*, *Charles G. Cole*, and *Bennett Evan Cooper;* for the American Council of Life Insurers by *William F. Sheehan* and *Victoria E. Fimea;* for the American Tort Reform Association by *Roy T. Englert, Jr.*, and *Alan E. Untereiner;* for the Business Roundtable by *Malcolm E. Wheeler;* for the Chamber of Commerce of the United States by *Andrew L. Frey*, *Andrew H. Schapiro*, *Evan M. Tager*, and *Robin S. Conrad;* for Common Good by *Philip K. Howard*, *Robert A. Long, Jr.*, and *Keith A. Noreika;* for the Defense Research Institute by *Patrick Lysaught;* for Ford Motor Co. by *Theodore J. Boutrous, Jr.*, *Miguel A. Estrada*, *John M. Thomas*, and *Michael J. O'Reilly;* for the Health Insurance Association of America et al. by *Robert N. Weiner* and *Nancy L. Perkins;* for the International Mass Retail Association et al. by *Daniel H. Bromberg*, *Robert J. Verdisco*, *David F. Zoll*, and *Donald D. Evans;* for the National Association of Manufacturers by *Carter G. Phillips*, *Gene C. Schaerr*, *Richard D. Bernstein*, *Stephen B. Kinnaird*, *Jan S. Amundson*, and *Quentin Riegel;* for the National Conference of Insurance Legislators by *Patrick Lynch;* for the Product Liability Advisory Council, Inc., by

JUSTICE KENNEDY delivered the opinion of the Court.

We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of $145 million in punitive damages, where full compensatory damages are $1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

I

In 1981, Curtis Campbell (Campbell) was driving with his wife, Inez Preece Campbell, in Cache County, Utah. He decided to pass six vans traveling ahead of them on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile, and col-

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*Victor E. Schwartz* and *Leah Lorber;* for the Washington Legal Foundation et al. by *Arvin Maskin*, *Daniel J. Popeo*, and *Paul D. Kamenar;* and for A. Mitchell Polinsky et al. by *Dan M. Kahan.*

Briefs of *amici curiae* urging affirmance were filed for the State of Minnesota et al. by *Mike Hatch*, Attorney General of Minnesota, and by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Frankie Sue Del Papa* of Nevada, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, and *Sheldon Whitehouse* of Rhode Island; for the Association of Trial Lawyers of America by *Jeffrey Robert White;* for the California Consumer Health Care Council, Inc., by *Eugene R. Anderson* and *Daniel Healy;* for Certain Leading Social Scientists et al. by *Paul M. Simmons* and *William M. Shernoff;* and for Keith N. Hylton by *Garry B. Bryant.*

Briefs of *amici curiae* were filed for Abbott Laboratories et al. by *Walter Dellinger;* for DeKalb Genetics Corp. by *Seth P. Waxman* and *David W. Ogden;* and for the Truck Insurance Exchange et al. by *Ellis J. Horvitz*, *S. Thomas Todd*, and *Mary-Christine Sungaila.*

lided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions as to who caused the accident, but "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." 65 P. 3d 1134, 1141 (Utah 2001). Campbell's insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless decided to contest liability and declined offers by Slusher and Ospital's estate (Ospital) to settle the claims for the policy limit of $50,000 ($25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." *Id.*, at 1142. To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the $135,849 in excess liability. Its counsel made this clear to the Campbells: " 'You may want to put for sale signs on your property to get things moving.' " *Ibid.* Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad-faith action against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions con-

cerning the bad-faith action. No settlement could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal in the wrongful-death and tort actions. *Slusher* v. *Ospital*, 777 P. 2d 437. State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. The trial court initially granted State Farm's motion for summary judgment because State Farm had paid the excess verdict, but that ruling was reversed on appeal. 840 P. 2d 130 (Utah App. 1992). On remand State Farm moved *in limine* to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah, but the trial court denied the motion. At State Farm's request the trial court bifurcated the trial into two phases conducted before different juries. In the first phase the jury determined that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict.

Before the second phase of the action against State Farm we decided *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), and refused to sustain a $2 million punitive damages award which accompanied a verdict of only $4,000 in compensatory damages. Based on that decision, State Farm again moved for the exclusion of evidence of dissimilar out-of-state conduct. App. to Pet. for Cert. 168a–172a. The trial court denied State Farm's motion. *Id.*, at 189a.

The second phase addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages. The Utah Supreme Court aptly characterized this phase of the trial:

> "State Farm argued during phase II that its decision to take the case to trial was an 'honest mistake' that did

> not warrant punitive damages. In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. This scheme was referred to as State Farm's 'Performance, Planning and Review,' or PP & R, policy. To prove the existence of this scheme, the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations. Although State Farm moved prior to phase II of the trial for the exclusion of such evidence and continued to object to it at trial, the trial court ruled that such evidence was admissible to determine whether State Farm's conduct in the Campbell case was indeed intentional and sufficiently egregious to warrant punitive damages." 65 P. 3d, at 1143.

Evidence pertaining to the PP&R policy concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. Both parties appealed.

The Utah Supreme Court sought to apply the three guideposts we identified in *Gore*, *supra*, at 574–575, and it reinstated the $145 million punitive damages award. Relying in large part on the extensive evidence concerning the PP&R policy, the court concluded State Farm's conduct was reprehensible. The court also relied upon State Farm's "massive wealth" and on testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability," 65 P. 3d, at 1153, and concluded that the ratio

between punitive and compensatory damages was not unwarranted. Finally, the court noted that the punitive damages award was not excessive when compared to various civil and criminal penalties State Farm could have faced, including $10,000 for each act of fraud, the suspension of its license to conduct business in Utah, the disgorgement of profits, and imprisonment. *Id.*, at 1154–1155. We granted certiorari. 535 U. S. 1111 (2002).

## II

We recognized in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424 (2001), that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. *Id.*, at 432. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Ibid.* (citing Restatement (Second) of Torts § 903, pp. 453–454 (1979)). By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries, supra,* at 432; see also *Gore, supra,* at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U. S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. *Cooper Industries, supra; Gore, supra,* at 559; *Honda Motor Co.* v. *Oberg,* 512 U. S. 415 (1994); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443 (1993); *Haslip, supra.* The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *Cooper Industries, supra,* at 433; *Gore,* 517 U. S., at 562; see also *id.*, at 587 (BREYER, J., concurring) ("This constitutional concern, itself

harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion"). The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.*, at 574; *Cooper Industries*, *supra*, at 433 ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion"). To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. *Haslip*, *supra*, at 42 (O'CONNOR, J., dissenting) ("Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category").

Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. We have admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor*, *supra*, at 432; see also *Haslip*, *supra*, at 59 (O'CONNOR, J., dissenting) ("[T]he Due Process Clause

does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim"). Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," App. to Pet. for Cert. 108a–109a, do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.

In light of these concerns, in *Gore*, *supra*, we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.*, at 575. We reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. 532 U. S. 424. Exacting appellate review ensures that an award of punitive damages is based upon an "'application of law, rather than a decisionmaker's caprice.'" *Id.*, at 436 (quoting *Gore, supra*, at 587 (BREYER, J., concurring)).

## III

Under the principles outlined in *BMW of North America, Inc.* v. *Gore*, this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award. We address each guidepost of *Gore* in some detail.

A

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U. S., at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.*, at 576–577. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.*, at 575.

Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this

reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells. 65 P. 3d, at 1143 ("[T]he Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide"). This was, as well, an explicit rationale of the trial court's decision in approving the award, though reduced from $145 million to $25 million. App. to Pet. for Cert. 120a ("[T]he Campbells demonstrated, through the testimony of State Farm employees who had worked outside of Utah, and through expert testimony, that this pattern of claims adjustment under the PP&R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated from the highest levels of corporate management").

The Campbells contend that State Farm has only itself to blame for the reliance upon dissimilar and out-of-state conduct evidence. The record does not support this contention. From their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities. App. 208 ("You're going to hear evidence that even the insurance commission in Utah and around the country are unwilling or inept at protecting people against abuses"); *id.*, at 242 ("[T]his is a very important case. . . . [I]t transcends the Campbell file. It involves a nationwide practice. And you, here, are going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages"). This was a po-

sition maintained throughout the litigation. In opposing State Farm's motion to exclude such evidence under *Gore*, the Campbells' counsel convinced the trial court that there was no limitation on the scope of evidence that could be considered under our precedents. App. to Pet. for Cert. 172a ("As I read the case *[Gore]*, I was struck with the fact that a clear message in the case . . . seems to be that courts in punitive damages cases should receive more evidence, not less. And that the court seems to be inviting an even broader area of evidence than the current rulings of the court would indicate"); *id.*, at 189a (trial court ruling).

A State cannot punish a defendant for conduct that may have been lawful where it occurred. *Gore*, *supra*, at 572; *Bigelow* v. *Virginia*, 421 U. S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co.* v. *Head*, 234 U. S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound"); *Huntington* v. *Attrill*, 146 U. S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States"). Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need

to apply the laws of their relevant jurisdiction. *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 821–822 (1985).

Here, the Campbells do not dispute that much of the out-of-state conduct was lawful where it occurred. They argue, however, that such evidence was not the primary basis for the punitive damages award and was relevant to the extent it demonstrated, in a general sense, State Farm's motive against its insured. Brief for Respondents 46–47 ("[E]ven if the practices described by State Farm were not malum in se or malum prohibitum, they became relevant to punitive damages to the extent they were used as tools to implement State Farm's wrongful PP&R policy"). This argument misses the mark. Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. *Gore*, 517 U. S., at 572–573 (noting that a State "does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the State] or its residents"). A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction. *Id.*, at 569 ("[T]he States need not, and in fact do not, provide such protection in a uniform manner").

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive dam-

ages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. 65 P. 3d, at 1149 ("Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate' "). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore*, *supra*, at 593 (BREYER, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," *Gore*, *supra*, at 577, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions. *TXO*, 509 U. S., at 462, n. 28 (noting that courts should look to " 'the existence and frequency of similar past conduct' " (quoting *Haslip*, 499 U. S., at 21–22)).

The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells. Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims

that had nothing to do with a third-party lawsuit was introduced at length. Other evidence concerning reprehensibility was even more tangential. For example, the Utah Supreme Court criticized State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrupted its employees. 65 P. 3d, at 1148, 1150. The Campbells attempt to justify the courts' reliance upon this unrelated testimony on the theory that each dollar of profit made by underpaying a third-party claimant is the same as a dollar made by underpaying a first-party one. Brief for Respondents 45; see also 65 P. 3d, at 1150 ("State Farm's continuing illicit practice created market disadvantages for other honest insurance companies because these practices increased profits. As plaintiffs' expert witnesses established, such wrongfully obtained competitive advantages have the potential to pressure other companies to adopt similar fraudulent tactics, or to force them out of business. Thus, such actions cause distortions throughout the insurance market and ultimately hurt all consumers"). For the reasons already stated, this argument is unconvincing. The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

B

Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 517 U. S., at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive

award"); *TXO, supra,* at 458. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U. S., at 23–24. We cited that 4-to-1 ratio again in *Gore.* 517 U. S., at 581. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. *Id.*, at 581, and n. 33. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, or, in this case, of 145 to 1.

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.;* see also *ibid.* (positing that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See Restatement (Second) of Torts § 908, Comment *c*, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both").

The Utah Supreme Court sought to justify the massive award by pointing to State Farm's purported failure to report a prior $100 million punitive damages award in Texas to its corporate headquarters; the fact that State Farm's policies have affected numerous Utah consumers; the fact that State Farm will only be punished in one out of every 50,000 cases as a matter of statistical probability; and State Farm's enormous wealth. 65 P. 3d, at 1153. Since the Supreme

Court of Utah discussed the Texas award when applying the ratio guidepost, we discuss it here. The Texas award, however, should have been analyzed in the context of the reprehensibility guidepost only. The failure of the company to report the Texas award is out-of-state conduct that, if the conduct were similar, might have had some bearing on the degree of reprehensibility, subject to the limitations we have described. Here, it was dissimilar, and of such marginal relevance that it should have been accorded little or no weight. The award was rendered in a first-party lawsuit; no judgment was entered in the case; and it was later settled for a fraction of the verdict. With respect to the Utah Supreme Court's second justification, the Campbells' inability to direct us to testimony demonstrating harm to the people of Utah (other than those directly involved in this case) indicates that the adverse effect on the State's general population was in fact minor.

The remaining premises for the Utah Supreme Court's decision bear no relation to the award's reasonableness or proportionality to the harm. They are, rather, arguments that seek to defend a departure from well-established constraints on punitive damages. While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the Campbells. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U. S., at 585 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business"); see also *id.*, at 591 (BREYER, J., concurring) ("[Wealth] provides an open-ended basis for

inflating awards when the defendant is wealthy . . . . That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct"). The principles set forth in *Gore* must be implemented with care, to ensure both reasonableness and proportionality.

C

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." *Id.*, at 575. We note that, in the past, we have also looked to criminal penalties that could be imposed. *Id.*, at 583; *Haslip*, 499 U. S., at 23. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, 65 P. 3d, at 1154, an amount dwarfed by the $145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

## IV

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

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

*It is so ordered.*

JUSTICE SCALIA, dissenting.

I adhere to the view expressed in my dissenting opinion in *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 598–599 (1996), that the Due Process Clause provides no substantive protections against "excessive" or "'unreasonable'" awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW* v. *Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect. See *id.*, at 599. I would affirm the judgment of the Utah Supreme Court.

JUSTICE THOMAS, dissenting.

I would affirm the judgment below because "I continue to believe that the Constitution does not constrain the size of punitive damages awards." *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 443 (2001) (THOMAS, J., concurring) (citing *BMW of North America*,

*Inc.* v. *Gore*, 517 U. S. 559, 599 (1996) (SCALIA, J., joined by THOMAS, J., dissenting)). Accordingly, I respectfully dissent.

JUSTICE GINSBURG, dissenting.

Not long ago, this Court was hesitant to impose a federal check on state-court judgments awarding punitive damages. In *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), the Court held that neither the Excessive Fines Clause of the Eighth Amendment nor federal common law circumscribed awards of punitive damages in civil cases between private parties. *Id.*, at 262–276, 277–280. Two years later, in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991), the Court observed that "unlimited jury [or judicial] discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities," *id.*, at 18; the Due Process Clause, the Court suggested, would attend to those sensibilities and guard against unreasonable awards, *id.*, at 17–24. Nevertheless, the Court upheld a punitive damages award in *Haslip* "more than 4 times the amount of compensatory damages, . . . more than 200 times [the plaintiff's] out-of-pocket expenses," and "much in excess of the fine that could be imposed." *Id.*, at 23. And in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443 (1993), the Court affirmed a state-court award "526 times greater than the actual damages awarded by the jury." *Id.*, at 453;[1] cf. *Browning-Ferris*, 492 U. S., at 262 (ratio of punitive to compensatory damages over 100 to 1).

It was not until 1996, in *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, that the Court, for the first time, invalidated a state-court punitive damages assessment as un-

[1] By switching the focus from the ratio of punitive to compensatory damages to the potential loss to the plaintiffs had the defendant succeeded in its illicit scheme, the Court could describe the relevant ratio in *TXO* as 10 to 1. See *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 581, and n. 34 (1996).

reasonably large. See *id.*, at 599 (SCALIA, J., dissenting). If our activity in this domain is now "well established," see *ante*, at 416, 427, it takes place on ground not long held.

In *Gore*, I stated why I resisted the Court's foray into punitive damages "territory traditionally within the States' domain." 517 U. S., at 612 (dissenting opinion). I adhere to those views, and note again that, unlike federal habeas corpus review of state-court convictions under 28 U. S. C. § 2254, the Court "work[s] at this business [of checking state courts] alone," unaided by the participation of federal district courts and courts of appeals. 517 U. S., at 613. It was once recognized that "the laws of the particular State must suffice [to superintend punitive damages awards] until judges or legislators authorized to do so initiate system-wide change." *Haslip*, 499 U. S., at 42 (KENNEDY, J., concurring in judgment). I would adhere to that traditional view.

## I

The large size of the award upheld by the Utah Supreme Court in this case indicates why damages-capping legislation may be altogether fitting and proper. Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers. In this regard, I count it significant that, on the key criterion "reprehensibility," there is a good deal more to the story than the Court's abbreviated account tells.

Ample evidence allowed the jury to find that State Farm's treatment of the Campbells typified its "Performance, Planning and Review" (PP&R) program; implemented by top management in 1979, the program had "the explicit objective of using the claims-adjustment process as a profit center." App. to Pet. for Cert. 116a. "[T]he Campbells presented considerable evidence," the trial court noted, documenting "that the PP&R program . . . has functioned, and continues to function, as an unlawful scheme . . . to deny benefits owed consumers by paying out less than fair value in order to meet

preset, arbitrary payout targets designed to enhance corporate profits." *Id.*, at 118a–119a. That policy, the trial court observed, was encompassing in scope; it "applied equally to the handling of both third-party and first-party claims." *Id.*, at 119a. But cf. *ante*, at 423–424, 427 (suggesting that State Farm's handling of first-party claims has "nothing to do with a third-party lawsuit").

Evidence the jury could credit demonstrated that the PP&R program regularly and adversely affected Utah residents. Ray Summers, "the adjuster who handled the Campbell case and who was a State Farm employee in Utah for almost twenty years," described several methods used by State Farm to deny claimants fair benefits, for example, "falsifying or withholding of evidence in claim files." App. to Pet. for Cert. 121a. A common tactic, Summers recounted, was to "unjustly attac[k] the character, reputation and credibility of a claimant and mak[e] notations to that effect in the claim file to create prejudice in the event the claim ever came before a jury." *Id.*, at 130a (internal quotation marks omitted). State Farm manager Bob Noxon, Summers testified, resorted to a tactic of this order in the Campbell case when he "instruct[ed] Summers to write in the file that Todd Ospital (who was killed in the accident) was speeding because he was on his way to see a pregnant girlfriend." *Ibid.* In truth, "[t]here was no pregnant girlfriend." *Ibid.* Expert testimony noted by the trial court described these tactics as "completely improper." *Ibid.*

The trial court also noted the testimony of two Utah State Farm employees, Felix Jensen and Samantha Bird, both of whom recalled "intolerable" and "recurrent" pressure to reduce payouts below fair value. *Id.*, at 119a (internal quotation marks omitted). When Jensen complained to top managers, he was told to "get out of the kitchen" if he could not take the heat; Bird was told she should be "more of a team player." *Ibid.* (internal quotation marks omitted). At times, Bird said, she "was forced to commit dishonest acts

and to knowingly underpay claims." *Id.*, at 120a. Eventually, Bird quit. *Ibid.* Utah managers superior to Bird, the evidence indicated, were improperly influenced by the PP&R program to encourage insurance underpayments. For example, several documents evaluating the performance of managers Noxon and Brown "contained explicit preset average payout goals." *Ibid.*

Regarding liability for verdicts in excess of policy limits, the trial court referred to a State Farm document titled the "Excess Liability Handbook"; written before the Campbell accident, the handbook instructed adjusters to pad files with "self-serving" documents, and to leave critical items out of files, for example, evaluations of the insured's exposure. *Id.*, at 127a–128a (internal quotation marks omitted). Divisional superintendent Bill Brown used the handbook to train Utah employees. *Id.*, at 134a. While overseeing the Campbell case, Brown ordered adjuster Summers to change the portions of his report indicating that Mr. Campbell was likely at fault and that the settlement cost was correspondingly high. *Id.*, at 3a. The Campbells' case, according to expert testimony the trial court recited, "was a classic example of State Farm's application of the improper practices taught in the Excess Liability Handbook." *Id.*, at 128a.

The trial court further determined that the jury could find State Farm's policy "deliberately crafted" to prey on consumers who would be unlikely to defend themselves. *Id.*, at 122a. In this regard, the trial court noted the testimony of several former State Farm employees affirming that they were trained to target "the weakest of the herd"—"the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value." *Ibid.* (internal quotation marks omitted).

The Campbells themselves could be placed within the "weakest of the herd" category. The couple appeared economically vulnerable and emotionally fragile. App. 3360a–3361a (Order Denying State Farm's Motion for Judgment NOV and New Trial Regarding Intentional Infliction of Emotional Distress). At the time of State Farm's wrongful conduct, "Mr. Campbell had residuary effects from a stroke and Parkinson's disease." *Id.*, at 3360a.

To further insulate itself from liability, trial evidence indicated, State Farm made "systematic" efforts to destroy internal company documents that might reveal its scheme, App. to Pet. for Cert. 123a, efforts that directly affected the Campbells, *id.*, at 124a. For example, State Farm had "a special historical department that contained a copy of all past manuals on claim-handling practices and the dates on which each section of each manual was changed." *Ibid.* Yet in discovery proceedings, State Farm failed to produce any claim-handling practice manuals for the years relevant to the Campbells' bad-faith case. *Id.*, at 124a–125a.

State Farm's inability to produce the manuals, it appeared from the evidence, was not accidental. Documents retained by former State Farm employee Samantha Bird, as well as Bird's testimony, showed that while the Campbells' case was pending, Janet Cammack, "an in-house attorney sent by top State Farm management, conducted a meeting . . . in Utah during which she instructed Utah claims management to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation in the past—in particular, old claim-handling manuals, memos, claim school notes, procedure guides and other similar documents." *Id.*, at 125a. "These orders were followed even though at least one meeting participant, Paul Short, was personally aware that these kinds of materials had been requested by the Campbells in this very case." *Ibid.*

Consistent with Bird's testimony, State Farm admitted that it destroyed every single copy of claim-handling manu-

als on file in its historical department as of 1988, even though these documents could have been preserved at minimal expense. *Ibid.* Fortuitously, the Campbells obtained a copy of the 1979 PP&R manual by subpoena from a former employee. *Id.*, at 132a. Although that manual has been requested in other cases, State Farm has never itself produced the document. *Ibid.*

"As a final, related tactic," the trial court stated, the jury could reasonably find that "in recent years State Farm has gone to extraordinary lengths to stop damaging documents from being created in the first place." *Id.*, at 126a. State Farm kept no records at all on excess verdicts in third-party cases, or on bad-faith claims or attendant verdicts. *Ibid.* State Farm alleged "that it has no record of its punitive damage payments, even though such payments must be reported to the [Internal Revenue Service] and in some states may not be used to justify rate increases." *Ibid.* Regional Vice President Buck Moskalski testified that "he would not report a punitive damage verdict in [the Campbells'] case to higher management, as such reporting was not set out as part of State Farm's management practices." *Ibid.*

State Farm's "wrongful profit and evasion schemes," the trial court underscored, were directly relevant to the Campbells' case, *id.*, at 132a:

> "The record fully supports the conclusion that the bad-faith claim handling that exposed the Campbells to an excess verdict in 1983, and resulted in severe damages to them, was a product of the unlawful profit scheme that had been put in place by top management at State Farm years earlier. The Campbells presented substantial evidence showing how State Farm's improper insistence on claims-handling employees' reducing their claim payouts . . . regardless of the merits of each claim, manifested itself . . . in the Utah claims operations during the period when the decisions were made not to offer to settle the Campbell case for the $50,000 policy limits—

> indeed, not to make any offer to settle at a lower amount. This evidence established that high-level manager Bill Brown was under heavy pressure from the PP&R scheme to control indemnity payouts during the time period in question. In particular, when Brown declined to pay the excess verdict against Curtis Campbell, or even post a bond, he had a special need to keep his year-end numbers down, since the State Farm incentive scheme meant that keeping those numbers down was important to helping Brown get a much-desired transfer to Colorado. . . . There was ample evidence that the concepts taught in the Excess Liability Handbook, including the dishonest alteration and manipulation of claim files and the policy against posting any supersedeas bond for the full amount of an excess verdict, were dutifully carried out in this case. . . . There was ample basis for the jury to find that everything that had happened to the Campbells—when State Farm repeatedly refused in bad-faith to settle for the $50,000 policy limits and went to trial, and then failed to pay the 'excess' verdict, or at least post a bond, after trial—was a direct application of State Farm's overall profit scheme, operating through Brown and others." *Id.*, at 133a–134a.

State Farm's "policies and practices," the trial evidence thus bore out, were "responsible for the injuries suffered by the Campbells," and the means used to implement those policies could be found "callous, clandestine, fraudulent, and dishonest." *Id.*, at 136a; see *id.*, at 113a (finding "ample evidence" that State Farm's reprehensible corporate policies were responsible for injuring "many other Utah consumers during the past two decades"). The Utah Supreme Court, relying on the trial court's record-based recitations, understandably characterized State Farm's behavior as "egregious and malicious." *Id.*, at 18a.

## II

The Court dismisses the evidence describing and documenting State Farm's PP&R policy and practices as essentially irrelevant, bearing "no relation to the Campbells' harm." *Ante,* at 422; see *ante,* at 424 ("conduct that harmed [the Campbells] is the only conduct relevant to the reprehensibility analysis"). It is hardly apparent why that should be so. What is infirm about the Campbells' theory that their experience with State Farm exemplifies and reflects an overarching underpayment scheme, one that caused "repeated misconduct of the sort that injured them," *ante,* at 423? The Court's silence on that score is revealing: Once one recognizes that the Campbells did show "conduct by State Farm similar to that which harmed them," *ante,* at 424, it becomes impossible to shrink the reprehensibility analysis to this sole case, or to maintain, at odds with the determination of the trial court, see App. to Pet. for Cert. 113a, that "the adverse effect on the State's general population was in fact minor," *ante,* at 427.

Evidence of out-of-state conduct, the Court acknowledges, may be "probative [even if the conduct is lawful in the State where it occurred] when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious. . . ." *Ante,* at 422; cf. *ante,* at 419 (reiterating this Court's instruction that trial courts assess whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident"). "Other acts" evidence concerning practices both in and out of State was introduced in this case to show just such "deliberateness" and "culpability." The evidence was admissible, the trial court ruled: (1) to document State Farm's "reprehensible" PP&R program; and (2) to "rebut [State Farm's] assertion that [its] actions toward the Campbells were inadvertent errors or mistakes in judgment." App. 3329a (Order Denying Various Motions of State Farm to Exclude Plaintiffs' Evidence). Viewed in this light, there surely was "a nexus" between much of the "other

acts" evidence and "the specific harm suffered by [the Campbells]." *Ante*, at 422.

III

When the Court first ventured to override state-court punitive damages awards, it did so moderately. The Court recalled that "[i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Gore*, 517 U. S., at 568. Today's decision exhibits no such respect and restraint. No longer content to accord state-court judgments "a strong presumption of validity," *TXO*, 509 U. S., at 457, the Court announces that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Ante*, at 425.[2] Moreover, the Court adds, when compensatory damages are substantial, doubling those damages "can reach the outermost limit of the due process guarantee." *Ibid.;* see *ante*, at 429 ("facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages"). In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order.

* * *

I remain of the view that this Court has no warrant to reform state law governing awards of punitive damages.

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[2] *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 462, n. 8 (1993), noted that "[u]nder well-settled law," a defendant's "wrongdoing in other parts of the country" and its "impressive net worth" are factors "typically considered in assessing punitive damages." It remains to be seen whether, or the extent to which, today's decision will unsettle that law.

*Gore*, 517 U. S., at 607 (GINSBURG, J., dissenting). Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders. For the reasons stated, I would leave the judgment of the Utah Supreme Court undisturbed.

Syllabus

# CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P. C. *v.* WELLS

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

No. 01–1435. Argued February 25, 2003—Decided April 22, 2003

Respondent filed suit alleging that petitioner medical clinic violated the Americans with Disabilities Act of 1990 (ADA or Act) when it terminated her employment. Petitioner moved for summary judgment, asserting that it was not covered by the Act because it did not have 15 or more employees for the 20 weeks required by the ADA. That assertion's accuracy depends on whether the four physician-shareholders who own the professional corporation and constitute its board of directors are counted as employees. In granting the motion, the District Court concluded that the physicians were more analogous to partners in a partnership than to shareholders in a corporation and therefore were not employees under the ADA. The Ninth Circuit reversed, finding no reason to permit a professional corporation to reap the tax and civil liability advantages of its corporate status and then argue that it is like a partnership so as to avoid employment discrimination liability.

*Held:*

1. The common-law element of control is the principal guidepost to be followed in deciding whether the four director-shareholder physicians in this case should be counted as "employees." Where, as here, a statute does not helpfully define the term "employee," this Court's cases construing similar language give guidance in how best to fill the statutory text's gap. *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 322, 323. The professional corporation is a new type of business entity with no exact common-law precedent, but the common law's definition of the master-servant relationship provides helpful guidance: the focus on the master's control over the servant. Accordingly, the Equal Employment Opportunity Commission (EEOC) argues that a court should examine whether shareholder-directors operate independently and manage the business or instead are subject to the firm's control. Specific EEOC guidelines discuss the broad question of who is an "employee" and the narrower one of when partners, officers, board of directors' members, and major shareholders qualify as employees. The Court is persuaded by the EEOC's focus on the common-law touchstone of control and specifically by its submission that each of six factors are relevant to the inquiry whether a shareholder-director is an employee. Pp. 444–451.

2. Because the District Court's findings appear to weigh in favor of concluding that the four physicians are not clinic employees, but evidence in the record may contradict those findings or support a contrary conclusion under the EEOC's standard, the case is remanded for further proceedings. P. 451.

271 F. 3d 903, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 451.

*Steven W. Seymour* argued the cause for petitioner. With him on the briefs was *Andria C. Kelly.*

*Irving L. Gornstein* argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Deputy Solicitor General Clement*, *Philip B. Sklover*, *Lorraine C. Davis*, and *Robert J. Gregory.*

*Craig A. Crispin* argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

The Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 327, as amended, 42 U. S. C. § 12101 *et seq.*, like other federal antidiscrimination legislation,[1] is inapplicable to very small businesses. Under the ADA an "em-

*Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, and *Laurence Gold;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Barbara R. Arnwine*, *Thomas J. Henderson*, *Michael L. Foreman*, *Daniel B. Kohrman*, *Melvin Radowitz*, *Vincent A. Eng*, *Dennis C. Hayes*, and *Judith L. Lichtman;* and for the National Employment Lawyers Association et al. by *Merl H. Wayman* and *Jenifer Bosco.*

[1] See, *e. g.*, 29 U. S. C. § 630(b) (setting forth a 20-employee threshold for coverage under the Age Discrimination in Employment Act of 1967 (ADEA)); 42 U. S. C. § 2000e(b) (establishing a 15-employee threshold for coverage under Title VII of the Civil Rights Act of 1964).

ployer" is not covered unless its work force includes "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." § 12111(5). The question in this case is whether four physicians actively engaged in medical practice as shareholders and directors of a professional corporation should be counted as "employees."

## I

Petitioner, Clackamas Gastroenterology Associates, P. C., is a medical clinic in Oregon. It employed respondent, Deborah Anne Wells, as a bookkeeper from 1986 until 1997. After her termination, she brought this action against the clinic alleging unlawful discrimination on the basis of disability under Title I of the ADA. Petitioner denied that it was covered by the Act and moved for summary judgment, asserting that it did not have 15 or more employees for the 20 weeks required by the statute. It is undisputed that the accuracy of that assertion depends on whether the four physician-shareholders who own the professional corporation and constitute its board of directors are counted as employees.

The District Court, adopting the Magistrate Judge's findings and recommendation, granted the motion. Relying on an "economic realities" test adopted by the Seventh Circuit in *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F. 2d 1177, 1178 (1984), the District Court concluded that the four doctors were "more analogous to partners in a partnership than to shareholders in a general corporation" and therefore were "not employees for purposes of the federal antidiscrimination laws." App. 89.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. Noting that the Second Circuit had rejected the economic realities approach, the majority held that the use of any corporation, including a professional corporation, "'precludes any examination designed to determine whether the entity is in fact a partnership.'" 271 F. 3d 903, 905

(2001) (quoting *Hyland* v. *New Haven Radiology Associates, P. C.*, 794 F. 2d 793, 798 (CA2 1986)). It saw "no reason to permit a professional corporation to secure the 'best of both possible worlds' by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination." 271 F. 3d, at 905. The dissenting judge stressed the differences between an Oregon physicians' professional corporation and an ordinary business corporation,[2] and argued that Congress'

[2] The dissenting judge summarized Oregon's treatment of professional corporations as follows:

"In Oregon, a physicians' professional corporation, like this one, preserves the professional relationship between the physicians and their patients, as well as the standards of conduct that the medical profession requires. Or. Rev. Stat. § 58.185(2). Further, '*a shareholder of the corporation is personally liable as if the shareholder were rendering the service or services as an individual*' with respect to all claims of negligence, wrongful acts or omissions, or misconduct committed in the rendering of professional services. Or. Rev. Stat. § 58.185(3) (emphasis added). A licensed professional also is *jointly and severally liable* for such claims, albeit with some dollar limitations. Or. Rev. Stat. § 58.185(4)–(9). Ordinary business corporation rules apply only to other aspects of the entity, apart from the provision of professional services. Or. Rev. Stat. § 58.185(11). A professional corporation's activities must remain consistent with the requirements of the type of license in question, Or. Rev. Stat. § 58.205, and it may merge only with other professional corporations, Or. Rev. Stat. § 58.196, so the provision of professional services—with its attendant liabilities—must remain at the heart of a P. C. like this defendant.

"Additional special rules apply to professional corporations that are organized to practice medicine, none of which apply to ordinary business corporations. A majority of the directors, the holders of the majority of shares, and all officers except the secretary and treasurer must be Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(a)–(c). The Board of Medical Examiners is given express statutory authority to require more than a majority of shares, and more than a majority of director positions, to be held by Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(d) & (e). The Board of Medical Examiners also may *restrict the corporate powers* of a professional corporation organized for the purpose of practicing medicine, beyond the restrictions imposed on ordinary business corpora-

reasons for exempting small employers from the coverage of the Act should apply to petitioner. *Id.*, at 906–909 (opinion of Graber, J.).

We granted certiorari to resolve the conflict in the Circuits, which extends beyond the Seventh and the Second Circuits.[3] 536 U. S. 990 (2002).

## II

"We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 322 (1992). The definition of the term in the ADA simply states that an "employee" is "an individual employed by an employer." 42 U. S. C. § 12111(4). That surely qualifies as a mere "nominal definition" that is "completely circular and explains nothing." *Darden*, 503 U. S., at 323. As we explained in *Darden*, our cases construing similar language give us guidance on how best to fill the gap in the statutory text.

In *Darden* we were faced with the question whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA). Because ERISA's definition of "employee" was "completely circular," 503 U. S., at 323, we followed the same general approach that we had previously used in deciding whether a sculptor was an "employee" within the meaning of the Copyright Act of 1976, see *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730

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tions. Or. Rev. Stat. § 58.379. Lastly, Or. Rev. Stat. §§ 58.375 through 58.389 contain impediments to the transfer of shares and other corporate activities." 271 F. 3d, at 907–908 (opinion of Graber, J.) (footnote omitted).

[3] The disagreement in the Circuits is not confined to the particulars of the ADA. For example, the Seventh Circuit's decision in *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F. 2d 1177 (1984), concerned Title VII, and the Second Circuit's opinion in *Hyland* v. *New Haven Radiology Associates, P. C.*, 794 F. 2d 793 (1986), involved the ADEA. See also *Devine* v. *Stone, Leyton & Gershman, P. C.*, 100 F. 3d 78 (CA8 1996) (Title VII case).

(1989),[4] and we adopted a common-law test for determining who qualifies as an "employee" under ERISA.[5] Quoting *Reid*, 490 U. S., at 739–740, we explained that "'when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" *Darden*, 503 U. S., at 322–323.

Rather than looking to the common law, petitioner argues that courts should determine whether a shareholder-director of a professional corporation is an "employee" by asking whether the shareholder-director is, in reality, a "partner." Brief for Petitioner 9, 15–16, 21 (arguing that the four shareholders in the clinic are more analogous to partners in a partnership than shareholders in a corporation and that

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[4] In *Reid*, 490 U. S., at 738, the ownership of a copyright in a statue depended on whether it had been "'prepared by an employee within the scope of his or her employment'" within the meaning of the Copyright Act of 1976.

[5] *Darden* described the common-law test for determining whether a hired party is an employee as follows:

"'[W]e consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.'" 503 U. S., at 323–324 (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 751–752 (1989), and citing Restatement (Second) of Agency § 220(2) (1958)).

These particular factors are not directly applicable to this case because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer.

"those who are properly classified as partners are not 'employees' for purposes of the anti-discrimination statutes"). The question whether a shareholder-director is an employee, however, cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner. Today there are partnerships that include hundreds of members, some of whom may well qualify as "employees" because control is concentrated in a small number of managing partners. Cf. *Hishon* v. *King & Spalding*, 467 U. S. 69, 79, n. 2 (1984) (Powell, J., concurring) ("[A]n employer may not evade the strictures of Title VII simply by labeling its employees as 'partners' "); *EEOC* v. *Sidley Austin Brown & Wood*, 315 F. 3d 696, 709 (CA7 2002) (Easterbrook, J., concurring in part and concurring in judgment); *Strother* v. *Southern California Permanente Medical Group*, 79 F. 3d 859 (CA9 1996). Thus, asking whether shareholder-directors are partners—rather than asking whether they are employees—simply begs the question.

Nor does the approach adopted by the Court of Appeals in this case fare any better. The majority's approach, which paid particular attention to "the broad purpose of the ADA," 271 F. 3d, at 905, is consistent with the statutory purpose of ridding the Nation of the evil of discrimination. See 42 U. S. C. § 12101(b).[6] Nevertheless, two countervailing considerations must be weighed in the balance. First, as the

[6] The meaning of the term "employee" comes into play when determining whether an individual is an "employee" who may invoke the ADA's protections against discrimination in "hiring, advancement, or discharge," 42 U. S. C. § 12112(a), as well as when determining whether an individual is an "employee" for purposes of the 15-employee threshold. See § 12111(5)(A); see also Brief for United States et al. as *Amici Curiae* 10–11; *Schmidt* v. *Ottawa Medical Center, P. C.*, 322 F. 3d 461 (CA7 2003). Consequently, a broad reading of the term "employee" would—consistent with the statutory purpose of ridding the Nation of discrimination—tend to expand the coverage of the ADA by enlarging the number of employees entitled to protection and by reducing the number of firms entitled to exemption.

dissenting judge noted below, the congressional decision to limit the coverage of the legislation to firms with 15 or more employees has its own justification that must be respected—namely, easing entry into the market and preserving the competitive position of smaller firms. See 271 F. 3d, at 908 (opinion of Graber, J.) ("Congress decided 'to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail'" (quoting *Papa* v. *Katy Industries, Inc.*, 166 F. 3d 937, 940 (CA7), cert. denied, 528 U. S. 1019 (1999))). Second, as *Darden* reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law. Congress has overridden judicial decisions that went beyond the common law in an effort to correct "'the mischief'" at which a statute was aimed. See 503 U. S., at 324–325.

Perhaps the Court of Appeals' and the parties' failure to look to the common law for guidance in this case stems from the fact that we are dealing with a new type of business entity that has no exact precedent in the common law. State statutes now permit incorporation for the purpose of practicing a profession, but in the past "the so-called learned professions were not permitted to organize as corporate entities." 1A W. Fletcher, Cyclopedia of the Law of Private Corporations § 112.10 (rev. ed. 1997–2002). Thus, professional corporations are relatively young participants in the market, and their features vary from State to State. See generally 1 B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 2.06 (7th ed. 2002) (explaining that States began to authorize the creation of professional corporations in the late 1950's and that the momentum to form professional corporations grew in the 1970's).

Nonetheless, the common law's definition of the master-servant relationship does provide helpful guidance. At common law the relevant factors defining the master-servant relationship focus on the master's control over the servant. The general definition of the term "servant" in the Restatement (Second) of Agency § 2(2) (1957), for example, refers to a person whose work is "controlled or is subject to the right to control by the master." See also *id.*, § 220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control"). In addition, the Restatement's more specific definition of the term "servant" lists factors to be considered when distinguishing between servants and independent contractors, the first of which is "the extent of control" that one may exercise over the details of the work of the other. *Id.*, § 220(2)(a). We think that the common-law element of control is the principal guidepost that should be followed in this case.

This is the position that is advocated by the Equal Employment Opportunity Commission (EEOC), the agency that has special enforcement responsibilities under the ADA and other federal statutes containing similar threshold issues for determining coverage. It argues that a court should examine "whether shareholder-directors operate independently and manage the business or instead are subject to the firm's control." Brief for United States et al. as *Amici Curiae* 8. According to the EEOC's view, "[i]f the shareholder-directors operate independently and manage the business, they are proprietors and not employees; if they are subject to the firm's control, they are employees." *Ibid.*

Specific EEOC guidelines discuss both the broad question of who is an "employee" and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees. See 2 Equal Employment Opportunity Commission, Compliance Manual

§§ 605:0008–605:00010 (2000) (hereinafter EEOC Compliance Manual).[7] With respect to the broad question, the guidelines list 16 factors—taken from *Darden*, 503 U. S., at 323–324—that may be relevant to "whether the employer controls the means and manner of the worker's work performance." EEOC Compliance Manual § 605:0008, and n. 71.[8] The guidelines list six factors to be considered in answering the narrower question, which they frame as "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.*, § 605:0009.

We are persuaded by the EEOC's focus on the common-law touchstone of control, see *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944),[9] and specifically by its submission that each of the following six factors is relevant to the inquiry whether a shareholder-director is an employee:

> "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work

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[7] The EEOC's manual states that it applies across the board to other federal antidiscrimination statutes. See EEOC Compliance Manual § 605:0001 ("This Section discusses coverage, timeliness, and other threshold issues to be considered when a charge is first filed under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA), or the Equal Pay Act of 1963 (EPA)" (footnote omitted)).

[8] For example, the EEOC considers whether the work requires a high level of skill or expertise, whether the employer furnishes the tools, materials, and equipment, and whether the employer has the right to control when, where, and how the worker performs the job. *Id.*, § 605:0008.

[9] As the Government has acknowledged, see Tr. of Oral Arg. 19, the EEOC's Compliance Manual is not controlling—even though it may constitute a "body of experience and informed judgment" to which we may resort for guidance. *Skidmore* v. *Swift & Co.*, 323 U. S., at 140; see also *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000) (holding that agency interpretations contained in "policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law[,] do not warrant *Chevron*-style deference").

> "Whether and, if so, to what extent the organization supervises the individual's work
>
> "Whether the individual reports to someone higher in the organization
>
> "Whether and, if so, to what extent the individual is able to influence the organization
>
> "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
>
> "Whether the individual shares in the profits, losses, and liabilities of the organization." EEOC Compliance Manual § 605:0009.[10]

As the EEOC's standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. The mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or a proprietor. See *ibid.* ("An individual's title . . . does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee"). Nor should the mere existence of a document styled "employment agreement" lead inexorably to the conclusion that either party is an employee. See *ibid.* (looking to whether "the parties intended that the individual be an employee, as expressed in written

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[10] The EEOC asserts that these six factors need not necessarily be treated as "exhaustive." Brief for United States et al. as *Amici Curiae* 9. We agree. The answer to whether a shareholder-director is an employee or an employer cannot be decided in every case by a "'shorthand formula or magic phrase.'" *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 324 (1992) (quoting *NLRB* v. *United Ins. Co. of America*, 390 U. S. 254, 258 (1968)).

agreements or contracts"). Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on "'all of the incidents of the relationship . . . with no one factor being decisive.'" 503 U. S., at 324 (quoting *NLRB* v. *United Ins. Co. of America*, 390 U. S. 254, 258 (1968)).

## III

Some of the District Court's findings—when considered in light of the EEOC's standard—appear to weigh in favor of a conclusion that the four director-shareholder physicians in this case are not employees of the clinic. For example, they apparently control the operation of their clinic, they share the profits, and they are personally liable for malpractice claims. There may, however, be evidence in the record that would contradict those findings or support a contrary conclusion under the EEOC's standard that we endorse today.[11] Accordingly, as we did in *Darden*, we reverse the judgment of the Court of Appeals and remand the case to that court for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

"There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U. S. 28, 32 (1961). As doctors performing the everyday work of petitioner Clackamas Gastroenterology Associates, P. C., the physician-shareholders function in several respects as

[11] For example, the record indicates that the four director-shareholders receive salaries, Tr. of Oral Arg. 8, that they must comply with the standards established by the clinic, App. 66, and that they report to a personnel manager, *ibid.*

common-law employees, a designation they embrace for various purposes under federal and state law. Classifying as employees all doctors daily engaged as caregivers on Clackamas' premises, moreover, serves the animating purpose of the Americans with Disabilities Act of 1990 (ADA or Act). Seeing no cause to shelter Clackamas from the governance of the ADA, I would affirm the judgment of the Court of Appeals.

An "employee," the ADA provides, is "an individual employed by an employer." 42 U. S. C. § 12111(4). Where, as here, a federal statute uses the word "employee" without explaining the term's intended scope, we ordinarily presume "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 322–323 (1992) (internal quotation marks omitted). The Court today selects one of the common-law indicia of a master-servant relationship—control over the work of others engaged in the business of the enterprise—and accords that factor overriding significance. *Ante*, at 448. I would not so shrink the inquiry.

Are the physician-shareholders "servants" of Clackamas for the purpose relevant here? The Restatement defines "servant" to mean "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Restatement (Second) of Agency § 2(2) (1957) (hereinafter Restatement). When acting as clinic doctors, the physician-shareholders appear to fit the Restatement definition. The doctors provide services on behalf of the corporation, in whose name the practice is conducted. See Ore. Rev. Stat. Ann. § 58.185(1)(a) (1998 Supp.) (shareholders of a professional corporation "render the specified professional services *of the corporation*" (emphasis added)). The doctors have employment contracts with Clackamas, App. 71, under which they receive salaries and

yearly bonuses, Tr. of Oral Arg. 8, and they work at facilities owned or leased by the corporation, App. 29, 71. In performing their duties, the doctors must "compl[y] with . . . standards [the organization has] established." *Id.*, at 66; see Restatement, ch. 7, tit. B, Introductory Note, p. 479 ("[F]ully employed but highly placed employees of a corporation . . . are not less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise.").

The physician-shareholders, it bears emphasis, invite the designation "employee" for various purposes under federal and state law. The Employee Retirement Income Security Act of 1974 (ERISA), much like the ADA, defines "employee" as "any individual employed by an employer." 29 U. S. C. § 1002(6). Clackamas readily acknowledges that the physician-shareholders are "employees" for ERISA purposes. Tr. of Oral Arg. 6–7. Indeed, gaining qualification as "employees" under ERISA was the prime reason the physician-shareholders chose the corporate form instead of a partnership. See *id.*, at 7. Further, Clackamas agrees, the physician-shareholders are covered by Oregon's workers' compensation law, *ibid.*, a statute applicable to "person[s] . . . who . . . furnish services for a remuneration, subject to the direction and control of an employer," Ore. Rev. Stat. Ann. § 656.005(30) (1996 Supp.). Finally, by electing to organize their practice as a corporation, the physician-shareholders created an entity separate and distinct from themselves, one that would afford them limited liability for the debts of the enterprise. §§ 58.185(4), (5), (10), (11) (1998 Supp.). I see no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal antidiscrimination statutes.

Nothing in or about the ADA counsels otherwise. As the Court observes, the reason for exempting businesses with

fewer than 15 employees from the Act, was "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Ante*, at 447 (quotation from *Papa* v. *Katy Industries, Inc.*, 166 F. 3d 937, 940 (CA7 1999)). The inquiry the Court endorses to determine the physician-shareholders' qualification as employees asks whether they "ac[t] independently and participat[e] in managing the organization, or . . . [are] subject to the organization's control." *Ante*, at 449 (quoting 2 Equal Employment Opportunity Commission, Compliance Manual § 605:0009 (2000)). Under the Court's approach, a firm's coverage by the ADA might sometimes turn on variations in ownership structure unrelated to the magnitude of the company's business or its capacity for complying with federal prescriptions.

This case is illustrative. In 1996, Clackamas had 4 physician-shareholders and at least 14 other employees for 28 full weeks; in 1997, it had 4 physician-shareholders and at least 14 other employees for 37 full weeks. App. 55–62; see 42 U. S. C. § 12111(5) (to be covered by the Act, an employer must have the requisite number of employees "for each working day in each of 20 or more calendar weeks in the current or preceding calendar year"). Beyond question, the corporation would have been covered by the ADA had one of the physician-shareholders sold his stake in the business and become a "mere" employee. Yet such a change in ownership arrangements would not alter the magnitude of Clackamas' operation: In both circumstances, the corporation would have had at least 18 people on site doing the everyday work of the clinic for the requisite number of weeks.

The Equal Employment Opportunity Commission's approach, which the Court endorses, it is true, "excludes from protection those who are most able to control the firm's practices and who, as a consequence, are least vulnerable to the discriminatory treatment prohibited by the Act." Brief for

United States et al. as *Amici Curiae* 11; see 42 U. S. C. §§ 12111(8), 12112(a) (only "employees" are protected by the ADA). As this dispute demonstrates, however, the determination whether the physician-shareholders are employees of Clackamas affects not only whether they may sue under the ADA, but also—and of far greater practical import—whether employees like bookkeeper Deborah Anne Wells are covered by the Act. Because the character of the relationship between Clackamas and the doctors supplies no justification for withholding from clerical worker Wells federal protection against discrimination in the workplace, I would affirm the judgment of the Court of Appeals.

Syllabus

# JINKS *v.* RICHLAND COUNTY, SOUTH CAROLINA, ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 02–258. Argued March 5, 2003—Decided April 22, 2003

Title 28 U. S. C. § 1367 determines whether a federal district court with jurisdiction over a civil action may exercise supplemental jurisdiction over other claims forming part of the same Article III "case or controversy." If the court declines to exercise such jurisdiction, the claims will be dismissed and must be refiled in state court. To prevent the limitations period on those claims from expiring while they are pending in federal court, § 1367(d) requires state courts to toll the period while a supplemental claim is pending in federal court and for 30 days after its dismissal unless state law provides for a longer tolling period. Petitioner filed a federal-court action claiming that Richland County (hereinafter respondent) and others violated 42 U. S. C. § 1983 in connection with her husband's death. She also asserted supplemental claims for wrongful death and survival under South Carolina law. The District Court granted defendants summary judgment on the § 1983 claim and declined to exercise jurisdiction over the state-law claims. Petitioner then filed the supplemental claims in state court and won a wrongful-death verdict against respondent. The State Supreme Court reversed, finding the state-law claims time barred. Although they would not have been barred under § 1367(d)'s tolling rule, the court held § 1367(d) unconstitutional as applied to claims brought in state court against a State's political subdivisions.

*Held:* Section 1367(d)'s application to claims brought against a State's political subdivisions is constitutional. Pp. 461–467.

(a) The Court rejects respondent's contention that § 1367(d) is facially invalid because it exceeds Congress's enumerated powers. Rather, it is necessary and proper for executing Congress's power "[t]o constitute Tribunals inferior to the supreme Court," Art. I, § 8, cl. 9, and assuring that those tribunals may fairly and efficiently exercise "[t]he judicial Power of the United States," Art. III, § 1. As to "necessity": It suffices that § 1367(d) is conducive to the administration of justice in federal court and is plainly adapted to that end. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. And as to propriety: Contrary to respondent's claim, § 1367(d) does not violate state-sovereignty principles by regulating state-court procedures. Pp. 461–465.

Syllabus

(b) Also without merit is respondent's contention that § 1367(d) should not be interpreted to apply to claims brought against a State's political subdivisions. Congress lacks Article I authority to override a State's immunity from suit in its own courts, see *Alden* v. *Maine*, 527 U. S. 706, but it may subject a municipality to suit in state court if that is done pursuant to a valid exercise of its enumerated powers, see *id.*, at 756. This is merely the consequence of those cases, which respondent does not ask the Court to overrule, holding that municipalities do not enjoy a constitutionally protected immunity from suit. And any suggestion that an "unmistakably clear" statement is required before an Act of Congress may expose a local government to liability cannot possibly be reconciled with *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658. Pp. 465–467.

349 S. C. 298, 563 S. E. 2d 104, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous court. SOUTER, J., filed a concurring opinion, *post*, p. 467.

*Robert S. Peck* argued the cause for petitioner. With him on the briefs were *James Mixon Griffin* and *Bradford P. Simpson.*

*Jeffrey A. Lamken* argued the cause for the United States as intervenor. On the briefs were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Clement*, *Malcolm L. Stewart*, *Mark B. Stern*, and *Alisa B. Klein.*

*Andrew F. Lindemann* argued the cause for respondent Richland County. With him on the brief were *William H. Davidson II* and *David L. Morrison.**

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**Barbara Arnwine* and *Thomas J. Henderson* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *William H. Pryor, Jr.*, Attorney General of Alabama, *Nathan A. Forrester*, Solicitor General, *Carter G. Phillips*, and *Gene C. Schaerr*, and by the Attorneys General for their respective States as follows: *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Mike Moore* of

JUSTICE SCALIA delivered the opinion of the Court.

The Supreme Court of South Carolina dismissed petitioner's lawsuit against Richland County (hereinafter respondent) as time barred. In doing so it held that 28 U. S. C. § 1367(d), which required the state statute of limitations to be tolled for the period during which petitioner's cause of action had previously been pending in federal court, is unconstitutional as applied to lawsuits brought against a State's political subdivisions. The issue before us is the validity of that constitutional determination.

## I

### A

When a federal district court has original jurisdiction over a civil cause of action, § 1367 determines whether it may exercise supplemental jurisdiction over other claims that do not independently come within its jurisdiction, but that form part of the same Article III "case or controversy." Section 1367(a) provides:

> "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such

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Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *David Samson* of New Jersey, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Charlie Condon* of South Carolina, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Jerry W. Kilgore* of Virginia; and for the Council of State Governments et al. by *Richard Ruda* and *James I. Crowley.*

> supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

As the introductory clause suggests, not every claim within the same "case or controversy" as the claim within the federal courts' original jurisdiction will be decided by the federal court; §§ 1367(b) and (c) describe situations in which a federal court may or must decline to exercise supplemental jurisdiction. Section 1367(c), for example, states:

> "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> "(1) the claim raises a novel or complex issue of State law,
>
> "(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> "(3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> "(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

Thus, some claims asserted under § 1367(a) will be dismissed because the district court declines to exercise jurisdiction over them and, if they are to be pursued, must be refiled in state court. To prevent the limitations period on such supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court, § 1367(d) provides a tolling rule that must be applied by state courts:

> "The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

B

On October 14, 1994, Carl H. Jinks was arrested and jailed for failure to pay child support. Four days later, while confined at respondent's detention center, he died of complications associated with alcohol withdrawal. In 1996, within the applicable statute of limitations, petitioner Susan Jinks, Carl Jinks's widow, brought an action in the United States District Court for the District of South Carolina against respondent, its detention center director, and its detention center physician. She asserted a cause of action under Rev. Stat. § 1979, 42 U. S. C. § 1983, and also supplemental claims for wrongful death and survival under the South Carolina Tort Claims Act. See S. C. Code Ann. § 15–78–10 *et seq.* (West Supp. 2002). On November 20, 1997, the District Court granted the defendants' motion for summary judgment on the § 1983 claim, and two weeks later issued an order declining to exercise jurisdiction over the remaining state-law claims, dismissing them without prejudice pursuant to 28 U. S. C. § 1367(c)(3).

On December 18, 1997, petitioner filed her wrongful-death and survival claims in state court. After the jury returned a verdict of $80,000 against respondent on the wrongful-death claim, respondent appealed to the South Carolina Supreme Court, which reversed on the ground that petitioner's state-law claims were time barred. Although they would not have been time barred under § 1367(d)'s tolling rule, the State Supreme Court held that § 1367(d) was unconstitutional as applied to claims brought in state court against a State's political subdivisions, because it "interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." 349 S. C. 298, 304, 563 S. E. 2d 104, 107 (2002).

We granted certiorari, 537 U. S. 972 (2002).

## II

### A

Respondent and its *amici* first contend that § 1367(d) is facially invalid because it exceeds the enumerated powers of Congress. We disagree. Although the Constitution does not expressly empower Congress to toll limitations periods for state-law claims brought in state court, it does give Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution [Congress's Article I, § 8,] Powers and all other Powers vested by this Constitution in the Government of the United States . . . ." Art. I, § 8, cl. 18. The enactment of § 1367(d) was not the first time Congress prescribed the alteration of a state-law limitations period;[1] nor is this the first case in which we have ruled on its authority to do so. In *Stewart* v. *Kahn*, 11 Wall.

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[1] See, *e. g.*, Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. App. § 525 ("The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court . . . by or against any person in military service"); 42 U. S. C. § 9658(a)(1) ("In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute"); 11 U. S. C. § 108(c) ("Except as provided in section 524 of this title, if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim").

493 (1871), we upheld as constitutional a federal statute that tolled limitations periods for state-law civil and criminal cases for the time during which actions could not be prosecuted because of the Civil War. We reasoned that this law was both necessary and proper to carrying into effect the Federal Government's war powers, because it "remed[ied] the evils" that had arisen from the war. "It would be a strange result if those in rebellion, by protracting the conflict, could thus rid themselves of their debts, and Congress, which had the power to wage war and suppress the insurrection, had no power to remedy such an evil, which is one of its consequences." *Id.*, at 507.

Of course § 1367(d) has nothing to do with the war power. We agree with petitioner and intervenor United States, however, that § 1367(d) is necessary and proper for carrying into execution Congress's power "[t]o constitute Tribunals inferior to the supreme Court," U. S. Const., Art. I, § 8, cl. 9, and to assure that those tribunals may fairly and efficiently exercise "[t]he judicial Power of the United States," Art. III, § 1. As to "necessity": The federal courts can assuredly exist and function in the absence of § 1367(d), but we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be "'*absolutely* necessary'" to the exercise of an enumerated power. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 414–415 (1819). Rather, it suffices that § 1367(d) is "conducive to the due administration of justice" in federal court,[2] and is "plainly adapted" to that end, *id.*, at 417, 421. Section 1367(d) is conducive to the administration of justice because it provides an alternative to the unsatisfactory options that federal judges faced when they decided whether to retain jurisdiction over supplemental state-law claims that might be time barred in state court. In the pre-§ 1367(d) world, they had three basic choices:

[2] This was Chief Justice Marshall's description in *McCulloch* of why—by way of example—legislation punishing perjury in the federal courts is valid under the Necessary and Proper Clause. See 4 Wheat., at 417.

First, they could condition dismissal of the state-law claim on the defendant's waiver of any statute-of-limitations defense in state court. See, *e. g.*, *Duckworth* v. *Franzen*, 780 F. 2d 645, 657 (CA7 1985); *Financial General Bankshares, Inc.* v. *Metzger*, 680 F. 2d 768, 778 (CADC 1982). That waiver could be refused, however, in which case one of the remaining two choices would have to be pursued. Second, they could retain jurisdiction over the state-law claim even though it would more appropriately be heard in state court. See *Newman* v. *Burgin*, 930 F. 2d 955, 963–964 (CA1 1991) (collecting cases). That would produce an obvious frustration of statutory policy. And third, they could dismiss the state-law claim but allow the plaintiff to reopen the federal case if the state court later held the claim to be time barred. See, *e. g.*, *Rheaume* v. *Texas Dept. of Public Safety*, 666 F. 2d 925, 932 (CA5 1982). That was obviously inefficient. By providing a straightforward tolling rule in place of this regime, § 1367(d) unquestionably promotes fair and efficient operation of the federal courts and is therefore conducive to the administration of justice.

And it is conducive to the administration of justice for another reason: It eliminates a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal- and state-law claims that "derive from a common nucleus of operative fact," *Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966). Prior to enactment of § 1367(d), they had the following unattractive options: (1) They could file a single federal-court action, which would run the risk that the federal court would dismiss the state-law claims after the limitations period had expired; (2) they could file a single state-law action, which would abandon their right to a federal forum; (3) they could file separate, timely actions in federal and state court and ask that the state-court litigation be stayed pending resolution of the federal case, which would increase litigation costs with no guarantee that the state court would oblige. Section 1367(d) replaces this selection of inadequate choices

with the assurance that state-law claims asserted under § 1367(a) will not become time barred while pending in federal court.

We are also persuaded, and respondent does not deny, that § 1367(d) is "plainly adapted" to the power of Congress to establish the lower federal courts and provide for the fair and efficient exercise of their Article III powers. There is no suggestion by either of the parties that Congress enacted § 1367(d) as a "pretext" for "the accomplishment of objects not entrusted to the [federal] government," *McCulloch*, *supra*, at 423, nor is the connection between § 1367(d) and Congress's authority over the federal courts so attenuated as to undermine the enumeration of powers set forth in Article I, § 8, cf. *United States* v. *Lopez*, 514 U. S. 549, 567–568 (1995); *United States* v. *Morrison*, 529 U. S. 598, 615 (2000).

Respondent and its *amici* further contend, however, that § 1367(d) is not a "proper" exercise of Congress's Article I powers because it violates principles of state sovereignty. See *Printz* v. *United States*, 521 U. S. 898, 923–924 (1997). Respondent views § 1367(d)'s tolling rule as a regulation of state-court "procedure," and contends that Congress may not, consistent with the Constitution, prescribe procedural rules for state courts' adjudication of purely state-law claims. See, *e. g.*, Bellia, Federal Regulation of State Court Procedures, 110 Yale L. J. 947 (2001); *Congressional Authority to Require State Courts to Use Certain Procedures in Products Liability Cases*, 13 Op. Off. Legal Counsel 372, 373–374 (1989) (stating that "potential constitutional questions" arise when Congress "attempts to prescribe directly the state court procedures to be followed in products liability cases"). Assuming for the sake of argument that a principled dichotomy can be drawn, for purposes of determining whether an Act of Congress is "proper," between federal laws that regulate state-court "procedure" and laws that change the "substance" of state-law rights of action, we do not think that

state-law limitations periods fall into the category of "procedure" immune from congressional regulation. Respondent's reliance on *Sun Oil Co.* v. *Wortman*, 486 U. S. 717 (1988), which held a state statute of limitations to be "procedural" for purposes of the Full Faith and Credit Clause, is misplaced. As we noted in that very case, the meaning of "'substance'" and "'procedure'" in a particular context is "largely determined by the purposes for which the dichotomy is drawn." *Id.*, at 726. For purposes of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), for example, statutes of limitations are treated as substantive. *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945). *Stewart* v. *Kahn*, 11 Wall., at 506–507, provides ample support for the proposition that—if the substance-procedure dichotomy posited by respondent is valid—the tolling of limitations periods falls on the "substantive" side of the line. To sustain § 1367(d) in this case, we need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts.

We therefore reject respondent's contention that § 1367(d) is facially unconstitutional.

B

Respondent next maintains that § 1367(d) should not be interpreted to apply to claims brought against a State's political subdivisions. We find this contention also to be without merit.

The South Carolina Tort Claims Act, S. C. Code Ann. § 15–78–10 *et seq.* (West Supp. 2002), confers upon respondent an immunity from tort liability for any claim brought more than two years after the injury was or should have been discovered. In respondent's view, § 1367(d)'s extension of the time period in which a State's political subdivisions may be sued constitutes an impermissible abrogation of "sovereign immunity." That is not so. Although we have held that Congress lacks authority under Article I to override a *State's* immunity from suit in its own courts, see *Alden* v. *Maine*,

527 U. S. 706 (1999), it may subject a *municipality* to suit in state court if that is done pursuant to a valid exercise of its enumerated powers, see *id.*, at 756. Section 1367(d) tolls the limitations period with respect to *state-law* causes of action brought against municipalities, but we see no reason why that represents a greater intrusion on "state sovereignty" than the undisputed power of Congress to override state-law immunity when subjecting a municipality to suit under a federal cause of action. In either case, a State's authority to set the conditions upon which its political subdivisions are subject to suit in its own courts must yield to the enactments of Congress. This is not an encroachment on "state sovereignty," but merely the consequence of those cases (which respondent does not ask us to overrule) which hold that municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.

Nor do we see any reason to construe § 1367(d) not to apply to claims brought against a State's political subdivisions absent an "unmistakably clear" statement of the statute's applicability to such claims. Although we held in *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533 (2002), that § 1367(d) does not apply to claims filed in federal court against *States* but subsequently dismissed on sovereign immunity grounds, we did so to avoid interpreting the statute in a manner that would raise "serious constitutional doubt" in light of our decisions protecting a *State's* sovereign immunity from congressional abrogation, *id.*, at 543. As we have just explained, however, no such constitutional doubt arises from holding that petitioner's claim against respondent—which is not a State, but a political subdivision of a State—falls under the definition of "*any claim* asserted under subsection (a)." § 1367(d) (emphasis added). In any event, the idea that an "unmistakably clear" statement is required before an Act of Congress may expose a *local* government to liability cannot possibly be reconciled with our holding in *Monell* v. *New*

*York City Dept. of Social Servs.*, 436 U. S. 658 (1978), that municipalities are subject to suit as "persons" under § 1983.

* * *

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

*It is so ordered.*

JUSTICE SOUTER, concurring.

In joining the Court today, I do not signal any change of opinion from my dissent in *Alden* v. *Maine*, 527 U. S. 706, 760 (1999).

Syllabus

# DOLE FOOD CO. ET AL. *v.* PATRICKSON ET AL.

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

No. 01–593. Argued January 22, 2003—Decided April 22, 2003*

Plaintiffs filed a state-court action against Dole Food Company and others (Dole petitioners), alleging injury from chemical exposure. The Dole petitioners impleaded petitioners Dead Sea Bromine Co. and Bromine Compounds, Ltd. (collectively, the Dead Sea Companies). The Dole petitioners removed the action to federal court under 28 U. S. C. § 1441(a), arguing that the federal common law of foreign relations provided federal-question jurisdiction under § 1331. The District Court agreed it had jurisdiction, but dismissed the case on other grounds. As to the Dead Sea Companies, the court rejected their claim that they are instrumentalities of a foreign state (Israel) as defined by the Foreign Sovereign Immunities Act of 1976 (FSIA), and are therefore entitled to removal under § 1441(d). The Ninth Circuit reversed. As to the Dole petitioners, it held removal could not rest on the federal common law of foreign relations. Regarding the Dead Sea Companies, the court noted, but declined to answer, the question whether status as an instrumentality of a foreign state is assessed at the time of the alleged wrongdoing or at the time suit is filed. It held that the Dead Sea Companies, even at the earlier date, were not instrumentalities of Israel because they did not meet the FSIA's instrumentality definition.

*Held:*

1. The writ of certiorari is dismissed in No. 01–593, as the Dole petitioners did not seek review in this Court of the Ninth Circuit's ruling on the federal common law of foreign relations. P. 472.

2. A foreign state must itself own a majority of a corporation's shares if the corporation is to be deemed an instrumentality of the state under the FSIA. Israel did not have direct ownership of shares in either of the Dead Sea Companies at any time pertinent to this action. Rather, they were, at various times, separated from Israel by one or more intermediate corporate tiers. As indirect subsidiaries of Israel, the companies cannot come within the statutory language granting instrumentality status to an entity a "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."

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*Together with No. 01–594, *Dead Sea Bromine Co., Ltd., et al.* v. *Patrickson et al.*, also on certiorari to the same court.

§ 1603(b)(2). Only direct ownership satisfies the statutory requirement. In issues of corporate law structure often matters. The statutory reference to ownership of "shares" shows that Congress intended coverage to turn on formal corporate ownership. As a corporation and its shareholders are distinct entities, see, *e. g.*, *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 625, a corporate parent which owns a subsidiary's shares does not, for that reason alone, own or have legal title to the subsidiary's assets; and, it follows with even greater force, the parent does not own or have legal title to the subsidiary's subsidiaries. The veil separating corporations and their shareholders may be pierced in certain exceptional circumstances, but the Dead Sea Companies refer to no authority for extending the doctrine so far that, as a categorical matter, all subsidiaries are deemed to be the same as the parent corporation. Various federal statutes refer to "direct or indirect ownership." The absence of this language in § 1603(b) instructs the Court that Congress did not intend to disregard structural ownership rules here. That section's "other ownership interest" phrase, when following the word "shares," should be interpreted to refer to a type of interest other than stock ownership. Reading the phrase to refer to a state's interest in entities further down the corporate ladder would make the specific reference to "shares" redundant. The fact that Israel exercised considerable control over the companies may not be substituted for an ownership interest, since control and ownership are distinct concepts, and it is majority ownership by a foreign state, not control, that is the benchmark of instrumentality status. Pp. 473–478.

3. Instrumentality status is determined at the time of the filing of the complaint. Construing § 1603(b)(2) so that the present tense in the provision "a majority of whose shares . . . is owned by a foreign state" has real significance is consistent with the longstanding principle that the Court's jurisdiction depends upon the state of things at the time the action is brought. *E. g.*, *Keene Corp.* v. *United States*, 508 U. S. 200, 207. The Dead Sea Companies' attempt to compare foreign sovereign immunity with other immunities that are based on a government officer's status at the time of the conduct giving rise to the suit is inapt because the reason for those other immunities does not apply here. Unlike those immunities, foreign sovereign immunity is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give them some protection from the inconvenience of suit as a gesture of comity, *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486. Because any relationship recognized under the FSIA between the Dead Sea Companies and Israel had been severed before suit was commenced, the companies would not be entitled to in-

strumentality status even if their theory that such status could be conferred on a subsidiary were accepted. Pp. 478–480.

No. 01–593, certiorari dismissed; No. 01–594, affirmed. Reported below: 251 F. 3d 795.

KENNEDY, J., delivered the opinion for a unanimous Court with respect to Parts I, II–A, and II–C, and the opinion of the Court with respect to Part II–B, in which REHNQUIST, C. J., and STEVENS, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 480.

*Peter R. Paden* argued the cause for petitioners in both cases. With him on the briefs in No. 01–594 were *Philip E. Karmel*, *Laurence A. Horvath*, *Thomas C. Walsh*, and *James F. Bennett*. On the briefs in No. 01–593 were *Robert H. Klonoff*, *Daniel H. Bromberg*, *Terence M. Murphy*, *Michael L. Rice*, *Robert G. Crow*, *Richard C. Sutton, Jr.*, *Robert T. Greig*, *Boaz S. Morag*, *Michael L. Brem*, *F. Walter Conrad, Jr.*, *D. Ferguson McNiel III*, *Charles W. Schwartz*, and *R. Burton Ballanfant*.

*Jonathan S. Massey* argued the cause for respondents in both cases. With him on the brief was *Christian H. Hartley*.

*Jeffrey P. Minear* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *Douglas N. Letter*, *H. Thomas Byron III*, and *William Howard Taft IV*.[†]

JUSTICE KENNEDY delivered the opinion of the Court.

Foreign states may invoke certain rights and immunities in litigation under the Foreign Sovereign Immunities Act of

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[†]Briefs of *amici curiae* urging reversal were filed for the Republic of Ireland et al. by *Martin R. Baach* and *James P. Davenport;* and for Consortium de Réalisation et al. by *George J. Terwilliger III*, *Darryl S. Lew*, and *R. Shawn Gunnarson*.

1976 (FSIA or Act), Pub. L. 94–583, 90 Stat. 2891. Some of the Act's provisions also may be invoked by a corporate entity that is an "instrumentality" of a foreign state as defined by the Act. *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 611 (1992); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 488 (1983). The corporate entities in this action claim instrumentality status to invoke the Act's provisions allowing removal of state-court actions to federal court. As the action comes to us, it presents two questions. The first is whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary. The second question is whether a corporation's instrumentality status is defined as of the time an alleged tort or other actionable wrong occurred or, on the other hand, at the time suit is filed. We granted certiorari, 536 U. S. 956 (2002).

## I

The underlying action was filed in a state court in Hawaii in 1997 against Dole Food Company and other companies (Dole petitioners). Plaintiffs in the action were a group of farm workers from Costa Rica, Ecuador, Guatemala, and Panama who alleged injury from exposure to dibromochloropropane, a chemical used as an agricultural pesticide in their home countries. The Dole petitioners impleaded petitioners Dead Sea Bromine Co., Ltd., and Bromine Compounds, Ltd. (collectively, the Dead Sea Companies). The merits of the suit are not before us.

The Dole petitioners removed the action to the United States District Court for the District of Hawaii under 28 U. S. C. § 1441(a), arguing that the federal common law of foreign relations provided federal-question jurisdiction under § 1331. The District Court agreed there was federal subject-matter jurisdiction under the federal common law of

foreign relations but, nevertheless, dismissed the case on grounds of *forum non conveniens*.

The Dead Sea Companies removed under a separate theory. They claimed to be instrumentalities of a foreign state as defined by the FSIA, entitling them to removal under § 1441(d). The District Court held that the Dead Sea Companies are not instrumentalities of a foreign state for purposes of the FSIA and are not entitled to removal on that basis. Civ. No. 97–01516HG (D. Haw., Sept. 9, 1998), App. to Pet. for Cert. in No. 01–594, p. 79a.

The Court of Appeals reversed. Addressing the ground relied on by the Dole petitioners, it held removal could not rest on the federal common law of foreign relations. 251 F. 3d 795, 800 (CA9 2001). In this Court the Dole petitioners did not seek review of that portion of the Court of Appeals' ruling, and we do not address it. Accordingly, the writ of certiorari in No. 01–593 is dismissed.

The Court of Appeals also reversed the order allowing removal at the instance of the Dead Sea Companies, who alleged they were instrumentalities of the State of Israel. The Court of Appeals noted, but declined to answer, the question whether status as an instrumentality of a foreign state is assessed at the time of the alleged wrongdoing or at the time suit is filed. It went on to hold that the Dead Sea Companies, even at the earlier date, were not instrumentalities of Israel because they did not meet the Act's definition of instrumentality.

In order to prevail here, the Dead Sea Companies must show both that instrumentality status is determined as of the time the alleged tort occurred and that they can claim instrumentality status even though they were but subsidiaries of a parent owned by the State of Israel. We address each question in turn. In No. 01–594, the case in which the Dead Sea Companies are petitioners, we now affirm.

## II

### A

Title 28 U. S. C. § 1441(d) governs removal of actions against foreign states. It provides that "[a]ny civil action brought in a State court against a foreign state as defined in [28 U. S. C. § 1603(a)] may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending." See also § 1330 (governing original jurisdiction). Section 1603(a), part of the FSIA, defines "foreign state" to include an "agency or instrumentality of a foreign state." "[A]gency or instrumentality of a foreign state" is defined, in turn, as:

> "[A]ny entity—
>
> "(1) which is a separate legal person, corporate or otherwise, and
>
> "(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> "(3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." § 1603(b).

### B

The Court of Appeals resolved the question of the FSIA's applicability by holding that a subsidiary of an instrumentality is not itself entitled to instrumentality status. Its holding was correct.

The State of Israel did not have direct ownership of shares in either of the Dead Sea Companies at any time pertinent to this suit. Rather, these companies were, at various times, separated from the State of Israel by one or more intermediate corporate tiers. For example, from 1984–1985, Israel wholly owned a company called Israeli Chemicals, Ltd.; which owned a majority of shares in another company called

Dead Sea Works, Ltd.; which owned a majority of shares in Dead Sea Bromine Co., Ltd.; which owned a majority of shares in Bromine Compounds, Ltd.

The Dead Sea Companies, as indirect subsidiaries of the State of Israel, were not instrumentalities of Israel under the FSIA at any time. Those companies cannot come within the statutory language which grants status as an instrumentality of a foreign state to an entity a "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." § 1603(b)(2). We hold that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.

Section 1603(b)(2) speaks of ownership. The Dead Sea Companies urge us to ignore corporate formalities and use the colloquial sense of that term. They ask whether, in common parlance, Israel would be said to own the Dead Sea Companies. We reject this analysis. In issues of corporate law structure often matters. It is evident from the Act's text that Congress was aware of settled principles of corporate law and legislated within that context. The language of § 1603(b)(2) refers to ownership of "shares," showing that Congress intended statutory coverage to turn on formal corporate ownership. Likewise, § 1603(b)(1), another component of the definition of instrumentality, refers to a "separate legal person, corporate or otherwise." In light of these indicia that Congress had corporate formalities in mind, we assess whether Israel owned shares in the Dead Sea Companies as a matter of corporate law, irrespective of whether Israel could be said to have owned the Dead Sea Companies in everyday parlance.

A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. See, *e. g.*, *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 625 (1983) ("Separate legal personality has been described as 'an almost indispensable aspect of the public corporation' "); *Burnet* v. *Clark*, 287 U. S. 410, 415

(1932) ("A corporation and its stockholders are generally to be treated as separate entities"). An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest. See 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 31 (rev. ed. 1999). A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary. See *id.*, § 31, at 514 ("The properties of two corporations are distinct, though the same shareholders own or control both. A holding corporation does not own the subsidiary's property"). The fact that the shareholder is a foreign state does not change the analysis. See *First Nat. City Bank*, *supra*, at 626–627 ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such").

Applying these principles, it follows that Israel did not own a majority of shares in the Dead Sea Companies. The State of Israel owned a majority of shares, at various times, in companies one or more corporate tiers above the Dead Sea Companies, but at no time did Israel own a majority of shares in the Dead Sea Companies. Those companies were subsidiaries of other corporations.

The veil separating corporations and their shareholders may be pierced in some circumstances, and the Dead Sea Companies essentially urge us to interpret the FSIA as piercing the veil in all cases. The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances, see, *e. g.*, *Burnet*, *supra*, at 415; Fletcher, *supra*, §§ 41 to 41.20, and usually determined on a case-by-case basis. The Dead Sea Companies have referred us to no authority for extending the doctrine so far that, as a categorical matter, all subsidiar-

ies are deemed to be the same as the parent corporation. The text of the FSIA gives no indication that Congress intended us to depart from the general rules regarding corporate formalities.

Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so. Various federal statutes refer to "direct and indirect ownership." See, *e. g.*, 5 U. S. C. § 8477(a)(4)(G)(iii) (referring to an interest "owned directly or indirectly"); 12 U. S. C. § 84(c)(5) (referring to "any corporation wholly owned directly or indirectly by the United States"); 15 U. S. C. § 79b(a)(8)(A) (referring to securities "which are directly or indirectly owned, controlled, or held with power to vote"); § 1802(3) ("The term 'newspaper owner' means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications"). The absence of this language in 28 U. S. C. § 1603(b) instructs us that Congress did not intend to disregard structural ownership rules.

The FSIA's definition of instrumentality refers to a foreign state's majority ownership of "shares or other ownership interest." § 1603(b)(2). The Dead Sea Companies would have us read "other ownership interest" to include a state's "interest" in its instrumentality's subsidiary. The better reading of the text, in our view, does not support this argument. The words "other ownership interest," when following the word "shares," should be interpreted to refer to a type of interest other than ownership of stock. The statute had to be written for the contingency of ownership forms in other countries, or even in this country, that depart from conventional corporate structures. The statutory phrase "other ownership interest" is best understood to accomplish this objective. Reading the term to refer to a state's interest in entities lower on the corporate ladder would make the specific reference to "shares" redundant. Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe the statute in

a manner that is strained and, at the same time, would render a statutory term superfluous. See *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 258 (1993) ("We will not read the statute to render the modifier superfluous"); *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 36 (1992) (declining to adopt a construction that would violate the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect").

The Dead Sea Companies say that the State of Israel exercised considerable control over their operations, notwithstanding Israel's indirect relationship to those companies. They appear to think that, in determining instrumentality status under the Act, control may be substituted for an ownership interest. Control and ownership, however, are distinct concepts. See, *e. g.*, *United States* v. *Bestfoods*, 524 U. S. 51, 64–65 (1998) (distinguishing between "operation" and "ownership" of a subsidiary's assets for purposes of Comprehensive Environmental Response, Compensation, and Liability Act of 1980 liability). The terms of § 1603(b)(2) are explicit and straightforward. Majority ownership by a foreign state, not control, is the benchmark of instrumentality status. We need not delve into Israeli law or examine the extent of Israel's involvement in the Dead Sea Companies' operations. Even if Israel exerted the control the Dead Sea Companies describe, that would not give Israel a "majority of [the companies'] shares or other ownership interest." The statutory language will not support a control test that mandates inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares.

The better rule is the one supported by the statutory text and elementary principles of corporate law. A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares.

We now turn to the second question before us, which provides an alternative reason for affirming the Court of Appeals. See *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 537 (1949).

C

To be entitled to removal under § 1441(d), the Dead Sea Companies must show that they are entities "a majority of whose shares or other ownership interest is owned by a foreign state." § 1603(b)(2). We think the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed.

Construing § 1603(b) so that the present tense has real significance is consistent with the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Keene Corp.* v. *United States*, 508 U. S. 200, 207 (1993) (quoting *Mollan* v. *Torrance*, 9 Wheat. 537, 539 (1824)). It is well settled, for example, that federal-diversity jurisdiction depends on the citizenship of the parties at the time suit is filed. See, *e. g.*, *Anderson* v. *Watt*, 138 U. S. 694, 702–703 (1891) ("And the [jurisdictional] inquiry is determined by the condition of the parties at the commencement of the suit"); see also *Minneapolis & St. Louis R. Co.* v. *Peoria & Pekin Union R. Co.*, 270 U. S. 580, 586 (1926) ("The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought"). The Dead Sea Companies do not dispute that the time suit is filed is determinative under § 1332(a)(4), which provides for suits between "a foreign state, defined in section 1603(a) . . . , as plaintiff and citizens of a State or of different States." It would be anomalous to read § 1441(d)'s words, "foreign state as defined in section 1603(a)," differently.

The Dead Sea Companies urge us to administer the FSIA like other status-based immunities, such as the qualified immunity accorded a state actor, that are based on the status

of an officer at the time of the conduct giving rise to the suit. We think its comparison is inapt. Our cases applying those immunities do not involve the interpretation of a statute. See, *e. g.*, *Spalding* v. *Vilas*, 161 U. S. 483, 493–499 (1896) (basing a decision regarding official immunity on common law and considerations of "convenience and public policy"); *Scheuer* v. *Rhodes*, 416 U. S. 232, 239–242 (1974).

The reason for the official immunities in those cases does not apply here. The immunities for government officers prevent the threat of suit from "crippl[ing] the proper and effective administration of public affairs." *Spalding*, *supra*, at 498 (discussing immunity for executive officers); see also *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967) (judicial immunity serves the public interest in judges who are "at liberty to exercise their functions with independence and without fear of consequences" (internal quotation marks omitted)). Foreign sovereign immunity, by contrast, is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns. *Verlinden*, 461 U. S., at 486.

For the same reason, the Dead Sea Companies' reliance on *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), is unavailing. There, we recognized that the President was immune from liability for official actions taken during his time in office, even against a suit filed when he was no longer serving in that capacity. The immunity served the same function that the other official immunities serve. See *id.*, at 751 ("Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government"). As noted above, immunity under the FSIA does not serve the same purpose.

The immunity recognized in *Nixon* was also based on a further rationale, one not applicable here: the constitutional

separation of powers. See *id.*, at 749 ("We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). That rationale is not implicated by the statutory immunity Congress created for actions such as the one before us.

Any relationship recognized under the FSIA between the Dead Sea Companies and Israel had been severed before suit was commenced. As a result, the Dead Sea Companies would not be entitled to instrumentality status even if their theory that instrumentality status could be conferred on a subsidiary were accepted.

* * *

For these reasons, we hold first that a foreign state must itself own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state under the provisions of the FSIA; and we hold second that instrumentality status is determined at the time of the filing of the complaint.

The judgment of the Court of Appeals in No. 01–594 is affirmed, and the writ of certiorari in No. 01–593 is dismissed.

*It is so ordered.*

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I join Parts I, II–A, and II–C, and dissent only from Part II–B, of the Court's opinion. Unlike the majority, I believe that the statutory phrase "other ownership interest . . . owned by a foreign state," 28 U. S. C. § 1603(b)(2), covers a Foreign Nation's legal interest in a Corporate Subsidiary, where that interest consists of the Foreign Nation's ownership of a Corporate Parent that owns the shares of the Subsidiary.

The Foreign Sovereign Immunities Act of 1976 (FSIA) sets forth legal criteria for determining when a "foreign state," 28 U. S. C. § 1603(a), can assert a defense of sovereign immunity. The FSIA also specifies that a "foreign state" defendant may ask a federal court to make the relevant sovereign immunity determination. § 1441(d). And the FSIA allows certain foreign-state commercial entities *not entitled to sovereign immunity* to have the merits of a case heard in federal court. §§ 1330(a), 1441(d), 1605(a)(2). These last-mentioned entities, entitled to invoke federal-court jurisdiction, include corporations that fall within the FSIA's definition of an "agency or instrumentality of a foreign state," §§ 1603(a), (b).

The corporate defendants here, subsidiaries of a foreign parent corporation, fall within that definition if "a majority of [their] shares or *other ownership interest is owned by*" a foreign nation. § 1603(b)(2) (emphasis added). The relevant foreign nation does not *directly* own a majority of the corporate subsidiaries' shares. But (simplifying the facts) it does own a corporate parent, which, in turn, owns the corporate subsidiaries' shares. See *ante*, at 473–474.

Does this type of majority-ownership interest count as an example of what the statute calls an "other ownership interest"? The Court says no, holding that the text of the FSIA requires that "*only direct ownership* of a majority of shares by the foreign state satisfies the statutory requirement." *Ante*, at 474 (emphasis added). I disagree.

The statute's language, standing alone, cannot answer the question. That is because the words "own" and "ownership"—neither of which is defined in the FSIA—are not technical terms or terms of art but common terms, the precise legal meaning of which depends upon the statutory context in which they appear. See J. Cribbet & C. Johnson, Principles of the Law of Property 16 (3d ed. 1989) ("Anglo-American law has not made much use of the term ownership in a technical sense"); Black's Law Dictionary 1049, 1105 (6th

ed. 1990) ("The term ['owner'] is . . . a nomen generalissimum"—a "term of the most general meaning" or "of the most general kind"—"and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied"). See also *Williams* v. *Taylor*, 529 U. S. 420, 431 (2000) ("We give the words of a statute their *ordinary*, *contemporary*, *common meaning*, absent an indication Congress intended them to bear some different import" (internal quotation marks omitted; emphasis added)).

Thus, this Court has held that "ship*owne[r]*" can include a corporate shareholder even though, technically speaking, the corporation, not the shareholder, owns the ship. *Flink* v. *Paladini*, 279 U. S. 59, 62–63 (1929) (emphasis added). Moreover, this Court has held that a trademark can be "*owned by*" a parent corporation even though, technically speaking, a subsidiary corporation, not the parent, registered and thus owned the mark. *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 292 (1988) (opinion of KENNEDY, J.) (emphasis added) (noting "the inability to discern" which "entit[y] . . . can be said to 'own' the . . . trademark if . . . the domestic subsidiary is wholly owned by its foreign parent"); *id.*, at 318 (SCALIA, J., concurring in part and dissenting in part) ("It may be reasonable for some purposes to say that a trademark nominally owned by a domestic subsidiary is 'owned by' its foreign parent corporation"); *id.*, at 319 ("A parent corporation may or may not be said to 'own' the assets owned by its subsidiary"). Similarly, here the words "other ownership interest" might, or might not, refer to the kind of majority-ownership interest that arises when one owns the shares of a parent that, in turn, owns a subsidiary. If a shareholder in Company A is an "owner" of Company A's ship, as in *Flink*, then why should the shareholder not be an "owner" of Company A's subsidiary? If Company A's trademark can be said to be "owned by" its shareholder, as in *K mart*, then why should Company A's subsidiary not be said

to be "owned by" its shareholder? And, at the very least, can we not say that the shareholder has an "ownership interest" in the subsidiary?

Neither do the various linguistic indicia to which the majority points help resolve the question. As the majority points out, the statute's use of the word "shares" leans in favor of reading "ownership" as incorporating formal, technical American legal requirements. *Ante*, at 474–475. But any resulting suggestion of formal technical limitation is neatly counterbalanced by the fact that the "statute had to be written for the contingency of ownership forms in other countries, or even in this country, that depart from conventional corporate structures." *Ante*, at 476. And given this latter necessity, there is no reason to read the phrase "*shares or other*" as if those words meant to exclude from the scope of "other" any kind of mixed, say, debt/equity, ownership arrangement that might involve shares only in part.

The majority's further claim that Congress' use of the word "ownership" means "only *direct* ownership," *ante*, at 474 (emphasis added), or formal ownership, founders upon *Flink*, *supra*, and *K mart*, *supra*, as well as upon several statutes that demonstrate that Congress felt it necessary explicitly to use the word "direct" (a word missing in the FSIA) in order to achieve that result. See, *e. g.*, 20 U. S. C. § 1087–3(a) ("common shares . . . *directly owned* by a Holding Company" (emphasis added)); 26 U. S. C. § 165(g)(3)(A) (requiring that "the taxpayer *owns directly* stock" in a corporation (emphasis added)); § 851(c)(3)(A) (stock "*owned directly* by one or more of the other corporations" (emphasis added)). Were the Court's logic correct, see *ante*, at 476–477, the word "direct" in these statutes would be redundant.

The majority's "veil piercing" argument, *ante*, at 475–476, is beside the point. So is the majority's reiteration of the separateness of a corporation and its shareholders, *ante*, at 474–475, a formal separateness that this statute explicitly sets aside. See 28 U. S. C. §§ 1603(a), (b) (acknowledging the

separateness of a corporate entity but nevertheless deliberately conferring the "foreign state" status of the shareholder upon the corporation itself); H. R. Rep. No. 94–1487, p. 15 (1976) (same). See also Working Group of the American Bar Association, Reforming the Foreign Sovereign Immunities Act, 40 Colum. J. Transnat'l L. 489, 517–518 (2002) (hereinafter ABA Working Group) (FSIA rejects the "separate-entity" rule that courts had often applied to deny immunity to state-owned corporations).

Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes. And here, as in *Flink*, *supra*, and *K mart*, *supra*, an examination of those purposes sheds considerable light. The statute itself makes clear that it seeks: (1) to provide a foreign-state defendant in a legal action the right to have its claim of a sovereign immunity bar decided by the "courts of the United States," *i. e.*, the federal courts, 28 U. S. C. § 1604; see § 1441(d); and (2) to make certain that the merits of unbarred claims against foreign states, say, states engaging in commercial activities, see § 1605(a)(2), will be decided "in the same manner" as similar claims against "a private individual," § 1606; but (3) to guarantee a foreign state defending an unbarred claim certain protections, including a prohibition of punitive damages, the right to removal to federal court, a trial before a judge, and other procedural rights (related to service of process, venue, attachment, and execution of judgments). §§ 1330, 1391(f), 1441(d), 1606, 1608–1611. See *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 497 (1983) ("Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts"); H. R. Rep. No. 94–1487, at 32 ("giv[ing] foreign states clear authority to remove to a Federal forum actions brought against them in the State courts" in light of "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area"); *id.*, at 13 ("Such

broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences").

Most important for present purposes, the statute seeks to guarantee these protections to the foreign nation not only when it acts directly in its own name but also when it acts through separate legal entities, including corporations and other "organ[s]." 28 U. S. C. § 1603(b).

Given these purposes, what might lead Congress to grant protection to a Foreign Nation acting through a Corporate Parent but deny the same protection to the Foreign Nation acting through, for example, a wholly owned Corporate Subsidiary? The answer to this question is: In terms of the statute's purposes, *nothing at all* would lead Congress to make such a distinction.

As far as this statute is concerned, decisions about how to incorporate, how to structure corporate entities, or whether to act through a single corporate layer or through several corporate layers are matters purely of form, not of substance. Cf. H. R. Rep. No. 94–1487, at 15 (agencies or instrumentalities "could assume a variety of forms"); *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 625 (1983) (noting that "developing countries" often "establish separate juridical entities . . . to make large-scale national investments"). The need for federal-court determination of a sovereign immunity claim is no less important where subsidiaries are involved. The need for procedural protections is no less compelling. The risk of adverse foreign policy consequences is no less great. See ABA Working Group 523 ("The strength of a foreign state's sovereign interests . . . does not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses"); Dellapenna, Refining the Foreign Sovereign Immunities Act, 9 Willamette J. Int'l L. & Disp. Resol. 57, 92–93 (2001). See also A. Kumar, The State

Holding Company: Issues and Options 3 (World Bank Discussion Paper No. 187, 1992) ("The existence of state holding companies, in many variants, is widespread").

That is why I doubt the majority's claim that its reading of the text of the FSIA is "[t]he better reading," *ante,* at 476, leading to "[t]he better rule," *ante,* at 477. The majority's rule is not better for a foreign nation, say, Mexico or Honduras, which may use "a tiered corporate structure to manage and control important areas of national interest, such as natural resources," ABA Working Group 523, and, as a result, will find its ability to use the federal courts to adjudicate matters of national importance and "potential sensitivity" restricted, H. R. Rep. No. 94–1487, at 32. Congress is most unlikely to characterize as "better" a rule tied to legal formalities that undercuts its basic jurisdictional objectives. And working lawyers will now have to factor into complex corporate restructuring equations (determining, say, whether to use an intermediate holding company when merging or disaggregating even wholly owned government corporations) a risk that the government might lose its previously available access to federal court.

Given these consequences, from what perspective can the Court's unnecessarily technical reading of this part of the statute produce a "better rule"? To hold, as the Court does today, that for purposes of the FSIA "other ownership interest" does not include the interest that a Foreign Nation has in a tiered Corporate Subsidiary "would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose." *Danciger* v. *Cooley,* 248 U. S. 319, 326 (1919).

I believe that the Court should decide this issue just as it decided *Flink.* There, the Court unanimously determined that, in light of "[t]he policy of the statutes" in question, a corporate shareholder was an "owner" of a ship, which, tech-

nically speaking, belonged to the corporation. 279 U. S., at 62–63. Justice Holmes wrote, in his opinion for the Court:

> "For th[e] purpose [of these statutes] no rational distinction can be taken between several persons owning shares in a vessel [here, a subsidiary] directly and making the same division by putting the title in a corporation and distributing the corporate stock. The policy of the statutes must extend equally to both. . . . We are of [the] opinion that the words of the acts must be taken in a broad and popular sense in order not to defeat the manifest intent. This is not to ignore the distinction between a corporation and its members, a distinction that cannot be overlooked even in extreme cases . . . , but to interpret an untechnical word ['owner'] in the liberal way in which we believe it to have been used . . . ." *Ibid.*

No more need be said.

Syllabus

# FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT ET AL.

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 02–42. Argued February 24, 2003—Decided April 23, 2003

Respondent Hyatt's (hereinafter respondent) "part-year" 1991 California income-tax return represented that he had ceased to be a California resident and had become a Nevada resident in October 1991, shortly before he received substantial licensing fees. Petitioner California Franchise Tax Board (CFTB) determined that he was a California resident until April 1992, and accordingly issued notices of proposed assessments for 1991 and 1992 and imposed substantial civil fraud penalties. Respondent filed suit against CFTB in a Nevada state court, alleging that CFTB had directed numerous contacts at Nevada and had committed negligence and intentional torts during the course of its audit of respondent. In its motion for summary judgment or dismissal, CFTB argued that the state court lacked subject matter jurisdiction because full faith and credit and other legal principles required that the court apply California law immunizing CFTB from suit. Upon denial of that motion, CFTB petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal. The latter court ultimately granted the petition in part and denied it in part, holding that the lower court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles, but that the intentional tort claims could proceed to trial. Among other things, the court noted that Nevada immunizes its state agencies from suits for discretionary acts but not for intentional torts committed within the course and scope of employment and held that affording CFTB statutory immunity with respect to intentional torts would contravene Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister States' government employees.

*Held:* The Full Faith and Credit Clause, U. S. Const., Art. IV, § 1, does not require Nevada to give full faith and credit to California's statutes providing its tax agency with immunity from suit. The full faith and credit command "is exacting" with respect to a final judgment rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, *Baker* v. *General Motors Corp.*, 522 U. S. 222, 233, but is less demanding with respect to choice of laws. The Clause does not compel a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it

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is competent to legislate. *E. g., Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 722. Nevada is undoubtedly competent to legislate with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders. CFTB argues unpersuasively that this Court should adopt a "new rule" mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would interfere with the State's capacity to fulfill its own sovereign responsibilities. The Court has, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States. See, *e. g., Bradford Elec. Light Co.* v. *Clapper*, 286 U. S. 145. However, this balancing-of-interests approach quickly proved unsatisfactory and the Court abandoned it, *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302, 308, n. 10, 322, n. 6, 339, n. 6, recognizing, instead, that it is frequently the case under the Clause that a court can lawfully apply either the law of one State or the contrary law of another, *Sun Oil Co.* v. *Wortman*, *supra*, at 727. The Court has already ruled that the Full Faith and Credit Clause does not require a forum State to apply a sister State's sovereign immunity statutes where such application would violate the forum State's own legitimate public policy. *Nevada* v. *Hall*, 440 U. S. 410, 424. There is no constitutionally significant distinction between the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereign function. States' sovereignty interests are not foreign to the full faith and credit command, but the Court is not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. *Carroll* v. *Lanza*, 349 U. S. 408, 413. The Nevada Supreme Court sensitively applied comity principles with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis. Pp. 494–499.

Affirmed.

O'Connor, J., delivered the opinion for a unanimous Court.

*Felix E. Leatherwood*, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor, *David S. Chaney*, Senior Assistant Attorney General, and *William Dean Freeman*, Lead Supervising Deputy Attorney General.

*H. Bartow Farr III* argued the cause for respondents. With him on the brief were *Peter C. Bernhard* and *Donald J. Kula.**

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to resolve whether the Nevada Supreme Court's refusal to extend full faith and credit to California's statute immunizing its tax collection agency from suit violates Article IV, § 1, of the Constitution. We conclude it does not, and we therefore affirm the judgment of the Nevada Supreme Court.

## I

Respondent Gilbert P. Hyatt (hereinafter respondent) filed a "part-year" resident income tax return in California for 1991. App. to Pet. for Cert. 54. In the return, respondent represented that as of October 1, 1991, he had ceased to be a California resident and had become a resident of Nevada. In 1993, petitioner California Franchise Tax Board (CFTB) commenced an audit to determine whether respondent had underpaid state income taxes. *Ibid.* The audit focused on

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Richard E. Dornan*, Attorney General of Florida, *Jonathan A. Glogau*, *Barbara J. Ritchie*, Acting Attorney General of Alaska, and *Thomas R. Keller*, Acting Attorney General of Hawaii, and by the Attorneys General for their respective jurisdictions as follows: *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Mike McGrath* of Montana, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *Anabelle Rodríguez* of Puerto Rico, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry W. Kilgore* of Virginia, and *Darrell V. McGraw, Jr.*, of West Virginia; for the Multistate Tax Commission by *Frank D. Katz;* and for the National Governors Association et al. by *Richard Ruda* and *James I. Crowley.*

*Sharon L. Browne* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging affirmance.

respondent's claim that he had changed residency shortly before receiving substantial licensing fees for certain patented inventions related to computer technology.

At the conclusion of its audit, CFTB determined that respondent was a California resident until April 3, 1992, and accordingly issued notices of proposed assessments for income taxes for 1991 and 1992 and imposed substantial civil fraud penalties. *Id.*, at 56–57, 58–59. Respondent protested the proposed assessments and penalties in California through CFTB's administrative process. See Cal. Rev. & Tax. Code Ann. §§ 19041, 19044–19046 (West 1994).

On January 6, 1998, with the administrative protest ongoing in California, respondent filed a lawsuit against CFTB in Nevada in Clark County District Court. Respondent alleges that CFTB directed "numerous and continuous contacts . . . at Nevada" and committed several torts during the course of the audit, including invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation. App. to Pet. for Cert. 51–52, 54. Respondent seeks punitive and compensatory damages. *Id.*, at 51–52. He also sought a declaratory judgment "confirm[ing] [his] status as a Nevada resident effective as of September 26, 1991," *id.*, at 51, but the District Court dismissed the claim for lack of subject matter jurisdiction on April 16, 1999, App. 93–95.

During the discovery phase of the Nevada lawsuit, CFTB filed a petition in the Nevada Supreme Court for a writ of mandamus, or in the alternative, for a writ of prohibition, challenging certain of the District Court's discovery orders. While that petition was pending, CFTB filed a motion in the District Court for summary judgment or, in the alternative, for dismissal for lack of jurisdiction. CFTB argued that the District Court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity, and administrative exhaustion all required that the District Court apply California law, under which:

> "Neither a public entity nor a public employee is liable for an injury caused by:
>
> "(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax [or]
>
> "(b) An act or omission in the interpretation or application of any law relating to a tax." Cal. Govt. Code Ann. § 860.2 (West 1995).

The District Court denied CFTB's motion for summary judgment or dismissal, prompting CFTB to file a second petition in the Nevada Supreme Court. This petition sought a writ of mandamus ordering the dismissal of the case, or in the alternative, a writ of prohibition and mandamus limiting the scope of the suit to claims arising out of conduct that occurred in Nevada.

On June 13, 2001, the Nevada Supreme Court granted CFTB's second petition, dismissed the first petition as moot, and ordered the District Court to enter summary judgment in favor of CFTB. App. to Pet. for Cert. 38–43. On April 4, 2002, however, the court granted respondent's petition for rehearing, vacated its prior ruling, granted CFTB's second petition in part, and denied it in part. *Id.*, at 5–18. The court held that the District Court "should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles" but that the intentional tort claims could proceed to trial. *Id.*, at 7.

The Nevada Supreme Court noted that both Nevada and California have generally waived their sovereign immunity from suit in state court and "have extended the waivers to their state agencies or public employees except when state statutes expressly provide immunity." *Id.*, at 9–10 (citing Nev. Rev. Stat. § 41.031 (1996); Cal. Const., Art. 3, § 5; and Cal. Govt. Code Ann. § 820 (West 1995)). Whereas Nevada has not conferred immunity on its state agencies for intentional torts committed within the course and scope of

employment, the court acknowledged that "California has expressly provided [CFTB] with complete immunity." App. to Pet. for Cert. 10 (citing Cal. Govt. Code Ann. § 860.2 (West 1995) and *Mitchell* v. *Franchise Tax Board*, 183 Cal. App. 3d 1133, 228 Cal. Rptr. 750 (1986)). To determine which State's law should apply, the court applied principles of comity.

Though the Nevada Supreme Court recognized the doctrine of comity as "an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations," the court also recognized its duty to determine whether the application of California law "would contravene Nevada's policies or interests," giving "due regard to the duties, obligations, rights and convenience of Nevada's citizens." App. to Pet. for Cert. 11. "An investigation is generally considered to be a discretionary function," the court observed, "and Nevada provides its [own] agencies with immunity for the performance of a discretionary function even if the discretion is abused." *Id.*, at 12. "[A]ffording [CFTB] statutory immunity for negligent acts," the court therefore concluded, "does not contravene any Nevada interest in this case." *Ibid.* The court accordingly held that "the district court should have declined to exercise its jurisdiction" over respondent's negligence claim under principles of comity. *Id.*, at 7. With respect to the intentional torts, however, the court held that "affording [CFTB] statutory immunity . . . does contravene Nevada's policies and interests in this case." *Id.*, at 12. Because Nevada "does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment," the court held that "Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees" should be accorded

greater weight "than California's policy favoring complete immunity for its taxation agency." *Id.*, at 12–13.

We granted certiorari to resolve whether Article IV, § 1, of the Constitution requires Nevada to give full faith and credit to California's statute providing its tax agency with immunity from suit, 537 U. S. 946 (2002), and we now affirm.

## II

The Constitution's Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art. IV, § 1. As we have explained, "[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." *Baker* v. *General Motors Corp.*, 522 U. S. 222, 232 (1998). Whereas the full faith and credit command "is exacting" with respect to "[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," *id.*, at 233, it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel "'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 722 (1988) (quoting *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, 501 (1939)).

The State of Nevada is undoubtedly "competent to legislate" with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders. "'[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally un-

fair.'" *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 818 (1985) (quoting *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302, 312–313 (1981) (plurality opinion)); see 472 U. S., at 822–823. Such contacts are manifest in this case: the plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada, Brief for Petitioner 33–34, n. 16. See, *e. g.*, *Carroll* v. *Lanza*, 349 U. S. 408, 413 (1955) ("The State where the tort occurs certainly has a concern in the problems following in the wake of the injury"); *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, *supra*, at 503 ("Few matters could be deemed more appropriately the concern of the state in which [an] injury occurs or more completely within its power").

CFTB does not contend otherwise. Instead, CFTB urges this Court to adopt a "new rule" mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would "interfer[e] with a State's capacity to fulfill its own sovereign responsibilities." Brief for Petitioner 13 (internal quotation marks omitted).

We have, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States. See *Bradford Elec. Light Co.* v. *Clapper*, 286 U. S. 145 (1932) (holding that the Constitution required a federal court sitting in New Hampshire to apply a Vermont workers' compensation statute in a tort suit brought by the administrator of a Vermont worker killed in New Hampshire). This balancing approach quickly proved unsatisfactory. Compare *Alaska Packers Assn.* v. *Industrial Accident Comm'n of Cal.*, 294 U. S. 532, 550 (1935) (holding that a forum State, which was the place of hiring but not of a claimant's domicile, could apply its own law to compensate for an accident in another State, because "[n]o persuasive reason" was shown for requiring application of the law of the State where the

accident occurred), with *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, *supra*, at 504–505 (holding that the State where an accident occurred could apply its own workers' compensation law and need not give full faith and credit to that of the State of hiring and domicile of the employer and employee). As Justice Robert H. Jackson, recounting these cases, aptly observed, "it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution." Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 16 (1945).

In light of this experience, we abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause. *Allstate Ins. Co.* v. *Hague*, 449 U. S., at 308, n. 10 (plurality opinion); *id.*, at 322, n. 6 (STEVENS, J., concurring in judgment); *id.*, at 339, n. 6 (Powell, J., dissenting). We have recognized, instead, that "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil Co.* v. *Wortman*, *supra*, at 727. We thus have held that a State need not "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, *supra*, at 501; see *Baker* v. *General Motors Corp.*, *supra*, at 232; *Sun Oil Co.* v. *Wortman*, *supra*, at 722; *Phillips Petroleum Co.* v. *Shutts*, *supra*, at 818–819. Acknowledging this shift, CFTB contends that this case demonstrates the need for a new rule under the Full Faith and Credit Clause that will protect "core sovereignty" interests as expressed in state statutes delineating the contours of the State's immunity from suit. Brief for Petitioner 13.

We disagree. We have confronted the question whether the Full Faith and Credit Clause requires a forum State to

recognize a sister State's legislatively recaptured immunity once before. In *Nevada* v. *Hall*, 440 U. S. 410 (1979), an employee of the University of Nevada was involved in an automobile accident with California residents, who filed suit in California and named Nevada as a defendant. The California courts refused to apply a Nevada statute that capped damages in tort suits against the State on the ground that "to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery." *Id.*, at 424.

We affirmed, holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. *Id.*, at 414–421. Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of petitioner's *amici* States, see Brief for State of Florida et al. as *Amici Curiae* 2, to do so. See this Court's Rule 14.1(a); *Mazer* v. *Stein*, 347 U. S. 201, 206, n. 5 (1954) ("We do not reach for constitutional questions not raised by the parties").

The question presented here instead implicates *Hall*'s second holding: that the Full Faith and Credit Clause did not require California to apply Nevada's sovereign immunity statutes where such application would violate California's own legitimate public policy. 440 U. S., at 424. The Court observed in a footnote:

> "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.*, at 424, n. 24.

CFTB asserts that an analysis of this lawsuit's effects should lead to a different result: that the Full Faith and Credit Clause requires Nevada to apply California's immunity statute to avoid interference with California's "sovereign responsibility" of enforcing its income tax laws. Brief for Petitioner 13.

Our past experience with appraising and balancing state interests under the Full Faith and Credit Clause counsels against adopting CFTB's proposed new rule. Having recognized, in *Hall*, that a suit against a State in a sister State's court "necessarily implicates the power and authority" of both sovereigns, 440 U. S., at 416, the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada, were we to deem this lawsuit an interference with California's "core sovereign responsibilities." We rejected as "unsound in principle and unworkable in practice" a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state government function was "integral" or "traditional." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546–547 (1985). CFTB has convinced us of neither the relative soundness nor the relative practicality of adopting a similar distinction here.

Even were we inclined to embark on a course of balancing States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause, this case would not present the occasion to do so. There is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and California's interests in the tort claims here arising out of its tax collection agency's residency audit. To be sure, the power to promulgate and enforce income tax laws is an essential attribute of sovereignty. See *Franchise Tax Bd. of Cal.* v. *Postal Service*, 467 U. S. 512, 523 (1984)

(" '[T]axes are the life-blood of government' " (quoting *Bull* v. *United States*, 295 U. S. 247, 259–260 (1935))). But the university employee's educational mission in *Hall* might also be so described. Cf. *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments").

If we were to compare the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereign function, we would be left to ponder the relationship between an automobile accident and educating, on one hand, and the intrusions alleged here and collecting taxes, on the other. We discern no constitutionally significant distinction between these relationships. To the extent CFTB complains of the burdens and expense of out-of-state litigation, and the diversion of state resources away from the performance of important state functions, those burdens do not distinguish this case from any other out-of-state lawsuit against California or one of its agencies.

States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. *Carroll* v. *Lanza*, 349 U. S., at 413. The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis. See App. to Pet. for Cert. 10–13.

In short, we heed the lessons learned as a result of *Bradford Elec. Light Co.* v. *Clapper*, 286 U. S. 145 (1932), and its progeny. Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.

The judgment of the Nevada Supreme Court is affirmed.

*It is so ordered.*

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# MASSARO *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 01–1559. Argued February 25, 2003—Decided April 23, 2003

Petitioner Massaro was indicted on federal racketeering charges in connection with a murder. The day before his trial began, prosecutors learned of a bullet allegedly recovered from the car in which the victim's body was found, but did not inform defense counsel until the trial was underway. Defense counsel more than once declined the trial court's offer of a continuance so the bullet could be examined. Massaro was convicted and sentenced to life imprisonment. On direct appeal his new counsel argued that the District Court had erred in admitting the bullet in evidence, but did not raise an ineffective-assistance-of-trial-counsel claim. The Second Circuit affirmed. Massaro later moved to vacate his conviction under 28 U. S. C. § 2255, claiming, as relevant here, that his trial counsel had rendered ineffective assistance in failing to accept the trial court's offer of a continuance. The District Court found his claim procedurally defaulted because he could have raised it on direct appeal. In affirming, the Second Circuit adhered to its precedent that, when the defendant is represented by new counsel on appeal and the ineffective-assistance claim is based solely on the trial record, the claim must be raised on direct appeal; failure to do so results in procedural default unless the petitioner shows cause and prejudice.

*Held:* An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal. Requiring a criminal defendant to bring ineffective-assistance claims on direct appeal does not promote the procedural default rule's objectives: conserving judicial resources and respecting the law's important interest in the finality of judgments. Applying that rule to ineffective-assistance claims would create a risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the claim's factual predicate, and would raise the issue for the first time in a forum not best suited to assess those facts, even if the record contains some indication of deficiencies in counsel's performance. A § 2255 motion is preferable to direct appeal for deciding an ineffective-assistance claim. When a claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record that is not developed precisely for, and is therefore

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often incomplete or inadequate for, the purpose of litigating or preserving the claim. A defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. *Strickland* v. *Washington*, 466 U. S. 668. The evidence introduced at trial, however, will be devoted to guilt or innocence issues, and the resulting record may not disclose the facts necessary to decide either prong of the *Strickland* analysis. Under the rule announced here, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial. The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance. In addition, the § 2255 motion often will be ruled upon by the district judge who presided at trial, who should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial. This Court does not hold that ineffective-assistance claims must be reserved for collateral review, as there may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will raise the issue on direct appeal or in which obvious deficiencies in representation will be addressed by an appellate court *sua sponte*. In such cases, certain questions may arise in subsequent § 2255 proceedings concerning the conclusiveness of determinations made on the claims raised on direct appeal; but these implementation matters are not before the Court. Pp. 504–509.

27 Fed. Appx. 26, reversed and remanded.

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

*Herald Price Fahringer* argued the cause for petitioner. With him on the briefs were *Erica T. Dubno* and *Eugene Gressman*.

*Sri Srinivasan* argued the cause for the United States. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Chertoff*, *Deputy Solicitor General Dreeben*, and *Steven L. Lane*.*

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**David A. Lewis* and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioner, Joseph Massaro, was indicted on federal racketeering charges, including murder in aid of racketeering, 18 U. S. C. § 1962(d), in connection with the shooting death of Joseph Fiorito. He was tried in the United States District Court for the Southern District of New York. The day before Massaro's trial was to begin, prosecutors learned of what appeared to be a critical piece of evidence: a bullet allegedly recovered from the car in which the victim's body was found. They waited for several days, however, to inform defense counsel of this development. Not until the trial was underway and the defense had made its opening statement did they make this disclosure. After the trial court and the defense had been informed of the development but still during the course of trial, defense counsel more than once declined the trial court's offer of a continuance so the bullet could be examined. Massaro was convicted and sentenced to life imprisonment.

On direct appeal new counsel for Massaro argued the District Court had erred in admitting the bullet in evidence, but he did not raise any claim relating to ineffective assistance of trial counsel. The Court of Appeals for the Second Circuit affirmed the conviction. Judgt. order reported at 57 F. 3d 1063 (1995).

Massaro later filed a motion under 28 U. S. C. § 2255, seeking to vacate his conviction. As relevant here, he claimed that his trial counsel had rendered ineffective assistance in failing to accept the trial court's offer to grant a continuance. The United States District Court for the Southern District of New York found this claim procedurally defaulted because Massaro could have raised it on direct appeal.

The Court of Appeals for the Second Circuit affirmed. 27 Fed. Appx. 26 (1995). The court acknowledged that ineffective-assistance claims usually should be excused from procedural-default rules because an attorney who handles both trial and appeal is unlikely to raise an ineffective-

assistance claim against himself. Nevertheless, it adhered to its decision in *Billy-Eko* v. *United States*, 8 F. 3d 111 (1993). Under *Billy-Eko*, when the defendant is represented by new counsel on appeal and the ineffective-assistance claim is based solely on the record made at trial, the claim must be raised on direct appeal; failure to do so results in procedural default unless the petitioner shows cause and prejudice. Finding that Massaro was represented by new counsel on appeal, that his trial counsel's ineffectiveness was evident from the record, and that he had failed to show cause or prejudice, the Court of Appeals held him procedurally barred from bringing the ineffective-assistance claim on collateral review.

We granted certiorari. 536 U. S. 990 (2002). Petitioner now urges us to hold that claims of ineffective assistance of counsel need not be raised on direct appeal, whether or not there is new counsel and whether or not the basis for the claim is apparent from the trial record. The Federal Courts of Appeals are in conflict on this question, with the Seventh Circuit joining the Second Circuit, see *Guinan* v. *United States*, 6 F. 3d 468 (CA7 1993), and 10 other Federal Courts of Appeals taking the position that there is no procedural default for failure to raise an ineffective-assistance claim on direct appeal, see, *e. g.*, *United States* v. *Cofske*, 157 F. 3d 1, 2 (CA1 1998), cert. denied, 526 U. S. 1059 (1999); *United States* v. *Jake*, 281 F. 3d 123, 132, n. 7 (CA3 2002); *United States* v. *King*, 119 F. 3d 290, 295 (CA4 1997); *United States* v. *Rivas*, 157 F. 3d 364, 369 (CA5 1998); *United States* v. *Neuhausser*, 241 F. 3d 460, 474 (CA6), cert. denied, 534 U. S. 879 (2001); *United States* v. *Evans*, 272 F. 3d 1069, 1093 (CA8 2001), cert. denied, 535 U. S. 1029 (2002); *United States* v. *Rewald*, 889 F. 2d 836, 859 (CA9 1989), cert. denied, 498 U. S. 819 (1990); *United States* v. *Galloway*, 56 F. 3d 1239, 1240 (CA10 1995) (en banc); *United States* v. *Griffin*, 699 F. 2d 1102, 1107–1109 (CA11 1983); *United States* v. *Richardson*, 167 F. 3d 621, 626 (CADC), cert. denied, 528 U. S. 895 (1999).

We agree with the majority of the Courts of Appeals, and we reverse.

The background for our discussion is the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice. See *United States* v. *Frady*, 456 U. S. 152, 167–168 (1982); *Bousley* v. *United States*, 523 U. S. 614, 621–622 (1998). The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. We conclude that requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote these objectives.

As Judge Easterbrook has noted, "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time." *Guinan*, *supra*, at 474 (concurring opinion). Applying the usual procedural-default rule to ineffective-assistance claims would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim. Furthermore, the issue would be raised for the first time in a forum not best suited to assess those facts. This is so even if the record contains some indication of deficiencies in counsel's performance. The better-reasoned approach is to permit ineffective-assistance claims to be brought in the first instance in a timely motion in the district court under § 2255. We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.

In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance. When an ineffective-assistance claim is brought on direct appeal, ap-

pellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland* v. *Washington*, 466 U. S. 668 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. See *Guinan*, *supra*, at 473 (Easterbrook, J., concurring) ("No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did. . . . Or it may turn out that counsel's overall performance was sufficient despite a glaring omission . . ."). The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. See, *e. g.*, *Billy-Eko*, *supra*, at 114. Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Under the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial. The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance.

See, *e. g.*, *Griffin*, 699 F. 2d, at 1109 (In a § 2255 proceeding, the defendant "has a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created"); *Beaulieu* v. *United States*, 930 F. 2d 805 (CA10 1991) (partially rev'd on other grounds, *United States* v. *Galloway*, 56 F. 3d 1239 (CA10 1995). In addition, the § 2255 motion often will be ruled upon by the same district judge who presided at trial. The judge, having observed the earlier trial, should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial.

The Second Circuit's rule creates inefficiencies for courts and counsel, both on direct appeal and in the collateral proceeding. On direct appeal it puts counsel into an awkward position vis-à-vis trial counsel. Appellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence.

Subjecting ineffective-assistance claims to the usual cause-and-prejudice rule also would create perverse incentives for counsel on direct appeal. To ensure that a potential ineffective-assistance claim is not waived—and to avoid incurring a claim of ineffective counsel at the appellate stage—counsel would be pressured to bring claims of ineffective trial counsel, regardless of merit.

Even meritorious claims would fail when brought on direct appeal if the trial record were inadequate to support them. Appellate courts would waste time and resources attempting to address some claims that were meritless and other claims that, though colorable, would be handled more efficiently if addressed in the first instance by the district court on col-

lateral review. See, *e. g., United States* v. *Galloway, supra,* at 1241 ("threat of . . . procedural bar has doubtless resulted in many claims being asserted on direct appeal only to protect the record . . . unnecessarily burden[ing] both the parties and the court . . ."). This concern is far from speculative. The Court of Appeals for the Second Circuit, in light of its rule applying procedural default to ineffective-assistance claims, has urged counsel to "err on the side of inclusion on direct appeal," *Billy-Eko,* 8 F. 3d, at 116.

On collateral review, the Second Circuit's rule would cause additional inefficiencies. Under that rule a court on collateral review must determine whether appellate counsel is "new." Questions may arise, for example, about whether a defendant has retained new appellate counsel when different lawyers in the same law office handle trial and appeal. The habeas court also must engage in a painstaking review of the trial record solely to determine if it was sufficient to support the ineffectiveness claim and thus whether it should have been brought on direct appeal. A clear rule allowing these claims to be brought in a proceeding under § 2255, by contrast, will eliminate these requirements. Although we could "require the parties and the district judges to search for needles in haystacks—to seek out the rare claim that could have been raised on direct appeal, and deem it waived," *Guinan,* 6 F. 3d, at 475 (Easterbrook, J., concurring)—we do not see the wisdom in requiring a court to spend time on exercises that, in most instances, will produce no benefit. It is a better use of judicial resources to allow the district court on collateral review to turn at once to the merits.

The most to be said for the rule in the Second Circuit is that it will speed resolution of some ineffective-assistance claims. For the reasons discussed, however, we think few such claims will be capable of resolution on direct appeal and thus few will benefit from earlier resolution. And the benefits of the Second Circuit's rule in those rare instances are outweighed by the increased judicial burden the rule would

impose in many other cases, where a district court on collateral review would be forced to conduct the cause-and-prejudice analysis before turning to the merits. The Second Circuit's rule, moreover, does not produce the benefits of other rules requiring claims to be raised at the earliest opportunity—such as the contemporaneous objection rule—because here, raising the claim on direct appeal does not permit the trial court to avoid the potential error in the first place.

A growing majority of state courts now follow the rule we adopt today. For example, the Supreme Court of Pennsylvania recently changed its position to hold that "a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness." *Commonwealth* v. *Grant*, 572 Pa. 48, 67, 813 A. 2d 726, 738 (2002); see also *id.*, at 62–67, and n. 13, 813 A. 2d, at 735–738, and n. 13 (cataloging other States' case law adopting this position).

Although the Government now urges us to adopt the rule of the Court of Appeals for the Second Circuit, the Government took the opposite approach in some previous cases, arguing not only that claims of ineffective assistance of counsel could be brought in the first instance in a motion under § 2255, but that they must be brought in such a motion proceeding and not on direct appeal. See, *e. g.*, *United States* v. *Cronic*, 466 U. S. 648, 667, n. 42 (1984). We do not go this far. We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*. In those cases, certain questions may arise in subsequent proceedings under § 2255 concerning the conclusiveness of determinations made on the ineffective-assistance claims raised on direct ap-

peal; but these matters of implementation are not before us. We do hold that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255.

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

*It is so ordered.*

Syllabus

# DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* KIM

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

No. 01–1491. Argued January 15, 2003—Decided April 29, 2003

Under the Immigration and Nationality Act, 8 U. S. C. § 1226(c), "[t]he Attorney General shall take into custody any alien who" is removable from this country because he has been convicted of one of a specified set of crimes, including an "aggravated felony." After respondent, a lawful permanent resident alien, was convicted in state court of first-degree burglary and, later, of "petty theft with priors," the Immigration and Naturalization Service (INS) charged him with being deportable from the United States in light of these convictions, and detained him pending his removal hearing. Without disputing the validity of his convictions or the INS' conclusion that he is deportable and therefore subject to mandatory detention under § 1226(c), respondent filed a habeas corpus action challenging § 1226(c) on the ground that his detention thereunder violated due process because the INS had made no determination that he posed either a danger to society or a flight risk. The District Court agreed and granted respondent's petition subject to the INS' prompt undertaking of an individualized bond hearing, after which respondent was released on bond. In affirming, the Ninth Circuit held that § 1226(c) violates substantive due process as applied to respondent because he is a lawful permanent resident, the most favored category of aliens. The court rejected the Government's two principal justifications for mandatory detention under § 1226(c), discounting the first—ensuring the presence of criminal aliens at their removal proceedings—upon finding that not all aliens detained pursuant to § 1226(c) would ultimately be deported, and discounting the second—protecting the public from dangerous criminal aliens—on the grounds that the aggravated felony classification triggering respondent's detention included crimes (such as respondent's) that the court did not consider "egregious" or otherwise sufficiently dangerous to the public to necessitate mandatory detention. Relying on *Zadvydas* v. *Davis*, 533 U. S. 678, the court concluded that the INS had not provided a justification for no-bail civil detention sufficient to overcome a permanent resident alien's liberty interest.

Syllabus

*Held:*

1. Section 1226(e)—which states that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review" and that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien"—does not deprive the federal courts of jurisdiction to grant habeas relief to aliens challenging their detention under § 1226(c). Respondent does not challenge a "discretionary judgment" by the Attorney General or a "decision" that the Attorney General has made regarding his detention or release. Rather, respondent challenges the statutory framework that permits his detention without bail. Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *E. g.*, *Webster* v. *Doe*, 486 U. S. 592, 603. And, where a provision precluding review is claimed to bar habeas review, the Court requires a particularly clear statement that such is Congress' intent. See *INS* v. *St. Cyr*, 533 U. S. 289, 308–309, 298, 327. Section 1226(e) contains no explicit provision barring habeas review. Pp. 516–517.

2. Congress, justifiably concerned with evidence that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings. In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. *Mathews* v. *Diaz*, 426 U. S. 67, 79–80. Although the Fifth Amendment entitles aliens to due process in deportation proceedings, *Reno* v. *Flores*, 507 U. S. 292, 306, detention during such proceedings is a constitutionally valid aspect of the process, *e. g.*, *Wong Wing* v. *United States*, 163 U. S. 228, 235, even where, as here, aliens challenge their detention on the grounds that there has been no finding that they are unlikely to appear for their deportation proceedings, *Carlson* v. *Landon*, 342 U. S. 524, 538. The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings, is governed by these cases. Respondent argues unpersuasively that the § 1226(c) detention policy violates due process under *Zadvydas*, 533 U. S., at 699, in which the Court held that § 1231(a)(6) authorizes continued detention of an alien subject to a final removal order beyond that section's 90-day removal period for only such time as is reasonably necessary to secure the removal. *Zadvydas* is materially different from the present case in two respects. First, the aliens there challenging their detention following final deportation orders were ones for whom removal was "no longer practically attainable," such that their detention

did not serve its purported immigration purpose. *Id.*, at 690. In contrast, because the statutory provision at issue in this case governs detention of deportable criminal aliens *pending their removal proceedings*, the detention necessarily serves the purpose of preventing the aliens from fleeing prior to or during such proceedings. Second, while the period of detention at issue in *Zadvydas* was "indefinite" and "potentially permanent," *id.*, at 690–691, the record shows that §1226(c) detention not only has a definite termination point, but lasts, in the majority of cases, for less than the 90 days the Court considered presumptively valid in *Zadvydas*. Pp. 517–531.

276 F. 3d 523, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which KENNEDY, J., joined in full, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined as to Part I, and in which O'CONNOR, SCALIA, and THOMAS, JJ., joined as to all but Part I. KENNEDY, J., filed a concurring opinion, *post*, p. 531. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA and THOMAS, JJ., joined, *post*, p. 533. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 540. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 576.

*Solicitor General Olson* argued the cause for petitioners. With him on the briefs were *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *Austin C. Schlick*, *Donald E. Keener*, and *Mark C. Walters*.

*Judy Rabinovitz* argued the cause for respondent. With her on the brief were *Lucas Guttentag*, *Lee Gelernt*, *Steven R. Shapiro*, *A. Stephen Hut, Jr.*, *Christopher J. Meade*, *Liliana M. Garces*, and *Jayashri Srikantiah*.*

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**Daniel J. Popeo* and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Alfred P. Carlton, Jr.*, and *Jeffrey L. Bleich;* for Citizens and Immigrants for Equal Justice et al. by *Nancy Morawetz;* for International Human Rights Organizations by *William J. Aceves* and *Paul L. Hoffman;* for Law Professors by *Daniel Kanstroom;* for the National Asian Pacific American Legal Consortium et al. by *Richard A. Cordray*, *Eugene F. Chay*, *Vincent A. Eng*, and *William L. Taylor;* and for T. Alexander Aleinikoff et al. by *Anthony J. Orler*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Section 236(c) of the Immigration and Nationality Act, 66 Stat. 200, as amended, 110 Stat. 3009–585, 8 U. S. C. § 1226(c), provides that "[t]he Attorney General shall take into custody any alien who" is removable from this country because he has been convicted of one of a specified set of crimes. Respondent is a citizen of the Republic of South Korea. He entered the United States in 1984, at the age of six, and became a lawful permanent resident of the United States two years later. In July 1996, he was convicted of first--degree burglary in state court in California and, in April 1997, he was convicted of a second crime, "petty theft with priors." The Immigration and Naturalization Service (INS) charged respondent with being deportable from the United States in light of these convictions, and detained him pending his removal hearing.[1] We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.

Respondent does not dispute the validity of his prior convictions, which were obtained following the full procedural protections our criminal justice system offers. Respondent also did not dispute the INS' conclusion that he is subject to

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[1] App. to Pet. for Cert. 32a; see 8 U. S. C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii). Section 1226(c) authorizes detention of aliens who have committed certain crimes including, *inter alia*, any "aggravated felony," §§ 1226(c)(1)(B), 1227(a)(2)(A)(iii), and any two "crimes involving moral turpitude," §§ 1226(c)(1)(B), 1227(a)(2)(A)(ii). Although the INS initially included only respondent's 1997 conviction in the charging document, it subsequently amended the immigration charges against him to include his 1996 conviction for first-degree burglary as another basis for mandatory detention and deportation. Brief for Petitioners 3, n. 2 (alleging that respondent's convictions reflected two " 'crimes involving moral turpitude' ").

mandatory detention under § 1226(c). See Brief in Opposition 1–2; App. 8–9.[2] In conceding that he was deportable, respondent forwent a hearing at which he would have been entitled to raise any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category. See 8 CFR § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999).[3] Respondent instead filed a habeas corpus action pursuant to 28 U. S. C. § 2241 in the United States District Court for the Northern District of California challenging the constitutionality of § 1226(c) itself. App. to Pet. for Cert. 2a. He argued that his detention under § 1226(c) violated due process because the INS had made no determination that he posed either a danger to society or a flight risk. *Id.*, at 31a, 33a.

The District Court agreed with respondent that § 1226(c)'s requirement of mandatory detention for certain criminal aliens was unconstitutional. *Kim* v. *Schiltgen*, No. C 99–

[2] As respondent explained: "The statute requires the [INS] to take into custody any alien who 'is deportable' from the United States based on having been convicted of any of a wide range of crimes. . . . [Respondent] does not challenge INS's authority to take him into custody after he finished serving his criminal sentence. His challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention, even where, as here, the INS never asserted that he posed a danger or significant flight risk." Brief in Opposition 1–2.

[3] This "*Joseph* hearing" is immediately provided to a detainee who claims that he is not covered by § 1226(c). Tr. of Oral Arg. 22. At the hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention. See 8 CFR § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Because respondent conceded that he was deportable because of a conviction that triggers § 1226(c) and thus sought no *Joseph* hearing, we have no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to § 1226(c). Such individualized review is available, however, and JUSTICE SOUTER is mistaken if he means to suggest otherwise. See *post*, at 555–556, 558 (opinion concurring in part and dissenting in part) (hereinafter dissent).

2257 SI (Aug. 11, 1999), App. to Pet. for Cert. 31a–51a. The District Court therefore granted respondent's petition subject to the INS' prompt undertaking of an individualized bond hearing to determine whether respondent posed either a flight risk or a danger to the community. *Id.*, at 50a. Following that decision, the District Director of the INS released respondent on $5,000 bond.

The Court of Appeals for the Ninth Circuit affirmed. *Kim* v. *Ziglar*, 276 F. 3d 523 (2002). That court held that § 1226(c) violates substantive due process as applied to respondent because he is a permanent resident alien. *Id.*, at 528. It noted that permanent resident aliens constitute the most favored category of aliens and that they have the right to reside permanently in the United States, to work here, and to apply for citizenship. *Ibid.* The court recognized and rejected the Government's two principal justifications for mandatory detention under § 1226(c): (1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminal aliens. The Court of Appeals discounted the first justification because it found that not all aliens detained pursuant to § 1226(c) would ultimately be deported. *Id.*, at 531–532. And it discounted the second justification on the grounds that the aggravated felony classification triggering respondent's detention included crimes that the court did not consider "egregious" or otherwise sufficiently dangerous to the public to necessitate mandatory detention. *Id.*, at 532–533. Respondent's crimes of first-degree burglary (burglary of an inhabited dwelling) and petty theft, for instance, the Ninth Circuit dismissed as "rather ordinary crimes." *Id.*, at 538. Relying upon our recent decision in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), the Court of Appeals concluded that the INS had not provided a justification "for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest." 276 F. 3d, at 535.

Three other Courts of Appeals have reached the same conclusion. See *Patel* v. *Zemski*, 275 F. 3d 299 (CA3 2001); *Welch* v. *Ashcroft*, 293 F. 3d 213 (CA4 2002); *Hoang* v. *Comfort*, 282 F. 3d 1247 (CA10 2002). The Seventh Circuit, however, rejected a constitutional challenge to § 1226(c) by a permanent resident alien. *Parra* v. *Perryman*, 172 F. 3d 954 (1999). We granted certiorari to resolve this conflict, see 536 U. S. 956 (2002), and now reverse.

## I

We address first the argument that 8 U. S. C. § 1226(e) deprives us of jurisdiction to hear this case. See *Florida* v. *Thomas*, 532 U. S. 774, 777 (2001) ("Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case"). An *amicus* argues, and the concurring opinion agrees, that § 1226(e) deprives the federal courts of jurisdiction to grant habeas relief to aliens challenging their detention under § 1226(c). See Brief for Washington Legal Foundation et al. as *Amici Curiae.* Section 1226(e) states:

> "(e) Judicial review
>
> "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."

The *amicus* argues that respondent is contesting a "decision by the Attorney General" to detain him under § 1226(c), and that, accordingly, no court may set aside that action. Brief for Washington Legal Foundation et al. as *Amici Curiae* 7–8.

But respondent does not challenge a "discretionary judgment" by the Attorney General or a "decision" that the Attorney General has made regarding his detention or release.

Rather, respondent challenges the statutory framework that permits his detention without bail. *Parra* v. *Perryman*, *supra*, at 957 ("Section 1226(e) likewise deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions").

This Court has held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster* v. *Doe*, 486 U. S. 592, 603 (1988); see also *Johnson* v. *Robison*, 415 U. S. 361, 367 (1974) (holding that provision barring review of "'decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans'" did not bar constitutional challenge (emphasis deleted)). And, where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent. See *INS* v. *St. Cyr*, 533 U. S. 289, 308–309 (2001) (holding that title of provision, "Elimination of Custody Review by Habeas Corpus," along with broad statement of intent to preclude review, was not sufficient to bar review of habeas corpus petitions); see also *id.*, at 298 (citing cases refusing to find bar to habeas review where there was no specific mention of the Court's authority to hear habeas petitions); *id.*, at 327 (SCALIA, J., dissenting) (arguing that opinion established "a superclear statement, 'magic words' requirement for the congressional expression of" an intent to preclude habeas review).

Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail.

## II

Having determined that the federal courts have jurisdiction to review a constitutional challenge to § 1226(c), we proceed to review respondent's claim. Section 1226(c) man-

dates detention during removal proceedings for a limited class of deportable aliens—including those convicted of an aggravated felony. Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens. See, *e. g.*, Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 103d Cong., 1st Sess. (1993); S. Rep. No. 104–48, p. 1 (1995) (hereinafter S. Rep. 104–48) (confinement of criminal aliens alone cost $724 million in 1990). Criminal aliens were the fastest growing segment of the federal prison population, already constituting roughly 25% of all federal prisoners, and they formed a rapidly rising share of state prison populations as well. *Id.*, at 6–9. Congress' investigations showed, however, that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country. *Id.*, at 1. One study showed that, at the then-current rate of deportation, it would take 23 years to remove every criminal alien already subject to deportation. *Id.*, at 5. Making matters worse, criminal aliens who were deported swiftly reentered the country illegally in great numbers. *Id.*, at 3.

The INS' near-total inability to remove deportable criminal aliens imposed more than a monetary cost on the Nation. First, as Congress explained, "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others." S. Rep. No. 104–249, p. 7 (1996). Second, deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began. Hearing on H. R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the

Judiciary, 101st Cong., 1st Sess., 54, 52 (1989) (hereinafter 1989 House Hearing); see also *Zadvydas*, 533 U. S., at 713–714 (KENNEDY, J., dissenting) (discussing high rates of recidivism for released criminal aliens).

Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings. See Department of Justice, Office of the Inspector General, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I–96–03 (Mar. 1996), App. 46 (hereinafter Inspection Report) ("Detention is key to effective deportation"); see also H. R. Rep. No. 104–469, p. 123 (1995). The Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society. See 8 U. S. C. § 1252(a) (1982 ed.). Despite this discretion to conduct bond hearings, however, in practice the INS faced severe limitations on funding and detention space, which considerations affected its release determinations. S. Rep. 104–48, at 23 ("[R]elease determinations are made by the INS in large part, according to the number of beds available in a particular region"); see also Reply Brief for Petitioners 9.

Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings. See S. Rep. 104–48, at 2; see also Brief for Petitioners 19.[4] The

[4] Although the Attorney General had authority to release these aliens on bond, it is not clear that *all* of the aliens released were in fact given individualized bond hearings. See Brief for Petitioners 19 ("[M]ore than 20% of criminal aliens who were released on bond *or otherwise not kept in custody* throughout their deportation proceedings failed to appear for those proceedings" (emphasis added)), citing S. Rep. 104–48, at 2. The evidence does suggest, however, that *many* deportable criminal aliens in this "released criminal aliens" sample received such determinations. See

dissent disputes that statistic, *post*, at 562–564 (opinion of SOUTER, J.), but goes on to praise a subsequent study conducted by the Vera Institute of Justice that more than confirms it. *Post*, at 565–566. As the dissent explains, the Vera study found that "77% of those [deportable criminal aliens] released on bond" showed up for their removal proceedings. *Post*, at 565. This finding—that one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings—is even more striking than the one-in-five flight rate reflected in the evidence before Congress when it adopted § 1226(c).[5] The Vera Institute study strongly supports Congress' concern that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight.

Congress amended the immigration laws several times toward the end of the 1980's. In 1988, Congress limited

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Brief for Petitioners 19 (noting that, for aliens not evaluated for flight risk at a bond hearing, the prehearing skip rate doubled to 40%).

[5] The dissent also claims that the study demonstrated that "92% of criminal aliens . . . who were released under supervisory conditions attended all of their hearings." *Post*, at 565 (opinion of SOUTER, J.). The study did manage to raise the appearance rate for criminal aliens through a supervision program known as the Appearance Assistance Program (AAP). But the AAP study is of limited value. First, the study included only 16 aliens who, like respondent, were released from prison and charged with being deportable on the basis of an aggravated felony. 1 Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. 33–34, 36 (Aug. 1, 2000). In addition, all 127 aliens in the AAP study were admitted into the study group only after being screened for "strength of family and community ties, appearance rates in prior legal proceedings, and eligibility to apply for a legal remedy." *Id.*, at 13; see also *id.*, at 37. Following this selection process, "supervision staff were in frequent, ongoing communication with participants," *id.*, at 14, through, among other things, required reporting sessions, periodic home visits, and assistance in retaining legal representation, *id.*, at 41–42. And, in any event, respondent seeks an individualized bond hearing, not "community supervision." The dissent's claim that criminal aliens released under supervisory conditions are likely to attend their hearings, *post*, at 565, therefore, is totally beside the point.

the Attorney General's discretion over custody determinations with respect to deportable aliens who had been convicted of aggravated felonies. See Pub. L. 100–690, Tit. VII, § 7343(a), 102 Stat. 4470. Then, in 1990, Congress broadened the definition of "aggravated felony," subjecting more criminal aliens to mandatory detention. See Pub. L. 101–649, Tit. V, § 501(a), 104 Stat. 5048. At the same time, however, Congress added a new provision, 8 U. S. C. § 1252(a)(2)(B) (1988 ed., Supp. II), authorizing the Attorney General to release permanent resident aliens during their deportation proceedings where such aliens were found not to constitute a flight risk or threat to the community. See Pub. L. 101–649, Tit. V, § 504(a)(5), 104 Stat. 5049.

During the same period in which Congress was making incremental changes to the immigration laws, it was also considering wholesale reform of those laws. Some studies presented to Congress suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country. See, *e. g.*, 1989 House Hearing 75; Inspection Report, App. 46; S. Rep. 104–48, at 32 ("Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond"). It was following those Reports that Congress enacted 8 U. S. C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability.

"In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews* v. *Diaz*, 426 U. S. 67, 79–80 (1976). The dissent seeks to avoid this fundamental premise of immigration law by repeatedly referring to it as "dictum." *Post*, at 547–549, n. 9 (opinion of SOUTER, J.). The Court in *Mathews*, however, made the statement the dissent now seeks to avoid in reliance on clear

precedent establishing that "'any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.'" 426 U. S., at 81, n. 17 (quoting *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952)). And, since *Mathews*, this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens. See, *e. g.*, *Zadvydas*, 533 U. S., at 718 (KENNEDY, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens"); *Reno* v. *Flores*, 507 U. S. 292, 305–306 (1993) ("Thus, 'in the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens"'" (quoting *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977), in turn quoting *Mathews*, *supra*, at 79–80)); *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 273 (1990).

In his habeas corpus challenge, respondent did not contest Congress' general authority to remove criminal aliens from the United States. Nor did he argue that he himself was not "deportable" within the meaning of § 1226(c).[6] Rather,

[6] Respondent's concession on this score is relevant for two reasons: First, because of the concession, respondent by his own choice did not receive one of the procedural protections otherwise provided to aliens detained under § 1226(c). And, second, because of the concession we do not reach a contrary argument raised by respondent for the first time in his brief on the merits in this Court. Specifically, in his brief on the merits, respondent suggests that he might not be subject to detention under § 1226(c) after all because his 1997 conviction for petty theft with priors might not qualify as an aggravated felony under recent Ninth Circuit precedent. Respondent now states that he intends to argue at his next removal hearing that "his 1997 conviction does not constitute an aggravated felony . . . and his 1996 conviction [for first-degree burglary] does not constitute either an aggravated felony or a crime involving moral turpitude." Brief for Respondent 11–12. As respondent has conceded that he is deportable for purposes of his habeas corpus challenge to § 1226(c) at all previous stages of this proceeding, see n. 3, *supra*, we decide the case on that basis.

respondent argued that the Government may not, consistent with the Due Process Clause of the Fifth Amendment, detain him for the brief period necessary for his removal proceedings. The dissent, after an initial detour on the issue of respondent's concession, see *post*, at 541–543 (opinion of SOUTER, J.), ultimately acknowledges the real issue in this case. *Post*, at 555–556, n. 11; see also Brief in Opposition 1–2 (explaining that respondent's "challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention").

"It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Flores*, *supra*, at 306. At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. As we said more than a century ago, deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Wong Wing* v. *United States*, 163 U. S. 228, 235 (1896); see also *Flores*, *supra*, at 305–306; *Zadvydas*, 533 U. S., at 697 (distinguishing constitutionally questioned detention there at issue from "detention pending a determination of removability"); *id.*, at 711 (KENNEDY, J., dissenting) ("Congress' power to detain aliens in connection with removal or exclusion . . . is part of the Legislature's considerable authority over immigration matters").[7]

In *Carlson* v. *Landon*, 342 U. S. 524 (1952), the Court considered a challenge to the detention of aliens who were deportable because of their participation in Communist ac-

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Lest there be any confusion, we emphasize that by conceding he is "*deportable*" and, hence, subject to mandatory detention under § 1226(c), respondent did not concede that he *will ultimately be deported.* As the dissent notes, respondent has applied for withholding of removal. *Post*, at 541 (opinion of SOUTER, J.).

[7] In fact, prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings. See §20, 34 Stat. 905.

tivities. The detained aliens did not deny that they were members of the Communist Party or that they were therefore deportable. *Id.*, at 530. Instead, like respondent in the present case, they challenged their detention on the grounds that there had been no finding that they were unlikely to appear for their deportation proceedings when ordered to do so. *Id.*, at 531–532; see also Brief for Petitioner in *Carlson* v. *Landon*, O. T. 1951, No. 35, p. 12 (arguing that legislative determinations could not justify "depriving [an alien] of his liberty without facts personal to the individual"). Although the Attorney General ostensibly had discretion to release detained Communist aliens on bond, the INS had adopted a policy of refusing to grant bail to those aliens in light of what Justice Frankfurter viewed as the mistaken "conception that Congress had made [alien Communists] in effect unbailable." 342 U. S., at 559, 568 (dissenting opinion).

The Court rejected the aliens' claims that they were entitled to be released from detention if they did not pose a flight risk, explaining "[d]etention is necessarily a part of this deportation procedure." *Id.*, at 538; see also *id.*, at 535. The Court noted that Congress had chosen to make such aliens deportable based on its "understanding of [Communists'] attitude toward the use of force and violence . . . to accomplish their political aims." *Id.*, at 541. And it concluded that the INS could deny bail to the detainees "by reference to the legislative scheme" even without any finding of flight risk. *Id.*, at 543; see also *id.*, at 550 (Black, J., dissenting) ("Denial [of bail] was not on the ground that if released [the aliens] might try to evade obedience to possible deportation orders"); *id.*, at 551, and n. 6.

The dissent argues that, even though the aliens in *Carlson* were not flight risks, "individualized findings of dangerousness were made" as to each of the aliens. *Post*, at 573 (opinion of SOUTER, J.). The dissent, again, is mistaken. The aliens in *Carlson* had *not* been found individually dangerous.

The only evidence against them was their membership in the Communist Party and "a degree . . . of participation in Communist activities." 342 U. S., at 541. There was no "individualized findin[g]" of likely future dangerousness as to any of the aliens and, in at least one case, there was a specific finding of nondangerousness.[8] The Court nonetheless concluded that the denial of bail was permissible "by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.*, at 543.[9]

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[8] See *Carlson* v. *Landon*, 342 U. S., at 549 (Black, J., dissenting) (noting that, in at least one case, the alien involved had been found "'*not* likely to engage in any subversive activities'" (emphasis added)); see also *id.*, at 550, n. 5 (quoting the District Judge's finding in case No. 35 that "'I don't know whether it is true . . . that their release is dangerous to the security of the United States'"); *id.*, at 552 ("[T]he bureau agent is *not* required to prove that a person he throws in jail is . . . 'dangerous'" (emphasis added)); see also *id.*, at 567 (Frankfurter, J., dissenting) ("[T]he Attorney General . . . did *not* deny bail from an individualized estimate of 'the danger to the public safety of [each person's] presence within the community'" (emphasis added)).

[9] Apart from its error with respect to the dangerousness determination, the dissent attempts to distinguish *Carlson* from the present case by arguing that the aliens in *Carlson* had engaged in "'personal activity'" in support of a political party Congress considered "'a menace to the public.'" *Post*, at 569 (opinion of SOUTER, J.). In suggesting that this is a distinction, the dissent ignores the "personal activity" that aliens like respondent have undertaken in committing the crimes that subject them to detention in the first instance—personal activity that has been determined with far greater procedural protections than any finding of "active membership" in the Communist Party involved in *Carlson*. See 342 U. S., at 530 ("[T]he Director made allegation[s], supported by affidavits, that the Service's dossier of each petitioner contained evidence indicating to him that each was at the time of arrest a member of the Communist Party of the United States and had since 1930 participated . . . in the Party's indoctrination of others"). In the present case, respondent became "deportable" under § 1226(c) only following criminal convictions that were secured following full procedural protections. These convictions, moreover, reflect "personal activity" that Congress considered relevant to future dangerousness. Cf. *Zadvydas* v. *Davis*, 533 U. S. 678, 714 (2001) (KENNEDY, J., dissenting) (noting that "a criminal record accumulated by an

In *Reno* v. *Flores*, 507 U. S. 292 (1993), the Court considered another due process challenge to detention during deportation proceedings. The due process challenge there was brought by a class of alien juveniles. The INS had arrested them and was holding them in custody pending their deportation hearings. The aliens challenged the INS' policy of releasing detained alien juveniles only into the care of their parents, legal guardians, or certain other adult relatives. See, *e. g.*, *id.*, at 297 (citing Detention and Release of Juveniles, 53 Fed. Reg. 17449 (1988) (codified as to deportation at 8 CFR § 242.24 (1992))). The aliens argued that the policy improperly relied "upon a 'blanket' presumption of the unsuitability of custodians other than parents, close relatives, and guardians" to care for the detained juvenile aliens. 507 U. S., at 313. In rejecting this argument, the Court emphasized that "reasonable presumptions and generic rules," even when made by the INS rather than Congress, are not necessarily impermissible exercises of Congress' traditional power to legislate with respect to aliens. *Ibid.;* see also *id.*, at 313–314 ("In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation . . . . The particularization and individuation need go no further than this"). Thus, as with the prior challenges to detention during deportation proceedings, the Court in *Flores* rejected the due process challenge and upheld the constitutionality of the detention.

Despite this Court's longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings, respondent argues that the narrow detention policy reflected in 8 U. S. C. § 1226(c) violates due process. Respondent, like

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admitted alien" is a good indicator of future danger, and that "[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist").

the four Courts of Appeals that have held § 1226(c) to be unconstitutional, relies heavily upon our recent opinion in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001).

In *Zadvydas*, the Court considered a due process challenge to detention of aliens under 8 U. S. C. § 1231 (1994 ed., Supp. V), which governs detention following a final order of removal. Section 1231(a)(6) provides, among other things, that when an alien who has been ordered removed is not in fact removed during the 90-day statutory "removal period," that alien "may be detained beyond the removal period" in the discretion of the Attorney General. The Court in *Zadvydas* read § 1231 to authorize continued detention of an alien following the 90-day removal period for only such time as is reasonably necessary to secure the alien's removal. 533 U. S., at 699.

But *Zadvydas* is materially different from the present case in two respects.

First, in *Zadvydas*, the aliens challenging their detention following final orders of deportation were ones for whom removal was "no longer practically attainable." *Id.*, at 690. The Court thus held that the detention there did not serve its purported immigration purpose. *Ibid.* In so holding, the Court rejected the Government's claim that, by detaining the aliens involved, it could prevent them from fleeing prior to their removal. The Court observed that where, as there, "detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed." *Ibid.* (internal quotation marks and citation omitted).[10]

In the present case, the statutory provision at issue governs detention of deportable criminal aliens *pending their*

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[10] The dissent denies this point, insisting that the detention at issue in *Zadvydas* actually did bear a reasonable relation to its immigration purpose. *Post*, at 561 (opinion of SOUTER, J.) ("[T]he statute in *Zadvydas* . . . served the purpose of preventing aliens . . . from fleeing prior to actual deportation").

*removal proceedings.* Such detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed. Respondent disagrees, arguing that there is no evidence that mandatory detention is necessary because the Government has never shown that individualized bond hearings would be ineffective. See Brief for Respondent 14. But as discussed above, see *supra*, at 519–520, in adopting § 1226(c), Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully.

Respondent argues that these statistics are irrelevant and do not demonstrate that individualized bond hearings "are ineffective or burdensome." Brief for Respondent 33–40. It is of course true that when Congress enacted § 1226, individualized bail determinations had not been tested under optimal conditions, or tested in all their possible permutations. But when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal. The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action. Cf., *e. g.*, *Los Angeles* v. *Alameda Books, Inc.*, 535 U. S. 425, 436–437 (2002); *Flores*, *supra*, at 315 ("It may well be that other policies would be even better, but 'we are [not] a legislature charged with formulating public policy' " (quoting *Schall* v. *Martin*, 467 U. S. 253, 281 (1984))).

*Zadvydas* is materially different from the present case in a second respect as well. While the period of detention at issue in *Zadvydas* was "indefinite" and "potentially permanent," 533 U. S., at 690–691, the detention here is of a much shorter duration.

*Zadvydas* distinguished the statutory provision it was there considering from § 1226 on these very grounds, noting that "post-removal-period detention, *unlike detention pending a determination of removability* . . . , has no obvious termination point." *Id.*, at 697 (emphasis added). Under §1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas.*[11] The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days. Brief for Petitioners 39–40. In the remaining 15% of cases, in which the alien appeals the decision of the immigration judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter. *Id.*, at 40.[12]

These statistics do not include the many cases in which removal proceedings are completed while the alien is still serving time for the underlying conviction. *Id.*, at 40,

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[11] The dissent concedes that "[t]he scheme considered in *Zadvydas* did not provide review immediately . . . . [C]ustody review hearings usually occurred within three months of a transfer to a postorder detention unit." *Post,* at 555, n. 11 (opinion of SOUTER, J.). Yet, in discussing the present case, the dissent insists that "the due process requirement of an individualized finding of necessity applies to detention periods shorter than" respondent's. *Post,* at 568, n. 24 (citing *Schall* v. *Martin,* 467 U. S. 253, 270, 276–277 (1984), in which "the detainee was entitled to a hearing" when threatened with "a maximum detention period of 17 days"). The dissent makes no attempt to reconcile its suggestion that aliens are entitled to an immediate hearing with the holding in *Zadvydas* permitting aliens to be detained for several months prior to such a hearing.

[12] The very limited time of the detention at stake under § 1226(c) is not missed by the dissent. See *post,* at 568 (opinion of SOUTER, J.) ("Successful challenges often require several months"); *ibid.* (considering "[t]he potential for several months [worth] of confinement"); but see *post,* at 549 ("potentially lengthy detention").

n. 17.[13] In those cases, the aliens involved are never subjected to mandatory detention at all. In sum, the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.[14] Respondent was detained for some-

[13] Congress has directed the INS to identify and track deportable criminal aliens while they are still in the criminal justice system, and to complete removal proceedings against them as promptly as possible. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, §§ 432, 438(a), 110 Stat. 1273–1276; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, §§ 326, 329, 110 Stat. 3009–630 to 3009–631 (codified at 8 U. S. C. § 1228). The INS therefore established the Institutional Hearing Program (IHP) (subsequently subsumed under the "Institutional Removal Program"). By 1997, the General Accounting Office found that nearly half of all deportable criminal aliens' cases were completed through the IHP prior to the aliens' release from prison. See General Accounting Office, Report to the Chairman, Subcommittee on Immigration and Claims of the House Committee on the Judiciary, INS' Efforts to Remove Imprisoned Aliens Continue to Need Improvement 10, Fig. 1 (Oct. 1998). The report urged, however, that the INS needed to improve its operations in order to complete removal proceedings against all deportable criminal aliens before their release. *Id.*, at 13. Should this come to pass, of course, § 1226(c) and the temporary detention it mandates would be rendered obsolete.

[14] Prior to the enactment of § 1226(c), when the vast majority of deportable criminal aliens were not detained during their deportation proceedings, many filed frivolous appeals in order to delay their deportation. See S. Rep. 104–48, at 2 ("Delays can earn criminal aliens more than work permits and wages—if they delay long enough they may even obtain U. S. citizenship"). Cf. *Zadvydas*, 533 U. S., at 713 (KENNEDY, J., dissenting) ("[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens"). Respondent contends that the length of detention required to appeal may deter aliens from exercising their right to do so. Brief for Respondent 32. As we have explained before, however, "the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow," and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices. *McGautha* v. *California*, 402 U. S. 183, 213 (1971) (internal quotation marks omitted); accord, *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 30–31 (1973).

what longer than the average—spending six months in INS custody prior to the District Court's order granting habeas relief, but respondent himself had requested a continuance of his removal hearing.[15]

For the reasons set forth above, respondent's claim must fail. Detention during removal proceedings is a constitutionally permissible part of that process. See, *e. g.*, *Wong Wing*, 163 U. S., at 235 ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid"); *Carlson* v. *Landon*, 342 U. S. 524 (1952); *Reno* v. *Flores*, 507 U. S. 292 (1993). The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings, is governed by these cases. The judgment of the Court of Appeals is

*Reversed.*

JUSTICE KENNEDY, concurring.

While the justification for 8 U. S. C. § 1226(c) is based upon the Government's concerns over the risks of flight and danger to the community, *ante*, at 518–521, the ultimate purpose behind the detention is premised upon the alien's deportability. As a consequence, due process requires individualized procedures to ensure there is at least some merit to the Immigration and Naturalization Service's (INS) charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing. See *Zadvydas* v. *Davis*, 533 U. S. 678, 690 (2001) ("[W]here detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which

[15] Respondent was held in custody for three months before filing his habeas petition. His removal hearing was scheduled to occur two months later, but respondent requested and received a continuance to obtain documents relevant to his withholding application. See Brief for Respondent 9, n. 12.

the individual was committed" (internal quotation marks and brackets omitted)); *id.*, at 718 (KENNEDY, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention"). If the Government cannot satisfy this minimal, threshold burden, then the permissibility of continued detention pending deportation proceedings turns solely upon the alien's ability to satisfy the ordinary bond procedures—namely, whether if released the alien would pose a risk of flight or a danger to the community. *Id.*, at 721 (KENNEDY, J., dissenting).

As the Court notes, these procedures were apparently available to respondent in this case. Respondent was entitled to a hearing in which he could have "raise[d] any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category." *Ante*, at 514, and n. 3 (citing 8 CFR § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999)). Had he prevailed in such a proceeding, the Immigration Judge then would have had to determine if respondent "could be considered . . . for release under the general bond provisions" of § 1226(a). *Id.*, at 809. Respondent, however, did not seek relief under these procedures, and the Court had no occasion here to determine their adequacy. *Ante*, at 514, n. 3.

For similar reasons, since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified. *Zadvydas*, 533 U. S., at 684–686; *id.*, at 721 (KENNEDY, J., dissenting) ("[A]liens are entitled to be free from detention that is arbitrary or capricious"). Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerous-

ness, but to incarcerate for other reasons. That is not a proper inference, however, either from the statutory scheme itself or from the circumstances of this case. The Court's careful opinion is consistent with these premises, and I join it in full.

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

I join all but Part I of the Court's opinion because, a majority having determined there is jurisdiction, I agree with the Court's resolution of respondent's challenge on the merits. I cannot join Part I because I believe that 8 U. S. C. § 1226(e) unequivocally deprives federal courts of jurisdiction to set aside "any action or decision" by the Attorney General in detaining criminal aliens under § 1226(c) while removal proceedings are ongoing. That is precisely the nature of the action before us.

I

I begin with the text of the statute:

> "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." § 1226(e) (emphasis added).

There is no dispute that after respondent's release from prison in 1999, the Attorney General detained him "under this section," *i. e.*, under § 1226. And, the action of which respondent complains is one "regarding the detention or release of a[n] alien or the grant, revocation, or denial of bond or parole." § 1226(e). In my view, the only plausible reading of § 1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the Attorney General's decision

to deem a criminal alien such as respondent ineligible for release during the limited duration of his or her removal proceedings.

I recognize both the "strong presumption in favor of judicial review of administrative action" and our "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS* v. *St. Cyr*, 533 U. S. 289, 298 (2001). I also acknowledge that Congress will not be deemed to have repealed habeas jurisdiction in the absence of a specific and unambiguous statutory directive to that effect. See *id.*, at 312–313; *Ex parte Yerger*, 8 Wall. 85, 105 (1869). Here, however, the signal sent by Congress in enacting § 1226(e) could not be clearer: "*No court* may set aside *any action or decision* . . . regarding the detention or release of any alien." (Emphasis added.) There is simply no reasonable way to read this language other than as precluding all review, including habeas review, of the Attorney General's actions or decisions to detain criminal aliens pursuant to § 1226(c).

In *St. Cyr*, the Court held that certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) do not strip federal courts of their jurisdiction to review an alien's habeas claim that he or she is eligible for a waiver of deportation. 533 U. S., at 312. I dissented in that case, and continue to believe it was wrongly decided. Nothing in *St. Cyr*, however, requires that we ignore the plain language and clear meaning of § 1226(e).

In *St. Cyr*, the Court stressed the significance of Congress' use of the term "judicial review" in each of the jurisdictional-limiting provisions at issue. In concluding that Congress had not intended to limit habeas jurisdiction by limiting "judicial review," the Court reasoned as follows:

> "The term 'judicial review' or 'jurisdiction to review' is the focus of each of these three provisions. In the im-

> migration context, 'judicial review' and 'habeas corpus' have historically distinct meanings. See *Heikkila* v. *Barber*, 345 U. S. 229 (1953). In *Heikkila*, the Court concluded that the finality provisions at issue 'preclud[ed] judicial review' to the maximum extent possible under the Constitution, and thus concluded that the [Administrative Procedure Act] was inapplicable. *Id.*, at 235. Nevertheless, the Court reaffirmed the right to habeas corpus. *Ibid.* Noting that the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA, the Court concluded that 'it is the scope of inquiry on habeas corpus that differentiates' habeas review from 'judicial review.'" *Id.*, at 311–312.

In this case, however, § 1226(e) does not mention any limitations on "judicial review." To be sure, the first sentence of § 1226(e) precludes "review" of the Attorney General's "discretionary judgment[s]" to detain aliens under § 1226(c). But the second sentence is not so limited, and states unequivocally that "[n]o court may set aside any action or decision" to detain an alien under § 1226(c). It cannot seriously be maintained that the second sentence employs a term of art such that "no court" does not really mean "no court," or that a decision of the Attorney General may not be "set aside" in actions filed under the Immigration and Naturalization Act but may be set aside on habeas review.

Congress' use of the term "Judicial review" as the title of § 1226(e) does not compel a different conclusion. As the Court stated in *St. Cyr*, "a title alone is not controlling," *id.*, at 308, because the title of a statute has no power to give what the text of the statute takes away. Where as here the statutory text is clear, "'the title of a statute . . . cannot limit the plain meaning of the text.'" *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947)).

The Court also focused in *St. Cyr* on the absence of any language in the relevant statutory provisions making explicit reference to habeas review under 28 U. S. C. § 2241. See 533 U. S., at 313, n. 36. This statutory silence spoke volumes, the Court reasoned, in light of the "historic use of § 2241 jurisdiction as a means of reviewing deportation and exclusion orders," *ibid.* In contrast, there is no analogous history of routine reliance on habeas jurisdiction to challenge the detention of aliens without bail pending the conclusion of removal proceedings. We have entertained such challenges only twice, and neither was successful on the merits. See *Reno* v. *Flores*, 507 U. S. 292 (1993); *Carlson* v. *Landon*, 342 U. S. 524 (1952). See also Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1067, n. 120 (1998) (distinguishing detention pursuant to a final order of removal from the interlocutory detention at issue here). Congress' failure to mention § 2241 in this context therefore lacks the significance that the Court accorded Congress' silence on the issue in *St. Cyr.* In sum, nothing in *St. Cyr* requires us to interpret 8 U. S. C. § 1226(e) to mean anything other than what its plain language says.

I recognize that the two Courts of Appeals that have considered the issue have held that § 1226(e) does not preclude habeas claims such as respondent's. See *Patel* v. *Zemski*, 275 F. 3d 299 (CA3 2001); *Parra* v. *Perryman*, 172 F. 3d 954 (CA7 1999). In *Parra*, the Seventh Circuit held that § 1226(e) does not bar "challenges to § 1226(c) itself, as opposed to decisions implementing that subsection." *Id.*, at 957. Though the Court's opinion today relies heavily on this distinction, I see no basis for importing it into the plain language of the statute.

The Seventh Circuit sought support from our decision in *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471 (1999) *(AADC)*, but our holding there supports my reading of § 1226(e). In *AADC*, the Court construed a statute that sharply limits review of claims "arising from the

decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this [Act]." 8 U. S. C. § 1252(g) (1994 ed., Supp. III). The Court concluded that this provision imposes jurisdictional limits only on claims addressing one of the three "'decision[s] or action[s]'" specifically enumerated in the statute. *AADC, supra,* at 482. Nowhere in *AADC* did the Court suggest, however, that the statute's jurisdictional limits might not apply depending on the particular grounds raised by an alien for challenging the Attorney General's decisions or actions in these three areas. *AADC* therefore provides no support for imposing artificial limitations on the broad scope of 8 U. S. C. § 1226(e).

## II

Because § 1226(e) plainly deprives courts of federal habeas jurisdiction over claims that mandatory detention under § 1226(c) is unconstitutional, one could conceivably argue that such a repeal violates the Suspension Clause, which provides as follows: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2. The clarity of § 1226(e)'s text makes such a question unavoidable, unlike in *St. Cyr*, where the Court invoked the doctrine of constitutional doubt and interpreted the relevant provisions of AEDPA and IIRIRA not to repeal habeas jurisdiction. *St. Cyr, supra,* at 314; see also *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 57, n. 9 (1996) (where the text of a statute is clear, the "preference for avoiding a constitutional question" cannot be invoked to defeat the plainly expressed intent of Congress).

In my view, any argument that § 1226(e) violates the Suspension Clause is likely unavailing. *St. Cyr* held that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" 533 U. S., at 301 (quoting *Felker* v. *Turpin,* 518 U. S. 651, 663–664 (1996)). The consti-

tutionality of § 1226(e)'s limitation on habeas review therefore turns on whether the writ was generally available to those in respondent's position in 1789 (or, possibly, thereafter) to challenge detention during removal proceedings.

Admittedly, discerning the relevant habeas corpus law for purposes of Suspension Clause analysis is a complex task. Nonetheless, historical evidence suggests that respondent would not have been permitted to challenge his temporary detention pending removal until very recently. Because colonial America imposed few restrictions on immigration, there is little case law prior to that time about the availability of habeas review to challenge temporary detention pending exclusion or deportation. See *St. Cyr*, *supra*, at 305. The English experience, however, suggests that such review was not available:

> "In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly exercised by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848. Eminent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 709 (1893) (citations omitted).

In this country, Congress did not pass the first law regulating immigration until 1875. See 18 Stat. (pt. 3) 477. In the late 19th century, as statutory controls on immigration tightened, the number of challenges brought by aliens to Government deportation or exclusion decisions also increased. See *St. Cyr*, *supra*, at 305–306. Because federal immigration laws from 1891 until 1952 made no express provision for judicial review, what limited review existed took the form of pe-

titions for writs of habeas corpus. See, *e. g.*, *Ekiu* v. *United States*, 142 U. S. 651 (1892); *Fong Yue Ting* v. *United States*, *supra; The Japanese Immigrant Case*, 189 U. S. 86 (1903); *Chin Yow* v. *United States*, 208 U. S. 8 (1908); *Kwock Jan Fat* v. *White*, 253 U. S. 454 (1920); *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922). Though the Court was willing to entertain these habeas challenges to Government exclusion and deportation decisions, in no case did the Court question the right of immigration officials to temporarily detain aliens while exclusion or deportation proceedings were ongoing.

By the mid-20th century, the number of aliens in deportation proceedings being released on parole rose considerably. See, *e. g.*, *Carlson* v. *Landon*, 342 U. S., at 538, n. 31. Nonetheless, until 1952 habeas corpus petitions remained the only means by which deportation orders could be challenged. *Heikkila* v. *Barber*, 345 U. S. 229, 236–237 (1953). Under this regime, an alien who had been paroled but wished to challenge a final deportation order had to place himself in Government custody before filing a habeas petition challenging the order. *Bridges* v. *Wixon*, 326 U. S. 135, 140 (1945). Given this, it is not surprising that the Court was not faced with numerous habeas claims brought by aliens seeking release from detention pending deportation.

So far as I am aware, not until 1952 did we entertain such a challenge. See *Carlson* v. *Landon*, *supra*. And there, we reaffirmed the power of Congress to order the temporary detention of aliens during removal proceedings. *Id.*, at 538. In *Reno* v. *Flores*, we likewise rejected a similar challenge to such detention. And, *Flores* was a wide-ranging class action in which 28 U. S. C. § 2241 was but one of several statutes invoked as the basis for federal jurisdiction. 507 U. S., at 296. All in all, it appears that in 1789, and thereafter until very recently, the writ was not generally available to aliens to challenge their detention while removal proceedings were ongoing.

Because a majority of the Court has determined that jurisdiction exists over respondent's claims, I need not conclusively decide the thorny question whether 8 U. S. C. § 1226(e) violates the Suspension Clause. For present purposes, it is enough to say that in my view, § 1226(e) unambiguously bars habeas challenges to the Attorney General's decisions regarding the temporary detention of criminal aliens under § 1226(c) pending removal. That said, because a majority of the Court has determined that there is jurisdiction, and because I agree with the majority's resolution of the merits of respondent's challenge, I join in all but Part I of the Court's opinion.

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

Respondent Kim is an alien lawfully admitted to permanent residence in the United States. He claims that the Constitution forbids the Immigration and Naturalization Service (INS) from detaining him under 8 U. S. C. § 1226(c) unless his detention serves a government interest, such as preventing flight or danger to the community. He contends that due process affords him a right to a hearing before an impartial official,[1] giving him a chance to show that he poses no risk that would justify confining him between the moment the Government claims he is removable and the adjudication of the Government's claim.

I join Part I of the Court's opinion, which upholds federal jurisdiction in this case, but I dissent from the Court's dispo-

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[1] Kim does not claim a hearing before any specific official. The generality of his claim may reflect the fact, noted just below, that the INS released him on bond without any hearing whatsoever after the District Court entered its judgment in this case. App. 11–13. Accordingly, there is no occasion to enquire whether due process requires access to any particular arbiter, such as one unaffiliated with the INS. I therefore use the neutral term "impartial" in describing the hearing Kim claims.

sition on the merits. The Court's holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process. The INS has never argued that detaining Kim is necessary to guarantee his appearance for removal[2] proceedings or to protect anyone from danger in the meantime. Instead, shortly after the District Court issued its order in this case, the INS, *sua sponte* and without even holding a custody hearing, concluded that Kim "would not be considered a threat" and that any risk of flight could be met by a bond of $5,000. App. 11–13. He was released soon thereafter, and there is no indication that he is not complying with the terms of his release.

The Court's approval of lengthy mandatory detention can therefore claim no justification in national emergency or any risk posed by Kim particularly. The Court's judgment is unjustified by past cases or current facts, and I respectfully dissent.

## I

At the outset, there is the Court's mistaken suggestion that Kim "conceded" his removability, *ante*, at 514, 523, and n. 6, 531. The Court cites no statement before any court conceding removability, and I can find none. At the first opportunity, Kim applied to the Immigration Court for withholding of removal, Brief for Respondent 9, n. 12, and he

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[2] In 1996, Congress combined "deportation" and "exclusion" proceedings into a single "removal" proceeding. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 304(a), 110 Stat. 3009–587, adding 8 U. S. C. § 1229a. Because this case requires consideration of cases decided both before and after 1996, this opinion refers to "removal" generally but, where the context requires, distinguishes between "deportation" of aliens who have entered the United States and "exclusion" of aliens who seek entry.

represents that he intends to assert that his criminal convictions are not for removable offenses and that he is independently eligible for statutory relief from removal, *id.*, at 11–12; see also *ante*, at 522–523, n. 6. In his brief before the Ninth Circuit, Kim stated that his removability was "an open question," that he was "still fighting [his] removal administratively," and that the Immigration Court had yet to hold a merits hearing. Brief of Petitioner-Appellee in No. 99–17373 (CA9), pp. 4, 13–14, 24, 33–34, and n. 28, 48–49. At oral argument here, his counsel stated that Kim was challenging his removability. See Tr. of Oral Arg. 36–38, 44.

The suggestion that Kim should have contested his removability in this habeas corpus petition, *ante*, at 522–523, and n. 6, misses the point that all he claims, or could now claim, is that his detention pending removal proceedings violates the Constitution. Challenges to removability itself, and applications for relief from removal, are usually submitted in the first instance to an immigration judge. See 8 U. S. C. § 1229a(a)(3). The Immigration Judge had not yet held an initial hearing on the substantive issue of removability when Kim filed his habeas petition in the District Court, even though Kim had been detained for over three months under § 1226(c). If Kim's habeas corpus petition had claimed "that he himself was not 'deportable,'" as the Court suggests it should have, *ante*, at 522, the District Court would probably have dismissed the claim as unexhausted. *E. g.*, *Espinal* v. *Filion*, No. 00–CIV–2647–HB–JCF, 2001 WL 395196 (SDNY, Apr. 17, 2001). Kim did not, therefore, "conced[e] that he is deportable," *ante*, at 531, by challenging removability before the Immigration Judge and challenging detention in a federal court.[3]

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[3] The Court's effort to explain its reference to a nonexistent concession, *ante*, at 522–523, n. 6, seeks to gain an advantage from the fact that the Immigration and Nationality Act uses the word "deportable" in various ways, one being to describe classes of aliens who may be removed if the necessary facts are proven, *e. g.*, § 1227(a), and another to describe aliens who have actually been adjudged as being in the United States unlawfully,

Kim may continue to claim the benefit of his current status unless and until it is terminated by a final order of removal. 8 CFR § 1.1(p) (2002). He may therefore claim the due process to which a lawful permanent resident is entitled.

## II

### A

It has been settled for over a century that all aliens within our territory are "persons" entitled to the protection of the Due Process Clause. Aliens "residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 724 (1893). *The Japanese Immigrant Case*, 189 U. S. 86, 100–101 (1903), settled any lingering doubt that the Fifth Amendment's Due Process Clause gives aliens a right to challenge mistreatment of their person or property.

The constitutional protection of an alien's person and property is particularly strong in the case of aliens lawfully

*e. g.*, § 1229b. An alien is not adjudged "deportable" until an order enters "concluding that the alien is deportable or ordering deportation," and such an order is not final until affirmed by the Board of Immigration Appeals or until the time expires for seeking review. §§ 1101(a)(47)(A)–(B). To suggest, as the Court seems to do, that an alien has conceded removability simply because he does not dispute that he has been charged with facts that will render him removable if those facts are later proven is like saying that a civil defendant has conceded liability by failing to move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) or that a criminal defendant has conceded guilt by failing to dispute the validity of the indictment. But even if the Court's reasoning were sound, it would not cover Kim's situation, for he has stated (and the Court acknowledges) his intent to contest the sufficiency of his criminal convictions as a basis for removal. *Ante*, at 522–523, n. 6. This discussion, which the Court calls a "detour," *ante*, at 523, is necessary only because of the Court's insistence in stating that Kim conceded that he is "deportable." *Ante*, at 513, 522, 531.

admitted to permanent residence (LPRs). The immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen. In fact, the law of the United States goes out of its way to encourage just such attachments by creating immigration preferences for those with a citizen as a close relation, 8 U. S. C. §§ 1153(a)(1), (3)–(4), and those with valuable professional skills or other assets promising benefits to the United States, §§ 1153(b)(1)–(5).

Once they are admitted to permanent residence, LPRs share in the economic freedom enjoyed by citizens: they may compete for most jobs in the private and public sectors without obtaining job-specific authorization, and apart from the franchise, jury duty, and certain forms of public assistance, their lives are generally indistinguishable from those of United States citizens. That goes for obligations as well as opportunities. Unlike temporary, nonimmigrant aliens, who are generally taxed only on income from domestic sources or connected with a domestic business, 26 U. S. C. § 872, LPRs, like citizens, are taxed on their worldwide income, 26 CFR §§ 1.1–1(b), 1.871–1(a), 1.871–2(b) (2002). Male LPRs between the ages of 18 and 26 must register under the Selective Service Act of 1948, ch. 625, Tit. I, § 3, 62 Stat. 605.[4] "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U. S. 717, 722 (1973). And if they choose, they may apply for full membership in the national polity through naturalization.

The attachments fostered through these legal mechanisms are all the more intense for LPRs brought to the United States as children. They grow up here as members of the society around them, probably without much touch with their country of citizenship, probably considering the United

[4] Although an LPR may seek exemption or discharge from registration on the grounds of alienage, such an action permanently bars the LPR from seeking United States citizenship. 8 U. S. C. § 1426(a).

States as home just as much as a native-born, younger brother or sister entitled to United States citizenship. "[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens." *Woodby* v. *INS*, 385 U. S. 276, 286 (1966). Kim is an example. He moved to the United States at the age of six and was lawfully admitted to permanent residence when he was eight. His mother is a citizen, and his father and brother are LPRs. LPRs in Kim's situation have little or no reason to feel or to establish firm ties with any place besides the United States.[5]

Our decisions have reflected these realities. As early as 1892, we addressed an issue of statutory construction with the realization that "foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil of choice . . . is to be presumed." *Lau Ow Bew* v. *United States*, 144 U. S. 47, 61–62.[6] Fifty years later in dealing with a question of evidentiary competence in *Bridges* v. *Wixon*, 326 U. S. 135 (1945), we said that "the notions of fairness on which our legal system is founded" applied with full force to "aliens whose roots may have become, as

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[5] See also *Welch* v. *Ashcroft*, 293 F. 3d 213, 215 (CA4 2002) (detainee obtained LPR status at age 10); *Hoang* v. *Comfort*, 282 F. 3d 1247, 1252–1253 (CA10 2002) (ages 3 and 15), cert. pending, No. 01–1616 [REPORTER'S NOTE: See *post*, p. 1010].

[6] In *The Venus*, 8 Cranch 253 (1814), we held that property belonging to American citizens who were resident in England during the War of 1812 was to be treated as belonging to English proprietors for purposes of prize law. We stated that, as permanent residents of England, the American citizens were "bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it, (with an exception in favor of such a subject, in relation to his native country) in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects," *id.*, at 282.

they are in the present case, deeply fixed in this land," *id.*, at 154. And in *Kwong Hai Chew* v. *Colding*, 344 U. S. 590 (1953), we read the word "excludable" in a regulation as having no application to LPRs, since such a reading would have been questionable given "a resident alien's constitutional right to due process." *Id.*, at 598–599.[7] *Kwong Hai Chew* adopted the statement of Justice Murphy, concurring in *Bridges*, that "'once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.'" 344 U. S., at 596–597, n. 5 (quoting *Bridges*, *supra*, at 161). See also *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); *Woodby*, *supra*, at 285 (holding that deportation orders must be supported by clear, unequivocal, and convincing evidence owing to the "drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification"); *Johnson* v. *Eisentrager*, 339 U. S. 763, 770–771 (1950) ("The alien, to whom the United States has been tradi-

[7] "Although the holding [in *Kwong Hai Chew*] was one of regulatory interpretation, the rationale was one of constitutional law. Any doubts that *Chew* recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg* v. *Fleuti*, [374 U. S. 449 (1963),] where we described *Chew* as holding 'that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.' 374 U. S., at 460." *Landon* v. *Plasencia*, 459 U. S. 21, 33 (1982).

tionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. . . . [A]t least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment").

The law therefore considers an LPR to be at home in the United States, and even when the Government seeks removal, we have accorded LPRs greater protections than other aliens under the Due Process Clause. In *Landon* v. *Plasencia*, 459 U. S. 21 (1982), we held that a long-term resident who left the country for a brief period and was placed in exclusion proceedings upon return was entitled to claim greater procedural protections under that Clause than aliens seeking initial entry. The LPR's interest in remaining in the United States is, we said, "without question, a weighty one." *Id.*, at 34. See also *Rosenberg* v. *Fleuti*, 374 U. S. 449 (1963); *Kwong Hai Chew*, *supra*.

Although LPRs remain subject to the federal removal power, that power may not be exercised without due process, and any decision about the requirements of due process for an LPR must account for the difficulty of distinguishing in practical as well as doctrinal terms between the liberty interest of an LPR and that of a citizen.[8] In evaluating Kim's challenge to his mandatory detention under 8 U. S. C. § 1226(c), the only reasonable starting point is the traditional doctrine concerning the Government's physical confinement of individuals.[9]

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[8] This case provides no occasion to determine the constitutionality of mandatory detention of aliens other than LPRs.

[9] The statement that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," *Mathews* v. *Diaz*, 426 U. S. 67, 79–80 (1976), cannot be read to leave limitations on the liberty of aliens unreviewable. *Ante*, at 521–522. *Diaz* involved a federal statute that limited eligibility for a federal medical insurance program to United States citizens and LPRs who had been continuously resident in the United States

B

Kim's claim is a limited one: not that the Government may not detain LPRs to ensure their appearance at removal hear-

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for five years. 426 U. S., at 69–70. Reversing a lower court judgment that this statute violated equal protection, we said this:

"In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'" *Id.*, at 79–80 (footnotes omitted).

Taken in full, the meaning of this paragraph is plain: through the exercise of the deportation and exclusion power, Congress exposes aliens to a treatment (expulsion) that cannot be imposed on citizens. The cases cited in the footnotes to this paragraph accordingly all concern Congress's power to enact grounds of exclusion or deportation. *Id.*, at 80, nn. 14–15 (citing *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972); *Galvan* v. *Press*, 347 U. S. 522 (1954); and *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952)); cf. *ante*, at 522 (quoting *Diaz*, *supra*, at 81, n. 17, in turn quoting *Harisiades*). Nothing in *Diaz* addresses due process protection of liberty or purports to sanction any particular limitation on the liberty of LPRs under circumstances comparable to those here.

Even on its terms, the *Diaz* statement is dictum. We acknowledged immediately that "[t]he real question presented by *[Diaz]* is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible." 426 U. S., at 80. Our holding that Congress could consider length of residence and immigration status in allocating medical insurance in no way suggests the existence of a federal power to imprison a long-term resident alien when the Government concedes that there is no need to do so.

The Court does not explain why it believes the *Diaz* dictum to be relevant to this case, other than to repeat it and identify prior instances of its quotation. *Ante*, at 521–522. The Court resists calling the statement "'dictum,'" *ante*, at 521, but it does not deny that *Diaz* involved "discrimination *within* the class of aliens" rather than "discrimination between citizens and aliens," 426 U. S., at 80, thus making any suggestion about Congress's power to treat citizens and aliens differently unnecessary to the holding. Nor does the Court deny that *Diaz* dealt with an equal protection challenge to the allocation of medical insurance and had nothing to

ings, but that due process under the Fifth Amendment conditions a potentially lengthy detention on a hearing and an impartial decisionmaker's finding that detention is necessary to a governmental purpose. He thus invokes our repeated decisions that the claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual. THE CHIEF JUSTICE wrote in 1987 that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U. S. 739, 755. See also *Reno* v. *Flores*, 507 U. S. 292, 316 (1993) (O'CONNOR, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny"); *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); *id.*, at 90 (KENNEDY, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution").

Accordingly, the Fifth Amendment permits detention only where "heightened, substantive due process scrutiny" finds a "'sufficiently compelling'" governmental need. *Flores*, *supra*, at 316 (O'CONNOR, J., concurring) (quoting *Salerno*, 481 U. S., at 748). In deciding in *Salerno* that this principle did not categorically bar pretrial detention of criminal defendants without bail under the Bail Reform Act of 1984, it was crucial that the statute provided that, "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.*, at 750 (citing 18 U. S. C.

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say on the subject of the right of LPRs to protection of their liberty under the Due Process Clause. See *supra*, at 543–547.

§ 3142(f)). We stressed that the Act was not a "scattershot attempt to incapacitate those who are merely suspected of" serious offenses, 481 U. S., at 750, and held that due process allowed some pretrial detention because the Act confined it to a sphere of real need: "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." *Id.*, at 751; see also *Foucha*, *supra*, at 81 (calling the pretrial detention statute in *Salerno* a "sharply focused scheme").

We have reviewed involuntary civil commitment statutes the same way. In *Addington* v. *Texas*, 441 U. S. 418 (1979), we held that a State could not civilly commit the mentally ill without showing by "clear and convincing evidence" that the person was dangerous to others, *id.*, at 433. The elevated burden of proof was demanded because "[l]oss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior." *Id.*, at 427. The statutory deficiency was the same in *Foucha*, where we held that Louisiana's civil commitment statute failed due process because the individual was denied an "adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community." 504 U. S., at 81. See also *id.*, at 88 (opinion of O'CONNOR, J.) (civil commitment depends on a "necessary connection between the nature and purposes of confinement").

In addition to requiring a compelling reason for detention, we held that the class of persons affected must be narrow and, in pretrial-type lockup, the time must be no more than what is reasonably necessary before the merits can be resolved. In the case of the Bail Reform Act, we placed weight on the fact that the statute applied only to defendants suspected of "the most serious of crimes," *Salerno*, *supra*, at 747; see also *Foucha*, *supra*, at 81, while the statute in *Kansas* v. *Hendricks*, 521 U. S. 346 (1997), likewise provided

only for confinement of "a limited subclass of dangerous persons" who had committed "'a sexually violent offense'" and who suffered from "'a mental abnormality or personality disorder'" portending "'predatory acts of sexual violence,'" *id.*, at 357 (quoting Kan. Stat. Ann. § 59–29a02(a) (1994)). *Salerno* relied on the restriction of detention "by the stringent time limitations of the Speedy Trial Act," 481 U. S., at 747, whereas in *Foucha*, it was a fault that the statute did not impose any comparable limitation, 504 U. S., at 82 (citing *Salerno*). See also *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

The substantive demands of due process necessarily go hand in hand with the procedural, and the cases insist at the least on an opportunity for a detainee to challenge the reason claimed for committing him. *E. g.*, *Hendricks*, *supra*, at 357 (stating that civil commitment was permitted where "the confinement takes place pursuant to proper procedures and evidentiary standards"); *Foucha*, *supra*, at 81–82 (invalidating a statute under which "the State need prove nothing to justify continued detention"); *Salerno*, *supra*, at 751 ("[T]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination"); *Addington*, *supra*, at 427 (requiring a heightened burden of proof "to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered").

These cases yield a simple distillate that should govern the result here. Due process calls for an individual determination before someone is locked away. In none of the cases cited did we ever suggest that the government could avoid the Due Process Clause by doing what § 1226(c) does, by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the

necessity of putting them away. The cases, of course, would mean nothing if citizens and comparable residents could be shorn of due process by this sort of categorical sleight of hand. Without any "full-blown adversary hearing" before detention, *Salerno*, *supra*, at 750, or heightened burden of proof, *Addington*, *supra*, or other procedures to show the government's interest in committing an individual, *Foucha*, *supra; Jackson*, *supra*, procedural rights would amount to nothing but mechanisms for testing group membership. Cf. *Foucha*, *supra*, at 88 (opinion of O'CONNOR, J.) ("Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes"). And if procedure could be dispensed with so expediently, so presumably could the substantive requirements that the class of detainees be narrow and the detention period strictly limited. *Salerno*, *supra; Hendricks*, *supra.*

C

We held as much just two Terms ago in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), which stands for the proposition that detaining an alien requires more than the rationality of a general detention statute; any justification must go to the alien himself. *Zadvydas* considered detention of two aliens, Zadvydas and Ma, who had already been ordered removed and therefore enjoyed no lawful immigration status. Their cases arose because actual removal appeared unlikely owing to the refusal of their native countries to accept them, with the result that they had been detained not only for the standard 90-day removal period, during which time most removal orders are executed, but beyond that period because the INS considered them to be a "'risk to the community'" and "'unlikely to comply with the order of removal.'" *Id.*, at 682 (quoting 8 U. S. C. § 1231(a)(6) (1994 ed., Supp. V)). Zadvydas and Ma challenged their continued and potentially indefinite detention under the Due Process Clause of the Fifth Amendment.

The *Zadvydas* opinion opened by noting the clear applicability of general due process standards: physical detention requires both a "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint'" and "adequate procedural protections." 533 U. S., at 690 (quoting *Hendricks*, 521 U. S., at 356). Nowhere did we suggest that the "constitutionally protected liberty interest" in avoiding physical confinement, even for aliens already ordered removed, was conceptually different from the liberty interest of citizens considered in *Jackson*, *Salerno*, *Foucha*, and *Hendricks*. On the contrary, we cited those cases and expressly adopted their reasoning, even as applied to aliens whose right to remain in the United States had already been declared forfeited. *Zadvydas*, 533 U. S., at 690.

Thus, we began by positing commonly accepted substantive standards and proceeded to enquire into any "special justification" that might outweigh the aliens' powerful interest in avoiding physical confinement "under [individually ordered] release conditions that may not be violated." *Id.*, at 696. We found nothing to justify the Government's position. The statute was not narrowed to a particularly dangerous class of aliens, but rather affected "aliens ordered removed for many and various reasons, including tourist visa violations." *Id.*, at 691. The detention itself was not subject to "stringent time limitations," *Salerno*, *supra*, at 747, but was potentially indefinite or even permanent, *Zadvydas*, 533 U. S., at 691. Finally, although both Zadvydas and Ma appeared to be dangerous, this conclusion was undermined by defects in the procedures resulting in the finding of dangerousness. *Id.*, at 692. The upshot was such serious doubt about the constitutionality of the detention statute that we construed it as authorizing continuing detention only when an alien's removal was "reasonably foreseeable." *Id.*, at 699. In the cases of Zadvydas and Ma, the fact that their countries of citizenship were not willing to accept their return weighed

against the Government's interest in keeping them at hand for instant removal, even though both were serious flight risks, *id.*, at 684–686, 690, and we remanded the cases to the Courts of Appeals for a determination of the sufficiency of the Government's interests in Zadvydas's and Ma's individual detention, *id.*, at 702.

Our individualized analysis and disposition in *Zadvydas* support Kim's claim for an individualized review of his challenge to the reasons that are supposed to justify confining him prior to any determination of removability. In fact, aliens in removal proceedings have an additional interest in avoiding confinement, beyond anything considered in *Zadvydas:* detention prior to entry of a removal order may well impede the alien's ability to develop and present his case on the very issue of removability. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 20–23. After all, our recognition that the serious penalty of removal must be justified on a heightened standard of proof, *Woodby* v. *INS*, 385 U. S. 276 (1966), will not mean all that much when the INS can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence. Cf. *Stack* v. *Boyle*, 342 U. S. 1, 4 (1951). Kim's right to defend against removal gives him an even stronger claim than the aliens in *Zadvydas* could raise.

In fact, the principal dissenters in *Zadvydas*, as well as the majority, accepted a theory that would compel success for Kim in this case. The dissent relied on the fact that Zadvydas and Ma were subject to a "final order of removal" and had "no right under the basic immigration laws to remain in this country," 533 U. S., at 720 (opinion of KENNEDY, J.), in distinguishing them "from aliens with a lawful right to remain here," *ibid.*, which is Kim's position. The dissent recognized the right of all aliens, even "removable and inadmissible" ones, to be "free from detention that is arbitrary or capricious," *id.*, at 721, and the opinion explained that detention would pass the "arbitrary or capricious" test "when

necessary to avoid the risk of flight or danger to the community," *ibid.*[10]

Hence the *Zadvydas* dissent's focus on "whether there are adequate procedures" allowing "persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Ibid.;* see also *id.*, at 722–723. Indeed, there is further support for Kim's claim in the dissent's view that the process afforded to removable aliens like Zadvydas and Ma "[went] far toward th[e] objective" of satisfying procedural due process, *id.*, at 722;[11] that process stands in stark contrast to the total ab-

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[10] In support of its standard, the dissent relied on a report by the United Nations High Commissioner for Refugees, which likewise countenanced detention only "in cases of *necessity*" and stated, under a heading entitled "Guideline 3: Exceptional Grounds for Detention":

"There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements . . .), these should be applied *first* unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose." United Nations High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Feb. 1999) (hereinafter Detention Guidelines) (emphasis in original), cited in *Zadvydas*, 533 U. S., at 721 (opinion of KENNEDY, J.).

The High Commissioner also referred to the "minimum procedural guarante[e]" for a detainee "either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made." Detention Guidelines, Guideline 5: Procedural Safeguards.

[11] The scheme considered in *Zadvydas* did not provide review immediately after the removability determination; the dissent noted that custody review hearings usually occurred within three months of a transfer to a postorder detention unit, with further reviews annually or more frequently if the alien requested them. 533 U. S., at 722–723. But the lag was fitted to the circumstances. In the usual case, removal in fact would

sence of custody review available in response to Kim's claim that he is neither dangerous nor a flight risk.[12] The removable aliens in *Zadvydas* had the right to a hearing, to representation, and to consideration of facts bearing on risk of flight, including criminal history, evidence of rehabilitation, and ties to the United States. *Ibid.* The references to the "necessity" of an individual's detention and the discussion of the procedural requirements show that the principal *Zadvydas* dissenters envisioned due process as individualized review, and the Court of Appeals in this case correctly held that Kim's mandatory detention without benefit of individualized enquiry violated due process as understood by both the *Zadvydas* majority and JUSTICE KENNEDY in dissent. *Kim* v. *Ziglar*, 276 F. 3d 523, 535–537 (CA9 2002). Every Court of Appeals to consider the detention of

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come promptly; it is only when it did not that interim custody raised a substantial issue. The issue here, of course, is not timing but the right to individualized review at all.

[12] The hearing recognized in *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999), is no response to this deficiency. As the Court notes, the "'*Joseph* hearing'" only permits an alien to show that he does not meet the statutory criteria for mandatory detention under § 1226(c). *Ante*, at 514, and n. 3. Kim argues that, even assuming that he fits under the statute, the statute's application to LPRs like him does not fit under the Due Process Clause.

JUSTICE KENNEDY recognizes that the Due Process Clause requires "an individualized determination as to [an LPR's] risk of flight and dangerousness if the continued detention [becomes] unreasonable or unjustified." *Ante*, at 532 (concurring opinion). It is difficult to see how Kim's detention in this case is anything but unreasonable and unjustified, since the Government concedes that detention is not necessary to completion of his removal proceedings or to the community's protection. Certainly the fact that "there is at least some merit to the [INS's] charge" that Kim should be held to be removable, *ante*, at 531, does not establish a compelling reason for detention. The INS releases many noncriminal aliens on bond or on conditional parole under § 1226(a)(2) pending removal proceedings, and the fact that Kim has been convicted of criminal offenses does not on its own justify his detention, see *supra*, at 550–553.

an LPR under § 1226(c) after *Zadvydas* reached the same conclusion.[13]

D

In sum, due process requires a "special justification" for physical detention that "outweighs the individual's constitutionally protected interest in avoiding physical restraint" as well as "adequate procedural protections." *Zadvydas*, 533 U. S., at 690–691 (internal quotation marks omitted). "There must be a 'sufficiently compelling' governmental interest to justify such [an] action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community." *Flores*, 507 U. S., at 316 (O'CONNOR, J., concurring) (quoting *Salerno*, 481 U. S., at 748). The class of persons subject to confinement must be commensurately narrow and the duration of confinement limited accordingly. *Zadvydas*, *supra*, at 691; *Hendricks*, 521 U. S., at 368; *Foucha*, 504 U. S., at 81–82; *Salerno*, *supra*, at 747, 750. JUSTICE KENNEDY's dissenting view in *Zadvydas*, like that of the majority, disapproved detention that is not "necessary" to counter a risk of flight or danger; it is "arbitrary or capricious" and violates the substantive component of the Due Process Clause. 533 U. S., at 721. Finally, procedural due process requires, at a minimum, that a detainee have the benefit of an impartial decisionmaker able to consider particular circumstances on the issue of necessity. *Id.*, at 691–692; *id.*, at 722 (KENNEDY, J., dissenting); *Foucha*, *supra*, at 81; *Salerno*, *supra*, at 750. See also *Kenyeres* v. *Ashcroft*, *post*, at 1305 (KENNEDY, J., in chambers) ("An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime").

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[13] *Welch* v. *Ashcroft*, 293 F. 3d 213 (CA4 2002); *Hoang* v. *Comfort*, 282 F. 3d 1247 (CA10 2002), cert. pending, No. 01–1616 [REPORTER'S NOTE: See *post*, p. 1010]; *Patel* v. *Zemski*, 275 F. 3d 299 (CA3 2001). The Seventh Circuit's decision in *Parra* v. *Perryman*, 172 F. 3d 954 (1999), preceded our decision in *Zadvydas*.

By these standards, Kim's case is an easy one. "[H]eightened, substantive due process scrutiny," *Flores*, *supra*, at 316 (O'CONNOR, J., concurring), uncovers serious infirmities in § 1226(c). Detention is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor. *E. g.*, *Michel* v. *INS*, 206 F. 3d 253, 256 (CA2 2000) (possession of stolen bus transfers); *Matter of Bart*, 20 I. & N. Dec. 436 (BIA 1992) (issuance of a bad check). Detention under § 1226(c) is not limited by the kind of time limit imposed by the Speedy Trial Act, and while it lasts only as long as the removal proceedings, those proceedings have no deadline and may last over a year. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 23–26; see also *id.*, at 10–20 (citing examples). Section 1226(c) neither requires nor permits an official to determine whether Kim's detention was necessary to prevent flight or danger.

Kim's detention without particular justification in these respects, or the opportunity to enquire into it, violates both components of due process, and I would accordingly affirm the judgment of the Court of Appeals requiring the INS to hold a bail hearing to see whether detention is needed to avoid a risk of flight or a danger to the community.[14] This is surely little enough, given the fact that 8 U. S. C. § 1536 gives an LPR charged with being a foreign terrorist the right to a release hearing pending a determination that he be removed.

## III

The Court proceeds to the contrary conclusion on the premise that "the Government may constitutionally detain

[14] Although Kim is a convicted criminal, we are not concerned here with a State's interest in punishing those who violate its criminal laws. Kim completed the criminal sentence imposed by the California courts on February 1, 1999, and California no longer has any interest in incarcerating him.

deportable aliens during the limited period necessary for their removal proceedings." *Ante*, at 526. Sometimes, maybe often, it may, but that is not the point in contention. Kim has never challenged the INS's general power to detain aliens in removal proceedings or even its power to detain him in particular, if it affords him a chance to participate in an enquiry whether he poses a flight risk or a danger to society.

The question, rather, is whether Congress has chosen "'a constitutionally permissible means of implementing' [its immigration] power." *Zadvydas*, *supra*, at 695 (quoting *INS* v. *Chadha*, 462 U. S. 919, 941–942 (1983)); see also *Carlson* v. *Landon*, 342 U. S. 524, 537 (1952) (stating that the deportation power "is, of course, subject to judicial intervention under the 'paramount law of the Constitution'"). As in *Zadvydas*, we are here concerned not with the power to remove aliens but with the "important constitutional limitations" on that power's exercise. *Zadvydas*, *supra*, at 695.[15]

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[15] The Court's citations to *Wong Wing* v. *United States*, 163 U. S. 228 (1896), are therefore inapposite. *Ante*, at 523, 531. In *Wong Wing*, we hypothesized that detention "necessary to give effect" to the removal of an alien "would be valid"; the use of the subjunctive mood makes plain that the issue was not before the Court. 163 U. S., at 235. *Wong Wing* certainly did not hold that detention in aid of removal was exempt from the Due Process Clause.

Moreover, the *Wong Wing* dictum must be understood in light of the common contemporary practice in the federal courts of releasing aliens on bail pending deportation proceedings. While the Court is correct that the first statutory provision permitting Executive officials to release aliens on bond was enacted in 1907, *ante*, at 523, n. 7, the Court ignores the numerous judicial grants of bail prior to that year. See, *e. g.*, *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 283 (1904) (stating that the lower court admitted the appellant to bail pending appeal to this Court); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 704 (1893) (same); *United States* v. *Moy Yee Tai*, 109 F. 1 (CA2 1901) *(per curiam); In re Lum Poy*, 128 F. 974, 975 (CC Mont. 1904) (noting that "the practice in California, Idaho, and Oregon has been and is to admit Chinese persons to

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The Court spends much effort trying to distinguish *Zadvydas*, but even if the Court succeeded, success would not avail it much. *Zadvydas* was an application of principles developed in over a century of cases on the rights of aliens and the limits on the government's power to confine individuals. While there are differences between detention pending removal proceedings (this case) and detention after entry of a removal order *(Zadvydas)*, the differences merely point up

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bail pending an investigation into the lawfulness of their residence within the United States, and before any order for deportation has been made"); *In re Ah Tai*, 125 F. 795, 796–797 (Mass. 1903) (identifying a practice in several federal districts admitting aliens to bail, both before an initial finding of deportability and during the appeal therefrom); *In re Chow Goo Pooi*, 25 F. 77, 78 (CC Cal. 1884). The breadth of this practice is evident from one court's statement that "[t]o hold bail altogether inadmissible . . . would invalidate hundreds of existing recognizances." *Ah Tai*, *supra*, at 797.

As Judge Augustus Hand later noted, the only change in 1907 was that bail decisions were committed to the discretion of Executive officials, rather than judges:

"Prior to the passage by Congress in 1907 of the act empowering the administrative official to fix bail, various courts made it a practice to grant bail to aliens during deportation hearings. . . . In our opinion that act was intended to place the general determination of granting bail in the hands of the authorities charged with the enforcement of the deportation laws as persons ordinarily best qualified to perform such a function . . . ." *United States ex rel. Potash* v. *District Director of Immigration and Naturalization*, 169 F. 2d 747, 751 (CA2 1948) (citations omitted).

Thus, while *Wong Wing* stated in passing that detention may be used where it was "part of the means necessary" to the removal of aliens, 163 U. S., at 235, that statement was written against the background of the general availability of judicial relief from detention pending deportation proceedings.

The judicial grants of bail prior to 1907 arose in federal habeas proceedings. Contrary to JUSTICE O'CONNOR's objection to federal jurisdiction in this matter, there is indeed a "history of routine reliance on habeas jurisdiction to challenge the detention of aliens without bail pending the conclusion of removal proceedings." *Ante*, at 536 (opinion concurring in part and concurring in judgment).

that Kim's is the stronger claim, see *supra,* at 554–556. In any case, the analytical framework set forth in *Salerno, Foucha, Hendricks, Jackson,* and other physical confinement cases applies to both, and the two differences the Court relies upon fail to remove Kim's challenge from the ambit of either the earlier cases or *Zadvydas* itself.[16]

First, the Court says that § 1226(c) "serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings." *Ante,* at 528. Yes it does, and the statute in *Zadvydas,* viewed outside the context of any individual alien's detention, served the purpose of preventing aliens ordered to be deported from fleeing prior to actual deportation. In each case, the fact that a statute serves its purpose in general fails to justify the detention of an individual in particular. Some individual aliens covered by § 1226(c) have meritorious challenges to removability or claims for relief from removal. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 10–20. As to such aliens, as with Zadvydas and Ma, the Government has only a weak reason under the immigration laws for detaining them.

The Court appears to respond that Congress may require detention of removable aliens based on a general conclusion that detention is needed for effective removal of criminal aliens on a class-wide basis. But on that logic *Zadvydas* should have come out the other way, for detention of the entire class of aliens who have actually been ordered removed will in general "serv[e] the purpose" of their effective removal, *ante,* at 528. Yet neither the Court nor JUSTICE KENNEDY in dissent suggested that scrutiny under the Due Process Clause could be satisfied at such a general level. Rather, we remanded the individual cases of Zadvydas and Ma for determinations of the strength of the Government's

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[16] The Court tellingly does not even mention *Salerno, Foucha, Hendricks,* or *Jackson.*

reasons for detaining them in particular. 533 U. S., at 702.[17] We can insist on nothing less here, since the Government's justification for detaining individuals like Zadvydas and Ma, who had no right to remain in this country and were proven flight risks and dangers to society, *id.*, at 684–686, is certainly stronger (and at least no weaker) than its interest in detaining a lawful permanent resident who has not been shown (or even claimed) to be either a flight risk or a threat to the community.[18]

The Court's closest approach to a reason justifying classwide detention without exception here is a Senate Report stating that over 20% of nondetained criminal aliens failed

[17] The Court is therefore mistaken in suggesting that I view the detention of the individual aliens in *Zadvydas* as serving a governmental purpose. *Ante*, at 527, n. 10. The Court confuses the "statute in *Zadvydas*, viewed outside the context of any individual alien's detention," *supra*, at 561, with the "detention at issue in *Zadvydas*," *ante*, at 527, n. 10, namely, the detention of Zadvydas and Ma as individuals. The due process analysis in *Zadvydas* concentrated on the latter, holding that the detention of Zadvydas and Ma would not serve a legitimate immigration purpose if there were no "significant likelihood of removal in the reasonably foreseeable future." 533 U. S., at 701. Thus, the Court's suggestion in this case that "the statutory provision" authorizes "detention" that prevents deportable aliens from fleeing as a general matter, *ante*, at 527–528, is no sufficient basis for claiming *Zadvydas* as support for the Court's methodology or result. Rather, the Court should consider whether the detention of Kim as an individual is necessary to a compelling Government interest, just as it did for the detention of Zadvydas and Ma as individuals. As the Government concedes, Kim's individual detention serves no Government purpose at all.

[18] Nor can the general risk of recidivism, *ante*, at 518–519, justify this measure. The interest in preventing recidivism may be vindicated "by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." *Foucha* v. *Louisiana*, 504 U. S. 71, 82 (1992). The ability to detain aliens in removal proceedings who pose threats to the community also satisfies this interest. Cf. *United States* v. *Salerno*, 481 U. S. 739 (1987). The alternative to detention, of course, is not unrestricted liberty, but supervised release, which also addresses the risk of recidivism. *Zadvydas*, 533 U. S., at 696.

to appear for removal hearings. *Ante,* at 519 (citing S. Rep. No. 104–48 (1995) (hereinafter Senate Report)). To begin with, the Senate Report's statistic treats all criminal aliens alike and does not distinguish between LPRs like Kim, who are likely to have developed strong ties within the United States, see *supra,* at 544–547, and temporary visitors or illegal entrants. Even more importantly, the statistic tells us nothing about flight risk at all because, as both the Court and the Senate Report recognize, the INS was making its custody determinations not on the ground of likelihood of flight or dangerousness, but "in large part, according to the number of beds available in a particular region." Senate Report 23, cited *ante,* at 519; see also H. R. Rep. No. 104–469, p. 124 (1995) (hereinafter House Report) ("[I]n deciding to release a deportable alien, the INS is making a decision that the alien cannot be detained given its limited resources"); App. 26–27. This meant that the INS often could not detain even the aliens who posed serious flight risks. Senate Report 23 (noting that the INS had only 3,500 detention beds for criminal aliens in the entire country and the INS district comprising Pennsylvania, Delaware, and West Virginia had only 15). The desperate lack of detention space likewise had led the INS to set bonds too low, because "if the alien is not able to pay, the alien cannot be released, and a needed bed space is lost." House Report 124. The Senate Report also recognized that, even when the INS identifies a criminal alien, the INS "often refuses to take action because of insufficient agents to transport prisoners, or because of limited detention space." Senate Report 2. Four former high-ranking INS officials explained the Court's statistics as follows: "Flight rates were so high in the early 1990s not as a result of chronic discretionary judgment failures by [the] INS in assessing which aliens might pose a flight risk. Rather, the rates were alarmingly high because decisions to release aliens in proceedings were driven over-

whelmingly by a lack of detention facilities." Brief for T. Alexander Aleinikoff et al. as *Amici Curiae* 19.

The Court's recognition that, at the time of the enactment of § 1226(c), "individualized bail determinations had not been tested under optimal conditions" is thus rather an understatement. *Ante*, at 528. The Court does not explain how the INS's resource-driven decisions to release individuals who pose serious flight risks, and their predictable failure to attend removal hearings, could justify a systemwide denial of any opportunity for release to individuals like Kim who are neither flight risks nor threats to the public.

The Court also cites a report by the Department of Justice relied upon by the Government. Department of Justice, Office of the Inspector General, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I–96–03 (Mar. 1996), App. 14 (hereinafter Post-Order Report), cited *ante*, at 519, 521. But that report does not even address the issue of detention before a determination has been made that an alien is removable. As its title indicates, the Post-Order Report analyzed removal rates only for aliens who had already received final orders of removability.[19] See also Post-Order Report, App. 25 ("This current review was limited to actions taken by INS to remove aliens after [immigration judges or the Board of Immigration Appeals] had issued final orders").[20]

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[19] Detention of such aliens is governed by the statute at issue in *Zadvydas*, § 1231(a), not by § 1226(c).

[20] A prior study by the same body noted that nonappearance rates by aliens in deportation proceedings before issuance of orders to deport (aliens, that is, like Kim) were approximately 23% for the first half of 1993 and 21% for all of 1992. Department of Justice, Office of the Inspector General, Case Hearing Process in the Executive Office for Immigration Review, Rep. No. I–93–03, p. 5 (May 1994) (hereinafter Case Hearing Report). Congress appears to have considered these relevant figures, Senate Report 2 ("Over 20 percent of nondetained criminal aliens fail to appear for deportation proceedings"), without referring to irrelevant postorder numbers. The Government relied on the Post-Order Report

More relevant to this case, and largely ignored by the Court, is a recent study conducted at the INS's request concluding that 92% of criminal aliens (most of whom were LPRs) who were released under supervisory conditions attended all of their hearings. 1 Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. ii, 33, 36 (Aug. 1, 2000) (hereinafter Vera Institute Study). Even without supervision, 82% of criminal aliens released on recognizance showed up, as did 77% of those released on bond, leading the reporters to conclude that "supervision was especially effective for criminal aliens" and that "mandatory detention of virtually all criminal aliens is not necessary." *Id.*, at ii, 36, 42.[21]

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in its brief and at oral argument. Brief for Petitioners 7, 19–20, and n. 7; Tr. of Oral Arg. 23. The Government did not cite the Case Hearing Report.

[21] The Court throws in minor criticisms of the Vera Institute Study that have no bearing on its relevance here. The institute's supervised release program included 127 criminal aliens who would be subject to mandatory detention under § 1226(c) because of their criminal histories. Vera Institute Study 33. Since the INS seeks Kim's removal on the grounds of either crimes of moral turpitude or an aggravated felony, see *ante*, at 513, n. 1, the fact that most of the Vera Institute Study's subjects were convicted of crimes of moral turpitude but not an aggravated felony, *ante*, at 520, n. 5, is of no moment. Nor were all of the aliens studied subject to intensive supervision, *ibid.*; most were subject to "regular supervision," which involved no mandatory reporting sessions beyond an initial orientation session with supervision staff and required only that the alien keep the staff apprised of a current mailing address, appear in court, and comply with the orders of the immigration judge, Vera Institute Study 17–18. That the institute considered various screening criteria before authorizing supervised release, *ante*, at 520, n. 5, does not undermine the value of the study, since any program adopted by the INS in lieu of mandatory detention could do the same. Cf. *Zadvydas*, 533 U. S., at 696. Finally, the fact that Kim sought and was granted release on bond rather than supervised release, *ante*, at 520, n. 5, does not detract from the relevance of the Vera Institute Study. Regardless of what methods the INS decides to employ to prevent flight, the study supports the conclusion that mandatory deten-

The Court nowhere addresses the Vera Institute's conclusion that criminal aliens released under supervisory conditions are overwhelmingly likely to attend their hearings. Instead, the Court fixes on the fact that 23% of the comparison group of aliens released on bond failed to attend all of their hearings. *Ante,* at 519–520. Since the bond determinations were made by the INS, the fact remains that resource-driven concerns may well have led the INS to release individuals who were evident flight risks on bonds too low to ensure their attendance. See *supra,* at 563–564. The Court's assumption that the INS's bond determinations involved "individualized screening" for flight risk, *ante,* at 520, finds no support in the Vera Institute Study. Thus the Court's reliance on the failure rate of aliens released by the INS on bond, whether it comes from the Senate Report or the Vera Institute Study, *ante,* at 519–520, does not support its conclusion.

In sum, the Court's inapposite statistics do not show that detention of criminal LPRs pending removal proceedings, even on a general level, is necessary to ensure attendance at removal hearings, and the Vera Institute Study reinforces the point by establishing the effectiveness of release under supervisory conditions, just as we did in *Zadvydas.* 533 U. S., at 696 (noting that imprisonment was constitutionally suspect given the possibility of "supervision under release conditions that may not be violated").[22] The Court's first attempt to distinguish *Zadvydas* accordingly fails.

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tion under § 1226(c) is "not necessary" to prevent flight, Vera Institute Study 42, and therefore violates the Due Process Clause.

[22] This case accordingly presents no issue of "'court ordered release,'" *ante,* at 530, n. 14 (quoting *Zadvydas, supra,* at 713 (KENNEDY, J., dissenting)); in this case, for example, the INS reached its own determination to release Kim on bond. This case concerns only the uncontroversial requirement that detention serve a compelling governmental interest and that detainees be afforded adequate procedures ensuring against erroneous confinement. *E. g., Salerno,* 481 U. S., at 751 ("[T]he procedures by

The Court's second effort is its claim that mandatory detention under § 1226(c) is generally of a "much shorter duration" than the incarceration at issue in *Zadvydas*. *Ante*, at 528. While it is true that removal proceedings are unlikely to prove "indefinite and potentially permanent," 533 U. S., at 696, they are not formally limited to any period, and often extend beyond the time suggested by the Court, that is, "an average time of 47 days" or, for aliens who exercise their right of appeal, "an average of four months," *ante*, at 529; see also Case Hearing Report 12 (finding that the average time from receipt of charging documents by a detained alien to a final decision by the immigration judge was 54 days). Even taking these averages on their face, however, they are no legitimate answer to the due process claim to individualized treatment and hearing.

In the first place, the average time from receipt of charging documents to decision obscures the fact that the alien may receive charging documents only after being detained for a substantial period. Kim, for example, was not charged until five weeks after the INS detained him. Brief for Respondent 9.

Even more revealing is an explanation of the raw numbers that are averaged out. As the Solicitor General conceded, the length of the average detention period in great part reflects the fact that the vast majority of cases involve aliens who raise no challenge to removability at all. Tr. of Oral Arg. 57. LPRs like Kim, however, will hardly fit that pattern. Unlike many illegal entrants and temporary nonimmigrants, LPRs are the aliens most likely to press substantial

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which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination"); see also *Zadvydas*, *supra*, at 721 (KENNEDY, J., dissenting) (stating that due process requires "adequate procedures" permitting detained aliens to show that "they no longer present special risks or danger" warranting confinement).

challenges to removability requiring lengthy proceedings.[23] See Vera Institute Study 33, 37 (stating that many of the criminal aliens studied were "lawful permanent residents who have spent much or all of their adult lives in the United States" and that 40% of those released on supervision "were allowed to stay in the United States"). Successful challenges often require several months of proceedings, see Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 10–20; detention for an open-ended period like this falls far short of the "stringent time limitations" held to be significant in *Salerno*, 481 U. S., at 747. The potential for several months of confinement requires an individualized finding of necessity under *Zadvydas*.[24]

B

The Court has failed to distinguish *Zadvydas* in any way that matters. It does no better in its effort to portray its result in this case as controlled by *Carlson* v. *Landon*, 342 U. S. 524 (1952), and *Reno* v. *Flores*, 507 U. S. 292 (1993).

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[23] Criminal aliens whose "removal proceedings are completed while [they are] still serving time for the underlying conviction," *ante*, at 529, are irrelevant to this case, since they are never detained pending removal proceedings under § 1226(c).

[24] The Court calls several months of unnecessary imprisonment a "very limited time," *ante*, at 529, n. 12. But the due process requirement of an individualized finding of necessity applies to detention periods shorter than Kim's. *Schall* v. *Martin*, 467 U. S. 253 (1984), involved a maximum detention period of 17 days, *id.*, at 270, yet our due process analysis noted that the detainee was entitled to a hearing in which he could challenge the necessity of his confinement before an impartial decisionmaker required to state the facts and reasons underlying any decision to detain, *id.*, at 276–277. The 90-day removal period in § 1231(a)(1) not only has a fixed endpoint, but also applies only after the alien has been adjudged removable, § 1231(a)(1)(B). The discussion of that provision in *Zadvydas* cannot be read to indicate any standard of permissible treatment of an LPR who has not yet been found removable.

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*Carlson* did not involve mandatory detention. It involved a system similar to the one Kim contends for here. The aliens' detention pending deportation proceedings in *Carlson* followed a decision on behalf of the Attorney General that custody was preferable to release on bond or on conditional parole. 342 U. S., at 528, n. 5 (citing Internal Security Act of 1950, § 23, 64 Stat. 1011). We sustained that decision because we found that the District Director of the INS, to whom the Attorney General had delegated the authority, did not abuse his discretion in concluding that "evidence of membership [in the Communist Party] plus personal activity in supporting and extending the Party's philosophy concerning violence" made the aliens "a menace to the public interest." 342 U. S., at 541. The significance of looking to "personal activity" in our analysis was complemented by our express recognition that there was "no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail," *id.*, at 541–542, and by a Government report showing that in fact "the large majority" of aliens arrested on charges comparable to the *Carlson* petitioners' were allowed bail. *Id.*, at 542; see also *id.*, at 538, n. 31 (noting that it was "quite clear" that "detention without bond has been the exception").

Indeed, the *Carlson* Court's constitutional analysis relying on the opportunity for individualized bond determinations simply followed the argument in the brief for the United States in that case. In response to the aliens' argument that the statute made it "mandatory on the Attorney General to deny bail to alien communists," the Government stated, "[w]e need not consider the constitutionality of such a law for that is not what the present law provides." Brief for Respondent in *Carlson* v. *Landon*, O. T. 1951, No. 35, p. 19; see also *id.*, at 20 ("[T]he act itself, by its terms, leaves no doubt that the power to detain is discretionary, not mandatory"). The

Government also presented the following excerpt of a statement of the chairman of the House Judiciary Committee:

> "'No particular hardship is going to be worked on anyone because, bear this fact in mind, *it is not mandatory on the Attorney General to hold people in detention. He is given discretionary power.* If in his judgment one of the class of people I have just mentioned ought to be held for paramount national reasons, he may detain him, but he is not obliged to hold anybody, *although I trust that in every case of a subversive or a hardened criminal he will.*'" *Id.*, at 19 (quoting 96 Cong. Rec. 10449–10450 (1950) (statement of Rep. Walter) (emphasis added in Brief for Respondent in *Carlson* v. *Landon*, *supra*)).

In short, *Carlson* addressed a very different scheme from the one here.

It is also beside the point for the Court to suggest that "like respondent in the present case," the *Carlson* petitioners challenged their detention because "there had been no finding that they were unlikely to appear for their deportation proceedings." *Ante*, at 524. Each of them was detained after being found to be "a menace to the public interest," 342 U. S., at 541, and their challenge, unlike Kim's, was that the INS had locked them up for an impermissible reason (danger to society) whereas only a finding of risk of flight would have justified detention. *Id.*, at 533–534 ("It is urged . . . that where there is no evidence to justify a fear of unavailability for the hearings or for the carrying out of a possible judgment of deportation, denial of bail under the circumstances of these cases is an abuse of discretion"); see also *id.*, at 551 (Black, J., dissenting) ("A power to put in jail because dangerous cannot be derived from a power to deport").[25]

[25] Similarly, the question presented in *Butterfield* v. *Zydok*, argued and decided together with *Carlson*, was "[w]hether, in exercising his discretion to grant or withhold bail pending final determination of the deportability

We rejected that contention, leaving the petitioners in detention because they were dangerous to the public interest, and on that issue, an official had determined that the *Carlson* petitioners ought to be detained. Here, however, no impartial decisionmaker has determined that detaining Kim is required for any purpose at all, and neither the Government nor the Court even claims such a need.

For the same reason it is beside the point to note that the unsuccessful *Carlson* petitioners' brief raised a claim that detention without reference to facts personal to their individual cases would violate the Due Process Clause. *Ante*, at 524. As the United States pointed out in its own *Carlson* brief, that issue was never presented, since the District Director's exercise of discretion was based on individualized determinations that the petitioners were dangerous to society. See *supra*, at 570.[26] Nor is the Court entitled to invoke *Carlson* by saying that the INS "had adopted a policy of refusing to grant bail" to alien Communists, which made the Attorney General's discretion to release aliens on bond merely "ostensibl[e]." *Ante*, at 524. The *Carlson* Court found that "[t]here is no evidence or contention that all per-

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of an alien, the Attorney General is justified in denying bail on the ground that the alien is an active participant in Communist Party affairs, or whether he is bound also to consider other circumstances, particularly the likelihood that the alien will report as ordered." Pet. for Cert. in *Butterfield* v. *Zydok*, O. T. 1951, No. 136, p. 2.

[26] While a prior conviction may sometimes evidence a risk of future danger, it is not conclusive in all cases, and Kim is a good example, given that the Government found that he "would not be considered a threat." App. 13. Indeed, the Court acknowledges that convictions are only "relevant to" dangerousness, *ante*, at 525, n. 9; it does not state that they compel a finding of danger in all cases. As even the *Zadvydas* dissent recognized, due process requires that detained criminal aliens be given an opportunity to rebut the necessity of detention by showing "that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." 533 U. S., at 721 (opinion of KENNEDY, J.).

sons arrested as deportable . . . for Communist membership are denied bail." 342 U. S., at 541–542.

The Court refuses to accept the opinion of the *Carlson* Court and the representations made in the successful brief for the Government in that case. The Court not only fails to acknowledge the actual holding of *Carlson;* it improperly adopts as authority statements made in dissent. The Court's emphatic assertion that "[t]here was no 'individualized findin[g]' of likely future dangerousness as to any of the aliens," *ante,* at 525, rests entirely on opinions voiced in dissent, although the Court only mentions this fact in a footnote, *ante,* at 525, n. 8 (citing 342 U. S., at 549, 550, n. 5, 552 (Black, J., dissenting), and *id.,* at 567 (Frankfurter, J., dissenting)). Statements made in dissent do not override the *Carlson* Court's express finding that the petitioners in that case were found to be not only members of the Communist Party, but "active in Communist work" and to "a degree, minor perhaps in [one] case, [participants] in Communist activities." *Id.,* at 541.[27]

Moreover, the *Carlson* dissenters did not suggest that no individualized determinations had occurred; rather, they contended that the District Director's individual findings of dangerousness were unsupported by sufficient reliable evidence. See *id.,* at 549–550 (Black, J., dissenting) (arguing that the aliens were not in fact "'dangerous'" at all); *id.,* at 552 (arguing that danger findings were based on "the rankest hearsay evidence" instead of the INS being "required to prove" that the detainee was dangerous); *id.,* at 555–556 (arguing that activity within the Communist movement did not make the aliens "dangerous"); *id.,* at 566–567 (Frankfurter, J.,

[27] In the footnote immediately following its citation of dissenting opinions, the Court cites a passage from the *Carlson* majority opinion confirming that the *Carlson* petitioners' detention rested on the "allegation, supported by affidavits, that the [INS's] dossier of each petitioner contained evidence" of Communist Party membership and activities "to the prejudice of the public interest." 342 U. S., at 530 (quoted *ante,* at 525, n. 9).

dissenting) (arguing that evidence of Communist party membership was "insufficient to show danger"; that evidence of some aliens' activities was stale; and that the history of treatment of the aliens involved forced him to conclude that the Attorney General was not actually exercising discretion on an individual basis).[28] And even if the *Carlson* dissenters were factually correct, all that would show is that the *Carlson* Court was misled (by the Government, no less) into deciding the case on the basis that individualized findings of dangerousness were made. Given that the *Carlson* Court clearly believed that it was deciding a case in which individualized determinations occurred, it is serious error for this Court to treat *Carlson* as deciding a case in which they did not.

Finally, the Court gets no help from the isolated passages of the *Carlson* opinion that it quotes. Although the *Carlson* Court stated that detention was "'a part'" of deportation procedure, *ante*, at 524 (quoting *Carlson*, 342 U. S., at 538), it nowhere said that detention was part of every deportation proceeding. Instead, it acknowledged that "the far larger part" of aliens deportable on "subversive charges" were re-

[28] Justice Black's dissenting statement that one of the aliens was "'not likely to engage in any subversive activities,'" 342 U. S., at 549, does not amount to a "specific finding of nondangerousness," *ante*, at 525. On the contrary, the Court expressly stated that the Government could prove dangerousness based on "personal activity" in the Communist Party; it simply was not required to go so far as to show "specific acts of sabotage or incitement to subversive action." *Carlson*, *supra*, at 541. Thus while there was no finding of "subversive action," there certainly was a finding of "danger," albeit one that Justice Black found unconvincing.

Likewise, Justice Frankfurter's statement in dissent that the Solicitor General of the United States had "advised" that "it has been the Government's policy . . . to terminate bail" for aliens awaiting deportation who were "present active Communists," 342 U. S., at 568, is difficult to reconcile with the contrary statements in both the majority opinion and the United States's brief in *Carlson*, see *supra*, at 569–572. Whatever its basis, Justice Frankfurter's reference to a "policy" of bail denials does not bear the weight that the Court places upon it today.

leased on "modest bonds or personal recognizances" pending their deportation proceedings. *Id.*, at 538, n. 31. Contrary to the Court's holding today, the *Carlson* Court understood that discretion to admit to bail was necessary, since "[o]f course [a] purpose to injure [the United States] could not be imputed generally to all aliens subject to deportation." *Id.*, at 538. It was only in this light that the Court said that the INS could "justify [its] refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity"; the Court was referring to the INS's power to detain on a finding that a given alien was engaged in Communist activity that threatened society. *Id.*, at 543. The Court nowhere addressed, much less approved, the notion that the INS could justify, or that Congress could compel, an individual's detention without any determination at all that his detention was necessary to some Government purpose. And if there was ever any doubt on this point, it failed to survive our subsequent, unanimous recognition that the detention scheme in *Carlson* required "some level of individualized determination" as a precondition to detention. *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 194–195 (1991); see also *Flores*, 507 U. S., at 313. *Carlson* stands at odds with the Court's outcome in this case.

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The Court's paragraph on *Flores*, *supra*, is no more help to it. Like *Carlson*, *Flores* did not involve mandatory detention, and the INS regulation at issue in *Flores* actually required that alien juveniles be released pending removal proceedings unless the INS determined that detention was required "'to secure [the juvenile's] timely appearance before the [INS] or the immigration court or to ensure the juvenile's safety or that of others.'" 507 U. S., at 297 (quoting 8 CFR § 242.24(b)(1) (1992)). Again, Kim agrees that such a system is constitutional and contends for it here. *Flores* turned not on the necessity of detention, but on the regulation's restric-

tion that alien juveniles could only be released to the custody of the juvenile's parent, legal guardian, or another specified adult relative. Even this limitation, however, was subject to exception for releasing a juvenile to another person in "'unusual and compelling circumstances and in the discretion of the [INS] district director or chief patrol agent.'" 507 U. S., at 297 (quoting 8 CFR § 242.24(b)(4) (1992)).

Thus, the substantive due process issue in *Flores* was not whether the aliens' detention was necessary to a governmental purpose: "'freedom from physical restraint'" was "not at issue" at all because, as juveniles, the aliens were "'always in some form of custody.'" 507 U. S., at 302 (quoting *Schall* v. *Martin*, 467 U. S. 253, 265 (1984)). Since "'[l]egal custody' rather than 'detention' more accurately describes the reality of the arrangement" in *Flores*, 507 U. S., at 298, that case has no bearing on this one, which concerns the detention of an adult.[29]

*Flores* is equally distinguishable at the procedural level. We held that the procedures for the custody decision sufficed constitutionally because any determination to keep the alien "in the custody of the [INS], released on recognizance, or released under bond" was open to review by the immigration court, the Board of Immigration Appeals, and the federal courts. *Id.*, at 308. Like the aliens in *Carlson*, the juveniles in *Flores* were subject to a different system and raised a different complaint from Kim's.

While *Flores* holds that the INS may use "reasonable presumptions and generic rules" in carrying out its statutory discretion, 507 U. S., at 313, it gave no *carte blanche* to gen-

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[29] Nor is it to the point for the Court to quote *Flores* as rejecting the aliens' challenge to a "'"blanket" presumption of the unsuitability of custodians other than parents, close relatives, and guardians.'" *Ante*, at 526 (quoting 507 U. S., at 313). *Flores* expressly stated that the regulation did not implicate the core liberty interest in avoiding physical confinement. *Id.*, at 302 ("The 'freedom from physical restraint' . . . is not at issue in this case").

eral legislation depriving an entire class of aliens of liberty during removal proceedings. *Flores* did not disturb established standards that detention of an adult must be justified in each individual instance.[30]

## IV

This case is not about the National Government's undisputed power to detain aliens in order to avoid flight or prevent danger to the community. The issue is whether that power may be exercised by detaining a still lawful permanent resident alien when there is no reason for it and no way to challenge it. The Court's holding that the Due Process Clause allows this under a blanket rule is devoid of even ostensible justification in fact and at odds with the settled standard of liberty. I respectfully dissent.

JUSTICE BREYER, concurring in part and dissenting in part.

I agree with the majority that the courts have jurisdiction, and I join Part I of its opinion. If I believed (as the majority apparently believes, see *ante*, at 513–514, and n. 3) that Kim had conceded that he is deportable, then I would conclude that the Government could detain him without bail for the few weeks ordinarily necessary for formal entry of a removal order. Brief for Petitioners 39–40; see *ante*, at 528–531. Time limits of the kind set forth in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), should govern these and longer periods of detention, for an alien's concession that he is deportable

[30] Indeed, the passages the Court quotes from *Flores* did not concern the regulation's constitutionality at all, but rather its validity as an implementation of the authorizing statute. *Id.*, at 313 ("Respondents also contend that the INS regulation violates the statute because it relies upon a 'blanket' presumption"). *Flores* clearly separated its analysis of the regulation under the Due Process Clause from its analysis of the regulation under the statute. See *id.*, at 300; see also *id.*, at 318–319 (O'CONNOR, J., concurring) (pointing out the substantive due process analysis at *id.*, at 301–306, and the procedural due process analysis at *id.*, at 306–309).

seems to me the rough equivalent of the entry of an order of removal. See *id.*, at 699–701 (reading the statute, under constitutional compulsion, as commonly imposing a presumption of a 6-month "reasonable" time limit for post-removal-order detention).

This case, however, is not one in which an alien concedes deportability. As JUSTICE SOUTER points out, Kim argues to the contrary. See *ante,* at 541–542 (opinion concurring in part and dissenting in part). Kim claims that his earlier convictions were neither for an " 'aggravated felony' " nor for two crimes of " 'moral turpitude.' " Brief for Respondent 3, 11–12, 31–32, and n. 29. And given shifting lower court views on such matters, I cannot say that his arguments are insubstantial or interposed solely for purposes of delay. See, *e. g., United States* v. *Corona-Sanchez,* 291 F. 3d 1201, 1213 (CA9 2002) (petty theft with a prior not an "aggravated felony"). Compare *Omagah* v. *Ashcroft,* 288 F. 3d 254, 259 (CA5 2002) (" 'Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved' "), with *Guarneri* v. *Kessler,* 98 F. 2d 580, 580–581 (CA5 1938) ("Moral turpitude" involves " '[a]nything done contrary to justice, honesty, principle or good morals' "), and *Quilodran-Brau* v. *Holland,* 232 F. 2d 183, 184 (CA3 1956) ("The borderline of 'moral turpitude' is not an easy one to locate").

That being so—as long as Kim's legal arguments are neither insubstantial nor interposed solely for purposes of delay—then the immigration statutes, interpreted in light of the Constitution, permit Kim (if neither dangerous nor a flight risk) to obtain bail. For one thing, Kim's constitutional claims to bail in these circumstances are strong. See *ante,* at 548–552, 557–558 (SOUTER, J., concurring in part and dissenting in part). Indeed, they are strong enough to require us to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may

be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); accord, *Zadvydas*, *supra*, at 689.

For another, the relevant statutes literally say nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within their terms. Title 8 U. S. C. § 1226(c) tells the Attorney General to "take into custody any alien who . . . *is* deportable" (emphasis added), not one who may, or may not, fall into that category. Indeed, the Government now permits such an alien to obtain bail if his argument against deportability is significantly *stronger* than substantial, *i. e.*, strong enough to make it "substantially unlikely" that the Government will win. *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Cf. 8 CFR § 3.19(h)(2)(ii) (2002).

Finally, bail standards drawn from the criminal justice system are available to fill this statutory gap. Federal law makes bail available to a criminal defendant after conviction and pending appeal provided (1) the appeal is "not for the purpose of delay," (2) the appeal "raises a substantial question of law or fact," and (3) the defendant shows by "clear and convincing evidence" that, if released, he "is not likely to flee or pose a danger to the safety" of the community. 18 U. S. C. § 3143(b). These standards give considerable weight to any special governmental interest in detention (*e. g.*, process-related concerns or class-related flight risks, see *ante*, at 528). The standards are more protective of a detained alien's liberty interest than those currently administered in the Immigration and Naturalization Service's *Joseph* hearings. And they have proved workable in practice in the criminal justice system. Nothing in the statute forbids their use when § 1226(c) deportability is in doubt.

I would interpret the (silent) statute as imposing these bail standards. Cf. *Zadvydas*, *supra*, at 698; *United States* v. *Witkovich*, 353 U. S. 194, 201–202 (1957); *Kent* v. *Dulles*, 357 U. S. 116, 129 (1958). So interpreted, the statute would require the Government to permit a detained alien to seek

an individualized assessment of flight risk and dangerousness as long as the alien's claim that he is not deportable is (1) not interposed solely for purposes of delay and (2) raises a question of "law or fact" that is not insubstantial. And that interpretation, in my view, is consistent with what the Constitution demands. I would remand this case to the Ninth Circuit to determine whether Kim has raised such a claim.

With respect, I dissent from the Court's contrary disposition.

Syllabus

# ROELL ET AL. *v.* WITHROW

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

No. 02–69. Argued February 26, 2003—Decided April 29, 2003

The Federal Magistrate Act of 1979 (Act) empowers full-time magistrate judges to conduct "any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," as long as they are "specially designated . . . by the district court" and acting with "the consent of the parties." 28 U. S. C. § 636(c)(1). Respondent Withrow, a state prisoner, brought an action under 42 U. S. C. § 1983 against members of the prison's medical staff, petitioners Roell, Garibay, and Reagan, alleging that they had deliberately disregarded his medical needs in violation of the Eighth Amendment. During a preliminary hearing, the Magistrate Judge told Withrow that he could choose to have her rather than the District Judge preside over the entire case. Withrow agreed orally and later in writing, but the petitioners did not at that point give their consent. Without waiting for their decision, the District Judge referred the case to the Magistrate Judge for final disposition, but with the caveat that all petitioners would have an opportunity to consent to her jurisdiction, and that the referral order would be vacated if any of them did not consent. Only Reagan gave written consent to the referral; Roell and Garibay said nothing about the referral. The case nevertheless proceeded in front of the Magistrate Judge, all the way to a jury verdict and judgment for the petitioners. Roell and Garibay voluntarily participated in the entire course of proceedings and voiced no objection when, at several points, the Magistrate Judge made it clear that she believed they had consented. When Withrow appealed, the Fifth Circuit *sua sponte* remanded the case to the District Court to determine whether the parties had consented to proceed before the Magistrate Judge. Only then did Roell and Garibay file a formal letter of consent stating that they consented to all of the prior proceedings before the Magistrate Judge. The District Court referred the Fifth Circuit's enquiry to that same Magistrate Judge, who reported that by their actions Roell and Garibay clearly implied their consent to her jurisdiction, but ruled that she had lacked jurisdiction because, under Circuit precedent, such consent had to be expressly given. The District Court adopted the report and recommendation. The Fifth Circuit affirmed, holding that, under § 636(c)(1), lack of consent and defects in the referral order are nonwaivable jurisdictional errors, that § 636(c) consent must be ex-

press, and that petitioners' postjudgment consent was inadequate under the Act.

*Held:* Consent to a magistrate judge's designation can be inferred from a party's conduct during litigation. Roell's and Garibay's general appearances before the Magistrate Judge, after they had been told of their right to be tried by a district judge, supply the consent necessary for the Magistrate Judge's "civil jurisdiction" under § 636(c)(1). It is true that § 636(c)(2) and Federal Rule of Civil Procedure 73(b), which establish the procedures for a § 636(c)(1) referral, envision advance, written consent communicated to the clerk. This procedure is by no means just advisory, and district courts are bound to adhere strictly to it. But the text and structure of § 636(c) as a whole indicate that a defect in the referral under § 636(c)(2) does not eliminate that magistrate judge's "civil jurisdiction" under § 636(c)(1) as long as the parties have in fact voluntarily consented. So far as concerns full-time magistrate judges, § 636(c)(1), which is the font of magistrate judge authority, speaks only of "the consent of the parties," without qualification as to form, and § 636(c)(3) similarly provides that "[t]he consent of the parties allows" a full-time magistrate judge to enter a final, appealable judgment of the district court. These unadorned references to the "consent of the parties" contrast with the language in § 636(c)(1) covering referral to certain part-time magistrate judges, which requires not only that the parties consent, but that they do so by "specific written request." In addition, there is a good pragmatic reason to think that Congress intended to permit implied consent. In giving magistrate judges case-dispositive civil authority, Congress hoped to relieve the district courts' caseload while still preserving every litigant's right to insist on trial before an Article III district judge. Strict insistence on the express consent requirement embodied in § 636(c)(2) would minimize any risk to the latter objective, but it would create an even greater risk to the former one: the risk of a full and complicated trial wasted at the option of an undeserving and possibly opportunistic litigant. Here, Withrow gave express, written consent; he thus received the protection intended by the statute and deserves no boon from the other side's failure. Had the outcome of the case been different, the shoe might be on the other foot; insistence on the bright line would let parties in Roell's and Garibay's position hedge their bets, keeping a poker face to conceal their failure to file the form, and then sandbagging the other side when the judgment turned out not to their liking. The preferable rule, which does better by the mix of congressional objectives, is to infer consent from a litigant's general appearance before the magistrate judge, after having been told of his right to be tried by a district judge. Pp. 585–591.

288 F. 3d 199, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which STEVENS, SCALIA, and KENNEDY, JJ., joined, *post*, p. 591.

*Lisa R. Eskow*, Deputy Solicitor General of Texas, argued the cause for petitioners. With her on the briefs were *Greg Abbott*, Attorney General, *Philip A. Lionberger*, former Solicitor General, *R. Ted Cruz*, Solicitor General, *Melanie P. Sarwal*, Assistant Solicitor General, and *Charles K. Eldred*, Assistant Attorney General.

*Amanda Frost* argued the cause for respondent. With her on the brief was *Brian Wolfman*.

JUSTICE SOUTER delivered the opinion of the Court.

The Federal Magistrate Act of 1979 (Federal Magistrate Act or Act) expanded the power of magistrate judges by authorizing them to conduct "any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," as long as they are "specially designated . . . by the district court" and are acting "[u]pon the consent of the parties." 28 U. S. C. § 636(c)(1). The question is whether consent can be inferred from a party's conduct during litigation, and we hold that it can be.

## I

Respondent Jon Michael Withrow is a Texas state prisoner who brought an action under Rev. Stat. § 1979, 42 U. S. C. § 1983, against members of the prison's medical staff, petitioners Joseph Roell, Petra Garibay, and James Reagan, alleging that they had deliberately disregarded his medical needs in violation of the Eighth Amendment. See *Estelle* v. *Gamble*, 429 U. S. 97 (1976). During a preliminary hearing before a Magistrate Judge to determine whether the suit could proceed *in forma pauperis*, see 28 U. S. C. § 1915, the Magistrate Judge told Withrow that he could choose to have

her rather than the District Judge preside over the entire case. App. 10–11. Withrow agreed orally, *id.*, at 11, and later in writing, App. to Pet. for Cert. 20a. A lawyer from the Texas attorney general's office who attended the hearing, but was not permanently assigned to Withrow's case, indicated that she would have to "talk to the attorneys who have been assigned the case to see if [the petitioners] will execute consent forms." App. 11.

Without waiting for the petitioners' decision, the District Judge referred the case to the Magistrate Judge for final disposition, but with the caveat that "all defendants [would] be given an opportunity to consent to the jurisdiction of the magistrate judge," and that the referral order would be vacated if any of the defendants did not consent. App. to Pet. for Cert. 21a. The Clerk of Court sent the referral order to the petitioners along with a summons directing them to include "[i]n their answer or in a separate pleading . . . a statement that 'All defendants consent to the jurisdiction of a United States Magistrate Judge' or 'All defendants do not consent to the jurisdiction of a United States Magistrate Judge.'" App. 13. The summons advised them that "[t]he court shall not be told which parties do not consent." *Ibid.* Only Reagan, who was represented by private counsel, gave written consent to the referral; Roell and Garibay, who were represented by an assistant in the attorney general's office, filed answers but said nothing about the referral. App. to Pet. for Cert. 17a.

The case nevertheless proceeded in front of the Magistrate Judge, all the way to a jury verdict and judgment for the petitioners. When Withrow appealed, the Court of Appeals *sua sponte* remanded the case to the District Court to "determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." *Id.*, at 13a. It was only then that Roell and Garibay filed a formal letter of consent with the District

Court, stating that "they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." *Id.*, at 22a.

The District Court nonetheless referred the Court of Appeals's enquiry to the same Magistrate Judge who had conducted the trial, who reported that "by their actions [Roell and Garibay] clearly implied their consent to the jurisdiction of a magistrate." *Id.*, at 19a. She was surely correct, for the record shows that Roell and Garibay voluntarily participated in the entire course of proceedings before the Magistrate Judge, and voiced no objection when, at several points, the Magistrate Judge made it clear that she believed they had consented.[1] The Magistrate Judge observed, however, that under the Circuit's precedent "consent cannot be implied by the conduct of the parties," *id.*, at 18a, and she accordingly concluded that the failure of Roell and Garibay to give express consent before sending their postjudgment letter to the District Court meant that she had lacked jurisdiction to hear the case, *ibid.* The District Court adopted the report and recommendation over the petitioners' objection. *Id.*, at 14a–15a.

The Court of Appeals affirmed the District Court, agreeing that "[w]hen, pursuant to § 636(c)(1), the magistrate judge

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[1] On at least three different occasions, counsel for Roell and Garibay was present and stood silent when the Magistrate Judge stated that they had consented to her authority. First, in a status teleconference involving the addition of a new defendant, Danny Knutson, who later settled with Withrow and was dropped from the suit, the Magistrate Judge stated that "all of the other parties have consented to my jurisdiction." App. 18. Petitioners later filed a motion for summary judgment, which the Magistrate Judge denied, noting in her order that "this case was referred to the undersigned to conduct all further proceedings, including entry of final judgment, in accordance with 28 U. S. C. § 636(c)(1)." App. to Pet. for Cert. 26a. And finally, during jury selection, the Magistrate Judge told the panel that both sides had consented to her jurisdiction to hear the case. *Id.*, at 27a.

enters [a] final judgment, lack of consent and defects in the order of reference are jurisdictional errors" that cannot be waived. 288 F. 3d 199, 201 (CA5 2002). It also reaffirmed its prior holding that "§ 636(c) consent must be express; it cannot be implied by the parties' conduct." *Ibid.* Finally, the appellate court decided that petitioners' postjudgment consent did not satisfy § 636(c)(1)'s consent requirement. *Id.*, at 203. We granted certiorari, 537 U. S. 999 (2002), and now reverse.

## II

The Federal Magistrate Act provides that "[u]pon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court." 28 U. S. C. § 636(c)(1). Unlike nonconsensual referrals of pretrial but case-dispositive matters under § 636(b)(1), which leave the district court free to do as it sees fit with the magistrate judge's recommendations, a § 636(c)(1) referral gives the magistrate judge full authority over dispositive motions, conduct of trial, and entry of final judgment, all without district court review. A judgment entered by "a magistrate judge designated to exercise civil jurisdiction under [§ 636(c)(1)]" is to be treated as a final judgment of the district court, appealable "in the same manner as an appeal from any other judgment of a district court." § 636(c)(3).[2]

[2] Prior to the 1996 amendments to the Act, see Federal Courts Improvement Act of 1996, Pub. L. 104–317, § 207(1)(B), 110 Stat. 3850, parties could also elect to appeal to "a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals." 28 U. S. C. § 636(c)(4) (1994 ed.) (repealed 1996). If the latter course was pursued, the court of appeals could grant leave to appeal the district court's judgment. § 636(c)(5) (same). In all events, whether the initial appeal was to the court of appeals under § 636(c)(3) or to the district court under § 636(c)(4), the parties retained the right to seek ultimate review from this Court. § 636(c)(5) (same).

Section 636(c)(2) establishes the procedures for a § 636(c)(1) referral. "If a magistrate judge is designated to exercise civil jurisdiction under [§ 636(c)(1)], the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction." § 636(c)(2). Within the time required by local rule, "[t]he decision of the parties shall be communicated to the clerk of court." *Ibid.* Federal Rule of Civil Procedure 73(b) specifies that the parties' election of a magistrate judge shall be memorialized in "a joint form of consent or separate forms of consent setting forth such election," see Fed. Rules Civ. Proc. Form 34, and that neither the magistrate nor the district judge "shall . . . be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge." The procedure created by 28 U. S. C. § 636(c)(2) and Rule 73(b) thus envisions advance, written consent communicated to the clerk, the point being to preserve the confidentiality of a party's choice, in the interest of protecting an objecting party against any possible prejudice at the magistrate judge's hands later on. See also § 636(c)(2) ("Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent").

Here, of course, § 636(c)(2) was honored in the breach, by a referral before Roell and Garibay gave their express consent, without any statement from them, written or oral, until after judgment. App. to Pet. for Cert. 19a. Nonetheless, Roell and Garibay "clearly implied their consent" by their decision to appear before the Magistrate Judge, without expressing any reservation, after being notified of their right to refuse and after being told that she intended to exercise case-dispositive authority. *Ibid.*[3] The only question is whether

[3] See Black's Law Dictionary 95 (7th ed. 1999) ("'The term "appearance" . . . designate[s] the overt act by which [a party] submits himself to the court's jurisdiction . . . . An appearance may be expressly made by formal

consent so shown can count as conferring "civil jurisdiction" under § 636(c)(1), or whether adherence to the letter of § 636(c)(2) is an absolute demand.

So far as it concerns full-time magistrate judges,[4] the font of a magistrate judge's authority, § 636(c)(1), speaks only of "the consent of the parties," without qualification as to form, and § 636(c)(3) similarly provides that "[t]he consent of the parties allows" a full-time magistrate judge to enter a final, appealable judgment of the district court. These unadorned references to "consent of the parties" contrast with the language in § 636(c)(1) covering referral to certain part-time magistrate judges, which requires not only that the parties consent, but that they do so by "specific written request." Cf. also 18 U. S. C. § 3401(b) (allowing magistrate judges to preside over misdemeanor trials only if the defendant "expressly consents . . . in writing or orally on the record"). A distinction is thus being made between consent simple, and consent expressed in a "specific written request." And although the specific referral procedures in 28 U. S. C. § 636(c)(2) and Federal Rule of Civil Procedure 73(b) are by no means just advisory, the text and structure of the section as a whole suggest that a defect in the referral to a full-time magistrate judge under § 636(c)(2) does not eliminate that magistrate judge's "civil jurisdiction" under § 636(c)(1) so long as the parties have in fact voluntarily consented. See *King* v. *Ionization Int'l, Inc.*, 825 F. 2d 1180, 1185 (CA7 1987) (noting that the Act "does not require a specific form . . . of consent").[5]

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written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction' " (quoting 4 Am. Jur. 2d, Appearance § 1, p. 620 (1995))).

[4] The parties do not dispute that the Magistrate Judge who presided over the trial was a full-time Magistrate Judge.

[5] The textual evidence cited by the dissent is far from conclusive. The dissent focuses on the fact that § 636(c)(1) allows a magistrate judge to exercise authority only "[u]pon" the parties' consent, and it concludes that this temporal connotation forecloses accepting implied consent. But the

These textual clues are complemented by a good pragmatic reason to think that Congress intended to permit implied consent. In giving magistrate judges case-dispositive civil authority, Congress hoped to relieve the district courts' "mounting queue of civil cases" and thereby "improve access to the courts for all groups." S. Rep. No. 96–74, p. 4 (1979); see H. R. Rep. No. 96–287, p. 2 (1979) (The Act's main object was to create "a supplementary judicial power designed to meet the ebb and flow of the demands made on the Federal judiciary"). At the same time, though, Congress meant to preserve a litigant's right to insist on trial before an Article III district judge insulated from interference with his obligation to ignore everything but the merits of a case. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 848 (1986) (Article III protects litigants' " 'right to have claims decided before judges who are free from potential

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timing of consent is a different matter from the manner of its expression, and it is perfectly in keeping with the sequence of events envisioned by § 636(c)(1) to infer consent from a litigant's initial act of appearing before the magistrate judge and submitting to her jurisdiction, instead of insisting on trial before a district judge. An "appearance" being commonly understood as "[t]he first act of the defendant in court," J. Ballentine, Law Dictionary with Pronunciations 91 (2d ed. 1948), any subsequent proceedings by the court will occur "[u]pon the consent of the parties," § 636(c)(1).

Furthermore, it is hardly true, contrary to the dissent's claim, *post*, at 594 (opinion of THOMAS, J.), that § 636(c)(2) and Rule 73(b) are pointless if implied consent is permitted under § 636(c)(1). Certainly, notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent, so that aspect of § 636(c)(2)'s protection is preserved. And litigants may undoubtedly insist that they be able to communicate their decision on the referral to the clerk, in order to guard against the risk of reprisals at the hands of either judge. The only question is whether a litigant who forgoes that procedural opportunity, but still voluntarily gives his consent through a general appearance before the magistrate judge, is still subject to the magistrate judge's "civil jurisdiction," and we think that the language of § 636(c)(1) indicates that he is.

domination by other branches of government'" (quoting *United States* v. *Will*, 449 U. S. 200, 218 (1980))). It was thus concern about the possibility of coercive referrals that prompted Congress to make it clear that "the voluntary consent of the parties is required before a civil action may be referred to a magistrate for a final decision." S. Conf. Rep. No. 96–322, p. 7 (1979); see also S. Rep. No. 96–74, at 5 ("The bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate's exercise of the new jurisdiction. The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates"); H. R. Rep. No. 96–287, at 2 (The Act "creates a vehicle by which litigants can consent, freely and voluntarily, to a less formal, more rapid, and less expensive means of resolving their civil controversies").[6]

When, as here, a party has signaled consent to the magistrate judge's authority through actions rather than words, the question is what outcome does better by the mix of congressional objectives. On the one hand, the virtue of strict insistence on the express consent requirement embodied in § 636(c)(2) is simply the value of any bright line: here, absolutely minimal risk of compromising the right to an Article

[6] Originally, the third sentence of § 636(c)(2) provided that once the decision of the parties was communicated to the clerk, "neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate." 93 Stat. 643. In the 1990 amendments to the Act, Congress amended § 636(c)(2) to provide that even after the parties' decision is made, "either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences." Judicial Improvements Act of 1990, Pub. L. 101–650, § 308, 104 Stat. 5112. The change reflected Congress's diminishing concern that communication between the judge and the parties would lead to coercive referrals. See H. R. Rep. No. 101–734, p. 27 (1990).

III judge. But there is another risk, and insisting on a bright line would raise it: the risk of a full and complicated trial wasted at the option of an undeserving and possibly opportunistic litigant. This risk is right in front of us in this case. Withrow consented orally and in writing to the Magistrate Judge's authority following notice of his right to elect trial by an Article III district judge; he received the protection intended by the statute, and deserves no boon from the other side's failure to cross the bright line. In fact, there is even more to Withrow's unworthiness, since under the local rules of the District Court, it was Withrow's unmet responsibility as plaintiff to get the consent of all parties and file the completed consent form with the clerk. See Gen. Order No. 80–5, Art. III(B)(2) (SD Tex., June 16, 1980), p. 5, App. to Brief in Opposition 7a. In another case, of course, the shoe might be on the other foot; insisting on the bright line would allow parties in Roell's and Garibay's position to sit back without a word about their failure to file the form, with a right to vacate any judgment that turned out not to their liking.

The bright line is not worth the downside. We think the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge. Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority. Judicial efficiency is served; the Article III right is substantially honored. See *Schor, supra,* at 849–850 (finding that the litigant "effective[ly] waive[d]" his right to an Article III court by deciding "to seek relief before the [Commodity Futures Trading Commission] rather than in the federal courts"); *United States* v. *Raddatz*, 447 U. S. 667, 676, n. 3 (1980) (eschewing a construction of the Act that would tend to "frus-

trate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts").[7]

## III

Roell's and Garibay's general appearances before the Magistrate Judge, after they had been told of their right to be tried by a district judge, supply the consent necessary for the Magistrate Judge's "civil jurisdiction" under § 636(c)(1).[8] We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE STEVENS, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The provision that this Court must interpret reads: "Upon the consent of the parties, a . . . magistrate judge . . . may

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[7] We doubt that this interpretation runs a serious risk of "spawn[ing] a second litigation of significant dimension." *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 609 (2001) (internal quotation marks omitted). In the first place, implied consent will be the exception, not the rule, since, as we discuss above, district courts remain bound by the procedural requirements of § 636(c)(2) and Federal Rule of Civil Procedure 73(b). See *supra*, at 586, 587–588, n. 5. The dissent surmises, *post*, at 596, that our position raises "ambiguities" as to whether an inference of consent will be supported in a particular case, but we think this concern is greatly exaggerated: as long as parties are notified of the availability of a district judge as required by § 636(c)(2) and Rule 73(b), a litigant's general appearance before the magistrate judge will usually indicate the necessary consent. In all events, whatever risk of "second[ary] litigation" may exist under an implied consent rule pales in comparison to the inefficiency and unfairness of requiring relitigation of the entire case in circumstances like these.

[8] Because we conclude that Roell and Garibay impliedly consented to the Magistrate Judge's authority, we need not address whether express postjudgment consent would be sufficient in a case where there was no prior consent, either express or implied. We also have no opportunity to decide whether the Court of Appeals was correct that lack of consent is a "jurisdictional defect" that can be raised for the first time on appeal.

conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment." 28 U. S. C. § 636(c)(1). The majority holds that no express consent need be given prior to the commencement of proceedings before the magistrate judge. Rather, consent can be implied "where . . . the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Ante*, at 590. In my view, this interpretation of § 636(c)(1) is contrary to its text, fails to respect the statutory scheme, and raises serious constitutional concerns. Furthermore, I believe that a lack of proper consent is a jurisdictional defect and, therefore, a court of appeals reviewing a judgment entered by a magistrate judge pursuant to § 636(c) may inquire *sua sponte* into the consent's validity.

## I

### A

There are two prongs to the majority's holding: (1) parties can give their consent *during* the actual proceedings conducted by a magistrate judge, and (2) such consent need not be explicit, but rather may be inferred from the parties' conduct. Neither of these conclusions is correct.

As already noted, a magistrate judge may carry out certain functions of a district court only "[u]pon the consent of the parties." Congress' use of the word "upon" suggests that the necessary consent must precede the magistrate judge's exercise of his authority. "Upon" is defined as "immediately or very soon after." The Random House Dictionary of the English Language 1570 (1966). Thus, under the plain language of the statute, consent is a precondition to the magistrate judge's exercise of case-dispositive power; without it, a magistrate judge cannot preside over a trial or enter judgment. *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F. 2d 537, 540 (CA9 1984) (en banc) (Kennedy, J.).

The word "upon" is used to mean "thereafter" in other parts of the statute as well. For example, § 636(h) provides that a "magistrate judge who has retired may, *upon* the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge . . . ." (Emphasis added.) Clearly, a retired magistrate judge cannot return to his former post before the chief judge consents. Similarly, § 636(e)(3) uses the word "upon" to mean "subsequent to." That subsection grants magistrate judges the power to hold parties before them in contempt, but conditions the imposition of contempt sanctions "*upon* notice and hearing under the Federal Rules of Criminal Procedure." (Emphasis added.) That is, a party cannot be held in contempt without *first* being given notice and a hearing. Because under the normal rules of statutory construction the Court "assumes that identical words used in different parts of the same act are intended to have the same meaning," *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986) (citations and internal quotation marks omitted), the word "upon" in § 636(c)(1) must mean "thereafter," just as it does in §§ 636(h) and (e)(3). By allowing consent to be "inferred from a party's conduct *during* litigation," *ante*, at 582 (emphasis added), the majority disregards the clear meaning of the word "upon."

Similarly, the conclusion that implied, rather than express, consent suffices is not borne out by either § 636(c)(1) itself or the statutory scheme as a whole. The majority is, of course, correct that the relevant clause of § 636(c)(1) speaks only of "consent," while the clause addressing part-time magistrate judges requires that consent be communicated by a "specific written request." *Ante*, at 587 (internal quotation marks omitted). But this premise does not command the conclusion the majority draws. Both clauses require *express* consent, with the latter mandating a *specific form* of express consent—a written request.

This reading is most consistent with the statutory scheme. Despite the majority's concession that § 636(c)(2) and Federal Rule of Civil Procedure 73 "are by no means just advisory," *ante*, at 587, the majority fails to give them any weight. Section 636(c)(2) requires the clerk of the district court to notify the parties of the availability of a magistrate "at the time the action is filed," *after* which the "decision of the parties [whether to consent] shall be communicated to the clerk of court." The fact that the parties' decision must be communicated to the clerk soon after the filing of the action indicates that the consent envisioned by the statute must be given affirmatively and expressly. Indeed, a party would find it quite difficult to "communicat[e]" the necessary consent to the *clerk of the court* through actions undertaken "*during litigation*," *ante*, at 582 (emphasis added). The majority's view suggests that the clerk of the court must monitor the parties' behavior in the magistrate judge's courtroom and determine, at some point not specified by the majority, that the parties' actions have ripened into consent. That is not a reasonable interpretation. Accordingly, I would hold that appearance before a magistrate judge without objection cannot be deemed "consent" within the meaning of this statutory scheme.

Federal Rule of Civil Procedure 73 fortifies this reading. The Rule mirrors the provisions of § 636(c)(2) for informing parties of their option to proceed before a magistrate judge and of their obligation to file a consent form if they chose to do so. Fed. Rule Civ. Proc. 73(b) ("When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent," and if the parties agree, "they *shall execute and file a joint form of consent* or separate forms of consent . . ." (emphasis added)).

Read together, the foregoing provisions indicate that parties must *expressly* communicate their consent to the magistrate judge's exercise of jurisdiction over their case and must

do so *before* litigation—or at the very least *before* a magistrate judge enters a binding judgment.

B

While I agree with the majority's view that § 636(c)(1) was "meant to preserve a litigant's right to insist on trial before an Article III district judge," *ante,* at 588, and to prevent "coercive referrals," *ante,* at 589, the majority's construction of this provision does not follow the Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues." *Gomez* v. *United States,* 490 U. S. 858, 864 (1989).

"A critical limitation on [the] expanded jurisdiction [of magistrate judges] is consent." *Id.,* at 870. Reading § 636(c)(1) to require express consent not only is more consistent with the text of the statute, but also ensures that the parties knowingly and voluntarily waive their right to an Article III judge. A party's express consent is a clear and unambiguous indication that the party had sufficient notice it was freely waiving its right. Accordingly, I would choose this interpretation over the majority's view that implied consent suffices to give a magistrate judge dispositive authority over a case. Cf. *Aetna Ins. Co.* v. *Kennedy ex rel. Bogash,* 301 U. S. 389, 393 (1937) (holding that the parties, by their request for directed verdicts, did not waive their right to trial by jury, and observing that "courts indulge every reasonable presumption against waiver"); *Ohio Bell Telephone Co.* v. *Public Util. Comm'n of Ohio,* 301 U. S. 292, 307 (1937) (holding that a telephone company did not waive its right to have the value of its property determined upon evidence presented in open proceedings by not opposing consolidation of two proceedings, and noting that "[w]e do not presume acquiescence in the loss of fundamental rights").

Moreover, the majority's test for determining whether a party has given adequate implied consent—"where . . . the litigant or counsel was made aware of the need for consent

and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge," *ante,* at 590—is rife with ambiguities. How are the courts to determine whether the litigant *or* counsel "was made aware of the need to consent and the right to refuse it"? Are courts required to search beyond the record and inquire into whether a clerk of the court informed either a litigant or his counsel of the litigant's rights and provided them with requisite forms to sign? Can courts rely, if applicable, on the parties' participation in other unrelated proceedings before a magistrate judge? In addition, the majority's view of what constitutes "voluntariness" in this context is not at all clear as it seems to depend, at least in part, on establishing a litigant's or counsel's awareness of the litigant's rights.

Although the majority brushes aside the prudential implications of its reading, *ante,* at 591, n. 7 ("We doubt that this interpretation runs a serious risk of 'spawn[ing] a second litigation of significant dimension.' *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources,* 532 U. S. 598, 609 (2001)"), it is hardly a novel proposition that a bright-line rule would be easier to administer. And, it would certainly be so in adjudicating the validity of consent under this statute. If express consent is required, courts will not have to study the record of a proceeding on a case-by-case basis, searching for patterns in the parties' behavior that would provide sufficient indicia of voluntariness to satisfy this newly minted, but vague, test for consent. A bright-line rule brings clarity and predictability, and, in light of the constitutional implications of this case, these values should not be discounted.

Given the uncertainties surrounding the determination of the validity of implied consent, it is not surprising that the majority does not even claim that the requirements of Article III have been satisfied in this case. Rather, all the majority can muster is that "the Article III right is *substantially* honored." *Ante,* at 590 (emphasis added). However,

litigants' rights under Article III are either protected or they are not. As the majority suggests, its reading does not safeguard these rights. Indeed, the only protection offered by the majority is its hope that the "procedural requirements of § 636(c)(2) and Federal Rule of Civil Procedure 73(b)" will be complied with. *Ante*, at 591, n. 7. The majority offers no credible solution for circumstances, such as the ones here, where these rules were not followed.

Even apart from the plain text of the statute and the canon of constitutional avoidance, concerns about fairness—to which the majority alludes above, see *ante*, at 588–590—weigh in favor of express consent. According to the majority, the respondent is a "possibly opportunistic litigant," who "deserves no boon from the other side's failure to cross the bright line," *ante*, at 590. The record, however, provides no evidence that respondent, proceeding *pro se* below, manipulated the system. Moreover, "the other side" is the State of Texas, a repeat player, represented by its own counsel, and no doubt familiar with the rules of the local federal courts. Finally, it was not respondent who raised the issue of consent, but the Court of Appeals, which considered the question *sua sponte*.

## II

Because the parties here did not expressly consent to the proceeding before the Magistrate Judge, I next consider whether the lack of such consent destroys jurisdiction of a court of appeals reviewing a magistrate judge's judgment. I believe it does, and thus, a court of appeals may—and indeed must—raise it *sua sponte*.

A court of appeals exercises jurisdiction over a magistrate judge's final order pursuant to § 636(c)(3), which provides:

> "Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in

> the same manner as an appeal from any other judgment of a district court. *The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedur*e." (Emphasis added.)

Under § 636(c)(3), appellate jurisdiction over final judgments entered by a magistrate judge depends on whether the requirements of § 636(c)(1), including consent, are satisfied. Absence of consent means absence of a "judgment," which, in turn, means absence of appellate jurisdiction. Thus, under § 636, the necessary precondition for a court of appeals' jurisdiction over a magistrate judge's order is the parties' consent to proceed before the magistrate judge. Because valid consent is a jurisdictional prerequisite for appellate jurisdiction, and, hence, an integral part of the inquiry into the existence of such jurisdiction, § 636(c)(3) permits a court of appeals to examine the validity of the consent to the magistrate judge's authority *sua sponte*.

The *de facto* officer doctrine is not to the contrary. That doctrine "prevent[s] litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 535 (1962) (plurality opinion). Examples of such "technicalities" are defects in the judge's appointment or designation. See, *e. g.*, *Ex parte Ward*, 173 U. S. 452, 456 (1899) (judge improperly appointed during a Senate recess); *Wright* v. *United States*, 158 U. S. 232, 238 (1895) (deputy marshal whose oath of office had not been properly administered); *McDowell* v. *United States*, 159 U. S. 596, 601–602 (1895) (judge whose designation to sit in a different district may have been improper under the statute); *Ball* v. *United States*, 140 U. S. 118, 128–129 (1891) (judge sitting in place of a deceased judge where designation permitted only the substitution for a disabled judge). The doctrine is, how-

ever, inapplicable "when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction. *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (three-judge court); *United States* v. *Emholt*, 105 U. S. 414 (certificate of divided opinion)." *Glidden*, 370 U. S., at 535 (plurality opinion). Additionally, "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity." *Id.*, at 535–536. This is the case here—§ 636(c) "embodies a strong policy" of ensuring that litigants waive their rights to an Article III judge knowingly and voluntarily. The requirement of consent is not a mere "technicality." Sections 636(c)(1), 636(c)(2), and 636(c)(3) reference consent explicitly and require it as a precondition for the exercise of a magistrate judge's authority and of a court of appeals' review of the magistrate judge's judgment. The foregoing indicates the importance of consent as a touchstone of this statutory scheme. Thus, absence of consent is a jurisdictional defect and a court of appeals must raise such defects *sua sponte*.

* * *

I would vacate the judgment below and remand the case with instructions to dismiss the appeal for lack of subject-matter jurisdiction. I respectfully dissent.

Syllabus

# ILLINOIS EX REL. MADIGAN, ATTORNEY GENERAL OF ILLINOIS *v.* TELEMARKETING ASSOCIATES, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 01–1806. Argued March 3, 2003—Decided May 5, 2003

Respondents, Illinois for-profit fundraising corporations and their owner (collectively Telemarketers), were retained by VietNow National Headquarters, a charitable nonprofit corporation, to solicit donations to aid Vietnam veterans. The contracts between those parties provided, among other things, that Telemarketers would retain 85 percent of the gross receipts from Illinois donors, leaving 15 percent for VietNow. The Illinois Attorney General filed a complaint in state court, alleging, *inter alia*, that Telemarketers represented to donors that a significant amount of each dollar donated would be paid over to VietNow for specifically identified charitable endeavors, and that such representations were knowingly deceptive and materially false, constituted a fraud, and were made for Telemarketers' private pecuniary benefit. The trial court granted Telemarketers' motion to dismiss the fraud claims on First Amendment grounds. In affirming, the Illinois Appellate and Supreme Courts placed heavy weight on *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, and *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781. Those decisions held that certain regulations of charitable solicitation barring fees in excess of a prescribed level effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment. The state high court acknowledged that this case involved no such prophylactic proscription of high-fee charitable solicitation. Instead, the court noted, the Attorney General sought to enforce the State's generally applicable antifraud laws against Telemarketers for specific instances of deliberate deception. However, the Illinois Supreme Court said, Telemarketers' solicitation statements were alleged to be false only because Telemarketers contracted for 85 percent of the gross receipts and failed to disclose this information to donors. The court concluded that the Attorney General's complaint was, in essence, an attempt to regulate Telemarketers' ability to engage in a protected activity based upon a percentage-rate limitation—the same regulatory principle rejected in *Schaumburg*, *Munson*, and *Riley*.

Syllabus

*Held:* Consistent with this Court's precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used. The Illinois Attorney General's allegations against Telemarketers therefore state a claim for relief that can survive a motion to dismiss. Pp. 611–624.

(a) The First Amendment protects the right to engage in charitable solicitation, see, *e. g.*, *Schaumburg*, 444 U. S., at 632, but does not shield fraud, see, *e. g.*, *Donaldson* v. *Read Magazine, Inc.*, 333 U. S. 178, 190. Like other forms of public deception, fraudulent charitable solicitation is unprotected speech. See, *e. g.*, *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 164. This Court has not previously addressed the First Amendment's application to individual fraud actions of the kind at issue here. It has, however, three times held unconstitutional prophylactic laws designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level. Pp. 611–617.

(b) In those cases, *Schaumburg*, *Munson*, and *Riley*, the Court took care to leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations. See, *e. g.*, *Schaumburg*, 444 U. S., at 637. As those decisions recognized, there are differences critical to First Amendment concerns between fraud actions trained on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high. Simply labeling an action one for "fraud," of course, will not carry the day. Had the State Attorney General's complaint charged fraud based solely on the percentage of donations the fundraisers would retain, or their failure to alert donors to fee arrangements at the start of each call, *Riley* would support swift dismissal. Portions of the Attorney General's complaint against Telemarketers were of this genre. But the complaint and annexed affidavits, in large part, alleged not simply what Telemarketers failed to convey. They also described what Telemarketers misleadingly represented. Taking into account the affidavits, and reading the complaint in the light most favorable to the Attorney General, that pleading described misrepresentations this Court's precedent does not place under the First Amendment's cover. First, the complaint asserted that Telemarketers affirmatively represented that a significant amount of each dollar donated would be paid over to VietNow to be used for specific charitable purposes while in fact Telemarketers knew that 15 cents or less of each dollar would be available for those purposes. Second, the complaint essentially alleged that the charitable solicitation was a façade: Although Telemarketers represented that donated funds would go to VietNow's charitable purposes, the amount of funds paid over to

the charity was merely incidental to the fundraising effort, which was made for Telemarketers' private pecuniary benefit. Fraud actions so tailored, targeting misleading affirmative representations about how donations would be used, are unlike the prophylactic measures invalidated in *Schaumburg*, *Munson*, and *Riley:* So long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors' fees *per se*, fraud actions need not impermissibly chill protected speech. Pp. 617–619.

(c) The prohibitions invalidated in *Schaumburg*, *Munson*, and *Riley* turned solely on whether high percentages of donated funds were spent on fundraising. Their application did not depend on whether the fundraiser made fraudulent representations to potential donors. In contrast to the prior restraints inspected in those cases, a properly tailored fraud action targeting specific fraudulent representations employs no "'[b]road prophylactic rul[e],'" *Schaumburg*, 444 U. S., at 637 (citation omitted), lacking any "nexus . . . [to] the likelihood that the solicitation is fraudulent," *Riley*, 487 U. S., at 793. Such an action thus falls on the constitutional side of the line "between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process." *Munson*, 467 U. S., at 969–970. The Attorney General's complaint has a solid core in allegations that home in on Telemarketers' affirmative statements designed to mislead donors regarding the use of their contributions. Of prime importance, to prove a defendant liable for fraud under Illinois case law, the State must show by clear and convincing evidence that the defendant knowingly made a false representation of a material fact, that such representation was made with the intent to mislead the listener, and that the representation succeeded in doing so. In contrast to a prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful, the State bears the full burden of proof in an individualized fraud action. Exacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room for protected speech. See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280. As an additional safeguard responsive to First Amendment concerns, an appellate court could independently review the trial court's findings. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 498–511. What the First Amendment and this Court's case law emphatically do not require, however, is a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations. While the percentage of fundraising proceeds turned over to a charity is not an accurate measure of the amount of funds used "for" a charitable purpose, *Munson*, 467 U. S., at 967, n. 16, the gravamen of the fraud action in this case is not high costs or fees,

but particular representations made with intent to mislead. The Illinois Attorney General has not suggested that a charity must desist from using donations for legitimate purposes such as information dissemination, advocacy, and the like. Rather, the Attorney General has alleged that Telemarketers attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, knowing full well that was not the case. Such representations remain false or misleading, however legitimate the other purposes for which the funds are in fact used. The Court does not agree with Telemarketers that the Attorney General's fraud action is simply an end run around *Riley*'s holding that fundraisers may not be required, in every telephone solicitation, to state the percentage of receipts the fundraiser would retain. It is one thing to compel every fundraiser to disclose its fee arrangements at the start of a telephone conversation, quite another to take fee arrangements into account in assessing whether particular affirmative representations designedly deceive the public. Pp. 619–623.

(d) Given this Court's repeated approval of government efforts to enable donors to make informed choices about their charitable contributions, see, *e. g.*, *Schaumburg*, 444 U. S., at 638, almost all States and many localities require charities and professional fundraisers to register and file regular reports on their activities, particularly their fundraising costs. These reports are generally available to the public and are often placed on the Internet. Telemarketers do not object on First Amendment grounds to these disclosure requirements. Just as government may seek to inform the public and prevent fraud through such requirements, so it may vigorously enforce antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. *Riley*, 487 U. S., at 800. High fundraising costs, without more, do not establish fraud, see *id.*, at 793, and mere failure to volunteer the fundraiser's fee when contacting a potential donee, without more, is insufficient to state a claim for fraud, *id.*, at 795–801. But these limitations do not disarm States from assuring that their residents are positioned to make informed choices about their charitable giving. Pp. 623–624.

198 Ill. 2d 345, 763 N. E. 2d 289, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 624.

*Richard S. Huszagh*, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs

were *Lisa Madigan*, Attorney General, *James E. Ryan*, former Attorney General, *Joel D. Bertocchi*, Solicitor General, *Barry B. Gross*, Chief Deputy Attorney General, and *Jerald S. Post*, *Floyd D. Perkins*, and *Matthew D. Shapiro*, Assistant Attorneys General.

*Deputy Solicitor General Clement* argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Matthew D. Roberts*, *Jacob M. Lewis*, and *Catherine Hancock*.

*Errol Copilevitz* argued the cause for respondents. With him on the brief were *William E. Raney*, *Mackenzie Canter III*, and *Mark Diskin*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Richard E. Doran*, Attorney General of Florida, *Thomas E. Warner*, Solicitor General, *Louis F. Hubener* and *Matthew J. Conigliaro*, Deputy Solicitors General, *Jonathan A. Glogau*, *Arabella W. Teal*, Corporation Counsel of the District of Columbia, *Thomas R. Keller*, Acting Attorney General of Hawaii, and *Anabelle Rodríguez*, Attorney General of Puerto Rico, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Gregg D. Renkes* of Alaska, *Mark Lunsford Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Alan G. Lance* of Idaho, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Albert B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Phillip P. McLaughlin* of New Hampshire, *David Samson* of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *Hardy Myers* of Oregon, *Mike Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charles Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont,

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the amenability of for-profit fundraising corporations to suit by the Attorney General of Illinois for fraudulent charitable solicitations. The controversy arises from the fundraisers' contracts with a charitable nonprofit corporation organized to advance the welfare of Vietnam veterans; under the contracts, the fundraisers were to retain 85 percent of the proceeds of their fundraising endeavors. The State Attorney General's complaint alleges that the fundraisers defrauded members of the public by falsely representing that "a significant amount of each dollar donated would be paid over to [the veterans organization] for its [charitable] purposes while in fact the [fundraisers] knew that . . . 15 cents or less of each dollar would be available" for those purposes. App. 9, ¶ 34. Complementing that allegation, the complaint states that the fundraisers falsely represented that "the funds donated would go to further . . . charitable purposes," *id.*, at 8, ¶ 29, when in fact "the amount . . . paid over to charity was merely incidental to the fund

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*Jerry W. Kilgore* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Hoke MacMillan* of Wyoming; and for the Council of Better Business Bureaus, Inc., et al. by *Steven J. Cole* and *Richard Woods.*

Briefs of *amici curiae* urging affirmance were filed for the American Teleservices Association by *Robert Corn-Revere;* for the Association of Fundraising Professionals et al. by *Geoffrey W. Peters* and *Walter J. Sczudlo;* for Disabled American Veterans by *Christopher J. Clay* and *John L. Moore, Jr.;* for the Free Speech Defense and Education Fund, Inc., et al. by *William J. Olson, John S. Miles, Herbert W. Titus, Mark Weinberg,* and *Mark Fitzgibbons;* for Independent Sector et al. by *Robert A. Boisture, Albert G. Lauber,* and *Lloyd H. Mayer;* and for Public Citizen, Inc., et al. by *Bonnie I. Robin-Vergeer* and *Alan B. Morrison.*

Briefs of *amici curiae* were filed for AARP by *Deborah M. Zuckerman, Stacy J. Canan,* and *Michael R. Schuster;* for Hudson Bay Co. of Illinois, Inc., by *Thomas H. Goodman* and *Anthony J. Gleekel;* and for Thirty-two Commercial Fundraisers et al. by *Charles H. Nave.*

raising effort," which was conducted primarily "for the private pecuniary benefit of" the fundraisers, *id.*, at 9, ¶ 35.

The question presented is whether those allegations state a claim for relief that can survive a motion to dismiss. In accord with the Illinois trial and appellate courts, the Illinois Supreme Court held they did not. That court was "mindful of the opportunity for public misunderstanding and the potential for donor confusion which may be presented with fund-raising solicitations of the sort involved in th[is] case," *Ryan* v. *Telemarketing Associates, Inc.*, 198 Ill. 2d 345, 363, 763 N. E. 2d 289, 299 (2001); it nevertheless concluded that threshold dismissal of the complaint was compelled by this Court's decisions in *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980), *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984), and *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988). Those decisions held that certain regulations of charitable subscriptions, barring fees in excess of a prescribed level, effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment.

We reverse the judgment of the Illinois Supreme Court. Our prior decisions do not rule out, as supportive of a fraud claim against fundraisers, any and all reliance on the percentage of charitable donations fundraisers retain for themselves. While bare failure to disclose that information directly to potential donors does not suffice to establish fraud, when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim.

## I

Defendants below, respondents here, Telemarketing Associates, Inc., and Armet, Inc., are Illinois for-profit fundraising corporations wholly owned and controlled by defendant-respondent Richard Troia. 198 Ill. 2d, at 347–348, 763

N. E. 2d, at 291. Telemarketing Associates and Armet were retained by VietNow National Headquarters, a charitable nonprofit corporation, to solicit donations to aid Vietnam veterans. *Id.*, at 348, 763 N. E. 2d, at 291. In this opinion, we generally refer to respondents, collectively, as "Telemarketers."

The contracts between the charity, VietNow, and the fundraisers, Telemarketers, provided that Telemarketers would retain 85 percent of the gross receipts from donors within Illinois, leaving 15 percent for VietNow. *Ibid.* Under the agreements, donor lists developed by Telemarketers would remain in their "sole and exclusive" control. App. 24, 93–94, 102, ¶ 65. Telemarketers also brokered contracts on behalf of VietNow with out-of-state fundraisers; under those contracts, out-of-state fundraisers retained between 70 percent and 80 percent of donated funds, Telemarketers received between 10 percent and 20 percent as a finder's fee, and VietNow received 10 percent. 198 Ill. 2d, at 348, 763 N. E. 2d, at 291. Between July 1987 and the end of 1995, Telemarketers collected approximately $7.1 million, keeping slightly more than $6 million for themselves, and leaving approximately $1.1 million for the charity. *Ibid.*[1]

In 1991, the Illinois Attorney General filed a complaint against Telemarketers in state court. *Id.*, at 348–350, 763 N. E. 2d, at 291–292.[2] The complaint asserted common-law and statutory claims for fraud and breach of fiduciary duty. *Ibid.* It alleged, *inter alia*, that the 85 percent fee for which Telemarketers contracted was "excessive" and "not justified

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[1] The petition for certiorari further alleges that, of the money raised by Telemarketers, VietNow in the end spent only about 3 percent to provide charitable services to veterans. Pet. for Cert. 2, and n. 1; see IRS Form 990, filed by VietNow in 2000, available at http://167.10.5.131/Ct0601_0700/0652/1M11INDV.PDF (as visited Apr. 10, 2003) (available in Clerk of Court's case file).

[2] References to the complaint in this opinion include all amendments to that pleading.

by expenses [they] paid." App. 103, ¶ 72. Dominantly, however, the complaint concerned misrepresentation.

In the course of their telephone solicitations, the complaint states, Telemarketers misleadingly represented that "funds donated would go to further Viet[N]ow's charitable purposes." *Id.*, at 8, ¶ 29. Affidavits attached to the complaint aver that Telemarketers told prospective donors their contributions would be used for specifically identified charitable endeavors; typical examples of those endeavors include "food baskets given to vets [and] their families for Thanksgiving," *id.*, at 124, paying "bills and rent to help physically and mentally disabled Vietnam vets and their families," *id.*, at 131, "jo[b] training," *id.*, at 145, and "rehabilitation [and] other services for Vietnam vets," *id.*, at 169 (some capitalization omitted in quotes). One affiant asked what percentage of her contribution would be used for fundraising expenses; she "was told 90% or more goes to the vets." *Ibid.* (capitalization omitted). Another affiant stated she was told her donation would not be used for "labor expenses" because "all members are volunteers." *Id.*, at 111 (capitalization omitted).[3] Written materials Telemarketers sent to each donor

[3] Under Illinois law, exhibits attached to a complaint and referred to in a pleading become part of the pleading "for all purposes." Ill. Comp. Stat., ch. 735, § 5/2–606 (1992); *Pure Oil Co.* v. *Miller-McFarland Drilling Co.*, 376 Ill. 486, 497–498, 34 N. E. 2d 854, 859 (1941); 3 R. Michael, Illinois Practice § 23.9, pp. 332–333, nn. 7–9 and accompanying text (1989) (collecting Illinois cases). Telemarketers' counsel stated at oral argument that the Illinois Supreme Court had "found as a matter of law that [the] affidavits were not part of the complaint." Tr. of Oral Arg. 40. We can locate no such finding in the court's opinion. Asked to supply a citation after argument, see *id.*, at 41, counsel directed us to the court's statement that "there is no allegation that [Telemarketers] made affirmative misstatements to potential donors." 198 Ill. 2d 345, 348, 763 N. E. 2d 289, 291 (2001)); see Letter from William E. Raney to William K. Suter, Clerk of the Court (Mar. 4, 2003). In so stating, the Illinois court overlooked, most obviously, the two affidavits attesting to Telemarketers' representations that "90% or more goes to the vets," and that there would be no "labor

represented that contributions would "be used to help and assist Viet[N]ow's charitable purposes." *Id.*, at 8, ¶ 30.[4]

The 15 cents or less of each solicited dollar actually made available to VietNow, the Attorney General charged, "was merely incidental to the fund raising effort"; consequently, she asserted, "representations made to donors [that a significant amount of each dollar donated would be paid over to Viet[N]ow for its purposes] were knowingly deceptive and materially false, constituted a fraud[,] and were made for the private pecuniary benefit of [Telemarketers]." *Id.*, at 9, ¶¶ 34, 35.

Telemarketers moved to dismiss the fraud claims, urging that they were barred by the First Amendment. The trial court granted the motion,[5] and the dismissal order was affirmed, in turn, by the Illinois Appellate Court and the Illinois Supreme Court. The Illinois courts placed heavy weight on three decisions of this Court: *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980); *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S.

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expenses." See App. 111, 169 (capitalization omitted). In any event, the sentence fragment counsel identified falls short of showing, in the face of established Illinois case law, that the court "found" the affidavits annexed by the Illinois Attorney General *dehors* the complaint. Counsel's contention is further clouded by the Illinois Supreme Court's explicit notation that "the Attorney General ha[d] attached to his complaint the affidavits of 44 VietNow donors." 198 Ill. 2d, at 352, 763 N. E. 2d, at 293.

[4] Illinois law provides that "[i]n any solicitation to the public for a charitable organization by a professional fund raiser or professional solicitor[,] [t]he public member shall be promptly informed by statement in verbal communications and by clear and unambiguous disclosure in written materials that the solicitation is being made by a paid professional fund raiser. The fund raiser, solicitor, and materials used shall also provide the professional fund raiser's name and a statement that contracts and reports regarding the charity are on file with the Illinois Attorney General and additionally, in verbal communications, the solicitor's true name must be provided." Ill. Comp. Stat., ch. 225, § 460/17(a) (2001).

[5] The parties subsequently stipulated to the dismissal of all remaining claims. App. to Pet. for Cert. 30–31.

947 (1984); and *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988). Each of the three decisions invalidated state or local laws that categorically restrained solicitation by charities or professional fundraisers if a high percentage of the funds raised would be used to cover administrative or fundraising costs. *Schaumburg*, 444 U. S., at 620; *Munson*, 467 U. S., at 947; and *Riley*, 487 U. S., at 781; see 198 Ill. 2d, at 359, 763 N. E. 2d, at 297.

The Illinois Supreme Court acknowledged that this case, unlike *Schaumburg*, *Munson*, and *Riley*, involves no prophylactic provision proscribing any charitable solicitation if fundraising costs exceeded a prescribed limit. Instead, the Attorney General sought to enforce the State's generally applicable antifraud laws against Telemarketers for "specific instances of deliberate deception." 198 Ill. 2d, at 358, 763 N. E. 2d, at 296 (quoting *Riley*, 487 U. S., at 803 (SCALIA, J., concurring)). "However," the court said, "the statements made by [Telemarketers] during solicitation are alleged to be 'false' only because [Telemarketers] retained 85% of the gross receipts and failed to disclose this information to donors." 198 Ill. 2d, at 359, 763 N. E. 2d, at 297. The Attorney General's complaint, in the Illinois Supreme Court's view, was "in essence, an attempt to regulate [Telemarketers'] ability to engage in a protected activity based upon a percentage-rate limitation"—"the same regulatory principle that was rejected in *Schaumburg[,] Munson*, and *Riley*." *Ibid.*

"[H]igh solicitation costs," the Illinois Supreme Court stressed, "can be attributable to a number of factors." *Ibid.* In this case, the court noted, Telemarketers contracted to provide a "wide range" of services in addition to telephone solicitation. *Ibid.* For example, they agreed to publish a newsletter and to maintain a toll-free information hotline. *Id.*, at 359–360, 763 N. E. 2d, at 297–298. Moreover, the court added, VietNow received "nonmonetary benefits by having [its] message disbursed by the solicitation process," and Telemarketers were directed to solicit "in a manner that

would 'promote goodwill' on behalf of VietNow." *Id.*, at 361, 763 N. E. 2d, at 298. Taking these factors into account, the court concluded that it would be "incorrect to presume . . . [any] nexus between high solicitation costs and fraud." *Id.*, at 360, 763 N. E. 2d, at 298.

The Illinois Supreme Court further determined that, under *Riley*, "fraud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." *Id.*, at 361, 763 N. E. 2d, at 298.[6] Finally, the court expressed the fear that if the complaint were allowed to proceed, all fundraisers in Illinois would be saddled with "the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fund-raiser's fee was too high." *Id.*, at 362, 763 N. E. 2d, at 299. The threatened exposure to litigation costs and penalties, the court said, "could produce a substantial chilling effect on protected speech." *Ibid.* We granted certiorari. 537 U. S. 999 (2002).

## II

The First Amendment protects the right to engage in charitable solicitation. See *Schaumburg*, 444 U. S., at 632 ("charitable appeals for funds . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of

[6] Contracts for fundraising campaigns in Illinois must be filed with the State's Attorney General, see Ill. Comp. Stat., ch. 225, §§ 460/2(a)(10) and 460/7 (2001), and those contracts must disclose all fundraiser fees, including any "stated percentage of the gross amount raised" to be retained by the fundraiser, § 460/7(b); see § 460/7(d). The filings are open for public inspection. § 460/2(f). Illinois law also provides that fundraisers must disclose "the percentage to be received by the charitable organization from each contribution, if such disclosure is requested by the person solicited." § 460/17(b). Telemarketers did not challenge these requirements.

causes—that are within the protection of the First Amendment"); *Riley*, 487 U. S., at 788–789. But the First Amendment does not shield fraud. See, *e. g.*, *Donaldson* v. *Read Magazine, Inc.*, 333 U. S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974) (the "intentional lie" is "no essential part of any exposition of ideas" (internal quotation marks omitted)). Like other forms of public deception, fraudulent charitable solicitation is unprotected speech. See, *e. g.*, *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 164 (1939) ("Frauds," including "fraudulent appeals . . . made in the name of charity and religion," may be "denounced as offenses and punished by law."); *Donaldson*, 333 U. S., at 192 ("A contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public.").

The Court has not previously addressed the First Amendment's application to individual fraud actions of the kind at issue here. It has, however, three times considered prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level. Each time, the Court held the prophylactic measures unconstitutional.

In *Schaumburg*, decided in 1980, the Court invalidated a village ordinance that prohibited charitable organizations from soliciting contributions unless they used at least 75 percent of their receipts "directly for the charitable purpose of the organization." 444 U. S., at 624 (internal quotation marks omitted). The ordinance defined "charitable purposes" to exclude salaries and commissions paid to solicitors, and the administrative expenses of the charity, including salaries. *Ibid.* The village of Schaumburg's "principal justification" for the ordinance was fraud prevention: "[A]ny organization using more than 25 percent of its receipts on fund-

raising, salaries, and overhead," Schaumburg submitted, "is not a charitable, but a commercial, for-profit enterprise"; "to permit [such an organization] to represent itself as a charity," the village urged, "is fraudulent." *Id.*, at 636.

The Court agreed with Schaumburg that fraud prevention ranks as "a substantial governmental interes[t]," *ibid.*, but concluded that "the 75-percent requirement" promoted that interest "only peripherally." *Ibid.* Spending "more than 25 percent of [an organization's] receipts on fundraising, salaries, and overhead," the Court explained, does not reliably indicate that the enterprise is "commercial" rather than "charitable." *Ibid.* Such spending might be altogether appropriate, *Schaumburg* noted, for a charitable organization "primarily engaged in research, advocacy, or public education [that uses its] own paid staff to carry out these functions as well as to solicit financial support." *Id.*, at 636–637. "The Village's legitimate interest in preventing fraud," the Court stated, "can be better served by measures less intrusive than a direct prohibition on solicitation," *id.*, at 637: "Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly," *ibid.*

Four years later, in *Munson*, the Court invalidated a Maryland law that prohibited charitable organizations from soliciting if they paid or agreed to pay as expenses more than 25 percent of the amount raised. Unlike the inflexible ordinance in *Schaumburg*, the Maryland law authorized a waiver of the 25 percent limitation "where [it] would effectively prevent the charitable organization from raising contributions." 467 U. S., at 950–951, n. 2. The Court held that the waiver provision did not save the statute. *Id.*, at 962. "[No] reaso[n] other than financial necessity warrant[ed] a waiver," *Munson* observed. *Id.*, at 963. The statute provided no shelter for a charity that incurred high solicitation costs because it chose to disseminate information as part of its fundraising. *Ibid.* Nor did it shield a charity

whose high solicitation costs stemmed from the unpopularity of its cause. *Id.*, at 967.

"[N]o doubt [there] are organizations that have high fundraising costs not due to protected First Amendment activity," the Court recognized; it concluded, however, that Maryland's statute was incapable of "distinguish[ing] those organizations from charities that have high costs due to protected First Amendment activities." *Id.*, at 966. The statute's fatal flaw, the Court said, was that it "operate[d] on [the] fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Ibid.* As in *Schaumburg*, the Court noted, fraud could be checked by "measures less intrusive than a direct prohibition on solicitation": Fraud could be punished directly and the State "could require disclosure of the finances of a charitable organization so that a member of the public could make an informed decision about whether to contribute." 467 U. S., at 961, and n. 9.

Third in the trilogy of cases on which the Illinois Supreme Court relied was our 1988 decision in *Riley*. The village ordinance in *Schaumburg* and the Maryland law in *Munson* regulated charities; the North Carolina charitable solicitation controls at issue in *Riley* directly regulated professional fundraisers. North Carolina's law prohibited professional fundraisers from retaining an "unreasonable" or "excessive" fee. 487 U. S., at 784 (internal quotation marks omitted). Fees up to 20 percent of the gross receipts collected were deemed reasonable; fees between 20 percent and 35 percent were deemed unreasonable if the State showed that the solicitation did not involve advocacy or dissemination of information. *Id.*, at 784–785. Fees exceeding 35 percent were presumed unreasonable, but the fundraiser could rebut the presumption by showing either that the solicitation involved advocacy or information dissemination, or that, absent the higher fee, the charity's "ability to raise money or communicate would be significantly diminished." *Id.*, at 785–786.

Relying on *Schaumburg* and *Munson*, the Court's decision in *Riley* invalidated North Carolina's endeavor to rein in charitable solicitors' fees. The Court held, once again, that fraud may not be inferred simply from the percentage of charitable donations absorbed by fundraising costs. See 487 U. S., at 789 ("solicitation of charitable contributions is protected speech"; "using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud").

The opportunity to rebut the unreasonableness presumption attending a fee over 35 percent did not bring North Carolina's scheme within the constitutional zone, the Court explained. Under the State's law, "even where a prima facie showing of unreasonableness ha[d] been rebutted, the fact-finder [still had to] make an ultimate determination, on a case-by-case basis, as to whether the fee was reasonable—a showing that the solicitation involved . . . advocacy or [the] dissemination of information [did] not alone establish that the total fee was reasonable." *Id.*, at 786.

Training on that aspect of North Carolina's regulation, the Court stated: "Even if we agreed that some form of a percentage-based measure could be used, in part, to test for fraud, we could not agree to a measure that requires the speaker to prove 'reasonableness' case by case based upon what is at best a loose inference that the fee might be too high." *Id.*, at 793. "[E]very campaign incurring fees in excess of 35% . . . [would] subject [fundraisers] to potential litigation over the 'reasonableness' of the fee," the Court observed; that litigation risk, the Court concluded, would "chill speech in direct contravention of the First Amendment's dictates." *Id.*, at 794. Especially likely to be burdened, the *Riley* opinion noted, were solicitations combined with advocacy or the communication of information, and fundraising by small or unpopular charities. *Ibid.* The Court cautioned, however, as it did in *Schaumburg* and *Munson*, that States need not "sit idly by and allow their citizens to be de-

frauded." 487 U. S., at 795. We anticipated that North Carolina law enforcement officers would be "ready and able" to enforce the State's antifraud law. *Ibid.*

*Riley* presented a further issue. North Carolina law required professional fundraisers to disclose to potential donors, before asking for money, the percentage of the prior year's charitable contributions the fundraisers had actually turned over to charity. *Ibid.* The State defended this disclosure requirement as a proper means to dispel public misperception that the money donors gave to professional fundraisers went in greater-than-actual proportion to benefit charity. *Id.*, at 798.

This Court condemned the measure as an "unduly burdensome" prophylactic rule, an exaction unnecessary to achieve the State's goal of preventing donors from being misled. *Id.*, at 800. The State's rule, *Riley* emphasized, conclusively presumed that "the charity derive[d] no benefit from funds collected but not turned over to it." *Id.*, at 798. This was "not necessarily so," the Court said, for charities might well benefit from the act of solicitation itself, when the request for funds conveyed information or involved cause-oriented advocacy. *Ibid.*

The Court noted in *Riley* that North Carolina (like Illinois here) required professional fundraisers to disclose their professional status. *Id.*, at 799; see Ill. Comp. Stat., ch. 225, § 460/17(a) (2001); *supra*, at 609, n. 4, 611, n. 6. That disclosure, the Court said, effectively notified contributors that a portion of the money they donated would underwrite solicitation costs. A concerned donor could ask how much of the contribution would be turned over to the charity, and under North Carolina law, fundraisers would be obliged to provide that information. *Riley*, 487 U. S., at 799 (citing N. C. Gen. Stat. § 131C–16 (1986)). But upfront telephone disclosure of the fundraiser's fee, the Court believed, might end as well as begin the conversation: A potential contributor who thought the fee too high might simply hang up. 487 U. S., at 799–

800. "[M]ore benign and narrowly tailored options" that would not chill solicitation altogether were available; for example, the Court suggested, "the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file," and "[it] may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." *Ibid.*

## III

### A

The Court's opinions in *Schaumburg*, *Munson*, and *Riley* took care to leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations. See *Schaumburg*, 444 U. S., at 637; *Munson*, 467 U. S., at 961, and n. 9; *Riley*, 487 U. S., at 795, 800.[7] As those decisions recognized, and as we further explain below, there are differences critical to First Amendment concerns between fraud actions trained on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high. See Part III–B, *infra*. Simply labeling an action one for "fraud," of course, will not carry the day. For example, had the complaint against Telemarketers charged fraud based solely on the percentage of donations the fundraisers would retain, or their failure to alert potential donors to their fee arrangements at the start of each telephone call, *Riley* would support swift dismissal.[8] A State's Attorney General surely cannot gain case-by-case ground this Court has declared off limits to legislators.

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[7] We are therefore unpersuaded by Telemarketers' plea that they lacked fair notice of their vulnerability to fraud actions. See Brief for Respondents 46, 49–50.

[8] Although fundraiser retention of 85 percent of donations is significantly higher than the 35 percent limit in *Riley*, this Court has not yet accepted any percentage-based measure as dispositive. See *supra*, at 615 (quoting *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 793 (1988)).

Portions of the complaint in fact filed by the Attorney General are of this genre. See, *e. g.*, App. 103, ¶ 72 (asserting that Telemarketers' charge "is excessive" and "not justified by expenses [they] paid"); *id.*, at 86, ¶¶ 67H–67I (alleging statutory violations based on failure to disclose to prospective donors Telemarketers' percentage fee). As we earlier noted, however, see *supra*, at 608–609, the complaint and annexed affidavits, in large part, alleged not simply what Telemarketers failed to convey; they also described what Telemarketers misleadingly represented.

Under Illinois law, similar to the Federal Rules of Civil Procedure, "[w]hen the legal sufficiency of a complaint is challenged by a . . . motion to dismiss, all well-pleaded facts in the complaint are taken as true and [the court] must determine whether the allegations . . . , *when interpreted in the light most favorable to the plaintiff*, are sufficient to establish a cause of action upon which relief may be granted." *Connick* v. *Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 490, 675 N. E. 2d 584, 588 (1997) (emphasis added). Dismissal is proper "only if it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover." 198 Ill. 2d, at 351, 763 N. E. 2d, at 293.

Taking into account the affidavits, and reading the complaint in the light most favorable to the Attorney General, that pleading described misrepresentations our precedent does not place under the First Amendment's cover. First, it asserted that Telemarketers affirmatively represented that "a significant amount of each dollar donated would be paid over to Viet[N]ow" to be used for specific charitable purposes—rehabilitation services, job training, food baskets, and assistance for rent and bills, App. 9, ¶ 34; *id.*, at 124, 131, 145, 163, 169, 187, 189—while in reality Telemarketers knew that "15 cents or less of each dollar" was "available to Viet-[N]ow for its purposes." *Id.*, at 9, ¶ 34. Second, the complaint alleged, essentially, that the charitable solicitation was a façade: Although Telemarketers represented that donated

funds would go to VietNow's specific "charitable purposes," *id.*, at 8, ¶ 29, the "amount of funds being paid over to charity was merely incidental to the fund raising effort," which was made "for the private pecuniary benefit of [Telemarketers] and their agents," *id.*, at 9, ¶ 35. Cf., *e. g., Voices for Freedom*, CCH Trade Reg. ¶ 23,080 (1993) [1987–1993 Transfer Binder] (complaint against fundraisers who, *inter alia*, represented that "substantial portions of the funds from [the sale of commemorative bracelets] would be used to support a message center for the troops stationed in the Persian Gulf," but "did not use substantial portions of the bracelet-sales proceeds to support the message center").

Fraud actions so tailored, targeting misleading affirmative representations about how donations will be used, are plainly distinguishable, as we next discuss, from the measures invalidated in *Schaumburg*, *Munson*, and *Riley:* So long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors' fees *per se*, such actions need not impermissibly chill protected speech.

## B

In *Schaumburg*, *Munson*, and *Riley*, the Court invalidated laws that prohibited charitable organizations or fundraisers from engaging in charitable solicitation if they spent high percentages of donated funds on fundraising—whether or not any fraudulent representations were made to potential donors. Truthfulness even of all representations was not a defense. See *supra*, at 612–616. In contrast to the prior restraints inspected in those cases, a properly tailored fraud action targeting fraudulent representations themselves employs no "[b]road prophylactic rul[e]," *Schaumburg*, 444 U. S., at 637 (internal quotation marks and citation omitted), lacking any "nexus . . . [to] the likelihood that the solicitation is fraudulent," *Riley*, 487 U. S., at 793. Such an action thus falls on the constitutional side of the line the Court's cases draw "between regulation aimed at fraud and regulation

aimed at something else in the hope that it would sweep fraud in during the process." *Munson*, 467 U. S., at 969–970. The Illinois Attorney General's complaint, in this light, has a solid core in allegations that home in on affirmative statements Telemarketers made intentionally misleading donors regarding the use of their contributions. See *supra*, at 608–609.

Of prime importance, and in contrast to a prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful, in a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a fundraiser to fraud liability. As restated in Illinois case law, to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so. See *In re Witt*, 145 Ill. 2d 380, 391, 583 N. E. 2d 526, 531 (1991). Heightening the complainant's burden, these showings must be made by clear and convincing evidence. See *Hofmann* v. *Hofmann*, 94 Ill. 2d 205, 222, 446 N. E. 2d 499, 506 (1983).[9]

Exacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room for protected speech. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964) (action for defamation of public

[9] In *Riley*, this Court expressed concern that case-by-case litigation over the reasonableness of fundraising fees would inhibit speech. 487 U. S., at 793–794. That concern arose in large measure because the North Carolina statute there at issue placed the burden of proof on the fundraiser. The Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected. See *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958). The government shoulders that burden in a fraud action.

official); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 502, and n. 19 (1984) (noting "kinship" between *New York Times* standard and "motivation that must be proved to support a common-law action for deceit").[10] As an additional safeguard responsive to First Amendment concerns, an appellate court could independently review the trial court's findings. Cf. *Bose Corp.*, 466 U. S., at 498–511 (*de novo* appellate review of findings regarding actual malice). What the First Amendment and our case law emphatically do not require, however, is a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations.

The Illinois Supreme Court in the instant case correctly observed that "the percentage of [fundraising] proceeds turned over to a charity is not an accurate measure of the amount of funds used 'for' a charitable purpose." 198 Ill. 2d, at 360, 763 N. E. 2d, at 298 (citing *Munson*, 467 U. S., at 967, n. 16). But the gravamen of the fraud action in this case is not high costs or fees, it is particular representations made with intent to mislead. If, for example, a charity conducted an advertising or awareness campaign that advanced charitable purposes in conjunction with its fundraising activity, its representation that donated funds were going to "charitable purposes" would not be misleading, much less intentionally so. Similarly, charitable organizations that engage primarily in advocacy or information dissemination could get and spend money for their activities without risking a fraud

[10] Although this case does not present the issue, the Illinois Attorney General urges that a constitutional requirement resembling "actual malice" does not attend "*every* form of liability by charitable solicitors who misrepresent the use of donations." Reply Brief 16–17, n. 11 (internal quotation marks omitted). We confine our consideration to the complaint in this case, which alleged that Telemarketers "acted with knowledge of the falsity of their representations." *Ibid.*

charge. See *Schaumburg*, 444 U. S., at 636–637; *Munson*, 467 U. S., at 963; *Riley*, 487 U. S., at 798–799.[11]

The Illinois Attorney General here has not suggested that a charity must desist from using donations for information dissemination, advocacy, the promotion of public awareness, the production of advertising material, the development or enlargement of the charity's contributor base,[12] and the like. Rather, she has alleged that Telemarketers attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, knowing full well that was not the case. See *supra*, at 608–609, 618–619. Such representations remain false or misleading, however legitimate the other purposes for which the funds are in fact used.

We do not agree with Telemarketers that the Illinois Attorney General's fraud action is simply an end run around *Riley*'s holding that fundraisers may not be required, in every telephone solicitation, to state the percentage of receipts the fundraiser would retain. See Brief for Respondents 14–19. It is one thing to compel every fundraiser to disclose its fee arrangements at the start of a telephone conversation, quite another to take fee arrangements into

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[11] *Amicus* Mothers Against Drunk Driving (MADD), for example, states that its mission is "to communicate the message 'Don't Drink and Drive.'" Brief for Public Citizen, Inc., et al. as *Amici Curiae* 13. Telephone solicitors retained by MADD "reach millions of people a year, and each call educates the public about the tragedy of drunk driving, provides statistics and asks the customer to always designate a sober driver." *Ibid.* (internal quotation marks and citation omitted). Solicitations that described MADD's charitable mission would not be fraudulent simply because MADD devotes a large proportion of its resources to fundraising calls, for those calls themselves fulfill its advocacy/information dissemination mission.

[12] This Court has consistently recognized that small or unpopular charities would be hindered by limitations on the portion of receipts they could devote to subscription building. See *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 967 (1984); *Riley*, 487 U. S., at 794.

account in assessing whether particular affirmative representations designedly deceive the public.

C

Our decisions have repeatedly recognized the legitimacy of government efforts to enable donors to make informed choices about their charitable contributions. In *Schaumburg*, the Court thought it proper to require "disclosure of the finances of charitable organizations," thereby to prevent fraud "by informing the public of the ways in which their contributions will be employed." 444 U. S., at 638. In *Munson*, the Court reiterated that "disclosure of the finances of a charitable organization" could be required "so that a member of the public could make an informed decision about whether to contribute." 467 U. S., at 961–962, n. 9. And in *Riley*, the Court said the State may require professional fundraisers to file "detailed financial disclosure forms" and may communicate that information to the public. 487 U. S., at 800; see also *id.*, at 799, n. 11 (State may require fundraisers "to disclose unambiguously [their] professional status").

In accord with our precedent, as Telemarketers and their *amici* acknowledge, in "[a]lmost all of [the] states and many localities," charities and professional fundraisers must "register and file regular reports on activities[,] particularly fundraising costs." Brief for Respondents 37; see Brief for Independent Sector et al. as *Amici Curiae* 6–8. These reports are generally available to the public; indeed, "[m]any states have placed the reports they receive from charities and professional fundraisers on the Internet." Brief for Respondents 39; see Brief for Independent Sector et al. as *Amici Curiae* 9–10. Telemarketers do not object on First Amendment grounds to these disclosure requirements. Tr. of Oral Arg. 43.

Just as government may seek to inform the public and prevent fraud through such disclosure requirements, so it may

"vigorously enforce . . . antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." *Riley*, 487 U. S., at 800. High fundraising costs, without more, do not establish fraud. See *id.*, at 793. And mere failure to volunteer the fundraiser's fee when contacting a potential donee, without more, is insufficient to state a claim for fraud. *Id.*, at 795–801. But these limitations do not disarm States from assuring that their residents are positioned to make informed choices about their charitable giving. Consistent with our precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used.

* * *

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

*It is so ordered.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

The question presented by the petition for certiorari in this case reads as follows: "Whether the First Amendment categorically prohibits a State from pursuing a fraud action against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps the vast majority (in this case 85 percent) of all funds donated." Pet. for Cert. i. I join the Court's opinion because I think it clear from the opinion that if the *only* representation made by the fundraiser were the one set forth in the question presented ("that donations will be used for charitable purposes"), and if the *only* evidence of alleged failure to comply with that representation were the evidence set forth in the question presented (that the fundraiser "keeps the

vast majority (in this case 85 percent) of all funds donated"), the answer to the question would be yes.

It is the teaching of *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 793 (1988), and *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 966 (1984), that since there is such wide disparity in the legitimate expenses borne by charities, it is not possible to establish a maximum percentage that is reasonable. It also follows from that premise that there can in general be no reasonable expectation on the part of donors as to what fraction of the gross proceeds goes to expenses. When that proposition is combined with the unquestionable fact that one who is promised, without further specification, that his charitable contribution will go to a particular cause must reasonably understand that it will go there *after* the deduction of legitimate expenses, the conclusion must be that the promise is not broken (and hence fraud is not committed) by the mere fact that expenses are very high. Today's judgment, however, rests upon a "solid core" of misrepresentations, *ante*, at 620, that go well beyond mere commitment of the collected funds to the charitable purpose.

Syllabus

# KAUPP *v.* TEXAS

## ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

No. 02–5636. Decided May 5, 2003

After petitioner Kaupp, then 17, was implicated in the murder of a 14-year-old girl by the confession of the girl's half brother, detectives tried, but failed, to obtain a warrant to question Kaupp. They then went to his house at 3 a.m.; awakened and handcuffed him; led him, shoeless and dressed only in his underwear, to a patrol car; stopped at the crime scene; and took him to the sheriff's headquarters, where they removed the handcuffs and advised him of his rights under *Miranda* v. *Arizona*, 384 U. S. 436. Once presented with the brother's confession, Kaupp admitted to having a part in the crime. He did not acknowledge causing the fatal wound or confess to the murder, for which he was later indicted. Kaupp moved unsuccessfully to suppress his confession as the fruit of an illegal arrest, was convicted, and was sentenced to prison. In affirming, the Texas Court of Appeals found that the arrest occurred after Kaupp's confession; that Kaupp consented to go with the officers when he answered "Okay" to an officer's statement that they needed to talk; that a reasonable person would not have believed that putting on handcuffs before being removed to a patrol car was a significant restriction on his freedom of movement, since this was common practice of the sheriff's office; and that Kaupp did not resist the use of handcuffs or act in a manner consistent with anything but full cooperation. The State Court of Criminal Appeals denied discretionary review.

*Held:* Kaupp was arrested within the meaning of the Fourth Amendment before the detectives began to question him. A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida* v. *Bostick*, 501 U. S. 429, 437. This test is derived from Justice Stewart's opinion in *United States* v. *Mendenhall*, 446 U. S. 544, 554, which includes, as examples of circumstances that might indicate a seizure, the threatening presence of several police officers, an officer's display of a weapon, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. This Court has never sustained the involuntary removal of a suspect from his home to a police

station and his detention there for investigative purposes absent probable cause or judicial authorization. The State does not claim to have had probable cause here, and an application of the test just mentioned shows that Kaupp was arrested, there being evidence of every one of *Mendenhall*'s probative circumstances. A 17-year-old boy was awakened at 3 a.m. by at least three police officers, placed in handcuffs, and taken in his underwear and without shoes in a patrol car to the crime scene and then to the sheriff's offices, where he was taken into an interrogation room and questioned. The contrary reasons mentioned by the state courts—his "Okay" response, that the sheriff's office routinely handcuffed individuals when transporting them, and that Kaupp did not resist the handcuffs or act uncooperatively—are no answer to the facts here. Because Kaupp was arrested before he was questioned, and because the State does not claim that the sheriff's department had probable cause to detain him at that point, his confession must be suppressed unless the State can show that it was an act of free will sufficient to purge the primary taint of the unlawful invasion. The only relevant consideration supporting the State is the observance of *Miranda*, but such warnings alone cannot always break the causal connection between the illegality and the confession, *Brown* v. *Illinois*, 422 U. S. 590, 603. All other relevant considerations—the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the official misconduct's purpose and flagrancy—point the opposite way. Unless, on remand, the State can point to testimony undisclosed on this record, and weighty enough to carry its burden despite the clear force of the evidence here, the confession must be suppressed.

Certiorari granted; vacated and remanded.

PER CURIAM.

This case turns on the Fourth Amendment rule that a confession "obtained by exploitation of an illegal arrest" may not be used against a criminal defendant. *Brown* v. *Illinois*, 422 U. S. 590, 603 (1975). After a 14-year-old girl disappeared in January 1999, the Harris County Sheriff's Department learned she had had a sexual relationship with her 19-year-old half brother, who had been in the company of petitioner Robert Kaupp, then 17 years old, on the day of the girl's disappearance. On January 26th, deputy sheriffs questioned the brother and Kaupp at headquarters; Kaupp was cooperative and was permitted to leave, but the brother

failed a polygraph examination (his third such failure). Eventually he confessed that he had fatally stabbed his half sister and placed her body in a drainage ditch. He implicated Kaupp in the crime.

Detectives immediately tried but failed to obtain a warrant to question Kaupp.[1] Detective Gregory Pinkins nevertheless decided (in his words) to "get [Kaupp] in and confront him with what [the brother] had said." App. A to Pet. for Cert. 2. In the company of two other plainclothes detectives and three uniformed officers, Pinkins went to Kaupp's house at approximately 3 a.m. on January 27th. After Kaupp's father let them in, Pinkins, with at least two other officers, went to Kaupp's bedroom, awakened him with a flashlight, identified himself, and said, "'we need to go and talk.'" *Ibid.* Kaupp said "'Okay.'" *Ibid.* The two officers then handcuffed Kaupp and led him, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car. The State points to nothing in the record indicating Kaupp was told that he was free to decline to go with the officers.

They stopped for 5 or 10 minutes where the victim's body had just been found, in anticipation of confronting Kaupp with the brother's confession, and then went on to the sheriff's headquarters. There, they took Kaupp to an interview room, removed his handcuffs, and advised him of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Kaupp first denied any involvement in the victim's disappearance, but 10

[1] The detectives applied to the district attorney's office for a "pocket warrant," which they described as authority to take Kaupp into custody for questioning. App. 3 to App. D to Pet. for Cert. 6 (trial transcript). The detectives did not seek a conventional arrest warrant, as they did not believe they had probable cause for Kaupp's arrest. See *ibid.* As the trial court later explained, the detectives had no evidence or motive to corroborate the brother's allegations of Kaupp's involvement, see App. C to Pet. for Cert. 2; the brother had previously failed three polygraph examinations, while, only two days earlier, Kaupp had voluntarily taken and passed one, in which he denied his involvement, see *id.*, at 1–2.

or 15 minutes into the interrogation, told of the brother's confession, he admitted having some part in the crime. He did not, however, acknowledge causing the fatal wound or confess to murder, for which he was later indicted.

After moving unsuccessfully to suppress his confession as the fruit of an illegal arrest, Kaupp was convicted and sentenced to 55 years' imprisonment. The State Court of Appeals affirmed the conviction by unpublished opinion, concluding that no arrest had occurred until after the confession. The state court said that Kaupp consented to go with the officers when he answered "'Okay'" to Pinkins's statement that "'we need to go and talk.'" App. A to Pet. for Cert. 2, 6. The court saw no contrary significance in the subsequent handcuffing and removal to the patrol car, given the practice of the sheriff's department in "routinely" using handcuffs for safety purposes when transporting individuals, as officers had done with Kaupp only the day before. *Id.*, at 6. The court observed that "a reasonable person in [Kaupp's] position would not believe that being put in handcuffs was a significant restriction on his freedom of movement." *Ibid.* Finally, the state court noted that Kaupp "did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation." *Id.*, at 6–7. Kaupp appealed, but the Court of Criminal Appeals of Texas denied discretionary review. App. B to Pet. for Cert. We grant the motion for leave to proceed *in forma pauperis*, grant the petition for certiorari, and vacate the judgment below.

A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida* v. *Bostick*, 501 U. S. 429, 437 (1991) (quoting *Michigan* v. *Chesternut*, 486 U. S. 567, 569 (1988)). This test is derived from Justice

Stewart's opinion in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), see *California* v. *Hodari D.*, 499 U. S. 621, 627–628 (1991), which gave several "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave," including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, *supra*, at 554.

Although certain seizures may be justified on something less than probable cause, see, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1 (1968), we have never "sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization." *Hayes* v. *Florida*, 470 U. S. 811, 815 (1985);[2] cf. *Payton* v. *New York*, 445 U. S. 573, 589–590 (1980); compare *Florida* v. *Royer*, 460 U. S. 491, 499 (1983) (plurality opinion) ("[The police] may [not] seek to verify [mere] suspicions by means that approach the conditions of arrest"), with *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989) ("[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause" (quoting *Terry*, *supra*, at 30)). Such involuntary transport to a police station for questioning is "sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause." *Hayes*, *supra*, at 816.

The State does not claim to have had probable cause here, and a straightforward application of the test just mentioned shows beyond cavil that Kaupp was arrested within the

[2] We have, however, left open the possibility that, "under circumscribed procedures," a court might validly authorize a seizure on less than probable cause when the object is fingerprinting. *Hayes*, 470 U. S., at 817.

meaning of the Fourth Amendment, there being evidence of every one of the probative circumstances mentioned by Justice Stewart in *Mendenhall*.[3] A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "'we need to go and talk.'" He was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned. This evidence points to arrest even more starkly than the facts in *Dunaway* v. *New York*, 442 U. S. 200, 212 (1979), where the petitioner "was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room." There we held it clear that the detention was "in important respects indistinguishable from a traditional arrest" and therefore required probable cause or judicial authorization to be legal. *Ibid.* The same is, if anything, even clearer here.

Contrary reasons mentioned by the state courts are no answer to the facts. Kaupp's "'Okay'" in response to Pinkins's statement is no showing of consent under the circumstances. Pinkins offered Kaupp no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words "'we need to go and talk'" presents no option but "to go." There is no reason to think Kaupp's answer was anything more than "a mere submission to a claim of lawful authority." *Royer*, *supra*, at 497 (plurality opinion); see also *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226, 233–234 (1973). If reasonable doubt were possible

[3] On the record before us, it is possible to debate whether the law enforcement officers were armed. The State Court of Appeals not only described them as armed but said specifically that Pinkins's weapon was visible, though not drawn, when he confronted Kaupp in the bedroom. See App. A to Pet. for Cert. 6. But at least one officer testified before the trial court that they went to Kaupp's house unarmed. See App. 3 to App. D to Pet. for Cert. 8 (trial transcript).

on this point, the ensuing events would resolve it: removal from one's house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene on the way to an interview room at law enforcement headquarters. Even "an initially consensual encounter . . . can be transformed into a seizure or detention within the meaning of the Fourth Amendment." *INS* v. *Delgado*, 466 U. S. 210, 215 (1984); see *Hayes*, *supra*, at 815–816 ("[A]t some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments"). It cannot seriously be suggested that when the detectives began to question Kaupp, a reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed.

Nor is it significant, as the state court thought, that the sheriff's department "routinely" transported individuals, including Kaupp on one prior occasion, while handcuffed for safety of the officers, or that Kaupp "did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation." App. A to Pet. for Cert. 6. The test is an objective one, see, *e. g.*, *Chesternut*, 486 U. S., at 574, and stressing the officers' motivation of self-protection does not speak to how their actions would reasonably be understood. As for the lack of resistance, failure to struggle with a cohort of deputy sheriffs is not a waiver of Fourth Amendment protection, which does not require the perversity of resisting arrest or assaulting a police officer.

Since Kaupp was arrested before he was questioned, and because the State does not even claim that the sheriff's department had probable cause to detain him at that point, well-established precedent requires suppression of the confession unless that confession was "an act of free will [sufficient] to purge the primary taint of the unlawful invasion."

*Wong Sun* v. *United States*, 371 U. S. 471, 486 (1963). Demonstrating such purgation is, of course, a function of circumstantial evidence, with the burden of persuasion on the State. See *Brown*, 422 U. S., at 604. Relevant considerations include observance of *Miranda*, "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." 422 U. S., at 603–604 (footnotes and citation omitted).

The record before us shows that only one of these considerations, the giving of *Miranda* warnings, supports the State, and we held in *Brown* that "*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." 422 U. S., at 603 (emphasis in original); see also *Taylor* v. *Alabama*, 457 U. S. 687, 699 (1982) (O'Connor, J., dissenting) (noting that, although *Miranda* warnings are an important factor, "they are, standing alone, insufficient"). All other factors point the opposite way. There is no indication from the record that any substantial time passed between Kaupp's removal from his home in handcuffs and his confession after only 10 or 15 minutes of interrogation. In the interim, he remained in his partially clothed state in the physical custody of a number of officers, some of whom, at least, were conscious that they lacked probable cause to arrest. See *Brown*, *supra*, at 604–605. In fact, the State has not even alleged "any meaningful intervening event" between the illegal arrest and Kaupp's confession. *Taylor*, *supra*, at 691. Unless, on remand, the State can point to testimony undisclosed on the record before us, and weighty enough to carry the State's burden despite the clear force of the evidence shown here, the confession must be suppressed.

The judgment of the State Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

Syllabus

# PRICE, WARDEN *v.* VINCENT

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

No. 02–524. Argued April 21, 2003—Decided May 19, 2003

At respondent's trial on an open murder charge, defense counsel moved, at the close of the prosecution's case in chief and outside the jury's hearing, for a directed verdict of acquittal as to first-degree murder. The trial judge stated that second-degree murder was "'an appropriate charge,'" 292 F. 3d 506, 508, but agreed to hear the prosecutor's statement on first-degree murder the next morning. When the prosecution made the statement, defense counsel objected, arguing that the court had granted its directed verdict motion the previous day, and that further prosecution on first-degree murder would violate the Double Jeopardy Clause. The judge responded that he had granted the motion but had not directed a verdict, and noted that the jury had not been told of his statement. He subsequently submitted the first-degree murder charge to the jury, which convicted respondent on that charge. The Michigan Court of Appeals reversed, concluding that the Double Jeopardy Clause prevented respondent's prosecution for first-degree murder. Reversing in turn, the State Supreme Court determined that the trial judge's comments were not sufficiently final to terminate jeopardy. Respondent then notified the court of a docket sheet entry stating: "'1 open murder to 2nd degree murder,'" *id.*, at 512. The Michigan Supreme Court refused to reconsider its decision. Respondent filed a federal habeas petition, and the Federal District Court granted the petition after concluding that continued prosecution for first-degree murder had violated the Double Jeopardy Clause. The Sixth Circuit affirmed.

*Held:* Respondent did not meet the statutory requirements for habeas relief. The parties do not dispute the underlying facts, and respondent is therefore entitled to relief only if he can demonstrate that the state court's adjudication of his claim was "contrary to" or an "unreasonable application of" this Court's clearly established precedents. 28 U. S. C. § 2254(d)(1). The Sixth Circuit recited this standard but then forgot to apply it, reviewing the double jeopardy question *de novo*. This was error. A state-court decision is "contrary to" this Court's clearly established law if it "applies a rule that contradicts the governing law set forth in [the Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and neverthe-

Syllabus

less arrives at" a different result. *Williams* v. *Taylor*, 529 U. S. 362, 405–406. Here, the Michigan Supreme Court identified, and reaffirmed the principles articulated in, the applicable precedents of *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, and *Smalis* v. *Pennsylvania*, 476 U. S. 140. Nowhere did it apply a legal standard contrary to those set forth in this Court's cases, nor did it confront a set of facts materially indistinguishable from those in any case decided by this Court. The state court's decision therefore was not "contrary to" this Court's precedents. Nor was the state court's decision an "unreasonable application" of clearly established law. That court applied both *Martin Linen* and *Smalis* to conclude that the judge's comments were not sufficiently final to terminate jeopardy. In reaching this conclusion, in addition to reviewing the context and substance of the trial judge's comments at length, the court observed that there was no formal judgment or order entered on the record. While it noted that formal motions or rulings were not required to demonstrate finality as a matter of Michigan law, it cautioned that a judgment must bear sufficient indicia of finality and it concluded that sufficient indicia were not present here. This was not an *objectively unreasonable* application of clearly established Supreme Court law. Indeed, numerous courts have refused to find double jeopardy violations under similar circumstances. Even if this Court agreed with the Sixth Circuit that the Double Jeopardy Clause should be read to prevent continued prosecution under these circumstances, it was at least reasonable for the state court to conclude otherwise. Pp. 638–643.

292 F. 3d 506, reversed.

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

*Arthur A. Busch* argued the cause for petitioner. With him on the briefs were *Michael A. Cox*, Attorney General of Michigan, *Thomas L. Casey*, Solicitor General, *Janet A. Van Cleve*, Assistant Attorney General, *Donald A. Kuebler*, *John C. Schlinker*, *Dale A. DeGarmo*, and *Michael A. Tesner*.

*Jeffrey A. Lamken* argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Olson*, *Assistant Attorney General Chertoff*, *Deputy Solicitor General Dreeben*, *Sri Srinivasan*, and *Joel M. Gershowitz*.

*David A. Moran*, by appointment of the Court, 537 U. S. 1186, argued the cause for respondent. With him on the brief was *Randy E. Davidson.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The United States Court of Appeals for the Sixth Circuit granted habeas relief to respondent Duyonn Andre Vincent after concluding that the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, barred his conviction for first-degree murder. *Vincent* v. *Jones*, 292 F. 3d 506 (2002). Because this decision exceeds the limits imposed on federal habeas review by 28 U. S. C. § 2254(d), we granted the petition for certiorari, 537 U. S. 1099 (2002), and now reverse.

## I

In an altercation between two groups of youths in front of a high school in Flint, Michigan, Markeis Jones was shot and

*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Barry R. McBee*, First Assistant Attorney General, *Jay Kimbrough*, Deputy Attorney General, *R. Ted Cruz*, Solicitor General, *Idolina Garcia*, Assistant Solicitor General, and *Christopher L. Morano*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *Hardy Myers* of Oregon, *Henry Dargan McMaster* of South Carolina, *Larry Long* of South Dakota, and *Mark L. Shurtleff* of Utah; for Wayne County Prosecuting Attorney by *Timothy A. Baughman;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

A brief of *amicus curiae* urging affirmance was filed for the National Association of Criminal Defense Lawyers by *Peter J. Henning, Robert Weisberg*, and *Lisa B. Kemler.*

killed. Respondent was arrested in connection with the shooting and was charged with open murder. At the close of the prosecution's case in chief and outside the hearing of the jury, defense counsel moved for a directed verdict of acquittal as to first-degree murder, arguing that there was insufficient evidence of premeditation and deliberation. The trial judge stated:

> "'[M]y impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. . . . I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.'" 292 F. 3d, at 508.

Before court adjourned, the prosecutor asked to make a brief statement regarding first-degree murder the following morning. *Ibid.* The trial judge agreed to hear it.

When the prosecution made the statement, however, defense counsel objected. The defense argued that the court had granted its motion for a directed verdict as to first-degree murder the previous day, and that further prosecution on that charge would violate the Double Jeopardy Clause. *Ibid.* The judge responded, "'Oh, I granted a motion but I have not directed a verdict.'" *Id.*, at 509. He noted that the jury had not been informed of his statements, and said that he would reserve a ruling on the matter. Subsequently, he decided to permit the charge of first-degree murder to be submitted to the jury. *Ibid.*

The jury convicted respondent of first-degree murder, and respondent appealed. *Ibid.* The Michigan Court of Appeals reversed, concluding that the trial judge had directed a verdict on the charge and that the Double Jeopardy Clause prevented respondent's prosecution for first-degree murder. *People* v. *Vincent*, 215 Mich. App. 458, 546 N. W. 2d 662 (1996). The Michigan Supreme Court reversed. It noted that "a judge's characterization of a ruling and the form of

the ruling may not be controlling" for purposes of determining whether a ruling terminated jeopardy. *People* v. *Vincent*, 455 Mich. 110, 119, 565 N. W. 2d 629, 632 (1997) (citing *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571, n. 9 (1977)). The State Supreme Court then reviewed the context and substance of the trial judge's comments, and concluded that the comments were not sufficiently final to constitute a judgment of acquittal terminating jeopardy. After the Michigan Supreme Court's decision, respondent discovered that the Clerk had made the following entry on the docket sheet: "'Motions by all atts for directed verdict. Court amended c[oun]t: 1 open murder to 2nd degree murder.'" 292 F. 3d, at 512; see also Tr. of Oral Arg. 7. Respondent moved the State Supreme Court to reconsider its judgment in light of this statement. The motion was denied without opinion. Judgt. order reported at 456 Mich. 1201, 568 N. W. 2d 670 (1997).

Respondent sought a writ of habeas corpus from the United States District Court for the Eastern District of Michigan. That court determined that respondent's prosecution for first-degree murder violated the Double Jeopardy Clause, and it granted his petition. App. to Pet. for Cert. 78a. The United States Court of Appeals for the Sixth Circuit affirmed, 292 F. 3d 506 (2002), and this petition ensued.

## II

A habeas petitioner whose claim was adjudicated on the merits in state court is not entitled to relief in federal court unless he meets the requirements of 28 U. S. C. § 2254(d). The double jeopardy claim in respondent's habeas petition arises out of the same set of facts upon which he based his direct appeal, and the State Supreme Court's holding that no double jeopardy violation occurred therefore constituted an adjudication of this claim on the merits. Thus, under § 2254(d), respondent is not entitled to relief unless he can demonstrate that the state court's adjudication of his claim:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Although the Court of Appeals recited this standard, 292 F. 3d, at 510, it proceeded to evaluate respondent's claim *de novo* rather than through the lens of § 2254(d), apparently because it "agree[d] with the district court that whether the state trial judge acquitted [respondent] of first-degree murder is a question of law and not one of fact." *Id.*, at 511. The Court of Appeals did not consider whether the Michigan Supreme Court's decision was "contrary to" or an "unreasonable application of" our clearly established precedents, or whether it was "based on an unreasonable determination of the facts." Instead, the Court of Appeals declared:

> "'[W]e are not bound by the holding of the Michigan Supreme Court that the trial judge's statements did not constitute a directed verdict under Michigan law. Instead, we must examine the state trial judge's comments to determine whether he made a ruling which resolved the factual elements of the first-degree murder charge.'" *Ibid.*

The Court of Appeals then concluded that, in its judgment, the state trial court's actions "constituted a grant of an acquittal on the first-degree murder charge such that jeopardy attached," *id.*, at 512, and affirmed.

This was error. As noted above, under § 2254(d) it must be shown that the Michigan Supreme Court's decision was either contrary to, or an unreasonable application of, this Court's clearly established precedents, or was based upon an unreasonable determination of the facts. The parties do not dispute the underlying facts, and respondent is therefore

entitled to habeas relief *only* if he can meet one of the two bases for relief provided in § 2254(d)(1). We will address these bases in turn.

First, we have explained that a decision by a state court is "contrary to" our clearly established law if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams* v. *Taylor*, 529 U. S. 362, 405–406 (2000). See also *Early* v. *Packer*, 537 U. S. 3, 7–8 (2002) *(per curiam)*. Here, the Michigan Supreme Court identified the applicable Supreme Court precedents, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977), and *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986), and "reaffirm[ed] the principles articulated" in those decisions. *People* v. *Vincent*, 455 Mich., at 121, 565 N. W. 2d, at 633. Moreover, the Michigan Supreme Court properly followed *Martin Linen* by recognizing that the trial judge's characterization of his own ruling is not controlling for purposes of double jeopardy, and by inquiring into "'whether the ruling of the [trial] judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" 455 Mich., at 119, 565 N. W. 2d, at 633 (citing *Martin Linen*, *supra*, at 571). Nowhere did the Michigan Supreme Court apply a legal standard contrary to those set forth in our cases. Nor did that court confront a set of facts materially indistinguishable from those presented in any of this Court's clearly established precedents. In *Smalis* and *Martin Linen*, unlike in the present case, the trial courts not only rendered statements of clarity and finality but also entered formal orders from which appeals were taken. 476 U. S., at 142; 430 U. S., at 566.

Second, respondent can satisfy § 2254(d) if he can demonstrate that the Michigan Supreme Court's decision involved

an "unreasonable application" of clearly established law. As we have explained:

> "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [a Supreme Court case] incorrectly. See *Bell* v. *Cone*, 535 U. S. 685, 698–699 (2002); *Williams*, *supra*, at 411. Rather, it is the habeas applicant's burden to show that the state court applied [that case] to the facts of his case in an objectively unreasonable manner." *Woodford* v. *Visciotti*, 537 U. S. 19, 24–25 (2002) *(per curiam)*.

Here, having recognized that, under *Martin Linen*, the trial judge's characterization of his own ruling was not controlling for purposes of double jeopardy, the court went on to examine the substance of the judge's actions, to determine whether "further proceedings would violate the defendant's double jeopardy rights." *People* v. *Vincent*, 455 Mich., at 119, 565 N. W. 2d, at 633. In doing so, the court noted the goal of the Double Jeopardy Clause to prevent against a second prosecution for the same offense after acquittal. *Id.*, at 120, n. 5, 565 N. W. 2d, at 633, n. 5; see also *Martin Linen*, *supra*, at 569 (noting controlling constitutional principle motivating Double Jeopardy Clause is prohibition against multiple trials and corresponding prevention of oppression by the Government); *Lockhart* v. *Nelson*, 488 U. S. 33, 42 (1988). The Michigan Supreme Court also considered *Smalis*, in which this Court stated:

> "[T]he Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" 476 U. S., at 145–146 (quoting *Martin Linen*, *supra*, at 570).

Applying *Martin Linen* and *Smalis,* the State Supreme Court concluded that the judge's comments simply were not sufficiently final as to terminate jeopardy. *People* v. *Vincent,* 455 Mich., at 120, 565 N. W. 2d, at 633 ("[F]urther proceedings were not barred by the Double Jeopardy Clause"); *id.*, at 120, n. 5, 565 N. W. 2d, at 633, n. 5 ("[T]he principles embodied within [double jeopardy] protections were not violated"); *id.*, at 127, 565 N. W. 2d, at 636 (Because "the judge's comments . . . lacked the requisite degree of clarity and specificity," "the continuation of the trial . . . did not prejudice or violate the defendant's constitutional rights").

In reaching this conclusion, in addition to reviewing the context and substance of the trial judge's comments at length, the Michigan Supreme Court observed that "there was no formal judgment or order entered on the record." *Ibid.*[1] The Michigan Supreme Court noted that formal motions or rulings were not required to demonstrate finality as a matter of Michigan law, but cautioned that "the judgment must bear sufficient indicia of finality to survive an appeal." *Id.*, at 126, n. 9, 565 N. W. 2d, at 636, n. 9. The court listed factors that might be considered in evaluating finality as including "a clear statement in the record or a signed order," "an instruction to the jury that a charge or element of the charge has been dismissed by the judge," or "a docket entry." *Ibid.* "[E]ach case," the court said, "will turn on its own particular circumstances." *Ibid.* Even after the docket entry was brought to its attention, the State Supreme Court adhered to its original decision that, in this case, the trial

[1] The Michigan Supreme Court noted that the comments at issue were never discussed in front of the jury, *People* v. *Vincent,* 455 Mich., at 114–115, n. 1, 565 N. W. 2d, at 631, n. 1, and that the jury was never discharged, *id.*, at 121, n. 6, 565 N. W. 2d, at 633, n. 6. Moreover, the State Supreme Court noted, no trial proceedings took place with respondent laboring under the mistaken impression that he was not facing the possibility of conviction for first-degree murder. *Id.*, at 114–115, n. 1, 565 N. W. 2d, at 631, n. 1.

judge's comments were not sufficiently final to terminate jeopardy. This was not an *objectively unreasonable* application of clearly established law as defined by this Court. Indeed, numerous other courts have refused to find double jeopardy violations under similar circumstances.[2] Even if we agreed with the Court of Appeals that the Double Jeopardy Clause should be read to prevent continued prosecution of a defendant under these circumstances, it was at least reasonable for the state court to conclude otherwise.

Because respondent did not meet the statutory requirements for habeas relief, the judgment of the Court of Appeals is reversed.

*It is so ordered.*

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[2] In *United States* v. *LoRusso*, 695 F. 2d 45, 54 (1982), for example, the Second Circuit held that double jeopardy did not bar continued prosecution on a charge when the judge withdrew an oral grant of a motion to dismiss a count "[w]here no judgment has been entered . . . and there has been no dismissal of the jury." In *United States* v. *Byrne*, 203 F. 3d 671 (2000), the Ninth Circuit found no double jeopardy violation where a trial judge orally granted a motion for acquittal, then agreed to consider an additional transcript. *Id.*, at 674 ("[T]here was no announcement of the court's decision to the jury, and the trial did not resume until" after the court had denied the defendant's motion). See also *United States* v. *Baggett*, 251 F. 3d 1087, 1095 (CA6 2001) ("*Byrne* and *LoRusso* stand for the proposition that an oral grant of a Rule 29 motion outside of the jury's presence does not terminate jeopardy, inasmuch as a court is free to change its mind prior to the entry of judgment"); *State* v. *Iovino*, 524 A. 2d 556, 559 (R. I. 1987) (distinguishing *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977), on the grounds that in the case before it, "the jury remained impaneled to adjudicate lesser included charges, and that defendant was not faced with any threat of reprosecution beyond the jury already assembled to hear his case"); *State* v. *Sperry*, 149 Ore. App. 690, 696, 945 P. 2d 546, 550 (1997) ("[U]nder the circumstances presented here, the trial court could reconsider [its oral grant of a motion for a judgment of acquittal] and withdraw its ruling without violating" the Double Jeopardy Clause).

Syllabus

# PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA *v.* WALSH, ACTING COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES, ET AL.

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

No. 01–188. Argued January 22, 2003—Decided May 19, 2003

A State participating in Medicaid must have a medical assistance plan approved by the Secretary of Health and Human Services (HHS). In response to increasing Medicaid expenditures for prescription drugs, Congress enacted a cost-saving measure in 1990 that requires drug companies to pay rebates to States on their Medicaid purchases. States have since enacted supplemental rebate programs to achieve additional cost savings on Medicaid purchases and purchases for other needy citizens. The purpose of the "Maine Rx" Program is to reduce prescription drug prices for state residents. Under the program, Maine will attempt to negotiate rebates with drug manufacturers. If a company does not enter into a rebate agreement, its Medicaid sales will be subjected to a "prior authorization" procedure that requires state agency approval to qualify a doctor's prescription for reimbursement. Petitioner, an association of nonresident drug manufacturers, challenged the program before its commencement date, claiming that it is pre-empted by the Medicaid Act and violates the negative Commerce Clause. Without resolving any factual issues, the District Court entered a preliminary injunction preventing the statute's implementation, concluding, *inter alia,* that any obstacle, no matter how modest, to the federal program's administration is sufficient to establish pre-emption. The First Circuit reversed.

*Held:* The judgment is affirmed.

249 F. 3d 66, affirmed.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, III, and VI, concluding that petitioner has not carried its burden of showing a probability of success on the merits of its Commerce Clause claims. Its arguments—that the rebate requirement constitutes impermissible extraterritorial regulation and that it discriminates against interstate commerce in order to subsidize in-state retail sales—are unpersuasive. Unlike the price control statute invalidated in *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, and the price affirma-

tion statute struck down in *Healy* v. *Beer Institute*, 491 U. S. 324, Maine Rx does not regulate the price of any out-of-state transaction by its express terms or its inevitable effect. Nor does Maine Rx impose a disparate burden on out-of-state competitors. A manufacturer cannot avoid its rebate obligation by opening production facilities in Maine and would receive no benefit from the rebates even if it did so; the payments to local pharmacists provide no special benefit to competitors of rebate-paying manufacturers. *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, distinguished. Pp. 668–670.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded in Parts IV and VII:

(a) The answer to the question before the Court—whether petitioner's showing was sufficient to support the District Court's injunction—will not determine the validity of Maine's Rx Program since further proceedings may lead to another result. Moreover, the Secretary may view Maine Rx as an amendment to its Medicaid Plan that requires his approval before becoming effective. As the case comes to this Court, the question is whether there is a probability that Maine's program was pre-empted by the federal statute's mere existence. Therefore, there is a presumption that the state statute is valid, and the question asked is whether petitioner has shouldered the burden of overcoming that presumption. Pp. 660–662.

(b) At this stage of the litigation, petitioner has not carried its burden of showing a probability of success on the merits of its claims. P. 670.

JUSTICE STEVENS, joined by JUSTICE SOUTER and JUSTICE GINSBURG, concluded in Part V that petitioner's showing is insufficient to support a finding that the Medicaid Act pre-empts Maine's Rx Program insofar as it threatens to coerce manufacturers into reducing their prices on non-Medicaid sales. Petitioner claims that the potential interference with Medicaid benefits without serving any Medicaid purpose is prohibited by the federal statute. However, petitioner must show that Maine Rx serves no such goal. In fact, Maine Rx may serve the Medicaid-related purposes of providing benefits to needy persons and curtailing the State's Medicaid costs. While these purposes would not provide a sufficient basis for upholding the program if it severely curtailed Medicaid recipients' prescription drug access, the District Court erred in assuming that even a modest impediment to such access would invalidate the program. The Medicaid Act gives States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage as long as care and services are provided in the recipients' best interests. *Alexander* v. *Choate*, 469 U. S. 287, 303. That a State's decision to curtail Medicaid benefits may have been motivated by a state

policy unrelated to the Medicaid Act does not limit the scope of its broad discretion to define the benefits package it will finance. See *Beal* v. *Doe,* 432 U. S. 438. The presumption against federal pre-emption of a state statute designed to foster public health has special force when it appears, and the Secretary has not decided to the contrary, that the two governments are pursuing common purposes. At this stage of the proceeding, the severity of any impediment that Maine's program may impose on a Medicaid patient's access to the drug of her choice is a matter of conjecture. Thus, the First Circuit correctly resolved the pre-emption issue. Pp. 662–668.

JUSTICE BREYER concluded that petitioner cannot obtain a preliminary injunction simply by showing minimal or quite modest harm even though Maine offered no evidence of countervailing Medicaid-related benefit. Proper determination of the pre-emption question will demand a more careful balancing of Medicaid-related harms and benefits than the District Court undertook. Thus, its technical misstatement of the proper legal standard should not be overlooked. Vacating the injunction will also help ensure that the District Court takes account of the Secretary's views in further proceedings, which is important since HHS administers Medicaid and is better able than a court to assemble relevant facts and to make relevant predictions, and since the law grants significant weight to the Secretary's legal conclusions about whether Maine's program is consistent with Medicaid's objectives. Under the Medicaid Act, Maine may obtain those views when it files its plan with HHS for approval. In addition, a court may "refer" a question to the Secretary under the legal doctrine of "primary jurisdiction," which seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime. Where, as here, certain conditions are satisfied, see *Far East Conference* v. *United States,* 342 U. S. 570, 574–575, a court may raise the doctrine on its own motion. A court may then stay its proceedings to allow a party to initiate agency review. Even if Maine chooses not to obtain the Secretary's views on its own, the desirability of the District Court's having those views to consider is relevant to the "public interest" determination that often factors into whether a preliminary injunction should issue. Pp. 670–674.

JUSTICE SCALIA concluded that petitioner's statutory claim should be rejected on the ground that the remedy for the State's failure to comply with its Medicaid Act obligations is set forth in the Act itself: termination of funding by the Secretary. Petitioner must seek enforcement of Medicaid conditions by that authority and may obtain relief in the courts

only when a denial of enforcement is arbitrary, capricious, an abuse of discretion, or otherwise unlawful. 5 U. S. C. § 706(2)(A). Pp. 674–675.

JUSTICE THOMAS concluded that Maine Rx is not pre-empted by the Medicaid Act. The premise of petitioner's pre-emption claim is that Maine Rx is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67. The Medicaid Act represents a delicate balance between competing interests, *e. g.*, care and cost. It grants States broad discretion to impose prior authorization, and proper consideration of the Secretary's role in administering the Act forecloses petitioner's pre-emption claim. The Act provides a complete list of the restrictions participating States may place on prescription drug coverage. 42 U. S. C. § 1396r–8(d)(1). The only stricture on a prior authorization program is compliance with certain procedures, § 1396r–8(d)(5). The purpose of § 1396r–8(d)(1) is its effect—to grant participating States authority to subject drugs to prior authorization subject only to § 1396r–8(d)(5)'s express limitations. In light of the broad grant of discretion to States to impose prior authorization, petitioner cannot produce a credible conflict between Maine Rx and the Medicaid Act. Given the Secretary's authority to administer and interpret the Medicaid Act, petitioner can prevail on its view that the Medicaid Act pre-empts Maine Rx and renders it void under the Supremacy Clause only by showing that the Medicaid Act is unambiguous or that Congress has directly addressed the issue. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842. However, the Act's text cannot be read in such a way. Indeed, the Secretary has adopted an interpretation of the Act that does not preclude States from negotiating prices for non-Medicaid drug purchases. Obstacle pre-emption's very premise is that Congress has not expressly displaced state law and therefore not directly spoken to the pre-emption question. Therefore, where an agency is charged with administering a federal statute, as the Secretary is here, *Chevron* imposes a perhaps-insurmountable barrier to an obstacle pre-emption claim. Pp. 675–683.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and VI, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, an opinion with respect to Parts IV and VII, in which SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Part V, in which SOUTER and GINSBURG, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 670. SCALIA, J., *post*, p. 674, and THOMAS, J., *post*, p. 675, filed opinions concurring in the judgment. O'CONNOR, J., filed an opinion concurring in part

and dissenting in part, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post,* p. 684.

*Carter G. Phillips* argued the cause for petitioner. With him on the briefs were *Kathleen M. Sullivan*, *Daniel M. Price*, *Marinn F. Carlson*, *Bruce C. Gerrity*, and *Ann R. Robinson.*

*Deputy Solicitor General Kneedler* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Lisa Schiavo Blatt*, *Mark B. Stern*, *Mark S. Davies*, *Alex M. Azar II*, *Sheree R. Kanner*, *Henry R. Goldberg*, and *Janice L. Hoffman.*

*Andrew S. Hagler*, Assistant Attorney General of Maine, argued the cause for respondents. With him on the brief were *G. Steven Rowe*, Attorney General, *Paul Stern*, Deputy Attorney General, *John R. Brautigam*, Assistant Attorney General, and *Cabanne Howard.**

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *John G. Roberts, Jr.*, *Catherine E. Stetson*, and *Robin S. Conrad;* for the International Patient Advocacy Association et al. by *Bert W. Rein;* for the Long Term Care Pharmacy Alliance by *David C. Todd;* for the Pacific Legal Foundation by *Deborah J. La Fetra;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the State of Massachusetts et al. by *Thomas F. Reilly*, Attorney General of Massachusetts, and *Linda A. Tomaselli* and *Peter Leight*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Earl I. Anzai* of Hawaii, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Albert B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Philip T. McLaughlin* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and VI, an opinion with respect to Parts IV and VII, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, and an opinion with respect to Part V, in which JUSTICE SOUTER and JUSTICE GINSBURG join.

In response to increasing Medicaid expenditures for prescription drugs,[1] Congress enacted a cost-saving measure in 1990 that requires drug companies to pay rebates to States on their Medicaid purchases. Over the last several years, state legislatures have enacted supplemental rebate programs to achieve additional cost savings on Medicaid purchases as well as for purchases made by other needy citizens. The "Maine Rx" program, enacted in 2000, is primarily intended to provide discounted prescription drugs to Maine's uninsured citizens but its coverage is open to all residents of the State. Under the program, Maine will attempt to negotiate rebates with drug manufacturers to fund the reduced price for drugs offered to Maine Rx participants. If a drug company does not enter into a rebate agreement, its

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Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charlie M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *John Cornyn* of Texas, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Anabelle Rodríguez* of Puerto Rico; for AARP et al. by *Sarah Lenz Lock, Bruce Vignery, Michael Schuster,* and *Robert M. Hayes;* for the Maine Council of Senior Citizens et al. by *Arn H. Pearson* and *Thomas C. Bradley;* and for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley.*

*Sheldon V. Toubman* filed a brief for Legal Services Organizations Representing Medicaid Beneficiaries as *amicus curiae.*

[1] From 1980 to 1989, payments for Medicaid prescription drugs increased 179% while Medicaid expenditures for all services increased by only 134%. Between 1982 and 1988, prescription drug costs "increased at an average annual rate of 9.5 percent . . . , more than any other component of the health care sector." M. Ford, Congressional Research Service Report to Congress, Medicaid: Reimbursement for Outpatient Prescription Drugs, CRS–15 (Mar. 7, 1991) (hereinafter Ford).

Medicaid sales will be subjected to a "prior authorization" procedure.

In this case, an association of nonresident drug manufacturers has challenged the constitutionality of the Maine Rx Program, claiming that the program is pre-empted by the federal Medicaid statute and that it violates the negative Commerce Clause. The association has not alleged that the program denies Medicaid patients meaningful access to prescription drugs or that it has excluded any drugs from access to the market in Maine. Instead, it contends that the program imposes a significant burden on Medicaid recipients by requiring prior authorization in certain circumstances without serving any valid Medicaid purpose, and that the program effectively regulates out-of-state commerce. The District Court sustained both challenges and entered a preliminary injunction preventing implementation of the statute. The Court of Appeals reversed, and we granted certiorari because the questions presented are of national importance. 536 U. S. 956 (2002).

## I

Congress created the Medicaid program in 1965 by adding Title XIX to the Social Security Act.[2] The program authorizes federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. In order to participate in the Medicaid program, a State must have a plan for medical assistance approved by the Secretary of Health and Human Services (Secretary). 42 U. S. C. § 1396a(b).[3] A state plan defines the categories of individuals eligible for benefits and the specific kinds of medical services that are covered. §§ 1396a(a)(10), (17). The plan must

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[2] 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.*

[3] The Centers for Medicare & Medicaid Services (CMS) is the agency administering the Medicaid program on behalf of the Secretary.

provide coverage for the "categorically needy"[4] and, at the State's option, may also cover the "medically needy."[5]

Prior to 1990, the Medicaid statute did not specifically address outpatient prescription drug coverage. The Secretary's regulations and guidelines "set upper limits on each State's aggregate expenditures for drugs."[6] Under plans approved by the Secretary, some States designed and administered their own formularies, listing the drugs that they would cover. States also employed "prior authorization programs" that required approval by a state agency to qualify a doctor's prescription for reimbursement. See, *e. g.*, *Dodson* v. *Parham*, 427 F. Supp. 97, 100–101 (ND Ga. 1977) ("Georgia has historically administered its prescription drug program on the basis of a drug 'formulary' or, in other words, a restricted list of drugs for which Medicaid will reimburse provider pharmacists. Thus, any drug not specifically included on the list will not be reimbursed unless prior approval is granted by [the administrator of Georgia Medicaid program]"); *Cowan* v. *Myers*, 187 Cal. App. 3d 968, 974–975, 232 Cal. Rptr. 299, 301–303 (1986) (describing 1982 California law providing that certain drugs would be covered under

[4] The "categorically needy" groups include individuals eligible for cash benefits under the Aid to Families with Dependent Children (AFDC) program, the aged, blind, or disabled individuals who qualify for supplemental security income (SSI) benefits, and other low-income groups such as pregnant women and children entitled to poverty-related coverage. § 1396a(a)(10)(A)(i).

[5] The "medically needy" are individuals who meet the nonfinancial eligibility requirements for inclusion in one of the groups covered under Medicaid, but whose income or resources exceed the financial eligibility requirements for categorically needy eligibility. § 1396a(a)(10)(C). Individuals are typically "entitled to medically needy protection when their income and resources, after deducting incurred medical expenses, falls *[sic]* below the medically needy standards." House Subcommittee on Health and the Environment of the Committee on Energy and Commerce, Medicaid Source Book: Background Data and Analysis, 103d Cong., 1st Sess., 167 (Comm. Print 1993).

[6] Ford, at CRS–1.

California Medicaid program only after prior authorization). These programs were not specifically governed by any federal law or regulations, but rather were made part of the State Medicaid plans and approved by the Secretary because they aided in controlling Medicaid costs.[7]

Congress effectively ratified the Secretary's practice of approving state plans containing prior authorization requirements when it created its rebate program in an amendment contained in the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990).[8] The new program had two basic parts. First, it imposed a general requirement that, in order to qualify for Medicaid payments, drug companies must enter into agreements either with the Secretary or, if authorized by the Secretary, with individual States, to provide rebates on their Medicaid sales of outpatient prescription drugs.[9] The rebate on a "single source drug" or an "innovator multiple source drug" is the difference between the manufacturer's average price and its "best price," or 15.1% of the average manufacturer price, whichever is greater. 42 U. S. C. §§ 1396r–8(c)(1), (2). The rebate for other drugs is 11.1% of the average manufacturer price. See § 1396r–8(c)(3).

Second, once a drug manufacturer enters into a rebate agreement, the law requires the State to provide coverage for that drug under its plan unless the State complies with one of the exclusion or restriction provisions in the Medicaid Act. See § 1396r–8(d). For example, a State may exclude

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[7] "Before 1990, States had routinely required prior authorization for prescription or dispensing of drugs in order to control Medicaid costs . . . . In enacting the drug rebate provisions of Section 1396r–8 in 1990, Congress did not intend to upset that practice." Brief in Opposition for United States as *Amicus Curiae* 14–15.

[8] 104 Stat. 1388–143.

[9] The statute authorizes payment for some drugs not covered by rebate agreements if a State determines that their availability is essential to the health of beneficiaries, if they have been given a special rating by the Federal Food and Drug Administration, and if a doctor has obtained prior authorization for their use. See 42 U. S. C. § 1396r–8(a)(3).

coverage of drugs such as "[a]gents . . . used for cosmetic purposes or hair growth." § 1396r–8(d)(2)(C).

Most relevant to this case, Congress allowed States, "as a condition of coverage or payment for a covered outpatient drug," § 1396r–8(d)(5), to require approval of the drug before it is dispensed. Thus, under OBRA 1990, except for a narrow category of new drugs,[10] "[a] State may subject to prior authorization any covered outpatient drug," § 1396r–8(d)(1)(A), so long as the State's prior authorization program (1) provides a response by telephone or other telecommunication device within 24 hours of a request for prior authorization, and, (2) except for the listed excludable drugs, provides for the dispensing of at least a 72-hour supply of a covered drug in an emergency situation, see § 1396r–8(d)(5).

In the Omnibus Budget Reconciliation Act of 1993,[11] Congress further amended the Act to allow the States to use formularies subject to strict limitations. That amendment expressly stated that a prior authorization program that complies with the 24-hour and 72-hour conditions is not subject to the limitations imposed on formularies.[12] The 1993 amendment reenacted the provisions for state prior authorization programs that had been included in OBRA 1990, omitting, however, the narrow exception for new drugs.

## II

In 2000, the Maine Legislature established the Maine Rx Program "to reduce prescription drug prices for residents of the State." Me. Rev. Stat. Ann., Tit. 22, § 2681 (West Supp.

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[10] "A State may not exclude for coverage, subject to prior authorization, or otherwise restrict any new biological or drug approved by the Food and Drug Administration after the date of enactment of this section, for a period of 6 months after such approval." 104 Stat. 1388–150, § 1927(d)(6).

[11] 107 Stat. 613.

[12] "A prior authorization program established by a State under paragraph (5) is not a formulary subject to the requirements of this paragraph." § 1396r–8(d)(4).

2002). The statute provides that "the State [shall] act as a pharmacy benefit manager in order to make prescription drugs more affordable for qualified Maine residents, thereby increasing the overall health of Maine residents, promoting healthy communities and protecting the public health and welfare." § 2681(1). The program is intended to enable individuals to buy drugs from retail pharmacies at a discount roughly equal to the rebate on Medicaid purchases. See § 2681(4).

The statute provides that any manufacturer or "labeler"[13] selling drugs in Maine through any publicly supported financial assistance program "shall enter into a rebate agreement" with the State Commissioner of Human Services (Commissioner). § 2681(3). The Commissioner is directed to use his best efforts to obtain a rebate that is at least equal to the rebate calculated under the federal program created pursuant to OBRA 1990. See § 2681(4). Rebates are to be paid into a fund administered by the Commissioner, and then distributed to participating pharmacies to compensate them for selling at discounted prices. § 2681(6).

For those manufacturers that do not enter into rebate agreements, there are two consequences: First, their nonparticipation is information that the Department of Human Services must release "to health care providers and the public." § 2681(7). Second, and more importantly for our purposes, the "department shall impose prior authorization requirements in the Medicaid program under this Title, as permitted by law, for the dispensing of prescription drugs provided by those [nonparticipating] manufacturers and labelers." *Ibid.*

The statute authorizes the department to adopt implementing rules. § 2681(14). The rules that have been proposed would limit access to the program to individuals who

[13] A "labeler" is a person who receives prescription drugs from a manufacturer or wholesaler and repackages them for later retail sale. § 2681(2)(C).

do "not have a comparable or superior prescription drug benefit plan."[14] The proposed rules also explain that Maine intends to appoint a "Drug Utilization Review Committee," composed of physicians and pharmacists who will evaluate each drug manufactured by a company that has declined to enter into a rebate agreement to decide whether it is clinically appropriate to subject the drug to prior authorization.[15] The State represents that it "certainly will not subject any single-source drug that fulfills a unique therapeutic function to the prior authorization process" even if its manufacturer does not enter into a rebate agreement.[16] The determination "whether a particular drug should be subjected to a prior authorization requirement will be based firmly upon considerations of medical necessity, and in compliance with the State's responsibilities as the administrator of the Maine Medicaid Program."[17]

## III

Several months before January 1, 2001, the intended commencement date of the Maine Rx Program, the Commissioner, then Kevin Concannon, sent a form letter to drug manufacturers enclosing a proposed rebate agreement.[18]

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[14] App. 317. The statute authorizes coverage for all "qualified Maine residents," Me. Rev. Stat. Ann., Tit. 22, §2681(1) (West Supp. 2002), and defines a qualified resident as one "who has obtained from the department a Maine Rx enrollment card," §2681(2)(F). In describing program goals, it provides: "It is not the intention of the State to discourage employers from offering or paying for prescription drug benefits for their employees or to replace employer-sponsored prescription drug benefit plans that provide benefits comparable to those made available to qualified Maine residents under this subchapter." §2681(1). In their brief, respondents state: "It would be economically irrational for a person with prescription drug coverage to use Maine Rx, but if any patient mistakenly attempts to do so, [the] proposed regulations . . . will not allow it." Brief for Respondents 7.

[15] See App. 268, 278.

[16] *Id.*, at 149.

[17] *Ibid.*

[18] See *id.*, at 62–74.

Although 27 individual manufacturers elected to participate by executing the proposed agreement, petitioner, the Pharmaceutical Research and Manufacturers of America, an association representing manufacturers that "account for more than 75 percent of brand name drug sales in the United States,"[19] responded by bringing this action challenging the validity of the statute. Its complaint was accompanied by a motion for a preliminary injunction, supported by seven affidavits.

Four of the affidavits describe the nature of the association and the companies' methods of distribution, emphasizing the fact that, with the exception of sales to two resident distributors, all of their prescription drug sales occur outside of Maine.[20] Three of them comment on the operation of prior authorization programs administered by private managed care organizations, describing their actual and potential adverse impact on both manufacturers and patients. Thus, one executive stated: "Imposition of a prior authorization [(PA)] requirement with respect to a particular drug severely curtails access to the drug for covered patients and sharply reduces the drug's market share and sales, as the PA causes a shift of patients to competing drugs of other manufacturers that are not subject to a PA. Because a PA imposes additional procedural burdens on physicians prescribing the manufacturer's drug and retail pharmacies dispensing it, the effect of a PA is to diminish the manufacturer's goodwill that helped foster demand for its drug over competing drugs produced by other manufacturers, and to shift physician and patient loyalty to those competing drugs, perhaps permanently."[21] Another affidavit described how prior authorization by a managed care organization in Nevada had sharply reduced the market share of four of SmithKline's drugs. For example, the market share of Aug-

[19] *Id.*, at 37 (Complaint ¶ 6).
[20] *Id.*, at 50, 53, 76–77, 87.
[21] *Id.*, at 57 (affidavit of George Bilyk of Janssen Pharmaceutica, Inc.).

mentin, a drug used to treat bacterial infections, declined from 49% to 18% in the six months after the program was imposed.[22] In the third affidavit, Dr. Howell of SmithKline Beecham Corporation expressed the opinion that prior authorization had never been required in one program "for the purpose of influencing the manufacturer's pricing behavior in another program," and that such use, "without regard to safety or efficacy, will lead to drugs being prescribed that are less safe and efficacious."[23]

Respondents' opposition to the motion was supported by Concannon's own affidavit and the affidavits of two doctors. They do not dispute the factual assertions concerning the impact of prior authorization on the drug companies' market shares, but instead comment on the benefits of prior authorization for patients. The State's Medicaid Medical Director, Dr. Clifford, explained that "[p]hysicians in Maine are already well acquainted with the extensive prior authorization programs of the four HMO/Insurance programs which collectively cover nearly half the state's residents" and that the State had taken steps to "ensure that physicians will always be able to prescribe the safest and most efficacious drugs for their Medicaid patients."[24] The second doctor, Dr. Richardson, stated that he prescribed Augmentin as a second line drug, that the drug amoxicillin was effective in treating ear infections 80%–85% of the time, and that Augmentin was

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[22] *Id.*, at 112 (affidavit of David Moules of SmithKline Beecham Corp.).

[23] *Id.*, at 103–104. Dr. Howell further stated: "Prior authorization is often employed by managed care organizations ('MCOs') to enforce a drug formulary and is usually intended to limit the drugs to be prescribed by health care professionals. MCOs typically require health care professionals to obtain prior authorization from the MCO before prescribing a drug (1) to ensure proper use of prescription drugs with a high potential for inappropriate use, (2) to limit the use of prescription drugs with severe or life threatening side effects and/or drug interactions; and (3) to encourage the use of cost-effective medications without diminishing safety or efficacy." *Id.*, at 102–103.

[24] *Id.*, at 149–150.

"3 to 6 times as expensive" as amoxicillin.[25] Concannon's affidavit described the composition of a committee of physicians and pharmacists that would "make the final determination of the clinical appropriateness of any recommendation that a prior authorization requirement be imposed with respect to a particular prescription drug manufactured by a manufacturer which has not entered into a Maine Rx Rebate Agreement."[26]

Without resolving any factual issues, the District Court granted petitioner's motion for a preliminary injunction. Relying on *Healy* v. *Beer Institute*, 491 U. S. 324, 336 (1989), the court first held that Maine had no power to regulate the prices paid to drug manufacturers in transactions that occur out of the State. Recognizing that some of their sales were made to two distributors in Maine, the court further held that the Medicaid Act pre-empted Maine's Rx Program insofar as it threatened to impose a prior authorization requirement on nonparticipating manufacturers. In so holding, the court assumed for the purpose of the decision that the " 'Department of Human Services will not deny a single Medicaid recipient access to the safest and most efficacious prescription drug therapy indicated for their individual medical circumstances.' "[27] In that court's view, pre-emption was nevertheless required because "Maine can point to no *Medicaid* purpose in this new prior authorization requirement that Maine has added for Medicaid prescription drugs. Maine has not just passed a law that might conflict with the objectives of a federal law. It has actually taken the federal Medicaid program and altered it to serve Maine's local purposes."[28] In the District Court's view, the fact that the

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[25] *Id.*, at 154.

[26] *Id.*, at 167.

[27] Civ. No. 00–157–B–H (D. Me., Oct. 26, 2000), App. to Pet. for Cert. 68.

[28] *Ibid.* The court further observed: "If Maine can use its authority over Medicaid authorization to leverage drug manufacturer rebates for the benefit of uninsured citizens, then it can just as easily put the rebates into

alteration served purposes outside the scope of the Medicaid program and created an obstacle to the administration of the federal program was sufficient to establish pre-emption: "No matter how modest an obstacle the new prior authorization amounts to (the parties disagree on the severity of the obstacle), it is an obstacle—drugs on the list must be approved by the state Medicaid Medical Director before they can be dispensed . . . ."[29]

The Court of Appeals disagreed with the District Court's analysis of the pre-emption issue for three reasons. First, since the federal statute expressly authorizes use of prior authorization, it found "no conflict between the Maine Act and Medicaid's structure and purpose." 249 F. 3d 66, 75 (CA1 2001). In its view, as long as there is compliance with the federal 24- and 72-hour conditions, the State's motivation for imposing the requirement is irrelevant. Second, given the absence of an actual conflict, the court found that the mere fact that Maine Rx "fails to directly advance the purpose of the federal program" is an insufficient basis for "inflicting the 'strong medicine' of preemption" on a state statute. *Id.*, at 76. Third, the court further stated that, assuming the relevance of the State's motivation, "the Maine Rx Program furthers Medicaid's aim of providing medical services to those whose 'income and resources are insufficient to meet the costs of necessary medical services,' 42 U. S. C. § 1396, even if the individuals covered by the Maine Rx Program are not poor enough to qualify for Medicaid." *Ibid.* Moreover, the court held that there is evidence that making prescription drugs more accessible to the uninsured may keep some of them off Medicaid thereby minimizing the State's Medicaid expenditures.

The Court of Appeals also reviewed the affidavits and concluded that they "fall short of establishing that the Act will

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a state program for highway and bridge construction or school funding." *Ibid.*

[29] *Ibid.*

inflict inevitable or even probable harm" on Medicaid patients, and thus were insufficient to support a pre-emption-based facial challenge. *Id.*, at 78. The court did, however, express concern that the prior authorization requirement might affect the quality of medical care for Medicaid recipients in subtle ways, such as inconveniencing prescribing physicians. It therefore expressly preserved petitioner's right to renew its pre-emption challenge after implementation of the program "should there be evidence that Medicaid recipients are harmed by the prior authorization requirement 'as applied.'" *Ibid.* The Court also found no violation of the dormant Commerce Clause and vacated the temporary injunction, but stayed its mandate pending our review of the case.

## IV

The question before us is whether the District Court abused its discretion when it entered the preliminary injunction. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931–932 (1975). By no means will our answer to that question finally determine the validity of Maine's Rx Program. The District Court did not conduct an evidentiary hearing and did not resolve any factual disputes raised by the affidavits filed by the parties. Accordingly, no matter how we answer the question whether petitioner's showing was sufficient to support the injunction, further proceedings in this case may lead to a contrary result.

Moreover, there is also a possibility that the Secretary may view the Maine Rx Program as an amendment to its Medicaid Plan that requires his approval before it becomes effective.[30] While the petition for certiorari was pending,

[30] We note that CMS, acting on behalf of the Secretary, see n. 3, *supra*, sent a letter on September 18, 2002, to all of the state Medicaid directors. In that letter, the CMS Director indicated that "the establishment of a prior authorization program for Medicaid covered drugs to secure drug benefits, rebates, or discounts for non-Medicaid populations is a significant component of a State plan and we would therefore expect that a State

the United States filed a brief recommending that we deny review, in part because further proceedings may clarify the issues. Its brief cautioned against the adoption of a rule prohibiting prior authorization programs whenever they operate in part to benefit a non-Medicaid population, and suggested that a program tailored to benefit needy persons who are not Medicaid-eligible might advance Medicaid-related goals.[31] That brief, however, as well as the Federal Government's brief filed after we granted review, expressed the opinion that, because Maine's program was adopted without the Secretary's approval and was open to all Maine residents regardless of financial need, it was not tailored to achieve Medicaid-related goals and was therefore invalid. Like the interlocutory judicial rulings in this case, we assume that a more complete understanding of all the relevant facts might lead to a modification of the views expressed in those briefs. In all events, we must confront the issues without the benefit of either a complete record or any dispositive ruling by the Secretary.

The issue we confront is, of course, quite different from the question that would be presented if the Secretary, after a hearing, had held that the Maine Rx Program was an impermissible amendment of its Medicaid Plan. In such event, the Secretary's ruling would be presumptively valid. As the case comes to us, however, the question is whether there is a probability that Maine's program was pre-empted by the mere existence of the federal statute. We start therefore with a presumption that the state statute is valid, see *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 153 (1944), and ask

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would submit such a program for CMS review under the State plan process." App. to Brief in Opposition for United States as *Amicus Curiae* 48a.

[31] Brief in Opposition for United States as *Amicus Curiae* 9, 12 ("A prescription drug discount, made possible by encouraging manufacturers to give rebates to the State, may significantly decrease the chance that such individuals will become Medicaid-eligible").

whether petitioner has shouldered the burden of overcoming that presumption.

V

The centerpiece of petitioner's attack on Maine's Rx Program is its allegedly unique use of a threat to impose a prior authorization requirement on Medicaid sales to coerce manufacturers into reducing their prices on sales to non-Medicaid recipients. Petitioner argues, and the District Court held, that the potential interference with the delivery of Medicaid benefits without any benefit to the federal program is prohibited by the federal statute. In accepting this argument, the District Court relied heavily on the fact that Maine had failed to identify any "*Medicaid* purpose" in its new authorization requirement. It appears that Maine had argued before the District Court that such a purpose was unnecessary because the federal statute expressly authorizes what it has done.

In this Court, petitioner argues that it could not have been an abuse of discretion for the District Court to decide the case on the assumption that the program will serve no Medicaid purpose, even if that assumption is erroneous, given that the State, insisting that no such purpose was necessary, offered no Medicaid purpose in its opposition to the motion for a temporary injunction. To the extent that petitioner is relying on a waiver theory, such reliance is inappropriate because the State never represented that there was no Medicaid purpose served by its program; it simply argued that it did not need to offer one. Regardless of the legal position taken by the State, petitioner bore the burden of establishing, by a clear showing, a probability of success on the merits. See *Mazurek* v. *Armstrong,* 520 U. S. 968, 972 (1997) *(per curiam);* cf. *Benten* v. *Kessler,* 505 U. S. 1084, 1085 (1992) *(per curiam)* (requiring movant to demonstrate a substantial likelihood of success on the merits). Accordingly, it was petitioner's burden to show that there was no Medicaid-related goal or purpose served by Maine Rx. Given that

burden, if the program on its face clearly serves some Medicaid-related goals, it would follow that the District Court's evaluation rested on an erroneous predicate. We are persuaded that there are three such goals plainly present in the Maine Rx Program.

The Court of Appeals identified two Medicaid-related interests that will be served if the program is successful and rebates become available on sales to uninsured individuals. First, the program will provide medical benefits to persons who can be described as "medically needy" even if they do not qualify for AFDC or SSI benefits. There is some factual dispute concerning the extent to which the program will also benefit nonneedy persons, but even if the program is more inclusive than the Secretary thinks it should be, the potential benefits for nonneedy persons would not nullify the benefits that would be provided to the neediest segment of the uninsured population.[32] Second, there is the possibility that, by enabling some borderline aged and infirm persons better access to prescription drugs earlier, Medicaid expenses will be reduced. If members of this borderline group are not able to purchase necessary prescription medicine, their conditions may worsen, causing further financial hardship and thus making it more likely that they will end up in the Medicaid program and require more expensive treatment.

A third rather obvious Medicaid purpose will be fostered whenever it is necessary to impose the prior authorization requirement on a manufacturer that refuses to participate. As the record demonstrates, private managed care organizations typically require prior authorization both to protect patients from inappropriate prescriptions and "to encourage the use of cost-effective medications without diminishing

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[32] We note in this regard that it is estimated that almost two-thirds of the nonelderly uninsured are low-income individuals or come from low-income families making less than 200% of the federal poverty level. See Kaiser Commission on Medicaid and the Uninsured, The Uninsured: A Primer 2 (Mar. 2001).

safety or efficacy."[33] No doubt that is why Congress expressly preserved the States' ability to adopt that practice when it passed the Medicaid amendments in 1990.[34] The fact that prior authorization actually does produce substantial cost savings for organizations purchasing large volumes of drugs is apparent both from the affidavits in the record describing the impact of such programs on manufacturers' market shares and from the results of a program adopted in Florida. See *Pharmaceutical Research and Manufacturers of America* v. *Meadows*, 304 F. 3d 1197 (CA11 2002).[35] Avoiding unnecessary costs in the administration of a State's Medicaid program obviously serves the interests of both the Federal Government and the States that pay the cost of providing prescription drugs to Medicaid patients.

The fact that the Maine Rx Program may serve Medicaid-related purposes, both by providing benefits to needy persons and by curtailing the State's Medicaid costs, would not

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[33] See n. 23, *supra*.

[34] "As under current law, States would have the option of imposing prior authorization requirements with respect to covered prescription drugs in order to safeguard against unnecessary utilization and assure that payments are consistent with efficiency, economy, and quality of care." H. R. Rep. No. 101–881, p. 98 (1990).

[35] "The new Florida law . . . exempts certain Medicaid-eligible drugs from a 'prior authorization' requirement. If a drug is not on the preferred list, the prescribing doctor must call a state pharmacist to obtain approval of its use. In the course of this procedure, the pharmacist informs the doctor of the availability of other drugs (usually on the preferred drug list) that allegedly have comparable therapeutic value but are less expensive. The actual phone calls tend to be relatively brief (usually less than 10 minutes in length), and approval of the prescribing doctor's first-choice drug is guaranteed in 100 percent of all cases, provided only that he or she make the telephone call. During the first three months of the program, approximately 55 percent of all these calls have resulted in a change of the prescription to a drug on the preferred drug list. Naturally, because this procedure may tend to promote less profitable drugs at the expense of more profitable ones, it is not favored by the pharmaceutical manufacturers that brought this lawsuit." 304 F. 3d, at 1198.

provide a sufficient basis for upholding the program if it severely curtailed Medicaid recipients' access to prescription drugs. Cf. 42 U. S. C. § 1396a(a)(19) (State Medicaid plan must assure that care and services are to be provided "in a manner consistent with . . . the best interests of the recipients"). It was, however, incorrect for the District Court to assume that any impediment, "[n]o matter how modest," to a patient's ability to obtain the drug of her choice at state expense would invalidate the Maine Rx Program. Civ. No. 00–157–B–H, App. to Pet. for Cert. 68.

We have made it clear that the Medicaid Act "gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interest of the recipients.'" *Alexander* v. *Choate*, 469 U. S. 287, 303 (1985). In that case, we rejected a challenge brought by a class of handicapped persons to a Tennessee cost-saving measure that reduced the number of annual days of inpatient hospital care for Medicaid patients from 20 to 14, emphasizing that the change did not deny beneficiaries "meaningful access" to medical services. *Id.*, at 302, 306. The District Court's finding that the 14-day limitation would fully serve 95% of handicapped individuals eligible for Medicaid satisfied the statutory standard.

In this case, the District Court made no comparable finding, but assumed that Maine would fully comply with all federal requirements and "not deny a single Medicaid recipient access to the safest and most efficacious prescription drug therapy indicated for their *[sic]* individual medical circumstances."[36] The District Court's assumption gave appropriate credence to the affidavits filed on behalf of the State, and, under our reasoning in *Alexander*, reflects compliance with the statutory standard.

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[36] Civ. No. 00–157–B–H, App. to Pet. for Cert. 68 (internal quotation marks omitted).

The fact that a State's decision to curtail Medicaid benefits may have been motivated by a state policy unrelated to the Medicaid Act does not limit the scope of its broad discretion to define the package of benefits it will finance. In *Beal* v. *Doe*, 432 U. S. 438 (1977), despite accepting the plaintiffs' submission that nontherapeutic abortions are both less dangerous and less expensive than childbirth, we held that Pennsylvania's interest in encouraging normal childbirth provided an adequate justification for its decision to exclude the abortion procedure from its Medicaid program. Maine's interest in protecting the health of its uninsured residents also provides a plainly permissible justification for a prior authorization requirement that is assumed to have only a minimal impact on Medicaid recipients' access to prescription drugs. The Medicaid Act contains no categorical prohibition against reliance on state interests unrelated to the Medicaid program itself when a State is fashioning the particular contours of its own program. It retains the "considerable latitude" that characterizes optional participation in a jointly financed benefit program.[37]

The presumption against federal pre-emption of a state statute designed to foster public health, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715–718 (1985), has special force when it appears, and the Secretary has not decided to the contrary, that the two governments are pursuing "common purposes," *New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 421 (1973). In *Dublino*, we rejected a pre-emption challenge to a state statute that imposed employment requirements as conditions for continued eligibility for AFDC benefits that went beyond the federal requirements. Commenting on

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[37] "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King* v. *Smith*, 392 U. S. 309, 318–319 (1968) (footnotes omitted).

New York's interest in encouraging employment of its citizens, we wrote:

> "To the extent that the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution." *Id.*, at 413.

The mere fact that the New York program imposed a nonfederal obstacle to continued eligibility for benefits did not provide a sufficient basis for pre-emption, but we left open questions concerning possible conflicts with the federal program for resolution in further proceedings. *Id.*, at 422–423. Similarly, in this case, the mere fact that prior authorization may impose a modest impediment to access to prescription drugs provided at government expense does not provide a sufficient basis for pre-emption of the entire Maine Rx Program.

At this stage of the proceeding, the severity of any impediment that Maine's program may impose on a Medicaid patient's access to the drug of her choice is a matter of conjecture. To the extent that drug manufacturers agree to participate in the program, there will be no impediment. To the extent that the manufacturers refuse, the Drug Utilization Review Committee will determine whether it is clinically appropriate to subject those drugs to prior authorization. If the committee determines prior authorization is required, that requirement may result in the delivery of a less expensive drug than a physician first prescribed, but on the present record we cannot conclude that a significant

number of patients' medical needs—indeed, any patient's medical needs—will be adversely affected.

The record does demonstrate that prior authorization may well have a significant adverse impact on the manufacturers of brand name prescription drugs and that it will impose some administrative costs on physicians. The impact on manufacturers is not relevant because any transfer of business to less expensive products will produce savings for the Medicaid program. The impact on doctors may be significant if it produces an administrative burden that affects the quality of their treatment of patients, but no such effect has been proved. Moreover, given doctors' familiarity with the extensive use of prior authorization in the private sector, any such effect seems unlikely.

We therefore agree with the Court of Appeals' resolution of the pre-emption issue based on the record before us. We again reiterate that the question whether the Secretary's approval must be sought before Maine Rx Program may go into effect is not before us. Along these same lines, we offer no view as to whether it would be appropriate for the Secretary to disapprove this program if Maine had asked the Secretary to review it. We also offer no view as to whether it would be proper for the Secretary to disallow funding for the Maine Medicaid program if Maine fails to seek approval from the Secretary of its Maine Rx Program. Based on the CMS letter of September 18, 2002,[38] it appears that the Secretary is likely to take some action with respect to this program. Until the Secretary does, however, we cannot predict at this preliminary stage the ultimate fate of the Maine Rx Program, and we limit our holding accordingly.

## VI

Whereas petitioner's pre-emption challenge focused on the effects of the prior authorization requirement that would fol-

[38] See n. 30, *supra*.

low a manufacturer's refusal to participate in the Rx Program, its Commerce Clause challenge focuses on the effects of the rebate agreements that will follow manufacturer compliance with the program. As we understand the challenge, the alleged harm to interstate commerce would be the same regardless of whether manufacturer compliance is completely voluntary or the product of coercion. Petitioner argues, first, that the rebate requirement constitutes impermissible extraterritorial regulation, and second, that it discriminates against interstate commerce in order to subsidize in-state retail sales. Neither argument is persuasive.

Writing for the Court in *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 521 (1935), Justice Cardozo made the classic observation that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." That proposition provided the basis for the majority's conclusion in *Healy* v. *Beer Institute*, 491 U. S. 324 (1989), that a Massachusetts price affirmation statute had the impermissible effect of regulating the price of beer sold in neighboring States. Petitioner argues that the reasoning in those cases applies to what it characterizes as Maine's regulation of the terms of transactions that occur elsewhere. But, as the Court of Appeals correctly stated, unlike price control or price affirmation statutes, "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices." 249 F. 3d, at 81–82 (footnote omitted). The rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case.

In *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186 (1994), we reviewed the constitutionality of a Massachusetts pricing order that imposed an assessment on all fluid milk sold by dealers to Massachusetts retailers and distributed

the proceeds to Massachusetts dairy farmers. Because two-thirds of the assessed milk was produced by out-of-state farmers while the entire fund was used to benefit in-state farmers, the order effectively imposed a tax on out-of-state producers to subsidize production by their in-state competitors. We concluded that the program was invalid because it had a discriminatory effect analogous to a protective tariff that taxes goods imported from neighboring States but does not tax similar products produced locally.

Petitioner argues that Maine's Rx fund is similar because it would be created entirely from rebates paid by out-of-state manufacturers and would be used to subsidize sales by local pharmacists to local consumers. Unlike the situation in *West Lynn*, however, the Maine Rx Program will not impose a disparate burden on any competitors. A manufacturer could not avoid its rebate obligation by opening production facilities in Maine and would receive no benefit from the rebates even if it did so; the payments to the local pharmacists provide no special benefit to competitors of rebate-paying manufacturers. The rule that was applied in *West Lynn* is thus not applicable to this case.

## VII

At this stage of the litigation, petitioner has not carried its burden of showing a probability of success on the merits of its claims. And petitioner has not argued that the Court of Appeals was incorrect in holding that other factors—such as the risk of irreparable harm, the balance of the equities, and the public interest—do not alter the analysis of its injunction request. The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

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

I join Parts I–III and Part VI of the Court's opinion and Parts IV and VII of the plurality's opinion. I also agree

with Part V's conclusion. The District Court's entry of a preliminary injunction rested upon a determination that federal Medicaid law pre-empted the Maine Rx Program as long as Maine's prior authorization program posed some obstacle, "*'[n]o matter how modest,'*" to realizing federal Medicaid goals. *Ante*, at 659 (majority opinion) (emphasis added). Like the plurality, I believe that the italicized phrase understates the strength of the showing that the law required petitioner to make. *Ante*, at 667.

To prevail, petitioner ultimately must demonstrate that Maine's program would "seriously compromise important federal interests." *Arkansas Elec. Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U. S. 375, 389 (1983). Cf. *Rosado* v. *Wyman*, 397 U. S. 397, 422–423 (1970). Petitioner consequently cannot obtain a preliminary injunction simply by showing minimal or quite "modest" harm—even though Maine offered no evidence of countervailing Medicaid-related benefit, *post*, at 687–688 (O'CONNOR, J., concurring in part and dissenting in part). The relevant statutory language, after all, expressly permits prior authorization programs, 42 U. S. C. § 1396r–8(d)(1), and Congress may well have believed that such programs, in general, help Medicaid by generating savings. See *ante*, at 651–653, and n. 7 (majority opinion). That being so, Congress would not have intended to forbid prior authorization programs virtually *per se*—*i. e.*, on the showing of slight harm—even if no specific Medicaid-related benefit is apparent in a particular case.

I recognize that petitioner presented evidence to the District Court that could have justified a stronger conclusion. *E. g.*, App. 57, 103–104. Cf. Brief for Legal Services Organizations Representing Medicaid Beneficiaries as *Amici Curiae* 14. Yet the District Court's preliminary injunction nonetheless rests upon premises that subsequent developments have made clear are unrealistic. For one thing, despite Maine's initial failure to argue the matter, Maine's program may further certain Medicaid-related objectives, at

least to some degree. *Ante*, at 663–665 (plurality opinion). For another, the Secretary of Health and Human Services (whose views are highly relevant to the question before us, *infra* this page) has indicated that state programs somewhat similar to Maine's may prove consistent with Medicaid objectives, and the Secretary has approved at least one such program. *Ante*, at 660–661, n. 30 (plurality opinion); Letter from Theodore B. Olson, Solicitor General, to William K. Suter, Clerk of the Court (Jan. 10, 2003). As a result, it is now apparent that proper determination of the pre-emption question will demand a more careful balancing of Medicaid-related harms and benefits than the District Court undertook. Cf. *California* v. *FERC*, 495 U. S. 490, 506 (1990) (finding a state law pre-empted where it "would disturb and conflict with the balance embodied in [a] considered federal agency determination"). These postentry considerations, along with the general importance of the pre-emption question, convince me that we should not overlook the District Court's technical misstatement of the proper legal standard, and that we should therefore affirm the Court of Appeals' judgment vacating the injunction.

By vacating the injunction, we shall also help ensure that the District Court takes account of the Secretary's views in further proceedings that may involve a renewed motion for a preliminary injunction. It is important that the District Court do so. The Department of Health and Human Services (HHS) administers the Medicaid program. Institutionally speaking, that agency is better able than a court to assemble relevant facts (*e. g.*, regarding harm caused to present Medicaid patients) and to make relevant predictions (*e. g.*, regarding furtherance of Medicaid-related goals). And the law grants significant weight to any legal conclusion by the Secretary as to whether a program such as Maine's is consistent with Medicaid's objectives. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S.

837 (1984); *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). Cf. *post*, at 680–681 (THOMAS, J., concurring in judgment).

The Medicaid statute sets forth a method through which Maine may obtain those views. A participating State must file a Medicaid plan with HHS and obtain HHS approval. 42 U. S. C. § 1396. A State must also promptly file a plan amendment to reflect any "[m]aterial changes in State law, organization, or policy, or in the State's operation of the Medicaid program." 42 CFR § 430.12(c) (2002). And the Secretary has said that a statute like Maine's is a "significant component of a state plan" with respect to which Maine is expected to file an amendment. App. to Brief for United States as *Amicus Curiae* 48a.

In addition, the legal doctrine of "primary jurisdiction" permits a court itself to "refer" a question to the Secretary. That doctrine seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63–65 (1956). "No fixed formula exists" for the doctrine's application. *Id.*, at 64. Rather, the question in each instance is whether a case raises "issues of fact not within the conventional experience of judges," but within the purview of an agency's responsibilities; whether the "limited functions of review by the judiciary are more rationally exercised, by preliminary resort" to an agency "better equipped than courts" to resolve an issue in the first instance; or, in a word, whether preliminary reference of issues to the agency will promote that proper working relationship between court and agency that the primary jurisdiction doctrine seeks to facilitate. *Far East Conference* v. *United States*, 342 U. S. 570, 574–575 (1952); see also *Western Pacific R. Co.*, *supra*, at 63–65. Cf. 2 R. Pierce, Administrative Law § 14.4, p. 944 (2002) (relatively frequent application of the doctrine in pre-emption cases).

Where such conditions are satisfied—and I have little doubt that they are satisfied here—courts may raise the doctrine on their own motion. *E. g.*, *Williams Pipe Line Co.* v. *Empire Gas Corp.*, 76 F. 3d 1491, 1496 (CA10 1996). See also 5 J. Stein, G. Mitchell, & B. Mezines, Administrative Law § 47.01[1], pp. 47–5 to 47–6 (2002); 2 Federal Procedure: Lawyers Edition § 2:337, p. 373 (2003). A court may then stay its proceedings—for a limited time, if appropriate—to allow a party to initiate agency review. *Western Pacific R. Co.*, *supra*, at 64; see also *Wagner & Brown* v. *ANR Pipeline Co.*, 837 F. 2d 199, 206 (CA5 1988) (stay of limited duration). Lower courts have sometimes accompanied a stay with an injunction designed to preserve the status quo. *E. g.*, *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306, 1316 (CADC 1971). And, in my view, even if Maine should choose not to obtain the Secretary's views on its own, the desirability of the District Court's having those views to consider, *supra*, at 672, is relevant to the "public interest" determination that often factors into whether a preliminary injunction should issue, see, *e. g.*, *MacDonald* v. *Chicago Park District*, 132 F. 3d 355, 357 (CA7 1997); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 131–133 (1995). But cf. *Rosado*, 397 U. S., at 406.

For these reasons, I concur in the Court's judgment and in major part in the plurality's opinion.

JUSTICE SCALIA, concurring in the judgment.

I would reject petitioner's negative-Commerce-Clause claim because the Maine statute under challenge is neither facially discriminatory against interstate commerce nor (as the Court explains, *ante*, at 668–670) similar to other state action that we have hitherto found invalid on negative-Commerce-Clause grounds; and because, as I have explained elsewhere, the negative Commerce Clause, having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially

discriminatory action, should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated. See *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 209–210 (1994) (opinion concurring in judgment).

I would reject petitioner's statutory claim on the ground that the remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act, see *Blessing* v. *Freestone*, 520 U. S. 329, 349 (1997) (SCALIA, J., concurring); *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981), is set forth in the Act itself: termination of funding by the Secretary of the Department of Health and Human Services, see 42 U. S. C. § 1396c. Petitioner must seek enforcement of the Medicaid conditions by that authority—and may seek and obtain relief in the courts only when the denial of enforcement is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A).

JUSTICE THOMAS, concurring in the judgment.

I agree with the plurality that petitioner was not entitled to a preliminary injunction against the enforcement of the Maine Rx Program. I write separately because I do not believe that "further proceedings in this case may lead to a contrary result," *ante*, at 660, and because I do not agree with the plurality's reasoning. It is clear from the text of the Medicaid Act and the Constitution that petitioner's pre-emption and negative Commerce Clause claims are without merit. I therefore concur in the judgment of the Court.

## I

The premise of petitioner's pre-emption claim is that Maine Rx "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). The plurality agrees that to succeed petitioner must demonstrate "that

there was no Medicaid-related goal or purpose served by Maine Rx." *Ante*, at 662. Both JUSTICE STEVENS and JUSTICE O'CONNOR treat the Medicaid Act as embodying an abstract and highly generalized purpose that is inconsistent with the Act's depth. The text of this complex statute belies their efforts to distill from it a single purpose.

The Medicaid Act represents a delicate balance Congress struck between competing interests—care and cost, mandates and flexibility, oversight and discretion. While petitioner principally relies on 42 U. S. C. § 1396a(a)(19), which requires the Secretary of the Department of Health and Human Services to ensure that state plans "provide such safeguards as may be necessary to assure that . . . care and services will be provided, in a manner consistent with . . . the best interests of the recipients," the Medicaid Act also pursues arguably competing interests such as cost control, see § 1396a(a)(30), and affording States broad discretion to control access to prescription drugs, see *Pharmaceutical Research and Mfrs. of America* v. *Thompson*, 259 F. Supp. 2d 39, 72 (DC 2003) (hereinafter *Pharmaceutical Research*) (noting that prior authorization may be in tension with the "'best interests'" of Medicaid recipients).

The plurality's conclusion that § 1396a(a)(19) imposes a silent prohibition on prior authorization programs that "severely curtai[l] Medicaid recipients' access to prescription drugs," *ante*, at 665, ignores this complexity. In my view, the Medicaid Act grants States broad discretion to impose prior authorization and proper consideration of the Secretary of the Department of Health and Human Services' role in administering the Medicaid Act forecloses petitioner's pre-emption claim.

A

I begin with an analysis of the relevant provisions of the Medicaid Act. Title 42 U. S. C. § 1396r–8(d)(1) provides a complete list of the restrictions participating States may

place on prescription drug coverage under Medicaid. Importantly, it says that "[a] State may subject to prior authorization any covered outpatient drug." § 1396r–8(d)(1)(A). The only stricture placed on a prior authorization program is compliance with certain enumerated procedures, § 1396r–8(d)(5). Undoubtedly, the "purpose" of § 1396r–8(d)(1) is its effect—to grant participating States the authority to subject drugs to prior authorization subject only to the express limitations in § 1396r–8(d)(5).

This reading of the Medicaid Act's prior authorization provisions is confirmed by its near-neighbors. Section 1396r–8(d) allows States to exclude or further restrict coverage (beyond prior authorization) of a "covered outpatient drug" if "the prescribed use is not for a medically accepted indication," § 1396r–8(d)(1)(B)(i), or if the drug or use is on a list specified in § 1396r–8(d)(2). That list includes, for example, prescriptions for "anorexia . . . or weight gain," § 1396r–8(d)(2)(A), and "cosmetic purposes or hair growth," § 1396r–8(d)(2)(C), as well as all barbiturates, § 1396r–8(d)(2)(I). Furthermore, under § 1396r–8(d)(6), "[a] State may impose limitations, with respect to all such drugs in a therapeutic class, on the minimum or maximum quantities per prescription . . . if such limitations are necessary to discourage waste . . . ." This fine-tuning of a State's ability to restrict drug coverage beyond prior authorization stands in stark contrast to the broad authority granted to States to impose prior authorization. Indeed, these provisions confirm that when Congress meant to impose limitations on state authority in this area it did so explicitly.

The authority to entirely exclude coverage of certain drugs or uses, for any reason,[1] again illustrates the futility

[1] Neither the plurality nor the opinion concurring in part and dissenting in part (hereinafter dissent) suggests that there is any purpose-based limitation on a State's authority under § 1396r–8(d)(2). Nor can they. The restrictions enable States to make value, rather than cost or care, judg-

of discerning one "purpose" from the Medicaid Act. If, as the plurality reasons, the "'best interests'" of Medicaid beneficiaries require that access to prescription drugs not be "severely curtailed," then § 1396r–8(d)(2) empowers States to do what the plurality believes is precisely opposed to the best interests of Medicaid beneficiaries. This is just a further illustration of the compromises embodied in the Medicaid Act and demonstrates the impossibility of defining "purposes" in complex statutes at such a high level of abstraction and the concomitant danger of invoking obstacle pre-emption based on the arbitrary selection of one purpose to the exclusion of others.

In light of the broad grant of discretion to States to impose prior authorization, petitioner cannot produce a credible conflict between Maine Rx and the Medicaid Act. Both the plurality and the dissent fail to explain how a State's purpose (and there may be many) in enacting a prior authorization program makes any difference in determining whether that program is in the "best interests" of Medicaid beneficiaries. The mere existence of a prior authorization procedure, as contemplated by § 1396r–8(d)(5), cannot "severely curtai[l]" access to prescription drugs (the Court's touchstone for a "conflict" with § 1396a(a)(19), *ante*, at 665). Otherwise the plurality has rendered an interpretation of the Medicaid Act that leaves it with an internal conflict.

The dissent reasons that prior authorization programs must "safeguar[d] against unnecessary utilization," *post*, at 685 (O'CONNOR, J., concurring in part and dissenting in part) (internal quotation marks omitted), of prescription drugs and

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ments as to whether a drug should be covered. See, *e. g.*, § 1396r–8(d)(2)(B) (fertility drugs), § 1396r–8(d)(2)(C) (cosmetic purposes). Again, this begs the question of why, for example, Congress would give States greater authority over the decision whether or not to cover a prescription hair growth drug than whether or not to subject the same hair growth drug to prior authorization.

control costs, but also never explains how the motivation for imposing prior authorization affects whether it furthers these ends.[2] The dissent points to nothing in the record that suggests that Maine Rx will not limit unnecessary use of the covered drugs or control costs associated with prescription drug expenditures under Medicaid. Rather, the dissent merely asserts that because Maine Rx conditions prior authorization on nonparticipation in the rebate program it follows *ipse dixit* that Maine Rx does not further these objectives. *Post*, at 688–689 (O'CONNOR, J., concurring in part and dissenting in part). Obstacle pre-emption turns on whether the goals of the federal statute are frustrated by the effect of the state law. The dissent's focus on the subjective intent of the state legislature enacting the law targeted for pre-emption asks an irrelevant question.

B

The plurality and dissent also fail to consider the necessary implications of the Secretary's role in approving state Medicaid plans and otherwise administering the Act. The Secretary is delegated a type of pre-emptive authority—he must approve state plans that comply with § 1396a, § 1396a(b), but is given the authority to withhold funds if he deems a State to be noncompliant, § 1396c.[3] While acknowledging the pos-

[2] These requirements, of course, have no basis in the text of the Medicaid Act. I discuss the dissent's reasoning only because its reliance on Maine Rx's express "purpose" turns the presumption against pre-emption on its head. If Maine Rx also stated that its purpose was to control prescription drug costs under Medicaid would it be safe from pre-emption? I find it odd that application of federal statutory pre-emption under the Supremacy Clause should turn on whether a state legislature has recited what this Court deems to be the proper rationale.

[3] In fact, the Secretary's power to withhold funds from States that breach the Medicaid Act's terms indicates that the Act itself contemplates the existence of state plans that do not comply with the requirements of § 1396a(a). Title 42 U. S. C. § 1396c provides:

sibility that the Secretary "may view the Maine Rx Program as an amendment to its Medicaid Plan that requires . . . approval before it becomes effective," *ante,* at 660, and potentially withhold such approval, the plurality does not discuss the logical consequences of petitioner's view that Maine Rx is pre-empted by the Medicaid Act.

According to petitioner, the Secretary is forbidden by the Medicaid Act from approving Maine Rx because the Act itself pre-empts Maine Rx and renders it void under the Supremacy Clause. If the Secretary approved Maine Rx, his interpretation would necessarily, if petitioner is correct, be rejected by a reviewing court under the first step of the inquiry of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984), which asks whether the statute is unambiguous.[4] See, *e. g.*, *Smiley* v.

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"If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—

"(1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or

"(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

"the Secretary shall notify such State agency that further payments will not be made to the State . . . until the Secretary is satisfied that there will no longer be any such failure to comply."

The Medicaid Act cannot meaningfully be interpreted to invalidate state laws, such as Maine Rx, that do not comply with its express terms, much less state laws a court concludes pose an obstacle to the Act's "purpose." State plans that do not meet § 1396a(a)'s requirements are to be defunded by the Secretary—they are not void under the Supremacy Clause. It is not apparent to me where the plurality finds the congressional directive to pre-empt state plans that breach a contract between the Federal Government and the State. Cf. Part I–D, *infra.* In my view, no such directive exists, and States are free to deviate from the Medicaid Act's requirements, subject only to sanctions by the Secretary.

[4] If a federal statute is ambiguous with respect to whether it pre-empts state law, then the presumption against pre-emption should ordinarily prevent a court from concluding that the state law is pre-empted. Therefore, a court's conclusion that Maine Rx is pre-empted would require rejection

*Citibank (South Dakota), N. A.*, 517 U. S. 735, 739 (1996). Petitioner must therefore show that the Medicaid Act is unambiguous or, in other words, that Congress "has directly spoken to the precise question at issue." *Chevron*, *supra*, at 842. However, given the foregoing discussion of the text of the Medicaid Act, it cannot be read to unambiguously prohibit Maine Rx, or indicate that Congress, in enacting § 1396a(a)(19), directly addressed this issue. Indeed, the Department of Health and Human Services has already adopted an interpretation of the Medicaid Act that "does not preclude States from negotiating prices, including manufacturer discounts and rebates for non-Medicaid drug purchases." Letter from D. Smith, Dir. of Center for Medicaid and State Operations, Centers for Medicare & Medical Services, to all State Medicaid Dirs. (Sept. 18, 2002), App. to Brief for United States as *Amicus Curiae* 48a.[5] Obstacle pre-emption's very premise is that Congress has not expressly displaced state law, and thus not "directly spoken" to the pre-emption question. Therefore, where an agency is charged with administering a federal statute as the Secretary is here, *Chevron* imposes a perhaps-insurmountable barrier to a claim of obstacle pre-emption.

I note that the interpretation of the Medicaid Act I offer, unlike petitioner's, does not require the Secretary to reach a particular decision with respect to Maine Rx. The Secretary is expressly charged with determining whether state plans comply with the numerous requirements of 42 U. S. C. §§ 1396a(a), 1396a(b), 1396c. Among these, as discussed earlier, is the requirement that the plan serve "the best in-

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of the Secretary's contrary construction of the statute at *Chevron*'s first step, not its second, which asks whether the agency construction is reasonable. 467 U. S., at 843.

[5] This interpretation has been upheld by the District Court for the District of Columbia. *Pharmaceutical Research and Mfrs. of America* v. *Thompson*, 259 F. Supp. 2d 39, 69–72 (2003). Petitioner's arguments provide no answer to the careful analysis offered by that court.

terests of [Medicaid] recipients." § 1396a(a)(19). While I maintain that federal courts cannot use obstacle pre-emption to determine whether or not Maine Rx serves these interests, the Secretary must examine the entire state plan, not just Maine Rx in isolation. Moreover, the Secretary's mandate from Congress is to conduct, with greater expertise and resources than courts, the inquiry into whether Maine Rx upsets the balance contemplated by the Medicaid Act. Congress' delegation to the agency to perform this complex balancing task precludes federal-court intervention on the basis of obstacle pre-emption—it does not bar the Secretary from performing his duty to adjudge whether Maine Rx upsets the balance the Medicaid Act contemplates and withhold approval or funding if necessary. If petitioner or respondents disagree with the Secretary's decision, they may seek judicial review, as petitioner has already done for plans similar to Maine Rx that the Secretary has approved. See *Pharmaceutical Research and Mfrs. of America* v. *Thompson*, 259 F. Supp. 2d 39, 69–72 (DC 2003).

C

Maine Rx is not pre-empted by the Medicaid Act. This conclusion is easily reached without speculation about whether Maine Rx advances "Medicaid-related goals" or how much it does so. The disagreement between the plurality and dissent in this case aptly illustrates why "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives . . . undercut[s] the principle that it is Congress rather than the courts that pre-empts state law." *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 111 (1992) (KENNEDY, J., concurring in part and concurring in judgment).

D

I make one final observation with respect to petitioner's pre-emption claim. The Court has stated that Spending Clause legislation "is much in the nature of a contract."

*Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). This contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation—through pre-emption or otherwise. See *Blessing* v. *Freestone*, 520 U. S. 329, 349–350 (1997) (SCALIA, J., concurring). In contract law, a third party to the contract (as petitioner is here) may only sue for breach if he is the "intended beneficiary" of the contract. See, *e. g.*, Restatement (Second) of Contracts § 304 (1979) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty"). When Congress wishes to allow private parties to sue to enforce federal law, it must clearly express this intent. Under this Court's precedents, private parties may employ 42 U. S. C. § 1983 or an implied private right of action only if they demonstrate an "unambiguously conferred right." *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 283 (2002). Petitioner quite obviously cannot satisfy this requirement and therefore arguably is not entitled to bring a pre-emption lawsuit as a third-party beneficiary to the Medicaid contract. Respondents have not advanced this argument in this case. However, were the issue to be raised, I would give careful consideration to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action.

## II

Petitioner's Commerce Clause challenge is easily met, because "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 610 (1997) (THOMAS, J., dissenting). I therefore agree with the Court that petitioner cannot prevail on this claim.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, concurring in part and dissenting in part.

I join Parts I–III and VI of the Court's opinion, and I agree with the plurality's conclusion that States may not impose on Medicaid beneficiaries the burdens of prior authorization in the absence of a countervailing Medicaid purpose, *ante*, at 662. I part with the plurality because I do not agree that the District Court abused its discretion in enjoining respondents from imposing prior authorization under the Maine Rx Program. Before the District Court, respondents "point[ed] to no *Medicaid* purpose" served by Maine Rx's prior-authorization requirement. App. to Pet. for Cert. 68 (emphasis in original). This is not surprising. The program is open to all Maine residents, rich and poor. It does not purport to further a Medicaid-related purpose, and it is not tailored to have such an effect. By imposing prior authorization on Maine's Medicaid population to achieve wholly non-Medicaid related goals, Maine Rx "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal Medicaid Act. *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). I would uphold the District Court's injunction on this basis, and I therefore respectfully dissent from Parts IV, V, and VII of the plurality's opinion.

## I

Our ultimate task in analyzing a pre-emption claim is "to determine whether state regulation is consistent with the structure and purpose" of the federal statutory scheme "as a whole." *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 98 (1992) (plurality opinion of O'CONNOR, J.). We look to "'the provisions of the whole law, and to its object and policy.'" *Ibid.* (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987)). Our touchstone is Congress' intent. *Gade* v. *National Solid Wastes Management Assn.*, *supra*, at 96. "The nature of the power exerted by

Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject." *Hines* v. *Davidowitz*, *supra*, at 70.

Under the Medicaid Act, once a drug manufacturer enters into a Medicaid rebate agreement with respect to a particular outpatient drug, a State that has elected to offer prescription drug coverage must cover the drug under its state plan unless it complies with one of the Medicaid Act's provisions that permits a State to exclude or restrict coverage. 42 U. S. C. § 1396r–8(d); see *ante*, at 652. Prior authorization is one such restriction. Section 1396r–8(d)(5) provides that a state plan "may require, as a condition of coverage or payment for a covered outpatient drug . . . the approval of the drug before its dispensing for any medically accepted indication."

Prior authorization is, by definition, a procedural obstacle to Medicaid beneficiaries' access to medically necessary prescription drugs covered under the Medicaid program. It nevertheless may serve a Medicaid purpose by "safeguard-[ing] against unnecessary utilization and assur[ing] that payments are consistent with efficiency, economy and quality of care." H. R. Rep. No. 101–881, p. 98 (1990). A State accordingly may impose prior authorization to reduce Medicaid costs. Cf. *New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complementary administrative framework, *and in the pursuit of common purposes*, the case for federal pre-emption becomes a less persuasive one" (emphasis added)). A State may not, however, impose prior authorization to generate revenue for purposes wholly unrelated to its Medicaid program.

While the Medicaid Act does not expressly bar States from using prior authorization to accomplish goals unrelated to the Medicaid program, such a limit on States' authority is

inherent in the purpose and structure of the Medicaid Act. As the District Court recognized, a contrary rule would permit Maine to use prior authorization to raise funds for "highway and bridge construction or school funding," and presumably any other purpose, so long as the Secretary of Health and Human Services took no action to prevent it. App. to Pet. for Cert. 68. The purpose and structure of the Medicaid Act make clear that Congress did not intend such an absurd result.

Congress created the Medicaid program to "enabl[e] each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U. S. C. § 1396. Consistent with that purpose, Congress has imposed income and resource limitations on many of the groups eligible for assistance under the Act. See, *e. g.*, §§ 1396a(a)(10)(A)(i)(IV), (VI), and (VII); § 1396b(f).

A requirement that prior authorization be used only where it furthers a Medicaid purpose is reinforced by the structure of the Medicaid Act. Congress has afforded States broad flexibility in tailoring the scope and coverage of their Medicaid programs, see *Alexander* v. *Choate*, 469 U. S. 287, 303 (1985), but the Act establishes a number of prerequisites for approval of a state plan by the Secretary. 42 U. S. C. §§ 1396a(a)(1)–(65). Two such requirements are of particular relevance here. First, a state plan must contain safeguards to ensure covered services are provided in a manner consistent with "the best interests of the [Medicaid] recipients." § 1396a(a)(19). Second, a state plan must "safeguard against unnecessary utilization" of services and ensure that "payments are consistent with efficiency, economy, and quality of care." § 1396a(a)(30)(A). These provisions confirm Congress' intent that state Medicaid initiatives not burden

Medicaid beneficiaries without serving a Medicaid goal such as stretching available resources to the greatest effect.

## II

The District Court correctly concluded that the Maine Rx Program's prior-authorization provision is invalid because it burdens Medicaid recipients while advancing no Medicaid goals. Under the Maine Rx Program, the State "shall impose prior authorization requirements in the Medicaid program" on any "nonparticipating" drug manufacturer that does not enter into a rebate agreement with the State for drugs dispensed to non-Medicaid patients. Me. Rev. Stat. Ann., Tit. 22, § 2681(7) (West Supp. 2002). The rebate agreements are designed to reduce prescription drug prices for all residents of the State, regardless of financial or medical need. §§ 2681(1), (2)(F). The program thus serves the State's non-Medicaid population by threatening to erect an obstacle to Medicaid recipients' ability to receive covered outpatient drugs.

The plurality concedes that Maine Rx cannot survive a pre-emption challenge if it does not have as its purpose or effect a "Medicaid-related goal or purpose." *Ante*, at 662. Based on the record before the District Court, I would hold that the court did not abuse its discretion in concluding that petitioner demonstrated a likelihood of success on its pre-emption claim. Petitioner alleged that the Maine Rx Program does not serve a Medicaid purpose. The Maine Rx statute on its face bears this out. The program is designed "to reduce prescription drug prices for residents of the State," and it accomplishes this goal by threatening to impose prior authorization on otherwise covered outpatient drugs. Me. Rev. Stat. Ann., Tit. 22, §§ 2681(1), (2)(F), (7) (West Supp. 2002). In the District Court, Maine did not attempt to justify the program on the basis that it served a Medicaid purpose. Instead, Maine took the position that it was not required to demonstrate any such purpose. An ap-

pellate court reviewing a preliminary injunction is confined to the record before the District Court, and here, neither the record before the District Court nor the Maine Rx statute itself reveals a Medicaid purpose that will be served by the Maine Rx Program.

The plurality speculates about three "Medicaid-related interests that will be served if the [Maine Rx] program is successful." *Ante*, at 663. First, the plurality asserts that Maine Rx "will provide medical benefits to persons who can be described as 'medically needy' even if they do not qualify for [Aid to Families with Dependent Children] or [Supplemental Security Income] benefits." *Ibid.* Second, the plurality contends that "there is the possibility that, by enabling some borderline aged and infirm persons better access to prescription drugs earlier, Medicaid expenses will be reduced." *Ibid.* Third, the plurality posits that "whenever it is necessary to impose the prior authorization requirement on a manufacturer that refuses to participate," Maine Rx will promote the use of cost-effective medications and thereby "[a]voi[d] unnecessary costs in the administration of [the] State's Medicaid program." *Ante*, at 663, 664. Asserting that these "Medicaid-related goals" are "plainly present in the Maine Rx Program," the plurality concludes that the District Court's failure *sua sponte* to recognize them constituted "an erroneous predicate" for the preliminary injunction. *Ante*, at 663.

I disagree. I would not say it was an abuse of discretion for the District Court to conclude petitioner met its burden in showing that there was no Medicaid-related goal or purpose served by Maine Rx. Cf. *ante*, at 662–665. Each of the plurality's *post-hoc* justifications for the Maine Rx Program's burden on Medicaid beneficiaries rests on factual predicates that are not supported in the record. Even assuming the predicate assumptions behind the plurality's first and second justifications—that some of the potential beneficiaries of Maine Rx can be classified as "medically needy" or

"borderline aged and infirm"—it is impossible to discern based on the facts in the record whether the Medicaid program would reap a benefit from the discounts made available to such populations. The proposition that discounts on prescription drugs purchased out-of-pocket might produce Medicaid cost savings by preventing Maine residents from becoming eligible for Medicaid is not self-evident. With no party before it advocating such an attenuated causal chain, and with no facts in the record to support it, the District Court can hardly be said to have abused its discretion in divining no Medicaid purpose on the face of the Maine Rx statute.

The plurality's third rationale fails on similar grounds. The assertion that prior authorization under the Maine Rx Program will *necessarily* produce cost savings for Maine's Medicaid program is unsupportable. Under Maine Rx, the imposition of prior authorization is in no manner tied to the efficacy or cost-effectiveness of a particular drug. Rather, the sole trigger for prior authorization is the failure of a manufacturer or labeler to pay rebates for the benefit of non-Medicaid populations. Me. Rev. Stat. Ann., Tit. 22, §2681(7) (West Supp. 2002). It is thus entirely possible that only the most efficacious and cost-effective drugs will be subject to a prior-authorization requirement under Maine Rx. Maine Rx's prior-authorization requirement would, in that event, at best serve no purpose and at worst delay and inhibit Medicaid beneficiaries' access to necessary medication. In concluding that the District Court abused its discretion, the plurality essentially rejects, out of hand, this possibility. In so doing, the plurality distorts the limitations on the scope of our appellate review at this interlocutory stage of proceedings. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931–932 (1975) ("[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review

is simply whether the issuance of the injunction . . . constituted an abuse of discretion").

The District Court had before it, on one hand, concrete evidence of the burdens that Maine Rx's prior-authorization requirement would impose on Medicaid beneficiaries. On the other hand, the District Court had no evidence or argument suggesting that Maine Rx would achieve cost savings or any other Medicaid-related goal. Finding that the District Court, under these circumstances, did not abuse its discretion by preliminarily enjoining Maine Rx's prior-authorization requirement, I would reverse the judgment of the Court of Appeals and remand for further proceedings.

Syllabus

# BREUER *v.* JIM'S CONCRETE OF BREVARD, INC.

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

No. 02–337. Argued April 2, 2003—Decided May 19, 2003

Petitioner Breuer sued respondent, his former employer, Jim's Concrete of Brevard, Inc., in a Florida state court for unpaid wages, liquidated damages, prejudgment interest, and attorney's fees under the Fair Labor Standards Act of 1938 (FLSA), which provides, *inter alia,* that "[a]n action to recover . . . may be maintained . . . in any Federal or State court of competent jurisdiction," 29 U. S. C. § 216(b). Jim's Concrete removed the case to the Federal District Court under 28 U. S. C. § 1441(a), which reads: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the [federal] district courts . . . have original jurisdiction, may be removed by the defendant . . . to the [appropriate federal] district court." Breuer sought an order remanding the case to state court, arguing that removal was improper because § 216(b)'s provision that an action "may be maintained" in state court put forward an express exception to § 1441(a)'s general removal authorization. Though the District Court denied Breuer's motion, it certified the issue for interlocutory appeal. The Eleventh Circuit affirmed, saying that although Congress had expressly barred removal in direct, unequivocal language in other statutes, § 216(b) was not comparably prohibitory.

*Held:* Section 216(b) does not bar removal of a suit from state to federal court. Breuer's case was properly removed under § 1441. Pp. 694–700.

(a) Breuer unquestionably could have begun his action in the District Court under § 216(b), as well as under 28 U. S. C. §§ 1331 and § 1337(a). Removal of FLSA actions is thus prohibited under § 1441(a) only if Congress expressly provided as much. Nothing on the face of § 216(b) looks like an express prohibition of removal, there being no mention of removal, let alone of prohibition. While § 216(b) provides that an action "may be maintained . . . in any . . . State court of competent jurisdiction," the word "maintain" enjoys a breadth of meaning that leaves its bearing on removal ambiguous at best. "Maintain" in reference to a legal action is often read as "bring" or "file," but "to maintain an action" may also mean "to continue" to litigate, as opposed to "commence" an action. If an ambiguous term like "maintain" qualified as an express provision for § 1441(a) purposes, then the requirement of an "expres[s] provi[sion]" would call for nothing more than a "provision," pure and

simple, leaving the word "expressly" without any consequence whatever. The need to take the express exception requirement seriously is underscored by examples of indisputable prohibitions of removal in a number of other statutes, *e. g.*, § 1445, which demonstrate that, when Congress wishes to give plaintiffs an absolute choice of forum, it is capable of doing so in unmistakable terms. Pp. 694–697.

(b) None of Breuer's refinements on his basic argument from the term "maintain" puts him in a stronger position. The Court rejects his argument that "may be maintained" shows up as sufficiently prohibitory once it is coupled with a federal policy of construing removal jurisdiction narrowly, as set forth in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100, 108–109. Whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by the later amendment of § 1441 into its present form, requiring any exception to the general removability rule to be express. Nor does it avail Breuer to emphasize the sense of "maintain" as implying continuation of an action to final judgment, so as to give a plaintiff who began an action the statutory right under § 216(b) to see it through. The right to maintain an action may indeed be a right to fight to the finish, but removal does nothing to defeat that right; far from concluding a case before final judgment, removal just transfers it from one forum to another. Moreover, if "an action . . . may be maintained" meant that a plaintiff could insist on keeping an FLSA case wherever he filed it in the first place, it would seem that an FLSA case brought in a federal district court could never be transferred to a different one over the plaintiff's objection, a result that would plainly clash with the provision for change of venue, § 1404(a). Finally, although Breuer may be right that many FLSA claims are for such small amounts that removal to a sometimes distant federal court, often increasing the cost of litigation, may make it difficult for many employees to vindicate their rights effectively, the implications of that assertion keep this Court from going Breuer's way. Because a number of other statutes incorporate or use the same language as 29 U. S. C. § 216(b), see, *e. g.*, § 626(b), there cannot be an FLSA removal exception without wholesale exceptions for other statutory actions, to the point that it is just too hard to believe that a right to "maintain" an action was ever meant to displace the right to remove. Pp. 697–699.

292 F. 3d 1308, affirmed.

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

*Donald E. Pinaud, Jr.*, argued the cause for petitioner. With him on the briefs was *Eric Schnapper*.

*Andrew S. Hament* argued the cause for respondent. With him on the brief was *Gregory Williamson.*

*Lisa S. Blatt* argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Olson*, *Deputy Solicitor General Kneedler*, *Howard M. Radzely*, *Allen H. Feldman*, and *Edward D. Sieger.**

JUSTICE SOUTER delivered the opinion of the Court.

The question is whether the provision of the Fair Labor Standards Act of 1938 (FLSA or Act), that suit under the Act "may be maintained . . . in any Federal or State court of competent jurisdiction," 52 Stat. 1069, as amended, 29 U. S. C. § 216(b), bars removal of a suit from state to federal court. We hold there is no bar.

I

Petitioner, Phillip T. Breuer, sued respondent, his former employer, Jim's Concrete of Brevard, Inc., in a state court of Florida for unpaid wages, liquidated damages, prejudgment interest, and attorney's fees. Section 216(b) provides not only that an employer who violates its minimum wage and overtime provisions is liable to an employee, but that "[a]n action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

Jim's Concrete removed the case to the United States District Court for the Middle District of Florida under 28 U. S. C. § 1441(a), which reads that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United

*Briefs of *amici curiae* urging affirmance were filed for the Academy of Florida Management Attorneys, Inc., by *Peter W. Zinober;* and for the Human Resource Association of Palm Beach County, Florida, et al. by *Christine D. Hanley*, *Sally Still*, and *Betty L. Dunkum.*

States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Breuer sought an order remanding the case to state court, arguing that removal was improper owing to the FLSA's provision that an action "may be maintained" in any state court, a provision that Breuer put forward as an express exception to the general authorization of removal under § 1441(a). Though the District Court denied Breuer's motion, it certified the issue for interlocutory appeal under § 1292(b). The Eleventh Circuit affirmed, saying that Congress had expressly barred removal in "direct, unequivocal language" in other statutes, 292 F. 3d 1308, 1310 (2002), but was not comparably prohibitory in § 216(b). The Eleventh Circuit thus joined the First, see *Cosme Nieves* v. *Deshler*, 786 F. 2d 445 (1986), but placed itself at odds with the Eighth, see *Johnson* v. *Butler Bros.*, 162 F. 2d 87 (1947) (denying removability under FLSA). We granted certiorari to resolve the conflict, 537 U. S. 1099 (2003), and now affirm.

## II

### A

There is no question that Breuer could have begun his action in the District Court. The FLSA provides that an action "may be maintained . . . in any Federal or State court of competent jurisdiction," 29 U. S. C. § 216(b), and the district courts would in any event have original jurisdiction over FLSA claims under 28 U. S. C. § 1331, as "arising under the Constitution, laws, or treaties of the United States," and § 1337(a), as "arising under any Act of Congress regulating commerce." Removal of FLSA actions is thus prohibited under § 1441(a) only if Congress expressly provided as much.

Nothing on the face of 29 U. S. C. § 216(b) looks like an express prohibition of removal, there being no mention of removal, let alone of prohibition. While § 216(b) provides

that an action "may be maintained . . . in any . . . State court of competent jurisdiction," the word "maintain" enjoys a breadth of meaning that leaves its bearing on removal ambiguous at best. "To maintain an action" may mean "to continue" to litigate, as opposed to "commence" an action.[1] Black's Law Dictionary 1143 (3d ed. 1933). But "maintain" in reference to a legal action is often read as "bring" or "file"; "[t]o maintain an action or suit may mean to commence or institute it; the term imports the existence of a cause of action." *Ibid.;* see 1A J. Moore et al., Moore's Federal Practice ¶ 0.167[5], p. 472 (2d ed. 1996) (calling the " 'may be maintained' " language an "ambiguous phrase" and "certainly not an express provision against removal within the meaning of § 1441"); 14C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3729, p. 235 (1998) (referring to "use of the ambiguous term 'maintain' in the statute"). The most, then, that Breuer can claim simply from the use of the term "maintain" is that any text, even when ambiguous, that might be read as inconsistent with removal is an "express" prohibiting provision under the statute. But if an ambiguous term like "maintain" qualified as an express provision

[1] Actually, there is reason to think that this sense of "maintain" was intended. Under the FLSA, the Secretary of Labor may file a suit on behalf of an employee to recover unpaid wages or overtime compensation, and when the Secretary files such a suit, an employee's right to bring a comparable action terminates, see, *e. g.,* 29 U. S. C. § 216(c). Congressional reports suggest that although an employee may no longer initiate a new action once the Secretary has sued, an employee may continue to litigate, *i. e.,* "maintain," an action already pending. See H. R. Conf. Rep. No. 327, 87th Cong., 1st Sess., 20 (1961) (filing of the Secretary's complaint would "not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff before the Secretary's action"); S. Rep. No. 145, 87th Cong., 1st Sess., 39 (1961) (Secretary's filing of complaint "terminates the rights of individuals to later file suit"); cf. *Smallwood* v. *Gallardo,* 275 U. S. 56, 61 (1927) ("To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun"). Seen in this light, Congress's use of the term "maintain" is easy to understand, carrying no implication for removal.

for purposes of 28 U. S. C. § 1441(a), then the requirement of an "expres[s] provi[sion]" would call for nothing more than a "provision," pure and simple, leaving the word "expressly" with no consequence whatever. "[E]xpres[s] provi[sion]" must mean something more than any verbal hook for an argument.

The need to take the express exception requirement seriously is underscored by examples of indisputable prohibitions of removal in a number of other statutes. Section 1445, for example, provides that

> "(a) A civil action in any State court against a railroad or its receivers or trustees . . . may not be removed to any district court of the United States.
>
> "(b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments . . . may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.
>
> "(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.
>
> "(d) A civil action in any State court arising under . . . the Violence Against Women Act of 1994 may not be removed to any district court of the United States."

See also 15 U. S. C. § 77v(a) ("[N]o case arising under [the Securities Act of 1933] and brought in any State court of competent jurisdiction shall be removed to any court of the United States"); § 1719 ("No case arising under [the Interstate Land Sales Full Disclosure Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party"); § 3612 ("No case arising under [the Condominium and Cooperative Abuse Relief Act of 1980] and

brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where any officer or employee of the United States in his official capacity is a party"). When Congress has "wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms." *Cosme Nieves*, 786 F. 2d, at 451. It has not done so here.

B

None of Breuer's refinements on his basic argument from the term "maintain" puts him in a stronger position. He goes on to say, for example, that interpretation does not stop at the dictionary, and he argues that the statutory phrase "may be maintained" shows up as sufficiently prohibitory once it is coupled with a federal policy of construing removal jurisdiction narrowly. Breuer relies heavily on our statement in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100 (1941), that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal legislation] . . . . 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits . . . the statute has defined.'" *Id.*, at 108–109 (quoting *Healy* v. *Ratta*, 292 U. S. 263, 270 (1934)). But whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development. At the time that case was decided, § 1441 provided simply that any action within original federal subject-matter jurisdiction could be removed. Fourteen years later, however, it was amended into its present form, requiring any exception to the general removability rule to be express. See Act of June 25, 1948, § 1441(a), 62 Stat. 937 (authorizing removal over civil suits within the district courts' original jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress"); see also 28 U. S. C. § 1441 (historical and revi-

sion notes). Since 1948, therefore, there has been no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception. As *Shamrock* itself said, "the language of the Act . . . evidence[s] the Congressional purpose," 313 U. S., at 108, and congressional insistence on express exception is hardly satisfied by the malleability of the term "maintain" in the text Breuer relies upon.

Nor does it do Breuer any good to emphasize a sense of "maintain" as implying continuation of an action to final judgment, so as to give a plaintiff who began an action the statutory right under 29 U. S. C. § 216(b) to see it through. We may concede that it does, and the concession leaves the term "maintain" just as ambiguous as ever on the issue before us.[2] The right to maintain an action may indeed be a right to fight to the finish, but removal does nothing to defeat that right; far from concluding a case before final judgment, removal just transfers it from one forum to another. As between a state and a federal forum, the statute seems to betray an indifference, with its provision merely for maintaining action "in any Federal or State Court," *ibid.*

But even if the text of § 216(b) were not itself reason enough to doubt that the provision conveys any right to remain in the original forum, the implication of Breuer's position would certainly raise misgivings about his point. For if the phrase "[a]n action . . . may be maintained" meant that a plaintiff could insist on keeping an FLSA case wherever he filed it in the first place, it would seem that an FLSA case brought in a federal district court could never be transferred to a different one over the plaintiff's objection, a result that would plainly clash with the provision for change of venue, 28 U. S. C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer

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[2] As to individual cases brought before the institution of any suit by the Government, see n. 1, *supra.*

any civil action to any other district or division where it might have been brought").

It is, finally, a like concern about consequences that leaves us with fatal reservations about Breuer's pragmatic appeal that many claims under the FLSA are for such small amounts that removal to a sometimes distant federal court may make it less convenient and more expensive for employees to vindicate their rights effectively. This may often be true, but even if its truth somehow justified winking at the ambiguity of the term "maintain," the implications would keep us from going Breuer's way. A number of other statutes incorporate or use the same language as § 216(b), see 29 U. S. C. § 626(b) (providing that the Age Discrimination in Employment Act of 1967 "shall be enforced in accordance with the powers, remedies, and procedures provided in" § 216(b) and other sections of the FLSA); § 2005(c)(2) ("An action to recover the liability prescribed [under the Employee Polygraph Protection Act of 1988] in paragraph (1) may be maintained against the employer in any Federal or State court of competent jurisdiction"); § 2617(a)(2) ("An action to recover the damages or equitable relief [under the Family and Medical Leave Act of 1993] prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees"). Breuer, then, cannot have a removal exception for the FLSA without entailing exceptions for other statutory actions, to the point that it becomes just too hard to believe that a right to "maintain" an action was ever meant to displace the right to remove.[3]

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[3] Breuer points to two nonjudicial authorities that do nothing to assuage our skepticism. He calls our attention to the position taken by the Administrator of the Wage and Hour Division, United States Department of Labor, in an *amicus* brief filed before the Eighth Circuit in *Johnson* v. *Butler Bros.*, 162 F. 2d 87 (1947), arguing that the text of the FLSA and the policies motivating its passage demonstrate that FLSA actions may

## III

Breuer's case was properly removed under 28 U. S. C. § 1441, and the judgment of the Eleventh Circuit is affirmed.

*It is so ordered.*

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not be removed to federal court. But this brief is not persuasive authority. The Secretary has no responsibility for applying the removal statute and no particular authority to interpret it; the Secretary's opinion cannot make up for the absence of express statutory language. Breuer also points to a Senate Report accompanying the 1958 enactment of 28 U. S. C. § 1445, a provision barring removal of workers' compensation actions under state law. Referring to actions brought under the FLSA, the report states "[i]f filed in the State courts the law prohibits removal to the Federal court." S. Rep. No. 1830, 85th Cong., 2d Sess., 9 (1958). But a stray comment in a congressional report stands a long way from an express statutory provision.

Syllabus

# INYO COUNTY, CALIFORNIA, ET AL. *v.* PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY ET AL.

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

No. 02–281. Argued March 31, 2003—Decided May 19, 2003

The Bishop Paiute Tribe in California chartered and wholly owns the Bishop Paiute Gaming Corporation, which operates and manages the Paiute Palace Casino (Casino), a tribal gaming operation. When the Inyo County District Attorney asked the Casino for the employment records of three Casino employees under investigation for welfare fraud, the Tribe responded that its privacy policy precluded release of the records without the employees' consent. The District Attorney, on showing probable cause, then obtained and executed a search warrant authorizing a search of the Casino for payroll records of the three employees. The District Attorney subsequently asked for the records of six other Casino employees. The Tribe reiterated its privacy policy, but offered to accept as evidence of consent a redacted copy of the last page of each employee's signed welfare application. The District Attorney refused the offer. To ward off any additional searches, the Tribe and its Gaming Corporation filed suit in Federal District Court against the District Attorney and the Sheriff, in their individual and official capacities, and Inyo County (County). Asserting federal-question jurisdiction under 28 U. S. C. §§ 1331, 1337, 1343(i)(3)(4), and the federal common law of Indian affairs, the Tribe sought injunctive and declaratory relief to vindicate its status as a sovereign immune from state processes under federal law, and to establish that state law was preempted to the extent that it purported to authorize seizure of tribal records. The Tribe also sought relief under 42 U. S. C. § 1983, including compensatory damages, alleging that the defendants violated the Tribe's and Gaming Corporation's Fourth and Fourteenth Amendment rights and the Tribe's right to self-government. The District Court, on defendants' motion, dismissed the Tribe's complaint, holding, *inter alia*, that tribal sovereign immunity did not categorically preclude the search and seizure of the Casino's personnel records. The Ninth Circuit reversed, holding that execution of a search warrant against the Tribe interfered with "the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U. S. 217, 220. Acknowledging a prior

decision in which it held that the right to tribal self-government is not protected by § 1983, the court concluded that, in this case, a § 1983 claim could be maintained because the Tribe sought protection from an unlawful search and seizure, a right secured by the Fourth Amendment and therefore within § 1983's compass.

*Held:*

1. The Tribe may not sue under § 1983 to vindicate the sovereign right it here claims. Section 1983 permits "citizen[s]" and "other person[s] within the jurisdiction" of the United States to seek legal and equitable relief from "person[s]" who, under color of state law, deprive them of federally protected rights. Although this case does not squarely present the question, the Court assumes that tribes, like States, are not subject to suit under § 1983. See *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58. The issue pivotal here is whether a tribe qualifies *as a claimant*—a "person within the jurisdiction" of the United States—under § 1983. Qualification of a sovereign as a "person" who may maintain a particular claim for relief depends not "upon a bare analysis of the word 'person,' " *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 317, but on the "legislative environment" in which the word appears, *Georgia* v. *Evans*, 316 U. S. 159, 161. There is in this case no allegation that the County lacked probable cause or that the warrant was otherwise defective. It is only by virtue of the Tribe's asserted "sovereign" status that it claims immunity from the County's processes. Section 1983 was designed to secure private rights against government encroachment, see *Will*, 491 U. S., at 66, not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation. For example, a tribal member complaining of a Fourth Amendment violation would be a "person" qualified to sue under § 1983. But, like other persons, that member would have no immunity from an appropriately executed search warrant based on probable cause. The Tribe, accordingly, may not sue under § 1983 to vindicate the sovereign right it here claims. Pp. 708–712.

2. The Tribe has not explained, and the trial and appellate courts have not clearly decided, what prescription of federal common law, if any, enables the Tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state criminal processes. This case is therefore remanded for focused consideration and resolution of that jurisdictional question. P. 712.

291 F. 3d 549, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and BREYER,

Syllabus

JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 713.

*John Douglas Kirby* argued the cause for petitioners. With him on the briefs was *Paul N. Bruce.*

*Barbara McDowell* argued the cause for the United States as *amicus curiae.* With her on the brief were *Solicitor General Olson*, *Assistant Attorney General Sansonetti*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Clark*, *Elizabeth Ann Peterson*, and *Ethan G. Shenkman.*

*Reid Peyton Chambers* argued the cause for respondents. With him on the brief were *Anne D. Noto*, *Colin Cloud Hampson*, *Arthur Lazarus, Jr.*, and *James T. Meggesto.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Medeiros*, Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, *Robert L. Mukai*, Senior Assistant Attorney General, *Sara J. Drake*, Supervising Deputy Attorney General, and *Marc A. Le Forestier*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Richard Blumenthal* of Connecticut, *Charlie Crist* of Florida, *Thomas J. Miller* of Iowa, *Phill Kline* of Kansas, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Lawrence E. Long* of South Dakota, and *Mark L. Shurtleff* of Utah; for Los Angeles County District Attorney Steve Cooley et al. by *Mr. Cooley, pro se*, *George M. Palmer*, *Roberta Schwartz*, and *Brent Dail Riggs;* for the California State Sheriffs' Association by *Paul R. Coble* and *Martin J. Mayer;* and for the National Sheriffs' Association et al. by *John J. Brandt.*

Briefs of *amici curiae* urging affirmance were filed for the National Congress of American Indians et al. by *Riyaz A. Kanji*, *Kaighn Smith, Jr.*, and *Ian Heath Gershengorn;* and for United South and Eastern Tribes, Inc., by *William W. Taylor III*, *Eleanor H. Smith*, and *David A. Reiser.*

A brief of *amici curiae* was filed for the State of New Mexico et al. by *Patricia A. Madrid*, Attorney General of New Mexico, *Stuart M. Bluestone*, Deputy Attorney General, *Christopher D. Coppin*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Mike McGrath* of Montana, and *Christine O. Gregoire* of Washington.

JUSTICE GINSBURG delivered the opinion of the Court.

This case stems from a California county's investigation of Native American tribe members for alleged off-reservation crimes. Pursuing the investigation, county law enforcement officers executed a state-court warrant for casino employment records kept by the Tribe on its reservation. The Tribe sued Inyo County (County), the District Attorney, and the Sheriff in federal court, asserting sovereign immunity from state-court processes and seeking declaratory, injunctive, and monetary relief.

The parties and, as *amicus curiae*, the United States agree that a Native American Tribe, like a State of the United States, is not a "person" subject to suit under 42 U. S. C. § 1983. We hold that, in the situation here presented, the Tribe does not qualify as a "person" who may sue under § 1983. Whether the Tribe's suit qualifies for federal-court jurisdiction because it arises under some federal law other than § 1983 is an issue the parties have not precisely addressed, and the trial and appellate courts have not clearly decided. We therefore remand the case for close consideration and specific resolution of that threshold question.

## I

The Bishop Paiute Tribe is a federally recognized tribe located on the Bishop Paiute Reservation in California. The Bishop Paiute Gaming Corporation, chartered and wholly owned by the Tribe, operates and manages the Paiute Palace Casino (Casino), a tribal gaming operation run under the Indian Gaming Regulatory Act, 102 Stat. 2467, 25 U. S. C. § 2701 *et seq.*

In March 1999, the Inyo County Department of Health and Human Services (Department) received information from the State Department of Social Services indicating that three Casino employees had failed to report Casino earnings on their applications for state welfare benefits. Brief for Petitioners 4–5. According to the County, the employees failed

to respond when the Department requested that they reconcile the apparent discrepancies between their Casino earnings and their welfare application forms. *Id.*, at 5. The Department then forwarded the matter to the Inyo County District Attorney's Office, which, in turn, asked the employees to reconcile the apparent discrepancies. *Id.*, at 6. That request, the County asserts, was also ignored. *Ibid.*

In February 2000, the District Attorney's Office asked the Casino for the three employees' employment records, explaining that it was investigating "alleged welfare fraud." 291 F. 3d 549, 554 (CA9 2002). The Tribe responded that its privacy policy precluded release of the records without the employees' consent.

The District Attorney then sought and, on showing probable cause, obtained a search warrant from the Inyo County Superior Court. The warrant authorized a search of the Casino for payroll records of the three employees. On March 23, 2000, the Inyo County Sheriff and the District Attorney executed the warrant. They did so over the objection of tribal officials. Those officials urged that the state court lacked jurisdiction to authorize a search of premises and seizure of records belonging to a sovereign tribe.[1] The Sheriff and the District Attorney, lacking cooperation from the Tribe, cut the locks off the storage facility containing the Casino's personnel records. The county officials seized timecard entries, payroll registers, and payroll check registers relating to the three employees; the seizure also garnered information contained in quarterly wage and withholding reports the Corporation had submitted to the State. Each item seized contained at least one reference to an employee under investigation.

In July 2000, the District Attorney's Office asked the Tribe for the personnel records of six other Casino employees.

[1] The United States maintains, and the County does not dispute, that the Corporation is an "arm" of the Tribe for sovereign immunity purposes. See Brief for United States as *Amicus Curiae* 11–14.

The Tribe reiterated its privacy policy, but offered to accept as evidence of consent a redacted copy of the last page of each employee's signed welfare application. That page contained a statement that employment records of individuals applying for public assistance were subject to review by county officials. The District Attorney refused the offer.[2]

To ward off any additional searches, the Tribe and the Corporation filed suit in Federal District Court naming as defendants the District Attorney and the Sheriff, in their individual and official capacities, and the County. Asserting federal-question jurisdiction under 28 U. S. C. §§ 1331, 1337, 1343(i)(3)(4), and the "federal common law of Indian affairs," the Tribe sought injunctive and declaratory relief to vindicate its status as a sovereign immune from state processes under federal law, and to establish that state law was preempted to the extent that it purported to authorize seizure of tribal records. App. 97, ¶ 1, 105–114, ¶¶ 26–53. The Tribe's complaint also sought relief under 42 U. S. C. § 1983, including compensatory damages. In this regard, the Tribe alleged that by acting beyond the scope of their jurisdiction and "without authorization of law" in executing the warrant,[3] the defendants violated the Tribe's and Corporation's Fourth and Fourteenth Amendment rights, and the Tribe's right to self-government. App. 109, ¶ 38; see *id.*, at 108–110, ¶¶ 33–39.

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[2] At oral argument, the County defended this refusal by asserting that federal law prohibited it from releasing the relevant pages of the employees' welfare applications. See Tr. of Oral Arg. 4–5. But the United States assured the Court that "[t]here is no Federal regulation or other Federal requirement" that would have prevented the County from sharing the relevant information with the Tribe. *Id.*, at 21. This entire controversy, it thus appears, might have been avoided had the county officials understood that federal law allowed the accommodation sought by the Tribe.

[3] The Tribe did not dispute the State's authority over the crimes under investigation. See Brief for United States as *Amicus Curiae* 29.

On November 22, 2000, the District Court, on defendants' motion, dismissed the Tribe's complaint. Tribal sovereign immunity, the court held, did not categorically preclude the search and seizure of the Casino's personnel records. Taking into account the competing interests of the State and the Tribe, the court concluded that, "[i]n the interest of a fair and uniform application of California's criminal law, state officials should be able to execute search warrant[s] against the tribe and tribal property." App. to Pet. for Cert. 62a. The court also held that the District Attorney and the Sheriff had qualified immunity from suit in their individual capacities. *Id.*, at 57a–58a.

The Court of Appeals for the Ninth Circuit reversed the District Court's judgment dismissing the action. "[E]xecution of a search warrant against the Tribe," the Court of Appeals said, "interferes with 'the right of reservation Indians to make their own laws and be ruled by them.'" 291 F. 3d, at 558 (quoting *Williams* v. *Lee*, 358 U. S. 217, 220 (1959)). In the appellate court's view, the District Court should not have "balanced the interests at stake" to determine whether the warrant was enforceable. 291 F. 3d, at 559. This Court's precedent, the Ninth Circuit said, advanced "a more categorical approach denying state jurisdiction . . . over a tribe absent a waiver by the tribe or a clear grant of authority by Congress." *Ibid.* (citing *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 458 (1995)).

"[E]ven if a balancing test is the appropriate legal framework," the Court of Appeals added, "the balance of interests favors a ruling for the Tribe." 291 F. 3d, at 559. The Tribe's privacy policies regarding employee records "promote tribal [self-government] interests," the Ninth Circuit reasoned; notably, those policies fostered "a trusting relationship with tribal members," and "affect[ed] the Casino, the Tribe's predominant source of economic development revenue." *Ibid.* The appeals court recognized the State's countervailing "interest in investigating potential welfare

fraud," but thought it incumbent upon the State to further that interest "through far less intrusive means." *Ibid.*

The Court of Appeals also ruled that the District Attorney and the Sheriff were not shielded by qualified immunity. "[A] reasonable county officer," it held, "would have known . . . that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction." *Id.*, at 568. The appeals court acknowledged prior Ninth Circuit precedent holding that the right to tribal self-government is not protected by § 1983. *Id.*, at 568, n. 7 (citing *Hoopa Valley Tribe* v. *Nevins*, 881 F. 2d 657 (1989)); see Brief for United States as *Amicus Curiae* 29, n. 15. But in this case, the Court of Appeals concluded, a § 1983 claim could be maintained because the Tribe sought "protection from an unlawful search and seizure," a right secured by the Fourth Amendment and therefore within § 1983's compass. 291 F. 3d, at 568, and n. 7. On December 2, 2002, we granted certiorari. 537 U. S. 1043.

## II

Central to our review is the question whether the Tribe's complaint is actionable under § 1983. That provision permits "citizen[s]" and "other person[s] within the jurisdiction" of the United States to seek legal and equitable relief from "person[s]" who, under color of state law, deprive them of federally protected rights.[4] In *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58 (1989), this Court held that a State is not a "person" amenable to suit under § 1983. "[I]n enact-

[4] The relevant portion of 42 U. S. C. § 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

ing § 1983," the Court said, "Congress did not intend to override well-established immunities or defenses under the common law," including "[t]he doctrine of sovereign immunity." *Id.*, at 67. Although this case does not squarely present the question, the parties agree, and we will assume for purposes of this opinion, that Native American tribes, like States of the Union, are not subject to suit under § 1983. See Brief for Petitioners 35–38; Tr. of Oral Arg. 49; *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, 754 (1998) ("an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity").

The issue pivotal here is whether a tribe qualifies *as a claimant*—a "person within the jurisdiction" of the United States—under § 1983.[5] The United States maintains it does not, invoking the Court's "longstanding interpretive presumption that 'person' does not include the sovereign," a presumption that "may be disregarded only upon some affirmative showing of statutory intent to the contrary." Brief for United States as *Amicus Curiae* 7–8 (quoting *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 780–781 (2000)); see *Will*, 491 U. S., at 64. Nothing in the text, purpose, or history of § 1983, the Government contends, overcomes the interpretive presumption

[5] Courts of Appeals have expressed divergent views on this question. See *Native Village of Venetie IRA Council* v. *Alaska*, 155 F. 3d 1150, 1152, n. 1 (CA9 1998) (concluding that Tribes are persons entitled to sue under § 1983); *American Vantage Co.* v. *Table Mountain Rancheria*, 292 F. 3d 1091, 1097, n. 4 (CA9 2002) ("[I]t is doubtful whether [a] Tribe qua sovereign would qualify as a 'citizen of the United States or other person' eligible to bring an action under § 1983." (quoting *White Mountain Apache Tribe* v. *Williams*, 810 F. 2d 844, 865, n. 16 (CA9 1987) (Fletcher, J., dissenting))); cf. *Illinois* v. *Chicago*, 137 F. 3d 474, 477 (CA7 1998) (stating in dictum that "a state is not a 'person' under [§ 1983]"); *Pennsylvania* v. *Porter*, 659 F. 2d 306, 314–318 (CA3 1981) (en banc) (holding that a State may bring a § 1983 action in a *parens patriae* capacity).

that "'person' does not include the sovereign." Brief for United States as *Amicus Curiae* 7–8 (some internal quotation marks omitted). Furthermore, the Government urges, given the Court's decision that "person" excludes sovereigns as defendants under § 1983, it would be anomalous for the Court to give the same word a different meaning when it appears later in the same sentence. *Id.*, at 8; see *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994) (the "presumption that a given term is used to mean the same thing throughout a statute" is "surely at its most vigorous when a term is repeated within a given sentence"); cf. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 397 (1978) (because municipalities are "persons" entitled to sue under the antitrust laws, they are also, in principle, "persons" capable of being sued under those laws).

The Tribe responds that Congress intended § 1983 "to provide a powerful civil remedy 'against all forms of official violation of federally protected rights.'" Brief for Respondents 45 (quoting *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 700–701 (1978)). To achieve that remedial purpose, the Tribe maintains, § 1983 should be "broadly construed." Brief for Respondents 45 (citing *Monell*, 436 U. S., at 684–685 (internal quotation marks omitted)). Indian tribes, the Tribe here asserts, "have been especially vulnerable to infringement of their federally protected rights by states." Brief for Respondents 42 (citing, *inter alia*, *The Kansas Indians*, 5 Wall. 737 (1867) (state taxation of tribal lands); *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999) (state infringement on tribal rights to hunt, fish, and gather on ceded lands); *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U. S. 30 (1989) (tribal jurisdiction over Indian child custody proceedings); *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202 (1987) (state attempt to regulate gambling on tribal land)). To guard against such infringements, the Tribe contends, the

Court should read § 1983 to encompass suits brought by Indian tribes.

As we have recognized in other contexts, qualification of a sovereign as a "person" who may maintain a particular claim for relief depends not "upon a bare analysis of the word 'person,'" *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 317 (1978), but on the "legislative environment" in which the word appears, *Georgia* v. *Evans*, 316 U. S. 159, 161 (1942). Thus, in *Georgia*, the Court held that a State, as purchaser of asphalt shipped in interstate commerce, qualified as a "person" entitled to seek redress under the Sherman Act for restraint of trade. *Id.*, at 160–163. Similarly, in *Pfizer*, the Court held that a foreign nation, as purchaser of antibiotics, ranked as a "person" qualified to sue pharmaceuticals manufacturers under our antitrust laws. 434 U. S., at 309–320; cf. *Stevens*, 529 U. S., at 787, and n. 18 (deciding States are not "person[s]" subject to *qui tam* liability under the False Claims Act, but leaving open the question whether they "can be 'persons' for purposes of commencing an FCA *qui tam* action" (emphasis deleted)); *United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 213 (2001) ("Although we generally presume that identical words used in different parts of the same act are intended to have the same meaning, the presumption is not rigid, and the meaning of the same words well may vary to meet the purposes of the law." (internal quotation marks, brackets, and citations omitted)).

There is in this case no allegation that the County lacked probable cause or that the warrant was otherwise defective. It is only by virtue of the Tribe's asserted "sovereign" status that it claims immunity from the County's processes. See App. 97–105, ¶¶ 1–25, 108–110, ¶¶ 33–39; 291 F. 3d, at 554 (Court of Appeals "find[s] that the County and its agents *violated the Tribe's sovereign immunity* when they obtained and executed a search warrant against the Tribe and tribal

property." (emphasis added)). Section 1983 was designed to secure private rights against government encroachment, see *Will*, 491 U. S., at 66, not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation. For example, as the County acknowledges, a tribal member complaining of a Fourth Amendment violation would be a "person" qualified to sue under § 1983. See Brief for Petitioners 20, n. 7. But, like other private persons, that member would have no right to immunity from an appropriately executed search warrant based on probable cause. Accordingly, we hold that the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims.[6]

## III

In addition to § 1983, the Tribe asserted as law under which its claims arise the "federal common law of Indian affairs." *Supra*, at 706 (quoting App. 97, ¶ 1). But the Tribe has not explained, and neither the District Court nor the Court of Appeals appears to have carefully considered, what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state criminal processes. In short, absent § 1983 as a foundation for the Tribe's action, it is unclear what federal law, if any, the Tribe's case "aris[es] under." 28 U. S. C. § 1331. We therefore remand for focused consideration and resolution of that jurisdictional question.

* * *

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

*It is so ordered.*

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[6] It hardly "demean[s] . . . Native American tribes," see *post*, at 713 (STEVENS, J., concurring in judgment), in our view, to bracket them with States of the Union in this regard.

JUSTICE STEVENS, concurring in the judgment.

In my judgment a Native American tribe is a "person" who may sue under 42 U. S. C. § 1983. The Tribe's complaint, however, does not state a cause of action under § 1983 because the county's alleged infringement of the Tribe's sovereign prerogatives did not deprive the Tribe of "rights, privileges, or immunities secured by the Constitution and laws" within the meaning of § 1983. At bottom, rather than relying on an Act of Congress or a provision of the Constitution, the Tribe's complaint rests on the judge-made doctrine of tribal immunity—a doctrine that "developed almost by accident." *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, 756 (1998). Because many applications of that doctrine are both anomalous and unjust, see *id.*, at 760, 764–766 (STEVENS, J., dissenting), I would not accord it the same status as the "laws" referenced in § 1983.

It is demeaning to Native American tribes to deny them the same access to a § 1983 remedy that is available to any other person whose constitutional rights are violated by persons acting under color of state law. The text of § 1983—which provides that § 1983 defendants are "person[s] who, under color of [State law,]" subject any "other person" to a deprivation of a federal right—adequately explains why a tribe is not a person subject to suit under § 1983. For tribes generally do not act under color of state law. But that text sheds no light on the question whether the tribe is an "other person" who may bring a § 1983 suit when the tribe is the victim of a constitutional violation. The ordinary meaning of the word "person" as used in federal statutes,[1] as well as the specific remedial purpose of § 1983, support the conclu-

[1] The Dictionary Act, which was passed just two months before § 1983 and was designed to supply rules of construction for all legislation, provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . ." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

sion that a tribe should be able to invoke the protections of the statute if its constitutional rights are violated.[2]

In this case, however, the Tribe's allegations do not state a cause of action under § 1983. The execution of the warrant challenged in this case would unquestionably have been lawful if the casino had been the property of an ordinary commercial corporation. See *ante*, at 711 ("There is in this case no allegation that the County lacked probable cause or that the warrant was otherwise defective"). Thus, the Tribe rests its case entirely on its claim that, as a sovereign, it should be accorded a special immunity that private casinos do not enjoy. See *ibid.* That sort of claim to special privileges, which is based entirely on the Tribe's sovereign status, is not one for which the § 1983 remedy was enacted.

Accordingly, while I agree with the Court that the judgment should be set aside, I do not join the Court's opinion.

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[2] Our holding in *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989), that a State is not a "person" within § 1983 is fully consistent with this view. *Will* rested on "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985); see also *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99 (1984)." *Ibid.*

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# CITY OF LOS ANGELES *v.* DAVID

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02–1212. Decided May 19, 2003

Respondent David paid petitioner Los Angeles $134.50 to recover his car, which had been towed from a spot where parking was prohibited, and requested a hearing to recover the money. The hearing was held 27 days after the car was towed and his claim was denied. He then filed a 42 U. S. C. § 1983 suit, claiming that the city violated his due process rights by failing to provide a sufficiently prompt hearing. The District Court granted the city summary judgment, but the Ninth Circuit reversed, holding that the Constitution required the city to provide an earlier hearing, perhaps within 48 hours of towing and at least within 5 days.

*Held:* The Due Process Clause does not prohibit an agency from imposing the kind of procedural delay experienced here when holding hearings to consider claims such as David's. The three factors that normally determine whether an individual has received the "process" that the Constitution finds "due"—which were set forth in *Mathews* v. *Eldridge*, 424 U. S. 319, 335, and applied in *FDIC* v. *Mallen*, 486 U. S. 230, 242—require reversal of the Ninth Circuit's decision. The first factor—the "private interest" affected by the official action—is a monetary interest that does not work the far more serious harm caused by the temporary deprivation of a job that was at issue in *Mallen*. The second factor—concern for accuracy—also does not support the Ninth Circuit's conclusion. A 30-day delay in presenting evidence is unlikely to spawn significant factual errors, and the nature of the issue—whether a car is illegally parked—indicates that initial towing errors are unlikely. The third factor—the government's interest—argues strongly in the city's favor. Only five percent of the 1,000 impound hearings the city holds annually are conducted within 48 hours, and those involve persons who cannot afford the impoundment fees. The delay is substantially required by administrative needs related to organizing the hearing, *e. g.*, arranging for the towing officer to appear. Requiring the city to hold 1,000 hearings, rather than 50, within a short time period would prove burdensome.

Certiorari granted; 307 F. 3d 1143, reversed.

PER CURIAM.

On August 13, 1998, an officer of the city of Los Angeles Department of Transportation ordered respondent Edwin David's automobile towed from a spot where parking was forbidden. After paying $134.50, David recovered his car. David, believing that the trees obstructed his view of the "no parking" sign, requested a hearing to recover the money. On September 9, 1998—27 days after the vehicle was towed—the city held the hearing and denied David's claim.

David then brought this lawsuit in Federal District Court under Rev. Stat. § 1979, 42 U. S. C. § 1983, arguing that the city, in failing to provide a sufficiently prompt hearing, had violated his federal right to "due process of law." Amdt. 14, § 1. The District Court granted summary judgment for the city. The Court of Appeals for the Ninth Circuit, by a vote of 2 to 1, reversed, holding that the Constitution required the city to provide an earlier payment-recovery hearing, perhaps within 48 hours of the towing and at least within 5 days. 307 F. 3d 1143, 1147 (2002). The city, seeking certiorari here, argues that the Ninth Circuit's holding runs contrary to well-settled principles of constitutional law. We agree. We grant the writ and summarily reverse the Ninth Circuit's judgment.

In *Mathews* v. *Eldridge,* 424 U. S. 319, 335 (1976), the Court set forth three factors that normally determine whether an individual has received the "process" that the Constitution finds "due":

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

By weighing these concerns, courts can determine whether a State has met the "fundamental requirement of due process"—"the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.*, at 333.

In *FDIC* v. *Mallen*, 486 U. S. 230, 242 (1988), the Court considered circumstances in which "impairment of an individual's property is not preceded by any opportunity for a pre-deprivation hearing." A Government agency had suspended an indicted bank employee from his job. A statute required the agency to provide a postdeprivation hearing within 30 days and to issue a decision within 60 days of that hearing. The bank employee claimed that the 30- or 90-day delay between (a) the suspension and (b) the postsuspension hearing and decision violated the Due Process Clause. The Court recognized that there "is a point at which an unjustified delay in completing a post-deprivation proceeding 'would become a constitutional violation.'" *Ibid.* It applied *Eldridge*-type factors to determine whether that point had been reached. 486 U. S., at 242 (assessing the importance of, and harm to, the private interest, the likelihood of interim error, and the governmental interest in a delay). And it concluded that a 30-day delay of the hearing, and a potential 90-day delay of a decision, did not violate the Constitution. *Id.*, at 243.

*Eldridge*, as applied in *Mallen*, requires reversal of the Ninth Circuit's decision. The first *Eldridge* factor, the "private interest," is a monetary interest here. It consists of the private individual's interest in maintaining the use of money between (a) the time of paying the impoundment and towing fees and (b) the time of the hearing. The temporary deprivation of a job, the "private interest" at issue in *Mallen*, typically works a far more serious harm. Cf. *Eldridge*, *supra*, at 340 (distinguishing in this respect between benefits "not based upon financial need" and welfare assistance "given to persons on the very margin of subsistence"). So does a temporary deprivation of the use of the automobile

itself—the relevant deprivation at issue in the lower court cases to which the Ninth Circuit looked for support. See *Stypmann* v. *San Francisco*, 557 F. 2d 1338, 1342–1344 (CA9 1977). Cf. *Goichman* v. *Rheuban Motors, Inc.*, 682 F. 2d 1320, 1324 (CA9 1982). Indeed, the city indicates that any loss in the time value of the money can be compensated by an interest payment. Pet. for Cert. 7.

The second *Eldridge* factor—concern for accuracy—does not support the Ninth Circuit's conclusion. A 30-day delay in presenting evidence is unlikely to spawn significant factual errors. Administrative and judicial proceedings normally take place after considerably more time has elapsed. And the straightforward nature of the issue—whether the car was illegally parked—indicates that initial towing errors, while they may occur, are unlikely. Cf. *Mallen*, *supra*, at 244–245 (finding "little likelihood that the deprivation is without basis" in light of the grand jury indictment).

The third *Eldridge* factor—the "Government's interest"—argues strongly in the city's favor. The nature of the city's interest in delay is one of administrative necessity. The city points out that it "conducts more than a thousand vehicle impound hearings annually." Pet. for Cert. 8. It holds about five percent of these hearings—those involving individuals who are unable to afford the impoundment fees—within 48 hours. *Ibid.* It "takes time to organize hearings: there are only so many courtrooms and presiding officials; the city has to contact the towing officer and arrange for his appearance; the city may have to find a substitute to cover that officer's responsibilities while he attends the hearing." 307 F. 3d, at 1149 (Kozinski, J., dissenting). And the Ninth Circuit's holding, which presumably would require the city to schedule annually 1,000 or more hearings, instead of 50 hearings, within a 48-hour (or 5-day) time limit, will prove burdensome. The administrative resources available to modern police departments are not limitless. The administrative necessity supporting the delay here is no less sub-

stantial than the governmental interest in the 30-day hearing delay in *Mallen*, namely, the need to protect the integrity of the banking system and to prepare thoroughly for the hearing. *Mallen*, *supra*, at 244. We also add that the reason for denying a predeprivation hearing here—such a hearing is impossible if the city is to be able to enforce the parking rules—is not any less important than in *Mallen*.

We conclude that the 27-day delay in holding a hearing here reflects no more than a routine delay substantially required by administrative needs. Our cases make clear that the Due Process Clause does not prohibit an agency from imposing this kind of procedural delay when holding hearings to consider claims of the kind here at issue. The Ninth Circuit's judgment to the contrary is reversed.

*It is so ordered.*

# KANSAS *v.* NEBRASKA

ON BILL OF COMPLAINT

No. 126, Orig. Decree entered May 19, 2003

The Final Report of the Special Master is received and ordered filed.

## DECREE

This cause, having come to be heard on the Second Report of the Special Master appointed by this Court, and on the Parties' Joint Motion for Approval of Final Settlement Stipulation, which accompanies said Report, IT IS HEREBY ORDERED THAT:

1. The Final Settlement Stipulation executed by all of the parties to this case and filed with the Special Master on December 16, 2002, is approved;

2. This action is recommitted to the Special Master for the sole purpose of deciding procedural questions arising in the completion by the state parties of the RRCA Groundwater Model pursuant to the binding procedures prescribed by the Final Settlement Stipulation. All claims, counterclaims, and cross-claims for which leave to file was or could have been sought in this case arising prior to December 15, 2002, are hereby dismissed with prejudice effective upon the filing by the Special Master of a final report certifying adoption of the RRCA Groundwater Model by the state parties.

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# NEVADA DEPARTMENT OF HUMAN RESOURCES ET AL. *v.* HIBBS ET AL.

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

No. 01–1368. Argued January 15, 2003—Decided May 27, 2003

Respondent Hibbs (hereinafter respondent), an employee of the Nevada Department of Human Resources (Department), sought leave to care for his ailing wife under the Family and Medical Leave Act of 1993 (FMLA), which entitles an eligible employee to take up to 12 work weeks of unpaid leave annually for the onset of a "serious health condition" in the employee's spouse and for other reasons, 29 U. S. C. § 2612(a)(1)(C). The Department granted respondent's request for the full 12 weeks of FMLA leave, but eventually informed him that he had exhausted that leave and that he must report to work by a certain date. Respondent failed to do so and was terminated. Pursuant to FMLA provisions creating a private right of action to seek both equitable relief and money damages "against any employer (including a public agency)," § 2617(a)(2), that "interfere[d] with, restrain[ed], or den[ied] the exercise of" FMLA rights, § 2615(a)(1), respondent sued petitioners, the Department and two of its officers, in Federal District Court seeking damages and injunctive and declaratory relief for, *inter alia*, violations of § 2612(a)(1)(C). The court awarded petitioners summary judgment on the grounds that the FMLA claim was barred by the Eleventh Amendment and that respondent's Fourteenth Amendment rights had not been violated. The Ninth Circuit reversed.

*Held:* State employees may recover money damages in federal court in the event of the State's failure to comply with the FMLA's family-care provision. Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. See, *e. g.*, *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 363. The FMLA satisfies the clear statement rule. See *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 73–78. Congress also acted within its authority under § 5 of the Fourteenth Amendment when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision. In the exercise of its § 5 power, Congress may enact so-called prophylactic legislation that proscribes facially constitutional con-

duct in order to prevent and deter unconstitutional conduct, *e. g.*, *City of Boerne* v. *Flores*, 521 U. S. 507, 536, but it may not attempt to substantively redefine the States' legal obligations, *Kimel*, *supra*, at 88. The test for distinguishing appropriate prophylactic legislation from substantive redefinition is that valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, *supra*, at 520. The FMLA aims to protect the right to be free from gender-based discrimination in the workplace. Statutory classifications that distinguish between males and females are subject to heightened scrutiny, see, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 197–199; *i. e.*, they must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives," *United States* v. *Virginia*, 518 U. S. 515, 533. When it enacted the FMLA, Congress had before it significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the States, which is weighty enough to justify the enactment of prophylactic § 5 legislation. Cf. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456. *Garrett*, *supra*, and *Kimel*, *supra*, in which the Court reached the opposite conclusion, are distinguished on the ground that the § 5 legislation there at issue responded to a purported tendency of state officials to make age- or disability-based distinctions, characteristics that are not judged under a heightened review standard, but pass equal protection muster if there is a rational basis for enacting them. See, *e. g.*, *Kimel*, *supra*, at 86. Here, because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than the rational-basis test, it was easier for Congress to show a pattern of state constitutional violations. Cf. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–313. The impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities, is significant. Moreover, Congress' chosen remedy, the FMLA's family-care provision, is "congruent and proportional to the targeted violation," *Garrett*, *supra*, at 374. Congress had already tried unsuccessfully to address this problem through Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act. Where previous legislative attempts have failed, see *Katzenbach*, *supra*, at 313, such problems may justify added prophylactic measures in response, *Kimel*, *supra*, at 88. By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female

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employees, and that employers could not evade leave obligations simply by hiring men. Unlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. Also significant are the many other limitations that Congress placed on the FMLA's scope. See *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 647. For example, the FMLA requires only unpaid leave, § 2612(a)(1); applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months, § 2611(2)(A); and does not apply to employees in high-ranking or sensitive positions, including state elected officials, their staffs, and appointed policymakers, §§ 2611(2)(B)(i) and (3), 203(e)(2)(C). Pp. 726–740.

273 F. 3d 844, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 740. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 740. SCALIA, J., filed a dissenting opinion, *post*, p. 741. KENNEDY, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 744.

*Paul G. Taggart*, Deputy Attorney General of Nevada, argued the cause for petitioners. With him on the briefs were *Frankie Sue Del Papa*, Attorney General, and *Traci L. Lovitt*.

*Cornelia T. L. Pillard* argued the cause for respondent Hibbs. With her on the brief were *Jonathan J. Frankel*, *Judith L. Lichtman*, and *Treva J. Hearne*.

*Assistant Attorney General Dinh* argued the cause for the United States. With him on the brief were *Solicitor General Olson*, *Assistant Attorneys General Boyd* and *McCallum*, *Deputy Solicitor General Clement*, *Patricia A. Millett*, *Mark B. Stern*, and *Kathleen Kane*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Bill Pryor*, Attorney General of Alabama, *Nathan A. Forrester*, Solicitor General, and *Charles B. Campbell*, Deputy Solicitor Gen-

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition" in an employee's spouse, child, or parent. 107 Stat. 9, 29 U. S. C. § 2612(a)(1)(C). The Act creates a private right of action to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," § 2617(a)(2), should that em-

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eral, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *M. Jane Brady* of Delaware, *Earl I. Anzai* of Hawaii, *Steve Carter* of Indiana, *Don Stenberg* of Nebraska, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Charles M. Condon* of South Carolina, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Mark Shurtleff* of Utah, and *Jerry W. Kilgore* of Virginia; for the Coalition for Local Sovereignty by *Kenneth B. Clark;* and for the Pacific Legal Foundation by *Deborah J. La Fetra.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Michelle Aronowitz*, Deputy Solicitor General, *Denise A. Hartman*, *Robert H. Easton*, and *David Axinn*, Assistant Solicitors General, and *Hilary Klein*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *James Ryan* of Illinois, *Michael Hatch* of Minnesota, *Patricia A. Madrid* of New Mexico, and *Christine O. Gregoire* of Washington; for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, *Laurence Gold*, and *Michael H. Gottesman;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Sidney S. Rosdeitcher*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Michael Foreman*, *Vincent A. Eng*, *Dennis Courtland Hayes*, and *Angela Ciccolo;* for the National Women's Law Center et al. by *Walter Dellinger*, *Pamela Harris*, *Marcia D. Greenberger*, *Judith C. Appelbaum*, and *Dina R. Lassow;* for Senator Christopher Dodd et al. by *Mark E. Haddad* and *Carter G. Phillips;* and for Alice Kessler-Harris et al. by *Isabelle Katz Pinzler*, *Conrad K. Harper*, and *William T. Russell, Jr.*

ployer "interfere with, restrain, or deny the exercise of" FMLA rights, § 2615(a)(1). We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act.

Petitioners include the Nevada Department of Human Resources (Department) and two of its officers. Respondent William Hibbs (hereinafter respondent) worked for the Department's Welfare Division. In April and May 1997, he sought leave under the FMLA to care for his ailing wife, who was recovering from a car accident and neck surgery. The Department granted his request for the full 12 weeks of FMLA leave and authorized him to use the leave intermittently as needed between May and December 1997. Respondent did so until August 5, 1997, after which he did not return to work. In October 1997, the Department informed respondent that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report to work by November 12, 1997. Respondent failed to do so and was terminated.

Respondent sued petitioners in the United States District Court seeking damages and injunctive and declaratory relief for, *inter alia,* violations of 29 U. S. C. § 2612(a)(1)(C). The District Court awarded petitioners summary judgment on the grounds that the FMLA claim was barred by the Eleventh Amendment and that respondent's Fourteenth Amendment rights had not been violated. Respondent appealed, and the United States intervened under 28 U. S. C. § 2403 to defend the validity of the FMLA's application to the States. The Ninth Circuit reversed. 273 F. 3d 844 (2001).

We granted certiorari, 536 U. S. 938 (2002), to resolve a split among the Courts of Appeals on the question whether an individual may sue a State for money damages in federal court for violation of § 2612(a)(1)(C). Compare *Kazmier* v.

*Widmann*, 225 F. 3d 519, 526, 529 (CA5 2000), with 273 F. 3d 844 (case below).

For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 363 (2001); *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 72–73 (2000); *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 669–670 (1999); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 54 (1996); *Hans* v. *Louisiana*, 134 U. S. 1, 15 (1890).

Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. See *Garrett*, *supra*, at 363; *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 786 (1991) (citing *Dellmuth* v. *Muth*, 491 U. S. 223, 228 (1989)). The clarity of Congress' intent here is not fairly debatable. The Act enables employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U. S. C. § 2617(a)(2), and Congress has defined "public agency" to include both "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State," §§ 203(x), 2611(4)(A)(iii). We held in *Kimel* that, by using identical language in the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, Congress satisfied the clear statement rule of *Dellmuth*. 528 U. S., at 73–78. This case turns, then, on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision.

In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment

to enforce that Amendment's guarantees.[1] Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. *Seminole Tribe*, *supra.* Congress may, however, abrogate States' sovereign immunity through a valid exercise of its § 5 power, for "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 (1976) (citation omitted). See also *Garrett*, *supra*, at 364; *Kimel*, *supra*, at 80.

Two provisions of the Fourteenth Amendment are relevant here: Section 5 grants Congress the power "to enforce" the substantive guarantees of § 1—among them, equal protection of the laws—by enacting "appropriate legislation." Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. " 'Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.' " *Garrett*, *supra*, at 365 (quoting *Kimel*, *supra*, at 81); *City of Boerne* v. *Flores*, 521 U. S. 507, 536 (1997); *Katzenbach* v. *Morgan*, 384 U. S. 641, 658 (1966). In other words, Congress may enact so-called prophylactic

[1] Compare 29 U. S. C. § 2601(b)(1) ("It is the purpose of this Act . . . to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity") with § 2601(b)(5) ("to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection C]lause") and § 2601(b)(4) ("to accomplish [the Act's other purposes] in a manner that, consistent with the Equal Protection Clause . . . , minimizes the potential for employment discrimination on the basis of sex"). See also S. Rep. No. 103–3, p. 16 (1993) (the FMLA "is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment"); H. R. Rep. No. 103–8, pt. 1, p. 29 (1993) (same).

legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.

*City of Boerne* also confirmed, however, that it falls to this Court, not Congress, to define the substance of constitutional guarantees. 521 U. S., at 519–524. "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." *Kimel*, 528 U. S., at 81. Section 5 legislation reaching beyond the scope of § 1's actual guarantees must be an appropriate remedy for identified constitutional violations, not "an attempt to substantively redefine the States' legal obligations." *Id.*, at 88. We distinguish appropriate prophylactic legislation from "substantive redefinition of the Fourteenth Amendment right at issue," *id.*, at 81, by applying the test set forth in *City of Boerne:* Valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," 521 U. S., at 520.

The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.[2] We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny. See, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 197–199 (1976). For a gender-based classification to withstand such scrutiny, it must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives." *United*

[2] The text of the Act makes this clear. Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U. S. C. § 2601(a)(5). In response to this finding, Congress sought "to accomplish the [Act's other] purposes . . . in a manner that . . . minimizes the potential for employment discrimination *on the basis of sex* by ensuring generally that leave is available . . . *on a gender-neutral basis[,]* and to promote the goal of equal employment opportunity *for women and men* . . . ." §§ 2601(b)(4) and (5) (emphasis added).

*States* v. *Virginia*, 518 U. S. 515, 533 (1996) (citations and internal quotation marks omitted). The State's justification for such a classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area.

The history of the many state laws limiting women's employment opportunities is chronicled in—and, until relatively recently, was sanctioned by—this Court's own opinions. For example, in *Bradwell* v. *State*, 16 Wall. 130 (1873) (Illinois), and *Goesaert* v. *Cleary*, 335 U. S. 464, 466 (1948) (Michigan), the Court upheld state laws prohibiting women from practicing law and tending bar, respectively. State laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they could take. In *Muller* v. *Oregon*, 208 U. S. 412, 419, n. 1 (1908), for example, this Court approved a state law limiting the hours that women could work for wages, and observed that 19 States had such laws at the time. Such laws were based on the related beliefs that (1) a woman is, and should remain, "the center of home and family life," *Hoyt* v. *Florida*, 368 U. S. 57, 62 (1961), and (2) "a proper discharge of [a woman's] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man," *Muller*, *supra*, at 422. Until our decision in *Reed* v. *Reed*, 404 U. S. 71 (1971), "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' "—such as the above beliefs—"could be conceived for the discrimination." *Virginia*, *supra*, at 531 (quoting *Goesaert*, *supra*, at 467).

Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U. S. C. § 2000e–2(a),

and we sustained this abrogation in *Fitzpatrick*. But state gender discrimination did not cease. "[I]t can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination . . . in the job market." *Frontiero* v. *Richardson*, 411 U. S. 677, 686 (1973). According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area. *Virginia*, *supra*, at 533. The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation.

As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. S. Rep. No. 103–3, pp. 14–15 (1993). The corresponding numbers from a similar BLS survey the previous year were 33 percent and 16 percent, respectively. *Ibid.* While these data show an increase in the percentage of employees eligible for such leave, they also show a widening of the gender gap during the same period. Thus, stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread.[3]

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[3] While this and other material described leave policies in the private sector, a 50-state survey also before Congress demonstrated that "[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees." The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor

Congress also heard testimony that "[p]arental leave for fathers . . . is rare. Even . . . [w]here child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave." Joint Hearing 147 (Washington Council of Lawyers) (emphasis added). Many States offered women extended "maternity" leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth,[4] but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. M. Lord & M. King, The State Reference Guide to Work-Family Programs for State Employees 30 (1991). This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.[5]

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Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 33 (1986) (hereinafter Joint Hearing) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project). See also *id.*, at 29–30.

[4] See, *e. g.*, *id.*, at 16 (six weeks is the medically recommended pregnancy disability leave period); H. R. Rep. No. 101–28, pt. 1, p. 30 (1989) (referring to Pregnancy Discrimination Act legislative history establishing four to eight weeks as the medical recovery period for a normal childbirth).

[5] For example, state employers' collective-bargaining agreements often granted extended "maternity" leave of six months to a year to women only. Gerald McEntee, President of the American Federation of State, County and Municipal Employees, AFL–CIO, testified that "the vast majority of our contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave." The Parental and Medical Leave Act of 1987: Hearings before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., pt. 1, p. 385 (1987) (hereinafter 1987 Senate Labor Hearings). In addition, state leave laws often specified that catchall leave-without-pay provisions could be used for extended maternity leave, but did not authorize such leave for paternity purposes. See, *e. g.*, Family and Medical Leave Act of 1987: Joint Hearing before the House Committee on Post Office and Civil Service, 100th Cong.,

Finally, Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of that leave rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment." H. R. Rep. No. 103–8, pt. 2, pp. 10–11 (1993). Testimony supported that conclusion, explaining that "[t]he lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimination is rampant." 1987 Senate Labor Hearings, pt. 2, at 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago).

In spite of all of the above evidence, JUSTICE KENNEDY argues in dissent that Congress' passage of the FMLA was unnecessary because "the States appear to have been ahead of Congress in providing gender-neutral family leave benefits," *post*, at 750, and points to Nevada's leave policies in particular, *post*, at 755. However, it was only "[s]ince Federal family leave legislation was first introduced" that the States had even "begun to consider similar family leave initiatives." S. Rep. No. 103–3, at 20; see also S. Rep. No. 102–

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1st Sess., 2–5 (1987) (Rep. Gary Ackerman recounted suffering expressly sex-based denial of unpaid leave of absence where benefit was ostensibly available for "child care leave").

Evidence pertaining to parenting leave is relevant here because state discrimination in the provision of both types of benefits is based on the same gender stereotype: that women's family duties trump those of the workplace. JUSTICE KENNEDY's dissent (hereinafter dissent) ignores this common foundation that, as Congress found, has historically produced discrimination in the hiring and promotion of women. See *post*, at 748–749. Consideration of such evidence does not, as the dissent contends, expand our § 5 inquiry to include "*general* gender-based stereotypes in employment." *Post*, at 749 (emphasis added). To the contrary, because parenting and family leave address very similar situations in which work and family responsibilities conflict, they implicate the same stereotypes.

68, p. 77 (1991) (minority views of Sen. Durenberger) ("[S]o few states have elected to enact similar legislation at the state level").

Furthermore, the dissent's statement that some States "had adopted some form of family-care leave" before the FMLA's enactment, *post,* at 750, glosses over important shortcomings of some state policies. First, seven States had childcare leave provisions that applied to women only. Indeed, Massachusetts required that notice of its leave provisions be posted only in "establishment[s] in which females are employed."[6] These laws reinforced the very stereotypes that Congress sought to remedy through the FMLA. Second, 12 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member.[7] Third, many States pro-

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[6] Mass. Gen. Laws, ch. 149, § 105D (West 1997) (providing leave to "female employee[s]" for childbirth or adoption); see also 3 Colo. Code Regs. § 708–1, Rule 80.8 (2002) (pregnancy disability leave only); Iowa Code § 216.6(2) (2000) (former § 601A.6(2)) (same); Kan. Admin. Regs. 21–32–6(d) (2003) ("a reasonable period" of maternity leave for female employees only); N. H. Stat. Ann. § 354–A:7(VI)(b) (Michie Supp. 2000) (pregnancy disability leave only); La. Stat. Ann. § 23:1008(A)(2) (West Supp. 1993) (repealed 1997) (4-month maternity leave for female employees only); Tenn. Code Ann. § 4–21–408(a) (1998) (same).

The dissent asserts that four of these schemes—those of Colorado, Iowa, Louisiana, and New Hampshire—concern "pregnancy disability leave only." *Post,* at 752. But Louisiana provided women with four months of such leave, which far exceeds the medically recommended pregnancy disability leave period of six weeks. See n. 4, *supra.* This gender-discriminatory policy is not attributable to any different physical needs of men and women, but rather to the invalid stereotypes that Congress sought to counter through the FMLA. See *supra,* at 731.

[7] See 3 Colo. Code Regs. § 708–1, Rule 80.8 (2002); Del. Code Ann., Tit. 29, § 5116 (1997); Iowa Code § 216.6(2) (2000); Kan. Admin. Regs. 21–32–6 (2003); Ky. Rev. Stat. Ann. § 337.015 (Michie 2001); La. Stat. Ann. § 23:1008(A)(2) (West Supp. 1993); Mass. Gen. Laws, ch. 149, § 105(D) (West 1997); Mo. Rev. Stat. § 105.271 (2000); N. H. Stat. Ann. § 354–A:7(VI)(b) (Michie Supp. 2000); N. Y. Lab. Law § 201–c (West 2002); Tenn. Code

vided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands.[8] Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate. Finally, four States provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law.[9] Against the above backdrop of limited state leave policies, no matter how generous petitioners' own may have been, see *post*, at 755 (dissent), Congress was justified in enacting the FMLA as remedial legislation.[10]

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Ann. § 4–21–408(a) (1998); U. S. Dept. of Labor, Women's Bureau, State Maternity/Family Leave Law, p. 12 (June 1993) (citing a Virginia personnel policy).

[8] See 3 Colo. Code Regs. § 708–1, Rule 80.8 (2002); Kan. Admin. Regs. 21–32–6 (2003); N. H. Stat. Ann. § 354–A:7(VI)(b) (Michie Supp. 2000). Oklahoma offered only a system by which employees could voluntarily donate leave time for colleagues' family emergencies. Okla. Stat., Tit. 74, § 840–2.22 (historical note) (West 2002).

[9] See 3 Colo. Code Regs. § 708–1, Rule 80.8 (2002); Kan. Admin. Regs. 21–32–6 (2003); Wis. Admin. Code ch. DWD 225 (1997) (former ch. ILHR 225); State Maternity/Family Leave Law, *supra*, at 12 (Virginia).

[10] Contrary to the dissent's belief, we do not hold that Congress may "abrogat[e] state immunity from private suits whenever the State's social benefits program is not enshrined in the statutory code and provides employers with discretion," *post*, at 753, or when a State does not confer social benefits "as generous or extensive as Congress would later deem appropriate," *post*, at 752. The dissent misunderstands the purpose of the FMLA's family-leave provision. The FMLA is not a "substantive entitlement program," *post*, at 754; Congress did not create a particular leave policy for its own sake. See *infra*, at 737–738. Rather, Congress sought to adjust family-leave policies in order to eliminate their reliance on, and perpetuation of, invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace. In pursuing that goal, for the reasons discussed above,

In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.[11]

We reached the opposite conclusion in *Garrett* and *Kimel*. In those cases, the § 5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is "a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Kimel*, 528 U. S., at 86 (quoting *Gregory* v. *Ashcroft*, 501 U. S. 452, 473 (1991)). See also *Garrett*, 531 U. S., at 367 ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational"). Thus, in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a "widespread pattern" of irrational reliance on such criteria. *Kimel*, *supra*, at 90. We found no such showing with respect to the ADEA and Title I of the Americans with Disabilities Act of 1990 (ADA). *Kimel*, *supra*, at 89; *Garrett*, *supra*, at 368.

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*supra*, at 733–734 and this page, Congress reasonably concluded that state leave laws and practices should be brought within the Act.

[11] Given the extent and specificity of the above record of unconstitutional state conduct, it is difficult to understand the dissent's accusation that we rely on "a simple recitation of a general history of employment discrimination against women." *Post*, at 746. As we stated above, our holding rests on congressional findings that, at the time the FMLA was enacted, States "rel[ied] on invalid gender stereotypes in the employment context, *specifically in the administration of leave benefits.*" *Supra*, at 730 (emphasis added). See *supra*, at 730–732.

Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. See, *e. g.*, *Craig*, 429 U. S., at 197–199. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test—it must "serv[e] important governmental objectives" and be "substantially related to the achievement of those objectives," *Virginia*, 518 U. S., at 533—it was easier for Congress to show a pattern of state constitutional violations. Congress was similarly successful in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–313 (1966), where we upheld the Voting Rights Act of 1965: Because racial classifications are presumptively invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment.

The impact of the discrimination targeted by the FMLA is significant. Congress determined:

> "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be." Joint Hearing 100.

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is "congruent and proportional to the targeted violation," *Garrett*, *supra*, at 374. Congress had already tried unsuccessfully to address this problem through Title VII and the amendment of Title VII by the Pregnancy Discrimination Act, 42 U. S. C. § 2000e(k). Here, as in *Katzenbach*, *supra*, Congress again confronted a "difficult and intractable proble[m]," *Kimel*, *supra*, at 88, where previous legislative attempts had failed. See *Katzenbach*, *supra*, at 313 (upholding the Voting Rights Act). Such problems may justify added prophylactic measures in response. *Kimel*, *supra*, at 88.

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

The dissent characterizes the FMLA as a "substantive entitlement program" rather than a remedial statute because it establishes a floor of 12 weeks' leave. *Post*, at 754. In the dissent's view, in the face of evidence of gender-based discrimination by the States in the provision of leave benefits, Congress could do no more in exercising its § 5 power than simply proscribe such discrimination. But this position cannot be squared with our recognition that Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," but may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, *supra*, at 81. For example, this Court has

upheld certain prophylactic provisions of the Voting Rights Act as valid exercises of Congress' § 5 power, including the literacy test ban and preclearance requirements for changes in States' voting procedures. See, *e. g.*, *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *Oregon* v. *Mitchell*, 400 U. S. 112 (1970); *South Carolina* v. *Katzenbach*, *supra.*

Indeed, in light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all. Where "[t]wothirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women," H. R. Rep. No. 103–8, pt. 1, at 24; S. Rep. No. 103–3, at 7, and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.

Unlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. Compare *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U. S. 81, 91 (2002) (discussing the "important limitations of the [FMLA's] remedial scheme"), with *City of Boerne*, 521 U. S., at 532 (the "[s]weeping coverage" of the Religious Freedom Restoration Act of 1993); *Kimel*, 528 U. S., at 91 ("the indiscriminate scope of the [ADEA's] substantive requirements"); and *Garrett*, 531 U. S., at 361 (the ADA prohibits disability discrimination "in regard to [any] terms, conditions, and privileges of employment" (internal quotation marks omitted)).

We also find significant the many other limitations that Congress placed on the scope of this measure. See *Florida Prepaid*, 527 U. S., at 647 ("[W]here 'a congressional enact-

ment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5' " (quoting *City of Boerne*, *supra*, at 532–533)). The FMLA requires only unpaid leave, 29 U. S. C. § 2612(a)(1), and applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months, § 2611(2)(A). Employees in high-ranking or sensitive positions are simply ineligible for FMLA leave; of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers. §§ 2611(2)(B)(i) and (3), 203(e)(2)(C). Employees must give advance notice of foreseeable leave, § 2612(e), and employers may require certification by a health care provider of the need for leave, § 2613. In choosing 12 weeks as the appropriate leave floor, Congress chose "a middle ground, a period long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.' " *Ragsdale*, *supra*, at 94 (quoting 29 U. S. C. § 2601(b)).[12] Moreover, the cause

[12] Congress established 12 weeks as a floor, thus leaving States free to provide their employees with more family-leave time if they so choose. See 29 U. S. C. § 2651(b) ("Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act"). The dissent faults Congress for giving States this choice, arguing that the FMLA's terms do not bar States from granting more family-leave time to women than to men. *Post*, at 756. But JUSTICE KENNEDY effectively counters his own argument in his very next breath, recognizing that such gender-based discrimination would "run afoul of the Equal Protection Clause or Title VII." *Ibid.* In crafting new legislation to remedy unconstitutional state conduct, Congress may certainly rely on and take account of existing laws. Indeed, Congress expressly did so here. See 29 U. S. C. § 2651(a) ("Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of . . . sex . . .").

of action under the FMLA is a restricted one: The damages recoverable are strictly defined and measured by actual monetary losses, §§ 2617(a)(1)(A)(i)–(iii), and the accrual period for backpay is limited by the Act's 2-year statute of limitations (extended to three years only for willful violations), §§ 2617(c)(1) and (2).

For the above reasons, we conclude that § 2612(a)(1)(C) is congruent and proportional to its remedial object, and can "be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, *supra*, at 532.

The judgment of the Court of Appeals is therefore

*Affirmed.*

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

Even on this Court's view of the scope of congressional power under § 5 of the Fourteenth Amendment, see *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356 (2001); *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62 (2000); *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627 (1999), the Family and Medical Leave Act of 1993 is undoubtedly valid legislation, and application of the Act to the States is constitutional; the same conclusions follow *a fortiori* from my own understanding of § 5, see *Garrett*, *supra*, at 376 (BREYER, J., dissenting); *Kimel*, *supra*, at 92 (STEVENS, J., dissenting); *Florida Prepaid*, *supra*, at 648 (STEVENS, J., dissenting); see also *Katzenbach* v. *Morgan*, 384 U. S. 641, 650–651 (1966). I join the Court's opinion here without conceding the dissenting positions just cited or the dissenting views expressed in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 100 (1996) (SOUTER, J., dissenting).

JUSTICE STEVENS, concurring in the judgment.

Because I have never been convinced that an Act of Congress can amend the Constitution and because I am uncer-

tain whether the congressional enactment before us was truly "'needed to secure the guarantees of the Fourteenth Amendment,'" I write separately to explain why I join the Court's judgment. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 458 (1976) (STEVENS, J., concurring in judgment) (quoting *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966)).

The plain language of the Eleventh Amendment poses no barrier to the adjudication of this case because respondents are citizens of Nevada. The sovereign immunity defense asserted by Nevada is based on what I regard as the second Eleventh Amendment, which has its source in judge-made common law, rather than constitutional text. *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 23 (1989) (STEVENS, J., concurring). As long as it clearly expresses its intent, Congress may abrogate that common-law defense pursuant to its power to regulate commerce "among the several States." U. S. Const., Art. I, § 8. The family-care provision of the Family and Medical Leave Act of 1993 is unquestionably a valid exercise of a power that is "broad enough to support federal legislation regulating the terms and conditions of state employment." *Fitzpatrick*, 427 U. S., at 458 (STEVENS, J., concurring in judgment).* Accordingly, Nevada's sovereign immunity defense is without merit.

JUSTICE SCALIA, dissenting.

I join JUSTICE KENNEDY's dissent, and add one further observation: The constitutional violation that is a prerequisite to "prophylactic" congressional action to "enforce" the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken.* There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even

*See Stevens, "Two Questions About Justice," 2003 U. Ill. L. Rev. 821 (discussing *Fitzpatrick*).

by 49 other States. We explained as much long ago in the *Civil Rights Cases*, 109 U. S. 3, 14 (1883), which invalidated a portion of the Civil Rights Act of 1875, purportedly based on § 5, in part for the following reason:

> "It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment."

Congress has sometimes displayed awareness of this self-evident limitation. That is presumably why the most sweeping provisions of the Voting Rights Act of 1965—which we upheld in *City of Rome* v. *United States*, 446 U. S. 156 (1980), as a valid exercise of congressional power under § 2 of the Fifteenth Amendment*—were restricted to States "with a demonstrable history of intentional racial discrimination in voting," *id.*, at 177.

Today's opinion for the Court does not even attempt to demonstrate that each one of the 50 States covered by 29 U. S. C. § 2612(a)(1)(C) was in violation of the Fourteenth Amendment. It treats "the States" as some sort of collective entity which is guilty or innocent as a body. "[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination," it concludes, "is weighty enough to justify the enactment of prophylactic § 5 legislation." *Ante*, at 735. This will not do. Prophylaxis in the sense of extending the remedy beyond the violation is one thing; prophylaxis in the sense of extending the remedy beyond the violator is something else. See *City of Rome*, *supra*, at 177 ("Congress could rationally have concluded

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*Section 2 of the Fifteenth Amendment is practically identical to § 5 of the Fourteenth Amendment. Compare Amdt. 14, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"), with Amdt. 15, § 2 ("The Congress shall have power to enforce this article by appropriate legislation").

that, because electoral changes *by jurisdictions with a demonstrable history of intentional racial discrimination* in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact" (emphasis added)).

When a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional *as applied to him.* See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973). When, on the other hand, a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face. Ante*, at 727–728; *Post*, at 744 (KENNEDY, J., dissenting); see *United States* v. *Morrison*, 529 U. S. 598 (2000); *City of Boerne* v. *Flores*, 521 U. S. 507 (1997); *United States* v. *Lopez*, 514 U. S. 549 (1995). If the statute survives this challenge, however, it stands to reason that the court may, if asked, proceed to analyze whether the statute (constitutional on its face) can be validly applied to the litigant. In the context of § 5 prophylactic legislation applied against a State, this would entail examining whether the State has itself engaged in discrimination sufficient to support the exercise of Congress's prophylactic power.

It seems, therefore, that for purposes of defeating petitioners' challenge, it would have been enough for respondents to demonstrate that § 2612(a)(1)(C) was *facially* valid—*i. e.*, that it could constitutionally be applied to *some* jurisdictions. See *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). (Even that demonstration, for the reasons set forth by JUSTICE KENNEDY, has not been made.) But when it comes to an as-applied challenge, I think Nevada will be entitled to assert that the mere facts that (1) it is a State, and (2) some States are bad actors, is not enough; it can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment.

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

The Family and Medical Leave Act of 1993 makes explicit the congressional intent to invoke § 5 of the Fourteenth Amendment to abrogate state sovereign immunity and allow suits for money damages in federal courts. *Ante*, at 726–727, and n. 1. The specific question is whether Congress may impose on the States this entitlement program of its own design, with mandated minimums for leave time, and then enforce it by permitting private suits for money damages against the States. This in turn must be answered by asking whether subjecting States and their treasuries to monetary liability at the insistence of private litigants is a congruent and proportional response to a demonstrated pattern of unconstitutional conduct by the States. See *ante*, at 728; *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 365 (2001); *City of Boerne* v. *Flores*, 521 U. S. 507, 520 (1997). If we apply the teaching of these and related cases, the family leave provision of the Act, 29 U. S. C. § 2612(a)(1)(C), in my respectful view, is invalid to the extent it allows for private suits against the unconsenting States.

Congress does not have authority to define the substantive content of the Equal Protection Clause; it may only shape the remedies warranted by the violations of that guarantee. *City of Boerne*, *supra*, at 519–520. This requirement has special force in the context of the Eleventh Amendment, which protects a State's fiscal integrity from federal intrusion by vesting the States with immunity from private actions for damages pursuant to federal laws. The Commerce Clause likely would permit the National Government to enact an entitlement program such as this one; but when Congress couples the entitlement with the authorization to sue the States for monetary damages, it blurs the line of accountability the State has to its own citizens. These basic concerns underlie cases such as *Garrett* and *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62 (2000), and should counsel far

more caution than the Court shows in holding § 2612(a)(1)(C) is somehow a congruent and proportional remedy to an identified pattern of discrimination.

The Court is unable to show that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits. The inability to adduce evidence of alleged discrimination, coupled with the inescapable fact that the federal scheme is not a remedy but a benefit program, demonstrates the lack of the requisite link between any problem Congress has identified and the program it mandated.

In examining whether Congress was addressing a demonstrated "pattern of unconstitutional employment discrimination by the States," the Court gives superficial treatment to the requirement that we "identify with some precision the scope of the constitutional right at issue." *Garrett*, *supra*, at 365, 368. The Court suggests the issue is "the right to be free from gender-based discrimination in the workplace," *ante*, at 728, and then it embarks on a survey of our precedents speaking to "[t]he history of the many state laws limiting women's employment opportunities," *ante*, at 729. All would agree that women historically have been subjected to conditions in which their employment opportunities are more limited than those available to men. As the Court acknowledges, however, Congress responded to this problem by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a). *Ante*, at 729; see also *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). The provision now before us, 29 U. S. C. § 2612(a)(1)(C), has a different aim than Title VII. It seeks to ensure that eligible employees, irrespective of gender, can take a minimum amount of leave time to care for an ill relative.

The relevant question, as the Court seems to acknowledge, is whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination on the basis of gender in the pro-

vision of family leave benefits. *Ante*, at 730. If such a pattern were shown, the Eleventh Amendment would not bar Congress from devising a congruent and proportional remedy. The evidence to substantiate this charge must be far more specific, however, than a simple recitation of a general history of employment discrimination against women. When the federal statute seeks to abrogate state sovereign immunity, the Court should be more careful to insist on adherence to the analytic requirements set forth in its own precedents. Persisting overall effects of gender-based discrimination at the workplace must not be ignored; but simply noting the problem is not a substitute for evidence which identifies some real discrimination the family leave rules are designed to prevent.

Respondents fail to make the requisite showing. The Act's findings of purpose are devoid of any discussion of the relevant evidence. See *Lizzi* v. *Alexander*, 255 F. 3d 128, 135 (CA4 2001) ("In making [its] finding of purpose, Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care"); see also *Chittister* v. *Department of Community and Econ. Dev.*, 226 F. 3d 223, 228–229 (CA3 2000) ("Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause").

As the Court seems to recognize, the evidence considered by Congress concerned discriminatory practices of the private sector, not those of state employers. *Ante*, at 730–731, n. 3. The statistical information compiled by the Bureau of Labor Statistics (BLS), which are the only factual findings the Court cites, surveyed only private employers. *Ante*, at 730. While the evidence of discrimination by private entities may be relevant, it does not, by itself, justify the abrogation of States' sovereign immunity. *Garrett*, 531

U. S., at 368 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions").

The Court seeks to connect the evidence of private discrimination to an alleged pattern of unconstitutional behavior by States through inferences drawn from two sources. The first is testimony by Meryl Frank, Director of the Infant Care Leave Project, Yale Bush Center in Child Development and Social Policy, who surveyed both private and public employers in all 50 States and found little variation between the leave policies in the two sectors. *Ante*, at 730–731, n. 3 (citing The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 33 (1986) (hereinafter Joint Hearing)). The second is a view expressed by the Washington Council of Lawyers that even "'[w]here child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave.'" *Ante*, at 731 (quoting Joint Hearing 147) (emphasis added by the Court).

Both statements were made during the hearings on the proposed 1986 national leave legislation, and so preceded the Act by seven years. The 1986 bill, which was not enacted, differed in an important respect from the legislation Congress eventually passed. That proposal sought to provide parenting leave, not leave to care for another ill family member. Compare H. R. 4300, 99th Cong., 2d Sess., §§ 102(3), 103(a) (1986), with 29 U. S. C. § 2612(a)(1)(C). See also L. Gladstone, Congressional Research Service Issue Brief, Family and Medical Leave Legislation, pp. 4–5, 10 (Oct. 26, 1995); Tr. of Oral Arg. 43 (statement of counsel for the United States that "the first time that the family leave was introduced and the first time the section (5) authority was invoked was in H. R. 925," which was proposed in 1987). The testimony on which the Court relies concerned the discrimination

with respect to the parenting leave. See Joint Hearing 31 (statement of Meryl Frank) (the Yale Bush study "evaluate[d] the impact of the changing composition of the workplace on families with infants"); *id.*, at 147 (statement of the Washington Council of Lawyers) ("[F]or the first time, *child-care* responsibilities of *both* natural and adoptive mothers *and* fathers will be legislatively protected"). Even if this isolated testimony could support an inference that private sector's gender-based discrimination in the provision of parenting leave was parallel to the behavior by state actors in 1986, the evidence would not be probative of the States' conduct some seven years later with respect to a statutory provision conferring a different benefit. The Court of Appeals admitted as much: "We recognize that a weakness in this evidence as applied to Hibbs' case is that the BLS and Yale Bush Center studies deal only with parental leave, not with leave to care for a sick family member. They thus do not document a widespread pattern of precisely the kind of discrimination that § 2612(a)(1)(C) is intended to prevent." 273 F. 3d 844, 859 (CA9 2001).

The Court's reliance on evidence suggesting States provided men and women with the parenting leave of different length, *ante,* at 731, and n. 5, suffers from the same flaw. This evidence concerns the Act's grant of parenting leave, §§ 2612(a)(1)(A), (B), and is too attenuated to justify the family leave provision. The Court of Appeals' conclusion to the contrary was based on an assertion that "if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other." 273 F. 3d, at 859. The charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture.

The Court maintains the evidence pertaining to the parenting leave is relevant because both parenting and family leave provisions respond to "the same gender stereotype: that women's family duties trump those of the workplace."

*Ante*, at 732, n. 5. This sets the contours of the inquiry at too high a level of abstraction. The question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment which "ha[ve] historically produced discrimination in the hiring and promotion of women," *ibid.;* the question is whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave. The evidence of gender-based stereotypes is too remote to support the required showing.

The Court next argues that "even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways." *Ante*, at 732. This charge is based on an allegation that many States did not guarantee the right to family leave by statute, instead leaving the decision up to individual employers, who could subject employees to "'discretionary and possibly unequal treatment.'" *Ibid.* (quoting H. R. Rep. No. 103–8, pt. 2, pp. 10–11 (1993)). The study from which the Court derives this conclusion examined "the parental leave policies of Federal executive branch agencies," H. R. Rep. No. 103–8, at 10, not those of the States. The study explicitly stated that its conclusions concerned federal employees: "'[I]n the absence of a national minimum standard for granting leave for parental purposes, the authority to grant leave and to arrange the length of that leave rests with individual supervisors, leaving Federal employees open to discretionary and possibly unequal treatment.'" *Id.*, at 10–11. A history of discrimination on the part of the Federal Government may, in some situations, support an inference of similar conduct by the States, but the Court does not explain why the inference is justified here.

Even if there were evidence that individual state employers, in the absence of clear statutory guidelines, discriminated in the administration of leave benefits, this circumstance alone would not support a finding of a state-sponsored pattern of discrimination. The evidence could perhaps sup-

port the charge of disparate impact, but not a charge that States have engaged in a pattern of intentional discrimination prohibited by the Fourteenth Amendment. *Garrett*, 531 U. S., at 372–373 (citing *Washington* v. *Davis*, 426 U. S. 229, 239 (1976)).

The federal-state equivalence upon which the Court places such emphasis is a deficient rationale at an even more fundamental level, however; for the States appear to have been ahead of Congress in providing gender-neutral family leave benefits. Thirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the Act's adoption. The reports in both Houses of Congress noted this fact. H. R. Rep. No. 103–8, at 32–33; S. Rep. No. 103–3, pp. 20–21 (1993); see also Brief for State of Alabama et al. as *Amici Curiae* 18–22. Congressional hearings noted that the provision of family leave was "an issue which has picked up tremendous momentum in the States, with some 21 of them having some form of family or medical leave on the books." The Family and Medical Leave Act of 1991: Hearing on H. R. 2 before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 102d Cong., 1st Sess., p. 4 (1991) (statement of Rep. Marge Roukema). Congress relied on the experience of the States in designing the national leave policy to be cost effective and gender neutral. S. Rep. No. 103–3, at 12–14; The Parental and Medical Leave Act of 1987: Hearings on S. 249 before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., pt. 2, pp. 194–195, 533–534 (1987). Congress also acknowledged that many States had implemented leave policies more generous than those envisioned by the Act. H. R. Rep. No. 103–8, pt. 1, at 50; S. Rep. No. 103–3, at 38. At the very least, the history of the Act suggests States were in the process of solving any existing gender-based discrimination in the provision of family leave.

The Court acknowledges that States have adopted family leave programs prior to federal intervention, but argues these policies suffered from serious imperfections. *Ante*, at 733–734. Even if correct, this observation proves, at most, that programs more generous and more effective than those operated by the States were feasible. That the States did not devise the optimal programs is not, however, evidence that the States were perpetuating unconstitutional discrimination. Given that the States assumed a pioneering role in the creation of family leave schemes, it is not surprising these early efforts may have been imperfect. This is altogether different, however, from purposeful discrimination.

The Court's lengthy discussion of the allegedly deficient state policies falls short of meeting this standard. A great majority of these programs exhibit no constitutional defect and, in fact, are authorized by this Court's precedent. The Court points out that seven States adopted leave provisions applicable only to women. *Ante*, at 733. Yet it must acknowledge that three of these schemes concerned solely pregnancy disability leave. *Ante*, at 733, n. 6 (citing 3 Colo. Code Regs. § 708–1, Rule 80.8 (2002); Iowa Code § 216.6(2) (2000); N. H. Stat. Ann. § 354–A:7(VI)(b) (Michie Supp. 2000)). Our cases make clear that a State does not violate the Equal Protection Clause by granting pregnancy disability leave to women without providing for a grant of parenting leave to men. *Geduldig* v. *Aiello*, 417 U. S. 484, 496–497, n. 20 (1974); see also Tr. of Oral Arg. 49 (counsel for the United States conceding that *Geduldig* would permit this practice). The Court treats the pregnancy disability scheme of the fourth State, Louisiana, as a disguised gender-discriminatory provision of parenting leave because the scheme would permit leave in excess of the period Congress believed to be medically necessary for pregnancy disability. *Ante*, at 733, n. 6. The Louisiana statute, however, granted leave only for "that period during which the female employee is disabled on account of pregnancy, child-

birth, or related medical conditions." La. Stat. Ann. § 23:1008(A)(2)(b) (West Supp. 1993) (repealed 1997). Properly administered, the scheme, despite its generous maximum, would not transform into a discriminatory "4-month maternity leave for female employees only." *Ante,* at 733, n. 6.

The Court next observes that 12 States "provided their employees no family leave, beyond an initial childbirth or adoption." *Ante,* at 733. Four of these States are those which, as discussed above, offered pregnancy disability leave only. See *ante,* at 733, n. 7 (citing 3 Colo. Code Regs. § 708–1, Rule 80.8 (2002); Iowa Code § 216.6(2) (2000); La. Stat. Ann. § 23:1008(A)(2) (West Supp. 1993) (repealed 1997); N. H. Stat. Ann. § 354–A:7(VI)(b) (Michie Supp. 2000)). Of the remaining eight States, five offered parenting leave to both men and women on an equal basis; a practice which no one contends suffers from a constitutional infirmity. See *ante,* at 733–734, n. 7 (citing Del. Code Ann., Tit. 29, § 5116 (1997); Ky. Rev. Stat. Ann. § 337.015 (Michie 2001); Mo. Rev. Stat. § 105.271 (2000); N. Y. Lab. Law § 201–c (West 2002); U. S. Dept. of Labor, Women's Bureau, State Maternity/Family Leave Law, p. 12 (June 1993) (discussing the policy adopted by the Virginia Department of Personnel and Training)). The Court does not explain how the provision of social benefits either on a gender-neutral level (as with the parenting leave) or in a way permitted by this Court's case law (as with the pregnancy disability leave) offends the Constitution. Instead, the Court seems to suggest that a pattern of unconstitutional conduct may be inferred solely because a State, in providing its citizens with social benefits, does not make these benefits as generous or extensive as Congress would later deem appropriate.

The Court further chastises the States for having "provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs." *Ante,* at 733–734; see also *ante,* at 734 ("[F]our States pro-

vided leave only through administrative regulations or personnel policies"). The Court does not argue the States intended to enable employers to discriminate in the provision of family leave; nor, as already noted, is there evidence state employers discriminated in the administration of leave benefits. See *supra*, at 749–750. Under the Court's reasoning, Congress seems justified in abrogating state immunity from private suits whenever the State's social benefits program is not enshrined in the statutory code and provides employers with discretion.

Stripped of the conduct which exhibits no constitutional infirmity, the Court's "exten[sive] and specifi[c] . . . record of unconstitutional state conduct," *ante*, at 735, n. 11, boils down to the fact that three States, Massachusetts, Kansas, and Tennessee, provided parenting leave only to their female employees, and had no program for granting their employees (male or female) family leave. See *ante*, at 733–734, nn. 6 and 7 (citing Mass. Gen. Laws, ch. 149, § 105D (West 1997); Kan. Admin. Regs. 21–32–6(d) (2003); Tenn. Code Ann. § 4–21–408(a) (1998)). As already explained, *supra*, at 748–749, the evidence related to the parenting leave is simply too attenuated to support a charge of unconstitutional discrimination in the provision of family leave. Nor, as the Court seems to acknowledge, does the Constitution require States to provide their employees with any family leave at all. *Ante*, at 738. A State's failure to devise a family leave program is not, then, evidence of unconstitutional behavior.

Considered in its entirety, the evidence fails to document a pattern of unconstitutional conduct sufficient to justify the abrogation of States' sovereign immunity. The few incidents identified by the Court "fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett*, 531 U. S., at 370; see also *Kimel*, 528 U. S., at 89–91; *City of Boerne*, 521 U. S., at 530–531. Juxtaposed to this evidence is the States' record of addressing gender-based discrimination in the provi-

sion of leave benefits on their own volition. See generally Brief for State of Alabama et al. as *Amici Curiae* 5–14.

Our concern with gender discrimination, which is subjected to heightened scrutiny, as opposed to age- or disability-based distinctions, which are reviewed under rational standard, see *Kimel*, *supra*, at 83–84; *Garrett*, *supra*, at 366–367, does not alter this conclusion. The application of heightened scrutiny is designed to ensure gender-based classifications are not based on the entrenched and pervasive stereotypes which inhibit women's progress in the workplace. *Ante*, at 736. This consideration does not divest respondents of their burden to show that "Congress identified a history and pattern of unconstitutional employment discrimination by the States." *Garrett*, *supra*, at 368. The Court seems to reaffirm this requirement. *Ante*, at 729 ("We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States . . ."); see also *ante*, at 735 ("[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation"). In my submission, however, the Court does not follow it. Given the insufficiency of the evidence that States discriminated in the provision of family leave, the unfortunate fact that stereotypes about women continue to be a serious and pervasive social problem would not alone support the charge that a State has engaged in a practice designed to deny its citizens the equal protection of the laws. *Garrett*, *supra*, at 369.

The paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted a substantive entitlement program of its own. If Congress had been concerned about different treatment of men and women with respect to family leave, a congruent remedy

would have sought to ensure the benefits of any leave program enacted by a State are available to men and women on an equal basis. Instead, the Act imposes, across the board, a requirement that States grant a minimum of 12 weeks of leave per year. 29 U. S. C. § 2612(a)(1)(C). This requirement may represent Congress' considered judgment as to the optimal balance between the family obligations of workers and the interests of employers, and the States may decide to follow these guidelines in designing their own family leave benefits. It does not follow, however, that if the States choose to enact a different benefit scheme, they should be deemed to engage in unconstitutional conduct and forced to open their treasuries to private suits for damages.

Well before the federal enactment, Nevada not only provided its employees, on a gender-neutral basis, with an option of requesting up to one year of unpaid leave, Nev. Admin. Code § 284.578(1) (1984), but also permitted, subject to approval and other conditions, leaves of absence in excess of one year, § 284.578(2). Nevada state employees were also entitled to use up to 10 days of their accumulated paid sick leave to care for an ill relative. § 284.558(1). Nevada, in addition, had a program of special "catastrophic leave." State employees could donate their accrued sick leave to a general fund to aid employees who needed additional leave to care for a relative with a serious illness. Nev. Rev. Stat. § 284.362(1) (1995).

To be sure, the Nevada scheme did not track that devised by the Act in all respects. The provision of unpaid leave was discretionary and subject to a possible reporting requirement. Nev. Admin. Code § 284.578(2)(3) (1984). A congruent remedy to any discriminatory exercise of discretion, however, is the requirement that the grant of leave be administered on a gender-equal basis, not the displacement of the State's scheme by a federal one. The scheme enacted by the Act does not respect the States' autonomous power to design their own social benefits regime.

Were more proof needed to show that this is an entitlement program, not a remedial statute, it should suffice to note that the Act does not even purport to bar discrimination in some leave programs the States do enact and administer. Under the Act, a State is allowed to provide women with, say, 24 weeks of family leave per year but provide only 12 weeks of leave to men. As the counsel for the United States conceded during the argument, a law of this kind might run afoul of the Equal Protection Clause or Title VII, but it would not constitute a violation of the Act. Tr. of Oral Arg. 49. The Act on its face is not drawn as a remedy to gender-based discrimination in family leave.

It has been long acknowledged that federal legislation which "deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 521 U. S., at 518; see also *ante*, at 737 (in exercising its power under § 5 of the Fourteenth Amendment, Congress "may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text' " (quoting *Kimel*, 528 U. S., at 81)). The Court has explained, however, that Congress may not "enforce a constitutional right by changing what the right is." *City of Boerne*, *supra*, at 519. The dual requirement that Congress identify a pervasive pattern of unconstitutional state conduct and that its remedy be proportional and congruent to the violation is designed to separate permissible exercises of congressional power from instances where Congress seeks to enact a substantive entitlement under the guise of its § 5 authority.

The Court's precedents upholding the Voting Rights Act of 1965 as a proper exercise of Congress' remedial power are instructive. In *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), the Court concluded that the Voting Rights Act's prohibition on state literacy tests was an appropriate method of enforcing the constitutional protection against racial dis-

crimination in voting. This measure was justified because "Congress documented a marked pattern of unconstitutional action by the States." *Garrett*, 531 U. S., at 373 (citing *Katzenbach*, *supra*, at 312, 313); see also *City of Boerne*, *supra*, at 525 ("We noted evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests" (citing *Katzenbach*, *supra*, at 333–334)). Congress' response was a "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment." *Garrett*, *supra*, at 373. This scheme was both congruent, because it "aimed at areas where voting discrimination has been most flagrant," *Katzenbach*, 383 U. S., at 315, and proportional, because it was necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century," *id.*, at 308. The Court acknowledged Congress' power to devise "strong remedial and preventive measures" to safeguard voting rights on subsequent occasions, but always explained that these measures were legitimate because they were responding to a pattern of "the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne*, *supra*, at 526–527 (citing *Oregon* v. *Mitchell*, 400 U. S. 112 (1970); *City of Rome* v. *United States*, 446 U. S. 156 (1980); *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966)).

This principle of our § 5 jurisprudence is well illustrated not only by the Court's opinions in these cases but also by the late Justice Harlan's dissent in *Katzenbach* v. *Morgan*. There, Justice Harlan contrasted his vote to invalidate a federal ban on New York state literacy tests from his earlier decision, in *South Carolina* v. *Katzenbach*, to uphold stronger remedial measures against the State of South Carolina, such as suspension of literacy tests, imposition of preclearance requirements for any changes in state voting laws, and appointment of federal voting examiners. *Katzenbach*

v. *Morgan*, *supra*, at 659, 667; see also *South Carolina* v. *Katzenbach*, *supra*, at 315–323. Justice Harlan explained that in the case of South Carolina there was "'voluminous legislative history' as well as judicial precedents supporting the basic congressional findings that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges. . . . Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative." 384 U. S., at 667 (quoting *South Carolina* v. *Katzenbach*, *supra*, at 309, 329–330). By contrast, the New York case, in his view, lacked a showing that "there has in fact been an infringement of that constitutional command, that is, whether a particular state practice . . . offend[ed] the command of the Equal Protection Clause of the Fourteenth Amendment." 384 U. S., at 667. In the absence of evidence that a State has engaged in unconstitutional conduct, Justice Harlan would have concluded that the literacy test ban Congress sought to impose was not an "appropriate remedial measur[e] to redress and prevent the wrongs," but an impermissible attempt "to define the *substantive* scope of the Amendment." *Id.*, at 666, 668.

For the same reasons, the abrogation of state sovereign immunity pursuant to Title VII was a legitimate congressional response to a pattern of gender-based discrimination in employment. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). The family leave benefit conferred by the Act is, by contrast, a substantive benefit Congress chose to confer upon state employees. See *City of Boerne*, *supra*, at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect"). The plain truth is Congress did not "ac[t] to accomplish the legitimate end of enforcing judicially-recognized Fourteenth Amendment

rights, [but] instead pursued an object outside the scope of Section Five by imposing new, non-remedial legal obligations on the states." Beck, The Heart of Federalism: Pretext Review of Means-End Relationships, 36 U. C. D. L. Rev. 407, 440 (2003).

It bears emphasis that, even were the Court to bar unconsented federal suits by private individuals for money damages from a State, individuals whose rights under the Act were violated would not be without recourse. The Act is likely a valid exercise of Congress' power under the Commerce Clause, Art. I, § 8, cl. 3, and so the standards it prescribes will be binding upon the States. The United States may enforce these standards in actions for money damages; and private individuals may bring actions against state officials for injunctive relief under *Ex parte Young*, 209 U. S. 123 (1908). What is at issue is only whether the States can be subjected, without consent, to suits brought by private persons seeking to collect moneys from the state treasury. Their immunity cannot be abrogated without documentation of a pattern of unconstitutional acts by the States, and only then by a congruent and proportional remedy. There has been a complete failure by respondents to carry their burden to establish each of these necessary propositions. I would hold that the Act is not a valid abrogation of state sovereign immunity and dissent with respect from the Court's conclusion to the contrary.

Syllabus

# CHAVEZ *v.* MARTINEZ

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

No. 01–1444. Argued December 4, 2002—Decided May 27, 2003

While respondent Martinez was being treated for gunshot wounds received during an altercation with police, he was interrogated by petitioner Chavez, a patrol supervisor. Martinez admitted that he used heroin and had taken an officer's gun during the incident. At no point was Martinez given *Miranda* warnings. Although he was never charged with a crime, and his answers were never used against him in any criminal proceeding, Martinez filed a 42 U. S. C. § 1983 suit, maintaining, among other things, that Chavez's actions violated his Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself," and his Fourteenth Amendment substantive due process right to be free from coercive questioning. The District Court ruled that Chavez was not entitled to qualified immunity, and the Ninth Circuit affirmed, finding that Chavez's coercive questioning violated Martinez's Fifth Amendment rights even though his statements were not used against him in a criminal proceeding, and that a police officer violates due process when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial.

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

270 F. 3d 852, reversed and remanded.

JUSTICE THOMAS, joined by THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA, concluded in Part II–A that Chavez did not deprive Martinez of his Fifth Amendment rights. Pp. 766–773.

(a) An officer is entitled to qualified immunity if his alleged conduct did not violate a constitutional right. See *Saucier* v. *Katz*, 533 U. S. 194, 201. The text of the Fifth Amendment's Self-Incrimination Clause cannot support the Ninth Circuit's view that mere compulsive questioning violates the Constitution. A "criminal case" at the very least requires the initiation of legal proceedings, and police questioning does not constitute such a case. Statements compelled by police interrogation may not be used against a defendant in a criminal case, but it is not until such use that the Self-Incrimination Clause is violated, see *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264. Martinez was never made to be a "witness" against himself because his statements were never admitted as testimony against him in a criminal case. Nor was

he ever placed under oath and exposed to "'the cruel trilemma of self-accusation, perjury or contempt.'" *Michigan* v. *Tucker*, 417 U. S. 433, 445. Pp. 766–767.

(b) The Ninth Circuit's approach is also irreconcilable with this Court's case law. The government may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness is not the target of the criminal case in which he testifies, see, *e. g.*, *Kastigar* v. *United States*, 406 U. S. 441, 443; and this Court has long permitted the compulsion of incriminating testimony so long as the statements (or evidence derived from them) cannot be used against the speaker in a criminal case, *id.*, at 458. Martinez was no more compelled in a criminal case to be a witness against himself than an immunized witness forced to testify on pain of contempt. That an immunized witness knows that his statements may not be used against him, while Martinez likely did not, does not make the immunized witness' statements any less compelled and lends no support to the Ninth Circuit's conclusion that coercive police interrogations alone violate the Fifth Amendment. Moreover, those subjected to coercive interrogations have an automatic protection from the use of their involuntary statements in any subsequent criminal trial, *e. g.*, *Oregon* v. *Elstad*, 470 U. S. 298, 307–308, which is coextensive with the use and derivative use immunity mandated by *Kastigar*. Pp. 767–770.

(c) The fact that the Court has permitted the Fifth Amendment privilege to be asserted in noncriminal cases does not alter the conclusion in this case. Judicially created prophylactic rules—such as the rule allowing a witness to insist on an immunity agreement before being compelled to give testimony in noncriminal cases, and the exclusionary rule—are designed to safeguard the core constitutional right protected by the Self-Incrimination Clause. They do not extend the scope of that right itself, just as violations of such rules do not violate a person's constitutional rights. Accordingly, Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a § 1983 action. And the absence of a "criminal case" in which Martinez was compelled to be a "witness" against himself defeats his core Fifth Amendment claim. Pp. 770–773.

JUSTICE SOUTER delivered the opinion of the Court with respect to Part II, concluding that the issue whether Martinez may pursue a claim of liability for a substantive due process violation should be addressed on remand. Pp. 779–780.

JUSTICE SOUTER, joined by JUSTICE BREYER, concluded in Part I that Martinez's claim that his questioning alone was a violation of the Fifth and Fourteenth Amendments subject to redress by a 42 U. S. C. § 1983 damages action, though outside the core of Fifth Amendment

Syllabus

protection, could be recognized if a core guarantee, or the judicial capacity to protect it, would be placed at risk absent complementary protection, see, *e. g., McCarthy* v. *Arndstein,* 266 U. S. 34, 40. However, Martinez cannot make the "powerful showing" necessary to expand protection of the privilege against self-incrimination to the point of the civil liability he requests. Inherent in his purely Fifth Amendment claim is the risk of global application in every instance of interrogation producing a statement inadmissible under the Fifth and Fourteenth Amendments, or violating one of the complementary rules this Court has accepted in aid of the core privilege. And Martinez has offered no reason to believe that this new rule is necessary in aid of the basic guarantee. Pp. 777–779.

THOMAS, J., announced the judgment of the Court and delivered an opinion, which was joined by REHNQUIST, C. J., in full, by O'CONNOR, J., as to Parts I and II–A, and by SCALIA, J., as to Parts I and II. SOUTER, J., delivered an opinion, Part II of which was for the Court and was joined by STEVENS, KENNEDY, GINSBURG, and BREYER, JJ., and Part I of which concurred in the judgment and was joined by BREYER, J., *post,* p. 777. SCALIA, J., filed an opinion concurring in part in the judgment, *post,* p. 780. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post,* p. 783. KENNEDY, J., filed an opinion concurring in part and dissenting in part, which was joined by STEVENS, J., in full and by GINSBURG, J., as to Parts II and III, *post,* p. 789. GINSBURG, J., filed an opinion concurring in part and dissenting in part, *post,* p. 799.

*Lawrence S. Robbins* argued the cause for petitioner. With him on the briefs were *Roy T. Englert, Jr.*, *Kathryn S. Zecca*, *Alan E. Wisotsky*, *Jeffrey Held*, and *Gary L. Gillig.*

*Deputy Solicitor General Clement* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Chertoff*, *Assistant Attorney General McCallum*, *John P. Elwood*, *Barbara L. Herwig,* and *Peter R. Maier.*

*Richard S. Paz* argued the cause for respondent. With him on the brief was *Sonia Mercado.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California *ex rel.* Bill Lockyer by *Mr. Lockyer,* Attorney General, *pro se*, *Robert R. Anderson,* Chief Assistant Attorney General, *Jo Graves,* Senior

JUSTICE THOMAS announced the judgment of the Court and delivered an opinion.*

This case involves a 42 U. S. C. § 1983 suit arising out of petitioner Ben Chavez's allegedly coercive interrogation of respondent Oliverio Martinez. The United States Court of Appeals for the Ninth Circuit held that Chavez was not entitled to a defense of qualified immunity because he violated Martinez's clearly established constitutional rights. We conclude that Chavez did not deprive Martinez of a constitutional right.

I

On November 28, 1997, police officers Maria Peña and Andrew Salinas were near a vacant lot in a residential area of Oxnard, California, investigating suspected narcotics activity. While Peña and Salinas were questioning an individual, they heard a bicycle approaching on a darkened path that crossed the lot. They ordered the rider, respondent Martinez, to dismount, spread his legs, and place his hands behind his head. Martinez complied. Salinas then conducted a

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Assistant Attorney General, *Stan Cross,* Supervising Deputy Attorney General, and *Lee E. Seale* and *Patrick J. Whalen,* Deputy Attorneys General; for the City of Escondido by *Jeffrey R. Epp* and *Richard J. Schneider;* for 50 California Cities et al. by *Girard Fisher;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for the National Association of Police Organizations by *Devallis Rutledge* and *William J. Johnson.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *Mark D. Rosenbaum, Steven R. Shapiro, Susan N. Herman, John T. Philipsborn,* and *Erwin Chemerinsky;* for the Association of Trial Lawyers of America by *Jeffrey L. Needle;* and for the National Police Accountability Project et al. by *Susan R. Klein* and *Michael Avery.*

*THE CHIEF JUSTICE joins this opinion in its entirety. JUSTICE O'CONNOR joins Parts I and II–A of this opinion. JUSTICE SCALIA joins Parts I and II of this opinion.

patdown frisk and discovered a knife in Martinez's waistband. An altercation ensued.[1]

There is some dispute about what occurred during the altercation. The officers claim that Martinez drew Salinas' gun from its holster and pointed it at them; Martinez denies this. Both sides agree, however, that Salinas yelled, "'He's got my gun!'" App. to Pet. for Cert. 3a. Peña then drew her gun and shot Martinez several times, causing severe injuries that left Martinez permanently blinded and paralyzed from the waist down. The officers then placed Martinez under arrest.

Petitioner Chavez, a patrol supervisor, arrived on the scene minutes later with paramedics. Chavez accompanied Martinez to the hospital and then questioned Martinez there while he was receiving treatment from medical personnel. The interview lasted a total of about 10 minutes, over a 45-minute period, with Chavez leaving the emergency room for periods of time to permit medical personnel to attend to Martinez.

At first, most of Martinez's answers consisted of "I don't know," "I am dying," and "I am choking." App. 14, 17, 18. Later in the interview, Martinez admitted that he took the gun from the officer's holster and pointed it at the police. *Id.*, at 16. He also admitted that he used heroin regularly. *Id.*, at 18. At one point, Martinez said "I am not telling you anything until they treat me," yet Chavez continued the interview. *Id.*, at 14. At no point during the interview was Martinez given warnings under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). App. to Pet. for Cert. 4a.

Martinez was never charged with a crime, and his answers were never used against him in any criminal prosecution. Nevertheless, Martinez filed suit under Rev. Stat. § 1979, 42

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[1] The parties disagree over what triggered the altercation. The officers maintain that Martinez ran away from them and that they tackled him while in pursuit; Martinez asserts that he never attempted to flee and Salinas tackled him without warning.

U. S. C. § 1983, maintaining that Chavez's actions violated his Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself," as well as his Fourteenth Amendment substantive due process right to be free from coercive questioning. The District Court granted summary judgment to Martinez as to Chavez's qualified immunity defense on both the Fifth and Fourteenth Amendment claims. Chavez took an interlocutory appeal to the Ninth Circuit, which affirmed the District Court's denial of qualified immunity. *Martinez* v. *Oxnard*, 270 F. 3d 852 (2001). Applying *Saucier* v. *Katz*, 533 U. S. 194 (2001), the Ninth Circuit first concluded that Chavez's actions, as alleged by Martinez, deprived Martinez of his rights under the Fifth and Fourteenth Amendments. The Ninth Circuit did not attempt to explain how Martinez had been "compelled in any criminal case to be a witness against himself." Instead, the Ninth Circuit reiterated the holding of an earlier Ninth Circuit case, *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1229 (1992) (en banc), that "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are destructive of human dignity," 270 F. 3d, at 857 (internal quotation marks omitted), and found that Chavez's "coercive questioning" of Martinez violated his Fifth Amendment rights, "[e]ven though Martinez's statements were not used against him in a criminal proceeding," *ibid.* As to Martinez's due process claim, the Ninth Circuit held that "a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial." *Ibid.*

The Ninth Circuit then concluded that the Fifth and Fourteenth Amendment rights asserted by Martinez were clearly established by federal law, explaining that a reasonable officer "would have known that persistent interrogation of the suspect despite repeated requests to stop violated the sus-

pect's Fifth and Fourteenth Amendment right to be free from coercive interrogation." *Id.*, at 858.

We granted certiorari. 535 U. S. 1111 (2002).

## II

In deciding whether an officer is entitled to qualified immunity, we must first determine whether the officer's alleged conduct violated a constitutional right. See *Katz*, 533 U. S., at 201. If not, the officer is entitled to qualified immunity, and we need not consider whether the asserted right was "clearly established." *Ibid.* We conclude that Martinez's allegations fail to state a violation of his constitutional rights.

### A

#### 1

The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, *Malloy* v. *Hogan*, 378 U. S. 1 (1964), requires that "[n]o person . . . shall be compelled *in any criminal case* to be a *witness* against himself." U. S. Const., Amdt. 5 (emphases added). We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.

Although Martinez contends that the meaning of "criminal case" should encompass the entire criminal investigatory process, including police interrogations, Brief for Respondent 23, we disagree. In our view, a "criminal case" at the very least requires the initiation of legal proceedings. See *Blyew* v. *United States*, 13 Wall. 581, 595 (1872) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning *a proceeding in court, a suit, or action*" (emphasis added)); Black's Law Dictionary 215 (6th ed. 1990) (defining "[c]ase" as "[a] general term for an action, cause, suit, or controversy at law . . . ; a question *contested before a court of justice*" (emphasis added)). We

need not decide today the precise moment when a "criminal case" commences; it is enough to say that police questioning does not constitute a "case" any more than a private investigator's precomplaint activities constitute a "civil case." Statements compelled by police interrogations of course may not be used against a defendant at trial, see *Brown* v. *Mississippi*, 297 U. S. 278, 286 (1936), but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs, see *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is *a fundamental trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial*" (emphases added; citations omitted)); *Withrow* v. *Williams*, 507 U. S. 680, 692 (1993) (describing the Fifth Amendment as a "'trial right'"); *id.*, at 705 (O'CONNOR, J., concurring in part and dissenting in part) (describing "true Fifth Amendment claims" as "the extraction *and use* of compelled testimony" (emphasis altered)).

Here, Martinez was never made to be a "witness" against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case. Nor was he ever placed under oath and exposed to "'the cruel trilemma of self-accusation, perjury or contempt.'" *Michigan* v. *Tucker*, 417 U. S. 433, 445 (1974) (quoting *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52, 55 (1964)). The text of the Self-Incrimination Clause simply cannot support the Ninth Circuit's view that the mere use of compulsive questioning, without more, violates the Constitution.

2

Nor can the Ninth Circuit's approach be reconciled with our case law. It is well established that the government may compel witnesses to testify at trial or before a grand

jury, on pain of contempt, so long as the witness is not the target of the criminal case in which he testifies. See *Minnesota* v. *Murphy*, 465 U. S. 420, 427 (1984); *Kastigar* v. *United States*, 406 U. S. 441, 443 (1972). Even for persons who have a legitimate fear that their statements may subject them to criminal prosecution, we have long permitted the compulsion of incriminating testimony so long as those statements (or evidence derived from those statements) cannot be used against the speaker in any criminal case. See *Brown* v. *Walker*, 161 U. S. 591, 602–604 (1896); *Kastigar*, *supra*, at 458; *United States* v. *Balsys*, 524 U. S. 666, 671–672 (1998). We have also recognized that governments may penalize public employees and government contractors (with the loss of their jobs or government contracts) to induce them to respond to inquiries, so long as the answers elicited (and their fruits) are immunized from use in any criminal case against the speaker. See *Lefkowitz* v. *Turley*, 414 U. S. 70, 84–85 (1973) ("[T]he State may insist that [contractors] . . . either respond to relevant inquiries about the performance of their contracts or suffer cancellation"); *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 806 (1977) ("Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity" against later use of statements in criminal proceedings).[2] By contrast, no "penalty" may ever be imposed on

[2] The government may not, however, penalize public employees and government contractors to induce them to waive their *immunity* from the use of their compelled statements in subsequent criminal proceedings. See *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968); *Lefkowitz* v. *Turley*, 414 U. S. 70 (1973), and this is true even though immunity is not itself a right secured by the text of the Self-Incrimination Clause, but rather a prophylactic rule we have constructed to protect the Fifth Amendment's right from invasion. See Part II–A–3, *infra*. Once an immunity waiver is signed, the signatory is unable to assert a Fifth Amendment objection to the subsequent use of his statements in a criminal case, even if his statements were

someone who exercises his core Fifth Amendment right not to be a "witness" against himself in a "criminal case." See *Griffin* v. *California*, 380 U. S. 609, 614 (1965) (the trial court's and the prosecutor's comments on the defendant's failure to testify violates the Self-Incrimination Clause of the Fifth Amendment). Our holdings in these cases demonstrate that, contrary to the Ninth Circuit's view, mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness.

We fail to see how Martinez was any more "compelled in any criminal case to be a witness against himself" than an immunized witness forced to testify on pain of contempt. One difference, perhaps, is that the immunized witness *knows* that his statements will not, and may not, be used against him, whereas Martinez likely did not. But this does not make the statements of the immunized witness any less "compelled" and lends no support to the Ninth Circuit's conclusion that coercive police interrogations, absent the use of the involuntary statements in a criminal case, violate the Fifth Amendment's Self-Incrimination Clause. Moreover, our cases provide that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial. *Oregon* v. *Elstad*, 470 U. S. 298, 307–308 (1985); *United States* v. *Blue*, 384 U. S. 251, 255 (1966); *Leyra* v. *Denno*, 347 U. S. 556, 558 (1954); *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155 (1944). See also *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 278 (1983) (Blackmun, J., concurring in judgment); *Williams* v. *United States*, 401 U. S. 646, 662 (1971) (Brennan, J., concurring in result). This protection is, in fact, coextensive with the use and de-

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in fact compelled. A waiver of immunity is therefore a prospective waiver of the core self-incrimination right in any subsequent criminal proceeding, and States cannot condition public employment on the waiver of constitutional rights, *Lefkowitz*, *supra*, at 85.

rivative use immunity mandated by *Kastigar* when the government compels testimony from a reluctant witness. See 406 U. S., at 453. Accordingly, the fact that Martinez did not *know* his statements could not be used against him does not change our view that no violation of the Fifth Amendment's Self-Incrimination Clause occurred here.

3

Although our cases have permitted the Fifth Amendment's self-incrimination privilege to be asserted in noncriminal cases, see *id.*, at 444–445 (recognizing that the "Fifth Amendment privilege against compulsory self-incrimination . . . *can be asserted in any proceeding,* civil or criminal, administrative or judicial, investigatory or adjudicatory . . ."); *Lefkowitz* v. *Turley, supra,* at 77 (stating that the Fifth Amendment privilege allows one "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"), that does not alter our conclusion that a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case.

In the Fifth Amendment context, we have created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause. See, *e. g.*, *Tucker,* 417 U. S., at 444 (describing the "procedural safeguards" required by *Miranda* as "not themselves rights protected by the Constitution but . . . measures to insure that the right against compulsory self-incrimination was protected" to "provide practical reinforcement for the right"); *Elstad, supra,* at 306 (stating that "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself"). Among these rules is an evidentiary privilege that protects witnesses from being forced to give incriminating testimony, even in noncriminal cases, unless that testimony has been immunized

from use and derivative use in a future criminal proceeding before it is compelled. See *Kastigar*, *supra*, at 453; *Maness* v. *Meyers*, 419 U. S. 449, 461–462 (1975) (noting that the Fifth Amendment privilege may be asserted if one is "compelled to produce evidence which later *may* be used against him as an accused in a criminal action" (emphasis added)).

By allowing a witness to insist on an immunity agreement *before* being compelled to give incriminating testimony in a noncriminal case, the privilege preserves the core Fifth Amendment right from invasion by the use of that compelled testimony in a subsequent criminal case. See *Tucker*, *supra*, at 440–441 ("Testimony obtained in civil suits, or before administrative or legislative committees, could [absent a grant of immunity] prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding"). Because the failure to assert the privilege will often forfeit the right to exclude the evidence in a subsequent "criminal case," see *Murphy*, 465 U. S., at 440; *Garner* v. *United States*, 424 U. S. 648, 650 (1976) (failure to claim privilege against self-incrimination before disclosing incriminating information on tax returns forfeited the right to exclude that information in a criminal prosecution); *United States* v. *Kordel*, 397 U. S. 1, 7 (1970) (criminal defendant forfeited his right to assert Fifth Amendment privilege with regard to answers he gave to interrogatories in a prior civil proceeding), it is necessary to allow assertion of the privilege prior to the commencement of a "criminal case" to safeguard the core Fifth Amendment trial right. If the privilege could not be asserted in such situations, testimony given in those judicial proceedings would be deemed "voluntary," see *Rogers* v. *United States*, 340 U. S. 367, 371 (1951); *United States* v. *Monia*, 317 U. S. 424, 427 (1943); hence, insistence on a prior grant of immunity is essential to memorialize the fact that the testimony had indeed been compelled and therefore

protected from use against the speaker in any "criminal case."

Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person. As we explained, we have allowed the Fifth Amendment privilege to be asserted by witnesses in noncriminal cases in order to safeguard the core constitutional right defined by the Self-Incrimination Clause—the right not to be compelled in any criminal case to be a witness against oneself.[3] We have likewise established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause—the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning. See *Warren* v. *Lincoln*, 864 F. 2d 1436, 1442 (CA8 1989) (alleged *Miranda* violation not actionable under § 1983); *Giuffre* v. *Bissell*, 31 F. 3d 1241, 1256 (CA3 1994) (same); *Bennett* v. *Passic*, 545 F. 2d 1260, 1263 (CA10 1976) (same); see also *New York* v. *Quarles*, 467 U. S. 649, 686 (1984) (Marshall, J., dissenting) ("All the Fifth Amendment forbids is the introduction of coerced statements at trial"). Accordingly, Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a § 1983 action. See *Connecticut* v. *Barrett*, 479 U. S. 523, 528 (1987) (*Miranda*'s warning requirement is "not itself required by the Fifth Amendmen[t] . . . but is instead justified only by reference to its prophylactic purpose"); *Tucker*, *supra*, at 444 (*Miranda*'s safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"). And the absence of a "criminal case" in which

[3] That the privilege is a prophylactic one does not alter our penalty cases jurisprudence, which allows such privilege to be asserted prior to, and outside of, criminal proceedings.

Martinez was compelled to be a "witness" against himself defeats his core Fifth Amendment claim. The Ninth Circuit's view that mere compulsion violates the Self-Incrimination Clause, see 270 F. 3d, at 857; *California Attorneys for Criminal Justice* v. *Butts*, 195 F. 3d 1039, 1045–1046 (1999); *Cooper*, 963 F. 2d, at 1243–1244, finds no support in the text of the Fifth Amendment and is irreconcilable with our case law.[4] Because we find that Chavez's alleged conduct did not violate the Self-Incrimination Clause, we reverse the Ninth Circuit's denial of qualified immunity as to Martinez's Fifth Amendment claim.

Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.[5]

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[4] It is JUSTICE KENNEDY's indifference to the text of the Self-Incrimination Clause, as well as a conspicuous absence of a single citation to the actual text of the Fifth Amendment, that permits him to adopt the Ninth Circuit's interpretation.

*Mincey* v. *Arizona*, 437 U. S. 385 (1978), on which JUSTICE KENNEDY and JUSTICE GINSBURG rely in support of their reading of the Fifth Amendment, was a case addressing the *admissibility* of a coerced confession under the *Due Process* Clause. *Mincey* did not even mention the Fifth Amendment or the Self-Incrimination Clause, and refutes JUSTICE KENNEDY's and JUSTICE GINSBURG's assertions that their interpretation of that Clause would have been known to any reasonable officer at the time Chavez conducted his interrogation.

[5] We also do not see how, in light of *Graham* v. *Connor*, 490 U. S. 386 (1989), JUSTICE KENNEDY can insist that "the Self-Incrimination Clause is applicable at the time and place police use compulsion to extract a statement from a suspect" while at the same time maintaining that the use of "torture or its equivalent in an attempt to induce a statement" violates the Due Process Clause. *Post*, at 795, 796 (opinion concurring in part and dissenting in part). *Graham* foreclosed the use of substantive due proc-

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The Fourteenth Amendment provides that no person shall be deprived "of life, liberty, or property, without due process of law." Convictions based on evidence obtained by methods that are "so brutal and so offensive to human dignity" that they "shoc[k] the conscience" violate the Due Process Clause. *Rochin* v. *California*, 342 U. S. 165, 172, 174 (1952) (overturning conviction based on evidence obtained by involuntary stomach pumping). See also *Breithaupt* v. *Abram*, 352 U. S. 432, 435 (1957) (reiterating that evidence obtained through conduct that "'shock[s] the conscience'" may not be used to support a criminal conviction). Although *Rochin* did not establish a civil remedy for abusive police behavior, we recognized in *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998), that deprivations of liberty caused by "the most egregious official conduct," *id.*, at 846, 847–848, n. 8, may violate the Due Process Clause. While we rejected, in *Lewis*, a § 1983 plaintiff's contention that a police officer's deliberate indifference during a high-speed chase that caused the death of a motorcyclist violated due process, *id.*, at 854, we left open the possibility that unauthorized police behavior in other contexts might "shock the conscience" and give rise to § 1983 liability. *Id.*, at 850.

We are satisfied that Chavez's questioning did not violate Martinez's due process rights. Even assuming, *arguendo*, that the persistent questioning of Martinez somehow deprived him of a liberty interest, we cannot agree with Marti-

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ess analysis in claims involving the use of excessive force in effecting an arrest and held that such claims are governed *solely* by the Fourth Amendment's prohibitions against "unreasonable" seizures, because the Fourth Amendment provided the explicit source of constitutional protection against such conduct. 490 U. S., at 394–395. If, as JUSTICE KENNEDY believes, the Fifth Amendment's Self-Incrimination Clause governs coercive police interrogation even absent use of compelled statements in a criminal case, then *Graham* suggests that the Due Process Clause would not.

nez's characterization of Chavez's behavior as "egregious" or "conscience shocking." As we noted in *Lewis*, the official conduct "most likely to rise to the conscience-shocking level" is the "conduct intended to injure in some way unjustifiable by any government interest." *Id.*, at 849. Here, there is no evidence that Chavez acted with a purpose to harm Martinez by intentionally interfering with his medical treatment. Medical personnel were able to treat Martinez throughout the interview, App. to Pet. for Cert. 4a, 18a, and Chavez ceased his questioning to allow tests and other procedures to be performed. *Id.*, at 4a. Nor is there evidence that Chavez's conduct exacerbated Martinez's injuries or prolonged his stay in the hospital. Moreover, the need to investigate whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.

The Court has held that the Due Process Clause also protects certain "fundamental liberty interest[s]" from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997). Only fundamental rights and liberties which are "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty'" qualify for such protection. *Ibid.* Many times, however, we have expressed our reluctance to expand the doctrine of substantive due process, see *Lewis*, *supra*, at 842; *Glucksberg*, *supra*, at 720; *Albright* v. *Oliver*, 510 U. S. 266, 271 (1994); *Reno* v. *Flores*, 507 U. S. 292, 302 (1993); in large part "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). See also *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 225–226 (1985).

*Glucksberg* requires a "'careful description'" of the asserted fundamental liberty interest for the purposes of sub-

stantive due process analysis; vague generalities, such as "the right not to be talked to," will not suffice. 521 U. S., at 721. We therefore must take into account the fact that Martinez was hospitalized and in severe pain during the interview, but also that Martinez was a critical nonpolice witness to an altercation resulting in a shooting by a police officer, and that the situation was urgent given the perceived risk that Martinez might die and crucial evidence might be lost. In these circumstances, we can find no basis in our prior jurisprudence, see, *e. g.*, *Miranda*, 384 U. S., at 477–478 ("It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement"), or in our Nation's history and traditions to suppose that freedom from unwanted police questioning is a right so fundamental that it cannot be abridged absent a "compelling state interest." *Flores*, *supra*, at 302. We have never required such a justification for a police interrogation, and we decline to do so here. The lack of any "guideposts for responsible decisionmaking" in this area, and our oft-stated reluctance to expand the doctrine of substantive due process, further counsel against recognizing a new "fundamental liberty interest" in this case.

We conclude that Martinez has failed to allege a violation of the Fourteenth Amendment, and it is therefore unnecessary to inquire whether the right asserted by Martinez was clearly established.

## III

Because Chavez did not violate Martinez's Fifth and Fourteenth Amendment rights, he was entitled to qualified immunity. The judgment of the Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings.

*It is so ordered.*

JUSTICE SOUTER delivered an opinion, Part II of which is the opinion of the Court and Part I of which is an opinion concurring in the judgment.*

I

Respondent Martinez's claim under 42 U. S. C. § 1983 for violation of his privilege against compelled self-incrimination should be rejected and his case remanded for further proceedings. I write separately because I believe that our decision requires a degree of discretionary judgment greater than JUSTICE THOMAS acknowledges. As he points out, the text of the Fifth Amendment (applied here under the doctrine of Fourteenth Amendment incorporation) focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence. JUSTICE GINSBURG makes it clear that the present case is very close to *Mincey* v. *Arizona*, 437 U. S. 385 (1978), and Martinez's testimony would clearly be inadmissible if offered in evidence against him. But Martinez claims more than evidentiary protection in asking this Court to hold that the questioning alone was a completed violation of the Fifth and Fourteenth Amendments subject to redress by an action for damages under § 1983.

To recognize such a constitutional cause of action for compensation would, of course, be well outside the core of Fifth Amendment protection, but that alone is not a sufficient reason to reject Martinez's claim. As Justice Harlan explained in his dissent in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), "extension[s]" of the bare guarantee may be warranted, *id.*, at 510, if clearly shown to be desirable means to protect the basic right against the invasive pressures of contemporary society, *id.*, at 515. In this light, we can make sense of a

*JUSTICE BREYER joins this opinion in its entirety. JUSTICE STEVENS, JUSTICE KENNEDY, and JUSTICE GINSBURG join Part II of this opinion.

variety of Fifth Amendment holdings: barring compulsion to give testimonial evidence in a civil proceeding, see *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924); requiring a grant of immunity in advance of any testimonial proffer, see *Kastigar* v. *United States*, 406 U. S. 441, 446–447 (1972); precluding threats or impositions of penalties that would undermine the right to immunity, see, *e. g.*, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280, 284–285 (1968); *Lefkowitz* v. *Turley*, 414 U. S. 70, 77–79 (1973); *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 804–806 (1977); *McKune* v. *Lile*, 536 U. S. 24, 35 (2002) (plurality opinion); and conditioning admissibility on warnings and waivers to promote intelligent choices and to simplify subsequent inquiry into voluntariness, see *Miranda*, *supra*. All of this law is outside the Fifth Amendment's core, with each case expressing a judgment that the core guarantee, or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection.

I do not, however, believe that Martinez can make the "powerful showing," subject to a realistic assessment of costs and risks, necessary to expand protection of the privilege against compelled self-incrimination to the point of the civil liability he asks us to recognize here. See *id.*, at 515, 517 (Harlan, J., dissenting). The most obvious drawback inherent in Martinez's purely Fifth Amendment claim to damages is its risk of global application in every instance of interrogation producing a statement inadmissible under Fifth and Fourteenth Amendment principles, or violating one of the complementary rules we have accepted in aid of the privilege against evidentiary use. If obtaining Martinez's statement is to be treated as a stand-alone violation of the privilege subject to compensation, why should the same not be true whenever the police obtain any involuntary self-incriminating statement, or whenever the government so much as threatens a penalty in derogation of the right to

immunity, or whenever the police fail to honor *Miranda?** Martinez offers no limiting principle or reason to foresee a stopping place short of liability in all such cases.

Recognizing an action for damages in every such instance not only would revolutionize Fifth and Fourteenth Amendment law, but would beg the question that must inform every extension or recognition of a complementary rule in service of the core privilege: why is this new rule necessary in aid of the basic guarantee? Martinez has offered no reason to believe that the guarantee has been ineffective in all or many of those circumstances in which its vindication has depended on excluding testimonial admissions or barring penalties. And I have no reason to believe the law has been systemically defective in this respect.

But if there is no failure of efficacy infecting the existing body of Fifth Amendment law, any argument for a damages remedy in this case must depend not on its Fifth Amendment feature but upon the particular charge of outrageous conduct by the police, extending from their initial encounter with Martinez through the questioning by Chavez. That claim, however, if it is to be recognized as a constitutional one that may be raised in an action under § 1983, must sound in substantive due process. See generally *County of Sacramento* v. *Lewis*, 523 U. S. 833, 849 (1998) ("[C]onduct 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"). Here, it is enough to say that JUSTICE STEVENS shows that Martinez has a serious argument in support of such a position.

## II

Whether Martinez may pursue a claim of liability for a substantive due process violation is thus an issue that should

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*The question whether the absence of *Miranda* warnings may be a basis for a § 1983 action under any circumstance is not before the Court.

be addressed on remand, along with the scope and merits of any such action that may be found open to him.

JUSTICE SCALIA, concurring in part in the judgment.

I agree with the Court's rejection of Martinez's Fifth Amendment claim, that is, his claim that Chavez violated his right not to be compelled in any criminal case to be a witness against himself.[1] See *ante*, at 766–767 (plurality opinion); *ante*, at 777–779 (SOUTER, J., concurring in judgment). And without a violation of the right protected by the text of the Self-Incrimination Clause (what the plurality and JUSTICE SOUTER call the Fifth Amendment's "core"), Martinez's 42 U. S. C. § 1983 action is doomed. Section 1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), as the Court today holds, see *ante*, at 772 (plurality opinion); *post*, at 789–790 (KENNEDY, J., concurring in part and dissenting in part); nor is it concerned with "extensions" of constitutional provisions designed to safeguard actual constitutional rights, cf. *ante*, at 777–778 (SOUTER, J., concurring in judgment).[2] Rather, a plaintiff seeking redress through § 1983 must establish the violation of a federal constitutional or statutory *right*. See *Blessing* v. *Freestone*, 520 U. S. 329, 340 (1997); *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 106 (1989).

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[1] While occasionally referring to this as a "Fifth Amendment claim," a convention commonly followed, JUSTICE THOMAS and JUSTICE SOUTER acknowledge that technically it is a Fourteenth Amendment claim, since it is only *through* the Fourteenth Amendment that the Fifth is "made applicable to the States," *ante*, at 766 (opinion of THOMAS, J.), citing *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

[2] Still less does § 1983 provide a remedy for actions inconsistent with the perceived "purpose" of a constitutional provision. Cf. *Martinez* v. *Oxnard*, 270 F. 3d 852, 857 (CA9 2001) ("[T]he Fifth Amendment's purpose is to prevent coercive interrogation practices that are destructive of human dignity" (internal quotation marks omitted)).

My reasons for rejecting Martinez's Fifth Amendment claim are those set forth in JUSTICE THOMAS's opinion. I join Parts I and II of that opinion, including Part II–B, which deals with substantive due process. Consideration and rejection of that constitutional claim is absolutely necessary to support reversal of the Ninth Circuit's judgment. For after discussing (and erroneously deciding) Martinez's Fifth Amendment claim, the Ninth Circuit continued as follows:

> "Likewise, a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial. 'The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is *complete with the coercive behavior itself. . . . The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution.*' *Cooper v. Dupnik*, 963 F. 2d at 1244–45 (emphasis added). Mr. Martinez has thus stated a *prima facie* case that Sergeant Chavez violated his Fifth and Fourteenth Amendment rights to be free from police coercion in pursuit of a confession." 270 F. 3d 852, 857 (2001).

It seems to me impossible to interpret this passage as anything other than an invocation of the doctrine of "substantive due process," which makes unlawful certain government conduct, regardless of whether the procedural guarantees of the Fifth Amendment (or the guarantees of any of the other provisions of the Bill of Rights) have been violated. See *Washington* v. *Glucksberg*, 521 U. S. 702 (1997). To be sure, the term "substantive due process" is not used in the quoted passage, but the passage's technically false dichotomy between Fifth Amendment and Fourteenth Amendment rights uses "Fourteenth Amendment rights" as a stand-in for *that aspect* of the Fourteenth Amendment which consists of the

doctrine of substantive due process. (JUSTICE THOMAS uses similar shorthand in the concluding sentence of his analysis: "Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases." *Ante*, at 773.) What other *possible meaning* could the passage possess? Surely the Ninth Circuit was not expending a paragraph to make the utterly useless observation that, in addition to violating the Fifth Amendment (because that is incorporated in the Fourteenth) Chavez violated the Fourteenth Amendment (because that incorporates the Fifth). That *substantive due process* was the point is confirmed by the fact that the sole authority cited to support violation of "the Fourteenth Amendment" is *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1244–1245 (1992), a Ninth Circuit case that explicitly recognized a substantive-due-process right to be free from coercive police questioning. See *id.*, at 1244–1250.

Since the Ninth Circuit's Fourteenth Amendment holding rested upon substantive due process, we are without authority to disturb that court's judgment solely because of our disagreement with its Fifth Amendment (Self-Incrimination Clause) analysis; the substantive-due-process holding provides an independent ground supporting the decision that Chavez was not entitled to qualified immunity. While JUSTICE SOUTER declines to address that independent ground—even though the parties extensively briefed the issue, Brief for Petitioner 21–36; Brief for Respondent 29–40; Reply Brief for Petitioner 8–12; Brief for United States as *Amicus Curiae* 17–23, and even though JUSTICE STEVENS discusses it in dissent, *post*, at 787–788 (opinion concurring in part and dissenting in part)—I believe that addressing it, and resolving

it against respondent, is essential to the Court's disposition, which reverses the Ninth Circuit's judgment in its entirety.

I therefore see no basis for a remand to determine "[w]hether Martinez may pursue a claim of liability for a substantive due process violation." *Ante*, at 779 (majority opinion). That question has already been decided by the Ninth Circuit, and we today reverse its decision. My disagreement with the Court, however, is of little consequence, because Martinez will not be able to prevail on remand by raising anew his substantive-due-process claim. Not only is the claim meritless, as JUSTICE THOMAS demonstrates, *ante*, at 774–776, but Martinez already had his chance to press a substantive-due-process theory in the Court of Appeals and chose not to, even though Ninth Circuit precedent clearly established substantive due process (including—contrary to the Government's assertion at oral argument, see Tr. of Oral Arg. 26—a "shocks the conscience" criterion) as an available theory of liability under the Fourteenth Amendment. See *Cooper*, *supra*, at 1248 ("There is a second Fourteenth Amendment substantive due process yardstick available to Cooper as a theory of § 1983 liability. The test is whether the Task Force's conduct 'shocks the conscience' "). Nowhere did respondent's appellate brief mention the words "substantive due process"; the only rights it asserted were the right against self-incrimination and the right to warnings under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Appellees' Responding Brief in No. 00–56520 (CA9), pp. 28–32, 36–43. If, as JUSTICE SOUTER apparently believes, the opinion below did not address respondent's "substantive due process" claim, that claim has been forfeited.

JUSTICE STEVENS, concurring in part and dissenting in part.

As a matter of fact, the interrogation of respondent was the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods. As

a matter of law, that type of brutal police conduct constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty. Because these propositions are so clear, the District Court and the Court of Appeals correctly held that petitioner is not entitled to qualified immunity.

I

What follows is an English translation of portions of the tape-recorded questioning in Spanish that occurred in the emergency room of the hospital when, as is evident from the text, both parties believed that respondent was about to die:

"Chavez: What happened? Olivero, tell me what happened.
"O[liverio] M[artinez]: I don't know.
"Chavez: I don't know what happened (sic)?
"O. M.: Ay! I am dying. Ay! What are you doing to me?
"No, . . . ! (unintelligible scream).
"Chavez: What happened, sir?
"O. M.: My foot hurts . . .
"Chavez: Olivera. Sir, what happened?
"O. M.: I am choking.
"Chavez: Tell me what happened.
"O. M.: I don't know.
"Chavez: 'I don't know.'
"O. M.: My leg hurts.
"Chavez: I don't know what happened (sic)?
"O. M.: It hurts . . .
"Chavez: Hey, hey look.
"O. M.: I am choking.
"Chavez: Can you hear? look listen, I am Benjamin Chavez with the police here in Oxnard, look.
"O. M.: I am dying, please.
"Chavez: OK, yes, tell me what happened. If you are going to die, tell me what happened. Look I need to tell (sic) what happened.

"O. M.: I don't know.
"Chavez: You don't know, I don't know what happened (sic)? Did you talk to the police?
"O. M.: Yes.
"Chavez: What happened with the police?
"O. M.: We fought.
"Chavez: Huh? What happened with the police?
"O. M.: The police shot me.
"Chavez: Why?
"O. M.: Because I was fighting with him.
"Chavez: Oh, why were you fighting with the police?
"O. M.: I am dying . . .
"Chavez: OK, yes you are dying, but tell me why you are fighting, were you fighting with the police?
. . . . . .
"O. M.: Doctor, please I want air, I am dying.
"Chavez: OK, OK. I want to know if you pointed the gun [to yourself] at the police.
"O. M.: Yes.
"Chavez: Yes, and you pointed it [to yourself]? (sic) at the police pointed the gun? (sic) Huh?
"O. M.: I am dying, please . . .
. . . . . .
"Chavez: OK, listen, listen I want to know what happened, ok??
"O. M.: I want them to treat me.
"Chavez: OK, they are do it (sic), look when you took out the gun from the tape (sic) of the police . . .
"O. M.: I am dying . . .
"Chavez: Ok, look, what I want to know if you took out (sic) the gun of the police?
"O. M.: I am not telling you anything until they treat me.
"Chavez: Look, tell me what happened, I want to know, look well don't you want the police know (sic) what happened with you?

"O. M.: Uuuggghhh! my belly hurts . . .

. . . . . .

"Chavez: Nothing, why did you run (sic) from the police?

"O. M.: I don't want to say anything anymore.

"Chavez: No?

"O. M.: I want them to treat me, it hurts a lot, please.

"Chavez: You don't want to tell (sic) what happened with you over there?

"O. M.: I don't want to die, I don't want to die.

"Chavez: Well if you are going to die tell me what happened, and right now you think you are going to die?

"O. M.: No.

"Chavez: No, do you think you are going to die?

"O. M.: Aren't you going to treat me or what?

"Chavez: Look, think you are going to die, (sic) that's all I want to know, if you think you are going to die? Right now, do you think you are going to die?

"O. M.: My belly hurts, please treat me.

"Chavez: Sir?

"O. M.: If you treat me I tell you everything, if not, no.

"Chavez: Sir, I want to know if you think you are going to die right now?

"O. M.: I think so.

"Chavez: You think (sic) so? Ok. Look, the doctors are going to help you with all they can do, Ok?. That they can do.

"O. M.: Get moving, I am dying, can't you see me? come on.

"Chavez: Ah, huh, right now they are giving you medication." App. 8–22.

The sound recording of this interrogation, which has been lodged with the Court, vividly demonstrates that respondent was suffering severe pain and mental anguish throughout petitioner's persistent questioning.

## II

The Due Process Clause of the Fourteenth Amendment protects individuals against state action that either " 'shocks the conscience,' *Rochin* v. *California*, 342 U. S. 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937)." *United States* v. *Salerno*, 481 U. S. 739, 746 (1987). In *Palko*, the majority of the Court refused to hold that every violation of the Fifth Amendment satisfied the second standard. In a host of other cases, however, the Court has held that unusually coercive police interrogation procedures do violate that standard.[1]

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[1] JUSTICE O'CONNOR listed many of these cases, as well as cases from state courts, in *Oregon* v. *Elstad*, 470 U. S. 298, 312–313, n. 3 (1985): "*Darwin* v. *Connecticut*, 391 U. S. 346 (1968) (suspect interrogated for 48 hours incommunicado while officers denied access to counsel); *Beecher* v. *Alabama*, 389 U. S. 35, 36 (1967) (officer fired rifle next to suspect's ear and said 'If you don't tell the truth I am going to kill you'); *Clewis* v. *Texas*, 386 U. S. 707 (1967) (suspect was arrested without probable cause, interrogated for nine days with little food or sleep, and gave three unwarned 'confessions' each of which he immediately retracted); *Reck* v. *Pate*, 367 U. S. 433, 439–440, n. 3 (1961) (mentally retarded youth interrogated incommunicado for a week 'during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher'). . . . *Cagle* v. *State*, 45 Ala. App. 3, 4, 221 So. 2d 119, 120 (1969) (police interrogated wounded suspect at police station for one hour before obtaining statement, took him to hospital to have his severe wounds treated, only then giving the *Miranda* warnings; suspect prefaced second statement with 'I have already give the Chief a statement and I might as well give one to you, too'), cert. denied, 284 Ala. 727, 221 So. 2d 121 (1969); *People* v. *Saiz*, 620 P. 2d 15 (Colo. 1980) (two hours' unwarned custodial interrogation of 16-year-old in violation of state law requiring parent's presence, culminating in visit to scene of crime); *People* v. *Bodner*, 75 App. Div. 2d 440, 430 N. Y. S. 2d 433 (1980) (confrontation at police station and at scene of crime between police and retarded youth with mental age of eight or nine); *State* v. *Badger*, 141 Vt. 430, 441, 450 A. 2d 336, 343 (1982) (unwarned 'close and intense' station house questioning of 15-year-old, including threats and promises, resulted

By its terms, the Fifth Amendment itself has no application to the States. It is, however, one source of the protections against state actions that deprive individuals of rights "implicit in the concept of ordered liberty" that the Fourteenth Amendment guarantees. Indeed, as I pointed out in my dissent in *Oregon* v. *Elstad*, 470 U. S. 298, 371 (1985), it is the most specific provision in the Bill of Rights "that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber, by 'the Germans of the 1930's and early 1940's,' and by some of our own police departments only a few decades ago."[2] Whenever it occurs, as it did here, official interrogation of that character is a classic example of a violation of a constitutional right "implicit in the concept of ordered liberty."[3]

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in confession at 1:20 a.m.; court held '[w]arnings . . . were insufficient to cure such blatant abuse or compensate for the coercion in this case')."

[2] Adding to the cases cited by JUSTICE O'CONNOR, I appended this footnote: "See, *e. g.*, *Leyra* v. *Denno*, 347 U. S. 556 (1954); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Vernon* v. *Alabama*, 313 U. S. 547 (1941); *White* v. *Texas*, 310 U. S. 530 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Wakat* v. *Harlib*, 253 F. 2d 59 (CA7 1958); *People* v. *La Frana*, 4 Ill. 2d 261, 122 N. E. 2d 583 (1954); cf. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857 (1965) (potential witness tortured by police). Such custodial interrogation is, of course, closer to that employed by the Soviet Union than that which our constitutional scheme tolerates. See *Coleman* v. *Alabama*, 399 U. S. 1, 15–16 (1970) (opinion of Douglas, J.) ('In [Russia] detention *incommunicado* is the common practice, and the period of permissible detention now extends for nine months. Where there is custodial interrogation, it is clear that the critical stage of the trial takes place long before the courtroom formalities commence. That is apparent to one who attends criminal trials in Russia. Those that I viewed never put in issue the question of guilt; guilt was an issue resolved in the inner precincts of a prison under questioning by the police')." *Id.*, at 371–372, n. 19 (dissenting opinion).

[3] A person's constitutional right to remain silent is an interest in liberty that is protected against federal impairment by the Fifth Amendment and from state impairment by the Due Process Clause of the Fourteenth

I respectfully dissent, but for the reasons articulated by JUSTICE KENNEDY, *post*, at 799, concur in Part II of JUSTICE SOUTER's opinion.

JUSTICE KENNEDY, with whom JUSTICE STEVENS joins, and with whom JUSTICE GINSBURG joins as to Parts II and III, concurring in part and dissenting in part.

A single police interrogation now presents us with two issues: first, whether failure to give a required warning under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), was itself a completed constitutional violation actionable under 42 U. S. C. § 1983; and second, whether an actionable violation arose at once under the Self-Incrimination Clause (applicable to the States through the Fourteenth Amendment) when the police, after failing to warn, used severe compulsion or extraordinary pressure in an attempt to elicit a statement or confession.

I agree with JUSTICE THOMAS that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues. As to the second aspect of the case, which does not involve the simple failure to give a *Miranda* warning, it is my respectful submission that JUSTICE SOUTER and JUSTICE THOMAS are incorrect. They conclude that a violation of the Self-Incrimination Clause does not arise until a privileged statement is introduced at some later criminal proceeding.

A constitutional right is traduced the moment torture or its close equivalents are brought to bear. Constitutional

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Amendment. JUSTICE THOMAS' opinion is fundamentally flawed in two respects. It incorrectly assumes that the claim it rejects is not a due process claim, *ante*, at 772–773, and it incorrectly assumes that coercive interrogation is not unconstitutional when it occurs because it merely violates a judge-made "prophylactic" rule. But the violation in this case is far more serious than a mere failure to advise respondent of his *Miranda* rights; moreover, the Court disavowed the "prophylactic" characterization of *Miranda* in *Dickerson* v. *United States*, 530 U. S. 428, 437–439 (2000).

protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place. These are the premises of this separate opinion.

## I

The *Miranda* warning, as is now well settled, is a constitutional requirement adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause. *Dickerson* v. *United States*, 530 U. S. 428, 444 (2000); *Miranda* v. *Arizona*, *supra*, at 467. *Miranda* mandates a rule of exclusion. It must be so characterized, for it has significant exceptions that can only be assessed and determined in the course of trial. Unwarned custodial interrogation does not in every instance violate *Miranda.* See, *e. g.*, *New York* v. *Quarles*, 467 U. S. 649 (1984) (statement admissible if questioning was immediately necessary for public safety). Furthermore, statements secured in violation of *Miranda* are admissible in some instances. See, *e. g.*, *Harris* v. *New York*, 401 U. S. 222 (1971) (statement admissible for purposes of impeachment). The identification of a *Miranda* violation and its consequences, then, ought to be determined at trial. The exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy.

## II

JUSTICE SOUTER and JUSTICE THOMAS are wrong, in my view, to maintain that in all instances a violation of the Self-Incrimination Clause simply does not occur unless and until a statement is introduced at trial, no matter how severe the pain or how direct and commanding the official compulsion used to extract it.

It must be remembered that the Self-Incrimination Clause of the Fifth Amendment is applicable to the States in its full text through the Due Process Clause of the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U. S. 1, 6 (1964); *Griffin* v. *California*, 380 U. S. 609, 615 (1965). The question is the

proper interpretation of the Self-Incrimination Clause in the context of the present dispute.

Our cases and our legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts. The Clause must provide more than mere assurance that a compelled statement will not be introduced against its declarant in a criminal trial. Otherwise there will be too little protection against the compulsion the Clause prohibits. The Clause protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future. "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar* v. *United States*, 406 U. S. 441, 444–445 (1972) (footnotes omitted). The decision in *Kastigar* described the Self-Incrimination Clause as an exemption from the testimonial duty. *Ibid.* As the duty is immediate, so must be the privilege. Furthermore, the exercise of the privilege depends on what the witness reasonably believes will be the future use of a statement. *Id.*, at 445. Again, this indicates the existence of a present right.

The Clause provides both assurance that a person will not be compelled to testify against himself in a criminal proceeding and a continuing right against government conduct intended to bring about self-incrimination. *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973) ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"); accord, *Bram* v. *United States*, 168 U. S. 532,

542–543 (1897); *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). The principle extends to forbid policies which exert official compulsion that might induce a person into forfeiting his rights under the Clause. *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 806 (1977) ("These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized"); accord, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968); *Gardner* v. *Broderick*, 392 U. S. 273, 279 (1968). JUSTICE SOUTER and JUSTICE THOMAS acknowledge a future privilege. *Ante*, at 777–778; *ante*, at 769. That does not end the matter. A future privilege does not negate a present right.

Their position finds some support in a single statement in *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990) ("Although conduct by law enforcement officials prior to trial may ultimately impair that right [against compelled self-incrimination], a constitutional violation occurs only at trial"). That case concerned the application of the Fourth Amendment, and the extent of the right secured under the Self-Incrimination Clause was not then before the Court. *Ibid.* Furthermore, *Verdugo-Urquidez* involved a prosecution in the United States arising from a criminal investigation in another country, *id.*, at 274–275, so there was a special reason for the Court to be concerned about the application of the Clause in that context, *id.*, at 269 (noting the Court had "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" (citing *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950))). In any event, the decision cannot be read to support the proposition that the application of the Clause is limited in the way JUSTICE SOUTER and JUSTICE THOMAS describe today.

A recent case illustrates that a violation of the Self-Incrimination Clause may have immediate consequences.

Just last Term, nine Justices all proceeded from the premise that a present, completed violation of the Self-Incrimination Clause could occur if an incarcerated prisoner were required to admit to past crimes on pain of forfeiting certain privileges or being assigned harsher conditions of confinement. *McKune* v. *Lile,* 536 U. S. 24 (2002); *id.,* at 48 (O'CONNOR, J., concurring in judgment); *id.,* at 54 (STEVENS, J., dissenting). Although there was disagreement over whether a violation occurred in the circumstances of that case, there was no disagreement that a present violation could have taken place. No Member of the Court suggested that the absence of a pending criminal proceeding made the Self-Incrimination Clause inquiry irrelevant.

This is not to say all questions as to the meaning and extent of the Clause are simple of resolution, or that all of the cited cases are easy to reconcile. Many questions about the application of the Self-Incrimination Clause are close and difficult. There are instances, moreover, when incriminating statements can be required from a reluctant witness, see, *e. g.*, *Gardner*, *supra,* at 276, and others where information may be required even absent a promise of immunity, see, *e. g.*, *Shapiro* v. *United States,* 335 U. S. 1, 19 (1948). JUSTICE SOUTER and JUSTICE THOMAS are correct to note that testimony may be ordered, on pain of contempt, if appropriate immunity is granted. It does not follow that the Clause establishes no present right. The immunity rule simply shows that the right is not absolute.

The conclusion that the Self-Incrimination Clause is not violated until the government seeks to use a statement in some later criminal proceeding strips the Clause of an essential part of its force and meaning. This is no small matter. It should come as an unwelcome surprise to judges, attorneys, and the citizenry as a whole that if a legislative committee or a judge in a civil case demands incriminating testimony without offering immunity, and even imposes sanctions for failure to comply, that the witness and counsel can-

not insist the right against compelled self-incrimination is applicable then and there. JUSTICE SOUTER and JUSTICE THOMAS, I submit, should be more respectful of the understanding that has prevailed for generations now. To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the right against compelled self-incrimination can only diminish a celebrated provision in the Bill of Rights. A Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom. Today's decision undermines one of those respected precepts.

Dean Griswold explained the place the Self-Incrimination Clause has secured in our legal heritage:

> "The Fifth Amendment has been very nearly a lone sure rock in a time of storm. It has been one thing which has held quite firm, although something like a juggernaut has pushed upon it. It has, thus, through all its vicissitudes, been a symbol of the ultimate moral sense of the community, upholding the best in us, when otherwise there was a good deal of wavering under the pressures of the times." E. Griswold, The Fifth Amendment Today 73 (1955).

It damages the law, and the vocabulary with which we impart our legal tradition from one generation to the next, to downgrade our understanding of what the Fifth Amendment requires.

There is some authority, it must be acknowledged, for the proposition that the act of torturing to obtain a confession is not comprehended within the Self-Incrimination Clause itself. In *Brown* v. *Mississippi*, 297 U. S. 278 (1936), the Court held that convictions based upon tortured confessions could not stand, but it identified the Due Process Clause, and not the Self-Incrimination Clause, as the source for its ruling.

*Id.*, at 285. The Court interpreted the Self-Incrimination Clause as limited to "the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter." *Ibid.* The decision in *Brown* antedated the incorporation of the Clause and the ensuing understanding of its fundamental role in our legal system.

The views expressed by JUSTICE SOUTER and JUSTICE THOMAS also have some academic support. Professor McNaughton, in his revision of Professor Wigmore's treatise on the law of evidence, recites various rationales for the Self-Incrimination Clause, declaring all of them insufficient. 8 J. Wigmore, Evidence § 2251 (J. McNaughton rev. ed. 1961). The 11th justification he discusses is the prevention of torture, *id.*, at 315, a practice Professor McNaughton simply assures us will not be revived, *ibid.*

This is not convincing. The Constitution is based upon the theory that when past abuses are forbidden the resulting right has present meaning. A police officer's interrogation is different in a formal sense from interrogation ordered by an official inquest, but the close relation between the two ought not to be so quickly discounted. Even if some think the abuses of the Star Chamber cannot revive, the specter of Sheriff Screws, see *Screws* v. *United States*, 325 U. S. 91 (1945), or of the deputies who beat the confessions out of the defendants in *Brown* v. *Mississippi*, is not so easily banished. See *Oregon* v. *Elstad*, 470 U. S. 298, 312, n. 3 (1985); *id.*, at 371–372, n. 19 (STEVENS, J., dissenting).

## III

In my view the Self-Incrimination Clause is applicable at the time and place police use compulsion to extract a statement from a suspect. The Clause forbids that conduct. A majority of the Court has now concluded otherwise, but that should not end this case. It simply implicates the larger definition of liberty under the Due Process Clause of the

Fourteenth Amendment. *Dickerson*, 530 U. S., at 433 ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment"). Turning to this essential, but less specific, guarantee, it seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person. *Brown*, *supra*, at 285; *Palko* v. *Connecticut*, 302 U. S. 319 (1937); see also *Rochin* v. *California*, 342 U. S. 165 (1952). The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both.

That brings us to the interrogation in this case. Had the officer inflicted the initial injuries sustained by Martinez (the gunshot wounds) for purposes of extracting a statement, there would be a clear and immediate violation of the Constitution, and no further inquiry would be needed. That is not what happened, however. The initial injuries and anguish suffered by the suspect were not inflicted to aid the interrogation. The wounds arose from events preceding it. True, police officers had caused the injuries, but they had not done so to compel a statement or with the purpose of facilitating some later interrogation. The case can be analyzed, then, as if the wounds had been inflicted by some third person, and the officer came to the hospital to interrogate.

There is no rule against interrogating suspects who are in anguish and pain. The police may have legitimate reasons, borne of exigency, to question a person who is suffering or in distress. Locating the victim of a kidnaping, ascertaining the whereabouts of a dangerous assailant or accomplice, or determining whether there is a rogue police officer at large are some examples. That a suspect is in fear of dying, fur-

thermore, may not show compulsion but just the opposite. The fear may be a motivating factor to volunteer information. The words of a declarant who believes his death is imminent have a special status in the law of evidence. See, *e. g.*, *Mattox* v. *United States*, 146 U. S. 140, 152 (1892) ("The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose"); see also Fed. Rule Evid. 804(b)(2) (providing an exception from the hearsay rule for certain statements uttered under belief of impending death). A declarant in Martinez's circumstances may want to tell his story even if it increases his pain and agony to do so. The Constitution does not forbid the police from offering a person an opportunity to volunteer evidence he wishes to reveal.

There are, however, actions police may not take if the prohibition against the use of coercion to elicit a statement is to be respected. The police may not prolong or increase a suspect's suffering against the suspect's will. That conduct would render government officials accountable for the increased pain. The officers must not give the impression that severe pain will be alleviated only if the declarant cooperates, for that, too, uses pain to extract a statement. In a case like this one, recovery should be available under § 1983 if a complainant can demonstrate that an officer exploited his pain and suffering with the purpose and intent of securing an incriminating statement. That showing has been made here.

The transcript of the interrogation set out by JUSTICE STEVENS, *ante*, at 784–786 (opinion concurring in part and dissenting in part), and other evidence considered by the District Court demonstrate that the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions.

It is true that the interrogation was not continuous. Ten minutes of questions and answers were spread over a 45-minute interval. App. to Pet. for Cert. 27a. Treatment was apparently administered during those interruptions. The pauses in the interrogation, however, do not indicate any error in the trial court's findings and conclusions.

The District Court found that Martinez "had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police." *Id.*, at 22a. His blinding facial wounds made it impossible for him visually to distinguish the interrogating officer from the attending medical personnel. The officer made no effort to dispel the perception that medical treatment was being withheld until Martinez answered the questions put to him. There was no attempt through *Miranda* warnings or other assurances to advise the suspect that his cooperation should be voluntary. Martinez begged the officer to desist and provide treatment for his wounds, but the questioning persisted despite these pleas and despite Martinez's unequivocal refusal to answer questions. Cf. *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978) (Court said of similar circumstances: "It is hard to imagine a situation less conducive to the exercise of a rational intellect and a free will" (internal quotation marks omitted)).

The standards governing the interrogation of suspects and witnesses who suffer severe pain must accommodate the exigencies that law enforcement personnel encounter in circumstances like this case. It is clear enough, however, that the police should take the necessary steps to ensure that there is neither the fact nor the perception that the declarant's pain is being used to induce the statement against his will. In this case no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement. The record supports the ultimate finding that

the officer acted with the intent of exploiting Martinez's condition for purposes of extracting a statement.

Accordingly, I would affirm the decision of the Court of Appeals that a cause of action under § 1983 has been stated. The other opinions filed today, however, reach different conclusions as to the correct disposition of the case. Were JUSTICE STEVENS, JUSTICE GINSBURG, and I to adhere to our position, there would be no controlling judgment of the Court. In these circumstances, and because a ruling on substantive due process in this case could provide much of the essential protection the Self-Incrimination Clause secures, I join Part II of JUSTICE SOUTER's opinion and would remand the case for further consideration.

JUSTICE GINSBURG, concurring in part and dissenting in part.

I join Parts II and III of JUSTICE KENNEDY's opinion. For reasons well stated therein, I would hold that the Self-Incrimination Clause applies at the time and place police use severe compulsion to extract a statement from a suspect. See *ante*, at 790–798 and this page (opinion concurring in part and dissenting in part). The evidence in this case, as JUSTICE KENNEDY explains, supports the conclusion "that the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions." *Ante*, at 797. I write separately to state my view that, even if no finding were made concerning Martinez's belief that refusal to answer would delay his treatment, or Chavez's intent to create such an impression, the interrogation in this case would remain a clear instance of the kind of compulsion no reasonable officer would have thought constitutionally permissible.

In *Mincey* v. *Arizona*, 437 U. S. 385 (1978), appropriately referenced by JUSTICE KENNEDY, see *ante*, at 798, this Court held involuntary certain statements made during an in-

hospital police interrogation.[1] The suspect questioned in *Mincey* had been "seriously wounded just a few hours earlier," and "[a]lthough he had received some treatment, his condition at the time of [the] interrogation was still sufficiently serious that he was in the intensive care unit." 437 U. S., at 398. He was interrogated while "lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus." *Id.*, at 399. Despite the suspect's clear and repeated indications that he did not want to talk, the officer persisted in questioning him as he drifted in and out of consciousness. The Court thought it "apparent" in these circumstances that the suspect's statements "were not the product of his free and rational choice." *Id.*, at 401 (internal quotation marks omitted).

Martinez's interrogation strikingly resembles the hospital-bed questioning in *Mincey*. Like the suspect in *Mincey*, Martinez was "at the complete mercy of [his interrogator], unable to escape or resist the thrust of [the] interrogation." *Id.*, at 399 (internal quotation marks omitted). As JUSTICE KENNEDY notes, Martinez "had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police." *Ante*, at 798 (quoting *Martinez* v. *Oxnard*, CV 98–9313 (CD Cal., July 31, 2000), p. 7, App. to Pet. for Cert. 22a). "In this debilitated and helpless condition, [Martinez] clearly expressed his wish not to be interrogated." *Mincey*, 437 U. S., at 399. Chavez nonetheless continued to question him, "ceas[ing] the interrogation only during intervals when [Martinez] lost consciousness or received medical treatment." *Id.*, at 401. Martinez was "weakened by pain and shock"; "barely conscious, . . . his will was simply overborne." *Id.*, at 401–402.

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[1] While *Mincey* concerned admissibility under the Due Process Clause of the Fourteenth Amendment, its analysis of the coercive nature of the interrogation is nonetheless instructive in this case. See *Dickerson* v. *United States*, 530 U. S. 428, 433–434 (2000).

Thus, whatever Martinez might have thought about Chavez's interference with his treatment, I would agree with the District Court that "the totality of the circumstances in this case" establishes "that [Martinez's] statement was not voluntarily given." CV 98–9313, at 7, App. to Pet. for Cert. 22a; accord, *Martinez* v. *Oxnard*, 270 F. 3d 852, 857 (CA9 2001). It is indeed "hard to imagine a situation less conducive to the exercise of a rational intellect and a free will." *Ante*, at 798 (KENNEDY, J., concurring in part and dissenting in part) (quoting *Mincey*, 437 U. S., at 398); see *ante*, at 783 (STEVENS, J., concurring in part and dissenting in part) (characterizing Martinez's interrogation as "the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods"); cf. 4 J. Wigmore, Evidence § 2251, p. 827 (1923) (noting about police interrogations common-law jurisprudence seeks to ward off: "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." (emphasis deleted and internal quotation marks omitted)).[2]

In common with the Due Process Clause, the privilege against self-incrimination safeguards "the freedom of the individual from the arbitrary power of governmental authorities." E. Griswold, The Fifth Amendment Today 51 (1955). Closely connected "with the struggle to eliminate torture as a governmental practice," *id.*, at 3, the privilege is rightly regarded as "one of the great landmarks in man's struggle to make himself civilized," *id.*, at 7. Its core idea is captured in the Latin maxim, "*Nemo tenetur prodere se ipsum*," in

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[2] There was an eyewitness, local farm worker Eluterio Flores, to the encounter between the police and Martinez. See Brief for Respondent 1; Defendants' Opposition to Plaintiff's Motion for Summary Adjudication of Issues, in Record for No. CV 98–9313 (CD Cal.), p. 3; *id.*, at App. E (transcript of videotaped deposition of Eluterio Flores). The record does not reveal the extent to which the police interrogated Flores about the encounter.

English, "No one should be required to accuse himself." *Id.*, at 2. As an "expression of our view of civilized governmental conduct," *id.*, at 9, the privilege should instruct and control all of officialdom, the police no less than the prosecutor.

Convinced that Chavez's conduct violated Martinez's right to be spared from self-incriminating interrogation, I would affirm the judgment of the Court of Appeals. To assure a controlling judgment of the Court, however, see *ante*, at 799 (KENNEDY, J., concurring in part and dissenting in part), I join Part II of JUSTICE SOUTER's opinion.

Syllabus

# NATIONAL PARK HOSPITALITY ASSOCIATION *v.* DEPARTMENT OF THE INTERIOR ET AL.

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

No. 02–196. Argued March 4, 2003—Decided May 27, 2003

The Contract Disputes Act of 1978 (CDA) establishes rules governing disputes arising out of certain Government contracts. After Congress enacted the National Parks Omnibus Management Act of 1998, establishing a comprehensive concession management program for national parks, the National Park Service (NPS) issued implementing regulations including 36 CFR § 51.3, which purports to render the CDA inapplicable to concession contracts. Petitioner concessioners' association challenged § 51.3's validity. The District Court upheld the regulation, concluding that the CDA is ambiguous on whether it applies to concession contracts and finding NPS' interpretation reasonable under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. The District of Columbia Circuit affirmed, placing no reliance on *Chevron*, but finding NPS' reading of the CDA consistent with both the CDA and the 1998 Act.

*Held:* The controversy is not yet ripe for judicial resolution. Determining whether administrative action is ripe requires evaluation of (1) the issues' fitness for judicial decision and (2) the hardship to the parties of withholding court consideration. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149. Regarding the hardship inquiry, the federal respondents concede that, because NPS has no delegated rulemaking authority under the CDA, § 51.3 is not a legislative regulation with the force of law. And their assertion that § 51.3 is an interpretative regulation advising the public of the agency's construction of the statutes and rules *which it administers* is incorrect, as NPS is not empowered to administer the CDA. That task rests with agency contracting officers and boards of contract appeals, as well as the federal courts; and any authority regarding the agency boards' proper arrangement belongs to the Administrator for Federal Procurement Policy. Consequently, § 51.3 is nothing more than a general policy statement designed to inform the public of NPS' views on the CDA's proper application. Thus, § 51.3 does not create "adverse effects of a strictly legal kind," which are required for a hardship showing. *Ohio Forestry Assn., Inc.* v. *Sierra Club*, 523 U. S. 726, 733. Moreover, § 51.3 does not affect a concessioner's primary conduct, *e. g.*, *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158, 164,

as it leaves the concessioner free to conduct its business as it sees fit. Moreover, nothing in the regulation prevents concessioners from following the procedures set forth in the CDA once a dispute over a concession contract actually arises. This Court has previously found that challenges to regulations similar to § 51.3 were not ripe for lack of a hardship showing. See, *e. g.*, *id.*, at 161–162. Petitioner's contention that delaying judicial resolution of the issue will cause real harm because the CDA's applicability *vel non* is a factor taken into account by a concessioner preparing its bids is unpersuasive. Mere uncertainty as to the validity of a legal rule does not constitute a hardship for purposes of the ripeness analysis. As to whether the issue here is fit for review, further factual development would "significantly advance [this Court's] ability to deal with the legal issues presented," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 82, even though the question is "purely legal" and § 51.3 constitutes "final agency action" under the Administrative Procedure Act, *Abbott Laboratories*, *supra*, at 149. Judicial resolution of the question presented here should await a concrete dispute about a particular concession contract. Pp. 807–812.

282 F. 3d 818, vacated and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 812. BREYER, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 817.

*Kenneth S. Geller* argued the cause for petitioner. With him on the briefs were *Richard B. Katskee* and *David M. Gossett*. *Robert R. Gasaway* and *Ashley C. Parrish* filed briefs for Xanterra Parks & Resorts, LLC, respondent under this Court's Rule 12.6, urging reversal.

*John P. Elwood* argued the cause for the federal respondents. With him on the briefs were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Clement*, and *Barbara C. Biddle*.

JUSTICE THOMAS delivered the opinion of the Court.

Petitioner, a nonprofit trade association that represents concessioners doing business in the national parks, challenges a National Park Service (NPS) regulation that pur-

ports to render the Contract Disputes Act of 1978 (CDA), 92 Stat. 2383, 41 U. S. C. § 601 *et seq.*, inapplicable to concession contracts. We conclude that the controversy is not yet ripe for judicial resolution.

I

The CDA establishes rules governing disputes arising out of certain Government contracts.[1] The statute provides that these disputes first be submitted to an agency's contracting officer. § 605. A Government contractor dissatisfied with the contracting officer's decision may seek review either from the United States Court of Federal Claims or from an administrative board in the agency. See §§ 606, 607(d), 609(a). Either decision may then be appealed to the United States Court of Appeals for the Federal Circuit.[2] See 28 U. S. C. § 1295; 41 U. S. C. § 607(g).

Since 1916 Congress has charged NPS to "promote and regulate the use of the Federal areas known as national parks," "conserve the scenery and the natural and historic objects and the wild life therein," and "provide for [their] enjoyment [in a way that] will leave them unimpaired for the enjoyment of future generations." An Act To establish a National Park Service, 39 Stat. 535, 16 U. S. C. § 1. To make visits to national parks more enjoyable for the public, Congress authorized NPS to "grant privileges, leases, and permits for the use of land for the accommodation of visitors."

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[1] Title 41 U. S. C. § 602(a) provides:

"Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency for—

"(1) the procurement of property, other than real property in being;

"(2) the procurement of services;

"(3) the procurement of construction, alteration, repair or maintenance of real property; or,

"(4) the disposal of personal property."

[2] The CDA also provides that a prevailing contractor is entitled to prejudgment interest. § 611.

§ 3, 39 Stat. 535. Such "privileges, leases, and permits" have become embodied in national parks concession contracts.

The specific rules governing national parks concession contracts have changed over time. In 1998, however, Congress enacted the National Parks Omnibus Management Act of 1998 (1998 Act or Act), Pub. L. 105–391, 112 Stat. 3497 (codified with certain exceptions in 16 U. S. C. §§ 5951–5966), establishing a new and comprehensive concession management program for national parks. The 1998 Act authorizes the Secretary of the Interior to enact regulations implementing the Act's provisions, § 5965.

NPS, to which the Secretary has delegated her authority under the 1998 Act, promptly began a rulemaking proceeding to implement the Act. After notice and comment, final regulations were issued in April 2000. 65 Fed. Reg. 20630 (2000) (codified in 36 CFR pt. 51). The regulations define the term "concession contract" as follows:

> "A *concession contract (or contract)* means a binding written agreement between the Director and a concessioner . . . . Concession contracts are not contracts within the meaning of 41 U. S. C. 601 *et seq.* (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions."[3] 36 CFR § 51.3 (2002).

Through this provision NPS took a position with respect to a longstanding controversy with the Department of Interior's Board of Contract Appeals (IBCA). Beginning in 1989, the IBCA ruled that NPS concession contracts *were* subject to the CDA, see *R & R Enterprises*, 89–2 B. C. A., ¶ 21708, pp. 109145–109147 (1989), and subsequent attempts by NPS to convince the IBCA otherwise proved unavailing, *National*

[3] For ease of reference, throughout this opinion we will refer to the second sentence quoted in the text as § 51.3.

*Park Concessions, Inc.*, 94–3 B. C. A., ¶ 27104, pp. 135096–135098 (1994).

II

Petitioner challenged the validity of § 51.3 in the District Court for the District of Columbia. *Amfac Resorts, L. L. C.* v. *United States Dept. of Interior*, 142 F. Supp. 2d 54, 80–82 (2001). The District Court upheld the regulation, applying the deference principle of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The court concluded that the CDA is ambiguous on whether it applies to concession contracts and found NPS' interpretation of the CDA reasonable. 142 F. Supp. 2d, at 80–82.

The Court of Appeals for the District of Columbia Circuit affirmed, albeit on different grounds. *Amfac Resorts, L. L. C.* v. *United States Dept. of Interior*, 282 F. 3d 818, 834–835 (2002). Recognizing that NPS "does not administer the [CDA], and thus may not have interpretative authority over its provisions," the court placed no reliance on *Chevron* but simply "agree[d]" with NPS' reading of the CDA, finding that reading consistent with both the CDA and the 1998 Act. 282 F. 3d, at 835. We granted certiorari to consider whether the CDA applies to contracts between NPS and concessioners in the national parks. 537 U. S. 1018 (2002). Because petitioner has brought a facial challenge to the regulation and is not litigating any concrete dispute with NPS, we asked the parties to provide supplemental briefing on whether the case is ripe for judicial action. Tr. of Oral Arg. 62.

III

Ripeness is a justiciability doctrine 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); accord, *Ohio Forestry Assn., Inc.* v. *Sierra Club*, 523 U. S. 726, 732–733 (1998). The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Reno* v. *Catholic Social Services, Inc.*, 509 U. S. 43, 57, n. 18 (1993) (citations omitted), but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion. *Ibid.* (citing *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 138 (1974)).

Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Abbott Laboratories*, *supra*, at 149. "Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act (APA)] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. . . .)" *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 891 (1990). Under the facts now before us, we conclude this case is not ripe.

We turn first to the hardship inquiry. The federal respondents concede that, because NPS has no delegated rulemaking authority under the CDA, the challenged portion of § 51.3 cannot be a legislative regulation with the force of law. See Brief for Federal Respondents 15, n. 6; Supplemental Brief for Federal Respondents 6. They note, though, that "agencies may issue interpretive rules 'to advise the public of the agency's construction of the statutes and rules *which*

*it administers*,'" Brief for Federal Respondents 15, n. 6 (quoting *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995) (emphasis added)), and seek to characterize § 51.3 as such an interpretive rule.

We disagree. Unlike in *Guernsey Memorial Hospital*, where the agency issuing the interpretative guideline was responsible for administering the relevant statutes and regulations, NPS is not empowered to administer the CDA. Rather, the task of applying the CDA rests with agency contracting officers and boards of contract appeals, as well as the Federal Court of Claims, the Court of Appeals for the Federal Circuit, and, ultimately, this Court. Moreover, under the CDA, any authority regarding the proper arrangement of agency boards belongs to the Administrator for Federal Procurement Policy. See 41 U. S. C. § 607(h) ("Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U. S. C. § 401 *et seq.*], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards . . ."). Consequently, we consider § 51.3 to be nothing more than a "general statemen[t] of policy" designed to inform the public of NPS' views on the proper application of the CDA. 5 U. S. C. § 553(b)(3)(A).

Viewed in this light, § 51.3 does not create "adverse effects of a strictly legal kind," which we have previously required for a showing of hardship. *Ohio Forestry Assn., Inc.*, 523 U. S., at 733. Just like the Forest Service plan at issue in *Ohio Forestry*, § 51.3 "do[es] not command anyone to do anything or to refrain from doing anything; [it] do[es] not grant, withhold, or modify any formal legal license, power, or authority; [it] do[es] not subject anyone to any civil or criminal liability; [and it] create[s] no legal rights or obligations." *Ibid.*

Moreover, § 51.3 does not affect a concessioner's primary conduct. *Toilet Goods Assn., Inc.* v. *Gardner,* 387 U. S. 158, 164 (1967); *Ohio Forestry Assn., supra,* at 733–734. Unlike the regulation at issue in *Abbott Laboratories,* which required drug manufacturers to change the labels, advertisements, and promotional materials they used in marketing prescription drugs on pain of criminal and civil penalties, see 387 U. S., at 152–153, the regulation here leaves a concessioner free to conduct its business as it sees fit. See also *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167, 171 (1967) (regulations governing conditions for use of color additives in foods, drugs, and cosmetics were "self-executing" and had "an immediate and substantial impact upon the respondents").

We have previously found that challenges to regulations similar to § 51.3 were not ripe for lack of a showing of hardship. In *Toilet Goods Assn.*, for example, the Food and Drug Administration (FDA) issued a regulation requiring producers of color additives to provide FDA employees with access to all manufacturing facilities, processes, and formulae. 387 U. S., at 161–162. We concluded the case was not ripe for judicial review because the impact of the regulation could not "be said to be felt immediately by those subject to it in conducting their day-to-day affairs" and "no irremediabl[y] adverse consequences flow[ed] from requiring a later challenge." *Id.*, at 164. Indeed, the FDA regulation was more onerous than § 51.3 because failure to comply with it resulted in the suspension of the producer's certification and, consequently, could affect production. See *id.*, at 165, and n. 2. Here, by contrast, concessioners suffer no practical harm as a result of § 51.3. All the regulation does is announce the position NPS will take with respect to disputes arising out of concession contracts. While it informs the public of NPS' view that concessioners are not entitled to take advantage of the provisions of the CDA, nothing in the

regulation prevents concessioners from following the procedures set forth in the CDA once a dispute over a concession contract actually arises. And it appears that, notwithstanding § 51.3, the IBCA has been quite willing to apply the CDA to certain concession contracts. *Watch Hill Concessions, Inc.*, 01–1 B. C. A., ¶ 31298, pp. 154520–154521 (IBCA 2001) (concluding that concession contract was subject to the CDA despite the contrary language in § 51.3).

Petitioner contends that delaying judicial resolution of this issue will result in real harm because the applicability *vel non* of the CDA is one of the factors a concessioner takes into account when preparing its bid for NPS concession contracts. See Supplemental Brief for Petitioner 4–6. Petitioner's argument appears to be that mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis. We are not persuaded. If we were to follow petitioner's logic, courts would soon be overwhelmed with requests for what essentially would be advisory opinions because most business transactions could be priced more accurately if even a small portion of existing legal uncertainties were resolved.[4] In short, petitioner has failed

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[4] Petitioner notes that its complaint challenged not only the regulation but also two specific prospectuses issued by NPS in late 2000. Thus, petitioner argues, even if the first challenge is not ripe, the latter two are reviewable under the Tucker Act, 28 U. S. C. § 1491(b)(1). See Supplemental Brief for Petitioner 6–8. Petitioner did not seek certiorari review on these issues; accordingly, we decline to consider them. See this Court's Rule 14.1(a); *Yee* v. *Escondido*, 503 U. S. 519, 535–536 (1992).

Similarly, JUSTICE BREYER's reliance on the Tucker Act to show that the hardship requirement of *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967), has been satisfied, see *post*, at 820–821 (dissenting opinion), is misplaced. The fact that one "congressional statute" authorizes "immediate judicial relief from [certain types of] agency determinations," *post*, at 820, says nothing about whether "immediate judicial review" is advisable for challenges brought against other types of agency actions based on a *different* statute.

to demonstrate that deferring judicial review will result in real hardship.

We consider next whether the issue in this case is fit for review. Although the question presented here is "a purely legal one" and § 51.3 constitutes "final agency action" within the meaning of § 10 of the APA, 5 U. S. C. § 704, *Abbott Laboratories, supra,* at 149, we nevertheless believe that further factual development would "significantly advance our ability to deal with the legal issues presented," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 82 (1978); accord, *Ohio Forestry Assn., Inc.*, 523 U. S., at 736–737; *Toilet Goods Assn., supra,* at 163. While the federal respondents generally argue that NPS was correct to conclude that the CDA does not cover concession contracts, they acknowledge that certain types of concession contracts might come under the broad language of the CDA. Brief for Federal Respondents 33–34. Similarly, while petitioner and respondent Xanterra Parks & Resorts, LLC, present a facial challenge to § 51.3, both rely on specific characteristics of certain types of concession contracts to support their positions. See Brief for Petitioner 21–23, 36; Brief for Respondent Xanterra Parks & Resorts, LLC, 20, 22. In light of the foregoing, we conclude that judicial resolution of the question presented here should await a concrete dispute about a particular concession contract.

* * *

For the reasons stated above, we vacate the judgment of the Court of Appeals insofar as it addressed the validity of § 51.3 and remand the case with instructions to dismiss the case with respect to this issue.

*It is so ordered.*

JUSTICE STEVENS, concurring in the judgment.

Petitioner seeks this Court's resolution of the straightforward legal question whether the Contract Disputes Act of

1978 (CDA), 41 U. S. C. § 601 *et seq.*, applies to concession contracts with the National Park Service. Though this question is one that would otherwise be appropriate for this Court to decide, in my view petitioner has not satisfied the threshold requirement of alleging sufficient injury to invoke federal-court jurisdiction. If such allegations of injury were present, however, this case would not raise any of the concerns that the ripeness doctrine was designed to avoid.

## I

The CDA provides certain significant protections for private parties contracting with federal agencies. It authorizes *de novo* review of a contractor's disputed decision, payment of prejudgment interest if a dispute with the agency is resolved in the contractor's favor, and expedited procedures for resolving minor disputes. §§ 607–612. The value to contractors of these protections has not been quantified in this case, but the protections are unquestionably significant.

Ever since the enactment of the CDA in 1978, the National Park Service has insisted that the statute does not apply to contracts with concessionaires who operate restaurants, lodges, and gift shops in the national parks. See, *e. g.*, Lodging of Federal Respondents 1. In its view, the statute applies to Government contracts involving the procurement of goods or services that the Government agrees to pay for, not to licenses issued by the Government to concessionaires who sell goods and services to the public. After the enactment of the National Parks Omnibus Management Act of 1998, 16 U. S. C. §§ 5951–5966, the Park Service issued a regulation restating that position. 36 CFR § 51.3 (2002). There is nothing tentative or inconclusive about the agency's position. The promulgation of the regulation indicated that the agency had determined that a clear statement of its interpretation of the CDA would be useful to potential concessionaires bidding for future contracts. Under the Park Service's view,

nearly 600 concession contracts in 131 national parks fall outside of the CDA. Lodging of Federal Respondents 6.

Petitioner is a trade association whose members are parties to such contracts and periodically enter into negotiations for future contracts. They are undisputedly interested in knowing whether disputes that are sure to arise under some of those contracts will be resolved pursuant to the CDA procedures or the less favorable procedures that will apply if the Park Service regulation is valid.

## II

In our leading case discussing the "ripeness doctrine" we explained that the question whether a controversy is "ripe" for judicial resolution has a "twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148–149 (1967). Both aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule.

The first aspect is the more important and it is satisfied in this case. The CDA applies to any express or implied contract for the procurement of property, services, or construction. 41 U. S. C. § 602(a). In the view of the Park Service, a procurement contract is one that obligates the Government to pay for goods and services that it receives, whereas concession contracts authorize third parties to provide services to park area visitors. Petitioner, on the other hand, argues that the contracts provide for the performance of services that discharge a public duty even though the Government does not pay the concessionaires. Whichever view may better reflect the intent of the Congress that enacted the CDA, it is perfectly clear that this question of statutory interpretation is as "fit" for judicial decision today as it will ever be. Even if there may be a few marginal cases in which the applicability of the CDA may depend on unique facts, the regula-

tion's blanket exclusion of concession contracts is either a correct or an incorrect interpretation of the statute. The issue has been fully briefed and argued and, in my judgment, is ripe for decision.

The second aspect of the ripeness inquiry is less clear and less important. If there were reason to believe that further development of the facts would clarify the legal question, or that the agency's view was tentative or apt to be modified, only a strong showing of hardship to the parties would justify a prompt decision. In this case, it is probably correct that the hardship associated with a delayed decision is minimal. On the other hand, as the Park Service's decision to promulgate the regulation demonstrates, eliminating the present uncertainty about the applicable dispute resolution procedures will provide a benefit for all interested parties. If petitioner had alleged sufficient injury arising from the Park Service's position, I would favor the exercise of our discretion to consider the case ripe for decision. Because such an allegation of injury is absent, however, petitioner does not have standing to have this claim adjudicated.

## III

To establish an Article III case or controversy, a litigant must establish that he has "standing." *Whitmore* v. *Arkansas*, 495 U. S. 149, 155 (1990). To have standing, a "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). This requirement specifically applies to parties challenging the validity of administrative regulations. See *Sierra Club* v. *Morton*, 405 U. S. 727, 735 (1972).

In the complaint filed in the District Court, petitioner alleged that the resolution of the merits of its dispute over the validity of the Park Service regulation was important, but it failed to allege that the existence of the regulation had caused any injury to it or to its members:

> "The applicability of the CDA to concession contracts is important to concessioners because NPS concession contracts are of lengthy duration, often require significant upfront financial commitments, and by their terms provide the agency with broad unilateral discretion to alter many aspects of those contracts over time. The unlawful decision by the NPS to exempt itself from the CDA is thus of great importance to the contract solicitation process." App. 22.

At oral argument, counsel reiterated that the resolution of this question was "important" and that concessionaires "need to know now, in terms of deciding whether to bid on certain contracts, what their rights are under those contracts." Tr. of Oral Arg. 7–8. After argument, when asked to brief the issue of ripeness, petitioner stated that its members "need to know *before* a dispute arises—and in fact, *before* deciding whether to bid on a concessions contract—what procedural mechanisms will apply to contractual disputes," and that "the prices at which concessioners 'compete for Government contract business' would be directly affected." Supplemental Brief for Petitioner 1, 5 (citations omitted). It is fair to infer from the record before us, however, that petitioner's members have bid on, and been awarded, numerous contracts without having the benefit of a definitive answer to the important legal question that their complaint has identified.

Neither in its complaint in the District Court nor in its briefing or argument before this Court has petitioner identified a specific incident in which the Park Service's regulation caused a concessionaire to refuse to bid on a contract, to modify its bid, or to suffer any other specific injury. Rather, petitioner has focused entirely on the importance of knowing whether the Park Service's position is valid. While it is no doubt important for petitioner and its members to know as much as possible about the future of their business transactions, importance does not necessarily establish injury.

Though some of petitioner's members may well have suffered some sort of injury from the Park Service's regulation, neither the allegations of the complaint nor the evidence in the record identifies any specific injury that would be redressed by a favorable decision on the merits of the case. Accordingly, petitioner has no standing to pursue its claim.

For this reason, I concur in the Court's judgment.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, dissenting.

Like the majority, I believe that petitioner National Park Hospitality Association has standing here to pursue its legal claim, namely, that the dispute resolution procedures set forth in the Contract Disputes Act of 1978 (CDA), 41 U. S. C. § 601 *et seq.*, apply to national park concession contracts. But, unlike the majority, I believe that the question is ripe for our consideration.

I cannot agree with JUSTICE STEVENS that petitioner lacks Article III standing to bring suit on behalf of its members. See *ante*, at 815–816 and this page (opinion concurring in judgment). In my view, the National Park Service's definition of "concession contract" to exclude the CDA's protections (a definition embodied in the regulation about which petitioner complains, see 36 CFR § 51.3 (2002)) causes petitioner and its members "injury in fact." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (discussing requirements of "injury in fact," causation, and redressability); see also *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977) (association's standing based on injury to a member).

For one thing, many of petitioner's members are parties to, as well as potential bidders for, park concession contracts. Lodging for Federal Respondents 6 (listing 590 concession contracts in 131 parks). Those members will likely find that disputes arise under the contracts. And in resolving such disputes, the Park Service, following its regulation, will re-

ject the concessioners' entitlement to the significant protections or financial advantages that the CDA provides. See 41 U. S. C. §§ 605–612; *ante*, at 813–814 (STEVENS, J., concurring in judgment). In the circumstances present here, that kind of injury, though a future one, is concrete and likely to occur.

For another thing, the challenged Park Service interpretation causes a present injury. If the CDA does not apply to concession contract disagreements, as the Park Service regulation declares, then some of petitioner's members must plan now for higher contract implementation costs. Given the agency's regulation, bidders will likely be forced to pay more to obtain, or to retain, a concession contract than they believe the contract is worth. That is what petitioner argues. Supplemental Brief for Petitioner 4–6. See also App. to Supplemental Brief for Petitioner 3a–4a. Certain general allegations in the underlying complaints support this claim. See, *e. g.*, App. 20–22, ¶¶ 35, 61–67; Amfac Resorts, L. L. C. Complaint in No. 1:00CV02838 (DC), pp. 4–5, ¶ 8 (available in Clerk of Court's case file); *id.*, at 31–33, ¶¶ 102–111. Cf. *Amfac Resorts, L. L. C.* v. *United States Dept. of Interior*, 282 F. 3d 818, 830 (CADC 2002). And several uncontested circumstances indicate that such allegations are likely to prove true.

First, as the record makes clear, petitioner has a widespread membership, and many of its members regularly bid on contracts that, through cross-references to the Park Service regulation, embody the Park Service's interpretation. See, *e. g.*, App. 69, 80; Lodging for Federal Respondents 14, 25. See also Standard Concession Contract, 65 Fed. Reg. 26052, 26063, 26065 (2000); Simplified Concession Contracts, *id.*, at 44898, 44899–44900, 44910, 44912. Second, related contract solicitations are similarly widespread and recurring, involving numerous bidders. Third, after investigation, the relevant congressional committee found that the "way potential contractors view the disputes-resolving system influ-

ences how, whether, and at what prices they compete for government contract business." S. Rep. No. 95–1118, p. 4 (1978). Fourth, the CDA provides a prevailing contractor with prejudgment interest, and authorizes expedited procedures. 41 U. S. C. §§ 607(f), 608, 611. These are factors that make the inapplicability of the CDA more costly to successful bidders. See S. Rep. No. 95–1118, at 2–4; *ante*, at 813–814 (STEVENS, J., concurring in judgment).

These circumstances make clear that petitioner's members will likely suffer a concrete monetary harm, either now or in the foreseeable future. Such a showing here is sufficient to satisfy the Constitution's standing requirements. And the threatened injuries, present and future—monetary harm, injuries to a potential or actual contractual relationship, and injuries that arguably fall within the CDA's protective scope—are sufficient to satisfy "prudential" standing requirements as well. *Federal Election Comm'n* v. *Akins*, 524 U. S. 11, 19–20 (1998); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153 (1970). Cf. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 421–422 (1942).

Given this threat of immediate concrete harm (primarily in the form of increased bidding costs), this case is also ripe for judicial review. As JUSTICE STEVENS explains in Parts I and II of his opinion, the case now presents a legal issue—the applicability of the CDA to concession contracts—that is fit for judicial determination. That issue is a purely legal one, demanding for its resolution only use of ordinary judicial interpretive techniques. See *ante*, at 814–815 (opinion concurring in judgment). The relevant administrative action, *i. e.*, the agency's definition of "concession contract" under the National Parks Omnibus Management Act of 1998, 16 U. S. C. §§ 5951–5966, has been "formalized," *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148 (1967). It is embodied in an interpretive regulation issued after notice and public comment and pursuant to the Department of the Interior's

formal delegation to the National Park Service of its own statutorily granted rulemaking authority, § 5965; *ante*, at 806–807. (Unlike the majority, I would apply to the regulation the legal label "interpretive rule," not "general statement of policy," *ante*, at 809 (internal quotation marks and alteration omitted), though I agree with the majority that, because the Park Service does not administer the CDA, see *ibid.*, we owe its conclusion less deference.) The Park Service's interpretation is definite and conclusive, not tentative or likely to change; as the majority concedes, the Park Service's determination constitutes "final agency action" within the meaning of the Administrative Procedure Act. *Ante*, at 812 (internal quotation marks omitted).

The only open question concerns the nature of the harm that refusing judicial review at this time will cause petitioner's members. See *Abbott Laboratories*, *supra*, at 149. The fact that concessioners can raise the legal question at a later time, after a specific contractual dispute arises, see *ante*, at 812, militates against finding this case ripe. So too does a precedential concern: Will present review set a precedent that leads to premature challenges in other cases where agency interpretations may be less formal, less final, or less well suited to immediate judicial determination? See *ante*, at 811–812.

But the fact of immediate and particularized (and not totally reparable) injury during the bidding process offsets the first of these considerations. And the second is more than offset by a related congressional statute that specifies that prospective bidders for Government contracts can obtain immediate judicial relief from agency determinations that unlawfully threaten precisely this kind of harm. See 28 U. S. C. § 1491(b)(1) (allowing prospective bidder to object, for instance, to "solicitation by a Federal agency for bids . . . for a proposed contract" and permitting review of related allegation of "any . . . violation of statute or regulation in connection with a procurement or a proposed procurement").

See also R. Nash, S. Schooner, & K. O'Brien, The Government Contracts Reference Book 308, 423 (2d ed. 1998). This statute authorizes a potential bidder to complain of a proposed contractual term that, in the bidder's view, is unlawful, say, because it formally incorporates a regulation that embodies a specific, allegedly unlawful, remedial requirement. Cf. App. 25, ¶¶ 114–116 (excerpts from petitioner's complaint making just this claim); App. to Supplemental Brief for Petitioner 2a, ¶¶ 121–122 (same). That being so, *i. e.*, the present injury in such a case being identical to the present injury at issue here, I can find no convincing prudential reason to withhold Administrative Procedure Act review.

In sum, given this congressional policy, the concrete nature of the injury asserted by petitioner, and the final nature of the agency action at issue, I see no good reason to postpone review. I would find the issue ripe for this Court's consideration. And I would affirm the decision of the Court of Appeals on the merits, primarily for the reasons set forth in its opinion as supplemented here by the Government.

Syllabus

# BLACK & DECKER DISABILITY PLAN *v.* NORD

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

No. 02–469. Argued April 28, 2003—Decided May 27, 2003

Petitioner Black & Decker Disability Plan (Plan), an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), provides benefits for eligible disabled employees of Black & Decker Corporation (Black & Decker) and certain of its subsidiaries. Black & Decker is the administrator of the Plan but has delegated authority to Metropolitan Life Insurance Company (MetLife) to render initial recommendations on benefit claims. Respondent Nord, an employee of a Black & Decker subsidiary, submitted a claim for disability benefits under the Plan, which MetLife denied. At MetLife's review stage, Nord submitted letters and supporting documentation from his physician, Dr. Hartman, and a treating orthopedist to whom Hartman had referred Nord. These treating physicians stated that Nord suffered from a degenerative disc disease and chronic pain that rendered him unable to work. Black & Decker referred Nord to a neurologist for an independent examination. The neurologist concluded that, aided by pain medication, Nord could perform sedentary work. MetLife thereafter made a final recommendation to deny Nord's claim, which Black & Decker accepted. Seeking to overturn that determination, Nord filed this action under ERISA. The District Court granted summary judgment for the Plan, concluding that Black & Decker's denial of Nord's claim was not an abuse of the plan administrator's discretion. The Ninth Circuit reversed and itself granted summary judgment for Nord. The Court of Appeals explained that the case was controlled by a recent Ninth Circuit decision holding that, when making benefit determinations, ERISA plan administrators must follow a "treating physician rule." As described by the appeals court, that rule required a plan administrator who rejects the opinions of a claimant's treating physician to come forward with specific reasons for the decision, based on substantial evidence in the record. The Ninth Circuit found that, under this rule, the plan administrator had not provided adequate justification for rejecting the opinions of Nord's treating physicians.

*Held:* ERISA does not require plan administrators to accord special deference to the opinions of treating physicians. The "treating physician rule" imposed by the Ninth Circuit was originally developed by Courts

of Appeals as a means to control disability determinations by administrative law judges under the Social Security Act. In 1991, the Commissioner of Social Security adopted regulations approving and formalizing use of the rule in the Social Security disability program. Nothing in ERISA or the Secretary of Labor's ERISA regulations, however, suggests that plan administrators must accord special deference to the opinions of treating physicians, or imposes a heightened burden of explanation on administrators when they reject a treating physician's opinion. If the Secretary found it meet to adopt a treating physician rule by regulation, courts would examine that determination with appropriate deference. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. But the Secretary has not chosen that course and an *amicus* brief reflecting the Department of Labor's position opposes adoption of such a rule for disability determinations under plans covered by ERISA. Whether a treating physician rule would increase the accuracy of ERISA disability determinations, as the Ninth Circuit believed it would, is a question that the Legislature or superintending administrative agency is best positioned to address. Finally, and of prime importance, critical differences between the Social Security disability program and ERISA benefit plans caution against importing a treating physician rule from the former area into the latter. By accepting and codifying such a rule, the Social Security Commissioner sought to serve the need for efficient administration of an obligatory nationwide benefits program. In contrast, nothing in ERISA requires employers to establish employee benefits plans or mandates what kind of benefits employers must provide if they choose to have such a plan. *Lockheed Corp.* v. *Spink*, 517 U. S. 882, 887. Rather, employers have large leeway to design disability and other welfare plans as they see fit. In determining entitlement to Social Security benefits, the adjudicator measures the claimant's condition against a uniform set of federal criteria. The validity of a claim to benefits under an ERISA plan, on the other hand, is likely to turn, in large part, on the interpretation of terms in the plan at issue. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 115. Deference is due the Labor Secretary's stated view that ERISA is best served by preserving the greatest flexibility possible for operating claims processing systems consistent with a plan's prudent administration. Plan administrators may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician. But courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's phy-

Syllabus

sician; nor may courts impose on administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation. Pp. 829–834.

296 F. 3d 823, vacated and remanded.

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

*Lee T. Paterson* argued the cause for petitioner. With him on the briefs were *John R. Ates*, *Amanda C. Sommerfeld*, and *William G. Bruner III*.

*Lisa Schiavo Blatt* argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Olson*, *Deputy Solicitor General Kneedler*, *Howard M. Radzely*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Mark S. Flynn*.

*Lawrence D. Rohlfing* argued the cause for respondent. With him on the brief was *Eric Schnapper*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Benefits Council by *Robert N. Eccles* and *Jonathan D. Hacker;* for the American Council of Life Insurers et al. by *William J. Kayatta, Jr.*, *Mark E. Schmidtke*, and *Victoria E. Fimea;* for the Bert Bell/Pete Rozelle NFL Player Retirement Plan by *Douglas W. Ell*, *John P. McAllister*, and *Alvaro I. Anillo;* for the Central States, Southeast and Southwest Areas Health and Welfare Fund by *Thomas C. Nyhan*, *James P. Condon*, and *John J. Franczyk, Jr.;* for the Delta Family-Care Disability and Survivorship Plan et al. by *Hunter R. Hughes;* for the ERISA Industry Committee by *Caroline M. Brown* and *John M. Vine;* for the National Association of Manufacturers et al. by *Frederick R. Damm*, *Lira A. Johnson*, *Jan S. Amundson*, and *Quentin Riegel;* and for Peabody Energy Corp. et al. by *Mark E. Solomons* and *Laura Metcoff Klaus*.

Briefs of *amici curiae* urging affirmance were filed for the AARP by *Mary Ellen Signorille* and *Melvin R. Radowitz;* for the American Medical Association by *Joseph R. Guerra* and *Jack R. Bierig;* for the National Employment Lawyers Association by *Jeffrey Lewis*, *Jenifer Bosco*, *Daniel T. Driesen*, and *Ronald Dean;* and for the National Organization of Social Security Claimants' Representatives by *Nancy G. Shor*, *Eric Schnaufer*, *Robert E. Rains*, and *Jon Holder*.

JUSTICE GINSBURG delivered the opinion of the Court.

Under a rule adopted by the Commissioner of Social Security, in determining whether a claimant is entitled to Social Security disability benefits, special weight is accorded opinions of the claimant's treating physician. See 20 CFR §§ 404.1527(d)(2), 416.927(d)(2) (2002). This case presents the question whether a similar "treating physician rule" applies to disability determinations under employee benefits plans covered by the Employee Retirement Income Security Act of 1974 (ERISA or Act), 88 Stat. 832, as amended, 29 U. S. C. § 1001 *et seq.* We hold that plan administrators are not obliged to accord special deference to the opinions of treating physicians.

ERISA and the Secretary of Labor's regulations under the Act require "full and fair" assessment of claims and clear communication to the claimant of the "specific reasons" for benefit denials. See 29 U. S. C. § 1133; 29 CFR § 2560.503–1 (2002). But these measures do not command plan administrators to credit the opinions of treating physicians over other evidence relevant to the claimant's medical condition. Because the Court of Appeals for the Ninth Circuit erroneously applied a "treating physician rule" to a disability plan governed by ERISA, we vacate that court's judgment and remand for further proceedings.

## I

Petitioner Black & Decker Disability Plan (Plan), an ERISA-governed employee welfare benefit plan, covers employees of Black & Decker Corporation (Black & Decker) and certain of its subsidiaries. The Plan provides benefits for eligible employees with a "disability." As relevant here, the Plan defines "disability" to mean "the complete inability . . . of a Participant to engage in his regular occupation with

the Employer."[1] 296 F. 3d 823, 826, n. 2 (CA9 2002). Black & Decker both funds the Plan and acts as plan administrator, but it has delegated authority to Metropolitan Life Insurance Company (MetLife) to render initial recommendations on benefit claims. Disability determinations, the Black & Decker Plan provides, "[are to] be made by the [plan administrator] based on suitable medical evidence and a review of the Participant's employment history that the [plan administrator] deems satisfactory in its sole and absolute discretion." *Id.*, at 826, n. 1.

Respondent Kenneth L. Nord was formerly employed by a Black & Decker subsidiary as a material planner. His job, classed "sedentary," required up to six hours of sitting and two hours of standing or walking per day. *Id.*, at 826.

In 1997, Nord consulted Dr. Leo Hartman about hip and back pain. Dr. Hartman determined that Nord suffers from a mild degenerative disc disease, a diagnosis confirmed by a Magnetic Resonance Imaging scan. After a week's trial on pain medication prescribed by Dr. Hartman, Nord's condition remained unimproved. Dr. Hartman told Nord to cease work temporarily, and recommended that he consult an orthopedist while continuing to take the pain medication.

Nord submitted a claim for disability benefits under the Plan, which MetLife denied in February 1998. Nord next exercised his right to seek further consideration by MetLife's "Group Claims Review." *Id.*, at 827. At that stage, Nord submitted letters and supporting documentation from Dr. Hartman and a treating orthopedist to whom Hartman had referred Nord. Nord also submitted a questionnaire form, drafted by Nord's counsel, headed "Work Capacity Evaluation." Black & Decker human resources representa-

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[1] The Plan sets out a different standard for determining whether an employee is entitled to benefits for a period longer than 30 months. Because respondent Nord sought benefits "for up to 30 months," 296 F. 3d 823, 826 (CA9 2002), the standard for longer term disability is not in play in this case.

tive Janmarie Forward answered the questions, as the form instructed, by the single word "yes" or "no." One of the six items composing the "Work Capacity Evaluation" directed Forward to "[a]ssume that Kenneth Nord would have a moderate pain that would interfere with his ability to perform intense interpersonal communications or to act appropriately under stress occasionally (up to one-third) during the day." Lodging for Pet. for Cert. L–37. The associated question asked whether an "individual of those limitations [could] perform the work of a material planner." *Ibid.* Forward marked a space labeled "no."

During the MetLife review process, Black & Decker referred Nord to neurologist Antoine Mitri for an independent examination. Dr. Mitri agreed with Nord's doctors that Nord suffered from a degenerative disc disease and chronic pain. But aided by pain medication, Dr. Mitri concluded, Nord could perform "sedentary work with some walking interruption in between." *Id.*, at L–45. MetLife thereafter made a final recommendation to deny Nord's claim.

Black & Decker accepted MetLife's recommendation and, on October 27, 1998, so informed Nord. The notification letter summarized the conclusions of Nord's doctors, the results of diagnostic tests, and the opinion of Dr. Mitri. See *id.*, at L–155 to L–156. It also recounted that Black & Decker had forwarded Dr. Mitri's report to Nord's counsel with a request for comment by Nord's attending physician. Although Nord had submitted additional information, the letter continued, he had "provided . . . no new or different information that would change [MetLife's] original decision." *Id.*, at L–156. The letter further stated that the Work Capacity Evaluation form completed by Black & Decker human resources representative Forward was "not sufficient to reverse [the Plan's] decision." *Ibid.*

Seeking to overturn Black & Decker's determination, Nord filed this action in Federal District Court "to recover benefits due to him under the terms of his plan." 29 U. S. C.

§ 1132(a)(1)(B). On cross-motions for summary judgment, the District Court granted judgment for the Plan, concluding that Black & Decker's denial of Nord's claim was not an abuse of the plan administrator's discretion.

The Court of Appeals for the Ninth Circuit roundly reversed and itself "grant[ed] Nord's motion for summary judgment." 296 F. 3d, at 832. Nord's appeal, the Ninth Circuit explained, was controlled by that court's recent decision in *Regula* v. *Delta Family-Care Disability Survivorship Plan*, 266 F. 3d 1130 (2001). 296 F. 3d, at 829. The Ninth Circuit had held in *Regula* that, when making benefit determinations, ERISA plan administrators must follow a "treating physician rule." See 266 F. 3d, at 1139–1144. As described by the appeals court, the rule required an administrator "who rejects [the] opinions [of a claimant's treating physician] to come forward with specific reasons for his decision, based on substantial evidence in the record." *Id.*, at 1139. Declaring that Nord was entitled to judgment as a matter of law, the Ninth Circuit emphasized that Black & Decker fell short under the treating physician rule: The plan administrator had not provided adequate justification, the Court of Appeals said, for rejecting opinions held by Dr. Hartman and others treating Nord on Hartman's recommendation. 296 F. 3d, at 830–832.

We granted certiorari, 537 U. S. 1098 (2002), in view of the division among the Circuits on the propriety of judicial installation of a treating physician rule for disability claims within ERISA's domain. Compare *Regula*, 266 F. 3d, at 1139; *Donaho* v. *FMC Corp.*, 74 F. 3d 894, 901 (CA8 1996), with *Elliott* v. *Sara Lee Corp.*, 190 F. 3d 601, 607–608 (CA4 1999); *Delta Family-Care Disability and Survivorship Plan* v. *Marshall*, 258 F. 3d 834, 842–843 (CA8 2001); *Turner* v. *Delta Family-Care Disability and Survivorship Plan*, 291 F. 3d 1270, 1274 (CA11 2002). See also *Salley* v. *E. I. DuPont de Nemours & Co.*, 966 F. 2d 1011, 1016 (CA5 1992) (expressing "considerable doubt" on the question whether a

treating physician rule should govern ERISA cases). Concluding that courts have no warrant to order application of a treating physician rule to employee benefit claims made under ERISA, we vacate the Ninth Circuit's judgment and remand the case for further proceedings.[2]

## II

The treating physician rule at issue here was originally developed by Courts of Appeals as a means to control disability determinations by administrative law judges under the Social Security Act, 49 Stat. 620, 42 U. S. C. § 231 *et seq.* See Maccaro, The Treating Physician Rule and the Adjudication of Claims for Social Security Disability Benefits, 41 Soc. Sec. Rep. Serv. 833, 833–834 (1993). In 1991, the Commissioner of Social Security adopted regulations approving and formalizing use of the rule in the Social Security disability program. See 56 Fed. Reg. 36961, 36968 (codified at 20 CFR §§ 404.1527(d)(2), 416.927(d)(2) (2002)). The Social Security Administration, the regulations inform, will generally "give more weight to opinions from . . . treating sources," and "will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." §§ 404.1527(d)(2), 416.927(d)(2).

Concluding that a treating physician rule should similarly govern private benefit plans under ERISA, the Ninth Circuit said in *Regula* that its "reasons ha[d] to do with common sense as well as consistency in [judicial] review of disability determinations where benefits are protected by federal law." 266 F. 3d, at 1139. "Just as in the Social Security context," the court observed, "the disputed issue in ERISA disability determinations concerns whether the facts of the beneficiary's case entitle him to benefits." *Ibid.* The Ninth Circuit

[2] The Plan sought review only of the Court of Appeals' holding "that an ERISA disability plan administrator's determination of disability is subject to the 'treating physician rule.'" Pet. for Cert. i. We express no opinion on any other issues.

perceived "no reason why the treating physician rule should not be used under ERISA in order to test the reasonableness of the [plan] administrator's positions." *Ibid.* The United States urges that the Court of Appeals "erred in equating the two [statutory regimes]." Brief for United States as *Amicus Curiae* 23. We agree.[3]

"ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 113 (1989) (internal quotation marks and citations omitted). The Act furthers these aims in part by regulating the manner in which plans process benefits claims. Plans must "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant." 29 U. S. C. § 1133(1). ERISA further requires that plan procedures "afford a rea-

[3] The treating physician rule has not attracted universal adherence outside the Social Security context. Some courts have approved a rule similar to the Social Security Commissioner's for disability determinations under the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, see, *e. g.*, *Pietrunti* v. *Director, Office of Workers' Compensation Programs*, 119 F. 3d 1035, 1042 (CA2 1997), and the Secretary of Labor has adopted a version of the rule for benefit determinations under the Black Lung Benefits Act, 30 U. S. C. § 901 *et seq.*, see 20 CFR § 718.104(d)(5) (2002). One Court of Appeals, however, has rejected a treating physician rule for the assessment of claims of entitlement to veterans' benefits for service-connected disabilities, see *White* v. *Principi*, 243 F. 3d 1378, 1381 (CA Fed. 2001), and another has rejected such a rule for disability determinations under the Railroad Retirement Act of 1974, 45 U. S. C. § 231 *et seq.*, see *Dray* v. *Railroad Retirement Bd.*, 10 F. 3d 1306, 1311 (CA7 1993). Furthermore, there appears to be no uniform practice regarding application of a treating physician rule under state workers' compensation statutes. See *Conradt* v. *Mt. Carmel School*, 197 Wis. 2d 60, 69, 539 N. W. 2d 713, 717 (Ct. App. 1995) ("Conradt misrepresents the state of the law when she claims that a majority of states have adopted the 'treating physician rule.' ").

sonable opportunity . . . for a full and fair review" of dispositions adverse to the claimant. § 1133(2). Nothing in the Act itself, however, suggests that plan administrators must accord special deference to the opinions of treating physicians. Nor does the Act impose a heightened burden of explanation on administrators when they reject a treating physician's opinion.

ERISA empowers the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out" the statutory provisions securing employee benefit rights. § 1135; see § 1133 (plans shall process claims "[i]n accordance with regulations of the Secretary"). The Secretary's regulations do not instruct plan administrators to accord extra respect to treating physicians' opinions. See 29 CFR § 2560.503–1 (1997) (regulations in effect when Nord filed his claim); 29 CFR § 2560.503–1 (2002) (current regulations). Notably, the most recent version of the Secretary's regulations, which installs no treating physician rule, issued more than nine years after the Social Security Administration codified a treating physician rule in that agency's regulations. Compare 56 Fed. Reg. 36932, 36961 (1991), with 65 Fed. Reg. 70265 (2000).

If the Secretary of Labor found it meet to adopt a treating physician rule by regulation, courts would examine that determination with appropriate deference. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The Secretary has not chosen that course, however, and an *amicus* brief reflecting the position of the Department of Labor opposes adoption of such a rule for disability determinations under plans covered by ERISA. See Brief for United States as *Amicus Curiae* 7–27. Although Congress "expect[ed]" courts would develop "a federal common law of rights and obligations under ERISA-regulated plans," *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 56 (1987), the scope of permissible judicial innovation is narrower in areas where other federal actors are engaged,

cf. *Milwaukee* v. *Illinois,* 451 U. S. 304, 317–332 (1981) (because Congress had enacted a comprehensive regulatory program dealing with discharge of pollutants into the Nation's waters, the State could not maintain a federal common-law nuisance action against the city based on the latter's pollution of Lake Michigan).

The question whether a treating physician rule would "increas[e] the accuracy of disability determinations" under ERISA plans, as the Ninth Circuit believed it would, *Regula,* 266 F. 3d, at 1139, moreover, seems to us one the Legislature or superintending administrative agency is best positioned to address. As compared to consultants retained by a plan, it may be true that treating physicians, as a rule, "ha[ve] a greater opportunity to know and observe the patient as an individual." *Ibid.* (internal quotation marks and citation omitted). Nor do we question the Court of Appeals' concern that physicians repeatedly retained by benefits plans may have an "incentive to make a finding of 'not disabled' in order to save their employers money and to preserve their own consulting arrangements." *Id.,* at 1143. But the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks. And if a consultant engaged by a plan may have an "incentive" to make a finding of "not disabled," so a treating physician, in a close case, may favor a finding of "disabled." Intelligent resolution of the question whether routine deference to the opinion of a claimant's treating physician would yield more accurate disability determinations, it thus appears, might be aided by empirical investigation of the kind courts are ill equipped to conduct.

Finally, and of prime importance, critical differences between the Social Security disability program and ERISA benefit plans caution against importing a treating physician

rule from the former area into the latter. The Social Security Act creates a nationwide benefits program funded by Federal Insurance Contributions Act payments, see 26 U. S. C. §§ 3101(a), 3111(a), and superintended by the Commissioner of Social Security. To cope with the "more than 2.5 million claims for disability benefits [filed] each year," *Cleveland* v. *Policy Management Systems Corp.*, 526 U. S. 795, 803 (1999), the Commissioner has published detailed regulations governing benefits adjudications. See, *e. g.*, *id.*, at 803–804. Presumptions employed in the Commissioner's regulations "grow out of the need to administer a large benefits system efficiently." *Id.*, at 804. By accepting and codifying a treating physician rule, the Commissioner sought to serve that need. Along with other regulations, the treating physician rule works to foster uniformity and regularity in Social Security benefits determinations made in the first instance by a corps of administrative law judges.

In contrast to the obligatory, nationwide Social Security program, "[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp.* v. *Spink*, 517 U. S. 882, 887 (1996). Rather, employers have large leeway to design disability and other welfare plans as they see fit. In determining entitlement to Social Security benefits, the adjudicator measures the claimant's condition against a uniform set of federal criteria. "[T]he validity of a claim to benefits under an ERISA plan," on the other hand, "is likely to turn," in large part, "on the interpretation of terms in the plan at issue." *Firestone Tire*, 489 U. S., at 115. It is the Secretary of Labor's view that ERISA is best served by "preserv[ing] the greatest flexibility possible for . . . operating claims processing systems consistent with the prudent administration of a plan." Department of Labor, Employee Benefits Security Administration, http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html, Question B–4 (as visited May 6, 2003)

(available in Clerk of Court's case file). Deference is due that view.

Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician. But, we hold, courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.[4] The Court of Appeals therefore erred when it employed a treating physician rule lacking Department of Labor endorsement in holding that Nord was entitled to summary judgment.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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[4] Nord asserts that there are two treating physician rules: a "procedural" rule, which requires a hearing officer to explain why she rejected the opinions of a treating physician, and a "substantive" rule, which requires that "more weight" be given to the medical opinions of a treating physician. Brief for Respondent 12–13 (internal quotation marks omitted). In this case, Nord contends, the Court of Appeals applied only the "procedural" version of the rule. *Id.*, at 13. We are not certain that Nord's reading of the Court of Appeals decision is correct. See 296 F. 3d, at 831 (faulting the Plan for, *inter alia*, having "[n]o evidence . . . that Nord's treating physicians considered inappropriate factors in making their diagnosis or that Nord's physicians lacked the requisite expertise to draw their medical conclusions"). At any rate, for the reasons explained in this opinion, we conclude that ERISA does not support judicial imposition of a treating physician rule, whether labeled "procedural" or "substantive."

Syllabus

# BUNKLEY *v.* FLORIDA

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 02–8636. Decided May 27, 2003

Petitioner Bunkley had a pocketknife with a 2½- to 3-inch blade in his pocket when he was arrested as he left an unoccupied restaurant. He was charged with first-degree burglary because his knife was classified as a "dangerous weapon" under Florida law, was convicted, and was sentenced to life in prison. Had the pocketknife not been so classified, his sentence could have been no more than five years. His conviction became final in 1989. Florida has exempted the "common pocketknife" from its weapons statute since 1901, and the relevant language has remained unchanged. In 1997, in a separate case, the Florida Supreme Court interpreted the meaning of the "common pocketknife" exception for the first time, including a pocketknife with a 3¾-inch blade within the exception. *L. B.* v. *State*, 700 So. 2d 370, 373. Bunkley then moved for state postconviction relief, alleging that his armed robbery conviction was invalid under *L. B.* because his pocketknife was shorter than 3¾ inches and could not therefore support a conviction involving weapon possession. The Circuit Court denied his motion, and the State District Court of Appeal affirmed. The State Supreme Court rejected Bunkley's claim, holding that *L. B.* was an evolutionary refinement in the law that did not apply retroactively.

*Held:* The Florida Supreme Court erred in failing to determine whether the "common pocketknife" exception encompassed Bunkley's pocketknife at the time his conviction became final. The result here is controlled by *Fiore* v. *White*, 531 U. S. 225, which involved a Pennsylvania criminal statute that the Pennsylvania Supreme Court interpreted for the first time after Fiore's conviction had already become final. Under that interpretation, Fiore's conduct did not violate an element of the statute. The Pennsylvania Supreme Court's reply to this Court's certified question—that its interpretation merely clarified the statute's plain language—revealed that Fiore's conviction violated due process, because a State cannot convict a person without proving each element of the crime beyond a reasonable doubt. Application of *Fiore*'s due process principles may render a retroactivity analysis unnecessary here. *Fiore* requires the Florida Supreme Court to answer whether, in light of *L. B.*, Bunkley's 2½- to 3-inch pocketknife fit within the state statute's "common pocketknife" exception at the time his conviction became final.

Per Curiam

Because the *L. B.* decision cast doubt on the validity of Bunkley's conviction by interpreting the exception to cover his weapon, *Fiore* entitles Bunkley to a determination whether *L. B.* correctly stated the law as it stood at the time Bunkley was convicted. The Florida Supreme Court characterized *L. B.* as part of a century-long evolutionary process, but did not decide what stage the law had reached by 1989. The proper question for purposes of *Fiore* is not just whether the law changed, but when it changed. Unless and until the State Supreme Court clarifies the exception's content in 1989, this Court cannot know whether Bunkley's conviction violates the due process principles set forth in *Fiore.*

Certiorari granted; 833 So. 2d 739, vacated and remanded.

PER CURIAM.

Clyde Timothy Bunkley petitions for a writ of certiorari, arguing that the Florida Supreme Court contradicted the principles of this Court's decision in *Fiore* v. *White*, 531 U. S. 225 (2001) *(per curiam)*, when it failed to determine whether the "common pocketknife" exception to Florida's definition of a "'[w]eapon'" encompassed Bunkley's pocketknife at the time that his conviction became final in 1989. Fla. Stat. § 790.001(13) (2000). We agree, and therefore grant Bunkley's motion to proceed *in forma pauperis* and his petition for a writ of certiorari.

## I

In the early morning hours of April 16, 1986, Bunkley burglarized a closed, unoccupied Western Sizzlin' Restaurant. Report and Recommendation in No. 91–113–CIV–T–99(B) (MD Fla.), p. 1. The police arrested him after he left the restaurant. At the time of his arrest, the police discovered a "pocketknife, with a blade of 2½ to 3 inches in length, . . . folded and in his pocket." 768 So. 2d 510 (Fla. App. 2000) *(per curiam)*. "There is no evidence indicating Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time." *Ibid.*

Bunkley was charged with burglary in the first degree because he was armed with a "dangerous weapon"—namely, the pocketknife. Fla. Stat. § 810.02(2)(b) (2000). The punishment for burglary in the first degree is "imprisonment

for a term of years not exceeding life imprisonment." § 810.02(2). If the pocketknife had not been classified as a "dangerous weapon," Bunkley would have been charged with burglary in the third degree. See 833 So. 2d 739, 742 (Fla. 2002). Burglary in the third degree is punishable "by a term of imprisonment not exceeding 5 years." Fla. Stat. § 775.082(3)(d) (2002); see also 833 So. 2d, at 742. Bunkley was convicted of burglary in the first degree. He was sentenced to life imprisonment. In 1989, a Florida appellate court affirmed Bunkley's conviction and sentence. See 539 So. 2d 477.

Florida law defines a "'[w]eapon'" to "mea[n] any dirk, metallic knuckles, slingshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife." § 790.001(13). Florida has excepted the "'common pocketknife'" from its weapons statute since 1901, and the relevant language has remained unchanged since that time. See 833 So. 2d, at 743.

In 1997, the Florida Supreme Court interpreted the meaning of the "common pocketknife" exception for the first time. In *L. B.* v. *State*, 700 So. 2d 370, 373 *(per curiam)*, the court determined that a pocketknife with a blade of 3¾ inches "plainly falls within the statutory exception to the definition of 'weapon' found in section 790.001(13)." The complete analysis of the Florida Supreme Court on this issue was as follows: "In 1951, the Attorney General of Florida opined that a pocketknife with a blade of four inches in length or less was a 'common pocketknife.' The knife appellant carried, which had a 3¾-inch blade, clearly fell within this range." *Ibid.* (citation omitted). The Florida Supreme Court accordingly vacated the conviction in *L. B.* because the "knife in question was a 'common pocketknife' under any intended definition of that term." *Ibid.* Justice Grimes, joined by Justice Wells, wrote an opinion agreeing with the majority's resolution of the case "[i]n view of the Attorney General's opinion and the absence of a more definitive description of a common pocketknife." *Ibid.*

After the Florida Supreme Court issued its decision in *L. B.*, Bunkley filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 (1999). Bunkley alleged that under the *L. B.* decision, his pocketknife could not have been considered a "weapon" under § 790.001(13). He therefore argued that his conviction for armed burglary was invalid and should be vacated because a "common pocketknife can not *[sic]* support a conviction involving possession of a weapon." App. to Pet. for Cert. C–2. The Circuit Court rejected Bunkley's motion, and the District Court of Appeal of Florida, Second District, affirmed. 768 So. 2d 510 (2000).

The Florida Supreme Court also rejected Bunkley's claim. It held that the *L. B.* decision did not apply retroactively. Under Florida law, only "jurisprudential upheavals" will be applied retroactively. 833 So. 2d, at 743 (internal quotation marks omitted). The court stated that a "jurisprudential upheaval is a *major* constitutional change of law." *Id.*, at 745 (internal quotation marks omitted). By contrast, any "evolutionary refinements" in the law "are not applied retroactively." *Id.*, at 744. The court then held that *L. B.* was an evolutionary refinement in the law, and therefore Bunkley was not entitled to relief. In a footnote, the Florida Supreme Court cited our decision in *Fiore* v. *White*, *supra*, and held without analysis that *Fiore* did not apply to this case. See 833 So. 2d, at 744, n. 12.*

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*The dissent claims that the Florida Supreme Court did not need to decide anything other than whether *L. B.* was a change in the law. See *post*, at 845 (citing Fla. Rule Crim. Proc. 3.850(b)(2) (2000)). Yet as the dissent concedes, see *post*, at 843, the Florida Supreme Court passed upon the *Fiore* due process inquiry as well as the retroactivity question. The dissent also notes that Bunkley has raised the issue of the common pocketknife in prior appeals. These appeals, however, were filed *prior* to the Florida Supreme Court's opinion in *L. B.* And we agree with the dissent that absent the *L. B.* decision, Bunkley would not be able to pursue his claim now. The Florida Supreme Court committed an error of law here by not addressing whether the *L. B.* decision means that at the time Bunk-

Justice Pariente, joined by Chief Justice Anstead, dissented. She stated that the Florida Supreme Court's decision in *L. B.* "should be applied to grant Bunkley collateral relief." 833 So. 2d, at 746. She criticized the majority opinion for relying solely on a retroactivity question. In her view, "application of the due process principles of *Fiore* renders a retroactivity analysis . . . unnecessary." *Id.*, at 747. She noted that even if *L. B.* was merely an evolutionary refinement of the law, "the majority offers no precedent laying out the stages of this evolution." 833 So. 2d, at 747. Because she thought the *L. B.* decision "correctly stated the law at the time Bunkley's conviction became final," she would have vacated Bunkley's conviction. 833 So. 2d, at 747.

## II

*Fiore* v. *White* involved a Pennsylvania criminal statute that the Pennsylvania Supreme Court interpreted for the first time after the defendant Fiore's conviction became final. See 531 U. S., at 226. Under the Pennsylvania Supreme Court's interpretation of the criminal statute, Fiore could not have been guilty of the crime for which he was convicted. See *id.*, at 227–228. We originally granted certiorari in *Fiore* to consider "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Id.*, at 226. "Because we were uncertain whether the Pennsylvania Supreme Court's decision . . . represented a change in the law," we certified a question to the Pennsylvania Supreme Court. *Id.*, at 228. This question asked whether the Pennsylvania Supreme Court's interpretation of the statute "'state[d] the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final.'" *Ibid.*

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ley was convicted, he was convicted of a crime—armed burglary—for which he may not be guilty. Therefore, *Michigan* v. *Long*, 463 U. S. 1032 (1983), has no applicability here.

When the Pennsylvania Supreme Court replied that the ruling "'merely clarified the plain language of the statute,'" *ibid.*, the question on which we originally granted certiorari disappeared. Pennsylvania's answer revealed the "simple, inevitable conclusion" that Fiore's conviction violated due process. *Id.*, at 229. It has long been established by this Court that "the Due Process Clause . . . forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.*, at 228–229. Because Pennsylvania law—as interpreted by the later State Supreme Court decision—made clear that Fiore's conduct did not violate an element of the statute, his conviction did not satisfy the strictures of the Due Process Clause. Consequently, "retroactivity [was] not at issue." *Id.*, at 226.

*Fiore* controls the result here. As Justice Pariente stated in dissent, "application of the due process principles of *Fiore*" may render a retroactivity analysis "unnecessary." 833 So. 2d, at 747. The question here is not just one of retroactivity. Rather, as *Fiore* holds, "retroactivity is not at issue" if the Florida Supreme Court's interpretation of the "common pocketknife" exception in *L. B.* is "a correct statement of the law when [Bunkley's] conviction became final." 531 U. S., at 226. The proper question under *Fiore* is not whether the law has changed. Rather, *Fiore* requires that the Florida Supreme Court answer whether, in light of *L. B.*, Bunkley's pocketknife of 2½ to 3 inches fit within § 790.001(13)'s "common pocketknife" exception at the time his conviction became final.

Although the Florida Supreme Court has determined that the *L. B.* decision was merely an "evolutionary refinement" in the meaning of the "common pocketknife" exception, it has not answered whether the law in 1989 defined Bunkley's 2½- to 3-inch pocketknife as a "weapon" under § 790.001(13). Although the *L. B.* decision might have "culminat[ed] . . . [the] century-long evolutionary process," the question remains about what § 790.001(13) meant in 1989. 833 So. 2d, at 745.

If Bunkley's pocketknife fit within the "common pocketknife" exception to § 790.001(13) in 1989, then Bunkley was convicted of a crime for which he cannot be guilty—burglary in the first degree. And if the "stages" of § 790.001(13)'s "evolution" had not sufficiently progressed so that Bunkley's pocketknife was still a weapon in 1989, this case raises the issue left open in *Fiore*.

It is true that the Florida Supreme Court held *Fiore* inapplicable because the *L. B.* decision was a change in the law which "culminat[ed] [the] century-long evolutionary process." 833 So. 2d, at 745. As the dissent acknowledges, however, see *post*, at 843, n. 1, the Florida Supreme Court's decision in *L. B.* cast doubt on the validity of Bunkley's conviction. For the first time, the Florida Supreme Court interpreted the common pocketknife exception, and its interpretation covered the weapon Bunkley possessed at the time of his offense. In the face of such doubt, *Fiore* entitles Bunkley to a determination as to whether *L. B.* correctly stated the common pocketknife exception at the time he was convicted. Ordinarily, the Florida Supreme Court's holding that *L. B.* constitutes a change in—rather than a clarification of—the law would be sufficient to dispose of the *Fiore* question. By holding that a change in the law occurred, the Florida Supreme Court would thereby likewise have signaled that the common pocketknife exception was narrower at the time Bunkley was convicted.

Here, however, the Florida Supreme Court said more. It characterized *L. B.* as part of the "century-long evolutionary process." 833 So. 2d, at 745. Because Florida law was in a state of evolution over the course of these many years, we do not know what stage in the evolutionary process the law had reached at the time Bunkley was convicted. The Florida Supreme Court never asked whether the weapons statute had "evolved" by 1989 to such an extent that Bunkley's 2½- to 3-inch pocketknife fit within the "common pocketknife" exception. The proper question under *Fiore* is not

just *whether* the law changed. Rather, it is *when* the law changed. The Florida Supreme Court has not answered this question; instead, it appeared to assume that merely labeling *L. B.* as the "culmination" in the common pocketknife exception's "century-long evolutionary process" was sufficient to resolve the *Fiore* question. 833 So. 2d, at 745. It is not. Without further clarification from the Florida Supreme Court as to the content of the common pocketknife exception in 1989, we cannot know whether *L. B.* correctly stated the common pocketknife exception at the time he was convicted.

On remand, the Florida Supreme Court should consider whether, in light of the *L. B.* decision, Bunkley's pocketknife of 2½ to 3 inches fit within § 790.001(13)'s "common pocketknife" exception at the time his conviction became final. The judgment of the Supreme Court of Florida, accordingly, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

The Court here makes new law, and does so without briefing or argument. In *Fiore* v. *White*, 528 U. S. 23, 29 (1999), we granted certiorari to answer whether due process requires a state court to apply a judicially announced change in state criminal law retroactively. We realized after granting certiorari, however, that we could not answer that question until we knew whether there had been a change in the law at all. We therefore certified a question to the Pennsylvania Supreme Court asking whether its decision in *Commonwealth* v. *Scarpone*, 535 Pa. 273, 279, 634 A. 2d 1109, 1112 (1993), was a change in the law from the time of the defendant's conviction. When the Pennsylvania Supreme Court answered that there had been no change, we acknowledged that there was no question of retroactivity left for

us to answer. *Fiore* v. *White*, 531 U. S. 225, 226 (2001) *(per curiam)*.

In the present case, the Court concedes that the Florida Supreme Court acknowledged our opinion in *Fiore*. The Florida Supreme Court concluded that its decision in *L. B.* v. *State*, 700 So. 2d 370 (1997) *(per curiam)*, decided after petitioner's conviction became final, marked a change in Florida law. 833 So. 2d 739, 744, n. 12 (2002).[1] The state court therefore considered whether the change should be applied retroactively, and concluded that it should not be.

The Court recognizes, as it must, that the Florida Supreme Court concluded that *L. B.* was a change in the law from the time of petitioner's conviction. *Ante*, at 841 ("It is true that the Florida Supreme Court held . . . [that] the *L. B.* decision was a change in the law"). Yet the Court criticizes the Florida Supreme Court for thinking that conclusion "sufficient to dispose of the *Fiore* question." *Ibid.* The Court acknowledges that "[o]rdinarily, the Florida Supreme Court's holding that *L. B.* constitutes a change in—rather than a clarification of—the law would be sufficient to dispose of the *Fiore* question," but then holds that, because the Florida Supreme Court "characterized *L. B.* as part of the 'century-long evolutionary process,'" *Fiore* requires that court to answer an additional question: whether petitioner's knife fit within the "'common pocketknife'" exception at the time of his conviction. *Ante*, at 841.

*Fiore* requires no such thing. *Fiore* asked whether a change had occurred and, upon finding that none had, ended the inquiry. The Court here goes much further. It acknowledges that *L. B.* neither clarified the law that was in existence at the time of petitioner's conviction nor changed the law with retroactive effect. Yet it nonetheless insists

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[1] Petitioner presents strong arguments in favor of his view that the bright-line rule set out in *L. B.* existed as a matter of Florida law at the time of his conviction. Pet. for Cert. 6. But the Florida Supreme Court concluded otherwise, and we may not revisit that question.

that the Florida Supreme Court reevaluate the sufficiency of the evidence in this case. See *ante*, at 840, 842 (holding that Florida Supreme Court must answer whether "Bunkley's pocketknife . . . fit within [Fla. Stat.] § 790.001(13)'s 'common pocketknife' exception at the time his conviction became final"). The Court announces this conclusion as a matter of "*Fiore*" without explaining why due process requires it. The Court's holding is a new one, and its criticism of the state court for failing to anticipate this holding is unjustified.[2] The Florida Supreme Court, moreover, has essentially answered the question on which the Court now remands.[3]

The Court's decision to expand *Fiore* is not only new, it also unjustifiably interferes with States' interest in finality. The Florida courts have already considered several times the question this Court now asks them to answer. On direct appeal, petitioner specifically argued that a knife with a

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[2] The Court further criticizes the Florida Supreme Court for its workmanship in the decision under review. Thus, while it recognizes the Florida court's conclusion that *L. B.* did not state the law at the time of petitioner's conviction, the Court reprimands the Florida court for failing to reach its holding in a sufficiently clear manner. See, *e. g.*, *ante*, at 842 ("Without further clarification from the Florida Supreme Court . . . we cannot know whether *L. B.* correctly stated the common pocketknife exception at the time [petitioner] was convicted"). This rebuke to the state court violates the well-established rule that this Court will not "require state courts to reconsider cases to clarify the grounds of their decisions." *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983); see also *id.*, at 1041 (noting the Court's desire to "avoi[d] the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court").

[3] The state court explained that "[a]lthough some courts" prior to *L. B.* "may have interpreted 'common pocketknife' contrary to the holding in *L. B.*, each court nevertheless sought to comply with legislative intent and to rule in harmony with the law as it was interpreted at that point in time." 833 So. 2d 739, 745 (Fla. 2002). Thus, the court explained, "none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause." *Ibid.*

blade of less than four inches was a "common pocketknife," and he cited the 1951 opinion letter issued by the Florida Attorney General on this issue. Brief for Appellant in No. 88–1376 (Fla. Dist. Ct. App.), pp. 5–6. Petitioner also filed two motions for state postconviction relief challenging the sufficiency of the evidence with respect to the jury's conclusion that he was armed with a dangerous weapon. See Motion to Set Aside or Vacate Judgment and Sentence in No. 86–1070–CF–A–N1 (Fla. Cir. Ct.), p. 4; Petition to Invoke "All Writs" Jurisdiction in No. 85–778 (Fla. Sup. Ct.), p. 4.[4]

Florida has established a 2-year period of limitations for filing motions for postconviction relief. Florida Rule of Criminal Procedure 3.850 "provides an exception to the two-year time limitation for filing postconviction motions where 'a fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.' " 768 So. 2d 510, 511 (Fla. App. 2000) *(per curiam)* (quoting Fla. Rule Crim. Proc. 3.850(b)(2) (2000)). The Court's decision here overrides Florida's Rule, authorizing claims for postconviction relief where there has been a change in the law that has specifically been held *not* to apply retroactively.

The Court's holding expanding *Fiore* is striking, and the Court's decision to adopt it summarily is even more so. I would deny the petition for writ of certiorari.

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[4] Petitioner also unsuccessfully raised this claim twice in Federal District Court. See Report and Recommendation in No. 91–113–CIV–T–99(B) (MD Fla.), p. 5; Memorandum of Law in Support of Petition for Writ of Habeas Corpus under U. S. C. Section 2254 in No. 96–405–Civ.–T–24C (MD Fla.), p. 5.

## Reporter's Note

The next page is purposely numbered 901. The numbers between 845 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

# ORDERS FOR MARCH 7 THROUGH MAY 27, 2003

## MARCH 7, 2003

*Dismissal Under Rule 46*

No. 02–990. VOLKSWAGEN OF AMERICA, INC., ET AL. *v.* GENTRY ET AL. Ct. App. Ga. Certiorari dismissed under this Court's Rule 46. Reported below: 254 Ga. App. 888, 564 S. E. 2d 733.

*Miscellaneous Orders*

No. 02–479. MEDICAL BOARD OF CALIFORNIA *v.* HASON. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1028.] Case removed from argument calendar for Tuesday, March 25, 2003.

No. 02–5664. SELL *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 537 U. S. 999.] Motion of the Solicitor General for leave to file a supplemental brief in excess of the page limit granted.

## MARCH 10, 2003

*Certiorari Granted—Vacated and Remanded*

No. 01–1487. MAYLE, WARDEN, ET AL. *v.* BROWN ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lockyer* v. *Andrade*, *ante*, p. 63. Reported below: 283 F. 3d 1019.

No. 01–9879. HERBERT *v.* UNITED STATES. C. A. 4th 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 *Clay* v. *United States*, 537 U. S. 522 (2003). Reported below: 22 Fed. Appx. 285.

No. 01–10898. SIFFORD *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case re-

manded for further consideration in light of *Clay* v. *United States*, 537 U. S. 522 (2003). Reported below: 30 Fed. Appx. 270.

No. 02–127. McGrath, Warden, et al. *v.* Chia. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lockyer* v. *Andrade*, *ante*, p. 63. Reported below: 281 F. 3d 1032.

No. 02–6427. Simboli *v.* Crosby, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clay* v. *United States*, 537 U. S. 522 (2003). Reported below: 37 Fed. Appx. 506.

No. 02–7089. Quick *v.* United States. C. A. 4th 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 *Clay* v. *United States*, 537 U. S. 522 (2003). Reported below: 37 Fed. Appx. 710.

*Certiorari Dismissed*

No. 02–8408. Eury *v.* Hamilton et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–8409. Eury *v.* Rountree et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–8417. Eury *v.* Goins et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 02A624. Giles *v.* Ashcroft, Attorney General. C. A. 9th Cir. Application for stay, addressed to Justice Stevens and referred to the Court, denied.

No. D–2346. In re Sullivan. Charles W. Sullivan, of New York, 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 February 24, 2003 [537 U. S. 1184], is discharged.

No. D–2347. IN RE DISCIPLINE OF CALDWELL. David Caldwell, of Dallas, 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–2348. IN RE DISCIPLINE OF APPLEBERRY. Miles Hartman Appleberry, of San Antonio, 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–2349. IN RE DISCIPLINE OF DANERI. Edward Nicholas Daneri, of San Antonio, 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–2350. IN RE DISCIPLINE OF CARSEY. Steven M. Carsey, of Fort Worth, 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–2351. IN RE DISCIPLINE OF LAYER. Ronald Bruce Layer, of San Antonio, 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–2352. IN RE DISCIPLINE OF MONAHAN. Dennis Francis Monahan, of Medway, 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. D–2353. IN RE DISCIPLINE OF GIBBONS. James Anthony Gibbons, of Clinton, 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. 02M64. BEATY *v.* RYAN, ACTING DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS; and

No. 02M65. MEHTA *v.* KONICA BUSINESS MACHINES USA INC. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 02–94. OVERTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. *v.* BAZZETTA ET AL. C. A. 6th Cir. [Certiorari granted, 537 U. S. 1043.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–102. LAWRENCE ET AL. *v.* TEXAS. Ct. App. Tex., 14th Dist. [Certiorari granted, 537 U. S. 1044.] Motion of Center for Law and Justice International for leave to file a brief as *amicus curiae* granted.

No. 02–241. GRUTTER *v.* BOLLINGER ET AL. C. A. 6th Cir. [Certiorari granted, 537 U. S. 1043.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Exxon Mobil Corp. for leave to file a brief as *amicus curiae* granted. Motion of respondents Kimberly James et al. for enlargement of argument time and for divided argument, or in the alternative, for divided argument denied.

No. 02–516. GRATZ ET AL. *v.* BOLLINGER ET AL. C. A. 6th Cir. [Certiorari granted, 537 U. S. 1044.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Exxon Mobil Corp. for leave to file a brief as *amicus curiae* granted. Motion of respondents Ebony Patterson et al. for additional argument time and for divided argument, or in the alternative, for divided argument denied.

No. 02–634. GREEN TREE FINANCIAL CORP., NKA CONSECO FINANCE CORP. *v.* BAZZLE ET AL., IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED, ET AL. Sup. Ct. S. C. [Certiorari granted, 537 U. S. 1098.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 02–722. AMERICAN INSURANCE ASSN. ET AL. *v.* GARAMENDI, INSURANCE COMMISSIONER, STATE OF CALIFORNIA.

C. A. 9th Cir. [Certiorari granted *sub nom. American Insurance Assn.* v. *Low*, 537 U. S. 1100.] Motion of Mitsubishi Materials Corp. et al. for leave to file a brief as *amici curiae* granted.

No. 02–857. HOUSEHOLD CREDIT SERVICES, INC., ET AL. *v.* PFENNIG. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 02–8412. IN RE COLLINS ET AL. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 02–693. LAMIE *v.* UNITED STATES TRUSTEE. C. A. 4th Cir. Certiorari granted. Reported below: 290 F. 3d 739.

No. 02–628. FREW, ON BEHALF OF HER DAUGHTER, FREW, ET AL. *v.* HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, ET AL. C. A. 5th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 300 F. 3d 530.

No. 02–682. VERIZON COMMUNICATIONS INC. *v.* LAW OFFICES OF CURTIS V. TRINKO, LLP. C. A. 2d Cir. Certiorari granted limited to the following question: "Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?" Reported below: 305 F. 3d 89.

No. 02–6320. FELLERS *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 285 F. 3d 721.

*Certiorari Denied*

No. 01–8816. BOWEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–8819. MACPHEAT *v.* MAZUREK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 710.

No. 01–9877. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–10226. MATTHEWS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–10402. HARRIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–10832. WRIGHT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 278 F. 3d 1245.

No. 02–639. ANDERSON ET AL. *v.* TREADWELL, SECRETARY OF STATE OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 294 F. 3d 453.

No. 02–651. RODRIGUEZ *v.* FARRELL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 280 F. 3d 1341.

No. 02–750. ROGERS MACHINERY CO., INC. *v.* WASHINGTON COUNTY, OREGON, ET AL. Ct. App. Ore. Certiorari denied. Reported below: 181 Ore. App. 369, 45 P. 3d 966.

No. 02–754. GRIFFIS *v.* LUBAN. Sup. Ct. Minn. Certiorari denied. Reported below: 646 N. W. 2d 527.

No. 02–834. JERICOL MINING INC. ET AL. *v.* NAPIER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 301 F. 3d 703.

No. 02–850. RANCHO LOBO, LTD. *v.* DEVARGAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 303 F. 3d 1195.

No. 02–859. VAILE *v.* PORSBOLL, FKA VAILE, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 118 Nev. 262, 44 P. 3d 506.

No. 02–862. BOISE CASCADE CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 296 F. 3d 1339.

No. 02–864. ALABAMA *v.* BRYANT. Sup. Ct. Ala. Certiorari denied. Reported below: 854 So. 2d 36.

No. 02–876. BALLARD ET AL. *v.* ADVANCE AMERICA ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 349 Ark. 545, 79 S. W. 3d 835.

No. 02–896. FLUOR HANFORD, INC., ET AL. *v.* BRUNDRIDGE ET AL. Ct. App. Wash. Certiorari denied. Reported below: 109 Wash. App. 347, 35 P. 3d 389.

No. 02–914. CITY OF MAYFIELD HEIGHTS, OHIO, ET AL. *v.* SHEMO, TRUSTEE, ET AL. Sup. Ct. Ohio. Certiorari denied.

Reported below: 95 Ohio St. 3d 59, 765 N. E. 2d 345, and 96 Ohio St. 3d 379, 775 N. E. 2d 493.

No. 02–997. MONTALVO ET AL. *v.* BORKOVEC ET AL. Ct. App. Wis. Certiorari denied. Reported below: 256 Wis. 2d 472, 647 N. W. 2d 413.

No. 02–1001. MESSINA *v.* JOHN LABATT LTD. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 299 F. 3d 635.

No. 02–1002. NICKLAS *v.* EAGLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 385.

No. 02–1004. ELVIN ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 02–1005. SEARLES ET AL. *v.* PATEL. C. A. 2d Cir. Certiorari denied. Reported below: 305 F. 3d 130.

No. 02–1008. NARTRON CORP. *v.* STMICROELECTRONICS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 305 F. 3d 397.

No. 02–1009. SCICCHITANO ET AL., BY AND THROUGH THEIR PARENTS AND NATURAL GUARDIANS, SCICCHITANO ET UX., ET AL. *v.* MOUNT CARMEL, PENNSYLVANIA, AREA SCHOOL BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 46 Fed. Appx. 667.

No. 02–1013. BAU *v.* ACTAMED CORP. Ct. App. Ga. Certiorari denied. Reported below: 254 Ga. App. 573, 562 S. E. 2d 734.

No. 02–1014. BRASSICA PROTECTION PRODUCTS LLC ET AL. *v.* SUNRISE FARMS ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 301 F. 3d 1343.

No. 02–1017. TRI-COUNTY CONCERNED CITIZENS ASSN. ET AL. *v.* CARR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 149.

No. 02–1020. HORTON *v.* CITY COLLEGES OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–1021. HARPER *v.* ALABAMA PERSONNEL BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 618.

No. 02–1022. FARROW *v.* AMERICAN POSTAL WORKERS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 958.

No. 02–1023. MULCAHEY *v.* EURO GENERAL CONTRACTORS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 943.

No. 02–1026. MILLER *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 928.

No. 02–1029. SNOHOMISH COUNTY, WASHINGTON, ET AL. *v.* GOBIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 304 F. 3d 909.

No. 02–1031. SCHER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 569 Pa. 284, 803 A. 2d 1204.

No. 02–1039. BROWN *v.* LI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 308 F. 3d 939.

No. 02–1046. DACOSTA *v.* NWACHUKWA. C. A. 11th Cir. Certiorari denied. Reported below: 304 F. 3d 1045.

No. 02–1052. MEDVED *v.* WORKERS' COMPENSATION APPEAL BOARD (ALBERT GALLATIN SERVICES). Commw. Ct. Pa. Certiorari denied. Reported below: 788 A. 2d 447.

No. 02–1064. ROEHSLER *v.* MIDDLESEX COUNTY HEALTH DEPARTMENT. Super. Ct. N. J., App. Div. Certiorari denied.

No. 02–1079. MAYER ET AL. *v.* TRANSAMERICA TITLE INSURANCE CO., NKA TRANSNATION TITLE INSURANCE CO., ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 02–1082. CARTWRIGHT ET AL. *v.* PERDUE, GOVERNOR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 304 F. 3d 1138.

No. 02–1089. LEWIS ET AL. *v.* STOLLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 308 F. 3d 768.

No. 02–1165. STEWART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–5487. SHEPARD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–6141. SCOGGINS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–6235. JOHNSON *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 786 So. 2d 981.

No. 02–6296. RANKINS *v.* CAREY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 36 Fed. Appx. 296.

No. 02–6422. ROGERS *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–6435. HYATT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 72 S. W. 3d 566.

No. 02–6603. RIOS *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 02–6698. HUGHES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–6725. PAGTALUNAN *v.* GALAZA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 291 F. 3d 639.

No. 02–7006. PIMPTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–7654. SANCHEZ-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 107.

No. 02–7813. ARAUJO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 21.

No. 02–7868. HERNANDEZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 304 F. 3d 1088.

No. 02–7916. YATES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 304 F. 3d 818.

No. 02–7936. KURDYUKOV *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 103.

No. 02–7937. MARINICH *v.* PEOPLES GAS LIGHT & COKE CO. C. A. 7th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 539.

No. 02–7956. WANG *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 643.

No. 02–8279. DOPP *v.* HARKINS, SHERIFF, OTTAWA COUNTY, OKLAHOMA, ET AL. Ct. Civ. App. Okla. Certiorari denied.

No. 02–8284. MCLEOD *v.* SESSIONS, WARDEN. Super. Ct. Washington County, Ga. Certiorari denied.

No. 02–8285. CORREOSO BONARD *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 02–8288. TEAGUE *v.* WOLFE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 731.

No. 02–8289. ABDULLAH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 02–8290. DARBY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–8293. DEVAUGHN *v.* DOVE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 174.

No. 02–8295. DUDLEY *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–8297. HOOKS *v.* CICCOLINI ET AL. Ct. App. Ohio, Summit County. Certiorari denied.

No. 02–8300. GLADNEY *v.* PENDLETON CORRECTIONAL FACILITY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 302 F. 3d 773.

No. 02–8307. SCOTT *v.* ADULT PROTECTIVE SERVICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 404.

No. 02–8309. ARNOLD *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–8312. FRANCIS *v.* BROWN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 416.

No. 02–8313. TERRY *v.* COMPTON ET AL. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 02–8314. VONBORSTEL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 827 So. 2d 1000.

No. 02–8318. CHIPP *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 619.

No. 02–8320. DEHONEY *v.* MONTGOMERY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 02–8335. ELRAWI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–8350. WEAVER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 87 S. W. 3d 557.

No. 02–8352. WILLIS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8353. WILLIAMS *v.* THOMPSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 327.

No. 02–8354. WILSON *v.* BECK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 884.

No. 02–8355. WITHEROW *v.* MELIGAN, WARDEN. Sup. Ct. Nev. Certiorari denied. Reported below: 118 Nev. 1160.

No. 02–8358. SIMPSON ET AL. *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 137 Idaho 813, 54 P. 3d 456.

No. 02–8360. MARSHALL *v.* HENDRICKS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 307 F. 3d 36.

No. 02–8361. CLAY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 104.

No. 02–8362. WHITSON *v.* MARRIOTT PAVILION HOTEL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 655.

No. 02–8366. PAGAN *v.* GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 02–8369. CASH *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8371. LEWIS *v.* HOLDER. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 486.

No. 02–8376. THOMAS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 02–8381. VOGEL *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 02–8383. BARKSDALE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 657.

No. 02–8386. GRUBOR *v.* GRUBOR. Super. Ct. Pa. Certiorari denied. Reported below: 797 A. 2d 378.

No. 02–8390. JONES *v.* RILEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 200.

No. 02–8391. EDMOND *v.* HANCOCK ET AL. Ct. App. Miss. Certiorari denied. Reported below: 830 So. 2d 658.

No. 02–8393. DANIELS *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–8394. BISHOP *v.* STREEFKIRK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 501.

No. 02–8395. BISHOP *v.* SCOTT ET UX. C. A. 11th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 945.

No. 02–8397. CELAJ *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 49 Fed. Appx. 331.

No. 02–8398. CUEVAS CARDENAS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 146 Wash. 2d 400, 47 P. 3d 127.

No. 02–8400. DEDMON *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 718.

No. 02–8402. BAILEY *v.* BLAINE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE. C. A. 3d Cir. Certiorari denied.

No. 02–8403. ALLEN, AKA GONZALEZ *v.* CRAWFORD, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–8404. MUSAYEV *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 110 Wash. App. 1051.

No. 02–8407. CLAIBORNE *v.* IRWIN. C. A. 9th Cir. Certiorari denied.

No. 02–8410. DELL *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8415. DELOATCH *v.* JOHNSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH. C. A. 3d Cir. Certiorari denied.

No. 02–8424. CHAPEY *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 02–8467. GLEAN *v.* SIKES, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 945.

No. 02–8472. LI *v.* UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT HOUSTON ET AL. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 02–8484. CLARKE *v.* HAWORTH. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 378.

No. 02–8486. CAMPBELL *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8507. THURSTON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 829 So. 2d 208.

No. 02–8571. SCOTT *v.* SMITH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–8641. SILVA *v.* KALBAC ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 809 So. 2d 80.

No. 02–8677. GOSSARD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 02–8682. CASTANEDA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 408.

No. 02–8683. DIEZ, AKA GUZMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 903.

No. 02–8704. FREEMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 327.

No. 02–8714. D'ALESSANDRO *v.* L. L. BEAN, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 198.

No. 02–8723. AYALA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–8726. BUDD *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 48 Fed. Appx. 822.

No. 02–8728. MCREYNOLDS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 313 F. 3d 372.

No. 02–8733. MICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–8735. GOMEZ-VAZQUEZ, AKA GOMEZ-VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 407.

No. 02–8736. ADDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–8744. LONDON *v.* MILLER, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–8750. COGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 575.

No. 02–8764. BENTON *v.* CRIST, ATTORNEY GENERAL OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 02–8783. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–8802. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 719.

No. 02–8809. TAUMOEPEAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 40 Fed. Appx. 461.

No. 02–8817. RODRIGUEZ CHAVEZ *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 310 F. 3d 805.

No. 02–8824. JULIAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–8832. VANASSE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 48 Fed. Appx. 30.

No. 02–8833. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 490.

No. 02–8836. COOPER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 202 Ill. 2d 282, 780 N. E. 2d 304.

No. 02–8843. ARELLANO-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 303 F. 3d 1173.

No. 02–8858. MARTIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 Fed. Appx. 119.

No. 02–8864. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 295 F. 3d 182.

No. 02–8869. THIBODEAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 51.

No. 02–8880. IKNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 929.

No. 02–8885. SHAMISELDIN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 202 Ill. 2d 522, 782 N. E. 2d 224.

No. 02–8888. BALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 490.

No. 02–8895. ELLIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 325 Ill. App. 3d 1172, 810 N. E. 2d 325.

No. 02–8905. SCULLOCK *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8936. PERRY *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 308 F. 3d 682.

No. 02–638. AGENCIA LA ESPERANZA CORP., INC. *v.* ORANGE COUNTY BOARD OF SUPERVISORS ET AL. Ct. App. Cal., 4th App. Dist. Motion of National Association of Home Builders for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 02–845. SILVEY *v.* CHAO, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 38 Fed. Appx. 991.

No. 02–996. OVERNITE TRANSPORTATION CO. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO, ET AL. App. Ct. Ill., 1st Dist. Motions of National Right to Work Legal Defense Foundation, Inc., and Chamber of Commerce of the United States for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 332 Ill. App. 3d 69, 773 N. E. 2d 26.

*Rehearing Denied*

No. 01–618. ELDRED ET AL. *v.* ASHCROFT, ATTORNEY GENERAL, 537 U. S. 186;

No. 01–7601. THOMAS *v.* UNITED STATES, 534 U. S. 1152;

No. 02–624. AGUILERA ET UX. *v.* DANIELS/NICHOLSON INSURANCE AGENCY ET AL., 537 U. S. 1107;

No. 02–677. PALUMBO *v.* WEILL ET AL., 537 U. S. 1109;

No. 02–824. ST. HILAIRE *v.* NEW HAMPSHIRE REAL ESTATE COMMISSION, 537 U. S. 1113;

No. 02–5307. IN RE PATTERSON-BEGGS, 537 U. S. 1070;

No. 02–6685. PRATHER *v.* GEORGIA BOARD OF PARDONS AND PAROLES, 537 U. S. 1055;

No. 02–6747. IN RE TOPPS, 537 U. S. 1070;

No. 02–7215. WHIGHAM *v.* ARIZONA ET AL., 537 U. S. 1123;

No. 02–7252. WILCOX *v.* IRON OUT, INC., ET AL., 537 U. S. 1124;

No. 02–7337. THARPE *v.* HEAD, WARDEN, 537 U. S. 1127;

No. 02–7695. MCLEOD *v.* JONES, WARDEN, 537 U. S. 1138;

No. 02–7732. CHANEY *v.* UNITED STATES POSTAL SERVICE, 537 U. S. 1139; and

No. 02–7884. DOYHARZABAL *v.* UNITED STATES, 537 U. S. 1144. Petitions for rehearing denied.

No. 02–249. PEABODY COAL CO. *v.* GROVES ET AL., 537 U. S. 1147. Petition for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

No. 02–670. HAUGHTON ET UX. *v.* WAL-MART STORES, INC., 537 U. S. 1147; and

No. 02–822. BOYCE ET UX. *v.* UNITED STATES, 537 U. S. 1147. Petitions for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of these petitions.

## MARCH 12, 2003

*Miscellaneous Order*

No. 02A724 (02–8286). BANKS *v.* COCKRELL, 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, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

## MARCH 13, 2003

*Dismissal Under Rule 46*

No. 02–1027. DCH HEALTHCARE AUTHORITY ET AL. *v.* MANGIERI. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 304 F. 3d 1072.

*Certiorari Denied*

No. 02–9512 (02A766). THOMPSON *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

## MARCH 17, 2003

*Miscellaneous Order*

No. 02–9541 (02A773). IN RE JONES. 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.

MARCH 18, 2003

*Miscellaneous Order*

No. 02–9575 (02A775). IN RE ROBINSON. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

MARCH 20, 2003

*Dismissal Under Rule 46*

No. 02–939. IN RE CASTLE ET AL. Petition for writ of mandamus dismissed under this Court's Rule 46.2.

MARCH 21, 2003

*Miscellaneous Orders*

No. 02–102. LAWRENCE ET AL. *v.* TEXAS. Ct. App. Tex., 14th Dist. [Certiorari granted, 537 U. S. 1044.] Motion of *amici curiae* Alabama et al. and respondent for leave to allow Alabama et al. to participate in oral argument as *amici curiae* and for divided argument denied.

No. 02–281. INYO COUNTY, CALIFORNIA, ET AL. *v.* PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY ET AL. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1043.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

MARCH 24, 2003

*Certiorari Granted—Vacated and Remanded*

No. 01–1711. UNITED STATES EX REL. DUNLEAVY *v.* COUNTY OF DELAWARE, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cook County* v. *United States ex rel. Chandler*, *ante*, p. 119. Reported below: 279 F. 3d 219.

No. 02–924. MULVANEY MECHANICAL, INC. *v.* SHEET METAL WORKERS INTERNATIONAL ASSN., LOCAL 38. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79 (2002). Reported below: 288 F. 3d 491.

*Certiorari Dismissed*

No. 02–855. GALAZA, WARDEN, ET AL. *v.* AVILA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari dismissed as moot. Reported below: 297 F. 3d 911.

No. 02–8432. NORTHINGTON *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 02–8562. JARRETT *v.* MANCAN, INC., DBA MANPOWER, INC. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 02A647. MOORE *v.* GRIEVANCE COMMITTEE. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Application for stay of enforcement of order of disbarment of applicant, addressed to JUSTICE BREYER and referred to the Court, denied.

No. D–2354. IN RE DISCIPLINE OF PORRO. Alfred A. Porro, Jr., of Lewisburg, Pa., 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. 02M66. SCOTT *v.* UNITED STATES;

No. 02M67. TIBERONDWA *v.* COX ET AL.;

No. 02M68. LADD *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION;

No. 02M70. MIGLIORE ET AL. *v.* RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT ET AL.;

No. 02M71. AFRASIABI *v.* HARVARD UNIVERSITY ET AL.;
No. 02M72. MARCUM *v.* OSCAR MAYER FOODS CORP. ET AL.; and
No. 02M73. NORRIS *v.* BASKERVILLE, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 02M69. AMERICAN CIVIL LIBERTIES UNION ET AL. *v.* UNITED STATES. Motion of American Civil Liberties Union et al. for leave to intervene in order to file a petition for writ of certiorari denied. Motion of Bar Association of San Francisco for leave to file a brief as *amicus curiae* denied.

No. 02M74. LUJAN *v.* ARIZONA; and
No. 02M75. MARTINEZ *v.* ARIZONA. Motions for leave to proceed *in forma pauperis* without affidavits of indigency executed by petitioners denied.

No. 01–10873. NGUYEN *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 537 U. S. 999.] Motion for appointment of counsel granted, and it is ordered that Howard Trapp, Esq., of Hagatna, Guam, be appointed to serve as counsel for petitioner in this case.

No. 02–5034. PHAN *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 537 U. S. 999.] Motion for appointment of counsel granted, and it is ordered that Rawlen Mantanona, Esq., of Hagatna, Guam, be appointed to serve as counsel for petitioner in this case.

No. 02–337. BREUER *v.* JIM'S CONCRETE OF BREVARD, INC. C. A. 11th Cir. [Certiorari granted, 537 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–575. NIKE, INC., ET AL. *v.* KASKY. Sup. Ct. Cal. [Certiorari granted, 537 U. S. 1099.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 02–891. CENTRAL LABORERS' PENSION FUND *v.* HEINZ ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 02–5664. SELL *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 537 U. S. 999.] Motion of petitioner for leave

to file a supplemental brief in excess of the page limitation granted.

No. 02–8477. SHULER *v.* SHULER. Sup. Ct. P. R. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 14, 2003, 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. 02–9133. IN RE SCOTT. Petition for writ of habeas corpus denied.

No. 02–1051. IN RE BRUETMAN;
No. 02–8425. IN RE DIXON;
No. 02–8546. IN RE ROSS; and
No. 02–8558. IN RE PARNELL. Petitions for writs of mandamus denied.

No. 02–8512. IN RE KOLODY. Petition for writ of mandamus denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 02–8462. IN RE CADOGAN. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 02–809. MARYLAND *v.* PRINGLE. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 370 Md. 525, 805 A. 2d 1016.

*Certiorari Denied*

No. 02–662. FISHER *v.* HART. C. A. 9th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 947.

No. 02–710. CASA DE CAMBIO COMDIV S. A. DE C. V. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 291 F. 3d 1356.

No. 02–724. DAVIS, GOVERNOR OF CALIFORNIA, ET AL. *v.* THOMPSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 295 F. 3d 890.

No. 02–734. PENN TRIPLE S, T/A PENN VENDING CO., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 304 F. 3d 1349.

No. 02–786. PARKMAN *v.* UNIVERSITY OF SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 606.

No. 02–868. SKEDDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 443.

No. 02–878. VILLA MARIA NURSING & REHABILITATION CENTER, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 289.

No. 02–880. ANEJA *v.* TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY. C. A. 2d Cir. Certiorari denied. Reported below: 35 Fed. Appx. 19.

No. 02–889. CRUMP *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 556.

No. 02–900. HARRIS ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 390.

No. 02–944. WEAVER, SUBSTITUTE ADMINISTRATOR OF THE ESTATE OF HEARN, DECEASED *v.* HINSHAW ET AL. Ct. App. Ind. Certiorari denied. Reported below: 762 N. E. 2d 791.

No. 02–948. JEFFERSON RANDOLPH CORP., DBA JRC TRUCKING, INC., ET AL. *v.* PROGRESSIVE DATA SYSTEMS, INC., ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 275 Ga. 420, 568 S. E. 2d 474.

No. 02–951. THYSSEN INC. *v.* M/V MARKOS N ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 310 F. 3d 102.

No. 02–970. MGM GRAND HOTEL, LLC *v.* RENE. C. A. 9th Cir. Certiorari denied. Reported below: 305 F. 3d 1061.

No. 02–1033. SWEENEY *v.* CARTER, ATTORNEY GENERAL OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 02–1034. WATTERS, T/A KEITH WATTERS AND ASSOCIATES *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. C. A. D. C. Cir. Certiorari denied. Reported below: 295 F. 3d 36.

No. 02–1035. PEARL *v.* CITY OF LONG BEACH, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 296 F. 3d 76.

No. 02–1037. WIT ET AL. *v.* BERMAN, CHAIRPERSON, NEW YORK STATE BOARD OF ELECTIONS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 306 F. 3d 1256.

No. 02–1040. RIVERSIDE COUNTY, CALIFORNIA *v.* WATSON. C. A. 9th Cir. Certiorari denied. Reported below: 300 F. 3d 1092.

No. 02–1042. FORD *v.* AETNA U. S. HEALTHCARE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 301 F. 3d 329.

No. 02–1048. WOLK *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 45 Fed. Appx. 188.

No. 02–1050. WARDLE *v.* LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT. C. A. 6th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 505.

No. 02–1053. READ CORP. ET AL. *v.* POWERSCREEN OF AMERICA, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 44 Fed. Appx. 502.

No. 02–1057. ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* SIMMONS. C. A. 8th Cir. Certiorari denied. Reported below: 299 F. 3d 929.

No. 02–1061. AAIPHARMA INC. *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 296 F. 3d 227.

No. 02–1062. CITY OF WHITE PLAINS, NEW YORK *v.* TCG NEW YORK, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 305 F. 3d 67.

No. 02–1065. MAY *v.* BREWER, SECRETARY OF STATE OF ARIZONA, ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 203 Ariz. 425, 55 P. 3d 768.

No. 02–1068. BIRD *v.* LEWIS & CLARK COLLEGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 303 F. 3d 1015.

No. 02–1069. GURARY *v.* NU-TECH BIO-MED, INC. C. A. 2d Cir. Certiorari denied. Reported below: 303 F. 3d 212.

No. 02–1071. KABIR ET AL. *v.* SILICON VALLEY BANK ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 02–1073. KING *v.* SCHOOL BOARD OF BROWARD COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 945.

No. 02–1078. TEAMSTERS AUTOMOBILE TRANSPORT CHAUFFEURS, DEMONSTRATORS, AND HELPERS LOCAL UNION NO. 604 *v.* ALLIED SYSTEMS, LTD., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 304 F. 3d 785.

No. 02–1084. LANDI *v.* HICKMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 383.

No. 02–1085. MACASPAC *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 911.

No. 02–1090. CASTILLO *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 79 S. W. 3d 817.

No. 02–1105. BEKHOR ET AL. *v.* JOSEPHTHAL GROUP, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 02–1109. VICARY *v.* CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 99 Cal. App. 4th 880, 121 Cal. Rptr. 2d 729.

No. 02–1116. DALO *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 264 Va. 431, 570 S. E. 2d 840.

No. 02–1120. BURR *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 02–1126. NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 314 F. 3d 1373.

No. 02–1127. TENNER *v.* WALKER, SHERIFF, JEFFERSON COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–1133. PORTER *v.* ENGLAND, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 660.

No. 02–1134. HASKELL *v.* PWS HOLDING CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 303 F. 3d 308.

No. 02–1139. PELICAN *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 02–1146. JAMES ET AL. *v.* INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS. C. A. 10th Cir. Certiorari denied. Reported below: 302 F. 3d 1139.

No. 02–1152. THURMAN *v.* BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE. Ct. App. La., 1st Cir. Certiorari denied.

No. 02–1158. CASELLA *v.* PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 193.

No. 02–1159. ALGEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 309 F. 3d 1011.

No. 02–1160. ACE/CLEARDEFENSE, INC. *v.* CLEAR DEFENSE, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 47 Fed. Appx. 582.

No. 02–1163. PEREZ *v.* SUPERIOR COURT OF ARIZONA, PIMA COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 368.

No. 02–1166. VOGT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 740.

No. 02–1177. CHANG QIN ZHENG ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 306 F. 3d 1080.

No. 02–1184. VYSE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 02–1193. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 685.

No. 02–1200. MARSH & MCLENNAN COS., INC., AND SUBSIDIARIES *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 302 F. 3d 1369.

No. 02–1204. GARCIA ABREGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–1207. PELULLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–6021. STEVENSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–7409. NICKLASSON *v.* ARIZONA. Super. Ct. Ariz., Mohave County. Certiorari denied.

No. 02–7449. HARTMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–7455. QUINTANILLA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 302 F. 3d 679.

No. 02–7461. RICE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 568 Pa. 182, 795 A. 2d 340.

No. 02–7993. NELSON *v.* ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 292 F. 3d 1291.

No. 02–8120. JOHNSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 306 F. 3d 249.

No. 02–8422. SCIALLA *v.* PASCACK VALLEY HOSPITAL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 02–8427. DUNN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8428. LAWRENCE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 831 So. 2d 121.

No. 02–8430. SCHEIB *v.* PORT AUTHORITY TRANSIT CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 35 Fed. Appx. 358.

No. 02–8433. MITCHELL *v.* BALLARD, DIRECTOR, TEXAS BOARD OF PARDONS AND PAROLES DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 253 F. 3d 705.

No. 02–8436. HARDAWAY *v.* ROBINSON. C. A. 6th Cir. Certiorari denied.

No. 02–8437. GARDNER *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8439. HARRIS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8440. HARRIS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8444. BRISCOE *v.* BUCKINGHAM CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 870.

No. 02–8446. THOMPSON *v.* SHERMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8453. DENSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 827 So. 2d 988.

No. 02–8454. CHAIDEZ *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–8456. CHARM *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 475.

No. 02–8460. COMBS *v.* WHEELER, SHERIFF, INDIAN RIVER COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 884.

No. 02–8461. ELLIS *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–8465. POWELL *v.* RAY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 301 F. 3d 1200.

No. 02–8470. GRANADOS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 85 S. W. 3d 217.

No. 02–8473. LATHELY *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–8474. LUNDH *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 815.

No. 02–8475. SJOSTRAND *v.* NORTH DAKOTA WORKERS COMPENSATION BUREAU ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 649 N. W. 2d 537.

No. 02–8482. COOPER *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–8487. TISTHAMMER *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 757.

No. 02–8493. SANDERS *v.* HOLLAND, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8494. RUFFNER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 831 So. 2d 192.

No. 02–8497. FERQUERON *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 748.

No. 02–8498. HENTON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8501. MOORE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 827 So. 2d 994.

No. 02–8503. KOLAHI *v.* RYAN, ACTING DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 661.

No. 02–8506. TORRES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 58 P. 3d 214.

No. 02–8508. BODY *v.* WATKINS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 807.

No. 02–8510. TRAINER *v.* STILLS ET AL. Ct. App. Ga. Certiorari denied. Reported below: 254 Ga. App. 430, 563 S. E. 2d 141.

No. 02–8513. JOHNSON ET AL. *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–8522. BURKE *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8525. TATE *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 743.

No. 02–8529. FINK *v.* NOURSE ET AL.; and FINK *v.* FLYNN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 670 (first judgment); 53 Fed. Appx. 432 (second judgment).

No. 02–8530. WARE *v.* JORDAN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 813.

No. 02–8534. KNIGGA *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 02–8535. EMMETT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 264 Va. 364, 569 S. E. 2d 39.

No. 02–8537. BARTH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 80 S. W. 3d 390.

No. 02–8539. BLANKS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8541. HOOK *v.* IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 307 F. 3d 756.

No. 02–8545. HUNTER *v.* CALIFORNIA BOARD OF PRISON TERMS. C. A. 9th Cir. Certiorari denied.

No. 02–8549. ZIMMERMAN *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8552. COLE *v.* SAUNDERS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 274.

No. 02–8559. WALLS *v.* REDMAN, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 02–8560. BRITT *v.* SAN DIEGO UNIFIED PORT DISTRICT. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–8563. JIMENEZ *v.* GONZALEZ. C. A. 9th Cir. Certiorari denied.

No. 02–8564. LARK *v.* OLSON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–8565. JACKSON *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8566. KNIGHTON *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 293 F. 3d 1165.

No. 02–8567. FAISON *v.* JEFFERSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8569. NEWBOLD *v.* SASSER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 309 F. 3d 1296.

No. 02–8570. RISNER *v.* SAFFLE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 602.

No. 02–8572. PAVELETZ *v.* PNC BANK, NATIONAL ASSN., SUCCESSOR BY MERGER TO FIRST EASTERN BANK. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 199.

No. 02–8574. KOK *v.* WARNER BROS. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–8577. PURDY *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8579. GIEGLER *v.* JAMROG, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8584. HARRIS *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 404.

No. 02–8592. WHITTLESEY *v.* CONROY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 301 F. 3d 213.

No. 02–8601. RIOS SALINAS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 84 S. W. 3d 913.

No. 02–8603. NAVA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 02–8604. REDMOND *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 264 Va. 321, 568 S. E. 2d 695.

No. 02–8607. WHITE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8609. MIDDLETON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8613. JIMENEZ *v.* ARIZONA. Super. Ct. Ariz., Maricopa County. Certiorari denied.

No. 02–8615. KEELING *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 799 A. 2d 170.

No. 02–8619. BOWLING *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 80 S. W. 3d 405.

No. 02–8624. BLACKWOOD *v.* MARTIN ET AL. Ct. App. Tenn. Certiorari denied.

No. 02–8625. ALLEN *v.* DUNCAN, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–8626. WILLIAMS *v.* STURM. C. A. 3d Cir. Certiorari denied. Reported below: 43 Fed. Appx. 524.

No. 02–8627. NICHOLS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 02–8628. PEARSON *v.* PEARSON. Ct. Civ. App. Ala. Certiorari denied. Reported below: 876 So. 2d 537.

No. 02–8630. CORBIN *v.* MAINE DEPARTMENT OF HUMAN SERVICES ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 809 A. 2d 1245.

No. 02–8633. NWAOKOCHA, AKA MBA *v.* HAGGE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 55.

No. 02–8634. SPENCER *v.* CHESTER, SUPERINTENDENT, CRAVEN CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 87.

No. 02–8635. BOUCHEREAU *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–8637. ALLEN *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–8639. BROOKS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 845 So. 2d 849.

No. 02–8640. ZIEGLER *v.* MARTIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 336.

No. 02–8644. NELSON *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–8661. HALE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 740.

No. 02–8666. HOGAN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 826 So. 2d 317.

No. 02–8668. SORRI *v.* BELL ATLANTIC. C. A. 2d Cir. Certiorari denied. Reported below: 45 Fed. Appx. 80.

No. 02–8688. NORTHUP *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–8701. MOORE *v.* GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. Ct. App. N. Y. Certiorari denied. Reported below: 99 N. Y. 2d 579, 785 N. E. 2d 736.

No. 02–8720. SCOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–8729. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 942.

No. 02–8738. ADAMS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied.

No. 02–8745. BLASINGAME *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 766.

No. 02–8769. KEY *v.* HOUSING AUTHORITY OF THE CITY OF CHARLESTON, SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 352 S. C. 26, 572 S. E. 2d 284.

No. 02–8770. L'ABBE *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 311 F. 3d 93.

No. 02–8775. MARTINELLI *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 649 N. W. 2d 886.

No. 02–8790. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–8814. CAYATINETO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 278.

No. 02–8818. CREIGHTON *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 310 F. 3d 221.

No. 02–8823. LINTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 203.

No. 02–8830. MCKINNIE *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 742.

No. 02–8831. WARD *v.* AMERICAN MEDICAL SYSTEMS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 909.

No. 02–8846. HOWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 408.

No. 02–8850. POOLE *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 02–8859. GOMEZ-MARTINEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 635.

No. 02–8860. SMITH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 292 F. 3d 90.

No. 02–8862. SUSSMAN ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. C. A. 3d Cir. Certiorari denied.

No. 02–8871. TAYLOR *v.* DUTT. Ct. Civ. App. Ala. Certiorari denied. Reported below: 876 So. 2d 528.

No. 02–8872. TOBIAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 33 Fed. Appx. 547.

No. 02–8874. VAN MASTRIGT *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 02–8886. RAGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–8889. LEPESH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 494.

No. 02–8897. STOVE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 189.

No. 02–8899. TURNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 704.

No. 02–8900. SHIPLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 706.

No. 02–8906. MCCULLOUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 40 Fed. Appx. 566.

No. 02–8909. RAMOS-COTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 373.

No. 02–8912. ARNS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 39 Fed. Appx. 442.

No. 02–8914. ABDUS-SAMAD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 812 A. 2d 226.

No. 02–8915. DINNALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 127.

No. 02–8919. MARCUCCI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 299 F. 3d 1156.

No. 02–8920. NOLASCO-AMAYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 412.

No. 02–8921. MENDOZA-BENITEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 02–8922. DIAZ-JUAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 299 F. 3d 1138.

No. 02–8924. DODD *v.* SNYDER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 41 Fed. Appx. 812.

No. 02–8926. DELGADO-BRUNETT *v.* LAPPIN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 02–8927. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 02–8928. MCFERREN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–8930. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 882.

No. 02–8931. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 557.

No. 02–8937. ONTIVEROS-SOTO, AKA ONTEBEROS SOTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796.

No. 02–8938. OLIVER, AKA BANKS, AKA AZIZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–8939. JAVIER REYNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 412.

No. 02–8940. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 296 F. 3d 344.

No. 02–8942. PEREZ *v.* UNITED STATES;
No. 02–8970. CARRION *v.* UNITED STATES;
No. 02–8980. ORTEGON ET AL. *v.* UNITED STATES;
No. 02–8982. MORALES *v.* UNITED STATES; and
No. 02–9043. GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 917.

No. 02–8943. PHILLIPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 303.

No. 02–8945. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 408.

No. 02–8946. ALDERETE-MONCADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796.

No. 02–8947. LOPEZ-RIOS, AKA NATIVADAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796.

No. 02–8948. LOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 310 F. 3d 1231.

No. 02–8949. LIVERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 150.

No. 02–8950. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–8951. HUIHUI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 219.

No. 02–8952. GUEVARA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 298 F. 3d 124.

No. 02–8956. FISHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 947.

No. 02–8957. ZACARIAS-ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 264.

No. 02–8962. WEBB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 860.

No. 02–8967. DELAMAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 149.

No. 02–8968. DUSSAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 413.

No. 02–8969. DE LA CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 413.

No. 02–8971. JILES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 171.

No. 02–8974. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–8975. MANCILLAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 413.

No. 02–8977. MAASS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 298.

No. 02–8979. SIMMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 127.

No. 02–8983. RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 311 F. 3d 435.

No. 02–8985. PAJES-LASTRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–8987. PAYNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–8988. SANDOVAL-HIDALGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–8991. PRINCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9001. CRUZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 53 Fed. Appx. 226.

No. 02–9002. CASAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–9004. JORDAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–9005. BRUNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 676.

No. 02–9006. BRAMSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–9007. ALANIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9010. BURRELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 289 F. 3d 220 and 43 Fed. Appx. 403.

No. 02–9011. PORTILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9013. PALMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 297 F. 3d 760.

No. 02–9020. BROWN *v.* GERLINSKI, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 43 Fed. Appx. 521.

No. 02–9025. SANDERS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 809 A. 2d 584.

No. 02–9036. FLIPPIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 435.

No. 02–9039. VILLEGAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 940.

No. 02–9040. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 837.

No. 02–9046. VINES *v.* HENDERSON ET AL. Ct. App. D. C. Certiorari denied.

No. 02–9047. MCCOLLUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 289.

No. 02–9048. TOPETE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 612.

No. 02–9049. ALSTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 46 Fed. Appx. 51.

No. 02–9053. MATTHEWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 F. 3d 652.

No. 02–9055. LAU *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 50 Fed. Appx. 407.

No. 02–9057. ANDERSON, AKA THOMAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 303 F. 3d 847.

No. 02–9058. RODRIGUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 739.

No. 02–9059. AGUILAR-CARDENAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 845.

No. 02–9062. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 705.

No. 02–9063. LUMPKIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 246.

No. 02–9064. MONTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 311 F. 3d 993.

No. 02–9072. MATTHEWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 143.

No. 02–9076. CARRILLO-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–9079. SHUMAKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 690.

No. 02–9081. ASTORE, AKA BEDSAUL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 868.

No. 02–9082. VELASQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 304 F. 3d 237.

No. 02–9083. ZOLICOFFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–9085. ANHOCK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 02–9093. MORENO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 302 F. 3d 679.

No. 02–9099. MASON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 51 Fed. Appx. 355.

No. 02–9100. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 794.

No. 02–9101. DEMPSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 705.

No. 02–9102. DULANEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 66.

No. 02–9107. MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 592.

No. 02–9109. DESANGES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 Fed. Appx. 680.

No. 02–9120. CALDWELL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 829 So. 2d 211.

No. 02–9129. GANSER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 315 F. 3d 839.

No. 02–9138. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 801.

No. 02–858. WORLDCOM, INC., ET AL. *v.* UNITED STATES TELECOM ASSN. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 290 F. 3d 415.

No. 02–8631. LUNDAHL *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 02–8598. WHITE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. JUSTICE BREYER would grant certiorari.

*Rehearing Denied*

No. 01–10343. DIXON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 537 U. S. 842;

No. 02–744. COLEMAN *v.* SIMPSON, TRUSTEE, 537 U. S. 1159;

No. 02–745. CANNON *v.* SWINDELL ET AL., 537 U. S. 1159;

No. 02–804. IN RE NEARHOOD, 537 U. S. 1170;

No. 02–894. MITRANO *v.* KELLY, 537 U. S. 1161;

No. 02–992. WEIL *v.* UNITED STATES, 537 U. S. 1173;

No. 02–6591. STRONG *v.* ILLINOIS DEPARTMENT OF HUMAN SERVICES, 537 U. S. 1173;

No. 02–7488. YARBROUGH *v.* LIFETOUCH NATIONAL SCHOOL STUDIOS ET AL., 537 U. S. 1163;

No. 02–7492. WILLEMS *v.* SEEFELDT, TRUSTEE, 537 U. S. 1163;

No. 02–7538. ZIEGLER *v.* BIRKETT, WARDEN, ET AL., 537 U. S. 1163;

No. 02–7549. TURNPAUGH *v.* MICHIGAN, 537 U. S. 1164;

No. 02–7555. CATALDO *v.* STEGALL, WARDEN, 537 U. S. 1164;

No. 02–7564. FAIR *v.* CITY OF GRESHAM, OREGON, 537 U. S. 1164;

No. 02–7605. COLQUITT *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 537 U. S. 1174;

No. 02–7879. MONTUE *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS, 537 U. S. 1176;

No. 02–7899. JOHNSTON *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 537 U. S. 1166; and

No. 02–7990. MIULLI *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 537 U. S. 1176. Petitions for rehearing denied.

No. 02–7406. WILLEMS *v.* PIMA COUNTY, ARIZONA, BY AND THROUGH ITS BOARD OF SUPERVISORS, ET AL., 537 U. S. 1128. Motion for leave to file petition for rehearing denied.

No. 02–7838. IN SOO CHUN *v.* UWAJIMAYA, INC., 537 U. S. 1176. Motion of petitioner to defer consideration of petition for rehearing denied. Petition for rehearing denied.

MARCH 25, 2003

*Miscellaneous Order*

No. 02–9738 (02A802). IN RE HOOKER. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

*Certiorari Denied*

No. 02–9767 (02A805). MOON *v.* HEAD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

MARCH 26, 2003

*Certiorari Denied*

No. 02–9773 (02A811). COLBURN *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 02–9801 (02A820). COLBURN *v.* COCKRELL, 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.

MARCH 27, 2003

*Miscellaneous Orders.* (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1073; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1077; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1085; and the Federal Rules of Evidence, see *post*, p. 1099.)

MARCH 31, 2003

*Certiorari Granted—Vacated and Remanded*

No. 02–1. PHILLIPS, CHIEF JUSTICE, SUPREME COURT OF TEXAS, ET AL. *v.* WASHINGTON LEGAL FOUNDATION ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Brown* v. *Legal Foundation of Wash.*, *ante*, p. 216. Reported below: 270 F. 3d 180.

*Certiorari Dismissed*

No. 02–8651. ROBINSON *v.* KNIGHT, SUPERINTENDENT, MIAMI CORRECTIONAL FACILITY. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 02–9024. RODENBAUGH *v.* CIAVARELLA. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 52 Fed. Appx. 189.

No. 02–8716. MARTIN *v.* MORGAN ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 45 Fed. Appx. 562.

No. 02–8754. WEAVER *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d

Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 36 Fed. Appx. 693.

No. 02–8755. McConico *v.* Mitchem, Warden, et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–8791. Eury *v.* True, Warden, et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–8792. Eury *v.* Young. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 54 Fed. Appx. 149.

No. 02–8800. Rudd *v.* United States. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 42 Fed. Appx. 649.

*Miscellaneous Orders*

No. 02M77. Clark *v.* Henninger, Deputy Sheriff. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 02–473. United States *v.* Banks. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1187.] Motion for appointment of counsel granted, and it is ordered that Randall J. Roske, Esq., of Las Vegas, Nev., be appointed to serve as counsel for respondent in this case.

No. 02–8863. Jacox *v.* England, Secretary of the Navy, et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 21, 2003, 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. 02–1301. In re Snavely; and

No. 02–9365. In re Walls. Petitions for writs of habeas corpus denied.

No. 02–8655. IN RE SCHILLING; and

No. 02–9021. IN RE MURRAY. Petitions for writs of mandamus denied.

*Certiorari Denied*

No. 02–359. HENRY *v.* JEFFERSON COUNTY PLANNING COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 92.

No. 02–953. FIRST PENN-PACIFIC LIFE INSURANCE CO. *v.* WILLIAM R. EVANS, CHARTERED, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 304 F. 3d 345.

No. 02–960. WALKER LOUISIANA PROPERTIES ET AL. *v.* BROUSSARD. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 813 So. 2d 487.

No. 02–982. DREILING *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 274 Kan. 518, 54 P. 3d 475.

No. 02–991. WATKINS *v.* NORTEL NETWORKS, INC., DBA NORTHERN TELECOM, INC. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 620.

No. 02–1049. TINNER *v.* UNITED INSURANCE COMPANY OF AMERICA. C. A. 7th Cir. Certiorari denied. Reported below: 308 F. 3d 697.

No. 02–1067. NOVA CHEMICALS INC. *v.* ADAMS ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 795 So. 2d 364.

No. 02–1081. CALIFORNIA *v.* M&P INVESTMENTS ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–1092. ACCRUED FINANCIAL SERVICES, INC. *v.* PRIME RETAIL, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 298 F. 3d 291.

No. 02–1098. FLATOW *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 308 F. 3d 1065.

No. 02–1100. IQ PRODUCTS CO. *v.* PENNZOIL-QUAKER STATE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 305 F. 3d 368.

No. 02–1102. HOUGHTON ET AL. *v.* UTAH DEPARTMENT OF HEALTH ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 57 P. 3d 1067.

No. 02–1104. SPARACO *v.* LAWLER, MATUSKY, SKELLY, ENGINEERS LLP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 303 F. 3d 460.

No. 02–1106. ABKA LIMITED PARTNERSHIP ET AL. *v.* WISCONSIN DEPARTMENT OF NATURAL RESOURCES ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 255 Wis. 2d 486, 648 N. W. 2d 854.

No. 02–1108. WILLSON *v.* CATHOLIC CHARITIES INC. ET AL. Ct. App. Kan. Certiorari denied. Reported below: 30 Kan. App. 2d —, 43 P. 3d 902.

No. 02–1110. WATERS *v.* ANDERSON, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 02–1113. LINEHAN *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 147 Wash. 2d 638, 56 P. 3d 542.

No. 02–1114. MATTHEWS *v.* COLUMBIA COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 294 F. 3d 1294.

No. 02–1117. DAVIS ET UX. *v.* SOUTHERN ENERGY HOMES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 305 F. 3d 1268.

No. 02–1118. ROANE *v.* WASHINGTON COUNTY HOSPITAL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 186.

No. 02–1122. ROBLES *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 302 F. 3d 262.

No. 02–1132. CHRISTMAN ET UX. *v.* SANDT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 53 Fed. Appx. 190.

No. 02–1140. GRANT ET AL. *v.* CHEVRON PHILLIPS CHEMICAL CO. C. A. 5th Cir. Certiorari denied. Reported below: 309 F. 3d 864.

No. 02–1144. KAMLER *v.* H/N TELECOMMUNICATION SERVICES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 305 F. 3d 672.

No. 02–1145. MARSH ET AL. *v.* BOARD OF ZONING APPEALS OF CHESTERFIELD COUNTY ET AL. Sup. Ct. Va. Certiorari denied.

No. 02–1147. BLOUGH *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 691.

No. 02–1153. MONTGOMERY *v.* TRISLER. Ct. App. Ind. Certiorari denied. Reported below: 771 N. E. 2d 1234.

No. 02–1162. SAFARI AVIATION, INC., DBA SAFARI HELICOPTER TOURS *v.* BLAKEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 300 F. 3d 1144.

No. 02–1176. FERNANDES ET UX. *v.* SPARTA TOWNSHIP. Super. Ct. N. J., App. Div. Certiorari denied.

No. 02–1181. MCCALL, GUARDIAN OF THE ESTATE OF BESS, AN INCOMPETENT MINOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 310 F. 3d 984.

No. 02–1187. LEIGHTON *v.* VIRGINIA DEPARTMENT OF HEALTH. Sup. Ct. Va. Certiorari denied.

No. 02–1195. CHRISTIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 571.

No. 02–1197. PALM *v.* PAIGE, SECRETARY OF EDUCATION. C. A. D. C. Cir. Certiorari denied.

No. 02–1218. NIX ET UX., INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF NIX, DECEASED *v.* FRANKLIN COUNTY SCHOOL DISTRICT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 311 F. 3d 1373.

No. 02–1227. STRAND, CHAIRMAN, MICHIGAN PUBLIC SERVICE COMMISSION, ET AL. *v.* VERIZON NORTH, INC. C. A. 6th Cir. Certiorari denied. Reported below: 309 F. 3d 935.

No. 02–1233. ANGLETON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 314 F. 3d 767.

No. 02–1239. Uberoi *v.* Equal Employment Opportunity Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 36 Fed. Appx. 457.

No. 02–1243. Burkett *v.* Goodwin et al. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 02–1248. Garner *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 278.

No. 02–1249. Herrera *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 917.

No. 02–1264. Bosch *v.* Crestar Bank, and Its Successor in Interest, Fleet Bank, et al. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 833.

No. 02–6336. Fierro *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 294 F. 3d 674.

No. 02–6526. Cooey *v.* Coyle, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 289 F. 3d 882.

No. 02–7467. Lorraine *v.* Coyle, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 291 F. 3d 416 and 307 F. 3d 459.

No. 02–7650. Stanford *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 944.

No. 02–8060. Baptiste et al. *v.* United States;
No. 02–8117. Schexnayder *v.* United States;
No. 02–8213. Frank *v.* United States; and
No. 02–8825. McCoy *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 264 F. 3d 578 and 309 F. 3d 274.

No. 02–8150. Jones *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 304 F. 3d 1035.

No. 02–8205. Lozano Sanchez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 467.

No. 02–8206. Fortenberry *v.* Haley, Commissioner, Alabama Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 297 F. 3d 1213.

No. 02–8514. TOLES *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 269 F. 3d 1167.

No. 02–8645. FETZER *v.* PETROVSKY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8652. SMITH *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 90 S. W. 3d 132.

No. 02–8653. ROBINSON *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8654. SUMBRY *v.* DAVIS, ATTORNEY GENERAL OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 02–8657. SMITH *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8658. RAUSO *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 35 Fed. Appx. 357.

No. 02–8659. SMITH *v.* ILLINOIS DEPARTMENT OF CORRECTIONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 02–8660. FISHER *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8662. IVY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 02–8663. GLOVER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8664. HOWARD *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–8667. HUNTSBERRY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8676. MUNIZ *v.* TAFOYA, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 205.

No. 02–8678. GRIGGS *v.* MAYLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 496.

No. 02–8681. CALDWELL *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8686. BEGOVIC *v.* CITY OF DOVER, NEW HAMPSHIRE. C. A. 1st Cir. Certiorari denied.

No. 02–8691. TRUJILLO PEREZ *v.* CALDERON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 295.

No. 02–8693. JACOBS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 406.

No. 02–8694. JIMINEZ *v.* RICE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 276 F. 3d 478.

No. 02–8698. WILLIAMS *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–8703. GUILLORY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 303 F. 3d 647.

No. 02–8706. MEDINA *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8711. TIJERINA *v.* OHIO. Ct. App. Ohio, Defiance County. Certiorari denied.

No. 02–8717. JOHNSON *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 02–8725. BELTON *v.* GROSCHKE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 929.

No. 02–8727. BONNETT *v.* ANHEUSER-BUSCH, INC. C. A. 8th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 34.

No. 02–8731. OMISORE, AKA BENNET *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 781.

No. 02–8734. CULLIFER *v.* CRAIG, JUDGE, DISTRICT COURT OF TEXAS, SMITH COUNTY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 405.

No. 02–8737. BROWN *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8739. BOLDRIDGE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 274 Kan. 795, 57 P. 3d 8.

No. 02–8741. OWENBY *v.* NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA. C. A. 9th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 59.

No. 02–8742. MOORE *v.* RICHMOND NURSING HOME ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 257.

No. 02–8746. PEAKE *v.* SIKES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–8747. HEMPHILL *v.* SCHOTT ET AL. C. A. 2d Cir. Certiorari denied.

No. 02–8748. SMITH *v.* KETCHEM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 254.

No. 02–8753. COLLIER *v.* TIME, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8756. SIMPSON *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8757. SHELTON *v.* ROTHOVE. C. A. 8th Cir. Certiorari denied.

No. 02–8760. FAISON *v.* CROCKETT ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8761. GUARDADO *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–8762. HENRY *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 02–8772. RHAGI *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 309 F. 3d 103.

No. 02–8773. FITZGERALD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 61 P. 3d 901.

No. 02–8778. COOLEY *v.* WALTERS, SUPERINTENDENT, STATE REGIONAL CORRECTIONAL FACILITY AT MERCER. C. A. 3d Cir. Certiorari denied.

No. 02–8787. EANES *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 02–8794. EFORD *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8795. DUC CANH PHAN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8828. ALMODOVAR *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–8852. ODUOK *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 02–8861. RICE *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 212.

No. 02–8893. MILLER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 256 Wis. 2d 80, 647 N. W. 2d 348.

No. 02–8958. WILSON *v.* BATTLES, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 302 F. 3d 745.

No. 02–8973. PACK *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. 7th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 214.

No. 02–9031. WOODFIN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 729.

No. 02–9034. HALL *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 296 F. 3d 685.

No. 02–9075. CUMMINGS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 356 N. C. 618, 575 S. E. 2d 33.

No. 02–9077. SANTIAGO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 60 Fed. Appx. 854.

No. 02–9078. RIGGINS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 827 So. 2d 983.

No. 02–9106. AUGUSTIN *v.* UNITED STATES; and
No. 02–9127. FELIX *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 765.

No. 02–9112. TRUEBLOOD *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 301 F. 3d 784.

No. 02–9124. GONZALEZ-GARCIA *v.* UNITED STATES; and
No. 02–9125. GUERRERO-ARANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 310 F. 3d 1217.

No. 02–9126. FRANK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–9128. GURRUSQUIETA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 592.

No. 02–9134. HITCHENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 62 Fed. Appx. 417.

No. 02–9135. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 691.

No. 02–9136. IWUOGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 684.

No. 02–9143. ROBLEDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 711.

No. 02–9149. VAUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 170.

No. 02–9151. LOUIS, AKA AVILMAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 671.

No. 02–9152. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 665.

No. 02–9154. DEPEW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 242.

No. 02–9155. EMBREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 250 F. 3d 1181.

No. 02–9156. CRUZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 691.

No. 02–9158. BOYD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 304 F. 3d 813.

No. 02–9159. BOLIVAR-MUNOZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 313 F. 3d 253.

No. 02–9160. ALVARADO-HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 591.

No. 02–9164. MOSES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 167.

No. 02–9168. PINEDA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 57 Fed. Appx. 4.

No. 02–9173. MACAULAY, AKA HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 592.

No. 02–9174. LYONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 689.

No. 02–9176. MOSS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 704.

No. 02–9179. BURNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 298 F. 3d 523.

No. 02–9181. SESCHILLIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 310 F. 3d 1208.

No. 02–9183. RATLIFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 717.

No. 02–9184. STEWART *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 287.

No. 02–9185. REUTER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 02–9186. ROGERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 312 F. 3d 1284.

No. 02–9189. VARGAS-MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 690.

No. 02–9190. GARRETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9192. OLIVARES VALLE *v.* UNITED STATES; and RIASCOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 592 (first judgment) and 798 (second judgment).

No. 02–9194. REAUX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–9195. SANTIAGO *v.* GERLINSKI, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 189.

No. 02–9196. SHARP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 957.

No. 02–9197. HINDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 02–9198. FIMBRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 726.

No. 02–9199. GANN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 792.

No. 02–9200. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 312 F. 3d 1250.

No. 02–9201. GARCIA-PEREZ, AKA ONTIVEROS-SILVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 676.

No. 02–9202. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 876.

No. 02–9210. PINCKNEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9213. EARVIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 584.

No. 02–9216. EAMES, AKA RODGERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 297 F. 3d 845.

No. 02–9217. DYER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9219. DOYLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–9222. AKSOY, AKA YILMAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 902.

No. 02–9226. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 933.

No. 02–9227. MENDOZA-VALLES, AKA MONSEIGNEUR-SILERO, AKA SILERO-MONSEIGNEUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 255.

No. 02–9228. MCNEAR *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 02–9231. BALTIMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 592.

No. 02–9237. ESPARZA-RAMIREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–9242. RIDDICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 175.

No. 02–9243. SHIVERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9246. RAPOSO *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. C. A. 2d Cir. Certiorari denied.

No. 02–9248. BENAVIDES-GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 742.

No. 02–9250. DECARLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–9251. RODRIGUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–9260. RODRIGUEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 101.

No. 02–9261. MARISCAL-FIGUEROA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 693.

No. 02–9264. ST. REMY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 686.

No. 02–9270. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 473.

No. 02–9271. ABIOLA, AKA JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 456.

No. 02–9272. BRADLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 412.

No. 02–9274. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 705.

No. 02–9282. BANYAVONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 367.

No. 02–9283. ZARAGOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 295 F. 3d 1025.

No. 02–9351. CHARLTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 287.

No. 02–9360. BINGHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 626.

No. 02–9361. BRADLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 85.

No. 02–1112. EDWARD D. JONES & CO., L. P., DBA EDWARD JONES, ET AL. *v.* KLOSS. Sup. Ct. Mont. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 310 Mont. 123, 54 P. 3d 1.

No. 02–1136. BRECKENRIDGE ET UX. *v.* NATIONSBANK OF TEXAS, N. A. Ct. App. Tex., 6th Dist. Certiorari denied. JUS-

TICE BREYER took no part in the consideration or decision of this petition. Reported below: 79 S. W. 3d 151.

No. 02–8923. IN SOO CHUN *v.* EMPLOYMENT SECURITY DEPARTMENT OF THE STATE OF WASHINGTON. Ct. App. Wash. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 111 Wash. App. 1004.

*Rehearing Denied*

No. 02–993. BROWN *v.* UNITED STATES, 537 U. S. 1173;

No. 02–5519. BEALL *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 537 U. S. 920;

No. 02–6950. VALDERRAMA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 537 U. S. 1092;

No. 02–7040. GRESHAM *v.* CHANDLER, WARDEN, ET AL., 537 U. S. 1061;

No. 02–7218. KIM *v.* MAXEY TRAINING SCHOOL ET AL., 537 U. S. 1123;

No. 02–7575. CLARK *v.* CALIFORNIA, 537 U. S. 1165;

No. 02–7991. CRAWFORD *v.* UNITED STATES, 537 U. S. 1166; and

No. 02–8301. IN RE GUNNELL, 537 U. S. 1170. Petitions for rehearing denied.

APRIL 3, 2003

*Miscellaneous Orders*

No. 02A845. HAIN *v.* MULLIN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied.

No. 02A848. MULLIN, WARDEN *v.* HAIN. Application to vacate stay of execution of sentence of death entered by the United States Court of Appeals for the Tenth Circuit on April 2, 2003, presented to JUSTICE BREYER, and by him referred to the Court, granted. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to vacate the stay of execution.

April 7, 2003

*Certiorari Dismissed*

No. 02–479. Medical Board of California *v.* Hason. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1028.] Writ of certiorari dismissed without award of damages and costs.

No. 02–8819. Eury *v.* Gilmore et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–8820. Eury *v.* Smith, Warden, et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–8834. Eury *v.* White et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–8933. Thompson *v.* Ernst, Judge, District Court of Texas, Walker County. Sup. Ct. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 02A700. Chilingirian *v.* United States. Application for bail pending appeal, addressed to Justice Souter and referred to the Court, denied.

No. D–2347. In re Discipline of Caldwell. Rule to show cause discharged, and order suspending David Caldwell from the practice of law in this Court, dated March 10, 2003 [*ante*, p. 903], vacated.

No. 02M78. Wiley *v.* Ohio/Oklahoma Hearst-Argyle Television, Inc.;

No. 02M79. Agim *v.* Taliaferro et al.; and

No. 02M80. MM, a Minor, By and Through Her Parents, DM et al. *v.* School District of Greenville County, South Carolina, et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 01–950. Hillside Dairy Inc. et al. *v.* Lyons, Secretary, California Department of Food and Agriculture, et al.; and

No. 01–1018. PONDEROSA DAIRY ET AL. *v.* LYONS, SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–524. PRICE, WARDEN *v.* VINCENT. C. A. 6th Cir. [Certiorari granted *sub nom. Jones* v. *Vincent*, 537 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–575. NIKE, INC., ET AL. *v.* KASKY. Sup. Ct. Cal. [Certiorari granted, 537 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–679. DESERT PALACE, INC., DBA CAESARS PALACE HOTEL & CASINO *v.* COSTA. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–722. AMERICAN INSURANCE ASSN. ET AL. *v.* GARAMENDI, INSURANCE COMMISSIONER, STATE OF CALIFORNIA. C. A. 9th Cir. [Certiorari granted *sub nom. American Ins. Assn.* v. *Low*, 537 U. S. 1100.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–241. GRUTTER *v.* BOLLINGER ET AL. C. A. 6th Cir. [Certiorari granted, 537 U. S. 1043]; and

No. 02–516. GRATZ ET AL. *v.* BOLLINGER ET AL. C. A. 6th Cir. [Certiorari granted, 537 U. S. 1044.] Motions of BP America Inc. and MTV Networks for leave to file briefs as *amici curiae* out of time denied.

No. 02–1007. DUKE UNIVERSITY *v.* MADEY. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 02–8064. GOBBI *v.* GOBBI. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [537 U. S. 1186] denied.

No. 02–9445. IN RE SEATON. Motion of petitioner for leave to proceed *in forma* pauperis denied, and petition for writ of

habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 02–9579. IN RE STEELE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

*Certiorari Denied*

No. 00–1295. COMMUNITY HEALTH PARTNERS, INC., ET AL. *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1357.

No. 02–700. TURTLE ISLAND RESTORATION NETWORK ET AL. *v.* EVANS, SECRETARY OF COMMERCE, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 284 F. 3d 1282.

No. 02–846. MAZARES *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 302 F. 3d 1382.

No. 02–871. AMIR *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 02–1091. COALITION FOR FAIR AND EQUITABLE REGULATION OF DOCKS ON LAKE OF THE OZARKS *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 297 F. 3d 771.

No. 02–1125. COELHO *v.* CITY OF ANGELS CAMP ET AL. C. A. D. C. Cir. Certiorari denied.

No. 02–1129. CUNNINGHAM *v.* GATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 312 F. 3d 1148.

No. 02–1137. MOORE *v.* HOME DEPOT, INC. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 493.

No. 02–1138. STEPHENS *v.* UNION CARBIDE CORP. ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 02–1150. MARTIN *v.* KEYCORP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 50 Fed. Appx. 56.

No. 02–1156. COLOMBO *v.* O'CONNELL. C. A. 2d Cir. Certiorari denied. Reported below: 310 F. 3d 115.

No. 02–1157. ENRIGHT *v.* SOLAR TURBINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 548.

No. 02–1168. AMERICAN GENERAL LIFE INSURANCE CO. *v.* SPHERE DRAKE INSURANCE LTD. C. A. 7th Cir. Certiorari denied. Reported below: 307 F. 3d 617.

No. 02–1169. CITY OF LODI, CALIFORNIA *v.* FIREMAN'S FUND INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 302 F. 3d 928.

No. 02–1170. TEST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 96.

No. 02–1202. EWEALTH USA, INC., ET AL. *v.* LINCOLN BENEFIT LIFE CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 227.

No. 02–1216. PUTNAM *v.* HARLANDALE INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 592.

No. 02–1224. ESTATE OF WOSKOB *v.* WOSKOB. C. A. 3d Cir. Certiorari denied. Reported below: 305 F. 3d 177.

No. 02–1240. SANDERS *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 314 F. 3d 236.

No. 02–1242. ARROYO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 328 Ill. App. 3d 277, 764 N. E. 2d 1214.

No. 02–1256. JONES ET AL. *v.* KENTUCKY DEPARTMENT OF MILITARY AFFAIRS ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 96 S. W. 3d 13.

No. 02–1269. FUTURESOURCE, LLC *v.* REUTERS LTD. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 312 F. 3d 281.

No. 02–1282. HOUSING AUTHORITY OF THE CITY OF DALLAS *v.* HIGHLANDS OF MCKAMY IV AND V COMMUNITY IMPROVEMENT ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 313 F. 3d 246.

No. 02–1298. GOUDIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 617.

No. 02–1299. ST. MARTIN ET AL. *v.* ENERGY DEVELOPMENT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 296 F. 3d 356.

No. 02–1312. MORENO-VARGAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 315 F. 3d 489.

No. 02–7039. GONZALEZ *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 437 Mass. 276, 771 N. E. 2d 134.

No. 02–7576. COCHRAN *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 02–7749. RANDLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 F. 3d 373.

No. 02–7861. VOLKOV *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 950.

No. 02–8068. HUNT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 375.

No. 02–8287. AREVALO *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 275 Ga. 392, 567 S. E. 2d 303.

No. 02–8338. MCFARLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 311 F. 3d 376.

No. 02–8801. BOGGAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–8805. ALLISON *v.* LUSK, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–8822. LOCKETT *v.* WILLIAMS, WARDEN. Super. Ct. Pulaski County, Ga. Certiorari denied.

No. 02–8837. MARTINEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 298 App. Div. 2d 897, 749 N. Y. S. 2d 118.

No. 02–8838. MCGATH *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–8839. ELLIS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 828 So. 2d 500.

No. 02–8840. DIAL *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8845. BLACKSHARE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 02–8847. HIGHFILL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 02–8848. HURTADO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 4th 1179, 52 P. 3d 116.

No. 02–8856. KADYEBO *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 02–8857. MARTIN *v.* NESBITT ET AL. Ct. App. Neb. Certiorari denied.

No. 02–8865. JENKINS *v.* UNIVERSAL AMERICAN MORTGAGE CORP. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 807 So. 2d 146.

No. 02–8866. SEARLES *v.* TOWN OF WEST HARTFORD BOARD OF EDUCATION. App. Ct. Conn. Certiorari denied. Reported below: 68 Conn. App. 907, 793 A. 2d 1247.

No. 02–8870. TAEGEL *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 02–8875. TEAR *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 74 S. W. 3d 555.

No. 02–8876. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 332 Ill. App. 3d 254, 773 N. E. 2d 143.

No. 02–8879. GURULE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 4th 557, 51 P. 3d 224.

No. 02–8887. ROUSE *v.* LAMPERT, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 162.

No. 02–8890. COTTEN *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 213.

No. 02–8892. MYERS *v.* BALTIMORE COUNTY, MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 583.

No. 02–8898. SOTELO *v.* CASTERLINE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–8901. BUTLER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8902. ARRINGTON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8904. BOSLEY *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 483.

No. 02–8908. GLAZE *v.* SANDERS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 505.

No. 02–8910. SHELTON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 451.

No. 02–8911. SERIAN *v.* CIBA VISION CORP. C. A. 11th Cir. Certiorari denied.

No. 02–8913. BLACK *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 831 So. 2d 195.

No. 02–8916. COLEMAN *v.* WATKINS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 442.

No. 02–8917. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 829 So. 2d 206.

No. 02–8929. THOMAS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 591.

No. 02–8932. TATE *v.* JAIMET, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 302.

No. 02–8934. JACKSON *v.* KLEVENHAGEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 591.

No. 02–8944. MOORE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 591.

No. 02–8953. HOWALD *v.* ADOPTIVE PARENTS ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 118 Nev. 972, 59 P. 3d 1233.

No. 02–8959. TURNER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 87 S. W. 3d 111.

No. 02–8961. MOORE *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 149.

No. 02–8993. ROSADO *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied.

No. 02–9000. BARNES *v.* DONNELLY, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–9014. ADEOGBA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 02–9015. BOYD ET AL. *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 8th Cir. Certiorari denied.

No. 02–9032. KINCHELOW *v.* UNITED STATES;
No. 02–9095. BENNETT *v.* UNITED STATES;

No. 02–9115. WILLIAMS *v.* UNITED STATES;
No. 02–9305. HOUSTON *v.* UNITED STATES; and
No. 02–9386. PALMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 313 F. 3d 372.

No. 02–9033. FRASIER *v.* MASCHNER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 304 F. 3d 815.

No. 02–9038. WYNN *v.* JENKINS, CHAIRMAN, VIRGINIA PAROLE BOARD, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 668.

No. 02–9067. WHITLEY *v.* HOUSING AUTHORITY OF THE CITY OF CHARLESTON, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 146.

No. 02–9073. LATTIMORE *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 311 F. 3d 46.

No. 02–9088. JORDAN *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. Super. Ct. Pa. Certiorari denied.

No. 02–9119. EVANS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 438 Mass. 142, 778 N. E. 2d 885.

No. 02–9121. CONDIT *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 02–9144. RUSH *v.* WEST VIRGINIA. Cir. Ct. Braxton County, W. Va. Certiorari denied.

No. 02–9157. DE LOS SANTOS, AKA URENA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 132.

No. 02–9163. MOSES *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Forsyth County, N. C. Certiorari denied.

No. 02–9167. MCGILL *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 02–9175. PHILLIPS *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 55 Fed. Appx. 100.

No. 02–9182. SIMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 325 Ill. App. 3d 1175, 810 N. E. 2d 326.

No. 02–9211. MILLER *v.* WISCONSIN. C. A. 7th Cir. Certiorari denied.

No. 02–9212. MILLER *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–9233. COX ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 304 F. 3d 635.

No. 02–9239. CASSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 144.

No. 02–9266. PORTO-CARREDO ESTUPINAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 932.

No. 02–9268. DONALDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 700.

No. 02–9275. RUCKMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 280.

No. 02–9276. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 793.

No. 02–9278. DUNKLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 287.

No. 02–9279. EDWARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 134.

No. 02–9281. MOREJON CORCHO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 620.

No. 02–9284. UPDIKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 643.

No. 02–9286. PEREA-SANTANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 926.

No. 02–9287. MORALEZ-ESPINOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 573.

No. 02–9289. SICARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 313 F. 3d 1287.

No. 02–9291. BOLTZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–9292. DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 409.

No. 02–9295. FRAZIER, AKA SATO, AKA ROSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 222.

No. 02–9297. GIBSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 814 A. 2d 964.

No. 02–9300. GROSS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9303. ROTHENBACH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9308. DANIELS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 323 Ill. App. 3d 1146, 800 N. E. 2d 885.

No. 02–9309. DROZDOWSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 313 F. 3d 819.

No. 02–9310. RUIZ-ESTRADA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 312 F. 3d 398.

No. 02–9311. DARCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 60 Fed. Appx. 339.

No. 02–9312. DANDRIDGE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9314. MILES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 53 Fed. Appx. 622.

No. 02–9316. TUNSTALL *v.* HOPKINS, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 306 F. 3d 601.

No. 02–9317. MAZZIO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 120.

No. 02–9321. CONN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 297 F. 3d 548.

No. 02–9322. TURNER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 319 Ill. App. 3d 1116, 791 N. E. 2d 739.

No. 02–9328. ROSSI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 743.

No. 02–9329. GODDARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 312 F. 3d 1360.

No. 02–9330. GONZALEZ, AKA JORGE DE HOYOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 407.

No. 02–9331. GONZALEZ-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 309 F. 3d 594.

No. 02–9332. GUSTAVE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 44 Fed. Appx. 573.

No. 02–9336. MOORE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 313 F. 3d 880.

No. 02–9341. SCHREIBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9345. KELLY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 312 F. 3d 328.

No. 02–9346. MANTILLA *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 302 F. 3d 182.

No. 02–9347. LEACHMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 309 F. 3d 377.

No. 02–9348. BAZEMORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 485.

No. 02–9349. AVILA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 313 F. 3d 1287.

No. 02–9357. BELLE ET AL. *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 326.

No. 02–9359. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9372. BLAIR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 746.

No. 02–9375. WOODSON *v.* HUTCHINSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 195.

No. 02–9376. TALLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 164.

No. 02–9381. SANTANA-BALTAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 592.

No. 02–9391. LUSTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 305 F. 3d 199.

No. 02–9392. KEELER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 02–9393. SIMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 793.

No. 02–9398. WARDRICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 115.

No. 02–9399. TUMEA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 305.

No. 02–9402. WIANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 314 F. 3d 826.

No. 02–9407. SCOLARO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 299 F. 3d 956.

No. 02–9411. DOMINGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 36 Fed. Appx. 622.

No. 02–9412. LOWERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 894.

No. 02–9413. LEDESMA-JIMENEZ, AKA ASTUDILLO NAVARETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 77.

No. 02–9414. FLEMING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 315 F. 3d 959.

No. 02–9415. OGLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 818.

No. 02–9417. PETRIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 302 F. 3d 1280.

No. 02–9419. BRAVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 295 F. 3d 1002.

No. 02–9424. GOINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 724.

No. 02–9428. STONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 919.

No. 02–9429. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 725.

No. 02–9433. SALAZAR SALDANA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 794.

No. 02–9443. MCGILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 602.

No. 02–9444. OSIRIS MINAYA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 531.

No. 02–9452. MCDANIELS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 302 F. 3d 384.

No. 02–9469. ALVAREZ-ROBLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 883.

No. 02–9477. SOUSSI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 316 F. 3d 1095.

No. 02–1142. TY INC. *v.* PERRYMAN. C. A. 7th Cir. Motion of AT&T Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 306 F. 3d 509.

No. 02–1143. PEROT *v.* MCDONALD'S CORP. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 48 Fed. Appx. 103.

No. 02–9220. MILLER *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari before judgment denied.

No. 02–9241. SHERKAT *v.* DISTRICT COURT OF KANSAS, JOHNSON COUNTY. C. A. 10th Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 00–9933. GIBBS *v.* FOSTER, GOVERNOR OF LOUISIANA, ET AL., 534 U. S. 838;

No. 00–9934. GIBBS *v.* CALIFORNIA, 534 U. S. 838;

No. 02–589. PIERSON *v.* CHARLES E. SMITH CO., 537 U. S. 1106;

No. 02–814. AGUSTIN *v.* ENGLAND, SECRETARY OF THE NAVY, 537 U. S. 1113;

No. 02–7422. GANZIE *v.* VIRGINIA, 537 U. S. 1162;

No. 02–8170. WHITE *v.* CARTER, WARDEN, ET AL., 537 U. S. 1210; and

No. 02–8370. CEMINCHUK *v.* OLSON, SOLICITOR GENERAL, ET AL., 537 U. S. 1218. Petitions for rehearing denied.

No. 02–5366. MANTECON-ZAYAS *v.* UNITED STATES, 537 U. S. 1031. Motion of petitioner for leave to file petition for rehearing denied.

APRIL 8, 2003

*Miscellaneous Order*

No. 02–9914 (02A855). IN RE HAWKINS. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

APRIL 9, 2003

*Dismissal Under Rule 46*

No. 02–828. CHEMQUE, INC. *v.* MINNESOTA MINING & MANUFACTURING CO. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 303 F. 3d 1294.

*Certiorari Denied*

No. 02–9869 (02A834). BRAMBLETT *v.* TRUE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE

SOUTER, and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 59 Fed. Appx. 1.

No. 02–9941 (02A842). BRAMBLETT *v.* TRUE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

No. 02–10026 (02A869). BRAMBLETT *v.* TRUE, WARDEN. Sup. Ct. Va. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

APRIL 10, 2003

*Dismissal Under Rule 46*

No. 02–9086. ABDUR'RAHMAN *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari before judgment dismissed under this Court's Rule 46.2.

APRIL 18, 2003

*Miscellaneous Orders*

No. 02–182. GEORGIA *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. D. C. D. C. [Probable jurisdiction noted, 537 U. S. 1151.] Motion of the Solicitor General for divided argument granted.

No. 02–299. ENTERGY LOUISIANA, INC. *v.* LOUISIANA PUBLIC SERVICE COMMISSION ET AL. Sup. Ct. La. [Certiorari granted, 537 U. S. 1152.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–306. BENEFICIAL NATIONAL BANK ET AL. *v.* ANDERSON ET AL. C. A. 11th Cir. [Certiorari granted, 537 U. S. 1169.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–371. VIRGINIA *v.* HICKS. Sup. Ct. Va. [Certiorari granted, 537 U. S. 1169.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–469. BLACK & DECKER DISABILITY PLAN *v.* NORD. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1098.] Motion of

the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–695. FITZGERALD, TREASURER OF IOWA *v.* RACING ASSOCIATION OF CENTRAL IOWA ET AL. Sup. Ct. Iowa. [Certiorari granted, 537 U. S. 1152.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–524. PRICE, WARDEN *v.* VINCENT. C. A. 6th Cir. [Certiorari granted *sub nom. Jones* v. *Vincent*, 537 U. S. 1099.] Motion of Texas et al. to consider out-of-time motion to participate in oral argument as *amici curiae* and for divided argument denied.

APRIL 21, 2003

*Certiorari Granted—Vacated and Remanded*

No. 01–1722. SAN PAOLO U. S. HOLDING CO., INC. *v.* SIMON, DBA LIBERTY PAPER CO. Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, *ante*, p. 408.

No. 02–130. DEKALB GENETICS CORP. *v.* BAYER CROPSCIENCE, S. A. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, *ante*, p. 408. Reported below: 272 F. 3d 1335.

No. 02–342. KEY PHARMACEUTICALS, INC., ET AL. *v.* EDWARDS. Ct. App. Ore. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, *ante*, p. 408. JUSTICE BREYER took no part in the consideration or decision of this case. Reported below: 178 Ore. App. 42, 35 P. 3d 1106.

No. 02–370. ANCHOR HOCKING, INC. *v.* WADDILL. Ct. App. Ore. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, *ante*, p. 408. Reported below: 175 Ore. App. 294, 27 P. 3d 1092.

No. 02–966. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA *v.* TEXTRON FINANCIAL CORP. Ct.

App. Cal., 4th App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, *ante*, p. 408.

No. 02–1055. WOODFORD, WARDEN *v.* PAYTON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Woodford* v. *Garceau*, *ante*, p. 202. Reported below: 299 F. 3d 815.

*Miscellaneous Orders*

No. D–2335. IN RE DISBARMENT OF KOVLER. Disbarment entered. [For earlier order herein, see 537 U. S. 1085.]

No. 02M81. HUNTERSON *v.* DISABATO ET AL.;
No. 02M82. HUTH *v.* YOUNG, JUDGE;
No. 02M83. BARKER *v.* BAYLESS;
No. 02M85. CUNNINGHAM *v.* LEWENSON ET AL.; and
No. 02M86. HOLT *v.* STATE ATTORNEY OFFICE. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 02M84. EVANS *v.* ARKANSAS BOARD OF EDUCATION ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 02M88. REID *v.* TENNESSEE. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 02–249. PEABODY COAL CO. *v.* GROVES ET AL., 537 U. S. 1147. Motion of respondent Wilma J. Groves for attorney's fees denied without prejudice to filing in the United States Court of Appeals for the Sixth Circuit. JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. 02–628. FREW, ON BEHALF OF HER DAUGHTER, FREW, ET AL. *v.* HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 905.] Motion of the parties to dispense with printing the joint appendix granted.

No. 02–813. GREEN FIRE & MARINE INSURANCE CO., LTD., FKA KUKJE HWAJAE INSURANCE CO., LTD. *v.* M/V HYUNDAI LIBERTY. C. A. 9th Cir.;

No. 02–1028. NORFOLK SOUTHERN RAILWAY CO. *v.* JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, ET AL. C. A. 11th Cir.; and

No. 02–1192. COOPER INDUSTRIES, INC. *v.* AVIALL SERVICES, INC. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 02–9054. KAFELE *v.* KARNES ET AL. Sup. Ct. Ohio. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 12, 2003, 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. 02–1427. IN RE ONAPOLIS ET UX.;
No. 02–9051. IN RE COOPER;
No. 02–9616. IN RE PHELPS; and
No. 02–9845. IN RE CALLAHAN. Petitions for writs of habeas corpus denied.

No. 02–8786. IN RE RODRIGUEZ; and
No. 02–9114. IN RE WARDELL. Petitions for writs of mandamus denied.

No. 02–1329. IN RE BLYDEN; and
No. 02–9023. IN RE SCRUGGS. Petitions for writs of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 02–1019. ARIZONA *v.* GANT. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 202 Ariz. 240, 43 P. 3d 188.

No. 02–1183. UNITED STATES *v.* PATANE. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 304 F. 3d 1013.

No. 02–1080. GENERAL DYNAMICS LAND SYSTEMS, INC. *v.* CLINE ET AL. C. A. 6th Cir. Motions of Equal Employment Advisory Council et al. and Central States, Southeast and Southwest Areas Health and Welfare Fund for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 296 F. 3d 466.

No. 02–1196. SECURITIES AND EXCHANGE COMMISSION *v.* EDWARDS. C. A. 11th Cir. Motions of North American Securities

Administrators Association, Inc., Florida Department of Financial Services et al., and Public Investors Arbitration Bar Association, Inc., for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 300 F. 3d 1281.

No. 02–8286. BANKS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Reported below: 48 Fed. Appx. 104.

*Certiorari Denied*

No. 02–770. DESTEFANO *v.* BROADWING COMMUNICATIONS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 103.

No. 02–915. KRILICH ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 303 F. 3d 784.

No. 02–931. AIRSTAR HELICOPTERS, INC. *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 298 F. 3d 997.

No. 02–978. TIME WARNER ENTERTAINMENT CO., L. P., ET AL. *v.* SIX FLAGS OVER GEORGIA, LLC, ET AL. Ct. App. Ga. Certiorari denied. Reported below: 254 Ga. App. 598, 563 S. E. 2d 178.

No. 02–1025. NILES *v.* PARKINSON, AS TRUSTEE OF THE LAURA J. NILES TRUST, ET AL.; and

No. 02–1038. BONO *v.* PARKINSON, AS TRUSTEE OF THE LAURA J. NILES TRUST, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 02–1032. STACEY *v.* CITY OF HERMITAGE, PENNSYLVANIA, ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 789 A. 2d 772.

No. 02–1045. ANDERSEN ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 298 F. 3d 804.

No. 02–1070. GAYLORD CONTAINER CORP. ET AL. *v.* GARRETT PAPER, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 305 F. 3d 145.

No. 02–1076. MICHIGAN *v.* JOHNSON. Ct. App. Mich. Certiorari denied.

No. 02–1088. LEIDER *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 301 F. 3d 1290.

No. 02–1093. CITY OF SAN DIEGO, CALIFORNIA *v.* PAULSON; and

No. 02–1101. MT. SOLEDAD MEMORIAL ASSN., INC. *v.* PAULSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 294 F. 3d 1124.

No. 02–1164. FLUELLEN *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 41 Fed. Appx. 497.

No. 02–1172. BAZARGANI *v.* HAVERFORD STATE HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 187.

No. 02–1174. GREGORY *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 56 S. W. 3d 164.

No. 02–1179. ZERLA *v.* ERWIN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 130.

No. 02–1180. JONES, WARDEN, ET AL. *v.* PACE. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 287.

No. 02–1182. OATMAN *v.* FUJI PHOTO FILM USA, INC. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 413.

No. 02–1194. CAMPBELL *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 958.

No. 02–1198. BRINES ET AL. *v.* XTRA CORP. C. A. 7th Cir. Certiorari denied. Reported below: 304 F. 3d 699.

No. 02–1211. JOSEPH *v.* SALT LAKE CITY, UTAH, CIVIL SERVICE COMMISSION ET AL. Ct. App. Utah. Certiorari denied.

No. 02–1214. MAYES *v.* GALVESTON COUNTY, TEXAS, JUVENILE DETENTION CENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 704.

No. 02–1217. JIANRONG CHEN *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 51 Fed. Appx. 352.

No. 02–1219. CECG, INC. *v.* MAGIC SOFTWARE ENTERPRISES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 51 Fed. Appx. 359.

No. 02–1247. HARDAWAY *v.* YOUNG, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 302 F. 3d 757.

No. 02–1258. RAISER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 325 F. 3d 1182.

No. 02–1259. STEVENS *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 294 App. Div. 2d 1, 741 N. Y. S. 2d 536.

No. 02–1261. REINHART *v.* DEPARTMENT OF AGRICULTURE. C. A. 6th Cir. Certiorari denied. Reported below: 39 Fed. Appx. 954.

No. 02–1278. BENES *v.* CITY OF DALLAS, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 405.

No. 02–1283. GALVAN ET AL. *v.* DEPARTMENT OF DEFENSE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 102.

No. 02–1284. ILLINOIS *v.* SWIFT. Sup. Ct. Ill. Certiorari denied. Reported below: 202 Ill. 2d 378, 781 N. E. 2d 292.

No. 02–1285. HAYES *v.* YORK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 311 F. 3d 321.

No. 02–1294. RISTOVSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 312 F. 3d 206.

No. 02–1296. BROWN, SPECIAL REPRESENTATIVE FOR REEVES, DECEASED *v.* MUND ET AL. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 02–1303. CLARK *v.* LA MARQUE INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 412.

No. 02–1310. ROSENKRANTZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 29 Cal. 4th 616, 59 P. 3d 174.

No. 02–1331. UNIFUND CCR PARTNERS, INC. *v.* MAGRIN. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 938.

No. 02–1338. GRANT *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 832 So. 2d 770.

No. 02–1345. EDWARDS *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 810 A. 2d 226.

No. 02–1357. LOCKHEED INFORMATION MANAGEMENT SERVICES, INC., ET AL. *v.* STANLEY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–1358. MORENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 40 Fed. Appx. 476.

No. 02–1360. O'CONNELL *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 99 S. W. 3d 94.

No. 02–1365. ZIMMERMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 19.

No. 02–1372. NISSENBAUM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 50 Fed. Appx. 87.

No. 02–1391. MAYFIELD *v.* MARYLAND. Cir. Ct. Prince George's County, Md. Certiorari denied.

No. 02–7517. EVANS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 50 Fed. Appx. 439.

No. 02–7565. GIFFORD *v.* VAIL RESORTS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 486.

No. 02–7823. MATHIS *v.* STAFFORD COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 252.

No. 02–7859. CHAPMAN *v.* LEMASTER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 302 F. 3d 1189.

No. 02–7946. PAYTON *v.* WOODFORD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 299 F. 3d 815.

No. 02–8095. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 293 F. 3d 886.

No. 02–8107. PEREIRA *v.* CITY OF PLANT CITY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 742.

No. 02–8405. WHITE *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 307 F. 3d 722.

No. 02–8441. FRIEDMAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 300 F. 3d 111 and 43 Fed. Appx. 424.

No. 02–8442. RASMUSSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 48.

No. 02–8516. VEERAPOL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 312 F. 3d 1128.

No. 02–8521. RINGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 300 F. 3d 788.

No. 02–8855. KOLBERG *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 829 So. 2d 29.

No. 02–8918. DELANCY *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–8925. BELL *v.* HERBERT, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–8935. ESTES *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8941. SHERMAN *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 41 Fed. Appx. 914.

No. 02–8954. HADDAD *v.* MICHIGAN NATIONAL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 217.

No. 02–8955. HARRIS-PITTMAN *v.* NASH COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. Ct. App. N. C. Certiorari denied. Reported below: 149 N. C. App. 756, 561 S. E. 2d 560.

No. 02–8963. LEE *v.* ENGLISH ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–8964. SLATE *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–8966. SILER *v.* VAVROSKY. C. A. 9th Cir. Certiorari denied.

No. 02–8972. LOCKETT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 53 P. 3d 418.

No. 02–8976. LONGSTREET *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 319 Ill. App. 3d 1114, 791 N. E. 2d 738.

No. 02–8978. MCQUEEN *v.* SAGINAW COUNTY, MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 962.

No. 02–8981. MILLER *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 148.

No. 02–8984. SWAFFORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 828 So. 2d 966.

No. 02–8986. MULLALLY *v.* CITY OF LOS ANGELES, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 190.

No. 02–8989. JOHNSON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 02–8990. MCCOWAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–8992. SMITH *v.* SMITH. Ct. Civ. App. Okla. Certiorari denied.

No. 02–8994. SMITH *v.* POLUNSKY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 106.

No. 02–8995. SLAUGHTER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–8996. RANDY *v.* STEPP, WARDEN. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 02–8997. LUNDAHL *v.* ZIMMER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 296 F. 3d 936.

No. 02–8998. MADDEN *v.* BOBINSKI-CROAN, NKA BOBINSKI. Sup. Ct. Alaska. Certiorari denied.

No. 02–8999. LITMON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 02–9008. BROWN *v.* RENDELL, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 48 Fed. Appx. 40.

No. 02–9012. PHELPS *v.* BEELER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 474.

No. 02–9016. ADANANDUS *v.* KING COUNTY PUBLIC DEFENSE OFFICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 832.

No. 02–9017. ARVIE *v.* ANDRICH ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 812 So. 2d 156.

No. 02–9018. AHMED *v.* HERSHEY ET AL. C. A. 6th Cir. Certiorari denied.

No. 02–9019. BLONDHEIM *v.* OLMSTED COUNTY, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 786.

No. 02–9022. SCOTT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 02–9026. RUSSELL *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9027. SCARVER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 02–9028. TAYLOR *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 02–9029. VAUGHN *v.* MONEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9030. YOUNG *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 02–9035. HARRINGTON *v.* DOWNS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 959.

No. 02–9041. LIBERMAN *v.* CITIBANK, N. A. Ct. App. N. Y. Certiorari denied. Reported below: 98 N. Y. 2d 728, 779 N. E. 2d 188.

No. 02–9042. EATON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 02–9044. HALL *v.* LENDIS. Super. Ct. N. J., App. Div. Certiorari denied.

No. 02–9045. SHABTAI *v.* GIULIANI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 48 Fed. Appx. 18.

No. 02–9050. COOPER *v.* CALDERON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 274 F. 3d 1270.

No. 02–9052. COBAS *v.* BURGESS. C. A. 6th Cir. Certiorari denied. Reported below: 306 F. 3d 441.

No. 02–9056. BRYANT *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 702.

No. 02–9061. STAMPS *v.* DISTRICT COURT OF COLORADO, 4TH JUDICIAL DISTRICT, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 320.

No. 02–9066. TRAVERS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–9068. YOUNG *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9069. PENDLEY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9070. MURPHY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 47 P. 3d 876.

No. 02–9071. KIRSCH *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9074. SANG XUAN DANG *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9080. STEPHENSON *v.* KRAMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 325.

No. 02–9084. WELLS *v.* CHU. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 116.

No. 02–9089. KENNER *v.* LEWIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9090. LAFAELE *v.* GARNICA. C. A. 9th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 72.

No. 02–9091. KUTSKA *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–9092. PAYNE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9094. CHAYOON *v.* MASHANTUCKET PEQUOT GAMING ENTERPRISE ET AL. C. A. 2d Cir. Certiorari denied.

No. 02–9097. ABDELSAMED *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 632.

No. 02–9098. LOVE *v.* CARTER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 6.

No. 02–9103. BROOKS *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9104. SMITH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 02–9105. BOWLING *v.* OHIO. Ct. App. Ohio, Sandusky County. Certiorari denied.

No. 02–9108. CROWELL *v.* MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 731.

No. 02–9110. DRAGER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9111. DENSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 326 Ill. App. 3d 1170, 811 N. E. 2d 794.

No. 02–9113. VEGA *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 810 So. 2d 576.

No. 02–9116. DAVIS *v.* FILION, SUPERINTENDENT, COXCACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 42 Fed. Appx. 488.

No. 02–9118. CHILDRESS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 930.

No. 02–9130. GALLIEN *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 02–9142. AKHMAD *v.* FARWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 256.

No. 02–9147. OXLEY *v.* OREGON. C. A. 9th Cir. Certiorari denied.

No. 02–9148. CORONEL *v.* OKU. C. A. 9th Cir. Certiorari denied.

No. 02–9161. MORGAN *v.* RAMIREZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–9169. PREVATTE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 356 N. C. 178, 570 S. E. 2d 440.

No. 02–9171. LAWRENCE *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Harnett County, N. C. Certiorari denied.

No. 02–9172. JOLLEY *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 02–9180. JONES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 41 Fed. Appx. 470.

No. 02–9187. VOGEL *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 02–9209. MOORE *v.* AMERICAN TRANSIT INSURANCE CO. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 300 App. Div. 2d 74, 752 N. Y. S. 2d 605.

No. 02–9221. PALMER *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–9223. BUNTING *v.* OHIO. Ct. App. Ohio, Stark County. Certiorari denied.

No. 02–9249. ALLEN *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Anson County, N. C. Certiorari denied.

No. 02–9252. RUSTIN *v.* LAVIGNE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9255. DINGLE *v.* SOUTH CAROLINA. Ct. Common Pleas of Greenwood County, S. C. Certiorari denied.

No. 02–9259. SMITH *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 851.

No. 02–9262. MITCHELL *v.* UNION PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 556.

No. 02–9269. LEE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 806 A. 2d 462.

No. 02–9290. PROPER *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9294. ISAACS *v.* HEAD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 300 F. 3d 1232.

No. 02–9296. HARRISON *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 316 F. 3d 1063.

No. 02–9298. HARDING *v.* WALLS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 300 F. 3d 824.

No. 02–9302. STURGEON *v.* PIERSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–9306. RICHARDS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 417.

No. 02–9319. MARTIN *v.* UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT. C. A. 8th Cir. Certiorari denied.

No. 02–9323. WADDELL *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 153 N. C. App. 202, 569 S. E. 2d 33.

No. 02–9333. FAIRLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9342. RAMIREZ *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 795.

No. 02–9350. BLACK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 314 F. 3d 752.

No. 02–9367. BONDS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 803 A. 2d 788.

No. 02–9368. BEY *v.* WELSBACH ELECTRIC CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 38 Fed. Appx. 690.

No. 02–9369. ROSENBACH *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 313 Ill. App. 3d 1100, 775 N. E. 2d 1073.

No. 02–9371. BISHOP *v.* CITY OF HENDERSON, NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 36 Fed. Appx. 636.

No. 02–9379. WILLIAMS *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–9382. MONTOYA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 908.

No. 02–9389. HILL *v.* COWAN, WARDEN. Sup. Ct. Ill. Certiorari denied. Reported below: 202 Ill. 2d 151, 781 N. E. 2d 1065.

No. 02–9395. BAKER *v.* WELLS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 39 Fed. Appx. 150.

No. 02–9396. BENTLEY *v.* DELAWARE DEPARTMENT OF FAMILY SERVICES ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 812 A. 2d 224.

No. 02–9400. RIVERA-OROZCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 414.

No. 02–9403. PETERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 917.

No. 02–9405. SOTO-ORNELAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 312 F. 3d 1167.

No. 02–9406. RABAGO-VAZQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796.

No. 02–9409. DIAZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 326 Ill. App. 3d 1150, 811 N. E. 2d 786.

No. 02–9416. FREDERICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 933.

No. 02–9421. CASTILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 491.

No. 02–9422. CURRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 307 F. 3d 664.

No. 02–9430. WINFIELD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9432. WOODFIN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 919.

No. 02–9435. MCGHEE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9439. ROMERO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–9441. HOLGUIN-PEREZ *v.* UNITED STATES; and GOMEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 798.

No. 02–9446. CORDERO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 313 F. 3d 161.

No. 02–9448. CARROLL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 785.

No. 02–9450. BANKS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. Crim. App. Tex. Certiorari denied.

No. 02–9453. MILLER *v.* UNITED STATES; SOLOMON *v.* UNITED STATES; and SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 795 (second judgment) and 797 (first judgment); 55 Fed. Appx. 716 (third judgment).

No. 02–9454. BONNER *v.* UNITED STATES; and SLAUGHTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797 (first judgment); 55 Fed. Appx. 716 (second judgment).

No. 02–9459. LEVY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 934.

No. 02–9460. LEVI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 403.

No. 02–9462. CARLISLE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 324 Ill. App. 3d 1128, 805 N. E. 2d 751.

No. 02–9465. CARRILLO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–9468. MONTALVO *v.* CASTERLINE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 480.

No. 02–9470. BRANNIC *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 02–9471. BUSH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–9473. RIVERA-ECHAVARRIA *v.* UNITED STATES; and SANDOVAL-GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797 (first judgment) and 798 (second judgment).

No. 02–9474. SOLIS-CAMPOZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 F. 3d 164.

No. 02–9475. SWACKHAMMER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 317 F. 3d 540.

No. 02–9478. LOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 310 F. 3d 1231.

No. 02–9480. WOODS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9482. POWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 326.

No. 02–9485. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 933.

No. 02–9488. LAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 700.

No. 02–9492. RENGIFO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 02–9494. AKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 764.

No. 02–9496. BUSTILLO-DELGADO *v.* UNITED STATES; SALGADO-PEREZ *v.* UNITED STATES; NAVA CORONA, AKA

PEREDES-GONZALEZ, AKA PAREDES-GONZALEZ *v.* UNITED STATES; ALVES DE LIMA, AKA DACUNHA *v.* UNITED STATES; REYNA-RODRIGUEZ *v.* UNITED STATES; JUAREZ-LOPEZ, AKA JUAREZ *v.* UNITED STATES; GARCIA-LOPEZ *v.* UNITED STATES; QUILANTAN-BROUSSARD *v.* UNITED STATES; and MARTINEZ-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 794 (first judgment), 796 (ninth judgment), 797 (fifth, sixth, and eighth judgments), and 798 (second, third, fourth, and seventh judgments).

No. 02–9497. LANE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–9499. MENDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–9501. BRITO-BETANCOURT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 978.

No. 02–9506. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 57 Fed. Appx. 486.

No. 02–9507. HOUSTON *v.* HALL, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 02–9510. GIVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9513. SIMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9515. GREGORY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 302 F. 3d 805.

No. 02–9518. GALLEGOS-DELGADO *v.* UNITED STATES (Reported below: 54 Fed. Appx. 794); CARRANZA-VELASQUEZ *v.* UNITED STATES (54 Fed. Appx. 796); LOPEZ-ESPINOZA *v.* UNITED STATES (54 Fed. Appx. 795); BARAHONA-GALIAS *v.* UNITED STATES (54 Fed. Appx. 797); DUENAZ DE GRANDE, AKA NORIEGA *v.* UNITED STATES (54 Fed. Appx. 797); CAMACHO-MUNIZ, AKA GUILLEN-RODRIGUEZ *v.* UNITED STATES (54 Fed. Appx. 798); CAMACHO-LORENZO, AKA RAMOS *v.* UNITED STATES (54 Fed. Appx. 798); ZAVALA-MARTINEZ *v.* UNITED STATES (54 Fed. Appx. 797); GOMEZ-CASTELLON *v.* UNITED STATES (54 Fed. Appx. 797);

and VELASQUEZ-LARIOS *v.* UNITED STATES (54 Fed. Appx. 796). C. A. 5th Cir. Certiorari denied.

No. 02–9523. TUTTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 650.

No. 02–9524. WILLIAMS *v.* UNITED STATES; and
No. 02–9525. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 933.

No. 02–9530. MARTINEZ-CINTRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 02–9531. WATKINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 922.

No. 02–9535. ESTRADA-TUFINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 464.

No. 02–9539. ASCHENBRENER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 258 Wis. 2d 981, 654 N. W. 2d 94.

No. 02–9542. PRATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9543. PAREDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 932.

No. 02–9548. RIOS ESPINOZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–9551. BACH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 310 F. 3d 1063.

No. 02–9556. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–9557. BUTTS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 175.

No. 02–9560. CORTINAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9564. WARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 624.

No. 02–9580. DIEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9607. BOWE *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9619. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9623. WELLS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 804 A. 2d 353.

No. 02–9625. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 309.

No. 02–9630. TILLITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–9632. VASQUEZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 884.

No. 02–9635. DECATO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 51 Fed. Appx. 888.

No. 02–9646. DAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9650. RUSHIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 313.

No. 02–9652. BRYANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 856.

No. 02–1188. MCDANIEL, WARDEN, ET AL. *v.* ESPIREDION VALERIO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 306 F. 3d 742.

No. 02–1203. MICHIGAN *v.* HUTCHINSON. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 02–1201. DUNCAN *v.* GENERAL MOTORS CORP. C. A. 8th Cir. Motion of NOW Legal Defense and Education Fund for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 300 F. 3d 928.

*Rehearing Denied*

No. 00–10589. DANTAS *v.* DEPARTMENT OF JUSTICE ET AL., 534 U. S. 867;

No. 01–7293. PUCKETT *v.* MISSISSIPPI, 537 U. S. 1232;

No. 02–392. NOTTI ET AL. *v.* COOK INLET REGION, INC., 537 U. S. 1104;

No. 02–594. ROLLESTON *v.* SANDEASE, LTD., ET AL., 537 U. S. 1106;

No. 02–875. PERSIK *v.* COLORADO, 537 U. S. 1190;

No. 02–886. MARTIN *v.* WALMER ET AL., 537 U. S. 1190;

No. 02–928. SCOTT *v.* ELO, WARDEN, 537 U. S. 1192;

No. 02–941. ROSS *v.* ILLINOIS ET AL., 537 U. S. 1192;

No. 02–984. PATTON *v.* LEMOINE ET AL., 537 U. S. 1193;

No. 02–1041. GOLDING *v.* UNITED STATES, 537 U. S. 1194;

No. 02–1074. IN RE VEY, 537 U. S. 1231;

No. 02–5154. JOHONOSON *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL., 537 U. S. 898;

No. 02–6938. SHELTON *v.* DOS SANTOS ET AL., 537 U. S. 1116;

No. 02–7182. JOHNSON *v.* SMART & FINAL STORES CORP., 537 U. S. 1234;

No. 02–7346. LAMBROS *v.* UNITED STATES, 537 U. S. 1195;

No. 02–7737. BOYD *v.* BASKERVILLE, WARDEN, 537 U. S. 1196;

No. 02–7854. NULL *v.* UNITED STATES, 537 U. S. 1143;

No. 02–7982. TAYLOR *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 537 U. S. 1202;

No. 02–8037. BREEDLOVE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 537 U. S. 1204;

No. 02–8049. WAGNER *v.* CALIFORNIA DEPARTMENT OF JUSTICE ET AL., 537 U. S. 1205;

No. 02–8051. JOHNSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 537 U. S. 1205;

No. 02–8118. KORNAFEL *v.* REPETTO, 537 U. S. 1207;

No. 02–8147. WINTER *v.* DEPARTMENT OF AGRICULTURE, 537 U. S. 1209;

No. 02–8157. IN RE CUNNINGHAM, 537 U. S. 1158;

No. 02–8159. CONKLE *v.* POTTER, POSTMASTER GENERAL, 537 U. S. 1209;

No. 02–8199. ODMAN, AKA ODDMAN, AKA LLEWELYN *v.* UNITED STATES, 537 U. S. 1211;

No. 02–8212. BRYSON ET AL. *v.* JOHNSTON, JUDGE, SUPERIOR COURT OF NORTH CAROLINA, MECKLENBURG COUNTY, ET AL., 537 U. S. 1235;

No. 02–8257. DELEON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 537 U. S. 1236;

No. 02–8280. LEWIS ET AL. *v.* EMIGRANTS MORTGAGE CO. ET AL., 537 U. S. 1237;

No. 02–8307. SCOTT *v.* ADULT PROTECTIVE SERVICES ET AL., *ante,* p. 910;

No. 02–8359. HADDAD *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 537 U. S. 1218;

No. 02–8485. DEGLACE *v.* UNITED STATES, 537 U. S. 1221;

No. 02–8509. BELLE *v.* UNITED STATES ET AL., 537 U. S. 1222; and

No. 02–8547. RIVERA *v.* UNITED STATES, 537 U. S. 1223. Petitions for rehearing denied.

No. 02–893. EUBANKS-JACKSON *v.* BANK OF AMERICA, N. A., 537 U. S. 1226. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 02–5868. WARD *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 537 U. S. 958;

No. 02–6504. MORA *v.* FLORIDA, 537 U. S. 1050; and

No. 02–7361. COBBLE *v.* KENTUCKY, 537 U. S. 1127. Motions for leave to file petitions for rehearing denied.

## APRIL 28, 2003

*Certiorari Dismissed*

No. 02–9193. MAHDAVI *v.* 100 FEDERAL, STATE, COUNTY, AND CITY OFFICIALS, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.,* at 4, and cases cited therein.

No. 02–9338. SHEARIN *v.* TOWN OF ELSMERE, DELAWARE. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 813 A. 2d 1141.

No. 02–9563. TURNER *v.* BARNES, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 02M87. HAYES *v.* JACOBS ENGINEERING GROUP, INC., ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 129, Orig. VIRGINIA *v.* MARYLAND. Motion of the Audubon Naturalist Society for leave to file a brief as *amicus curiae* granted. Exceptions to Report of the Special Master set for oral argument in due course. [For earlier order herein, see, *e. g.*, 537 U. S. 1185.]

No. 02–1267. CHARTER COMMUNICATIONS, INC. *v.* SANTA CRUZ COUNTY, CALIFORNIA. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 02–6320. FELLERS *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, *ante,* p. 905.] Motion for appointment of counsel granted, and it is ordered that Seth P. Waxman, Esq., of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 02–1459. IN RE WEIL;
No. 02–9873. IN RE BRUGGEMAN;
No. 02–9877. IN RE JERRY;
No. 02–9898. IN RE MCBRIDE;
No. 02–9916. IN RE PEDRAZA; and
No. 02–9953. IN RE CRANFORD. Petitions for writs of habeas corpus denied.

No. 02–9117. IN RE DOPP;
No. 02–9146. IN RE MCLEOD; and

No. 02–9664. IN RE BARNETT. Petitions for writs of mandamus denied.

No. 02–9244. IN RE SACCO. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 02–819. KONTRICK *v.* RYAN. C. A. 7th Cir. Certiorari granted. Reported below: 295 F. 3d 724.

*Certiorari Denied*

No. 02–1036. WESTINGHOUSE ELECTRIC CORP. ET AL. *v.* FREIER, INDIVIDUALLY, AS ADMINISTRATOR OF THE ESTATE OF FREIER, DECEASED, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 303 F. 3d 176.

No. 02–1099. MIRELES ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 315 F. 3d 97.

No. 02–1103. HOGROBROOKS *v.* PARK PLACE ENTERTAINMENT, DBA BALLY'S SALOON & GAMBLING HALL. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 917.

No. 02–1167. VIRGINIA VERMICULITE, LLC *v.* HISTORIC GREEN SPRINGS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 307 F. 3d 277.

No. 02–1189. ORTIZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 93 S. W. 3d 79.

No. 02–1208. MEADE *v.* DECISIONS OF THE ORPHANS' COURT FOR ANNE ARUNDEL COUNTY, MARYLAND, ET AL. (three judgments). Cir. Ct. Anne Arundel County, Md. Certiorari denied.

No. 02–1209. DAIMLERCHRYSLER SERVICES NORTH AMERICA LLC *v.* POWE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 312 F. 3d 1241.

No. 02–1210. MAHARAJ, EXECUTRIX OF THE ESTATE OF MONGA *v.* OTTENBERG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 43 Fed. Appx. 523.

No. 02–1220. WALMAR INVESTMENT CO. *v.* BRUNJES ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 87 S. W. 3d 349.

No. 02–1222. YEOMANS *v.* SCHWARTZ ET AL.; and
No. 02–1229. SIMON ET AL. *v.* SCHWARTZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 832.

No. 02–1231. PETER LETTERESE & ASSOCIATES, INC. *v.* DASHMAN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 296 App. Div. 2d 448, 744 N. Y. S. 2d 897.

No. 02–1232. AINSWORTH ET AL. *v.* STANLEY, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 317 F. 3d 1.

No. 02–1234. RUIZ *v.* MCDONNELL, EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 299 F. 3d 1173.

No. 02–1236. PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC. *v.* CALDERON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 310 F. 3d 1.

No. 02–1237. PRYOR, ATTORNEY GENERAL OF ALABAMA, ET AL. *v.* BRADLEY. C. A. 11th Cir. Certiorari denied. Reported below: 305 F. 3d 1287.

No. 02–1241. RUSS, COMMISSIONER OF THE KENTUCKY DEPARTMENT FOR FACILITIES MANAGEMENT *v.* ADLAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 307 F. 3d 471.

No. 02–1244. WATNIK *v.* KNIESLEY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–1246. FERNANDES *v.* K AND J CONSTRUCTION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 02–1250. HEALTHGRADES.COM, INC. *v.* NORTHWEST HEALTHCARE ALLIANCE, INC., DBA ASSURED HOME HEALTH & HOSPICE. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 339.

No. 02–1252. HALL *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 259.

No. 02–1254. ADVANCED COMMUNICATION DESIGN, INC. *v.* PREMIER RETAIL NETWORKS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 46 Fed. Appx. 964.

No. 02–1255. F/V JEANINE KATHLEEN ET AL. *v.* VENTURA PACKERS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 305 F. 3d 913.

No. 02–1262. AMERICAN RENOVATION & CONSTRUCTION CO. *v.* FAVEL ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 312 Mont. 285, 59 P. 3d 412.

No. 02–1268. RODRIGUEZ *v.* HAZBUN ESCAF. C. A. 4th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 207.

No. 02–1288. HARMAN *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied.

No. 02–1300. SPRINGER *v.* LORSON. C. A. D. C. Cir. Certiorari denied.

No. 02–1323. MUZZI *v.* UNITED STATES SUPREME COURT ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–1330. NEUFELD *v.* TOWN OF SAN ANSELMO, CALIFORNIA. App. Div., Super. Ct. Cal., Marin County. Certiorari denied.

No. 02–1334. KONG ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 616.

No. 02–1341. SAFARIAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–1346. CHADWICK *v.* CHADWICK. C. A. 3d Cir. Certiorari denied. Reported below: 312 F. 3d 597.

No. 02–1378. BELL *v.* POTTER, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 178.

No. 02–1381. FROST *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 58 M. J. 21.

No. 02–1385. BELL *v.* POTTER, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 976.

No. 02–1401. MCKENZIE *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. D. C. Cir. Certiorari denied. Reported below: 54 Fed. Appx. 1.

No. 02–1413. FLEISCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 305 F. 3d 643.

No. 02–1420. KELLY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 314 F. 3d 908.

No. 02–1436. BOWMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 302 F. 3d 1228.

No. 02–7612. BROOKS *v.* WALLS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 279 F. 3d 518.

No. 02–8214. GUTIERREZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 4th 1083, 52 P. 3d 572.

No. 02–8623. AUSTIN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 87 S. W. 3d 447.

No. 02–8642. MENDIOLA-AMADOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 958.

No. 02–8671. VELAZQUEZ-ROTGER *v.* MENDEZ, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 199.

No. 02–8807. OLIVER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 02–8853. JOHNSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 301 F. 3d 234.

No. 02–9122. CUESTA *v.* GITZEL ET AL. C. A. 7th Cir. Certiorari denied.

No. 02–9132. ADAMS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9137. HINES *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 853.

No. 02–9139. IDELLE C. *v.* OVANDO C. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–9140. LYON *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–9141. SWEGER *v.* CHESNEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 294 F. 3d 506.

No. 02–9145. SMITH *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 275 Ga. 715, 571 S. E. 2d 740.

No. 02–9150. TURRENTINE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 02–9153. JONES *v.* CLARK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 732.

No. 02–9162. SHABTAI *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 614.

No. 02–9166. MOORMAN *v.* HOBBS, DEPUTY/ASSISTANT DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied.

No. 02–9170. BURTON *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 295 F. 3d 839.

No. 02–9177. PARQUET ET VIR *v.* CONTINENTAL AIRLINES, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–9178. O'BANION *v.* ANDERSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 775.

No. 02–9188. WILLIAMS *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 301 F. 3d 625.

No. 02–9191. VEASLEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 275 Ga. 516, 570 S. E. 2d 298.

No. 02–9204. MCGUIRE *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 02–9205. JENKINS *v.* THACKER ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–9206. JACKSON *v.* CHANDLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796.

No. 02–9208. LANGLEY *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 02–9214. CHAVEZ-IBARRA *v.* LONG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–9215. ELLIS *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9218. DANIELS *v.* MISSOURI BOARD OF PROBATION AND PAROLE. C. A. 8th Cir. Certiorari denied.

No. 02–9224. BENJAMIN-ANDERSON *v.* FLORIDA POWER CORP. ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9225. THOMPSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9229. MEDFORD *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9232. BROWN *v.* WORKMAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 269.

No. 02–9234. COLEMAN *v.* BLACKLOCK ET AL. C. A. 8th Cir. Certiorari denied.

No. 02–9235. CAMAROTO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 829 So. 2d 917.

No. 02–9236. DOLBERRY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 97 N. Y. 2d 695, 765 N. E. 2d 296.

No. 02–9238. ELROD *v.* HAWRY, DEPUTY SHERIFF, LIVINGSTON COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 770.

No. 02–9240. SWIGER *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 02–9245. SCOTT *v.* BOUCHARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9247. STEWART *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 295 App. Div. 2d 249, 745 N. Y. S. 2d 151.

No. 02–9253. THOMAS *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–9256. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 02–9257. DUCKETT *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 306 F. 3d 982.

No. 02–9258. CHILTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 02–9265. SAMUEL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 676 A. 2d 906.

No. 02–9267. MILLER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 275 Ga. 730, 571 S. E. 2d 788.

No. 02–9320. AVERY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–9334. GILBERT *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 302 F. 3d 1166.

No. 02–9344. SMITH *v.* FEDERAL BUREAU OF PRISONS. C. A. 6th Cir. Certiorari denied. Reported below: 300 F. 3d 721.

No. 02–9352. COLE *v.* ESPINOSA, JUDGE, 13TH JUDICIAL CIRCUIT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 02–9353. SZWEDO *v.* HCA HEALTH SERVICES OF MIDWEST, INC., DBA COLUMBIA DOCTORS HOSPITAL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 668.

No. 02–9358. ANTHONY *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 131.

No. 02–9362. BARRAGAN *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 02–9363. STROUPE *v.* TANDY CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 713.

No. 02–9364. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 835 So. 2d 1112.

No. 02–9387. RICHARDSON *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 02–9394. MILLER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 02–9431. TYSON *v.* ARMSTRONG, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. Sup. Ct. Conn. Certiorari denied. Reported below: 261 Conn. 806, 808 A. 2d 653.

No. 02–9455. ARMSTEADE *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. (two judgments). C. A. 3d Cir. Certiorari denied.

No. 02–9457. JACOBS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–9467. PRECIADO OCHOA *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 444.

No. 02–9502. HOLGERSON *v.* KNOWLES, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 309 F. 3d 1200.

No. 02–9529. JONES *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 360.

No. 02–9549. CEDILLO-AGUIRRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 798.

No. 02–9550. DOUGLAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 794.

No. 02–9561. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–9562. POLLACK *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 4th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 449.

No. 02–9565. PISTOLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 795.

No. 02–9566. BAHENA-LAGUNAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–9567. ACEVEDO-HERNANDEZ, AKA ACEVEDO, AKA CASTRO-PAZ *v.* UNITED STATES; and ALBERTO VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 795.

No. 02–9568. ALVAREZ-CANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–9570. LOVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 513.

No. 02–9571. LOVEJOY *v.* UNITED STATES; RODRIGUEZ *v.* UNITED STATES; HERAS-JIMENEZ *v.* UNITED STATES; SUAREZ-GARCIA *v.* UNITED STATES; SIMMS *v.* UNITED STATES; and CAMBRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796 (first and fourth judgments), 797 (third judgment), and 798 (second and fifth judgments); 61 Fed. Appx. 121 (sixth judgment).

No. 02–9572. JENKINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 313 F. 3d 549.

No. 02–9576. ROSENBLUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 799.

No. 02–9582. EZELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 21.

No. 02–9587. CHAMBERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 66 Fed. Appx. 281.

No. 02–9588. CHAIDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 307 F. 3d 713.

No. 02–9589. OYUELA-BAQUEDANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–9590. OLIVE-MARRERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 933.

No. 02–9591. MOHR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 751.

No. 02–9596. JUAREZ-RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 383.

No. 02–9597. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9598. LIGHTFOOT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–9600. PULU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 307 F. 3d 1150.

No. 02–9601. AGUILAR-DOZAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–9602. RIOS-AMAYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 798.

No. 02–9604. RAMIREZ-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 798.

No. 02–9605. RAMIRES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 307 F. 3d 713.

No. 02–9606. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 305 F. 3d 304.

No. 02–9608. REYES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 56 Fed. Appx. 559.

No. 02–9609. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 316 F. 3d 1196.

No. 02–9612. AGUILAR-CASTILLO *v.* UNITED STATES (Reported below: 54 Fed. Appx. 797); DONIS ARREDONDO *v.* UNITED STATES (61 Fed. Appx. 922); BOWEN, AKA JENKINS *v.* UNITED STATES (54 Fed. Appx. 797); DELGADO-LAMAS *v.* UNITED STATES (61 Fed. Appx. 922); FLORES-BAUTISTA *v.* UNITED STATES (54 Fed. Appx. 798); FLORES-RODRIGUEZ *v.* UNITED STATES (54 Fed. Appx. 797); GARCIA-PEREZ *v.* UNITED STATES (54 Fed. Appx. 795); GARCIA-SANCHEZ *v.* UNITED STATES (61 Fed. Appx. 921); HERNANDEZ-MARTINEZ *v.* UNITED STATES (54 Fed. Appx. 797); IBANEZ DE LA CRUZ, AKA IBANEZ-DE LA CRUZ, AKA IBANEZ *v.* UNITED STATES (54 Fed. Appx. 798); MENDOZA REYES *v.* UNITED STATES (54 Fed. Appx. 797); and VASQUEZ-HERRERA *v.* UNITED STATES (54 Fed. Appx. 797). C. A. 5th Cir. Certiorari denied.

No. 02–9613. AMERMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–9642. GONZALEZ-TAMARIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 310 F. 3d 1168.

No. 02–9644. HAIRSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 794.

No. 02–9645. GARCIA-BENITEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–9666. INGRAM *v.* DOVE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 186.

No. 02–9669. GREEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 372.

No. 02–9671. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 502.

No. 02–9675. STEPLIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 453.

No. 02–9677. BARRERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 812.

No. 02–9699. TEAFATILLER *v.* DOBRE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 120.

No. 02–9709. CROWLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 285 F. 3d 553.

No. 02–9783. BONN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–856. FEDERAL AVIATION ADMINISTRATION *v.* CITY OF ALAMEDA, CALIFORNIA, ET AL. C. A. 9th Cir. Motion of the Solicitor General to vacate denied. Certiorari denied. Reported below: 285 F. 3d 1143.

No. 02–1235. GREENVILLE WOMEN'S CLINIC ET AL. *v.* COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, ET AL. C. A. 4th Cir. Motions of American College of Obstetricians and Gynecologists et al. and National Abortion Federation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 317 F. 3d 357.

No. 02–9384. O'Connor *v.* United States et al. C. A. 10th Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 01–729. Smith et al. *v.* Doe et al., *ante*, p. 84;

No. 01–10473. Carrico *v.* Waddington, Warden, 537 U. S. 845;

No. 02–976. Durand et ux. *v.* Arif et al., 537 U. S. 1233;

No. 02–7806. Espinoza Pena *v.* Broyles et al., 537 U. S. 1198;

No. 02–7908. Baker *v.* Toledo City School District Board of Education, 537 U. S. 1200;

No. 02–7923. Partin *v.* Young et al., 537 U. S. 1200;

No. 02–8015. In re Nyhuis, 537 U. S. 1186;

No. 02–8079. Fulton *v.* Crosby, Secretary, Florida Department of Corrections, 537 U. S. 1206;

No. 02–8225. Rooks *v.* United States, 537 U. S. 1212;

No. 02–8315. Brown *v.* United States, 537 U. S. 1216;

No. 02–8320. Dehoney *v.* Montgomery, Warden, et al., *ante*, p. 911;

No. 02–8536. Elliott *v.* Geise et al., 537 U. S. 1238;

No. 02–8554. Correa, aka Alvarez *v.* United States, 537 U. S. 1223;

No. 02–8830. McKinnie *v.* Potter, Postmaster General, et al., *ante*, p. 933; and

No. 02–8897. Stove *v.* United States, *ante*, p. 934. Petitions for rehearing denied.

No. 02–6687. Abdul Malik *v.* Hill, 537 U. S. 1055. Motion for leave to file petition for rehearing denied.

## May 1, 2003

*Miscellaneous Orders.* (For revisions to the Rules of this Court effective this date, see 537 U. S. 1248.)

*Certiorari Denied*

No. 02–10381 (02A919). Hough *v.* Indiana. Sup. Ct. Ind. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Certiorari denied.

## May 2, 2003

*Dismissal Under Rule 46*

No. 02–9207. Lott *v.* Ohio. Sup. Ct. Ohio. Certiorari dismissed under this Court's Rule 46.2. Reported below: 97 Ohio St. 3d 303, 779 N. E. 2d 1011.

## May 5, 2003

*Certiorari Granted—Vacated and Remanded.* (See also No. 02–5636, *ante,* p. 626.)

No. 01–1459. Riley, Interim District Director, Bureau of Immigration and Customs Enforcement *v.* Radoncic. C. A. 3d Cir. Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Demore* v. *Kim*, *ante,* p. 510. Reported below: 28 Fed. Appx. 113.

No. 01–1616. Weber, Interim District Director, Bureau of Immigration and Customs Enforcement *v.* Phu Chan Hoang et al. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Demore* v. *Kim*, *ante,* p. 510. Reported below: 282 F. 3d 1247.

No. 01–1752. Weber, Interim District Director, Bureau of Immigration and Customs Enforcement, et al. *v.* Sosa. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Demore* v. *Kim*, *ante,* p. 510. Reported below: 30 Fed. Appx. 919.

No. 02–8263. Brown *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position taken by the Solicitor General in his brief for the United States filed April 4, 2003. Reported below: 299 F. 3d 1252.

*Certiorari Dismissed*

No. 02–9356. Lundahl *v.* Compton et al. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. D–2337. IN RE DISBARMENT OF PULLEY. Disbarment entered. [For earlier order herein, see 537 U. S. 1183.]

No. D–2338. IN RE DISBARMENT OF REIS. Disbarment entered. [For earlier order herein, see 537 U. S. 1183.]

No. D–2339. IN RE DISBARMENT OF HALL. Disbarment entered. [For earlier order herein, see 537 U. S. 1183.]

No. D–2340. IN RE DISBARMENT OF AYRES-FOUNTAIN. Disbarment entered. [For earlier order herein, see 537 U. S. 1183.]

No. D–2341. IN RE DISBARMENT OF LASHER. Disbarment entered. [For earlier order herein, see 537 U. S. 1184.]

No. D–2342. IN RE DISBARMENT OF BUTIN. Disbarment entered. [For earlier order herein, see 537 U. S. 1184.]

No. D–2343. IN RE DISBARMENT OF BERGSTEIN. Disbarment entered. [For earlier order herein, see 537 U. S. 1184.]

No. D–2344. IN RE DISBARMENT OF RAGUSA. Disbarment entered. [For earlier order herein, see 537 U. S. 1184.]

No. D–2345. IN RE DISBARMENT OF GRANT. Disbarment entered. [For earlier order herein, see 537 U. S. 1184.]

No. 02–8863. JACOX *v.* ENGLAND, SECRETARY OF THE NAVY, ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 943] denied.

No. 02–9024. RODENBAUGH *v.* CIAVARELLA. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 942] denied.

No. 02–1499. IN RE MOTA-HERNANDEZ; and

No. 02–10011. IN RE MAULDIN. Petitions for writs of habeas corpus denied.

No. 02–1450. IN RE MCCASKILL; and

No. 02–9315. IN RE MENDEZ. Petitions for writs of mandamus denied.

*Certiorari Granted*

No. 02–954. OFFICE OF INDEPENDENT COUNSEL *v.* FAVISH ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 37 Fed. Appx. 863.

No. 02–1060. ILLINOIS *v.* LIDSTER. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 202 Ill. 2d 1, 779 N. E. 2d 855.

*Certiorari Denied*

No. 02–956. A. T. MASSEY COAL CO., INC., ET AL. *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 305 F. 3d 226.

No. 02–980. CORE COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 288 F. 3d 429.

No. 02–995. BERWIND CORP. *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 307 F. 3d 222.

No. 02–1044. MACHUCA GONZALEZ ET UX., INDIVIDUALLY AND AS HEIRS AND REPRESENTATIVES OF THE ESTATE OF MACHUCA LOPEZ, DECEASED *v.* DAIMLERCHRYSLER CORP., FKA CHRYSLER CORP., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 301 F. 3d 377.

No. 02–1086. POWER ENGINEERING CO. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 303 F. 3d 1232.

No. 02–1107. UNITED STATES EX REL. BECKER *v.* WESTINGHOUSE SAVANNAH RIVER CO. C. A. 4th Cir. Certiorari denied. Reported below: 305 F. 3d 284.

No. 02–1111. MICHIGAN COMMUNITY SERVICES ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 309 F. 3d 348.

No. 02–1128. GRASSO ET AL. *v.* CITY OF NEW BEDFORD, MASSACHUSETTS, ET AL. App. Ct. Mass. Certiorari denied. Reported below: 55 Mass. App. 1116, 774 N. E. 2d 1186.

No. 02–1130. LAUGHNER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 769 N. E. 2d 1147.

No. 02–1151. INTERSTATE POWER CO. *v.* MARTIN ET UX. Sup. Ct. Iowa. Certiorari denied. Reported below: 652 N. W. 2d 657.

No. 02–1260. ANZALONE ET AL. *v.* O'CONNELL. C. A. 2d Cir. Certiorari denied. Reported below: 51 Fed. Appx. 75.

No. 02–1263. WANTA, SOMALIA AMBASSADOR TO CANADA AND SWITZERLAND *v.* CHANDLER, SECRETARY, WISCONSIN DEPARTMENT OF REVENUE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 02–1274. MIDDLESTEAD *v.* TAYLOR, CIRCUIT JUDGE, DADE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–1275. CONTINENTAL INSURANCE CO. *v.* ALLIANZ INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 557.

No. 02–1277. CASSIDY *v.* WORKERS' COMPENSATION APPEAL BOARD OF PENNSYLVANIA (WYATT, INC.). Commw. Ct. Pa. Certiorari denied.

No. 02–1279. ASKEY ET UX. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 593.

No. 02–1280. SIMMONS *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 98 Fed. Appx. 834.

No. 02–1287. GRIFFIN TELEVISION OKC, L. L. C., ET AL. *v.* MITCHELL. Ct. Civ. App. Okla. Certiorari denied. Reported below: 60 P. 3d 1058.

No. 02–1313. ARNDT *v.* KOBY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 309 F. 3d 1247.

No. 02–1319. ZELMER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 490.

No. 02–1352. PALAIS ROYAL, INC., ET AL. *v.* STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 81 S. W. 3d 909.

No. 02–1392. BADER *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 148 N. H. 265, 808 A. 2d 12.

No. 02–1395. CHRUBY *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP. C. A. 3d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 520.

No. 02–1408. ELDER ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* CITY OF HOUSTON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 103.

No. 02–1412. BIRD *v.* DAVIS, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 267.

No. 02–1453. BIEGANOWSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 313 F. 3d 264.

No. 02–8217. GALLARDO *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 131.

No. 02–8785. CAMPANA-JANSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 491.

No. 02–8810. MCDERMOTT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 4th 946, 51 P. 3d 874.

No. 02–9254. MOORE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 771 N. E. 2d 46.

No. 02–9263. COVILLION *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 02–9273. COOK *v.* NABISCO, INC. C. A. 4th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 93.

No. 02–9277. CASTRO-CUELLAR *v.* MILES, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796.

No. 02–9280. COOPER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–9285. VERA *v.* OGDEN CITY, UTAH. Ct. App. Utah. Certiorari denied.

No. 02–9288. McGregor *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 02–9293. Ivory *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 02–9299. Guilmette, aka Gailmette, aka Guillette *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 02–9301. Flournoy *v.* Creamer et al. C. A. 9th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 859.

No. 02–9304. Rowell *v.* Griegas, Warden. C. A. 9th Cir. Certiorari denied.

No. 02–9307. Davis *v.* Williams, Warden. C. A. 11th Cir. Certiorari denied.

No. 02–9313. Dansby *v.* Arendall. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 958.

No. 02–9318. Knight *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9324. Taylor *v.* Edgar et al. C. A. 7th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 825.

No. 02–9325. Lanzy *v.* Harrison, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 921.

No. 02–9326. Lara *v.* Carey, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 02–9327. Lamb *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 02–9335. Newland *v.* Turpin, Warden. Sup. Ct. Ga. Certiorari denied.

No. 02–9337. Jones *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9339. Pena *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 02–9343. REGER *v.* PORTNOY. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 02–9354. PENRY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 02–9355. POWELL *v.* ST. PAUL POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 448.

No. 02–9366. WATTS *v.* MILLER, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–9370. BOLDEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 29 Cal. 4th 515, 58 P. 3d 931.

No. 02–9373. BUHL *v.* LAPPIN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–9374. SCHWINDLER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 254 Ga. App. 579, 563 S. E. 2d 154.

No. 02–9377. TOWNSEND *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 478.

No. 02–9378. TINMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9380. MCCULLOUGH *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 448.

No. 02–9383. KENNEY *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 271.

No. 02–9385. CLARK *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9388. NABELEK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 120.

No. 02–9390. HILLS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 829 So. 2d 1027.

No. 02–9397. NELSON *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–9401. THOMPSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9425. GREGORY *v.* SPANNAGEL ET UX. Sup. Ct. Mont. Certiorari denied. Reported below: 313 Mont. 422, 63 P. 3d 514.

No. 02–9426. GLOVER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 02–9427. HADDAD *v.* MICHIGAN DEPARTMENT OF CIVIL RIGHTS. Ct. App. Mich. Certiorari denied.

No. 02–9442. FIELDS *v.* BURNETT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 308.

No. 02–9464. DUNCAN *v.* WOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 591.

No. 02–9484. BARRY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9489. RICHARDS *v.* HORBALY, CLERK, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. C. A. D. C. Cir. Certiorari denied. Reported below: 53 Fed. Appx. 125.

No. 02–9503. GOZY *v.* CAREY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 920.

No. 02–9511. HASTINGS *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9545. DIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 922.

No. 02–9553. MACKEY *v.* HATT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 506.

No. 02–9555. COLEMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 206 Ill. 2d 261, 794 N. E. 2d 275.

No. 02–9574. TURNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 319 F. 3d 716.

No. 02–9583. CARRASCO-CARRASCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 798.

No. 02–9584. CAMACHO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 901.

No. 02–9585. DOWNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 652.

No. 02–9586. CORTES-URBINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 795.

No. 02–9592. VEGA MOJARRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 844.

No. 02–9593. BOYD *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 187.

No. 02–9599. MEROLD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 957.

No. 02–9603. SALAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 798.

No. 02–9614. BROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 647.

No. 02–9615. ARNESON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 739.

No. 02–9617. HOLMBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 376.

No. 02–9626. MACKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–9628. MALONE *v.* PAYNE. C. A. 9th Cir. Certiorari denied.

No. 02–9631. TORRES *v.* LEVESQUE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 155.

No. 02–9634. POWELL, AKA ROBINSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 57 Fed. Appx. 959.

No. 02–9639. HUSK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 798.

No. 02–9640. GONZALEZ-BUSTAMANTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 722.

No. 02–9641. GEROLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–9643. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 414.

No. 02–9647. COWELL *v.* COALTER. C. A. 1st Cir. Certiorari denied.

No. 02–9648. DORROUGH *v.* GAINES, COMMISSIONER, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 107.

No. 02–9654. FOGLE *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 02–9655. HODGES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 315 F. 3d 794.

No. 02–9656. GONZALEZ-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–9657. GONZALEZ-VARGAS *v.* UNITED STATES; HERRERA-ORTEGA *v.* UNITED STATES; NEAL-ESTRADA *v.* UNITED STATES; and PEREZ-AVALOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796 (third judgment), 797 (first and second judgments), and 798 (fourth judgment).

No. 02–9658. PARSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 134.

No. 02–9660. PADILLA-MICHEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 450.

No. 02–9661. NICHOLAS *v.* MIRO, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 243.

No. 02–9663. BERMUDEZ-BARBA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 949.

No. 02–9678. ADAMS *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 02–9682. HUSNER *v.* LOS ANGELES COUNTY MENTAL HEALTH DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–9686. STANISTREET ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 29 Cal. 4th 497, 58 P. 3d 465.

No. 02–9691. STRASSINI *v.* DODRILL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 78.

No. 02–9692. WADEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 303.

No. 02–9696. WILKERSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 02–9697. RILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 929.

No. 02–9698. ROGERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 400.

No. 02–9702. TIDWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 40 Fed. Appx. 522.

No. 02–9717. DENSMORE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 02–9718. CALLAWAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9723. HUGHES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9726. MYERS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 716.

No. 02–9728. KOERTH, AKA YOUNGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 312 F. 3d 862.

No. 02–9729. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 269.

No. 02–9732. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 412.

No. 02–9734. MORA-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 834.

No. 02–9736. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 632.

No. 02–9740. WORRELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 313 F. 3d 867.

No. 02–9741. VIGNIERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 901.

No. 02–9744. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 44.

No. 02–9747. CAICEDO-CUERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 F. 3d 697.

No. 02–9748. COLLAZOS-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 231.

No. 02–9749. CROSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 901.

No. 02–9750. EYMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 313 F. 3d 741.

No. 02–9757. BINH HOA LE, AKA BINH BA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 901.

No. 02–9758. IWUOGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 900.

No. 02–9760. SAMUEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 619.

No. 02–9763. RIVAS-CASTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 717.

No. 02–9765. LAC HONG TRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 717.

No. 02–9766. MARQUEZ-LARIOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–9772. SOTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 739.

No. 02–9774. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 983.

No. 02–9776. BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–9777. JOHNSON *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 314 F. 3d 159.

No. 02–9781. APONTE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 326 Ill. App. 3d 1146, 811 N. E. 2d 784.

No. 02–9782. BOONE *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 463.

No. 02–9784. ADAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796.

No. 02–9786. TAM TRAN NGUYEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 900.

No. 02–9788. STRAND *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 258 Wis. 2d 981, 654 N. W. 2d 94.

No. 02–9789. RANGEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 465.

No. 02–9791. CARRILLO-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 313 F. 3d 1185.

No. 02–9794. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 966.

No. 02–9796. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 314 F. 3d 905.

No. 02–9802. WALLACE, AKA WALLHEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 581.

No. 02–9803. TISDALE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 295.

No. 02–9806. VILLANUEVA MONROY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–9807. VASSELL *v.* PEREZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 348.

No. 02–9812. RAMOS-ESCOBAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 468.

No. 02–9815. THOMAS *v.* BARRON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 932.

No. 02–9819. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 313 F. 3d 1206.

No. 02–9820. GRUBB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 58 Fed. Appx. 889.

No. 02–9821. IRWIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 361.

No. 02–9822. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 138.

No. 02–9824. GRIFFITH *v.* GENERAL MOTORS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 303 F. 3d 1276.

No. 02–9826. SULMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 836.

No. 02–9828. RESTO DIAZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 02–9829. SPEAD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 485.

No. 02–9831. RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–9836. NICHOLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 320 F. 3d 647.

No. 02–9838. WESLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9840. SEARCY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 316 F. 3d 550.

No. 02–9842. RIVERA *v.* HOLDER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 837.

No. 02–9843. TREVINO-CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 211.

No. 02–9846. PAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9849. MILAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 304 F. 3d 273.

No. 02–9853. BREMERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 591.

No. 02–9856. CONDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 980.

No. 02–9863. ELLIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 306.

No. 02–9886. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 491.

No. 02–9891. AVERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 02–9892. VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 375.

No. 02–9894. ANGELET *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 878.

No. 02–9896. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 44 Fed. Appx. 573.

No. 02–9905. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 60 Fed. Appx. 16.

No. 02–9909. MIRANDA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 02–9911. GOSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 902.

No. 02–9912. FABIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 312 F. 3d 550.

No. 02–9913. ROUTH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 187.

No. 02–9917. ENGLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9930. COLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–9931. SPENCER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 02–9932. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 316 F. 3d 506.

No. 02–9939. CASTELLANOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 100.

No. 02–9940. CARTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–9943. CARTWRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9948. WITCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–9954. COCKERILL *v.* DARIUS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 297.

No. 02–1257. SMITH ET AL. *v.* NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION ET AL. Sup. Ct. N. H. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 148 N. H. 536, 813 A. 2d 372.

No. 02–1266. MCDONALD *v.* TENNESSEE. Sup. Ct. Tenn. Motion of petitioner for leave to amend petition for writ of certiorari denied. Certiorari denied.

No. 02–9827. SMITH *v.* COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS. C. A. 10th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 48 Fed. Appx. 712.

No. 02–9837. PENDLETON *v.* PENDLETON ET AL. C. A. 7th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 50 Fed. Appx. 770.

No. 02–9832. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 02–1047. EDLUND *v.* BOB RYAN MOTORS, INC., 537 U. S. 1194;

No. 02–1165. STEWART *v.* UNITED STATES, *ante*, p. 908;

No. 02–7611. SHELTON *v.* ST. LOUIS COUNTY, MISSOURI, 537 U. S. 1174;

No. 02–7920. MILLER *v.* DEMARINO ET AL., 537 U. S. 1200;

No. 02–8016. BEAVERS *v.* WARD, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, 537 U. S. 1203;

No. 02–8028. WEARING *v.* BOVIS LEND LEASE, INC., 537 U. S. 1204;

No. 02–8158. CAMPBELL *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, 537 U. S. 1209;

No. 02–8293. DEVAUGHN *v.* DOVE, WARDEN, *ante*, p. 910;

No. 02–8427. DUNN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 926;

No. 02–8439. HARRIS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 927;

No. 02–8627. NICHOLS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, *ante*, p. 931;

No. 02–8628. PEARSON *v.* PEARSON, *ante*, p. 931;

No. 02–8640. ZIEGLER *v.* MARTIN ET AL., *ante*, p. 932; and

No. 02–9031. WOODFIN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 951. Petitions for rehearing denied.

No. 02–837. ROLLESTON *v.* ESTATE OF SIMS ET AL., 537 U. S. 1189. Motion for leave to file petition for rehearing denied.

MAY 6, 2003

*Dismissal Under Rule 46*

No. 02–1154. CONNECTICUT GENERAL LIFE INSURANCE CO. *v.* INSURANCE COMMISSIONER FOR THE STATE OF MARYLAND. Ct. App. Md. Certiorari dismissed under this Court's Rule 46.1. Reported below: 371 Md. 455, 810 A. 2d 425.

*Miscellaneous Order*

No. 02–10519 (02A939). IN RE ISAACS. 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. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution. JUSTICE THOMAS took no part in the consideration or decision of this application and this petition.

*Certiorari Denied*

No. 02–10539 (02A941). ISAACS *v.* HEAD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this application and this petition.

MAY 15, 2003

*Miscellaneous Order*

No. 02M98. MCCONNELL, UNITED STATES SENATOR, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.; and

No. 02M99. FEDERAL ELECTION COMMISSION ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL. D. C. D. C. Motions to dispense with printing the District Court's opinions denied. All appellants are directed to file 40 copies of a single appendix prepared in compliance with this Court's Rule 33.1 containing the District Court's opinions, which will serve as an appendix to all jurisdictional statements.

MAY 16, 2003

*Dismissal Under Rule 46*

No. 02–1058. OKLAHOMA COUNTY, OKLAHOMA, BY AND THROUGH ITS COMMISSIONERS, ET AL. *v.* SHERWOOD. C. A. 10th

Cir. Certiorari dismissed under this Court's Rule 46.2. Reported below: 42 Fed. Appx. 353.

MAY 19, 2003

*Certiorari Granted—Vacated and Remanded*

No. 02–1096. FORD MOTOR CO. *v.* ESTATE OF SMITH ET AL. Sup. Ct. Ky. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, *ante*, p. 408. Reported below: 83 S. W. 3d 483.

No. 02–1097. FORD MOTOR CO. *v.* RAMON ROMO ET AL. Ct. App. Cal., 5th App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, *ante*, p. 408. Reported below: 99 Cal. App. 4th 1115, 122 Cal. Rptr. 2d 139.

*Certiorari Granted—Reversed.* (See No. 02–1212, *ante*, p. 715.)

*Certiorari Dismissed*

No. 02–9486. SLAGEL *v.* RUTH ET AL. App. Ct. Ill., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–9627. LAU *v.* S & M ENTERPRISES ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–9514. HEIMERMANN *v.* KOHLER. Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 02–9895. ANDERSON *v.* MENDEZ, WARDEN. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As

petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

*Miscellaneous Orders.* (See also No. 126, Orig., *ante*, p. 720.)

No. 02A856. BARCLAY ET AL. *v.* FRANKLIN COUNTY, OHIO, ET AL. C. A. 6th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 02A952. REPUBLIC OF AUSTRIA ET AL. *v.* ALTMANN. C. A. 9th Cir. Application for stay of mandate, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

No. 02M89. MEDINA *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal denied without prejudice to filing a renewed motion together with a redacted petition for writ of certiorari within 30 days.

No. 02M90. MOSQUERA *v.* UNITED STATES;

No. 02M91. SCHULER *v.* DONNELLY, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY;

No. 02M92. GATZEMEYER *v.* COMMERCIAL STATE BANK ET AL.; and

No. 02M93. DIAZ *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 02–8432. NORTHINGTON *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 919] denied.

No. 02–8562. JARRETT *v.* MANCAN, INC., DBA MANPOWER, INC. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 919] denied.

No. 02–8754. WEAVER *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 942] denied.

No. 02–9438. SELVERA *v.* FRIO COUNTY, TEXAS. Ct. App. Tex., 4th Dist.;

No. 02–9505. GRAVES *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist.;

No. 02–9581. MCMAHON *v.* REBOUND CARE, DBA OPEN ARM CARE. C. A. 6th Cir.; and

No. 02–9753. PRATO *v.* VALLAS ET AL. App. Ct. Ill., 1st Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 9, 2003, 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. 02–9519. IN RE FLYNN. Dist. Ct. Mich., 34th Dist. Petition for writ of common-law certiorari denied.

No. 02–10303. IN RE KHOURI. Petition for writ of habeas corpus denied.

No. 02–10328. IN RE GUNNELL. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 02–9472. IN RE WILLS;

No. 02–9573. IN RE LOVE;

No. 02–9578. IN RE RIVAS;

No. 02–9695. IN RE MENDOZA MALDONADO; and

No. 02–9854. IN RE DOYHARZABAL. Petitions for writs of mandamus denied.

No. 02–9872. IN RE MORRISON; and

No. 02–9889. IN RE MORRISON. Motions of petitioner for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus dismissed. See this Court's Rule 39.8.

*Certiorari Granted*

No. 02–1205. JONES ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED *v.* R. R. DONNELLEY & SONS CO. C. A. 7th Cir. Certiorari granted. Reported below: 305 F. 3d 717.

No. 02–1315. LOCKE, GOVERNOR OF WASHINGTON, ET AL. *v.* DAVEY. C. A. 9th Cir. Certiorari granted. Reported below: 299 F. 3d 748.

No. 02–1371. MISSOURI *v.* SEIBERT. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 93 S. W. 3d 700.

*Certiorari Denied.* (See also No. 02–9519, *supra.*)

No. 02–129. KUSTNER INDUSTRIES, S. A., ET AL. *v.* SCHREIBER FOODS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 31 Fed. Appx. 727.

No. 02–1054. SCOTT ET AL. *v.* PASADENA UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 306 F. 3d 646.

No. 02–1124. BOWLER, COMMISSIONER OF INSURANCE OF MASSACHUSETTS *v.* UNITED STATES ET AL.; and

No. 02–1135. ALABAMA INSURANCE GUARANTY ASSN. ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 303 F. 3d 375.

No. 02–1141. TA CHEN STAINLESS STEEL PIPE, LTD. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 298 F. 3d 1330.

No. 02–1155. COALITION OF CLERGY, LAWYERS & PROFESSORS ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 310 F. 3d 1153.

No. 02–1171. SOUTHWESTERN BELL TELEPHONE CO. *v.* TELECOR COMMUNICATIONS, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 305 F. 3d 1124.

No. 02–1173. METROPOLITAN TRANSPORTATION AUTHORITY *v.* GREENE. C. A. 2d Cir. Certiorari denied. Reported below: 280 F. 3d 224.

No. 02–1175. FIFE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 1st Cir. Certiorari denied. Reported below: 311 F. 3d 1.

No. 02–1185. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 297 F. 3d 505.

No. 02–1190. COLE *v.* BUILDERS SQUARE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 684.

No. 02–1199. SMITH *v.* GRIMMETT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 317 F. 3d 918.

No. 02–1281. HAYS, RECEIVER AND DISBURSING AGENT ON BEHALF OF DEBTORS, HANNOVER CORP. ET AL. *v.* JIMMY SWAGGART MINISTRIES. C. A. 5th Cir. Certiorari denied. Reported below: 310 F. 3d 796.

No. 02–1293. COHEN ET AL. *v.* THOMAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 304 F. 3d 563.

No. 02–1302. BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG *v.* BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 312 F. 3d 614.

No. 02–1306. BAXTER *v.* CONTE ET AL. C. A. 1st Cir. Certiorari denied.

No. 02–1307. GRACE CONSULTING, INC., T/A GRACE MAINTENANCE INT., ET AL. *v.* DUN & BRADSTREET SOFTWARE SERVICES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 307 F. 3d 197.

No. 02–1316. MAULER ET AL. *v.* BAYFIELD COUNTY, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 309 F. 3d 997.

No. 02–1320. MIRROR IMAGE INTERNET, INC., ET AL. *v.* PARFI HOLDING AB ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 817 A. 2d 149.

No. 02–1321. CITY OF NEW YORK, NEW YORK, ET AL. *v.* PATROLMEN BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 310 F. 3d 43.

No. 02–1322. PERITZ *v.* PAINEWEBBER, INC. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 487.

No. 02–1324. Locksley *v.* Fried, Frank, Harris, Shriver & Jacobson et al. C. A. 2d Cir. Certiorari denied.

No. 02–1325. Kelly *v.* Medical College of Ohio et al. C. A. 6th Cir. Certiorari denied. Reported below: 40 Fed. Appx. 176.

No. 02–1327. Pirelli Armstrong Tire Corp. *v.* James et al. C. A. 6th Cir. Certiorari denied. Reported below: 305 F. 3d 439.

No. 02–1328. Warren Hills Regional Board of Education et al. *v.* Sypniewski et al. C. A. 3d Cir. Certiorari denied. Reported below: 307 F. 3d 243.

No. 02–1332. Wilkins *v.* Jakeway et al. C. A. 6th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 724.

No. 02–1333. Waxman et ux., as Parents and Natural Guardians of Waxman, a Minor, et al. *v.* Roslyn Union Free School District. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 293 App. Div. 2d 662, 740 N. Y. S. 2d 451.

No. 02–1335. Jefferson Smurfit Corp. *v.* Department of Treasury. Ct. App. Mich. Certiorari denied. Reported below: 248 Mich. App. 271, 639 N. W. 2d 269.

No. 02–1336. Thomason et al. *v.* Monsanto Co. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 49 Fed. Appx. 897.

No. 02–1337. Viazis *v.* American Association of Orthodontists et al. C. A. 5th Cir. Certiorari denied. Reported below: 314 F. 3d 758.

No. 02–1340. Friedman *v.* Southern California Permanente Medical Group et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 102 Cal. App. 4th 39, 125 Cal. Rptr. 2d 663.

No. 02–1347. Autodisc, Inc. *v.* Talley et al. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 02–1351. LNC Investments, Inc., et al. *v.* First Fidelity Bank et al. C. A. 2d Cir. Certiorari denied. Reported below: 308 F. 3d 169.

No. 02–1354. JOHNSON ET AL. *v.* CITY OF CHESAPEAKE, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 608.

No. 02–1356. KENEMORE *v.* CONNER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 930.

No. 02–1359. SCHAFLER *v.* FIELD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 625.

No. 02–1361. MAITLAND *v.* PITNEY BOWES COPIER SYSTEMS, A DIVISION OF PITNEY BOWES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 55 Fed. Appx. 9.

No. 02–1362. KING *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING. Commw. Ct. Pa. Certiorari denied. Reported below: 806 A. 2d 529.

No. 02–1363. KRYSTEK *v.* UNIVERSITY OF SOUTHERN MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 716.

No. 02–1366. CHITKARA *v.* NEW YORK TELEPHONE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 45 Fed. Appx. 53.

No. 02–1368. CSX TRANSPORTATION, INC. *v.* CAROLINA FEED MILLS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 676.

No. 02–1370. S. P. *v.* V. T. ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 851 So. 2d 55.

No. 02–1373. OLSON ET AL. *v.* HILLSIDE COMMUNITY CHURCH, S. B. C., ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 58 P. 3d 1021.

No. 02–1376. BRITTAN COMMUNICATIONS INTERNATIONAL CORP. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 313 F. 3d 899.

No. 02–1379. CITY OF BURBANK, CALIFORNIA *v.* RUBIN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 101 Cal. App. 4th 1194, 124 Cal. Rptr. 2d 867.

No. 02–1380. FOSTER ET UX. *v.* MARITRANS, INC., ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 790 A. 2d 328.

No. 02–1394. YOUNG *v.* NEW HAVEN ADVOCATE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 315 F. 3d 256.

No. 02–1399. D. A. *v.* UTAH; and E. A. *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 63 P. 3d 100 (second judgment) and 607 (first judgment).

No. 02–1400. MANNING *v.* NEW YORK UNIVERSITY. C. A. 2d Cir. Certiorari denied. Reported below: 299 F. 3d 156.

No. 02–1407. CASH *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 02–1438. ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* MANNING. C. A. 8th Cir. Certiorari denied. Reported below: 310 F. 3d 571.

No. 02–1442. PLATINUM CAPITAL, INC. *v.* SYLMAR PLAZA, L. P., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 314 F. 3d 1070.

No. 02–1443. JENSEN ET AL. *v.* UNITED STATES;
No. 02–1492. O'NEILL *v.* UNITED STATES; and
No. 02–9923. POWERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 310 F. 3d 542.

No. 02–1449. IMMACULATE CONCEPTION CORP. ET AL. *v.* IOWA DEPARTMENT OF TRANSPORTATION. Sup. Ct. Iowa. Certiorari denied. Reported below: 656 N. W. 2d 513.

No. 02–1451. WILSON ET AL. *v.* HUCKABEE, GOVERNOR OF ARKANSAS, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 351 Ark. 31, 91 S. W. 3d 472.

No. 02–1455. SHARPENTER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 02–1463. BAILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 755.

No. 02–1469. SCHIEDLER-BROWN *v.* WASHINGTON STATE BAR ASSOCIATION DISCIPLINARY BOARD. Sup. Ct. Wash. Certiorari denied.

No. 02–1470. FUREY *v.* SNIPAS. Super. Ct. Pa. Certiorari denied. Reported below: 797 A. 2d 1029.

No. 02–1473. MARTINEZ *v.* UNITED STATES; and
No. 02–10059. PRINTZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 60 Fed. Appx. 656.

No. 02–1481. CORCORAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 254.

No. 02–1488. FILIPKOWSKI *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 58 M. J. 132.

No. 02–1491. SMITH *v.* CONNECTICUT ET AL. App. Ct. Conn. Certiorari denied. Reported below: 74 Conn. App. 23, 812 A. 2d 70.

No. 02–1515. AULAKH ET UX. *v.* CAPITOL INDEMNITY CORP. C. A. 4th Cir. Certiorari denied. Reported below: 313 F. 3d 200.

No. 02–1532. STEWART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 57 Fed. Appx. 936.

No. 02–8505. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 929.

No. 02–8680. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 185.

No. 02–8903. BENFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 306 F. 3d 295.

No. 02–9003. MAYZEL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 49 Fed. Appx. 318.

No. 02–9404. WILLINGHAM *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 296 F. 3d 917.

No. 02–9420. DUBOSE *v.* ANDREWS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 419.

No. 02–9423. HARDAWAY *v.* WITHROW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 305 F. 3d 558.

No. 02–9436. BURR *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9437. BARNES *v.* MATRISCIANO, ACTING WARDEN. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9440. GROSS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 97 Ohio St. 3d 121, 776 N. E. 2d 1061.

No. 02–9449. TREJO *v.* CANDELARIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–9451. MELBOURNE *v.* GMK ENTERPRISES, INC. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 834 So. 2d 169.

No. 02–9458. LIMONTE *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 934.

No. 02–9461. JUAREZ *v.* RAMIREZ-PALMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–9463. M. C.-B., MOTHER *v.* IOWA DEPARTMENT OF HUMAN SERVICES. Ct. App. Iowa. Certiorari denied.

No. 02–9466. PYEATT *v.* DOE ET AL. C. A. 10th Cir. Certiorari denied.

No. 02–9479. LYNCH-BEY *v.* GARRAGHTY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 167.

No. 02–9483. ACEVEDO *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 741.

No. 02–9487. SHELTON *v.* COFFMAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 02–9490. RIVERA *v.* BRILEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 270.

No. 02–9491. SPENCER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 02–9495. SOKOLSKY *v.* MADRID. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–9498. ABDUL MALIK, AKA ALAM *v.* ALAM. C. A. 7th Cir. Certiorari denied.

No. 02–9500. NELMS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 482.

No. 02–9504. FLINT *v.* NEMARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 885.

No. 02–9508. HEDRICK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9509. GOULD *v.* CITY OF CLEVELAND, OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 02–9516. HIGGINS *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 800 So. 2d 918.

No. 02–9517. HAWTHORNE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 797.

No. 02–9520. SMITH *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTION CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 893.

No. 02–9521. RIECK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 321 F. 3d 487.

No. 02–9522. MITCHELL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9526. POWERS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 101 S. W. 3d 383.

No. 02–9527. PRENATT *v.* G. W. WILLIAMS CO. ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 02–9528. PLAISANCE, AKA THOMAS *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 811 So. 2d 1172.

No. 02–9532. NORBERTO TORRES *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 273.

No. 02–9533. MILLER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 148 Ohio App. 3d 103, 772 N. E. 2d 175.

No. 02–9534. WILSON *v.* PIMA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–9536. TIMMS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9537. ROMNEY *v.* KOOIMAN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–9538. SEARS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 837 So. 2d 411.

No. 02–9540. WATERS *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9544. DUNSON *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 02–9546. DAVIS *v.* HAYWARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 02–9547. DARDEN *v.* PERALTA COMMUNITY COLLEGE DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 705.

No. 02–9552. JUSTO *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9554. MARABLE *v.* MOSLEY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9558. MCKINNEY *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 02–9559. CUBIE *v.* WALLS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–9569. BRYSON ET AL. *v.* JOHNSTON, JUDGE, SUPERIOR COURT OF NORTH CAROLINA, MECKLENBURG COUNTY, ET AL. Ct. App. N. C. Certiorari denied.

No. 02–9577. PAYNE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9594. AMUNGA *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 532.

No. 02–9595. MARTELLO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 97 Ohio St. 3d 398, 780 N. E. 2d 250.

No. 02–9610. BARDEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 356 N. C. 316, 572 S. E. 2d 108.

No. 02–9611. ANTHONY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9618. YOUNG *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 521.

No. 02–9620. LANCASTER *v.* FINN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 765.

No. 02–9621. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–9622. WILSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–9624. WRIGHT *v.* COTTON, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 02–9629. SHERKAT *v.* CIRCUIT COURT OF MISSOURI, CLAY COUNTY, ET AL. C. A. 8th Cir. Certiorari denied.

No. 02–9633. REMSEN ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–9636. SCANLON *v.* DOUGLAS. C. A. 8th Cir. Certiorari denied.

No. 02–9637. HINES *v.* MILLER, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 318 F. 3d 157.

No. 02–9673. HEATH *v.* SOARES, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 818.

No. 02–9674. FLORENCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9676. ROBINSON-BEY *v.* BRILEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–9679. HENRIQUEZ *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 02–9693. GUINN *v.* SAN BERNARDINO COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 136.

No. 02–9700. WARD *v.* ALESE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 371.

No. 02–9707. DEGONIA *v.* TAYLOR. C. A. 8th Cir. Certiorari denied.

No. 02–9711. COX *v.* BAYER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 421.

No. 02–9715. COMPTON *v.* JARVIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 413.

No. 02–9716. DAUGHTRY *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–9730. JACKSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 701.

No. 02–9733. ARMSTRONG *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 02–9735. POUND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 485.

No. 02–9743. WEBBER *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 413.

No. 02–9751. DANTZLER *v.* CITY OF HAMMOND, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–9755. WESTMORELAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 312 F. 3d 302.

No. 02–9762. ROY *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 148 N. H. 662, 814 A. 2d 169.

No. 02–9769. KELLY *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 315 F. 3d 1063.

No. 02–9775. PETERSON, AKA AL-DIN SADDIQ *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Richmond County, N. C. Certiorari denied.

No. 02–9790. JACKSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–9795. SALVATORE *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied.

No. 02–9798. TELLO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 315 F. 3d 873.

No. 02–9805. ALEXANDER *v.* INTEL-FOODS CORP. Sup. Ct. N. D. Certiorari denied. Reported below: 655 N. W. 2d 84.

No. 02–9814. LOGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 245.

No. 02–9830. SMITH *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 671.

No. 02–9834. PALMER *v.* UNITED STATES JUDICIAL BRANCH ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 54 Fed. Appx. 503.

No. 02–9835. MONTOYA *v.* LYTLE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 496.

No. 02–9844. NUNES *v.* HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 1st Cir. Certiorari denied.

No. 02–9847. BERTOLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 406.

No. 02–9858. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 210.

No. 02–9860. CONKLIN *v.* LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 02–9864. LOCKE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 149 N. H. 1, 813 A. 2d 1182.

No. 02–9875. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 111.

No. 02–9878. ROBERTSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 305 F. 3d 164.

No. 02–9879. ALEXANDER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–9880. PRUESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 869.

No. 02–9883. ROBERTS *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 310.

No. 02–9884. PRICE *v.* NEAL, SUPERINTENDENT, COLORADO STATE PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 293.

No. 02–9888. LAWRENCE *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 419.

No. 02–9902. THIBEAUX *v.* TOBIAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 918.

No. 02–9904. HYLAND *v.* GALAZA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 701.

No. 02–9908. FELTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 617.

No. 02–9910. MORRIS *v.* COURT OF APPEALS OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 652.

No. 02–9915. MCDANIEL *v.* KEPPEL, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL. Ct. App. Ariz. Certiorari denied.

No. 02–9920. DAVIES *v.* GOMEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 650.

No. 02–9927. RAMON RODRIGUEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–9937. ELDRIDGE *v.* STEPP, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 02–9946. OCHOA-NAVARRO, AKA NUNES-CUELLAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 210.

No. 02–9949. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 315 F. 3d 911.

No. 02–9951. PYEATT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 275.

No. 02–9955. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–9956. STEPHENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–9959. MORRISON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 381.

No. 02–9960. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 692.

No. 02–9961. MIJARES-RASCON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 920.

No. 02–9962. MCGREGOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 853.

No. 02–9966. PEREZ-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 920.

No. 02–9967. McClelland *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 822.

No. 02–9979. Lujan *v.* Conner, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 412.

No. 02–9980. Johnson *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 812 A. 2d 234.

No. 02–9981. Mann *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 528.

No. 02–9982. Maduena *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 341.

No. 02–9985. Escobar *v.* Newland, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 267.

No. 02–9986. Cruz-Gonzalez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 211.

No. 02–9987. Dill *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 906.

No. 02–9988. Neely *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 466.

No. 02–9990. McCoy *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 663.

No. 02–9992. Mackins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 315 F. 3d 399.

No. 02–9993. Marshall *v.* Iowa. Ct. App. Iowa. Certiorari denied.

No. 02–9994. Artis *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 802 A. 2d 959.

No. 02–9997. Phu Van Ho *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 622.

No. 02–9998. Fredette *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 315 F. 3d 1235.

No. 02–9999. Fobbs *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 211.

No. 02–10003. CALEF *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 58 M. J. 132.

No. 02–10005. RODRIGUEZ-DISLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 211.

No. 02–10006. COCKBURN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 742.

No. 02–10007. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 244.

No. 02–10013. BRADFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 592.

No. 02–10014. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 125.

No. 02–10015. SOTO BOUZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 373.

No. 02–10016. MCQUEEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 28.

No. 02–10017. MCCLURGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 311 F. 3d 866.

No. 02–10019. EATON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10021. BEAUFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 211.

No. 02–10022. BATTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–10023. LEGG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10030. SNULLIGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10031. STORY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 834.

No. 02–10036. RUIZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–10039. PETTAWAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 59 Fed. Appx. 355.

No. 02–10042. VALENCIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 264.

No. 02–10045. EVANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–10046. LITTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 697.

No. 02–10050. ALONSO-FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10055. GIBSON, AKA FORNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 401.

No. 02–10056. HORN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 190.

No. 02–10058. MOLINA-GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 211.

No. 02–10061. VALDEZ *v.* ROSENBAUM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 302 F. 3d 1039.

No. 02–10064. GROOMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10066. VEGA FLEITES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10067. MURRAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 55 Fed. Appx. 16.

No. 02–10070. DEJESUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 57 Fed. Appx. 474.

No. 02–10072. KELLEY *v.* ROMINE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 55 Fed. Appx. 104.

No. 02–10074. DUDLEY, AKA BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 188.

No. 02–10079. GOIST *v.* FEDERAL BUREAU OF PRISONS. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 159.

No. 02–10083. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 836.

No. 02–10086. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–10088. KRUPPSTADT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 310 F. 3d 542.

No. 02–10089. NGAI MAN LEE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 317 F. 3d 26.

No. 02–10091. KEHOE, AKA COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 310 F. 3d 579.

No. 02–10092. MGRDICHIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 759.

No. 02–10094. WAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 02–10097. SMALLWOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 399.

No. 02–10098. RUSSELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10099. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 212.

No. 02–10100. WIGGINS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 818 A. 2d 202.

No. 02–10102. BLACKMON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 212.

No. 02–10111. OLESON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 310 F. 3d 1085.

No. 02–10112. MURKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 821.

No. 02–10113. LAVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 921.

No. 02–10114. CROSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 318.

No. 02–10115. CAMPBELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 300 F. 3d 202.

No. 02–10116. FELLOWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 50 Fed. Appx. 82.

No. 02–10117. PIGGIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 303 F. 3d 923.

No. 02–10120. MENDOZA-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 318 F. 3d 663.

No. 02–10121. NIEVES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 322 F. 3d 51.

No. 02–10122. ORTIZ-DE LA ROSA, AKA ORTIZ, AKA DE LA ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 920.

No. 02–10123. SCHNEIDER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 310 F. 3d 542.

No. 02–10124. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 282.

No. 02–10126. ROJAS-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 595.

No. 02–10129. GONZALEZ-ESPINOZA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 851.

No. 02–10130. GIL-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 248.

No. 02–10131. GUIDRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 794.

No. 02–10132. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10134. HOLT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 306.

No. 02–10139. HARDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–10140. HOPKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 665.

No. 02–10142. GREEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–10143. GIRALDO, AKA RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10144. HUDSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 79.

No. 02–10145. FRANCIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10147. FLAGGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10149. ELTAYIB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 294 F. 3d 397.

No. 02–10151. JOHNSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 57 Fed. Appx. 875.

No. 02–10154. BRYANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10155. MARTORANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–10158. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 212.

No. 02–10159. BEST-SALCEDO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 420.

No. 02–10164. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10171. ALVARENGA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 589.

No. 02–10173. DE LA CRUZ-POTRAZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–10180. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 Fed. Appx. 632.

No. 02–10191. MENDEZ *v.* BRITT, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 246.

No. 02–10192. MONTALVO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 595.

No. 02–10195. BROCK *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 02–10197. VALOIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–10198. PLASENCIA-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 206.

No. 02–10199. PEREZ-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 922.

No. 02–10200. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 595.

No. 02–10201. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 416.

No. 02–10204. STEIGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 318 F. 3d 1039.

No. 02–10205. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–10207. RHONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 311 F. 3d 893.

No. 02–10209. GUANIPA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10214. GALLOS-VASQUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10217. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–10221. BOYD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 662.

No. 02–10223. CHAMBERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 509.

No. 02–10224. QUINTANILLA-ALCANTARA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 595.

No. 02–10231. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 595.

No. 02–10233. GONZALEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–10246. HARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 310 F. 3d 1105.

No. 02–10250. MOORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–10257. NESBITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 402.

No. 02–10258. JAVIER LIZARRAGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 287.

No. 02–10259. MAYORGA-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–10260. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–10261. GUILLERMO PIESCHACON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–10264. MAYORGA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 629.

No. 02–10265. LOPEZ-CANTU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–10268. CAMACHO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 655.

No. 02–10269. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 176.

No. 02–10273. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–39. MICREL, INC. *v.* LINEAR TECHNOLOGY CORP. C. A. Fed. Cir. Motion of McKechnie Vehicle Components USA,

Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 275 F. 3d 1040.

No. 02–989. ILLINOIS *v.* WHITE. App. Ct. Ill., 2d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 331 Ill. App. 3d 22, 770 N. E. 2d 261.

No. 02–1161. RYAN, ACTING DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* BEATY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 303 F. 3d 975.

No. 02–9434. REEDER *v.* CITY OF PARIS, TEXAS, ET AL. C. A. 5th Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 02–924. MULVANEY MECHANICAL, INC. *v.* SHEET METAL WORKERS INTERNATIONAL ASSN., LOCAL 38, *ante*, p. 918;

No. 02–1087. LI-LAN TSAI *v.* ROCKEFELLER UNIVERSITY, 537 U. S. 1194;

No. 02–1120. BURR *v.* ASHCROFT, ATTORNEY GENERAL, *ante*, p. 924;

No. 02–1133. PORTER *v.* JOHNSON, ACTING SECRETARY OF THE NAVY, *ante*, p. 924;

No. 02–1207. PELULLO *v.* UNITED STATES, *ante*, p. 926;

No. 02–6526. COOEY *v.* COYLE, WARDEN, *ante*, p. 947;

No. 02–6737. ISOM *v.* MCANDREWS ET AL., 537 U. S. 1057;

No. 02–7303. SKLAR *v.* NEW YORK LIFE INSURANCE CO., 537 U. S. 1126;

No. 02–8206. FORTENBERRY *v.* HALEY, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *ante*, p. 947;

No. 02–8381. VOGEL *v.* ARIZONA, *ante*, p. 912;

No. 02–8402. BAILEY *v.* BLAINE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, *ante*, p. 913;

No. 02–8486. CAMPBELL *v.* GRAYSON, WARDEN, *ante*, p. 913;

No. 02–8513. JOHNSON ET AL. *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL., *ante*, p. 928;

No. 02–8549. ZIMMERMAN *v.* MITCHEM, WARDEN, ET AL., *ante*, p. 929;

No. 02–8560. BRITT *v.* SAN DIEGO UNIFIED PORT DISTRICT, *ante*, p. 929;

No. 02–8572. PAVELETZ *v.* PNC BANK, NATIONAL ASSN., SUCCESSOR BY MERGER TO FIRST EASTERN BANK, *ante*, p. 930;

No. 02–8592. WHITTLESEY *v.* CONROY, WARDEN, ET AL., *ante*, p. 930;

No. 02–8607. WHITE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 930;

No. 02–8641. SILVA *v.* KALBAC ET AL., *ante*, p. 913;

No. 02–8668. SORRI *v.* BELL ATLANTIC, *ante*, p. 932;

No. 02–8734. CULLIFER *v.* CRAIG, JUDGE, DISTRICT COURT OF TEXAS, SMITH COUNTY, ET AL., *ante*, p. 949;

No. 02–8860. SMITH *v.* UNITED STATES, *ante*, p. 933;

No. 02–8890. COTTEN *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL., *ante*, p. 964;

No. 02–8912. ARNS *v.* UNITED STATES, *ante*, p. 934; and

No. 02–9021. IN RE MURRAY, *ante*, p. 944. Petitions for rehearing denied.

No. 02–8512. IN RE KOLODY, *ante*, p. 921. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

## MAY 27, 2003

*Certiorari Granted—Vacated and Remanded.* (See also No. 02–8636, *ante*, p. 835.)

No. 02–983. CASS *v.* STEPHENS ET AL. Ct. App. Tex., 8th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, *ante*, p. 408.

*Certiorari Dismissed*

No. 02–9704. DOPP *v.* LORING ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 54 Fed. Appx. 296.

No. 02–9945. BROOKS *v.* AJIBADE ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 52 Fed. Appx. 493.

No. 02–9739. McBride *v.* Dvoskin et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. Justice Stevens dissents. See *id.*, at 4, and cases cited therein.

*Miscellaneous Orders*

No. 02A993. Johnson, Director, Virginia Department of Corrections *v.* Walton. Application to vacate stay of execution of sentence of death entered by the United States District Court for the Western District of Virginia on May 25, 2003, presented to The Chief Justice, and by him referred to the Court, denied.

No. 02M95. Carlson *v.* United States. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 02M96. McCorkle *v.* United States. Motion for leave to file petition for writ of certiorari under seal denied without prejudice to filing a renewed motion together with a redacted petition for writ of certiorari within 30 days.

No. 126, Orig. Kansas *v.* Nebraska et al. Motion of the Special Master for allowance of fees and disbursements granted, and the Special Master is awarded a total of $145,182.45 for the period July 1, 2002, through April 15, 2003, to be paid equally by the parties. [For earlier decision herein, see, *e. g.*, *ante*, p. 720.]

No. 128, Orig. Alaska *v.* United States. Motion of the Special Master for allowance of fees and reimbursement granted, and the Special Master is awarded a total of $57,264.08 for the period October 17, 2002, through April 16, 2003, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 537 U. S. 1026.]

No. 02–9764. In re Miller; and

No. 02–10320. In re Mehdipour. Petitions for writs of mandamus denied.

*Certiorari Granted*

No. 02–1290. UNITED STATES POSTAL SERVICE *v.* FLAMINGO INDUSTRIES (USA) LTD. ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 302 F. 3d 985.

No. 02–964. BALDWIN *v.* REESE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 282 F. 3d 1184.

No. 02–1348. OLYMPIC AIRWAYS *v.* HUSAIN, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HANSON, DECEASED, ET AL. C. A. 9th Cir. Certiorari granted. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 316 F. 3d 829.

*Certiorari Denied*

No. 02–728. VALDIVIESO ET AL. *v.* ATLAS AIR, INC. C. A. 11th Cir. Certiorari denied. Reported below: 305 F. 3d 1283.

No. 02–869. PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA *v.* MEDOWS, SECRETARY, AGENCY FOR HEALTH CARE ADMINISTRATION FOR THE STATE OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 304 F. 3d 1197.

No. 02–1206. TIGUE ET AL. *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 312 F. 3d 70.

No. 02–1221. UNITED STATES SHOE CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 296 F. 3d 1378.

No. 02–1228. SHREFFLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 Fed. Appx. 140.

No. 02–1230. RANG *v.* SCHLUMBERGER TECHNOLOGY CORP. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 404.

No. 02–1245. MUHAMMAD *v.* DIAMOND OFFSHORE CO. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 822 So. 2d 869.

No. 02–1289. NORTH JERSEY MEDIA GROUP ET AL. *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 308 F. 3d 198.

No. 02–1382. FISHER ET UX. *v.* NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 289 App. Div. 2d 723, 734 N. Y. S. 2d 656.

No. 02–1383. GOODE-HENRY, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF BURNETT, HER DAUGHTER, DECEASED *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 804 A. 2d 97.

No. 02–1387. WAITERS ET AL. *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 607.

No. 02–1390. LOREN *v.* SASSER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 309 F. 3d 1296.

No. 02–1396. AXFORD *v.* SUPREME COURT OF ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 02–1397. RASMUSSEN ET UX. *v.* KING COUNTY, WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 299 F. 3d 1077.

No. 02–1398. MILLER *v.* BROWNSTEIN ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 290 App. Div. 2d 510, 736 N. Y. S. 2d 257.

No. 02–1402. PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. *v.* NATIONAL RAILROAD PASSENGER CORPORATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 288 F. 3d 519.

No. 02–1403. ST. GERMAIN ET AL. *v.* U. S. HOME CORP. ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–1410. PAGE, WARDEN *v.* SCHULTZ. C. A. 7th Cir. Certiorari denied. Reported below: 313 F. 3d 1010.

No. 02–1414. GRAND FORKS PROFESSIONAL BASEBALL, INC., ET AL. *v.* NORTH DAKOTA WORKERS COMPENSATION BUREAU. Sup. Ct. N. D. Certiorari denied. Reported below: 654 N. W. 2d 426.

No. 02–1415. GRAND AERIE, FRATERNAL ORDER OF EAGLES *v.* TENINO AERIE NO. 564, FRATERNAL ORDER OF EAGLES, ET AL.

Sup. Ct. Wash. Certiorari denied. Reported below: 148 Wash. 2d 224, 59 P. 3d 655.

No. 02–1421. MADISON ET AL. *v.* GRAHAM, DIRECTOR, MONTANA DEPARTMENT OF FISH, WILDLIFE, AND PARKS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 316 F. 3d 867.

No. 02–1431. SPAHR ET AL. *v.* RESORTS INTERNATIONAL HOTEL, INC. Super. Ct. N. J., App. Div. Certiorari denied.

No. 02–1439. LENTINO *v.* CAGE. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–1456. SHARMA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 454.

No. 02–1484. TEXAS DIGITAL SYSTEMS, INC. *v.* TELEGENIX, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 308 F. 3d 1193.

No. 02–1502. KALODNER *v.* ABRAHAM, SECRETARY OF ENERGY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 310 F. 3d 767.

No. 02–1544. PLUNK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–1552. HOLMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 314 F. 3d 837.

No. 02–8477. SHULER *v.* SHULER. Sup. Ct. P. R. Certiorari denied.

No. 02–8538. AMES *v.* PONTESSO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 523.

No. 02–8767. MICHAELS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 4th 486, 49 P. 3d 1032.

No. 02–8868. ZENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–9638. GIBSON *v.* CANDELARIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 460.

No. 02–9649. CRUM *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–9651. SHILLING *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9653. BEARD *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9659. PARKER *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 459.

No. 02–9662. HAMBY *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 878.

No. 02–9665. HIGH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 02–9667. HASTINGS *v.* CAMPBELL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 559.

No. 02–9668. HALE *v.* BOONE ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9670. FENLON *v.* THOMAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–9672. GARCIA *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 02–9680. GOETSCH *v.* BERGE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–9681. HARDAWAY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–9683. HALL *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 02–9684. HATFIELD *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 832.

No. 02–9685. PARRISH *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 834 So. 2d 176.

No. 02–9687. HAILEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 87 S. W. 3d 118.

No. 02–9688. FLORES *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9689. GRAHAM *v.* BATTLE, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–9690. GARCIA *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–9694. KULKA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–9701. PAIGE *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 02–9703. CUMMINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 02–9705. DAVIS *v.* OVERTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 717.

No. 02–9706. GONZALEZ DE LA CRUZ *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 02–9708. CADOGAN *v.* LAVIGNE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 729.

No. 02–9710. EMMITT *v.* SNIDER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 314.

No. 02–9712. COCHRANE *v.* MCGINNIS, SUPERINTENDENT, DOWNSTATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 50 Fed. Appx. 478.

No. 02–9713. DIZON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 297 Ill. App. 3d 880, 697 N. E. 2d 780.

No. 02–9714. CHAMBERS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 326 Ill. App. 3d 1170, 811 N. E. 2d 794.

No. 02–9721. HUMPHREY *v.* EVERETT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 533.

No. 02–9722. HANSFORD *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 639.

No. 02–9724. GOLDWATER *v.* BALLINGER, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY. Ct. App. Ariz. Certiorari denied.

No. 02–9725. GOLDWATER *v.* MCNALLY, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY. Ct. App. Ariz. Certiorari denied.

No. 02–9727. BATES *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 308 F. 3d 411.

No. 02–9731. JOHNSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 903.

No. 02–9737. BROWN *v.* SAAR, SECRETARY, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES. Ct. Sp. App. Md. Certiorari denied. Reported below: 148 Md. App. 726.

No. 02–9742. WILLIAMS *v.* NORTHWEST AIRLINES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 350.

No. 02–9746. DEFRANK *v.* PALMATEER, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 171.

No. 02–9752. RISER *v.* BOSTIC ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 169.

No. 02–9754. PERRUQUET *v.* MATRISCIANO, ACTING WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–9759. REID *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 02–9761. SEITZ *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 930.

No. 02–9768. MADYUN *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 259.

No. 02–9770. LOVELL *v.* HATCHER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–9771. KELLEY *v.* MOORE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 53 Fed. Appx. 125.

No. 02–9778. CAMPBELL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 332 Ill. App. 3d 721, 773 N. E. 2d 776.

No. 02–9780. ANDREWS *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9785. MACY *v.* SAIF CORP. Ct. App. Ore. Certiorari denied. Reported below: 181 Ore. App. 663, 49 P. 3d 851.

No. 02–9787. PATTERSON *v.* CZERNIAK, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 762.

No. 02–9793. MCINTYRE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–9797. SCHIRATO *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9799. TAYLOR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 98 Ohio St. 3d 27, 781 N. E. 2d 72.

No. 02–9800. BURNS *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 690.

No. 02–9817. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 838 So. 2d 1161.

No. 02–9818. TRAINER *v.* BROWN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 490.

No. 02–9851. WAGENER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 02–9876. KALINOWSKI *v.* HOLMES, WARDEN, ET AL. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 02–9881. NITSCHKE *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 177 Ore. App. 727, 33 P. 3d 1027.

No. 02–9887. LYONS *v.* BEELER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 636.

No. 02–9901. WHEELER *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 23.

No. 02–9947. PALMER *v.* LAVIGNE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 827.

No. 02–9950. MUSICA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 670.

No. 02–9971. MORE *v.* DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD. C. A. 7th Cir. Certiorari denied.

No. 02–9972. ALOMBA *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9975. CLEMONS *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 811 So. 2d 1047.

No. 02–9976. EDWARDS *v.* DOBBS ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–9977. KRONCKE *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. Ariz. Certiorari denied.

No. 02–9995. ALTHOUSE *v.* DALLAS COUNTY JAIL MEDICAL DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–10000. GRIFFIN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 31 Kan. App. 2d ——, 59 P. 3d 1061.

No. 02–10004. CABANILLA *v.* BATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 336.

No. 02–10020. DUNCAN *v.* MIRO, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 898.

No. 02–10028. ECKLES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 860 So. 2d 922.

No. 02–10033. SMITH *v.* ENGLISH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 55 Fed. Appx. 105.

No. 02–10035. SANDERS *v.* NEUMAN. C. A. 7th Cir. Certiorari denied.

No. 02–10040. BAILEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–10044. CALDWELL *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied.

No. 02–10047. ATAMIAN *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 55 Fed. Appx. 104.

No. 02–10051. BACH *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 02–10065. THORN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 317 F. 3d 107.

No. 02–10068. YOUNGWORTH *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 55 Mass. App. 30, 769 N. E. 2d 299.

No. 02–10075. ROBERTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 308 F. 3d 1147.

No. 02–10087. MANNING *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 02–10118. PANGELINAN ET UX. *v.* TRINIDAD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 470.

No. 02–10189. PERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 608.

No. 02–10219. LADD *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. Crim. App. Tex. Certiorari denied.

No. 02–10225. DUFRESNE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 58 Fed. Appx. 890.

No. 02–10235. GENERAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 185.

No. 02–10245. GAMBRELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10247. GARCIA-MEZA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 315 F. 3d 683.

No. 02–10248. FORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10270. ESPINOZA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 846.

No. 02–10274. PITTMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10277. WHITED *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 311 F. 3d 259.

No. 02–10284. RANDALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10286. RISHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–10290. WIEDERHOLD *v.* UNITED STATES (two judgments). C. A. 11th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 413 (first judgment).

No. 02–10291. AGUILAR-MARTINEZ *v.* UNITED STATES; AMAYA-RAMOS, AKA RAMOS, AKA AMAYA, AKA LOPEZ *v.* UNITED STATES; AVILA-ROJAS *v.* UNITED STATES; LEDEZMA-RUIZ, AKA LEDESMA-RUIZ *v.* UNITED STATES; MORENO-SANTANA *v.* UNITED STATES; NAVARRO-RODRIGUEZ *v.* UNITED STATES; PALENCIA-RAMIREZ *v.* UNITED STATES; and SALAS-MATA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 670 (seventh judgment).

No. 02–10294. HARDEN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 486.

No. 02–10298. CRAWFORD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 35 Fed. Appx. 878.

No. 02–10300. CLINTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 692.

No. 02–10301. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 794.

No. 02–10305. HAMLET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 120.

No. 02–10306. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–10307. GOFF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 314 F. 3d 1248.

No. 02–10308. GERALDO-BURGOIN *v.* UNITED STATES; GARCIA-RUBIO *v.* UNITED STATES; RODRIGUEZ-GONZALEZ *v.* UNITED STATES; PEREZ-PARAMO *v.* UNITED STATES; and MOLINERO-JIMENEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 647 (second and third judgments), 648 (fifth judgment), and 659 (first and fourth judgments).

No. 02–10313. RIDDICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 958.

No. 02–10316. BARLOW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 310 F. 3d 1007.

No. 02–10317. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 58 Fed. Appx. 915.

No. 02–10318. WINSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 289.

No. 02–10330. GONZALEZ *v.* WILEY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–10333. GINYARD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 816 A. 2d 21.

No. 02–10336. EDMUNDS *v.* DEPPISCH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 313 F. 3d 997.

No. 02–10341. PASTRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 795.

No. 02–10342. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 134.

No. 02–10344. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–10345. MALDONADO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10350. STRINGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–10353. ROSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 315 F. 3d 956.

No. 02–10354. BUTRON-PONCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 311.

No. 02–10356. ACOSTA-OLVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–10358. MOLLOY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 324 F. 3d 35.

No. 02–10359. PAULA-MARTES, AKA VARGAS-DE JESUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 921.

No. 02–10361. LATHERN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 167.

No. 02–10362. LIPSCOMB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 796.

No. 02–10363. MOSS *v.* UNITED STATES; and
No. 02–10406. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 704.

No. 02–10364. SINGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 41 Fed. Appx. 599.

No. 02–10365. ROSAS-RESENDIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 119.

No. 02–10367. BARAJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 313.

No. 02–10371. GAMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 301 F. 3d 1138.

No. 02–10372. HAOUARI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 319 F. 3d 88.

No. 02–10374. VARGAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 316 F. 3d 1163.

No. 02–10375. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 677.

No. 02–10376. DIOS-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 40 Fed. Appx. 521.

No. 02–10377. DIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 523.

No. 02–10378. CESENA DE GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 102.

No. 02–10384. SERRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 57 Fed. Appx. 12.

No. 02–10394. GAMEZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 319 F. 3d 695.

No. 02–10397. SALDANA GONZALES, AKA GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–10400. TABAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 45 Fed. Appx. 113.

No. 02–10403. KUZON, AKA BROWN, AKA LAWRENCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 877.

No. 02–10404. ZUNIGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 597.

No. 02–10408. VIGGIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 57 Fed. Appx. 907.

No. 02–1066. KUEHNE & NAGEL, INC. *v.* MOTOROLA, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 308 F. 3d 995.

No. 02–1286. HOHENBERG BROS. CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. JUSTICE BREYER

took no part in the consideration or decision of this petition. Reported below: 301 F. 3d 1299.

No. 02–1404. CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. *v.* BANK OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 309 F. 3d 551.

No. 02–10299. CHUNG *v.* MEYERS, WARDEN, ET AL. C. A. 3d Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 01–10341. HERNANDEZ OCANA *v.* PUERTO RICO POLICE DEPARTMENT, 537 U. S. 841;

No. 02–7467. LORRAINE *v.* COYLE, WARDEN, *ante*, p. 947;

No. 02–7572. STRUBEL ET VIR *v.* UNITED STATES, 537 U. S. 1133;

No. 02–7927. WATANABE *v.* LOYOLA UNIVERSITY OF CHICAGO ET AL., 537 U. S. 1200;

No. 02–7937. MARINICH *v.* PEOPLES GAS LIGHT & COKE CO., *ante*, p. 909;

No. 02–8287. AREVALO *v.* GEORGIA, *ante*, p. 962;

No. 02–8422. SCIALLA *v.* PASCACK VALLEY HOSPITAL, *ante*, p. 926;

No. 02–8430. SCHEIB *v.* PORT AUTHORITY TRANSIT CO. ET AL., *ante*, p. 926;

No. 02–8546. IN RE ROSS, *ante*, p. 921;

No. 02–8757. SHELTON *v.* ROTHOVE, *ante*, p. 950;

No. 02–8790. CAMPBELL *v.* UNITED STATES, *ante*, p. 933;

No. 02–8923. IN SOO CHUN *v.* EMPLOYMENT SECURITY DEPARTMENT OF THE STATE OF WASHINGTON, *ante*, p. 957;

No. 02–9038. WYNN *v.* JENKINS, CHAIRMAN, VIRGINIA PAROLE BOARD, ET AL., *ante*, p. 966; and

No. 02–9190. GARRETT *v.* UNITED STATES, *ante*, p. 954. Petitions for rehearing denied.

No. 02–7540. PATTERSON *v.* UNITED STATES POSTAL SERVICE, 537 U. S. 1132; and

No. 02–8407. CLAIBORNE *v.* IRWIN, *ante*, p. 913. Motions for leave to file 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 March 27, 2003, 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. 1072. 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, 517 U. S. 1255, 523 U. S. 1147, and 535 U. S. 1123.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 27, 2003

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

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.

Accompanying the order revising these forms are excerpts from the report of the Judicial Conference of the United States 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

MARCH 27, 2003

ORDERED:

1. That Forms 1, 2, 3, and 5 in the Appendix to the Federal Rules of Appellate Procedure be, and they hereby are, amended by replacing all references to "19__" with references to "20__."

2. That the foregoing amendments to the forms in the Appendix to the Federal Rules of Appellate Procedure shall take effect on December 1, 2003, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

# AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on March 27, 2003, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1076. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, and 535 U. S. 1139.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 27, 2003

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

SUPREME COURT OF THE UNITED STATES

MARCH 27, 2003

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, and 2016, and new Rule 7007.1.

[See *infra*, pp. 1079–1082.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2003, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

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*Rule 1005. Caption of petition.*

The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the following information about the debtor: name, employer identification number, last four digits of the social security number, any other federal tax identification number, and all other names used within six years before filing the petition. If the petition is not filed by the debtor, it shall include all names used by the debtor which are known to the petitioners.

*Rule 1007. Lists, schedules, and statements; time limits.*

(*a*) *List of creditors and equity security holders, and corporate ownership.*

(*1*) *Voluntary case.*—In a voluntary case, the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

. . . . .

(*c*) *Time limits.*—The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within

15 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days of the entry of the order for relief. Schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

. . . . .

(*f*) *Statement of social security number.*—An individual debtor shall submit a verified statement that sets out the debtor's social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall submit the statement with the petition. In an involuntary case, the debtor shall submit the statement within 15 days after the entry of the order for relief.

. . . . .

*Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.*

(*a*) *Twenty-day notices to parties in interest.*—Except as provided in subdivisions (h), (i), and (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code, which notice, unless the court orders otherwise, shall include the debtor's employer identification

number, social security number, and any other federal taxpayer identification number;

. . . . .

*Rule 2003. Meeting of creditors or equity security holders.*

. . . . .

(*b*) *Order of meeting.*

(*1*) *Meeting of creditors.*—The United States trustee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may include the election of a creditors' committee and, if the case is not under subchapter V of chapter 7, the election of a trustee. The presiding officer shall have the authority to administer oaths.

. . . . .

*Rule 2009. Trustees for estates when joint administration ordered.*

(*a*) *Election of single trustee for estates being jointly administered.*—If the court orders a joint administration of two or more estates under Rule 1015(b), creditors may elect a single trustee for the estates being jointly administered, unless the case is under subchapter V of chapter 7 of the Code.

(*b*) *Right of creditors to elect separate trustee.*—Notwithstanding entry of an order for joint administration under Rule 1015(b), the creditors of any debtor may elect a separate trustee for the estate of the debtor as provided in § 702 of the Code, unless the case is under subchapter V of chapter 7.

(*c*) *Appointment of trustees for estates being jointly administered.*

(*1*) *Chapter 7 liquidation cases.*—Except in a case governed by subchapter V of chapter 7, the United States trustee may appoint one or more interim trustees for estates being jointly administered in chapter 7 cases.

. . . . .

*Rule 2016. Compensation for services rendered and reimbursement of expenses.*

. . . . .

(*c*) *Disclosure of compensation paid or promised to bankruptcy petition preparer.*—Every bankruptcy petition preparer for a debtor shall file a declaration under penalty of perjury and transmit the declaration to the United States trustee within 10 days after the date of the filing of the petition, or at another time as the court may direct, as required by § 110(h)(1). The declaration must disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration must describe the services performed and documents prepared or caused to be prepared by the bankruptcy petition preparer. A supplemental statement shall be filed within 10 days after any payment or agreement not previously disclosed.

*Rule 7007.1. Corporate ownership statement.*

(*a*) *Required disclosure.*—Any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, shall file two copies of a statement that identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests, or states that there are no entities to report under this subdivision.

(*b*) *Time for filing.*—A party shall file the statement required under Rule 7007.1(a) with its first pleading in an adversary proceeding. A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose.

# 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 March 27, 2003, 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. 1084. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, and 535 U. S. 1147.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 27, 2003

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

SUPREME COURT OF THE UNITED STATES

MARCH 27, 2003

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 23, 51, 53, 54, and 71A.

[See *infra*, pp. 1087–1096.]

2. That Forms 19, 31, and 32 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended by replacing all references to "19__" with references to "20__."

3. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2003, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. 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

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*Rule 23. Class actions.*

. . . . .

(c) *Determining by order whether to certify a class action; appointing class counsel; notice and membership in class; judgment; multiple classes and subclasses.*

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

. . . . .

(*e*) *Settlement, voluntary dismissal, or compromise.*

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

. . . . .

(*g*) *Class counsel.*

(*1*) *Appointing class counsel.*

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(*2*) *Appointment procedure.*

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(*h*) *Attorney fees award.*—In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(*1*) *Motion for award of attorney fees.*—A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(*2*) *Objections to motion.*—A class member, or a party from whom payment is sought, may object to the motion.

(*3*) *Hearing and findings.*—The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(*4*) *Reference to special master or magistrate judge.*—The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

*Rule 51. Instructions to jury; objections; preserving a claim of error.*

(*a*) *Requests.*

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and

(B) with the court's permission file untimely requests for instructions on any issue.

(*b*) *Instructions.*—The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

(*c*) *Objections.*

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(*d*) *Assigning error; plain error.*

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and—unless the court made a definitive ruling on the record rejecting the request—also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).

*Rule 53. Masters.*

(*a*) *Appointment.*

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U. S. C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(*b*) *Order appointing master.*

(*1*) *Notice.*—The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(*2*) *Contents.*—The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances—if any—in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(*3*) *Entry of order.*—The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U. S. C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(*4*) *Amendment.*—The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

(*c*) *Master's authority.*—Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction pro-

vided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(*d*) *Evidentiary hearings.*—Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

(*e*) *Master's orders.*—A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(*f*) *Master's reports.*—A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(*g*) *Action on master's order, report, or recommendations.*

(*1*) *Action.*—In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(*2*) *Time to object or move.*—A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(*3*) *Fact findings.*—The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(*4*) *Legal conclusions.*—The court must decide de novo all objections to conclusions of law made or recommended by a master.

(*5*) *Procedural matters.*—Unless the order of appointment establishes a different standard of review, the court may set

aside a master's ruling on a procedural matter only for an abuse of discretion.

(*h*) *Compensation.*

(*1*) *Fixing compensation.*—The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.

(*2*) *Payment.*—The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(*3*) *Allocation.*—The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(*i*) *Appointment of magistrate judge.*—A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

*Rule 54. Judgments; costs.*

. . . . .

(*d*) *Costs; attorneys' fees.*

. . . . .

(*2*) *Attorneys' fees.*

. . . . .

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of Rule 53(a)(1) and may refer

a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

. . . . .

*Rule 71A. Condemnation of property.*

. . . . .

(*h*) *Trial.*

. . . . .

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the authority of a master provided in Rule 53(c) and proceedings before it shall be governed by the provisions of Rule 53(d). Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in Rule 53(e), (f), and (g). Trial of all issues shall otherwise be by the court.

. . . . .

# 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 March 27, 2003, 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. 1098. 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, 520 U. S. 1323, 523 U. S. 1235, and 529 U. S. 1189.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 27, 2003

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

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 this rule are excerpts from the report of the Judicial Conference of the United States containing the Committee Note 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

MARCH 27, 2003

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rule 608(b).

[See *infra*, p. 1101.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2003, 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

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*Rule 608. Evidence of character and conduct of witness.*

(*a*) *Opinion and reputation evidence of character.*—The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(*b*) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

## Reporter's Note

The next page is purposely numbered 1301. The numbers between 1101 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

# OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

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## KENYERES *v.* ASHCROFT, ATTORNEY GENERAL, ET AL.

ON APPLICATION FOR STAY

No. 02A777. Decided March 21, 2003

Applicant's request for a stay of his removal from the United States is denied, and a previously granted temporary stay to enable the United States to respond to his claims and to permit JUSTICE KENNEDY to consider the matter is vacated. When the Immigration and Naturalization Service initiated removal proceedings against him for overstaying his tourist visa, an Immigration Judge denied applicant's asylum request and ruled that withholding of removal was unavailable because there was reason to believe that applicant had committed a serious nonpolitical crime outside the United States. The Bureau of Immigration Appeals (BIA) affirmed. The Eleventh Circuit denied a stay of removal pending judicial review on the ground that 8 U. S. C. § 1252(f)(2) requires a court to adduce clear and convincing evidence before granting such a temporary stay. This is not an appropriate case in which to examine and resolve the important question whether § 1252(f)(2)'s heightened standard applies to temporary stays, an issue that has divided the Courts of Appeals. Applicant is unlikely to prevail under either the Eleventh Circuit's standard or the more lenient one adopted by other Courts of Appeals. A reviewing court must uphold an administrative determination in an immigration case unless the evidence compels a contrary conclusion. Given the Immigration Judge's factual findings and the evidence in the removal hearing record, applicant is unable to establish a reasonable likelihood that a reviewing court will be compelled to disagree with the BIA's decision. Thus, his claim is not sufficiently meritorious to create a reasonable probability that four Members of this Court will vote to grant certiorari.

JUSTICE KENNEDY, Circuit Justice.

This case is before me on an application for a stay of an alien's removal from the United States.

Applicant, Zsolt Kenyeres, is a citizen of the Republic of Hungary. On January 29, 1997, he entered the United States on a tourist visa, which permitted him to remain in the country through July 28, 1997. Applicant remained past the deadline without authorization from the Immigration and Naturalization Service (INS), and on June 21, 2000, the INS initiated removal proceedings, alleging the overstay. Applicant sought asylum under 94 Stat. 105, as amended, 8 U. S. C. § 1158(a), withholding of removal under 110 Stat. 3009–602, 8 U. S. C. § 1231(b)(3), and deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U. N. T. S. 85, 23 I. L. M. 1027, see 8 CFR § 208.17 (2002). An Immigration Judge held applicant to be removable; but the Bureau of Immigration Appeals (BIA) concluded that the judge failed to provide sufficient explanation for his decision, and remanded the case.

On remand the Immigration Judge determined that Kenyeres' asylum application was untimely under 8 U. S. C. § 1158(a)(2)(B), and that he could not make a showing of changed circumstances or extraordinary conditions necessary to excuse the delay, see § 1158(a)(2)(D). As to withholding of removal, the judge ruled this relief was unavailable because of "serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States." § 1231(b)(3)(B)(iii).

The INS presented sufficient evidence that applicant was wanted in Hungary on charges of embezzlement, which is a serious nonpolitical crime. See *In re Castellon,* 17 I. & N. Dec. 616 (BIA 1981). Noting applicant's concession that he overstayed his visa, the Immigration Judge ordered him

removed on account of this violation. (Applicant has withdrawn his application for deferral of removal under the Convention Against Torture.) The BIA affirmed the Immigration Judge's order without opinion.

Applicant sought review by the Court of Appeals for the Eleventh Circuit and requested a stay of removal pending review. The Court of Appeals denied the stay. No. 03–10845–D (Mar. 14, 2003). The court relied on 8 U. S. C. § 1252(f)(2), which provides that "no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The Court of Appeals relied on its decision in *Weng* v. *Attorney General*, 287 F. 3d 1335 (2002) *(per curiam)*, which holds that the evidentiary standard prescribed by § 1252(f)(2) applies to motions for a temporary stay of removal pending judicial review.

Kenyeres has filed with me as Circuit Justice an application for a stay of removal, arguing that the interpretation of § 1252(f)(2) adopted by the Court of Appeals is erroneous. By insisting that clear and convincing evidence be adduced in order to grant a stay, he maintains, the Eleventh Circuit in effect made judicial review unavailable in cases of asylum and withholding of deportation. He contends that an application for a stay should be assessed under a more lenient standard, one adopted by other Courts of Appeals. Their standard simply asks whether applicant has demonstrated a likelihood of success on the merits. Applicant submits he can satisfy this requirement and so a stay of removal should issue. I granted a temporary stay of the BIA order to enable the United States to respond to applicant's claims and to consider the matter.

The question raised by applicant indeed has divided the Courts of Appeals. The Courts of Appeals for the Second, Sixth, and Ninth Circuits have examined the matter, both

before and after the Eleventh Circuit's decision in *Weng*, and have reached a contrary result. See *Andreiu* v. *Ashcroft*, 253 F. 3d 477 (CA9 2001) (en banc); *Bejjani* v. *INS*, 271 F. 3d 670 (CA6 2001); *Mohammed* v. *Reno*, 309 F. 3d 95 (CA2 2002). In the cases just cited, these courts take the position that the heightened standard of § 1252(f)(2) applies only to injunctions against an alien's removal, not to temporary stays sought for the duration of the alien's petition for review. *Andreiu*, *supra*, at 479–483; *Bejjani*, *supra*, at 687–689; *Mohammed*, *supra*, at 97–100. These courts evaluate requests for a stay under their traditional standard for granting injunctive relief in the immigration context, which seeks to measure an applicant's likelihood of success on the merits and to take account of the equity interests involved. See *Andreiu*, *supra*, at 483 ("[P]etitioner must show 'either (1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor'" (quoting *Abassi* v. *INS*, 143 F. 3d 513, 514 (CA9 1998))); *Bejjani*, *supra*, at 688 (requiring a showing of "(1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the movant outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest" (quoting *Sofinet* v. *INS*, 188 F. 3d 703, 706 (CA7 1999))); *Mohammed*, *supra*, at 101 ("'a substantial possibility, although less than a likelihood, of success'" (quoting *Dubose* v. *Pierce*, 761 F. 2d 913, 920 (CA2 1985), vacated on other grounds, 487 U. S. 1229 (1988))).

The courts on each side of the split have considered the contrary opinions of their sister Circuits and have adhered to their own expressed views. See *Weng*, *supra*, at 1337, n. 2; *Mohammed*, *supra*, at 98–99. Both standards have been a subject of internal criticism. See *Andreiu*, *supra*, at 485 (Beezer, J., separately concurring); *Bonhomme-Ardouin*

v. *Attorney General*, 291 F. 3d 1289, 1290 (CA11 2002) (Barkett, J., concurring).

The issue is important. If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits. See *Addington* v. *Texas*, 441 U. S. 418, 425 (1979) (The "intermediate standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt"). An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped. A standard that is excessively stringent may impede access to the courts in meritorious cases. On the other hand, § 1252(f)(2) is a part of Congress' deliberate effort to reform the immigration law in order to relieve the courts from the need to consider meritless petitions, and so devote their scarce judicial resources to meritorious claims for relief. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 486 (1999). If the interpretation adopted by the Second, Sixth, and Ninth Circuits is erroneous, and § 1252(f)(2) governs requests for stays, this congressional effort will be frustrated. As of this point, applicant already has overstayed his visa by more than five years. Had the Eleventh Circuit granted the stay under the more lenient approach, months more would elapse before his case is resolved.

Given the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court, in my view, should examine and resolve the question in an appropriate case. This, however, is not an appropriate case.

Applicant is unlikely to prevail in his request for a stay under either of the standards adopted by the Courts of Ap-

peals. Applicant argues that the Immigration Judge erroneously rejected his claim under the nonpolitical crime restriction of § 1231(b)(3)(B)(iii). He asserts that the Hungarian Government fabricated the embezzlement and fraud charges against him for political reasons. Whether these charges should be disregarded as fabricated depends on a question of fact. The Immigration Judge's findings in that respect are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." § 1252(b)(4)(B). Based on the record presented at the removal hearing, the Immigration Judge could find substantial grounds to believe that applicant committed serious financial crimes in Hungary. The record contains a translation of the Hungarian arrest warrant for embezzlement and aggravated fraud, as well as testimony that the warrant was obtained from Interpol, which the INS deems to be a reliable source. See App. E to Memorandum of Respondents in Opposition 100–101, 135–136. In his own testimony applicant did not dispute that he was engaged in money laundering for organized crime. See *id.*, at 111–112, 115–116, 120.

A reviewing court must uphold an administrative determination in an immigration case unless the evidence compels a conclusion to the contrary. *INS* v. *Elias-Zacarias*, 502 U. S. 478, 481, n. 1, 483–484 (1992); see also *INS* v. *Orlando Ventura*, 537 U. S. 12, 16 (2002) *(per curiam)*. Given the factual findings of the Immigration Judge and the evidence in the record, applicant is unable to establish a reasonable likelihood that a reviewing court will be compelled to disagree with the decision of the BIA. Applicant's claim is not sufficiently meritorious to create a reasonable probability that four Members of this Court will vote to grant certiorari in his case. See, *e. g.*, *Bartlett* v. *Stephenson*, 535 U. S. 1301, 1304–1305 (2002) (REHNQUIST, C. J., in chambers); *Lucas* v. *Townsend*, 486 U. S. 1301, 1304 (1988) (KENNEDY, J., in chambers). My assessment likely would be different in a case

where the choice of evidentiary standard applicable to a request for a stay could influence the outcome.

The stay previously granted is vacated, and the application for a stay is denied.

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